78

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)

CASE NO: M311/2021

In the matter between :-

SAKELIGA NPC	Applicant
And	
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	1st Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	2nd Respondent
THE THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	3rd Respondent
THE MINISTER OF FINANCE	4th Respondent
DITSOBOTLA LOCAL MUNICIPALITY	5th Respondent
NALEDI LOCAL MUNICIPALITY	6th Respondent
THE PREMIER: NORTH WEST PROVINCE	7th Respondent
ESKOM SOC LIMITED	8th Respondent

MAGALIES WATER BOARD 9th Respondent

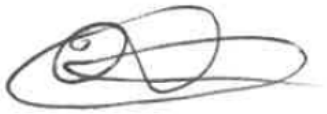
SEDIBENG WATER BOARD 10th Respondent

FILING SHEET

Document presented for filing:

1. Fourth Respondent's Heads of Argument**.**

DATED at **PRETORIA** this **27th** day of **FEBRUARY 2023**



ATTORNEY FOR 4TH RESPONDENT
State Attorney Pretoria
Salu Building
255 Francis Baard Street Cnr Thabo
Sehume (Andries) And Francis Baard
(Schoeman) Streets
PRETORIA, 0001
Ref: 2021/Z32
Tel: (012) 309 1575
Email: ZZenani@justice.gov.za
Enq: Z. Zenani
c/o: State Attorney – Mmabatho
First Floor, East Gallery, Mega City Complex
Cnr Sekame Road &, Dr James

Moroka Drive

MMABATHO

Ref: Mr M Moholo

TO: **THE REGISTRAR OF THE HIGH COURT**

MAHIKENG

AND

TO: **KRIEK WASSENNAR & VENTER INC.**

Attorneys for Applicant

79 Rauch Avenue

Georgeville

Pretoria

Ref: P. Wassenaar/es/QB0616

Tel: 012 656 7566

e-mail: peter@kriekprok.co.za

c/o: Smit Stanton Inc

29 Warren Street

MAHIKENG

Tel: 018 381 0180

e-mail: litigation1@smitstanton.co.za

Ref: KRI19/0002/21

AND

TO: **STATE ATTORNEY – MMABATHO**

Attorneys for the 1st, 2nd, 3rd and 7th Respondents

First Floor, East Gallery, Mega City Complex

Cnr Sekame Road &, Dr James Moroka Drive

MMABATHO

Ref: Ref: Mr M Moholo

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH WEST DIVISION, MAHIKENG)

Case No: M311/2021

In the matter between:

SAKELIGA NPC	Applicant
and	
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	First Respondent
THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	Second Respondent
THE MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
THE MINISTER OF FINANCE	Fourth Respondent
DITSOBOTLA LOCAL MUNICIPALITY	Fifth Respondent
NALEDI LOCAL MUNICIPALITY	Sixth Respondent
THE PREMIER: NORTH WEST PROVINCE	Seventh Respondent
ESKOM SOC LIMITED	Eighth Respondent
MAGALIES WATER BOARD	Nineth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION

1 In this application, the applicant ("**Sakeliga**") seeks, in essence, that the fifth and sixth respondents (Ditsobotla Local Municipality and Naledi Local Municipality, together "**the municipalities**") be placed under mandatory intervention in terms of section 139 of the Constitution.[1] Until the financial recovery plan that forms part of the intervention is implemented, the applicant seeks the appointment of a special master to collect, control and distribute income received by the municipality from electricity and water sales.

2 The fourth respondent ("**the Minister of Finance**") submits that the relief sought is both inappropriate and dangerous, for it threatens the effectiveness of the ongoing intervention into the municipalities as well as the sanctity of the constitutionally enshrined system of cooperative governance.

3 At the outset, it is important to emphasise that the Minister of Finance, as set out in the answering affidavit, recognises that local government has a pivotal role in realising our democracy. It is the sphere of government closest to the people and impacts the day-to-day lives of South Africans.[2]

[1] The Constitution of the Republic of South Africa, 1996 ("the Constitution").
[2] AA para 11 p 617.

4 The Minister of Finance has also frankly acknowledged that in the last decade the performance of many municipalities has unfortunately been synonymous with failure, which in turn threatens the legitimacy of both pollical and administrative leadership.[3] Poor financial management in local government undermines service delivery, destroys public confidence in the state, and wastes public funds. Protracted dysfunction can easily become the norm, leading to politically disengaged and disgruntled citizens.

5 Proactive and effective intervention into struggling municipalities is an urgent priority for the Minister of Finance and for the government. For this reason, the National Treasury has been working with provincial Treasury departments to create systems and mechanisms that will assist and support interventions and ultimately ensure that municipalities are properly capacitated so that they can properly run their own finances.[4]

6 Both our Constitution[5] and established legal precedent[6] demand that such intervention **be aimed at strengthening local government capacity.** This requires a "balancing of the constitutional imperative to respect the integrity of local government as far as possible against the constitutional requirement of effective government".[7]

---

[3] Fourth respondent's AA para 11 p 617.

[4] Fourth respondent's AA para 11.4 p 617.

[5] The Constitution s 154(1).

[6] *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* 2022 (1) SA 16 (CC) ("*Premier, Gauteng*") para 82; *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECBHC 14 ("*Mnquma*") para 26.

[7] *Mnquma* (above) para 75.

7 In demonstrating why the Minister of Finance is justified in opposing the sought, these submissions set out:

7.1 a brief background to the application, to the extent that the Minister of Finance is aware of the facts;

7.2 the legislative and policy framework that guides interventions into fraught municipalities;

7.3 the features of a special master remedy, including:

7.3.1 its use as a special aid to the court in complex cases; and

7.3.2 its use as an extraordinary remedy of last resort;

7.4 the inappropriateness of a special master remedy in the present; application;

7.5 the conclusion.

BACKGROUND

8 Both respondent municipalities have been the subject of concern and scrutiny by the North West provincial executive since at least late 2020. In a report by the first respondent ("**North West MEC for Co-operative Governance**"), released in August 2020, it is noted that:

8.1 Naledi Local Municipality, the sixth respondent, was placed on intervention in terms of section 137 of the Local Government: Municipal Finance Management Act 56 of 2003 ("**MFMA**") and section 139 of the

Connstitution with the support of national government. But, despite improvements, the provincial government was forced to withdraw the intervention after six months due to a lack of support from the National Council of Provinces.[8] Even the short intervention led to "a number of tangibles" including "[i]mproved Council functionality and public participation."[9]

8.2 Ditsobotla Local Municipality, the fifth respondent, was also being supported and monitored closely at the time, including in its decision to appoint a firm of attorneys to conduct forensic investigations into lost Integrated National Electrification Programme funds.[10]

9 Despite these efforts, on 17 May 2021 the second respondent ("**North West MEC for Finance**") included both respondent municipalities in a list of thirteen municipalities that were facing severe financial problems requiring mandatory intervention in terms of section 139(5) of the Constitution, read together with chapter 13 of the MFMA.[11]

10 Soon after the plans for the mandatory interventions were announced, this application was launched.

11 Given the lapse in time from the filing of the Minister of Finance's affidavit and the hearing of this matter, the Minister of Finance will, ahead of the hearing of

[8] FA annexure "X3" para 5.1.3 a).
[9] FA annexure "X3" para 5.1.3 a).
[10] FA annexure "X3" para 5.1.14 b).
[11] AA para 22, annexure "DM1".

this application, file a supplementary affidavit informing the Court of any new facts within the Minister of Finance's knowledge concerning the state of the interventions in the two respondent municipalities. This supplementary affidavit is intended to ensure that the Court has all the relevant information within the Minister of Finances knowledge to enable this Court to make an informed order.

LEGISLATIVE AND POLICY FRAMEWORK

12 Local government is a distinct sphere of government with extensive governing powers and functions as well as a significant developmental mandate.[12]

13 Sections 151(3) and (4) of the Constitution provide:

> "A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
>
> The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.'

14 Section 154(1) states further:

> "The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."

[12] The Constitution ss 151-6. *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC) ("*City of Cape Town*") para 60 .

15 A municipality thus enjoys "'original' and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the Constitution permits."[13]

16 While each sphere of government must respect "the constitutional status, institutions, powers and functions of government in the other spheres,"[14] the sphere of local government is in special need of safeguarding because members of municipal councils are democratically elected by their local community to serve and are the public representatives that are that most likely to understand the priorities and needs of South Africans.

17 While the Constitution foreshadows that there may be a need to intervene in the affairs of an errant or dysfunctional municipality, the mechanisms through which such an intervention can be carried out are limited and carefully circumscribed. They may only be invoked temporarily, in exceptional circumstances, and in compliance with strict procedures.[15]

18 Section 139(5), the only intervention mechanism relevant for the purposes of this application,[16] compels the provincial executive to intervene where a municipality is facing a crisis in its financial affairs and, as a result, is in "serious or persistent

---

[13] *City of Cape Town* (above) para 60.

[14] *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union and Others* 2002 (1) SA 76 (SCA) para 7.

[15] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010* (6) SA 182 (CC) paras 43-4.

[16] Where no prima facie evidence exists and the municipality does not admit to being disfunctional, the Local Government: Municipal Systems Act 32 of 2000 s 106 allows the MEC to request the municipal council or municipal manager to provide the MEC with information required or, if the MEC considers it necessary, designate a person or persons to investigate the matter.

material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments."[17] Provincial executives should consult municipalities in good faith prior to making the decision to intervene.[18]

19 Read with section 139 of the MFMA, section 139(5) of the Constitution provides that, in such circumstances, the provincial executive must:

19.1 impose a binding recovery plan, prepared by the Municipal Financial Recovery Service ("MFRS"), aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments;[19]

19.2 consult the mayor of the municipality to obtain the municipality's cooperation in implementing the recovery plan;[20] and,

19.3 if the municipality cannot or does not approve legislative measures necessary to give effect to the recovery plan, dissolve the municipal council and appoint a temporary administrator;[21] or

19.4 if the municipal council is not dissolved, assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.[22]

---

[17] The Constitution s 139(5).

[18] *Democratic Alliance and Others v Premier for the Province of Gauteng and Others* [2020] 2 All SA 793 (GP) para 80.

[19] The Constitution s 139(5)(a).

[20] MFMA s139(1)(b).

[21] The Constitution s 139(5)(b).

[22] The Constitution s 139(5)(c).

20 Once the section 139(5) intervention has taken place, the national executive is required to assess whether the provincial executive is adequately exercising its powers and performing its functions under the sub-section. If the provincial executive fails to do so, national government is then obliged to act in terms of section 139(7) and section 150 of the MFMA.

21 The applicant approaches this court for an order that will find the respondent municipalities to be in serious and persistent material breach of their obligations, will find the North West MECs for Co-operative Governance and Finance in breach of their obligations to intervene and will bring the abovementioned intervention mechanism into operation in respect of each of the municipalities.[23]

22 In respect of the relief sought against the Minister of Finance, any relief that seeks to compel the direct intervention of the Minister of Finance in the affairs of the Municipality in the absence of national intervention in terms of section 139(7) of the Constitution is premature. The Minister of Finance sits at the national level of government, and any order that compels the Minister of Finance to execute various steps in the ongoing provincial intervention subverts the constitutional structure for intervention. The applicant appears to appreciate and concede this matter. In its heads of argument, the applicant is at pains to emphasise that all it seeks is mandatory intervention by the provincial executive (in terms of section 139(5)), which implicitly involves the statutorily required request to the Municipal Finance Recovery Service.[24] The applicant then states that it assumes that the

[23] NOM paras 1-7.

[24] Applicant's heads of argument para 144 p 58.

involvement of the Municipal Finance Recovery Service will necessitate the involvement of the Minister of Finance in the provincial intervention. However, this purported clarification is of no assistance and is problematic for two reasons:

22.1 First: section 157 of the MFMA establishes the Municipal Financial Recovery Service as part of the National Treasury. This is a dedicated unit to assist municipalities upon request or to perform the necessary tasks within a discretionary or mandatory intervention.

22.2 It is clear from section 158 of the MFMA that the requests contemplated by the applicant in the orders sought can be made by the relevant MECs for Finance.[25] Nothing in section 158 of the MFMA requires the direct intervention of the Minister of Finance to trigger the statutorily required processes of the Municipal Financial Recovery Service. In seeking to

---

[25] Section 158 of the MFMA provides that the Municipal Financial Recovery Service—

(*a*) must perform the duties and may exercise the powers assigned to the Service in terms of this Act;

(*b*) may, on request by the MEC for finance in a province, prepare a financial recovery plan for a municipality or, with the approval of the Director-General of the National Treasury, instruct any suitably qualified person to prepare the plan in accordance with the directions of the Service;

(*c*) may, on request by the MEC for finance in the province, monitor the implementation of any financial recovery plans that it has prepared, and may recommend such amendments and revisions as are appropriate;

(*d*) may on request by any municipality that is experiencing financial problems, and in co-ordination with any other provincial or national efforts, assist the municipality to identify the causes of, and potential solutions for, these financial problems;

(*e*) may, with the approval of the Director-General of the National Treasury, obtain the services of any financial expert to perform any specific work for the Service; and

(*f*) may collect information on municipal financial problems and on best practices in resolving such problems.

have the direct intervention of the Minister of Finance, the applicant is yet again seeking to circumvent the statutory process.

22.3 Thus, even with this clarification, prayer 5 remains premature and incompetent.

22.4 Second: It is clear that with prayer 5 of the notice of motion, the applicant seeks that the Minister of Finance is ordered to prepare a financial recovery plan which will be submitted to the Finance MEC in respect of each municipality. Evidently, the applicant is trying to supplant the role of the MEC for Finance by imposing the obligations that constitutionally and statutorily should be performed by the MEC for Finance and placing them on the Minister. This is impermissible.

23 The relief sought against the Minister of Finance in prayers 5 remains incompetent and falls to be dismissed.

FEATURES OF A SPECIAL MASTER REMEDY

24 In addition to the relief relating to the mandatory intervention, the applicant also seeks the appointment of Advoca Auditors as a special master with the following duties:

24.1 collecting and overseeing the ringfencing in separate municipal bank accounts all municipal income generated from the sale of electricity and water;

24.2 effecting the distribution of the municipal income to electricity, water and emergency maintenance suppliers, and transferring the balance to the municipality in question;

24.3 providing a monthly account in respect of all money received and paid out for electricity and/or water;

24.4 opening a bank account on behalf of the municipalities and taking control of the bank account;

24.5 appointing and paying contractors to conduct maintenance;

24.6 incurring all necessary expenditure to maintain the sanitation and other reticulation networks within the areas of the municipalities;

24.7 claiming all costs including expenditure incurred in the performance of its duties; and

24.8 engaging with other people in the necessary performance of the functions of a special master.[26]

25 Since the imposition of a special master is a novel remedy in South Africa, the applicant's heads of argument rely exclusively on *Mwelase*[27] to justify the remedy.[28] However, the applicant fails to engage with the Constitutional Court's reasoning for why the appointment of a special master specifically, as opposed to any other supervisory remedy, was adopted in that case.

[26] NOM paras 8-13.

[27] *Mwelase v Director-General for the Department and Land Reform* 2019 JDR 1480 (CC) ("*Mwelase*").

[28] The other cases referenced in the heads of argument discuss the discretionary power of courts to order an appropriate remedy as well as courts' position on separation of powers in general.

26 In *Mwelase,* the Constitutional Court examined the use of special masters in United States caselaw in order to assess the appropriateness of the Land Claims Court order appointing a special master to help the Department of Rural Development and Land Reform to process the backlog of land claims.[29]

27 The judgment acknowledges the extraordinary nature of the relief sought and provides guidance for when such an intervention might be warranted, including:

27.1 where the court, moreso than the parties, is in need of assistance from a special master; and

27.2 where the court has limited other mechanisms at its disposal to grant an effective remedy.

28 These two features are discussed below, with reference to *Mwelase* and the sources relied upon therein.

<u>The court is in need of special assistance</u>

29 The most salient feature of a special master remedy is that is is introduced when the court itself is in need of assistance, and cannot easily order an effective remedy without such assistance. The Land Claims Court, in its original judgement in the Mwelase matter, quoted one jurist who noted that a special

[29] *Mwelase* (above) para 3.

master remedy was appropriate "where complexity was high and the judges own grasp of the myriad interlocking policies was low."[30]

30 In the United States, the special master remedy is usually introduced where there is an "especially complex" factual scenario.[31] A court faced with a "mass of complicated activity"[32] can benefit from an unbiased expert who offers guidance on what would constitute an effective resolution to the matter. Special masters are relied upon primarily for the formulation of an effective technical remedy or solution, which can then be made into an order of the court.[33] Where special masters are tasked with the implementation of an order, they are required to oversee and monitor implementation, rather than actually perform executive functions to implement it. The latter functions are more closely associated with other court-appointed officers, such as administrators:[34]

> "Masters are generally employed as expert substitutes for the court when formulation of the remedy cannot be left wholly to the parties. Their appointment meets the need for the active involvement of a judicial officer in remedy formulation when the judge does not have the skills to make proper use of the pertinent social information."[35]

---

[30] MP Singh *VN Shukla's Constitution of India* 12 ed (2013) at 34, cited in *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* 2017 (4) SA 422 (LCC) para 22.

[31] Willging et al *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center, 2000) at 12, cited in *Mwelase* (above) fn 12; Jokela and Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool" (2005) 31 *William Mitchell Law Review* 1299 at 1301, cited in *Mwelase* (above) fn 113.

[32] Willging (above) at 5.

[33] Buckholz et al "Special Project: The Remedial Process in Institutional Reform Litigation" (1978) 90 *Columbia Law Review* 807 at 828.

[34] *Mwelase* (above) paras 58, 99 – 204 (minority judgment of Jafta J).

[35] Buckholz (above) at 805.

31 In these cases, the court appoints "unbiased candidates who have the special expertise needed".[36] Nominations are usually invited from parties for a suitably qualified independent actor.[37]

32 This aspect of a special master remedy fits the facts in *Mwelase* neatly. The issue in need of remedy was "sustained, large-scale, systemic dysfunctionality."[38] At the time that the matter was before the Court, nearly 11 000 land claims remained unsettled, meaning that if each claim took only one day to process, the load would take the Department forty years to complete if it worked solely on the claims each weekday.[39] The special master was thus sorely needed to:

> "[A]ssist the Department to develop a comprehensive strategy for the efficient processing and referral of claims, to deal with lost applications, to prevent potential overburdening of the Land Claims Court and to significantly ameliorate the disadvantage of having too few judges at the Court."[40]

33 The Constitutional Court distinguished the matter from *Black Sash*,[41] wherein the Minister for Social Development had failed or refused to take adequate steps in line with her obligations.[42] While such a failure had a devastating impact on South Africa, the remediy did "not cry out for a special master" because the resolution of the matter was not characterised by complexity, confusion and "obduracy".[43]

---

[36] Willging (above) at 6.
[37] Willging (above) at 5; Jokela & Herr (above) at 1313.
[38] *Mwelase* (above) para 39.
[39] *Mwelase* (above) para 27.
[40] *Mwelase* (above) para 27.
[41] *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).
[42] *Mwelase* (above) para 39.
[43] *Mwelase* (above) para 39-40.

In *Black Sash*, the steps needed to be taken were clear; in *Mwelase*, a special master was needed to determine which steps ought to be taken.[44]

34 Thus, in *Mwelase*, the Land Claims Court was in need of the assistance of a special master itself. The Land Claims Court "made plain that the work to be done would alleviate its own capacity constraints in overseeing the output of the Department."[45]

35 The Constitutional Court upheld the order of the Land Claims Court and a special master was tasked with developing an implementation plan for the performance of the duties of the Department, with supervision by the special master.[46] Parties were invited to nominate candidates for the special master and then to comment on the nominations.[47] They were also entitled to object to the implementation plan prepared.[48]

<u>The court has limited other mechanisms at its disposal to grant an effective remedy</u>

36 Given the intrusiveness of a special master remedy, special masters are traditionally appointed very rarely, even in jurisdictions such as the United States, where the remedy is an established one.[49]

---

[44] Mukherjeea & Tuovinenb "Designing remedies for a recalcitrant administration" (2020) 36 *South African Journal on Human Rights* 386 at 393.

[45] *Mwelase* (above) para 61.

[46] *Mwelase* (above) para 93.

[47] *Mwelase* (above) para 93.

[48] *Mwelase* (above) para 93.

[49] Jokela and Herr (above) at 1308; Willging (above) at 3.

37 Where the legislative framework governing a state organ has built in accountability mechanisms, such as the section 139 intervention mechanism for poorly administered municipalities, caselaw suggests that the courts would be reluctant to grant a special master remedy if an effective intervention can be achieved through an already-existing statutory scheme.

38 This approach is evident in our courts' treatment of dissolutions of municipal councils by provincial executives before alternative, less drastic interventions are attempted. In *Premier, Gauteng*,[50] the Constitutional Court expressed concern that provincial executives were opting to dissolve municipal councils without considering which possible intervention would best preserve the autonomy of local government:

> "Previous attempts by the provincial executive to address the failure using other means must be considered as well as the conduct of the municipality to address the failure. In other words, appropriateness cannot be determined in the abstract.[51]
>
> …
>
> Resorting to dissolution may very well be inappropriate in circumstances where there was another step that could have been taken which was reasonably capable of resolving the issue and would have been less invasive of local government autonomy. Where dissolution is resorted to, appropriateness must be determined in light of the fact that it results in the takeover of a democratically elected municipal council by an administrator appointed by the provincial executive. It involves, as counsel for the first respondent put it, the dissolution of one sphere of government by another and this impacts on separation of powers.[52]

[50] *Premier, Gauteng* (above).
[51] *Premier, Gauteng* (above) para 84.
[52] *Premier, Gauteng* (above) para 88. Emphasis added.

39 While those comments were made in relation to the dissolution of municipal councils, it is submitted that the same principles must apply to the imposition of a special master before the existing, statutorily prescribed interventions have been exhausted.

40 In *Mwelase*, there was no staturily prescribed intervention process for dealing with institutional failure on the part of the Department. Nevertheless, the applicants had on numerous occasions agreed to settlement agreements with the Department in order to give it an opportunity to remedy its own failings without the imposition of a special master. The parties entered into at least three binding settlement agreements before the Court recognised that even supervisory orders, with mandatory reporting, were not capable of providing an effective remedy.

41 The Land Claims Court was willing to grant the extraordinary special master remedy when it did because the applicant's approach demonstrated a preference for strengthening existing governance structures rather than supplanting them.[53]

INAPPROPRIATENESS OF A SPECIAL MASTER REMEDY

<u>The court is not in need of assistance</u>

42 A special master is an unsuitable remedy in the present application.

[53] *Mwelase* (above) paras 40-2.

42.1 This Honourable Court is not in need of the assistance of a special master. The issue in terms of which a special master is sought relates solely to the collection and disbursement of monies recieved for electricity and water. The issue is not complex and involves the accounts of only two municipalities.

42.2 A special master is not needed to help this Court craft an effective remedy relating to the collection and disbursement of the monies, or to oversee the implementation of the remedy. The applicant has already proposed who the special master should be and what they should be ordered to do. All that is left is the implementation of the order — an executive function that is not suited for a special master.

42.3 Furthermore, the special master would not be independent or impartial. The special master is sought to be appointed without a proper vetting process to verify the proposed appointees' qualifications to deal with local government governance matters.The potential for bias or perceived bias would render the special master even less useful to this Honourable Court.

Effective relief is available without a special master

43 The Constitution and the MFMA provide clear, viable alternatives to employing a special master. The mandatory intervention in section 139(5) of the Constitution has been specially crafted to capacitate municipalities in the position of the respondent municipalities.

44 The preferred situation is that the municipal council engages meaningfully in the intervention process. However, where a municipal council is obstructive, there are provisions for the dissolution of the council and the appointment of a temporary administrator who would have many of the same duties that the special master would have.[54]

45 The imposition of a special master while a comprehensive intervention is underway may have the effect of hampering long-lasting transformation within the municipalities.[55] The objective of the intervention is to capacitate the municipal council to put in place thorough accounting processes. For the intervention to have a lasting effect, the shifts need to be spearheaded by the municipal council, or the temporary administrator.

46 The applicant seeks to supplement an ongoing intervention with a remedy that will have the effect of taking responsibility away from the targets of the intervention, thus rendering the intervention less impactful. The applicant is essentially asking this Court to denude the statutory and constitutional structures and to place their powers in the hands of a hand-picked special master who will exercise governance responsibilities. This is impermissible.

[54] FA paras 40.2–40.11.

[55] *Premier, Gauteng* (above) para 120.

The relief is otherwise inappropriate.

47 In addition to the reasons outlined above, the special master relief is impermissible for a host of other reasons outlined in the Minister of Finance's answering affidavit.[56] These include:

47.1 The municipality will incur additional costs remunerating the special master that are not part of the budgeting process. The appointment will be done without a proper procurement process for services, meaning the appointed special master might not be the most cost-effective or best qualified for the role.

47.2 A municipality is the only entity entitled to make collections. Section 8(2)(d) of the MFMA sets out that all money collected by a municipal entity or other external mechanism on behalf of the municipality, must be paid into the municipality's primary bank account. Further, in terms of section 10 of the MFMA, control of the municipal bank account is the responsibility of the Accounting Officer. This means that Advoca Auditors cannot be appointed to collect monies or open a new bank account for the municipalities as this would be in contravention with the MFMA.

47.3 The ordering of resources and the allocation of monies collected by the municipality lie at the heartland of executive functions. The special master is intended to take over this function with the blessing of the

[56] AA paras 39-41.

Court. This would constitute an egregious breach of the separation of powers not warranted by the facts of this case. There is no evidence that all constitutionally permissible interventions have completely failed.

CONCLUSION

48 In *Premier, Gauteng*, the Constitutional Court held that "[t]he primary purpose of the intervention by the provincial government is to assist the local government, in the spirit of co-operative governance, to fulfil its executive obligations"[57] Any intervention into a municipality must consider which corrective measure is most likely to "ensure the problems that beset a municipality are resolved."[58]

49 Based on the foregoing analysis, it is submitted that there is no merit to the application and it should be dismissed. In the event that the application is unsuccessful, the Minister of Finance does not seek costs against the applicant. In the event that the application is successful, it is submittd that the appropriate order would be that costs be awarded on the ordinary scale.

NGWAKO MAENETJE SC
LERATO ZIKALALA
Fourth Respondent's counsel
Chambers, Sandton
27 February 2023

[57] *Premier, Gauteng* (above) para 82.
[58] *Mnquma* (above) para 26.

LIST OF AUTHORITIES

Legislation

1 Local Government: Municipal Finance Management Act 56 of 2003

2 Local Government: Municipal Systems Act 32 of 2000

3 The Constitution of the Republic of South Africa, 1996

Cases

4 *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC)

5 *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC)

6 *Democratic Alliance and Others v Premier for the Province of Gauteng and* Others [2020] 2 All SA 793 (GP)

7 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC)

8 *Member of the Executive Council for Local Government, Mpumalanga v Independent Municipal and Allied Trade Union and Others* 2002 (1) SA 76 (SCA)

9 *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECBHC 14

10 *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* 2017 (4) SA 422 (LCC)

11 *Mwelase v Director-General for the Department and Land Reform* 2019 JDR 1480 (CC)

12 *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* 2022 (1) SA 16 (CC)

Journal articles and academic books

13 Buckholz et al "Special Project: The Remedial Process in Institutional Reform Litigation" (1978) 90 *Columbia Law Review* 807

14 Jokela and Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool" (2005) 31 *William Mitchell Law Review* 1299

15 Mukherjeea & Tuovinenb “Designing remedies for a recalcitrant administration” (2020) 36 *South African Journal on Human Rights* 386

16 Singh *VN Shukla's Constitution of India* 12 ed (2013)

17 Willging et al *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center, 2000)