IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case number: M311/2021

In the application between:

SAKELIGA NPC	Applicant
and	
MEC, NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	First Respondent
MEC, NORTH WEST PROVINCE: FINANCE	Second Respondent
THE MINISTER 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 OF THE NORTH WEST PROVINCE	Seventh Respondent
ESKOM SOC LTD	Eighth Respondent
MAGALIES WATER BOARD	Ninth Respondent
SEDIBENG WATER BOARD	Tenth Respondent

APPLICANT'S REPLYING AFFIDAVIT TO FIRST, SECOND, THIRD AND SEVENTH RESPONDENTS' SUPPLEMENTARY ANSWERING AFFIDAIVT

I, the undersigned,

PIETER JACOBUS LE ROUX

do hereby take the oath and state the following:

1. I am an adult male and the chief executive officer of the applicant, Sakeliga NPC, which has its offices at Building A, 5th Floor, Loftus Park, 402 Kirkness Street, Arcadia, Pretoria, Gauteng Province.

2. The facts set forth in this affidavit fall within my personal knowledge unless the contrary appears from the context, and such facts are both true and correct.

3. Where I make legal submissions in this affidavit, I do so on the advice of the applicant's legal team.

4. I have deposed to affidavits filed on behalf of the applicant throughout these proceedings to date and I retain my authority to depose to this affidavit on the applicant's behalf.

[A] AD STATUS OF THE MATTER:

5. This application concerns the invocation of mandatory intervention in the fifth and sixth respondent municipalities ("*Ditsobotla*" and "*Naledi*" respectively) by the North West Provincial Executive Council ("*the PEC*") in terms of section 139(5) of the Constitution.

6. This is clear from prayers 1, 2 and 3 of the amended notice of motion, which read:

    1. That the fifth and sixth respondent municipalities be found, in terms of Section 139 (5) of the Constitution, read with Sections 136 (4), 139 and

140 of the Local Government: Municipal Finance Management Act, No. 56 of 2003 ("MFMA"), to be in serious and persistent material breach of their obligations to provide basic services and to meet their financial commitments.

2. *That the first, second and seventh respondent's failure to implement mandatory interventions in respect of or within the fifth and sixth respondent municipalities, in terms of Section 139 (5) read with Sections 136 (4), 139 and 140 of the MFMA, be found to be inconsistent with Sections 2, 10, 24, 139 (5), 195 and 237 of the Constitution.*

3. *That the seventh respondent, in the capacity as the head of the executive council of the Northwest province, be directed to forthwith implement a mandatory intervention as envisaged in Sections 139 (5) of the Constitution and Section 139 (5) of the MFMA and to comply with the provisions of the said legislation.*

7. The application was issued on 26 May 2021 and instituted by service on the respondents between 2 and 17 June 2021.

8. The application is opposed by:

8.1. The first to third and seventh respondents, who filed an answering affidavit on 25 August 2021 and a supplementary answering affidavit on 26 September 2023, more than two years later,

8.2. The fourth respondent, who filed an answering affidavit on 25 August 2021 and a supplementary affidavit on 22 March 2023,

8.3. Naledi, who filed an answering affidavit on 9 September 2021, and

8.4. Ditsobotla, who filed an answering affidavit on 17 April 2023.

9. It has since transpired that the PEC resolved to invoke mandatory intervention in Ditsobotla and Naledi, in terms of section 139(5) of the Constitution, on 24 November 2021 ("*the PEC resolution*"). I attach a copy of this resolution as "**X1**".

10. Despite the matter having endured for more than two years, the respondents have never placed the PEC resolution before this Court, which would obviously have curtailed the matter significantly.

11. Certain of the respondents alluded to the invocation of section 139(5) during a round-table discussion with Sakeliga's legal representatives on 22 September 2022, but failed to provide Sakeliga with the PEC resolution in confirmation thereof.

12. The fourth respondent ("*the Minister of Finance*") had alluded to the PEC resolution in his supplementary answering affidavit of 22 March 2023, but had not attached it. Instead of addressing the existence of the PEC head-on, the Minister of Finance had said, in paragraph 5, that "the MEC had presented *the intention to invoke* section 139(5)(a) and (c) of the Constitution".

13. The Finance Minister had further said, in paragraph 26 of his supplementary affidavit, that "National Treasury's MFRS unit is currently *in the advanced stages* of developing financial recovery plans for the two municipalities". Having now considered the actual FRPs, it is clear that this was not the case.

14. Sakeliga ultimately obtained the PEC resolution from the Minister of Finance on 11 May 2023, pursuant to a notice in terms of Rule 35(12) delivered on 14 April 2023.

15. The PEC resolution renders the primary relief sought in this application moot. The state respondents have in fact conceded the relief sought by Sakeliga, and it is astonishing that the matter continues to be opposed causing a serious waste of

court time and resources, time and costs for the applicant, and taxpayers funds. The continued opposition is vexatious.

16. Given the manner in which the PEC has gone about the ostensible implementation of the section 139(5) intervention, it is clear on the facts that the PEC has either failed to implement or has failed to adequately implement the section 139(5) intervention, particularly in respect of Ditsobotla. This failure triggers the provisions of section 139(7) of the Constitution which obliges the national government to intervene in the PEC's stead.

17. Sakeliga, the Centre for Good Governance and Social Justice NPC and Barend Lourens Snyman instituted separate proceedings, under case number UM192/2022, to compel the national government to intervene in Ditsobotla under section 139(7) of the Constitution. Case number UM192/2022 is set down to be heard together with this application.

18. On 15 September 2023, Sakeliga's legal representatives delivered a practice note, clearly setting out its position that the relief has become moot and that the only remaining issue to be determined is that of costs. The practice note contains submissions on costs.

19. Surprisingly then, on 26 September 2023, the first to third and seventh respondents ("*the provincial and national respondents*"), filed a supplementary answering affidavit.

20. It is clear from the content of the supplementary answering affidavit that nothing contained therein warrants the service of the affidavit a mere eight days prior to the hearing of the matter. I point out that the state respondents have previously used the same modus operandi in an attempt to derail the application. All of the

information set forth in the affidavit has been at the provincial and national respondents' disposal for months, and it is clear that the respondents have improperly timed the service of the present supplementary answering affidavit.

21. Filing their supplementary answering affidavit as they have, the provincial and national respondents thereby further demonstrate their failure, throughout these proceedings, to meet their duty as State litigants to be fair to their opponents, and honest and forthright with the court. Such duty is heightened where there are Constitutional rights and duties at stake.

22. Furthermore, the supplementary answering affidavit:

22.1. Still does not attach the PEC resolution, and

22.2. Clearly demonstrates the inadequacy of the PEC's implementation of the section 139(5) intervention and its failure to perform its functions under section 139(5) adequately.

[B] AD LEAVE TO FILE FURTHER AFFIDAVITS:

23. There is an urgent need to determine both applications before court. Sakeliga accordingly does not oppose the granting of leave to the provincial and national respondents to file their supplementary answering affidavit in terms of Rule 6(5)(e), provided that it is similarly given leave under Rule 6(5)(e) to file this affidavit.

24. In paragraphs 9 and 10 of their supplementary answering affidavit, the provincial and national respondents envisage this reply being filed prior to, and the matter continuing, on 5 and 6 October 2023. The provincial and national respondents can therefore not conceivably have any basis to oppose leave being granted for this affidavit to be filed.

25. As I have explained above, the only remaining issue in the matter is costs.

26. I submit that the content of both this affidavit and the provincial and national respondents' supplementary answering affidavit are relevant to the determination of the issue of costs and leave should therefore be granted for the filing of both affidavits in terms of Rule 6(5)(e).

27. In the interests of brevity, I do not propose to respond to each allegation made in the provincial and national respondents' supplementary answering affidavit. I further respectfully point out that, by design, the provincial and national respondents have afforded the applicant practically no time within which to reply, and that the present reply ought to be read in the aforesaid context. I request the court to read any allegation contained in the supplementary answering affidavit which does not expressly accord with the facts set out in the affidavits filed by Sakeliga as denied.

28. It is, however, necessary for Sakeliga to respond to certain of the averments made in the supplementary answering affidavit because, as I will demonstrate:

    28.1. Certain of the allegations made therein are simply inaccurate or untrue, and

    28.2. The provincial and national respondents are still not being forthright with this Court.

[C] SERIATUM REPLY:

AD PARAGRAPH 3 THEREOF:

29. I deny that the provincial and national respondents "provide an oversight role over the activities of the fifth and sixth respondents in this application".

30. This application, as well as the application brought under case number UM192/2022 are directly concerned with the failure of the provincial and national government, and thereby the provincial and national respondents, to fulfil their constitutional obligations under section 139(5) and 139(7) of the Constitution to intervene in Ditsobotla and Naledi.

31. The provincial and national respondents are not cited in these proceedings as mere spectators.

AD PARAGRAPHS 4 TO 10 THEREOF:

32. As I have stated, for the reasons set out above, Sakeliga does not oppose leave being granted to file the provincial and national respondents' supplementary answering affidavit, provided that Sakeliga is similarly given leave to file this affidavit in reply.

33. However, I do wish to highlight the following, relevant to the issue of costs:

    33.1. The initial answering affidavit simply took unmeritorious technical points;

    33.2. The supplementary answering affidavit was deposed to by Dr Bole on Thursday, 21 September 2023, two years after the initial answering

affidavit and a mere 9 days prior to the hearing of the matter on 5 October 2023.

33.3. The affidavit was, however, only served on Sakeliga's attorneys on Tuesday, 26 September 2023, a mere 7 prior to the hearing.

33.4. The supplementary answering affidavit was further not properly served on Sakeliga's attorney by the State Attorney representing the provincial and national respondents. It was sent to Sakeliga's attorney by the provincial and national respondents' counsel by email.

33.5. I am advised that the Constitutional Court has held that State litigants, such as the provincial and national respondents, have a duty to be fair to their opponents, and honest and forthright with the court and bear a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.

33.6. It is therefore, in my submission, shocking and in complete disregard of this duty for Dr Bole to casually state that:

33.6.1. There is "no prejudice to any of the parties" in the service of a 215 page supplementary answering affidavit 7 days before the hearing, and

33.6.2. There is "ample time for the parties to deal with the allegations contained in this supplementary affidavit".

34. I submit that this approach by the provincial and national respondents smacks of complete disregard for the procedural rights of Sakeliga and the processes and rules of this Court.

35. I further submit that the Court should take a dim view of this conduct when considering the issue of costs and the scale thereof.

AD PARAGRAPH 11 THEREOF:

36. It is clear from the content of this paragraph that the provincial and national respondents have either misconstrued or misunderstood Sakeliga's case.

37. It has always been Sakeliga's case that the jurisdictional facts required to trigger mandatory intervention in terms of section 139(5) of the Constitution are present in both Ditsobotla and Naledi, but that the PEC had failed to act on its obligations to intervene under section 139(5).

38. Section 139(1) of the Constitution provides for discretionary intervention by the PEC when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.

39. As Dr Bole himself states in his Doctoral Thesis on section 139(1) interventions in local government in the North West,

    39.1. Ditsobotla was placed under section 139(1) intervention by the PEC between January 2016 and January 2017 and between September 2018 and September 2019.

    39.2. Naledi was placed under section 139(1) intervention by the PEC between 1 September 2018 and 28 August 2019.

    39.3. In fact, in financial year 2018/19, 60% of municipalities in the North West Province were placed under section 139(1) intervention by the PEC.

40. Section 139(1) interventions by the PEC have never succeeded.

41. Hence, the PEC eventually resolved to invoke section 139(5) intervention as it was obliged to do.

42. This application has never been concerned with the adequacy of discretionary interventions by the PEC under section 139(1) of the Constitution. These have all failed. In the present application, Sakeliga has always sought compliance with the mandatory provisions of section 139(5) of the Constitution.

AD PARAGRAPH 12 THEREOF:

43. In terms of the common cause facts, Sakeliga has been substantially successful in respect of the relief that it sought in the present application.

44. I deny that the provincial and national respondents are "not responsible for the relevant constitutional and legislative obligations".

45. In this matter, the "relevant constitutional and legislative obligations" are section 139(5) of the Constitution and sections 139 to 147 of the MFMA.

46. These provisions place express obligations and responsibilities on the provincial and national respondents.

AD PARAGRAPHS 13 TO 15 THEREOF:

47. The provincial and national respondents' persistence with the argument of misjoinder of each member of the PEC is misguided and vexatious.

48. Prayer 3 of Sakeliga's amended notice of motion seeks:

3. That the seventh respondent, in the capacity as the head of the executive council of the Northwest province, be directed to forthwith implement a mandatory intervention as envisaged in Sections 139 (5) of the Constitution and Section 139 (5) of the MFMA and to comply with the provisions of the said legislation.

49. However, this argument has been overtaken by events as the PEC resolution was subsequently taken on 24 November 2021.

50. The disingenuous nature of this argument is further highlighted by the fact that the "Political Oversight Committee" to be established to direct the section 139(5) intervention in Ditsobotla is to include the first, second and seventh respondents and no other members of the PEC are involved in either the implementation of oversight of Ditsobotla's Financial Recovery Plan ("*FRP*") (See page 15 of Ditsobotla's FRP). The same is true in respect of Naledi (See page 11 of Naledi's FRP).

AD PARAGRAPH 16 THEREOF:

51. As I have stated above, prior, discretionary interventions by either the PEC or individual members of the PEC are not relevant to the present application save to the extent that their failure exacerbated the need for mandatory intervention in terms of section 139(5) of the Constitution.

52. The first and second respondents, as members of the PEC directly tasked with the implementation of the mandatory intervention in terms of section 139(5) of the Constitution, are individually and collectively responsible with the PEC for the failure to act. It is clear from the facts that the provincial executive acted in breach of section 136(4) of the MFMA for years.

AD PARAGRAPH 17 THEREOF:

53. Despite this concession, the first and second respondents have been recalcitrant in the exercise of their constitutional and legislative obligations.

AD PARAGRAPH 18 THEREOF:

54. Section 136(1) of the MFMA obliges the first respondent, upon becoming aware that there is a serious financial problem in a municipality, to

54.1. consult the mayor of the municipality to determine the facts;

54.2. assess the seriousness of the situation and the municipality's response to the situation; and

54.3. determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

55. The first respondent has, or ought reasonably to have been aware for years that both Ditsobotla and Naledi were, as a result of a crisis in their financial affairs, in serious or persistent material breach of their obligations to provide basic services or to meet their financial commitments, triggering an obligation to act in terms of section 139(5) of the Constitution as spelt out in section 136(4) of the MFMA.

56. It is now common cause that the PEC resolution was only taken on 24 November 2021.

57. I therefore deny that the first respondent has "always" acted consistently with section 139(4) of the MFMA. Had that been the case, this application would not have been necessary.

58. In fact, it is clear from Dr Bole's evidence that the first respondent, and indeed the PEC, has shirked the invocation of section 139(5) of the Constitution for years, preferring to invoke unsuccessful discretionary interventions under section 139(1) of the Constitution.

AD PARAGRAPHS 19 AND 20 THEREOF:

59. This is denied.

60. This application is bursting at the seams with evidence of the failures by the first and second respondents to protect the dignity of the residents of Ditsobotla and Naledi.

AD PARAGRAPH 21 THEREOF:

61. I deny the over-simplistic and plainly disingenuous suggestion that the problems faced by Ditsobotla and Naledi are "operational challenges".

62. The financial recovery plans attached by Dr Bole paint a far more dire picture of governance in these municipalities and reference will be made to those findings by the MFRS at the hearing of this matter.

63. The first and second respondents can further not conceivably claim to have "always made sure that the environment is healthy for the inhabitants", while the residents of these municipalities, and particularly Ditsobotla, frequently find themselves without either water or electricity (sometimes simultaneously) for days or weeks on end.

64. The provincial executive does not understand its Constitutional obligations. I point out also that section 4 of the Constitution deals with the National anthem.

AD PARAGRAPH 22 THEREOF:

65. This is denied.

66. I have placed a plethora of actual evidence before this Court in my previous affidavits of the actual situation regarding water treatment in Ditsobotla.

67. During an inspection *in loco* conducted by the parties in matter UM192/2022 it was confirmed by representatives of Ngaka Modiri Molema District Municipality that the water treatment is not operational and that an official has yet to be commissioned to operate the water treatment. A confirmatory affidavit by Sakeliga's attorney, who attended such inspection, shall be filed with this affidavit. I shall also attempt to obtain further supporting affidavits in the time available.

68. If any progress had been made, Dr Bole would surely have adduced some evidence of the "progress" he is referring to.

AD PARAGRAPH 23 THEREOF:

69. The relief sought in prayer 3 has become moot. However, given the content of this paragraph, it is necessary for me to respond in clarification.

70. Firstly, prayer 3 seeks the implementation of mandatory intervention in terms of section 139(5) of the Constitution.

71. Prayer 3 has nothing to do with the provision of water.

72. However, given the content of this paragraph, it is necessary to clarify the position, as set out on page 6 of Ditsobotla's FRP, regarding the involvement of Ngaka Modiri Molema District Municipality in the provision of water services to Ditsobotla:

"The district municipality as a partner in this regard is not adequately equipped or lacks the will to execute their functions effectively with respect to the water and sanitation services. Ditsobotla LM is therefore facing interruptions in bulk water supply which in turn affects the supply of water to residents. Furthermore, blockages on the bulk sewer treatment plant and main lines create back flows and contamination and health risk for the households and streets of the municipality. The disjuncture emanates from the service level agreement that is not properly documented between the water services authority and the water service provider. The local municipality bears the financial burden and incurs expenditure for unfunded mandates to repair or maintain the assets belonging to the district.

Ditsobotla LM has infrastructure that is not coping with the current demand and is subjecting the community and local business to severe inconvenience. This is evidenced by the disinvesting of one of the big companies, Clover SA, from the municipality recently. There is infrastructure that has failed or is on the verge of failure, exposing communities to health and safety hazards that need immediate attention."

73. Ditsobotla's FRP was prepared between 23 February 2023 and 7 May 2023 and signed off as correct and final by the second respondent on 12 July 2023.

74. The allegations of Dr Bole are untrue. I refer to what I have stated already regarding supporting affidavits.

AD PARAGRAPH 24 THEREOF:

75. The relief sought in prayer 4 has become moot. However, given the content of this paragraph, it is necessary for me to respond in clarification.

76. Prayer 4 does not seek the dissolution of the municipal council.

77. The provincial and national respondents misconstrue prayer 4 of the amended notice of motion, which merely makes provision for the exercise of the power already provided by section 139(5)(b) of the Constitution if the trigger events provided for therein occur.

78. The dissolution of the Ditsobotla municipal council in terms of section 139(1) of the Constitution is irrelevant to the relief sought.

AD PARAGRAPH 25 THEREOF:

79. This is denied.

80. Elections were held in Ditsobotla on 14 December 2022, not 1 December.

AD PARAGRAPH 26 THEREOF:

81. The relief sought in prayer 5 has become moot. However, given the content of this paragraph, it is necessary for me to respond in clarification.

82. Prayer 5 does not affect the Ditsobotla municipal council.

AD PARAGRAPH 27 THEREOF:

83. I have no knowledge of whether the FRPs are being implemented in either Ditsobotla or Naledi.

84. The provincial and national respondents are ideally placed to inform this Court of the exact details of

    84.1. When implementation of the FRPs in Ditsobotla and Naledi began, if at all, and

84.2. What progress has been made, if any, in the implementation of the FRPs in Ditsobotla and Naledi, but

Dr Bole provides no evidence whatsoever in this regard and this allegation is accordingly denied.

AD PARAGRAPH 28 THEREOF:

85. In the light of what is said by Dr Bole in this paragraph, prayer 6 has indeed become moot.

86. Firstly, I refer to my statements above regarding implementation of the FRPs in Ditsobotla and Naledi.

87. However, I note that Dr Bole states the "recovery plan is led by officials of the fourth respondent". This is inconsistent with:

87.1. Section 146(1)(a) of the MFMA, which provides that the municipality concerned must implement the approved recovery plan, and

87.2. The content of the FRPs themselves, which states that the PEC has assumed responsibility for the implementation of the FRPs in terms of section 139(5)(c) of the Constitution. This is confirmed by the PEC resolution attached to Dr Bole's affidavit as annexure 5.

88. The fact that Dr Bole now states the implementation of the FRPs is being led by the Minister of Finance (i.e. national government) speaks to the inadequacy of the performance of its functions under section 139(5) of the Constitution by the PEC.

AD PARAGRAPH 29 THEREOF:

89. I admit that the FRPs are attached to Dr Bole's affidavit and therefore prayer 7 is moot.

90. I highlight again that, despite the application having been instituted in June 2021 and the PEC resolution having been taken on 24 November 2021, Naledi's FRP was:

90.1. only developed from 13 March 2023,

90.2. only finalised in draft on 31 May 2023, and

90.3. only accepted as final on 23 June 2023.

91. Similarly, Ditsobotla's FRP was:

91.1. only developed from 23 February 2023,

91.2. only finalised in draft on 7 May 2023, and

91.3. only accepted as final on 12 July 2023.

92. The delay in preparing FRPs between 24 November 2021 and 23 June 2023 and 12 July 2023, for Naledi and Ditsobotla respectively, is inordinate and suggests gross inadequacy by the PEC in the performance of its mandatory function under section 139(5)(a) of the Constitution.

93. In his supplementary answering affidavit, the Minister of Finance had stated that status *quo* assessments were conducted in both municipalities and status *quo*

assessment reports prepared by August 2022. Yet work on the FRPs only commenced in February 2023.

AD PARAGRAPHS 30 AND 31 THEREOF:

94. Sakeliga does not persist with the relief sought in prayer 8.

AD PARAGRAPH 43 THEREOF:

95. I take issue with Dr Bole's characterisation of Sakeliga's approach to this litigation.

96. It should be apparent to Dr Bole that Sakeliga's aim in instituting this application has always been to secure compliance by the PEC with its obligations under the Constitution in pursuance of the object of local government set forth in section 152 of the Constitution.

97. In this regard, it should further be noted that:

97.1. Ditsobotla's FRP states, on page 4, that:

> *One need to, of necessity ask the question to what extent the municipality fulfils its Constitutional mandate espoused in section 152 with respect to its objects, and again it appears as if the following are not achieved:*
> *a) Provide democratic and accountable government for local communities.*
> *b) Provide sustainable services.*
> *c) Promote a safe and healthy environment.*
> *d) Encourage community involvement.*
> *e) Promote social and economic development.*

97.2. Similar findings are made in Naledi's FRP, which states on page 4 that:

NLM has been experiencing financial management and service delivery related challenges which collectively resulted in an inability by the municipality to deliver acceptable levels of basic services to its communities and has so adversely affected the liquidity of the municipality. The Institution has been constrained to deliver sustainable and uninterrupted services incubated by failure to meet financial commitments due to its prolonged state of financial crisis for the preceding five financial years.

98. Sakeliga's assessment of the situation in Ditsobotla and Naledi, which prompted this application to be brought, has thus been borne out, not only by the evidence adduced in the founding affidavit, but also by the subsequent PEC resolution and the findings of the MFRS.

AD PARAGRAPH 54 THEREOF:

99. This is denied.

100. Section 125 of the Constitution vests the executive authority of the province in the Premier.

101. Section 132 of the Constitution provides that the Premier is the head of the PEC.

102. I am advised that, in the result, it is proper to cite the Premier as representing the PEC.

AD PARAGRAPH 59 THEREOF:

103. The so-called "challenges" faced by Ditsobotla and Naledi, reflected in the COGTA report of 24 August 2020 persist and have become more severe. This is clearly reflected in the FRPs and comparative reference will be made to these documents at the hearing of the matter should it be required.

AD PARAGRAPH 60 THEREOF:

104. I refer back to my statements in reply to paragraph 27 above, pertaining to the alleged “implementation” of the FRPs.

105. I submit that it is simply not sufficient for Dr Bole to allege the FRPs have been “implemented” in the abstract, without providing the Court with a single piece of evidence in that regard.

106. The resolution to invoke section 139(1)(c) of the Constitution in respect of Ditsobotla is not a surrogate for the mandatory process invoked by the PEC resolution under section 139(5) of the Constitution.

107. However, there are several key aspects to the resolution taken in terms of section 139(1)(c) of the Constitution, which warrant mention:

107.1. It is little wonder that, having found themselves compelled to invoke section 139(5) of the Constitution by resolution on 24 November 2021, the situation had deteriorated further and to such an extent that by 14 September 2022, the PEC invoked section 139(1)(c) of the Constitution. The facts show that the provincial executive simply failed to exercise their powers or perform their functions in terms of section 139(5) of the Constitution at all.

107.2. There is no evidence that, in the 294 days between 24 November 2021 and 14 September 2022, the PEC complied with its obligation under section 139(5) of the Constitution and section 139 of the MFMA to actually intervene and assist Ditsobotla by imposing a recovery plan.

107.3. In fact, this failure should be common cause as the FRPs were only adopted in mid-2023.

107.4. Section 139(5) of the Constitution and section 139 of the MFMA are prescriptive and there is no discretion for the PEC to adopt a so-called “progressive approach” (vide paragraph 2.3 of the resolution)

107.5. The tabulated chronology of “interactions and guidance to Ditsobotla” between 8 February 2022 and 8 September 2022 reveals that no steps were taken during this period to “impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments” as required by section 139(5)(a) of the Constitution.

107.6. The “progressive approach” adopted by the PEC is thus patently inadequate.

107.7. It is further interestingly recorded in the resolution that the “SAKELIGA case to take over the powers of the municipality is gaining momentum” and “the municipality is at risk of losing the SAKELIGA case”.

107.8. While it is clear that the PEC had either completely misunderstood or misconstrued this matter as an attempt by Sakeliga to “take over the powers of the municipality”, which it is not, it is pleasing to see that the matter prompted further action by the PEC, albeit misdirected and inadequate action.

AD PARAGRAPH 61 THEREOF:

108. The PEC's dissolution of the Ditsobotla municipal council in terms of section 139(1) of the Constitution is not relevant to the performance of its functions under section 139(5) of the Constitution.

109. It is to be noted that section 139(5) does not require the dissolution of the municipal council concerned *per se.*

110. However, given the well-documented and stark deterioration in Ditsobotla between 24 November 2021 and 14 September 2022, had the PEC performed its functions under section 139(5) and imposed a recovery plan on Ditsobotla at any time in that period, which it did not, it is likely that the dissolution would have occurred in terms of section 139(5)(b) of the Constitution.

111. It is solely because the PEC had failed to perform its functions under section 139(5) that it dissolved the municipal council in terms of section 139(1), as that was the only option available to it because of its inaction.

112. I deny that the position of Naledi improved at all. The FRP for Naledi directly contradicts this.

113. I deny Dr Bole's assertion that the "recovery plan is in the implementation phase", for the reasons already stated. I have already addressed the inadequacy of this bald and unsubstantiated claim above.

AD PARAGRAPHS 62 AND 63 THEREOF:

114. The principal of co-operative governance does not excuse the failure to perform the functions mandated by section 139(5) of the Constitution.

AD PARAGRAPH 64 THEREOF:

115. The prior interventions by the provincial and national respondents all failed, largely due to the PEC's approach.

116. Ditsobotla's FRP states, on page 6, that:

> *"Previous Interventions have failed, and the desired results have not been achieved. There has also been no progressive realization of the strategic objectives underpinning the intervention and material errors of judgment which allowed the situation to deteriorate to the current financial crisis and service delivery collapse. Despite all the interventions by the province, the situation has continued to deteriorate even further to the extent that the municipality is now in a worse-off situation than before the interventions by the province."*

117. Similarly, Naledi's FRP states, on page 4, that:

> *"Earlier attempts to assist the municipality in July 2018 through the development of a Provincial Mandatory Financial Recovery Plan, seems to have only resulted in giving contextual and analytical spectrum to the municipality's crisis without any causative elements of the crisis being resolved."*

118. I further deny Dr Bole's assertion that the "*responsibility of the provincial and national respondents is <u>only to oversee</u> whether the implementation of the constitutional basic rights and basic obligations are properly carried out by the fifth and sixth respondents.*

119. This approach is precisely the reason why each of the PEC's prior attempts have failed. It also demonstrates that the provincial executive could not and did not exercise its powers in terms of section 139(5) of the Constitution.

120. However, more concerning is that Dr Bole's assertion is directly contradicted by annexure 5 to his affidavit, which confirms that the PEC has assumed responsibility for the implementation of the FRPs in terms of section 139(5)(c) of the Constitution.

AD PARAGRAPH 65 THEREOF:

121. I deny Dr Bole's assertion that "*section 139 allows for instances where the provincial and national respondents can intervene".*

122. The characterisation of section 139 of the Constitution as providing for discretionary intervention is plainly misleading.

123. Section 139(5) and 139(7) of the Constitution provide for circumstances where the provincial and national respondents must intervene.

124. It is further fallacious and plainly incorrect of Dr Bole to suggest that intervention under section 139(5) and 139(7) of the Constitution impede upon the "democratically elected" municipal council of the municipality concerned.

125. Section 139(5)(a) of the Constitution, read with section 146(1)(a) of the MFMA, obliges the municipality concerned to implement the approved recovery plan in instances of mandatory intervention.

126. The "democratically elected" municipal council remains *in situ* and questions of dissolution of the municipal council only arise if the municipal council fails to execute this constitutional and legislative obligation.

127. However, this professed deference to the municipal councils in Ditsobotla and Naledi is directly contradicted by annexure 5 to his affidavit, which confirms that

the PEC has assumed responsibility for the implementation off the FRPs in terms of section 139(5)(c) of the Constitution.

128. Dr Bole fails to explain to this Court why, if the provincial and national respondents hold such strong belief in the autonomy of local government, the PEC resolved on 24 April 2023, before the FRPs were even finalised, to invoke section 139(5)(c) of the Constitution.

AD PARAGRAPH 66 THEREOF:

129. To date, each intervention by the provincial respondents has failed.

130. I refer back to the findings of the MFRS reflected in the FRPs quoted in reply to paragraph 64 above.

AD PARAGRAPH 67 THEREOF:

131. Dr Bole's broad and unsubstantiated assertion that the "electricity supply is stable in Ditsobotla" is denied.

132. It has been widely reported that Ditsobotla's debt to Eskom continues to increase and it is currently indebted to Eskom in excess of R1 000 000 000 (one billion rand). In this regard I attach a news report as **X2**.

133. The residents Lichtenburg and its surrounds were without any electricity for 26 days after a pylon fell on 27 July 2023 and a transformer was vandalised. Electricity supply was only restored on 21 August 2023 after litigation by political parties and residents.

134. This can hardly be described as a "stable" situation.

135. Regarding Dr Bole's further claim that Naledi "has made an application" to the Minister of Finance in respect of its debt to Eskom under Treasury Circular 124, the following:

135.1. An application for Eskom debt relief under *MFMA Municipal Debt Relief Circular 124,* attached by Dr Bole as annexure 2, is not a foregone conclusion. Dr Bole thus misleads this Court by insinuating that it is.

135.2. The Municipal Debt Relief scheme only comes into consideration after the municipality concerned has met the applicable set of conditions to municipalities (to the National Treasury's satisfaction) to write-off a third of the municipality's debt annually (over three financial years).

135.3. The municipality must meet the conditions applicable to municipalities set out in 6.1 to 6.14, for 12 consecutive months to qualify for debt write-off.

135.4. While Naledi may have made an application, which I doubt in the absence of any evidence, it is only at that stage that it has demonstrated compliance with the conditions set in paragraphs 6.1 to 6.14 of Circular 124, that a municipality qualifies to for a write-off over three years.

135.5. The conditions set by paragraph 6.1 to 6.14 include:

135.5.1. **The application must be supported by the municipal council** (6.2). There is no evidence that Naledi's municipal council has considered or resolved to make an application as yet.

135.5.2. **The municipality must maintain its Eskom bulk current account** (6.3) by paying and maintaining its Eskom bulk current

account within 30 days of receiving the relevant invoice for twelve consecutive months.

135.5.3. As stated in paragraph 7 of Eskom's explanatory affidavit (vide page 678), between January 2017 and July 2021, Naledi has never paid its monthly electricity bill to Eskom on time and has never paid its monthly electricity bill to Eskom in full. That is a period of 55 consecutive months.

135.5.4. There is no evidence advanced by Dr Bole that Naledi is paying and maintaining its current account with Eskom.

135.5.5. In fact, the financial recovery plan in respect of Naledi, attached as annexure 4, states that Naledi is indebted to Eskom in the amount of R740 000 000,00 and that it is not paying its current monthly account of approximately R12 000 000 (vide page 39 of annexure 2).

135.5.6. **The municipality must table and adopt a funded MTREF (Medium Term Revenue and Expenditure Framework)** (6.4) The financial recovery plan in respect of Naledi, attached as annexure 4, states that "the approved budget for the 2022/23 MTREF and outer years of the 2023/2023 and 2024/25 respectively, remain unfunded" (vide page 34 of annexure 2).

135.5.7. **Cost reflective tariffs** (6.5). The municipality must demonstrate through the National Treasury tariff tool that the municipality's tariffs recover what it costs the municipality to render the four main trading – and other services (relevant to the municipality).

If the tariff(s) for any service is not cost-reflective, the municipality should phase the cost-reflective tariff in over a period of 3 to 5 years. The budget narratives should include the municipality's strategy in this regard.

135.5.8. **Electricity and water as collection tools** (6.6). With effect from the tabling of the 2023/24 MTREF, the municipality must demonstrate, through its by-laws and budget related policies that:

- The municipality monthly issues all consumers/ property owners with a consolidated municipal bill in terms of which all partial payments received are allocated in the following order of priority: firstly, to property rates, thereafter to water, wastewater, refuse removal and lastly to electricity;

- The municipality is cutting electricity services and/ or blocking the purchasing of pre-paid electricity of any defaulting consumer/ property owner unless the defaulter already registered as an indigent consumer with the municipality;

- The municipality is restricting and/ or interrupting the supply of water of any defaulting consumer/ property owner unless the defaulter already registered as an indigent consumer with the municipality; and

- If the defaulting consumer/ property owner is registered as an indigent consumer with the municipality, the monthly supply of electricity and water to that consumer/ property owner must be physically restricted to the monthly national basic free electricity- and water limits of 50 Kilowatt electricity and 6 Kilolitres water, respectively.

136. I do not intend to address each of the remaining 9 requirements as I believe it is self-evident from those which I have expressly raised that Dr Bole is somewhat disingenuous to suggest that Naledi will receive debt relief in respect of its debt to Eskom of at least R740 000 000,00 as a matter of course.

137. Dr Bole further fails to adduce a single piece of evidence in respect of:

137.1. If and when Naledi actually made the application for debt relief, or

137.2. How Naledi will comply with the requirements, particularly payment of its current account for twelve consecutive months.

138. If, in fact, an application for debt relief under Treasury Circular 124 has been submitted by Naledi, Dr Bole should be in a position to inform this Court about the details of such application and the progress being made to meet the requirements for debt relief.

AD PARAGRAPH 68 THEREOF:

139. I deny the content hereof.

AD PARAGRAPHS 69 AND 70 THEREOF:

140. To date, each intervention by the provincial respondents has failed.

141. I refer back to the findings of the MFRS reflected in the FRPs quoted in reply to paragraph 64 above.

142. The PEC does not have a discretion to "determine" whether to intervene in terms of section 139(1) or section 139(5) of the Constitution. Section 139(5) is mandatory in circumstances where a municipality, as result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments.

143. It is common cause that on 24 November 2021, the PEC resolved to impose mandatory interventions in Naledi and Ditsobotla under section 139(5) of the Constitution. Once that resolution was taken, the PEC was obliged to implement the intervention in terms of section 139(5)(a) of the Constitution and the MFMA. It is apparent that the PEC failed to do so, and cannot and has not adequately exercised the powers and performed the functions in terms of section 139(5) of the Constitution.

AD PARAGRAPH 71 THEREOF:

144. The content of this paragraph is non-sensical and is therefore denied *ex abundanti cautela.*

AD PARAGRAPH 72 THEREOF:

145. This is denied.

146. The PEC has continually failed to oversee the process and to ensure implementation of a recovery plan in terms of section 139(5)(a) of the Constitution.

147. Having taken the PEC resolution on 24 November 2021, it took the PEC until mid-2023 to sign off on final FRPs for Ditsobotla and Naledi. In the intervening period, the situation deteriorated markedly in both municipalities, as recorded in the FRPs.

148. In fact, the situation deteriorated to such an extent in Ditsobotla, that the PEC was forced to resolve to dissolve the municipal council in terms of section 139(1) of the Constitution because it had failed to impose a recovery plan for 294 days.

149. There is further no evidence adduced by Dr Bole that Ditsobotla's FRP, signed off on 12 July 2023, is being implemented, with municipal employees not having been paid their salaries for August 2023. The situation remains dire and Dr Bole provides zero insight into the implementation of the FRP.

150. It cannot be said that the PEC is adequately performing its functions under section 139(5) of the Constitution, and the irresistible conclusion is thus that the invocation of national intervention under section 139(7) of the Constitution has been triggered.

AD PARAGRAPH 73 THEREOF:

151. I submit that this statement by Dr Bole is precisely why the Court was approached to intervene.

152. This matter is not concerned with intervention under section 139(1)(c) of the Constitution.

153. The Ditsobotla municipal council was patently only dissolved in terms of section 139(1)(c) of the Constitution because the PEC did not perform their functions under

section 139(5) adequately or at all for a period of 294 days following the PEC resolution.

AD PARAGRAPH 74 THEREOF:

154. I take note of the FRPs attached as annexures 3 and 4 respectively and I have already made reference thereto above.

155. At this juncture, I point out that Dr Bole has not attached the FRPs in full.

156. What is missing from each FRP is the crucial “Annexure A: FRP Implementation Plan”, as well as the “Annexure B: Updated Status Quo Assessment Report”.

157. These documents, particularly the detailed FRP Implementation Plans, would have provided the Court with crucial insight into the timelines and deliverables expected in terms of the FRPs.

158. The detailed FRP Implementation Plans would have provided the Court with a yardstick by which to assess Dr Bole’s otherwise entirely unsubstantiated claims that the FRPs are being implemented.

159. Yet these documents are conspicuously absent.

160. Also absent from Dr Bole’s evidence are the monthly reports on FRP target achievement required by the FRPs.

161. If one accepts Dr Bole’s evidence that the FRPs are being implemented, one would expect monthly reports to be available for at least August 2023, if not September 2023 as well.

162. Dr Bole states, in paragraph 74.2, that a PEC representative *is* deployed to provide these reports. Yet, this readily available evidence by which Dr Bole's claims of implementation can tangibly be measured are conspicuously absent.

163. The irresistible conclusion is that the provincial and national respondents are either unable to provide these documents as evidence of Dr Bole's claims, because they do not exist, or they are unwilling to place these documents before the Court's scrutiny.

AD PARAGRAPH 75 THEREOF:

164. This paragraph is not a "nutshell" of what Ditsobotla's recovery plan entails.

165. This paragraph is merely a list of focus area headings from Ditsobotla's recovery plan and not the actual recovery plan in respect of each focus area.

AD PARAGRAPH 76 THEREOF:

166. This paragraph is not a "nutshell" of what Naledi's recovery plan entails.

167. This paragraph is merely a list of focus area headings from Ditsobotla's recovery plan and not the actual recovery plan in respect of each focus area.

AD PARAGRAPH 77 THEREOF:

168. This is noted. I have addressed the dissolution of the Ditsobotla municipal council above.

AD PARAGRAPHS 78 AND 79 THEREOF:

169. The characterisation of the Ditsobotla municipal council, elected on 14 December 2022, as having "hit the ground running" or as "running smoothly", is denied in the strongest terms. Such statements under oath reveal the extent to which the state respondents will go in an attempt to avoid the intervention of the court in ensuring compliance with Constitutional obligations. I respectfully state that the evidence of Dr Bole ought to be treated with caution.

170. Not only is this allegation entirely unsubstantiated by any actual evidence, it is, in fact, contradicted by Dr Bole's own evidence.

171. Ditsobotla's FRP:

171.1. was developed from 23 February 2023 (vide page 11 thereof), and

171.2. was completed in draft on 7 May 2023 (vide page 14 thereof), and

171.3. was finalised, by accepted thereof by the second respondent, on 12 July 2023 (vide page 61 thereof).

172. Ditsobotla's FRP was therefore developed during approximately the first six to seven months of the term of Ditsobotla's municipal council, elected on 14 December 2022.

173. However, Dr Bole's professed enthusiasm is not shared by the MFRS and Ditsobotla's FRP states the following, on page 6, *per example:*

> *"Council is not effectively playing its role as It cannot unanimously agree on the critical council business. The municipality is vulnerable to abuse of power, which may result in a culture of fraud and corruption. The Office of*

the Auditor-General of South Africa raised concerns on issues concerning leadership, governance, service delivery, supply chain management, and other, repetitive findings which continue without being corrected. The municipality has a bloated organisational structure from 2016 to 2023, no proper job evaluations were performed, and positions filled were at the general worker level. Notably, the critical positions were not filled, especially at management level, resulting in the organisational structure not being fit for purpose of the Municipality and a challenge to comply to the staff regulations that came into effect on 1 July 2022."

174. The FRP further records, on page 19 under the focus area "governance legislative matters" that:

174.1. The municipality has a collective executive committee system council in place with the Mayor, Council Whip, and Speaker designated as full-time Councillors and 39 Councillors. New Council members appointed by 15 December 2022,

174.2. The municipality's council and its committees are not functional.

174.3. There is administrative instability with weakened oversight of the administration. There are no resolutions register or system to track resolutions. There are perpetual delays in the processing and submission of decisions making on statutory reports. There are municipal accounts of councillors in arrears for more than 90 days and there is no record of councillors' declaration of interest. There is no code of conduct that addresses ethical behaviour by councillors. There is no training program for councillors on governance, financial management, code of conduct, and service delivery.

174.4. There were recent community protests on the provision of water, roads, and sewerage spillages.

174.5. Office bearers do not observe protocol when requesting information and reports and when issuing directives to the administrative components.

174.6. There is no institutional annual calendar for council and committee meetings.

174.7. The municipality has not established and aligned portfolio committees to directorates.

174.8. MPAC is properly constituted in terms of Section 79 of the Municipal Structures Act and MFMA, but the committee is not effective.

174.9. Ward committee system is not functional and Council-approved ward committee operational plans were not provided.

175. Under the “HR admin” focus area, the FRP records that:

175.1. All senior positions vacant.

175.2. Political Interference in Recruitment and Selection decisions.

175.3. Excessive Overtime.

175.4. No Code of Conduct and Disciplinary Board.

175.5. Outstanding Disciplinary Action and Investigations.

175.6. No control system to prevent appointment of ghost employees and or duplication.

175.7. No HR Committees.

175.8. Lack of a HR Strategy.

175.9. Lack of HR Policies and Committees.

175.10. Non-compliance with reviewed staff regulations that came into effect on 1/7/22.

176. These are the findings of the MFRS in respect of the “new council” which has supposedly hit the ground running.

177. At the end of May 2023, the mayor of Ditsobotla, Boitumelo Lethoko revealed before the North West Legislature Standing Committee on Provincial Public Accounts that the balance in the municipal bank account is zero, which has led to a total collapse of services in the municipality. She said the situation is so dire that the municipality cannot even afford to buy a simple thing like toilet paper. Municipal workers had also abandoned the municipal offices.

AD PARAGRAPHS 80, 81 AND 82 THEREOF:

178. Sakeliga does not persist with the relief for a special master.

AD PARAGRAPH 84 THEREOF:

179. Dr Bole’s stated interpretation of section 139 of the Constitution is misleading.

180. Section 139(5) and (7) of the Constitution do not “allow” for the PEC or national government to intervene, they mandate it.

181. Intervention under section 139(5) of the Constitution is further not guided by section 151(2) of the Constitution.

182. The facts demonstrate that the provincial executive has not, cannot and does not exercise the powers in terms of section 139(5) of the Constitution.

AD PARAGRAPHS 85 AND 86 THEREOF:

183. This matter is not concerned with intervention under section 139(1) of the Constitution. These are matters for legal argument.

AD PARAGRAPH 87 THEREOF:

184. This is admitted. Whilst the provincial executive appears to know this, it has failed to act for years.

AD PARAGRAPH 88 THEREOF:

185. Section 139(5) of the Constitution must be read with section 139 of the MFMA.

186. Section 139(1) of the MFMA required the PEC to act “promptly”, which it entirely failed to do.

187. It was only because the PEC failed to impose a recovery plan in the 294 days since the PEC resolution was taken that it was forced to act in terms of section 139(1) of the Constitution to dissolve the Ditsobotla municipal council.

AD PARAGRAPH 89 THEREOF:

188. This matter is not concerned with intervention under section 139(1) of the Constitution.

189. However, I am advised the Dr Bole is incorrect in his attempt to distinguish between executive functions and a financial crisis resulting in persistent and material breaches of the municipality's financial and service delivery obligations.

190. I am further advised that the Supreme Court of Appeal has held in *Afriforum NPC v Premier, Gauteng Province and Others* that sections 139(4) and (5) of the Constitution simply do not purport to define executive obligations or to differentiate between executive and legislative obligations. This is particularly illustrated by the fact that the obligations of a Municipal Council to provide basic services and to meet its financial commitments are clearly of executive nature.

191. I am advised that, the distinction to be drawn between section 139(1) and section 139(5) of the Constitution is the jurisdictional facts required by section 139(5) that:

191.1. The municipality must be in a financial crisis, and

191.2. The financial crisis must result in a serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments.

AD PARAGRAPH 90 THEREOF:

192. As I have explained in reply to paragraph 89 above, Dr Bole's interpretation of section 139 is incorrect.

193. Intervention under section 139(5) is only triggered and therefore mandatory when the jurisdictional requirements set forth therein are present.

194. Section 139(1) is available when there has been a failure to perform an executive function, even if that failure is not the result of a financial crisis and does not result in a serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments.

195. I submit that section 139(1) is, in fact, intended to cater for early intervention so as to prevent a financial crisis, resulting in a serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments.

196. I am thus advised that there is no tension between sections 139(1) and (5) of the Constitution and no “manoeuvring” is required as Dr Bole suggests.

AD PARAGRAPH 91 THEREOF:

197. By taking the PEC resolution, the PEC acknowledged that the jurisdictional facts for mandatory intervention under section 139(5) of the Constitution were present in both Ditsobotla and Naledi. The facts demonstrate that this has been the case for years, and that the provincial executive has simply failed to act for years in breach of its Constitutional duties.

198. As I have explained above, *ad nauseum,* the Ditsobotla municipal council was patently only dissolved in terms of section 139(1)(c) of the Constitution because the PEC did not perform their functions under section 139(5) adequately or at all for a period of 294 days following the PEC resolution and therefore had no other options available to it when the situation in Ditsobotla reached breaking point.

199. I am advised that Dr Bole's assertion that the PEC "could not dissolve the fifth respondent in terms of section 139(5)" because section 139(5) is limited to financial crisis resulting in a serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, is plainly wrong and misleading.

AD PARAGRAPH 92 THEREOF:

200. This is admitted.

201. For the reasons already set forth above, I submit that section 139(7) of the Constitution has been triggered by the failure of the PEC to adequately perform its functions under section 139(5).

AD PARAGRAPH 93 THEREOF:

202. The intervention, done belatedly and with the utmost indolence, is admitted.

AD PARAGRAPH 94 THEREOF:

203. This is denied.

204. I have addressed the manner in which the PEC proceeded following the PEC resolution and I therefore submit that section 139(7) of the Constitution is therefore triggered.

AD PARAGRAPHS 95 AND 96 THEREOF:

205. As I have already discussed above, the assertion by Dr Bole that "a concerted effort" is being "led" by the National Department of Finance stands contrary to the

resolution taken by the PEC to assume responsibility for the implementation of the FRPs in terms of section 139(5)(c) of the Constitution.

206. If the implementation is to be led by national government it is, in effect, an intervention in terms of section 139(7) of the Constitution. However, section 139(7) of the Constitution has not been invoked, as is Constitutionally required in the circumstances and based on the facts.

207. Therefore, it follows that the PEC is not performing its functions in terms of section 139(5) of the Constitution and section 139(7) is thereby triggered.

208. It is further misleading to claim that work started in February 2023 to turn Ditsobotla and Naledi around.

209. The only thing that started in February 2023 was the development of Ditsobotla's FRP. At that stage, nothing was being implemented on the ground to turn either municipality around.

210. The FRPs for Ditsobotla and Naledi were approved on 12 July 2023 and 23 June 2023 respectively.

211. As I have highlighted above, there is no evidence adduced by Dr Bole of the "fruits" which these interventions are ostensibly bearing, despite evidence in the form of progress reports meant to be readily available.

212. I further expressly deny that the water crisis in Ditsobotla or the debts to Eskom have been resolved.

213. Members of the community are to this day experiencing little to no access to water. They rely on businesses and households who have boreholes to supply water. Supporting affidavits will be filed with this affidavit.

214. It is also important to note that applying for debt relief does not solve the Eskom debt. I have however dealt with this point and the requirements above.

215. The truth and facts on the ground is that there has been no improvement of the situation, and the situation is now more dire than it has ever been. In the time available, I shall attempt to procure supporting affidavits in further confirmation of these facts to be filed with this affidavit.

216. I have already addressed these issues above.

AD PARAGRAPH 97 THEREOF:

217. It is inexplicable to think that the PEC resolution, which was taken on 24 November 2021, would only be published on 23 May 2023, after work had already commenced on the FRPs. However, considering annexure 5 alongside X1 to this affidavit, it is apparent that annexure 5 is not the PEC resolution.

AD PARAGRAPH 98 THEREOF:

218. This is denied.

219. The electricity crisis in Ditsobotla is not resolved.

220. What was resolved, ostensibly through the intervention of the Minister of Electricity was the blackout for 26 days between 27 July 2023 and 21 August 2023 after a

pylon fell on 27 July 2023 and a transformer was vandalised. In this regard, I attach a news report as "**X3**" confirming same.

221. The Minister of Electricity thus only intervened to resolve an isolated incident and not the problem more broadly.

222. As is evident from page 35 of Ditsobotla's FRP, the following issues persist:

222.1. The municipality is licensed to provide electricity at Lichtenburg, Blydeville, and Coligny.

222.2. The remainder of the electricity is provided by Eskom.

222.3. The total electricity infrastructure for Lichtenburg and Coligny areas needs urgent upgrading as it experiences maximum demand problems.

222.4. The municipality is facing challenges of burning cables, circuit breakers, transformers, and switchgear due to overloading.

222.5. The municipality is facing illegal connections, and faulty meters resulting in high consumption making it a challenge to bill customers.

222.6. Use of fake electricity coupons by the community

AD PARAGRAPH 99 THEREOF:

223. This is denied.

224. I have already addressed Dr Bole's misinterpretation of section 139 of the Constitution above in reply to paragraphs 89 and 90.

AD PARAGRAPHS 100, 101 AND 102 THEREOF:

225. Something cannot simultaneously be both discretionary and obligatory.

226. Save for the aforesaid, the legislation referred to in these paragraphs is a matter for legal argument, to the extent that it proves necessary now that section 139(5) has been invoked by the PEC resolution.

AD PARAGRAPH 103 THEREOF:

227. This matter is only concerned with a financial recovery plan prepared by the MFRS in terms of section 139(5) of the Constitution, read with sections 139, 141, 142 and 143 of the MFMA.

AD PARAGRAPHS 104 AND 105 THEREOF:

228. I admit the provisions of the MFMA relating to the preparation of FRPs.

AD PARAGRAPH 106 THEREOF:

229. I deny Dr Bole's suggestion that there is no difference, in effect, between intervention under sections 139(5) and (7) of the Constitution.

230. If the PEC cannot or does not adequately perform its functions under section 139(5) of the Constitution and the complimentary provisions of the MFMA, section 139(7) of the Constitution is triggered and national government must intervene in the PEC's stead. This is peremptory.

231. It therefore follows that, where the PEC is not performing its functions under section 139(5) of the Constitution and the complimentary provisions of the MFMA, relying

instead on national government as the facts demonstrate, then section 139(7) of the Constitution is triggered and must be formally invoked.

AD PARAGRAPH 107, 108, 109, 110 AND 111 THEREOF:

232. The difficulty I have with Dr Bole's attempts at assurance in these paragraphs is his complete failure to adduce any evidence regarding the implementation of the FRPs and progress being made in respect thereof. The facts further show that this is not the case.

AD PARAGRAPH 112 THEREOF:

233. I have addressed the governance issues in Ditsobotla in my reply to paragraph 77, 78 and 79 above.

AD PARAGRAPH 113 THEREOF:

234. This is denied.

235. Again, Dr Bole fails to provide even a single example of the "substantial change in the maintenance of infrastructure" in Ditsobotla, which I deny.

236. It is stated on page 23 of Ditsobotla's FRP that:

> *"Insufficient planning and budget for maintenance of critical service delivery assets and ageing infrastructure is contributing to rapid deterioration of the municipality's already frail infrastructure and poses a risk to the municipality's revenue generation capabilities."*

237. On page 25 of Ditsobotla's FRP the following findings are listed under the "asset management" focus area of the financial services pillar:

237.1. Misappropriation of assets due to lack of controls and a standalone asset management division (capacity); for example, building projects reported as completed could not be Identified during physical verification. Poor record keeping of information.

237.2. No up-to-date asset management policy.

237.3. No fleet management plan to ensure efficient service delivery.

238. On page 35 of Ditsobotla's FRP the following findings are listed under the "asset management" focus area of the service delivery pillar:

238.1. The municipality has not approved Asset Management Policy. Poor asset management practices.

238.2. Limited management of assets based on conditional assessments on asset register.

238.3. No maintenance management plans.

238.4. The municipality has water meters that are old, damaged, and not readable leading to a loss of revenue. Inability to supply and install meters in all households.

238.5. The municipality has a shortage of maintenance equipment which makes it more challenging to maintain water and electricity infrastructure.

238.6. Lack of monitoring and proper record keeping on projects completed and still work in progress.

238.7. Lack of monitoring and proper record keeping on land, buildings, and infrastructure owned by the municipality.

239. There is no evidence of any “substantial change in the maintenance of infrastructure” in Ditsobotla.

240. Dr Bole further fails to attach the un-named annexures 6 and 7 referred to in this paragraph.

AD PARAGRAPH 116 THEREOF:

241. The characterisation of Sakeliga as “complaining” about the situation demonstrates a complete lack of insight into the situation in these municipalities, which is now also thoroughly recorded by the MFRS in the FRPs.

242. I deny that the situation is being corrected through the recovery plan. The facts demonstrate no improvement whatsoever.

AD PARAGRAPH 120 THEREOF:

243. As I have demonstrated above, with reference to the FRPs, the previous interventions by the PEC have all failed.

244. The less said about the assertion that the situation as it existed in Ditsobotla prior to 14 September 2022 has been “dissolved”, as if swept clean by the wave of a magic wand, the better. The allegation is clearly untrue and is denied.

AD PARAGRAPH 123 THEREOF:

245. It is inconceivable that Dr Bole would even suggest that the citizens of Ditsobotla and Naledi do not have a clear right.

246. I have dealt with the remainder of the allegations already.

AD PARAGRAPH 127 THEREOF:

247. As stated at the outset, the taking of the PEC resolution has rendered much of the relief sought in this application moot. Further, Sakeliga has been substantially successful in its application.

248. Matters have further developed through the institution of case number UM192/2022.

249. The present application could and should have been curtailed at a much earlier stage once the PEC resolution was taken. However, the failure of the respondents to disclose and provide the PEC resolution is the sole reason that this matter continued to be litigated.

250. In the result, I submit that Sakeliga is entitled to its costs.

251. Sakeliga has further been substantially successful in compelling the state respondents to comply with their Constitutional obligations, also in the interests of the community of the municipalities. The state respondents ought properly to have tendered costs yet have persisted with futile and obstructive opposition. Costs on an attorney and client scale ought to be granted.

252. Further argument will be advanced in this regard at the hearing of the matter.

SIGNED AT **PRETORIA** ON THIS THE _____DAY OF **SEPTEMBER 2023**

_____

DEPONENT

I HEREBY CERTIFY THAT THE DEPONENT HAS ACKNOWLEDGED:

(a) he knows and understands the contents of this affidavit;

(b) he has no objection to taking an oath;

(c) he considers the oath to be binding on his conscience.

THUS signed and sworn before me, at **PRETORIA** on this the __ _____ day of **SEPTEMBER 2023**, the Regulations contained in Government Notice No. R1648 of 19 August 1977 (as amended) having been fully complied with.

_____

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

DESIGNATION:

AREA / OFFICE: