IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case no: UM192/22

In the matter between:

SAKELIGA NPC	**First applicant**
CENTRE FOR GOOD GOVERNANCE AND SOCIAL JUSTICE NPC	**Second applicant**
BAREND LOURENS SNYMAN	**Third applicant**

and

DITSOBOTLA LOCAL MUNICIPALITY	**First respondent**
THE MUNICIPAL MANAGER / ACTING MUNICIPAL MANAGER OF THE DITSOBOTLA LOCAL MUNICIPALITY	**Second respondent**
PREMIER OF THE NORTH WEST PROVINCE	**Third respondent**
AND ELEVEN OTHER RESPONDENTS (AS PER NOTICE OF MOTION)	**Fourth – Fourteenth respondents**

FILING NOTICE

DOCUMENT TO BE FILED:

- **APPLICANTS' PRACTICE NOTE – PART B**

- **APPLICANTS' HEADS OF ARGUMENT - PART B**
- **DRAFT ORDER – PART B**

FILED BY: **KRIEK WASSENAAR & VENTER INC. ATTORNEYS**

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Ref: Mr Labuschagne/GW1763

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

AND TO: **TIRO & ASSOCIATES ATTORNEYS**
ATTORNEYS FOR THE 1ST RESPONDENT
43 Shippard Street
Office no. 06. Shasons Center
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mmolefe94@gmail.com

Service by email

AND TO: **THE STATE ATTORNEY- MMABATHO**

ATTORNEYS FOR THE 3rd – 6th AND 10TH RESPONDENTS

First Floor, Gallery East

Mega City Complex

Cnr Sekame Road & Dr James Moraka Drive

Mmabatho

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REF: Mr Musa Moholo / 0955/21/P3

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AND TO: **MOLEFE ATTORNEYS**

ATTORNEYS FOR THE 11th RESPONDENT

2 Jakaranda Ave

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AND TO: **MOTSHABI AND ASSOCIATES INC**

ATTORNEYS FOR THE 14th RESPONDENT

12 Havenga Street

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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case no: UM192/22

In the matter between:

SAKELIGA NPC **First applicant**

(and two others)

and

DITSOBOTLA LOCAL MUNICIPALITY **First respondent**

(and thirteen others)

APPLICANTS' PRACTICE NOTE:

PART B OF THE NOTICE OF MOTION

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1. **Date on roll:**

1.1. 10 November 2022 in respect of PART B of the notice of motion.

1.2. The applicants have enrolled PART B of the application for hearing on 10 November 2022. Should the court incline to hear the matter on a different day, the

applicants' representatives shall make themselves available on any day and time from 11 November 2022 to 18 November 2022.

2. **Number on the roll:**

2.1. Unknown – the matter is on the urgent roll.

3. **Counsel for the applicants:**

3.1. C Woodrow SC

Parc Nouveau Chambers

Pretoria

Cell: 082 921 9191

E-mail: woodrow@advchambers.co.za

4. **Attorneys for the applicants:**

4.1. Kriek Wassenaar & Venter Inc.

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Ref: QB1021

c/o **Labuschagne Attorneys**

Mahikeng

Tel: 018 381 6828

Email: litigation2@labuschagneatt.co.za

Ref: Mr Labuschagne

5. **Attorneys for the first respondent:**

5.1. Tiro & Associates Attorneys

Mahikeng

Tel: 018 381 0119

Email: info@tiroattorneysinc.co.za

Ref: Mr Molefe / DLM / CIV004

6. **Attorneys for the third to the sixth respondents:**

6.1. The State Attorney Mmabtho

Tel: 018 384 0269

E-mail: MuMoholo@justice.gov.za

7. **Attorneys for the eleventh respondent:**

7.1. Molefe attorneys

Cell: 073 260 5691

E-mail: thapelo@lawyer.com

8. **Attorneys for the fourteenth respondent:**

8.1. Motshabi and associates Inc

Tel: 018 381 8187

9. **Nature of the application:**

9.1. Urgent application

9.2. Constitutional law / administrative law matter.

10. **Service:**

10.1. Yes.

10.2. Returns of service are included in the record at pages 416 – 429.

10.3. A service affidavit is included in the record at pages 442 – 453.

11. **Issues to be determined:**

11.1. The relief sought in **PART B** of the notice of motion.

11.2. The issues that arise for determination include:

11.2.1. Urgency.[1]

[1] Notice of motion, prayer 1, page 6

11.2.2. Whether there is a crisis in the financial affairs of the Ditsobotla Local Municipality ("**Ditsobotla**") as envisaged in section 139(5) of the Constitution of the Republic of South Africa (the "**Constitution**").[2]

11.2.3. If so, whether the Provincial Executive for the Province of the North West Province, as contemplated in section 139 of the Constitution (the "**Provincial Executive**"), cannot or has not exercised the powers and performed the functions referred to in section 139(5) of the Constitution of the Republic of South Africa (the "**Constitution**").[3]

11.2.4. Whether the National Executive, as contemplated in section 139 of the Constitution ("the "**National Executive**"), failure to have intervened in terms of section 139(7) of the Constitution constitutes a breach of section 139(7) of the Constitution.[4]

11.2.5. Whether an interim order directing such intervention in terms of section 139(7) of the Constitution ought to be granted.[5]

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[2] Notice of motion, prayer 2, page 6

[3] Notice of motion, prayer 3, page 6 - 7

[4] Notice of motion, prayer 4, page 7

[5] Notice of motion, prayer 5 – 5.1.3, page 7 - 8

11.2.6. Whether National Treasury ought to be directed to release part of the equitable share necessary to restore the most basic municipal services to the community of Ditsobotla.[6]

11.2.7. Whether the respondents ought to be directed to report back to the court regarding the restoration of and continuation of basic municipal services to the community of Ditsobotla,[7] and whether the applicants ought to be permitted to re-approach court in the event of further breaches.[8]

11.2.8. Whether the respondents have breached their duty in failing to meaningfully engage with the applicants,[9] and whether they ought to be directed to so meaningfully engage.[10]

11.2.9. The costs of Part A and Part B of the application, the scale thereof and the appropriate order in terms thereof.[11]

11.3. Heads of argument shall be filed with this practice note containing my more detailed submissions of and concerning the issues.

11.4. A draft order shall be filed together with this practice note.

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[6] Notice of motion, prayer 9, page 11

[7] Notice of motion, prayer 10 – 10.2, page 11 - 12

[8] Notice of motion, prayer 14, page 13

[9] Notice of motion, prayer 12, page 12

[10] Notice of motion, prayer 12, page 12

[11] Notice of motion, prayer 15, page 13

12. **Notice to oppose:**

12.1. The first respondent (at page 430 – 432), but no answering affidavit has been filed.

12.2. The third to the sixth respondents (at page 608 – 610), however they have filed an answering affidavit only to Part A of the application (at page 617 – 648)

12.3. The fourteenth respondent (at page 495 – 502). However, the fourteenth respondent states in his explanatory affidavit that he is "*not actually opposing the application*".

13. **Notice to abide and explanatory affidavits:**

13.1. The tenth respondent has filed a notice to abide (at page 611 – 613)

13.2. The eleventh respondent has filed an 'explanatory affidavit' (at page 507 – 522), but this relates to Part A of the notice of motion.

14. **Necessity to read the papers:**

14.1. Yes.

14.2. I submit that based on the fact that the respondents do not challenge any part of the founding affidavit in respect of Part B of the notice of motion, the matter may be determined on the founding affidavit read together with the affidavits (explanatory or otherwise) that the respondents have filed.

14.3. Only insofar as the court wishes to have sight of any particular attachment or requires any confirmation regarding any particular fact set out in the founding affidavit is it necessary to have sight of such attachment.

14.4. Counsel shall submit argument on relevant parts of the attachments insofar as is necessary.

15. **Relief sought:**

15.1. An order in terms of Part B of the notice of motion.

15.2. A draft order shall be filed together with this practice note setting out the relief sought in terms of Part B of the notice of motion.

16. **Duration of hearing:**

16.1. If not opposed: One hour

16.2. If opposed: 3 – 4 hours

17. **Manner of hearing:**

17.1. Should the presiding Judge be conducting their roll by virtual means, the applicants' legal representatives shall arrange the necessary links to facilitate same if this would be of assistance to the court.

C WOODROW SC

COUNSEL FOR THE APPLICANTS

PARC NOUVEAU CHAMBERS, PRETORIA
7 NOVEMBER 2022

SAAKNOMMER 28293/2001
IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAALSE PROVINSIALE AFDELING
TRANSVAAL PROVINCIAL DIVISION

VOOR SY EDELE REGTER VAN DER WESTHUIZEN
VOOR SY EDELE REGTER JOOSTE (WR)
BEFORE THE HONOURABLE MR JUSTICE VAN DER WESTHUIZEN
BEFORE THE HONOURABLE MR JUSTICE JOOSTE (AJ)

Te	PRETORIA	hede die	11DE	dag van	DESEMBER	2001
At	PRETORIA	this	11TH	day of	DECEMBER	2001

NADEMAAL DIT GEBLYK HET DAT
IT APPEARING THAT

CHRISTOPHER WOODROW

bevoeg is om ingevolge die Wet op die Toelating van Advokate, 1964 (Wet 74 van 1964),
is duly qualified in terms of the Admission of Advocates Act, 1964, (Act 74 of 1964,

toegelaat te word om as advokaat van die Hooggeregshof van Suid-Afrika te praktiseer en
to be admitted and authorised to practice and to be enrolled as an advocate of the High Court

ingeskryf te word,
of South Africa.

WORD DIT GELAS DAT
IT IS HEREBY ORDERED THAT

CHRISTOPHER WOODROW

hierby toegelaat word as advokaat van die Hooggeregshof van Suid-Afrika en dat sy/haar naam
be admitted to practice as an advocate of the High Court of South Africa and that her/his name

as sodanige deur die bevoegde beampte op die Rol aangeteken word.
be Enrolled as such by the proper officer

OP LAS VAN DIE HOF
BY ORDER OF THIS COURT



Griffier/Registrar

DESIGNATION
Advocate

LPC PRACTITIONER NUMBER
53531



NAME
Christopher Woodrow SC

FIRM
Parc Nouveau Advocates Chambers

PRACTISING
Yes

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case no: UM192/22

Held at MMABATHO on the 10th day of November 2022

BEFORE the Honourable Justice _____

In the matter between:

SAKELIGA NPC **First applicant**

CENTRE FOR GOOD GOVERNANCE
AND SOCIAL JUSTICE NPC **Second applicant**

BAREND LOURENS SNYMAN **Third applicant**

and

DITSOBOTLA LOCAL MUNICIPALITY **First respondent**

THE MUNICIPAL MANAGER / ACTING MUNICIPAL MANAGER
OF THE DITSOBOTLA LOCAL MUNICIPALITY **Second respondent**

PREMIER OF THE NORTH WEST PROVINCE **Third respondent**

PROVINCIAL EXECUTIVE OF THE
NORTH WEST PROVINCE **Fourth respondent**
MEMBER OF THE EXECUTIVE COUNCIL:
NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS **Fifth respondent**

MEMBER OF THE EXECUTIVE COUNCIL:

NORTH WEST PROVINCE: FINANCE **Sixth respondent**

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **Seventh respondent**

MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **Eighth respondent**

MINISTER: NATIONAL DEPARTMENT OF FINANCE **Ninth respondent**

MINISTER: WATER AND SANITATION **Tenth respondent**

NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY **Eleventh respondent**

ESKOM SOC LTD **Twelfth respondent**

MAGALIES WATER BOARD **Thirteenth respondent**

THE ADMINISTRATOR: DITSOBOTLA LOCAL MUNICIPALITY **Fourteenth respondent**

DRAFT ORDER

Having perused the documents filed on record, and having head counsel for the parties, it is ordered:

1 The normal rules pertaining to the service, times and filing of applications are dispensed with and Part B of this application is determined on an urgent basis in terms of the provisions of Rule 6(12)(a) and (b) of the uniform rules of court.

2 It is declared that the first respondent, the Ditsobotla Local Municipality ("**Ditsobotla**"), as a result of a crisis in its financial affairs, is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments and is unable to meet its obligations and financial commitments.

3 It is declared that the Provincial Executive for the Province of the North West Province, as contemplated in section 139 of the Constitution (the "**Provincial Executive**"), cannot, has not and does not, and has not and does not adequately, exercise the powers and perform the functions referred to in section 139(5) of the Constitution of the Republic of South Africa (the "**Constitution**").

4 It is declared that the failure of the National Executive, as contemplated in section 139 of the Constitution ("the "**National Executive**"), to intervene in terms of section 139(7) of the Constitution constitutes a breach of section 139(7) of the Constitution.

5 Pending the resolution of the crisis in the financial affairs of Ditsobotla and the securing of the ability of Ditsobotla to meet its obligations to provide basic services:

5.1 The National Executive is directed as a matter of urgency to forthwith invoke section 139 (7) of the Constitution in respect of Ditsobotla, and to

exercise the powers and perform the functions referred to in section 139 (5) of the Constitution, and in this regard to:

5.1.1 forthwith implement a recovery plan aimed at securing the ability of Ditsobotla to meet its obligations to provide basic municipal services (as defined in the Local Government: Municipal Finance Management Act, Act 56 of 2003) (the "**basic municipal services**") to the community of Ditsobotla;

5.1.2 forthwith approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the aforesaid recovery plan to provide for the restoration of basic municipal services to the community of Ditsobotla and thereafter the continued functionality of Ditsobotla.

5.1.3 forthwith assume responsibility for the implementation of the recovery plan in order to restore basic municipal services to the community of Ditsobotla and thereafter the continued functionality of Ditsobotla.

6 National Treasury is ordered and directed to make available such part of the funds due to Ditsobotla as its share of the local government's equitable share referred to in section 214 (1) (a) of the Constitution in order to restore basic municipal services to the community of Ditsobotla, such funds to include the funds necessary to make payment of the salaries of the employees and administration of Ditsobotla whose services are necessary to restore and to continue to provide basic municipal services to the community of Ditsobotla, and

such funds necessary to make payment of the monthly payment of the providers of basic municipal services such as the twelfth and thirteenth respondents.

7 THAT the seventh to the tenth respondents are ordered and directed to monitor the restoration of and continuation of basic municipal services to the community of Ditsobotla, and for such purpose are ordered and directed:

7.1 To report back to this court on affidavit all relevant facts dealing with the restoration of and continuation of basic municipal services to the community of Ditsobotla, and all facts relevant to any challenges in this regard, such report to be served on the applicants and to be filed on the court file within 10 days of this order;

7.2 Thereafter, and until the court finds that the crisis in the financial affairs of Ditsobotla has been resolved and the ability of Ditsobotla to meet its obligations to provide basic services has been secured, to file a report in affidavit form at the end of each calendar month dealing with the provision of basic municipal services to the community of Ditsobotla, and all facts relevant to any challenges in this regard, such report to be served on the applicants and to be filed on the court file on or before the last day of each calendar month.

8 It is declared that the conduct of the third to the sixth respondents in failing to engage meaningfully with the first applicant is inconsistent with the Constitution.

9 The third to the tenth respondents are ordered and directed to meet with the applicants and their representatives in order to meaningfully engage on the issues underlying the financial crisis of the municipality and the various breaches

of constitutional rights in relation to the complete failure of Ditsobotla to provide basic municipal services to the community of Ditsobotla.

10 The applicants are granted leave to supplement the founding affidavit, to amend the notice of motion, and to seek such further relief as may be necessary should further breaches, and/alternatively continued breaches, of the constitutional rights of the communities of Ditsobotla, in relation to the provision of basic municipal services to the communities of Ditsobotla, occur after the granting of this order, alternatively should the applicants be of the view that the respondents have failed to comply with the order of this court, in which event the respondents shall have a period of 15 (fifteen) days to answer such supplemented papers and to such supplementary relief claimed.

11 The first to the tenth respondents are ordered to pay the costs of Part A and Part B of this application, jointly and severally, the one to pay the other to be absolved, on the scale as between attorney and client, such costs to include the costs consequent upon the employ of two counsel where so employed.

BY ORDER

REGISTRAR OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case no: UM192/22

In the matter between:

SAKELIGA NPC **First applicant**

(and two others)

and

DITSOBOTLA LOCAL MUNICIPALITY **First respondent**

(and thirteen others)

APPLICANTS' HEADS OF ARGUMENT:

PART B OF THE NOTICE OF MOTION

INTRODUCTION

[1]. There is a serious financial and constitutional crisis in the municipality of Ditsobotla, a complete collapse of the municipality and complete failure to provide any basic municipal services. ***(Founding affidavit, page 35 – 46, paragraph 35 – 47)***

[2]. This is endangering public health, safety, and the environment. It is also destroying a local economy that has already seen large businesses fleeing to more sustainable areas. The situation is dire. ***(Founding affidavit, page 44, paragraph 40)***

[3]. The firm hand of the law is urgently necessary to stem the crisis and collapse which have been caused by government's non-compliance with constitutional standards due to inattentiveness, incompetence, and intransigence. The urgent, interim remedial measures sought in this application are aimed at addressing and remedying institutional dysfunction that threatens and has impaired rights at a systemic and basic level and continues to do so on a daily basis to the severe and extreme prejudice of the community. ***(Founding affidavit, page 44, paragraph 41)***

[4]. The Constitution, in peremptory terms, compels the primary relief that the applicants seek: Where the provincial executive fails in its duty to exercise the powers and functions required by section 139(5) of the Constitution either adequately or at all, section 139(7) requires in peremptory terms that the national executive must intervene.

[5]. I submit that the applicants have made out a case for the primary relief sought, together with the further relief that they seek.

STRUCTURE OF THE HEADS OF ARGUMENT

[6]. I structure these heads of argument as follows:

a. First, I briefly describe the parties and the nomenclature that I use to refer to the parties under the heading "*THE PARTIES AND THEIR NOMENCLATURE*".

b. Second, I set out what I submit is an effective remedy and the appropriate order in these proceedings under the heading "*THE RELIEF SOUGHT BY THE APPLICANTS*".

c. Third, I make brief submissions regarding applicable law, authority and legislation under the heading "*LAW AND LEGISLATION RELEVANT TO THE APPLICATION*".

d. Fourth, I address the relevant background facts which confirm the persistent and ongoing financial crisis in Ditsobotla under the heading "*RELEVANT BACKGROUND FACTS*".

e. Fifth, I address the current financial and constitutional crisis in Ditsobotla under the heading "*THE CURRENT CONSTITUTIONAL CRISIS*".

f. Sixth, I deal with the steps taken and preceding the present application under the heading "*STEPS TAKEN BY THE APPLICANTS*".

g. Seventh, I make submissions regarding the various breaches of and failure to take required steps in terms of the Constitution under the heading "*FAILURE TO TAKE CONSTITUTIONALLY REQUIRED STEPS*".

h. Eighth, I make short submissions that the requisites for an interdict are met under the heading "*REQUIREMENTS FOR AN INTERDICT*".

i. Ninth, I deal with the fact that the applicants are entitled to meaningful engagement which has been frustrated and denied the applicants under the heading "*MEANINGFUL ENGAGEMENT*".

j. Tenth, I make submissions regarding the urgency of the matter under the heading "*URGENCY*".

k. Finally, I conclude under the heading "*CONCLUSION*".

THE PARTIES AND THEIR NOMENCLATURE

[7]. Due to the fact that there are a number of parties to the present application and in order to facilitate ease of reference, I set out at the outset brief submissions about the parties and the way in which I shall refer to the parties in these heads of argument:

The applicants

a. The first applicant, SAKELIGA NPC, is referred to as either "**the first applicant**" or "**Sakeliga**".

i. Sakeliga was established in 2011. It is a business interest organisation with a significant supporter and donor base of businesspeople, companies and organisations, and a network of more than 40,000 subscribers in South Africa.

ii. Sakeliga's main objective is the protection of constitutional rights, constitutional order, the rule of law, free-market principles, and a just and sustainable business environment within the Republic of South Africa.

(Founding affidavit, page 26 - 28, paragraph 4 - 8; Sakeliga's memorandum of incorporation, clause 4, "CC2", page 114 - 115)

iii. Sakeliga has standing to bring this application and to seek the relief sought.

(Founding affidavit, page 34 – 35, paragraph 34)

b. The second applicant, the CENTRE FOR GOOD GOVERNANCE AND SOCIAL JUSTICE NPC, is referred to as either "**the second applicant**" or the "**CGGSJ**".

i. CGGSJ is a non-profit, public interest organisation with the goal of promoting, advocating for and defending good governance, ethical leadership, and accountability, especially in the context of local government.

ii. A central concern of CGGSJ is ensuring justice, especially for the poor and marginalised communities who suffer most due to municipal maladministration, corruption and the wastage of public funds. Corruption, nepotism, criminality, the lack of service delivery and municipal failure in the North West Province are particularly concerning to the CGGSJ.

(Founding affidavit, page 28 - 29, paragraph 9 - 13; CGGSJ resolution, "CC3", page 116)

iii. CGGSJ has standing to bring this application and to seek the relief sought.

(Founding affidavit, page 34 – 35, paragraph 34)

c. The third applicant, BAREND LOURENS SNYMAN, is referred to as either "**the third applicant**" or "**Snyman**".

i. Snyman is a businessman permanently resident and conducting business in Lichtenburg, North West Province. Snyman, his family, business and employees are directly affected by the governmental failures of the first respondent.

ii. Snyman has a material and direct interest in the outcome of the litigation and the relief sought.

(Founding affidavit, page 29, paragraph 14 - 16; Confirmatory affidavit of Snyman, page 380 - 385)

The respondents:

d. The first respondent, the DITSOBOTLA LOCAL MUNICIPALITY, is referred to as either "**the municipality**" or simply "**Ditsobotla**".

i. Ditsobotla is a municipality established in terms of the Local Government: Municipal Structures Act, Act 117 of 1998 (the "**Structures Act**"), read with section 155 of the Constitution of the Republic of South Africa, 1996 (the "**Constitution**").

(Founding affidavit, page 29 - 30, paragraph 17)

e. The second respondent, the MUNICIPAL MANAGER, alternatively the ACTING MUNICIPAL MANAGER of the municipality, is referred to as the "**municipal manager**". ***(Founding affidavit, page 30, paragraph 18)***

f. The third respondent, the PREMIER OF THE NORTH WEST PROVINCE, is referred to as "**the Premier**". ***(Founding affidavit, page 30, paragraph 19)***

g. The fourth respondent, the PROVINCIAL EXECUTIVE OF THE NORTH WEST PROVINCE, is referred to as the "**provincial executive**". The Premier, as the head of the provincial executive of the North West Province, in his representative capacity is the official responsible for the provincial executive. ***(Founding affidavit, page 30 - 31, paragraph 20)***

h. The fifth respondent, the MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, is referred to as "**the COGTA MEC**". ***(Founding affidavit, page 31, paragraph 21)***

i. The sixth respondent, the MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE, is referred to as "**the Finance MEC**". ***(Founding affidavit, page 31, paragraph 22)***

j. The seventh respondent, the PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, is referred to as "**the President**". The President is the head of the National Executive. ***(Founding affidavit, page 31, paragraph 23)***

k. The eighth respondent, the MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, is referred to as "**the COGTA Minister**". ***(Founding affidavit, page 32, paragraph 24)***

l. The ninth respondent, the MINISTER: NATIONAL DEPARTMENT OF FINANCE, is referred to as "**the Finance Minister**". ***(Founding affidavit, page 32, paragraph 25)***

m. The tenth respondent, the MINISTER: WATER AND SANITATION, is referred to as "**the Water Minister**". ***(Founding affidavit, page 32, paragraph 26)***

n. The eleventh respondent, the NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY, is referred to as either "**the district municipality**" or simply "**Ngaka**". ***(Founding affidavit, page 32 - 33, paragraph 27)***

o. The twelfth respondent, ESKOM SOC LTD, is referred to as "**Eskom**". ***(Founding affidavit, page 33, paragraph 28)***

p. The thirteenth respondent, the MAGALIES WATER BOARD, is referred to as "**Magalies Water**". ***(Founding affidavit, page 33, paragraph 29)***

q. The fourteenth respondent, the appointed ADMINISTRATOR: DITSOBOTLA LOCAL MUNICIPALITY, is referred to as the "**administrator**". ***(Founding affidavit, page 33, paragraph 30)***

THE RELIEF SOUGHT BY THE APPLICANTS

[8]. As is apparent from the notice of motion read together with the founding affidavit, the applicants seek an effective remedy to the current financial and constitutional crisis in Ditsobotla. Alternative relief has been sought in the notice of motion, and the applicants persist with all of the relief sought. ***(Notice of motion, Part B, prayer 1 - 16, page 6 - 13)***

[9]. My submission is that the following order is the order that ought to ensue in the current proceedings:

1 The normal rules pertaining to the service, times and filing of applications are dispensed with and Part B of this application is determined on an urgent basis in terms of the provisions of Rule 6(12)(a) and (b) of the uniform rules of court.[1]

2 It is declared that the first respondent, the Ditsobotla Local Municipality ("**Ditsobotla**"), as a result of a crisis in its financial affairs, is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments and is unable to meet its obligations and financial commitments.[2]

3 It is declared that the Provincial Executive for the Province of the North West Province, as contemplated in section 139 of the Constitution (the "**Provincial Executive**"), cannot, has not and does not, and has not and does not adequately, exercise the powers and perform the functions referred to in section 139(5) of the Constitution of the Republic of South Africa (the "**Constitution**").[3]

4 It is declared that the failure of the National Executive, as contemplated in section 139 of the Constitution ("the "**National Executive**"), to intervene in terms of

[1] Notice of motion, prayer 1, page 6

[2] Notice of motion, prayer 2, page 6

[3] Notice of motion, prayer 3, page 6 - 7

section 139(7) of the Constitution constitutes a breach of section 139(7) of the Constitution.[4]

5 Pending the resolution of the crisis in the financial affairs of Ditsobotla and the securing of the ability of Ditsobotla to meet its obligations to provide basic services:[5]

5.1 The National Executive is directed as a matter of urgency to forthwith invoke section 139 (7) of the Constitution in respect of Ditsobotla, and to exercise the powers and perform the functions referred to in section 139 (5) of the Constitution, and in this regard to:

5.1.1 forthwith implement a recovery plan aimed at securing the ability of Ditsobotla to meet its obligations to provide basic municipal services (as defined in the Local Government: Municipal Finance Management Act, Act 56 of 2003) (the "**basic municipal services**") to the community of Ditsobotla;

5.1.2 forthwith approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the aforesaid recovery plan to provide for the restoration of basic municipal services to the community of Ditsobotla and thereafter the continued functionality of Ditsobotla.

5.1.3 forthwith assume responsibility for the implementation of the recovery plan in order to restore basic municipal services to the community of Ditsobotla and thereafter the continued functionality of Ditsobotla.

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[4] Notice of motion, prayer 4, page 7

[5] Notice of motion, prayer 5 – 5.1.3, page 7 - 8

6 National Treasury is ordered and directed to make available such part of the funds due to Ditsobotla as its share of the local government's equitable share referred to in section 214 (1) (a) of the Constitution in order to restore basic municipal services to the community of Ditsobotla, such funds to include the funds necessary to make payment of the salaries of the employees and administration of Ditsobotla whose services are necessary to restore and to continue to provide basic municipal services to the community of Ditsobotla, and such funds necessary to make payment of the monthly payment of the providers of basic municipal services such as the twelfth and thirteenth respondents.[6]

7 THAT the seventh to the tenth respondents are ordered and directed to monitor the restoration of and continuation of basic municipal services to the community of Ditsobotla, and for such purpose are ordered and directed:[7]

7.1 To report back to this court on affidavit all relevant facts dealing with the restoration of and continuation of basic municipal services to the community of Ditsobotla, and all facts relevant to any challenges in this regard, such report to be served on the applicants and to be filed on the court file within 10 days of this order;

7.2 Thereafter, and until the court finds that the crisis in the financial affairs of Ditsobotla has been resolved and the ability of Ditsobotla to meet its obligations to provide basic services has been secured, to file a report in affidavit form at the end of each calendar month dealing with the provision of basic municipal services to the community of Ditsobotla, and all facts relevant to any challenges in this regard, such report to be served on the applicants and to be filed on the court file on or before the last day of each calendar month.

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[6] Notice of motion, prayer 9, page 11

[7] Notice of motion, prayer 10 – 10.2, page 11 - 12

8 It is declared that the conduct of the third to the sixth respondents in failing to engage meaningfully with the first applicant is inconsistent with the Constitution.[8]

9 The third to the tenth respondents are ordered and directed to meet with the applicants and their representatives in order to meaningfully engage on the issues underlying the financial crisis of the municipality and the various breaches of constitutional rights in relation to the complete failure of Ditsobotla to provide basic municipal services to the community of Ditsobotla.[9]

10 The applicants are granted leave to supplement the founding affidavit, to amend the notice of motion, and to seek such further relief as may be necessary should further breaches, and/alternatively continued breaches, of the constitutional rights of the communities of Ditsobotla, in relation to the provision of basic municipal services to the communities of Ditsobotla, occur after the granting of this order, alternatively should the applicants be of the view that the respondents have failed to comply with the order of this court, in which event the respondents shall have a period of 15 (fifteen) days to answer such supplemented papers and to such supplementary relief claimed.[10]

11 The first to the tenth respondents are ordered to pay the costs of Part A and Part B of this application, jointly and severally, the one to pay the other to be absolved, on the scale as between attorney and client, such costs to include the costs consequent upon the employ of two counsel where so employed.[11]

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[8] Notice of motion, prayer 12, page 12

[9] Notice of motion, prayer 13, page 12 - 13

[10] Notice of motion, prayer 14, page 13

[11] Notice of motion, prayer 15, page 13

[10]. A draft order in the above terms shall be filed together with these heads of argument.

[11]. Should the court not incline to grant the above order, the applicants shall seek an alternative order in terms of the alternative relief sought in the notice of motion.

[12]. The current constitutional crisis (which is more akin to an emergency at this stage), compels our courts to grant a remedy. Should the court not be inclined to grant the remedies sought in terms of the relief sought in the notice of motion, the applicants seek an order that is just and equitable as envisaged in section 172 of the Constitution. ***(Notice of motion, Part B, prayer 11, page 12)***

[13]. In order to contextualise the relief sought, and so that one may analyse the relevant facts *in casu* in order to determine whether the applicants are entitled to the relief that they seek, I deal with relevant law and legislation next before dealing with the facts.

LAW AND LEGISLATION RELEVANT TO THE APPLICATION[12]

The Constitution and relevant legislation

[14]. The Constitution imposes various obligations on all branches of government. The obligations imposed by the Constitution must be fulfilled and any law or conduct inconsistent with it is invalid. ***(Section 2 of the Constitution)***

[15]. While section 40 of the Constitution vests governance of the Republic in the three distinctive, interdependent, and interrelated national, provincial, and local spheres, section 41 requires all spheres of government and all organs of state *inter alia* to:

[12] See also: Founding affidavit, page 46 - 53, paragraph 48 - 70

a. secure the well-being of the people of the Republic; ***(Section 41(1)(b) of the Constitution)***

b. provide effective, transparent, accountable and coherent government for the Republic as a whole; ***(Section 41(1)(c) of the Constitution)***

c. be loyal to the Constitution, the Republic, and its people; ***(Section 41(1)(d) of the Constitution)***

d. respect the constitutional status, institutions, powers, and functions of government in the other spheres. ***(Section 41(1)(e) of the Constitution)***

[16]. Section 152(1) of the Constitution provides for the following objects of local government, as a sphere of government:

a. to provide democratic and accountable government for local communities; ***(Section 152(1)(a) of the Constitution)***

b. to ensure the provision of services to communities in a sustainable manner; ***(Section 152(1)(b) of the Constitution)***

c. to promote social and economic development; ***(Section 152(1)(c) of the Constitution)***

d. to promote a safe and healthy environment; ***(Section 152(1)(d) of the Constitution)*** and

e. to encourage the involvement of communities and community organisations in the matters of local government. ***(Section 152(1)(e) of the Constitution)***

[17]. Section 152(2) of the Constitution requires a municipality to strive for the achievement of these objects.

[18]. Section 73 of the Systems Act requires, in peremptory terms, a municipality to give effect to the provisions of the Constitution and: to give priority to the basic needs of the local community; promote the development of the local community; and ensure that all members of the local community have access to at least the minimum level of basic municipal services.

[19]. The term "basic municipal service" is defined in the Local Government: Municipal Finance Management Act, Act 56 of 2003 (the "**MFMA**") as follows: "*means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and which, if not provided, would endanger public health or safety or the environment*".

[20]. Section 135 of the MFMA requires in peremptory terms that: "*A municipality must meet its financial commitments.*" Section 65(2) of the MFMA requires the municipality to make payment of all money owing by it within 30 days of receiving the relevant invoice or statement, unless prescribed otherwise for certain categories of expenditure.

[21]. Section 154 of the Constitution requires the provincial and national spheres of government to support and strengthen the capacity of municipalities to manage their affairs, exercise their powers and perform their functions.

[22]. Section 155(6) of the Constitution, read together with section 105 of the Systems Act, empowers the COGTA MEC to monitor municipalities in her province with a view to assessing the support needed to strengthen the capacity to manage their own affairs.

[23]. In the context of stopping funds to municipalities, section 38(3) of the MFMA provides that: "*If the stopping of funds … affects the provision of basic municipal services in the municipality, the provincial executive must monitor the continuation of those services. Section 139 of the Constitution applies if the municipality cannot or does not fulfil its obligations with regard to the provision of those services.*"

Section 139 of the Constitution

[24]. Within the context of the aforesaid provisions, section 139 of the Constitution permits and requires provincial governments to supervise the affairs of local governments and to intervene when things "*go awry*". *(**Premier of the Western Cape & Others v Overberg District Municipality & Others** 2011 (4) SA 441 (SCA) par [1]*)

[25]. A municipality has an obligation to provide service delivery in the form of access to basic services and a failure to provide basic municipal services warrants an intervention. (***Premier, Gauteng and Others v Democratic Alliance and Others*** *2022 (1) SA 16 (CC) par [100]) (*the "**Democratic alliance case**") Where the municipal council has failed to deliver basic services, an appropriate step could be to assume responsibility to ensure that the minimum standards for the rendering of the services are met.

[26]. The Constitution provides that provincial governments must not only support but also monitor municipalities and see to the effective performance of their functions. A provincial executive is fully entitled, if not obliged, to ensure that the Constitution and applicable legislation are adhered to by municipalities. (***Mogalakwena Local Municipality v Provincial Executive Council, Limpopo*** *2016 (4) SA 99 (GP) par [30]*)

[27]. Section 139(1) of the Constitution provides as follows: (my emphasis)

> When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive **may** intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
>
> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
>
> (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —
>
> (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
>
> (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
>
> (iii) maintain economic unity; or
>
> (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

[28]. Section 139(1) of the Constitution creates a mechanism of intervention by the provincial executive. Section 139(1) of the Constitution confers a power coupled with a duty on the part of the provincial government. The provincial government has a constitutional duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. (***Democratic alliance case, par [59]***)

[29]. This Constitutional duty is **peremptory** when regard is had to section 139(5) of the Constitution (duty of the provincial executive) and section 139(7) of the Constitution (duty of the national executive).

[30]. Section 139(5) of the Constitution provides: (my emphasis)

> If a municipality, as a 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, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive **must**—
>
> (a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—
>
> (i) is to be prepared in accordance with national legislation; and
>
> (ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and
>
> (b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—
>
> (i) appoint an administrator until a newly elected Municipal Council has been declared elected; and
>
> (ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or
>
> (c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent

> that the municipality cannot or does not otherwise implement the recovery plan.

[31]. The peremptory language of section 139(5) of the Constitution therefore creates a mechanism of mandatory intervention. (***Unemployed People's Movement v Eastern Cape Premier and Others*** *2020 (3) SA 562 (ECG) par [25]*) Where there is a financial crisis in the municipality, the provincial executive's recourse is in section 139(5) and not section 139(1) of the Constitution. (***Democratic alliance case, par [108]***)

[32]. Where the provincial executive fails in its duty to exercise the powers and functions required by section 139(5) of the Constitution either adequately or at all, **section 139(7) of the Constitution requires in mandatory terms that the national executive must intervene**.

[33]. Section 139(7) provides that: (my emphasis)

> If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive **must intervene** in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

[34]. Section 139(8) of the Constitution provides that:

> National legislation may regulate the implementation of this section, including the processes established by this section.

[35]. The national legislation which regulates the implementation of section 139 of the Constitution is the MFMA. Accordingly, in order to determine whether the "… *provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection [139(5) of the Constitution]…"*, which triggers the

mandatory intervention on the part of the national executive in the stead of the relevant provincial executive, one must consider the compliance of the provincial executive with section 139(5)(a) to (c) of the Constitution, as well as its compliance with the powers and functions imposed on the provincial executive in terms of the MFMA in relation thereto.

[36]. Section 139(1) of the MFMA provides that: (my emphasis)

> If a municipality, as a 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, or admits that it is unable to meet its financial obligations or financial commitments, the provincial executive **must** promptly-
>
> (a) request the Municipal Financial Recovery Service-
>
> (i) to determine the reasons for the crisis in its financial affairs;
>
> (ii) to assess the municipality's financial State;
>
> (iii) to prepare an appropriate recovery plan for the municipality:
>
> (iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan: and
>
> (v) to submit to the MEC for finance in the province-
>
> (aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and
>
> (bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance: and
>
> (b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.

[37]. The "*Municipal Financial Recovery Service*" referred to in section 139(1)(a) of the MFMA is defined in section 1 of the MFMA as the body established by section 157 of the MFMA, and functioning, in terms of section 157(2), within the National Treasury.

[38]. Section 139(3) of the MFMA provides that:

> An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.

Just and equitable order

[39]. Section 172(1) of the Constitution provides:

> 172(1) When deciding a constitutional matter within its power, a court
>
> a. must declare that any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency; and
>
> b. may make any order that is just and equitable, including
>
> i. an order limiting the retrospective effect of the declaration of invalidity; and
>
> ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[40]. Through section 172 of the Constitution the court is clothed with a discretion to make any order that is just and equitable when deciding a constitutional matter. This remedial discretion is a discretion in the true sense.

[41]. Providing guidance on the exercise of remedial discretion, Kriegler J in **Fose v Minister of Safety & Security** 1997 (3) SA 786 (CC) at [95] ("**Fose**"), observes that "*harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial*".

[42]. The court, in exercising its discretion to choose between appropriate forms of relief, must carefully analyse the nature of a constitutional infringement, and strike effectively at its source. ***(Fose, par [96])*** The suitability of appropriate relief "*is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights*" with reference to the particular facts of the matter. ***(Fose, par [97])***

[43]. In **Electoral Commission v Mhlope** 2016 (5) SA 1 (CC) at par [83] per Madlanga J, the Constitutional Court held that:

> The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it, as it is empowered to.

[44]. In **Minister of Health and Others v Treatment Action Campaign and Others (No 2)** 2002 (5) SA 721 (CC) at par [99], the Constitutional Court held:

> The primary duty of Courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'. The Constitution requires the State to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'.

> Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself.

[45]. In **Doctors For Life International v Speaker of the National Assembly and Others** 2006 (6) SA 416 (CC) at par [200] ("**Doctors For Life**"), the Constitutional Court held:

> … while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.

[46]. In **Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)** 2001 (3) SA 893 (CC) at par [71], the Constitutional Court held:

> To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.

[47]. I submit, with reference to the authorities referred to above, that a court's power under section 172 of the Constitution obliges, and not merely empowers, a court to craft suitably just and equitable relief to action (or inaction) which infringes upon constitutional rights.

Meaningful engagement remedy

[48]. The 'meaningful engagement remedy' is an effective remedy enhancing participatory democracy, transparency and accountability in the delivery of socio-economic goods and services.

[49]. In **Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others** 2008 5 BCLR 475 (CC) (the "**Olivia case**"), the Constitutional Court located the duty to meaningfully engage within the City's constitutional obligations to provide services to communities in a sustainable manner, promote social and economic development and encourage the involvement of communities and community organisations in matters of local government; ***(Olivia case, par [16])*** to fulfil the objectives in the Preamble to the Constitution; to respect, protect, promote and fulfil the rights in the Bill of Rights; ***(S 7(2) of the Constitution)***and the state's obligation to act reasonably in section 26(2) of the Constitution. ***(Olivia case, par [17])*** The Court also highlighted the significance of the "*need to treat human beings with the appropriate respect and care for their dignity to which they have a right as members of humanity*" as well as the right to life. ***(Olivia case, par [10] and [16])***

[50]. The remedy fits into the Constitutional Court's vision of the kind of democracy the South African Constitution establishes. In **Doctors for Life**, par [111] and [116] the Constitutional Court stated:

> Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated.

[51]. Representative democracy would be meaningless without public participation and "participation by the public on a continuous basis provides vitality to the functioning of representative democracy". ***(Doctors for Life, par [115])***

[52]. The Constitution contemplates participatory democracy that is accountable, transparent, responsive and open and that makes provision for the participation of society in decision-making processes. *(**Minister of Health & Another NO v New Clicks South Africa (Pty) Ltd & Others** 2006 8 BCLR 872 (CC) par [111], [625] and [627] ("**New Clicks**"))*

[53]. The Constitutional Court in **New Clicks** further observed that "*... [t]he principle of consultation and involvement has become a distinctive part of our national ethos ...*". ***(New Clicks, par [625])***

[54]. Meaningful engagement thus lies at the heart of our democracy and enhances the possibilities for the kind of participatory democracy that forms part of the constitutional vision of democracy.

[55]. Meaningful engagement constitutes an effective remedy in matters such as the present.

RELEVANT BACKGROUND FACTS

[56]. The common cause facts extracted from the first application[13] and set out in the founding affidavit ***(Founding affidavit, page 53 – 79, paragraph 71 – 101)*** show incontrovertibly that:

a. Ditsobotla is experiencing a crisis in its financial affairs and has been in financial distress for years.

b. The financial crisis which Ditsobotla is experiencing has resulted in a serious and persistent material breach of both:

i. Its obligations to provide basic services; and

ii. Its obligations to meet its financial commitments.

c. Mandatory intervention in terms of section 139 of the Constitution is urgently required in respect of the municipality.

(Founding affidavit, page 70, paragraph 91)

[57]. I do not intend repeating all of the facts herein, and refer to the full exposition thereof in the founding affidavit that confirms unequivocally that which I have submitted above. ***(Founding affidavit, page 53 – 79, paragraph 71 – 101)*** I shall highlight certain of the facts herein.

[58]. The COGTA MEC prepared and signed a report titled "*REPORT ON THE STATE OF LOCAL GOVERNMENT IN THE NORTH WEST PROVINCE*", dated 24 August 2020 (the

[13] See: Founding affidavit, page 53 - 57, paragraph 71 - 73

"**COGTA report**"), which confirms that Ditsobotla is, because of financial crisis, in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments. ***(Founding affidavit, page 57, paragraph 74 - 75; COGTA report, "CC15", page 162 - 239)***

[59]. In addition to the COGTA report, the Finance Minister, through National Treasury, periodically publishes "*National Treasury: The state of local government finances and the financial management report*" (the "**Treasury report**"), which details the financial health of South Africa's municipalities, and which reveals that **(a)** Ditsobotla has been identified as **a municipality in financial distress since 2013** and **(b)** Ditsobotla has been under some form of **intervention in terms of section 139 of the Constitution in 2013, 2014, 2016 and 2017**. All interventions have failed and proven entirely ineffective. ***(Founding affidavit, page 58, paragraph 76 - 77; Treasury report, "CC16", page 240 - 254)***

[60]. In respect of Ditsobotla, the COGTA report highlights the following concerns: ***(Founding affidavit, page 58 - 61, paragraph 78 – 78.11)***

a. The appointment of senior officials is marred by controversy and irregularity; ***(Paragraph 5.1.14(a) of the COGTA report)*** It appears that Ditsobotla has been under prior intervention / administration; ***(Paragraph 5.1.14(a) of the COGTA report)*** Municipal employees have been dismissed without disciplinary processes, creating tension between the Municipality and Labour; ***(Paragraph 5.1.14(a) of the COGTA report)*** Only two of six senior management positions are filled, being the Municipal Manager and Chief Financial Officer; ***(Paragraph 5.1.14(a) of the COGTA report)*** The work of the Municipal Public Accounts Committee

("**MPAC**") is not properly resourced and the committees' reports are not processed by the Municipal Council; ***(Paragraph 5.1.14(a) of the COGTA report)*** Serious and damning allegations exist against key office bearers; ***(Paragraph 5.1.14(a) of the COGTA report)*** Ditsobotla experiences community protests which result in closure of the Municipal Offices; ***(Paragraph 5.1.14(a) of the COGTA report)*** Employees are on strike in protest against the Municipal Manager; ***(Paragraph 5.1.14(a) of the COGTA report)***

b. **Ditsobotla's financial position is dire**: The approved budget is not cash-backed; ***(Paragraph 5.1.14(b) of the COGTA report)*** Ditsobotla is "*not financially viable*"; ***(Paragraph 5.1.14(b) of the COGTA report)*** Ditsobotla fails to pay its creditors and fulfil other commitments; ***(Paragraph 5.1.14(b) of the COGTA report)*** There are serious cash flow challenges; ***(Paragraph 5.1.14(b) of the COGTA report)*** There is an ever-increasing creditor balance, in violation of section 65(2)(e) of the MFMA, which requires that "*all money owing by the municipality be paid within 30 days of receiving the relevant invoice or statement*"; ***(Paragraph 5.1.14(b) of the COGTA report)*** Ditsobotla owes Eskom R627,717,201, of which R607,004,585 (97%) is overdue; ***(Paragraph 5.1.14(b) of the COGTA report)*** Attorneys have been appointed to conduct a forensic investigation into the loss and embezzlement of integrated national electrification plan ("**INEP**") funds; ***(Paragraph 5.1.14(b) of the COGTA report)*** Supply chain management receives no attention because the position of the supply chain management manager is vacant; ***(Paragraph 5.1.14(b) of the COGTA report)*** Ditsobotla does not run on a proper municipal IT system; ***(Paragraph 5.1.14(b) of the COGTA report)***

Ditsobotla has received three consecutive disclaimer audit opinions for the financial years 2016 / 2017 to 2019 / 2020. ***(Paragraph 5.1.14(b) of the COGTA report)***. Ditsobotla does not run on a proper municipal IT system; ***(Paragraph 5.1.14(b) of the COGTA report)*** Ditsobotla has received three consecutive disclaimer audit opinions for the financial years 2016 / 2017 to 2019 / 2020. ***(Paragraph 5.1.14(b) of the COGTA report)***.

c. **Persistent and material breach of Ditsobotla's service delivery obligations:** There are generally incidents of non-compliance with service delivery commitments by Ditsobotla; ***(Paragraph 5.1.14(c) of the COGTA report)*** Ditsobotla does not collect refuse; ***(Paragraph 5.1.14(c) of the COGTA report)*** Communities had to dispose of their own refuse which led to violent protests; ***(Paragraph 5.1.14(c) of the COGTA report)*** Access roads are not maintained; ***(Paragraph 5.1.14(c) of the COGTA report)*** Internal roads have deteriorated to a point where most tarred roads have informally turned into gravel roads. ***(Paragraph 5.1.14(c) of the COGTA report)***

d. At the end of the COGTA report the COGTA MEC makes the following recommendation: "*It is recommended that the Provincial Executive Council mandate the MEC of COGTA working with the MEC of PT to develop a Municipal Recovery Programme focusing on … [Ditsobotla]…*". (There does not appear to be any such "municipal recovery programme".)

[61]. Ditsobotla's annual financial statements unequivocally demonstrate a financial crisis of extreme proportions in the financial affairs of Ditsobotla with "*Fruitless and wasteful*

expenditure", "*Irregular spending*", and "*Unauthorised spending and expenditure*" running into hundreds of millions of rands over years. ***(Founding affidavit, page 61 - 62, paragraph 79 – 80)***

[62]. Ditsobotla does not conduct proper financial management of the municipality. Ditsobotla has failed to provide the Auditor-General with sufficient information to conduct the audit on its financial affairs required by Section 183 of the Constitution and Section 4(1) of the PAA for five of six audit periods between 2014 and 2019. ***(Founding affidavit, page 62, paragraph 81)***

[63]. Ditsobotla's audit report for financial year-end 2018, evidences the fact of the financial crisis in the municipality and serious and persistent breaches of various provisions of the Constitution and the MFMA. I respectfully refer the court to the extent of the crisis and the breaches more fully set out in the founding affidavit. ***(Founding affidavit, page 62 - 65, paragraph 82 – 82.16; Auditor-General report, "CC17", page 255 - 264)***

[64]. The lack of proper accounting practices, financial procedures, accounting system and management oversight in themselves reflect a financial crisis in the municipality. It is evident that there are no proper controls in place. The auditor general is, due to a lack of evidence, in no position to check whether the unauthorised, irregular, fruitless and wasteful spending is indeed accurate. Ditsobotla cannot account for millions of Rand's worth of cash and cash equivalent transactions. Regardless of the repeated audit failures over the years, neither the Provincial Executive nor the National executive have effectively intervened. ***(Founding affidavit, page 65 - 66, paragraph 83)***

[65]. The municipality can no longer effectively: maintain the electricity reticulation networks; collect, allocate and account for monies for electricity so distributed; settle the Eskom liabilities as they become due and payable (mostly due to collected electricity payments not being ring fenced and used to finance other activities). ***(Founding affidavit, page 66, paragraph 84)***

[66]. Eskom has filed an affidavit with factual evidence supporting the overwhelming evidence confirming that as a result of a crisis in the financial affairs of the municipality, it is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments, including the following evidence:

a. Due to late or no payment on the electricity account, Ditsobotla was charged the following amounts on **interest alone**: R29,919,204.45 in 2017; R52,000,498.16 in 2018; R66,015,949.68 in 2019; R29,278,192.15 in 2020.

b. The auditor general has correctly categorised the aforesaid as wasteful expenditure: the misuse of scarce public resources by the municipality is inimical to the principle of legality and the rule of law since the municipality cannot account for how it uses scarce public resources and how it complies with its statutory obligations, including prioritising paying for basic services such as electricity.

c. In terms of an order of this Court dated 14 February 2020, Ditsobotla is required and is ordered to: "*punctually pay [Eskom] for the ongoing monthly supply of electricity to, and use by, its consumers other than the Applicants [to that application]*". The municipality continues to be in breach of the court order, and

has "*… consistently demonstrated its contempt, wilful disobedience and defiance of the court order…*".

d. Ditsobotla is in breach of the Constitution by failing to "*structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community*" in terms of section 153(a) of the Constitution.

e. Eskom requires the assistance of the court as final arbiter to hold the municipality to its Constitutional and statutory obligations and not absolve the delinquent municipalities to escape public scrutiny for how they allocate the resources for basic services like electricity.

f. The overwhelming and uncontested evidence is that the municipality continuously collects from the ratepayers, while failing to prioritise the payment of Eskom. The continued default by the municipality prejudices the residents of Ditsobotla who are the ratepayers and Eskom.

g. The municipality is in contravention of its licence condition issued by NERSA, and the use of the equitable share by the municipality is unlawful.

h. At the end of July 2021, the electricity debt that Ditsobotla owed to Eskom stood at R696,368,372.35, and as of 17 September 2021 the municipality remained in arrears towards Eskom in the amount of R735,829,062.00.

i. In terms of the financial statements attached to the affidavit of Eskom, as at 30 June 2019 the municipality's total liabilities exceeded its assets by R947,800,223.00 (in

other words, as at that time already, the municipality was insolvent to the extent of almost 1 Billion Rand).

(Founding affidavit, page 66 - 68, paragraph 85 – 85.9)

[67]. There has been a complete administrative collapse within the municipality. ***(Founding affidavit, page 68, paragraph 86)***

[68]. Roads and infrastructure are completely dilapidated and not maintained, service delivery is practically non-existent in the municipality, and businesses in the municipality are failing and either closing or relocating out of the municipality. The municipality fails to settle its outstanding water debts and has millions of Rand's due and owing to the relevant water board. As at or about May 2021, the municipality owed Eskom a sum of R691,783,110.00. ***(Founding affidavit, page 68 - 69, paragraph 87 - 89)***

[69]. As a result of the financial crisis and governance collapse at the municipality:

a. water supply has become irregular and unpredictable and the municipality no longer has the necessary skills and funds to service the water reticulation networks;

b. the municipality no longer maintains the electricity reticulation networks and infrastructure, resulting in regular interruptions in the supply of electricity to the businesses and homes of the community of the municipality;

c. the stormwater network of the municipality has become basically non-existent;

d. the sewerage network is failing resulting in raw sewage spilling into business premises and onto the streets;

e. sewerage treatment plants are not properly maintained and continue to seep raw sewerage into the Harts River which as a consequence provides polluted water to the town of Schweizer-Reneke that falls within the Kgetlengrivier Local Municipality;

f. the municipality no longer possesses the required skills and/or funds to ensure continuous and reliable refuse removal service delivery, resulting in refuse being dumped along the roads of Lichtenburg and dumping sites that are not adequately maintained by the municipality;

g. Lichtenburg is no longer a desirable place for conducting business resulting in loss of business, job losses and the town's economic lifeblood.

(Founding affidavit, page 69 - 70, paragraph 90)

[70]. Based on the common cause facts in the first application, it was mandatory in terms of the Constitution for the provincial executive to intervene in terms of section 139(5) of the Constitution. Instead, they opposed the first application. ***(Founding affidavit, page 69 - 70, paragraph 92)***

[71]. It is relevant that in the first application the Finance Minister took a position that appears to support a mandatory intervention, stating under oath *inter alia* that:

a. Ditsobotla (amongst certain other municipalities) was "*... identified as facing* ***severe financial problems <u>requiring the implementation of the mandatory interventions in terms of section 139 (5) of the Constitution</u>****, read together with Chapter 13 of the MFMA*." (my emphasis)

b. "*31 As this Honourable Court can see from the above, the process takes time, but it is important to note that the process is underway and the National Treasury will be offering support to the province to ensure that the process is achieved and that the municipalities are back on their feet and ready to function at full capacity.*"

(Founding affidavit, page 70 - 72, paragraph 93 – 93.5; 2; extract from affidavit filed on behalf of the Finance Minister, "CC18", page 265 - 271)

[72]. Ditsobotla has for years experienced a crisis in its financial affairs, and the municipality continues to experience a serious crisis in its financial affairs, and as a result is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments. The aforesaid facts are overwhelmingly supported by the evidence obtained from the state respondents in the documents which are titled the "**crisis report**" ***("CC19", page 272 - 297)*** and the "**analysis report**" ***("CC20", page 298 - 326)*** in the founding affidavit. (This information and documentation was only disclosed after applications to compel and orders of court requiring such disclosure). ***(Founding affidavit, page 72 - 73, paragraph 96***).

[73]. The **crisis report** confirms that a mandatory intervention in terms of section 139 of the Constitution is inevitable. I refer the court to the further startling facts set out in the founding affidavit in regard to the **crisis report**. ***(Founding affidavit, page 73 - 75, paragraph 97 – 97.7; "Crisis report", "CC19", page 272 - 297)***

[74]. The **analysis report** confirms that Ditsobotla "*... triggered both s 138 and s 140 of the MFMA ...*", that mandatory intervention in terms of section 139 of the Constitution is inevitable, and that urgent attention must be given to an intervention "… *otherwise the*

municipality will not be able to deliver on its mandate in the foreseeable future …". I refer the court to the further startling facts set out in the founding affidavit in regard to the **analysis report**. ***(Founding affidavit, page 75 - 78, paragraph 99 – 100; "Analysis report", "CC20", page 298 - 326)***

THE CURRENT CONSTITUTIONAL CRISIS

[75]. At the date of deposing to the founding affidavit: The offices of the municipality are locked and closed; Municipal employees have not been fully paid and refuse to work due to non-payment of salaries end of August 2022 and end of September 2022; There is no individual (not to speak of any leadership) in control of the municipality. It is riderless; There is a vacuum in respect of any person who is responsible for overseeing and implementing the provision of basic municipal services; Anarchy reigns in the municipal area of Ditsobotla, and the provision of the most basic municipal services has ground to a halt; There has been a complete collapse of the municipality, with devastating consequences to the community of the municipality. ***(Founding affidavit, page 35, paragraph 36)***

[76]. The community of the municipality are not receiving basic municipal services, namely such municipal services that are necessary to ensure an acceptable and reasonable quality of life and which, if not provided, endanger the economic viability of the community. The failure is also a serious public health, safety and environmental concern. ***(Founding affidavit, page 35 - 36, paragraph 37)***

[77]. As a result of the financial and constitutional crisis, the following essential municipal services, amongst other essential services, have ground to a halt: ***(Founding affidavit, page 36 – 44, paragraph 39 - 40, and the attachments referred to therein; see also: supporting***

and confirmatory affidavits at pages 380 – 385, 389 – 395, 396 – 400, 401 – 405, 406 – 408, 409 – 412, 413 - 415)

a. The towns of Lichtenburg and Coligny are receiving little to no water due to water not being pumped and reservoirs running dry.

b. There are no municipal staff available to attend to breakdowns in the water and electricity reticulation networks. Many residents have been without water and/or electricity due to breakdowns in the network for weeks.

c. The general failure in the supply of water to the Lichtenburg and Coligny areas is of even greater concern. There are further large sections of the community that do not have direct access to any water at all.

d. Large portions of Lichtenburg and Coligny are without <u>any</u> municipal water, whilst some areas in the two towns have been without any water for extended periods of time. Absent urgent intervention, the community will continue to suffer a lack of sufficient water, and might even face dry town reservoirs.

(Founding affidavit, page 36 – 40, paragraph 39.3 – 39.5; diagram showing the general areas that have been without any water for extended periods of time, "CC4", page 117 - 118; photographs of extensive water storage systems, "CC5", page 119 - 124; photographs 26 September 2022 – 3 October 2022, "CC6", page 125 - 136; photographs 3 October 2022, supply levels less than 25%, "CC7", page 137 - 138)

e. There is no refuse collection in any of the two affected towns, with severe consequences. ***(Founding affidavit, page 41, paragraph 39.6 – 39.7; photographs of waste build up, "CC8", page 139 - 140; photographs of illegal dump sites, "CC9", page 141 - 142)***

f. There is no one to clear blocked sewerage pipes, resulting in sewerage spilling into and onto the streets. Sewerage is becoming an increasing health risk in both Lichtenburg and Coligny, and a problem also for business owners. ***(Founding affidavit, page 41 - 42, paragraph 39.8 – 39.8; photographs of waste sewage build up, "CC8", , page 139 - 140)***

g. The employees of the municipality have not been paid their salaries. As a result, the employees of the municipality are not attending to the provision of basic municipal services. Worse still, certain of such employees have organised themselves into vigilante units, apparently terminating the power of community members and businesses and thereafter demanding cash payments to reconnect such power. The rule of law is directly threatened, and the state has lost control. It is not an exaggeration to describe the situation in Lichtenburg and Coligny as anarchy. ***(Founding affidavit, page 42, paragraph 39.10; Newspaper article, "CC10", page 143)***

h. Ditsobotla's debt to Eskom has continued to spiral and has grown to almost R1 billion. Eskom has threatened termination of supply. ***(Founding affidavit, page 42 - 43, paragraph 39.11; Eskom account, "CC11", page 144; Eskom notice, "CC12", page 145)***

i. There is no one to issue and collect invoices, or to collect rates and taxes. There is no one to pay Eskom, nor any of the other service providers and creditors of the municipality. ***(Founding affidavit, page 43, paragraph 39.12)***

j. There is general decay in the maintaining of infrastructure. The closing of municipal offices has resulted in a total collapse in maintenance services. There is a serious risk of unattended manholes and other infrastructure causing real harm to the public, and to the safety of the community. ***(Founding affidavit, page 43, paragraph 39.13)***

k. There has been a sharp increase in gastroenteritis, diarrhoea and other stomach-related conditions. The health of the community has been impacted due to the crisis and is under threat. There is the further real risk of serious diseases (such as cholera) developing if water and sanitation services are not restored. ***(Founding affidavit, page 43, paragraph 39.14; Affidavit of Dr Gerrie van den Berg, page 406 - 408)***

l. The residents of Ditsobotla find themselves in a dire situation. ***(Founding affidavit, page 44, paragraph 39.15; Confirmatory and supporting affidavits, pages at pages 380 – 385, 389 – 395, 396 – 400, 401 – 405, 406 – 408, 409 – 412, 413 - 415)***

[78]. The complete collapse of the municipality and the complete failure to provide any basic municipal services is endangering public health, safety, and the environment. It is also destroying a local economy that has already seen large businesses fleeing to more sustainable areas. The situation is dire. ***(Founding affidavit, page 44, paragraph 40)***

[79]. The collapse further seriously infringes on the right of the first applicant's supporters who conduct business within the jurisdictional area of the municipality: to be productive members of the community within which they reside; to conduct business; to be economically sustainable and profitable; to offer continued and sustainable employment to other members of their community; to participate effectively in economic and social activities within the community; and to contribute to the growth and well-being of the communities as a whole, and maintain a stable income for their businesses, and employees, and this affects families in particular. It is extremely difficult to conduct normal and sustainable business within the jurisdictional area of the municipality without basic municipal services. ***(Founding affidavit, page 44 - 45, paragraph 44 - 45)***

[80]. The current state of affairs has a direct and seriously prejudicial impact on every citizen that resides within the jurisdictional area of the municipality. The applicants seek an order that is just and equitable, on an urgent basis, in order to afford its members and the community of the municipality a practical and effective remedy. ***(Founding affidavit, page 44, paragraph 42 - 43)***

STEPS TAKEN BY THE APPLICANTS:

[81]. On 21 September 2022, Sakeliga was informed by certain of its supporters and affiliated organisations who conduct business in the jurisdictional area of Ditsobotla that the North West Provincial Executive had proceeded to invoke section 139(1)(c) of the Constitution. On 22 September 2022, Sakeliga was provided with what purports to be an extract from the minutes of a meeting of the North West Provincial Executive Council dated 15

September 2022 ***(Founding affidavit, page 79, paragraph 102 – 103; minutes of a meeting, "CC21", page 327 - 328)***

[82]. Sakeliga was surprised as a mandatory intervention, in terms of section 139(5) read with section 139(7) of the Constitution, was quite clearly required. Voluntary intervention had repeatedly failed. This did not appear to Sakeliga to be an effective remedy at all. Indeed, as is evident from the current total collapse of the municipality, nothing that has been done by the Provincial Executive to date, has been effective. ***(Founding affidavit, page 79 - 80, paragraph 104 – 106)***

[83]. On 23 September 2022, the applicants' attorney of record, Kriek Wassenaar and Venter ("**KWV**"), directed a letter of demand, the content of which is incorporated into the founding affidavit. Argument shall be advanced with reference to the content thereof. ***(Founding affidavit, page 80, paragraph 107; KWV letter, 23 September 2022, "CC22", page 329 – 339)*** Sakeliga requested an urgent meeting with government representatives, and further demanded the following undertakings from government:

> 25.1 That the provincial executive immediately impose urgent mandatory intervention in Ditsobotla in terms of section 139(5) of the Constitution, alternatively and in the event of the provincial executive failing and/or refusing to do so, that the national executive impose urgent mandatory intervention in Ditsobotla in terms of section 139(7) of the Constitution;
>
> 25.2 That an administrator be appointed by no later than 27 September 2022;

25.3 That … the provincial executive release to the administrator a sufficient portion of Ditsobotla's equitable portion in order to allow the administrator to pay employee salaries for August 2022 and September 2022 by no later than 27 September 2022;

25.4 That the appointed administrator be authorised to pay municipal employees and to oversee the day to day management and control of the municipal administration and service delivery functions by no later than 28 September 2022;

25.5 That the appointed administrator be instructed to meet with Sakeliga and the residents of Ditsobotla to discuss the municipality's current problems and seek solutions.

(Founding affidavit, page 84, paragraph 113)

[84]. Over the weekend of 24 and 25 September 2022, Sakeliga was placed in possession of:

a. a letter from the Finance MEC to the Mayor of Ditsobotla dated 19 June 2022, stating:

> This serves to inform you that the introductory of the intervention team will conduct the status quo assessment. The purpose of the status quo assessment is to identify **the municipalities that are on financial crisis in line with the provisions of chapter 13 of the MFMA and subsequently placed under mandatory intervention in line with section 139 (5) (a) and (c) of the Constitution** read together with section 139 of the MFMA. (my emphasis)

(Founding affidavit, page 85 - 86, paragraph 114.1; letter from the Finance MEC, "CC25", page 346)

b. a letter from National Treasury dated 2 September 2022 confirming that the equitable share to Ditsobotla was withheld, and stating *inter alia*:

> Given these challenges, the **municipality was identified to be in financial and service delivery crisis since it met the criteria outlined in Section 140 of the MFMA**. The **municipality has met the legal requirements for a mandatory intervention under Section 139(5) of the Constitution** read together with Chapter 13 of the Municipal Finance Management Act of 2003 (Act No. 56 of 2003). Whilst the process of developing and **implementing the mandatory intervention in the municipality** is in process, the National Treasury will closely monitor the state of affairs in the municipality to ensure and enforce compliance with the provisions of the MFMA. (my emphasis)

(Founding affidavit, page 86, paragraph 114.2; letter from National Treasury, "CC26", page 347 - 350)

[85]. On Monday, 26 September 2022, KWV received a noncommittal email from the attorney of record representing certain of the respondents (the "**State attorney**") stating in essence that the requested meeting "*... is short notice and therefore impractical* ..." and committing to revert "*... as soon as practically possible with a date of the proposed meeting.*" ***(Founding affidavit, page 87, paragraph 115; letter from State attorney, "CC27", page 351)*** The demand for the undertakings sought by KWV was completely ignored.

[86]. Accordingly, KWV responded on the same day by email as follows:

I acknowledge receipt of your email below, which refers to an urgent letter direct to our client in response to the collapse of government in the Ditsobotla Local Municipality.

You will note from the contents of the letter that our client deems the matter to be of a most severe nature. The urgency of the matter requires an urgent response. Refusal to urgently deal with the case is most concerning to our client and will most likely result in urgent litigation between the parties. Our client has appointed senior counsel to attend to the drafting of an urgent application.

We would, of course, prefer to avoid urgent litigation, but that will require that your clients urgently start meaningfully engaging with our client. Refusing our invitation is at your clients' own peril. Urgent events result in urgent letters with urgent demands. The urgent situation in Ditsobotla has not been convenient for anybody.

Our letter does not only require a meeting. The letter also seeks various urgent undertakings from the government to avoid litigation. Your e-mail under reply has failed to respond to the undertakings sought.

Our instructions are that the matter in Ditsobotla has further deteriorated over the weekend. Your lacklustre response forces us to proceed with an urgent application."

(Founding affidavit, page 87 - 88, paragraph 116; E-mail from KWV, "CC28", Page 352 - 353)

[87]. On 27 September 2022, the state attorney responded by email indicating that their instructions were to hold a meeting with Sakeliga and interested parties virtually on Friday 30 September 2022 at 10h00, and indicating their understanding that that the undertakings

sought by the applicants has been complied with. ***(Founding affidavit, page 88, paragraph 117; E-mail form State Attorney, "CC29", Page 354 - 356)***

[88]. On 27 September 2022, KWV responded in a letter stating as follows *inter alia*:

> "
> …
>
> 2. Our client does not share your clients' view that they have already complied with the demands in our letter. Our primary concern is with the failure to implement mandatory section 139(5) intervention. Unless the required mandatory intervention has since been implemented, your clients continue with voluntary intervention under circumstances where mandatory constitutional intervention has become an urgent imperative. Furthermore, our client requires the immediate deployment of an administrator to take control of the municipality and to ensure that basic service delivery is restored. Even the undertaking that the administrator will meet with our client has been qualified.
>
> 3. On your clients' admission, Ditsobotla's equitable share is still being withheld pending the appointment of an administrator. However, your clients are also the party responsible for the appointment of the said administrator. Notwithstanding our demand, your clients have failed to provide us with a date for the appointment and deployment of an administrator. Our letter did not demand undertakings that something will potentially happen on an unknown future date.
>
> 4. Our client requires urgent and decisive action by the government in response to a potentially serious humanitarian and constitutional crisis developing in Ditsobotla.

5. The lack of urgency on the part of provincial and national governments is concerning. We have received reports from the community that, due to the closing of the municipal offices and the non-payment of employees, Ditsobotla is facing a serious risk of running out of water. There is simply no one available to grant access to municipal works to turn on the municipality's water pumps and maintain reservoir levels. Large portions of the municipality are already sitting without water. Our instructions are that residents are required to source their water from alternative sources. Those who can afford it, use vehicles to collect and distribute water. Despite having access to water, residents residing in informal settlements must again collect water by wheelbarrow. There is simply no one in the municipality to fix the available water systems.

6. Your clients' position that the financial officer must pay employees screams a lack of appreciation of the current crisis. Our client has been advised that the municipal offices have remained closed and that there is no money to pay employees. The withholding of the equitable share under these circumstances, especially considering the delay in appointing and deploying an administrator, is a major contributor to the current constitutional crisis.

7. We deem the matter to be of the utmost urgency. Our senior counsel is continuing to prepare an urgent application given the failure to respond to our client's demands adequately.

8. However, we accept your offer for a virtual meeting on 30 September 2022 at 10h00. We will attend the meeting with the hope of avoiding urgent litigation and potentially settling disputes in regards to Ditsobotla. We trust that actual decision-makers from various government spheres will be available to engage with our client and leaders in the community meaningfully. The fact that we are accepting the invitation does not detract from the urgency of the matter.

...

(Founding affidavit, page 88 - 90; Letter from KWV, "CC30", page 357 - 359)

[89]. In the light of the state respondents undertaking to urgently engage with Sakeliga, Sakeliga accordingly attempted to practically address the crisis that had arisen in Ditsobotla in a meaningful way with the state. To date of this affidavit, the respondents have yet to respond to any of the issues raised by KWV in the letters of 28 September 2022. **(Founding affidavit, page 90 - 91; paragraph 119 – 121; "CC31" to "CC33", pages 360 – 361, 362 – 367, 368 - 369)**

[90]. On 29 September 2022, Sakeliga was furnished with a letter from the Finance Minister to the Premier. This was the first time that Sakeliga had sight of this letter which is of fundamental importance. It is astounding that the state respondents have never to date disclosed the existence of this letter which effectively concedes the fact that **mandatory intervention in Ditsobotla is required**. The letter further exposes urgency of intervention in Ditsobotla since at least 2021 and the ineffective handling of the process leading up to the September 2022 collapse. ***(Founding affidavit, page 91; paragraph 122; Letter from the Finance Minister to the Premier, "CC34", page 370 - 373)***

[91]. On Friday 30 September 2022, a virtual engagement was held between representatives for the applicants and representatives from the government. The attendees are listed and the parts of the content of the discussion are set out in the founding affidavit, which I do not repeat herein. Argument shall be advanced in respect thereof. ***(Founding affidavit, page 91 - 98; paragraph 123 – 124.10; Attendance list, "CC35", page 374)***

a. Of significant importance is that the state for the first time ever informed the applicants that Ditsobotla was **already under section 139(5) administration since 24 November 2021 already**. (This was the first that KWV or Sakeliga had ever heard that Ditsobotla had been placed under mandatory intervention in terms of section 139(5) of the Constitution. The disclosure came as a surprise. Despite the first application, seeking such mandatory intervention, none of the respondents to the first application had ever whispered a word about this. If Ditsobotla has been under section 139(5) administration since November 2021 already, then this demonstrates incontrovertibly that the provincial executive has not and cannot exercise the powers and functions imposed under section 139(5) of the Constitution read together with relevant legislation. The continued financial crisis and complete breakdown of basic municipal services, and the further facts set out in the application confirm this.) ***(Founding affidavit, page 96 - 97; paragraph 124.9)***

b. Government was unwilling to give any clear commitments or replies to the undertakings sought by Sakeliga in their letter, and the requests made by Mr Wassenaar of KWV during the meeting. In closing, Mr Wassenaar stated the following:

> We urge government also to talk to us when we reach out to government, either via litigation, because litigation is an invitation by groups frustrated by a lack of response to engage with government and it is unfortunate that it often leads to years of litigation, only to find out that the thing we, one of the big features of our case has already been resolved on 24 November 2021 and we have never been notified formally of it.

> But be that as it may, on our side we do require a clear response as to what, when exact dates where service delivery will be recovered by Monday morning at nine. Failing that Sakeliga has instructed that we proceed with urgent application against government. We would even want to cooperate with government to break through any legislative barriers on an interim basis in order to allow government to intervene.
>
> It is not acceptable for legislation and barriers to stop people from having basic services and stop government from effectively intervening. And we would like government to please meet over the weekend and today and come back to us Monday morning with a response.
>
> **(Founding affidavit, page 97 - 98; paragraph 124.10)**

[92]. After the meeting on 30 September 2022, KWV forwarded a letter to the State Attorney, requiring that government provide a proper reply as to government's plans to ensure the return of basic service delivery in Ditsobotla. The applicants warned that if no clear undertakings were received, an urgent application would be brought. ***(Founding affidavit, page 98; paragraph 125; Letter from KWV, "CC36", page 375 - 376)***

[93]. The applicants have no alternative but to bring the present urgent application. ***(Founding affidavit, page 99; paragraph 127)***

FAILURE TO TAKE CONSTITUTIONALLY REQUIRED STEPS

[94]. The Constitutional failures of the municipality are wide ranging, unlawful, and persistent. The conduct and omissions of the municipality have breached and continue to breach the basic human rights of the community of the municipality. ***(Founding affidavit, page 101; paragraph 140 - 141)***

[95]. Without being exhaustive:

a. the section 27 of the Constitution right guaranteeing everyone the right to have access to sufficient water is currently being breached and continues to be breached.

b. The right of everyone to an environment that is not harmful to their health and wellbeing, as contemplated in section 24 of the Constitution, is currently being breached and continues to be breached.

c. Section 152(1) of the Constitution enjoins local government to provide services to communities in a sustainable manner and to promote a safe and healthy environment. This has been and continues to be breached.

d. In terms of section 156 (1) (a), read with Schedule 4B of the Constitution, local government is responsible for administering "water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems." This has been and continues to be breached.

e. The fundamental right to *inter alia* dignity under section 10 of the Constitution is further breached by virtue of the failures relating to access to sufficient water, basic sanitation, a safe environment, and the provision of further basic municipal services. It is inconsistent with the right to dignity to have to live without access to sufficient water, sanitation, and basic municipal services.

(Founding affidavit, page 101 - 102; paragraph 142)

[96]. The municipality, as a result of a crisis in its financial affairs, is in serious and persistent material breach of its obligations to provide basic services and to meet its financial commitments. The municipality is further unable to meet its obligations to provide basic services and to meet its financial commitments. ***(Founding affidavit, page 102; paragraph 143)***

[97]. I submit that the Constitution demands a section 139(7) mandatory intervention on the part of the national executive.

[98]. The contention on the part of the state respondents made during the 30 September 2022 meeting that Ditsobotla has been under section 139(5) intervention since 24 November 2021 demonstrates that the provincial executive cannot or does not or does not adequately exercise the powers and perform the functions referred to in section 139(5) of the Constitution: ***(Founding affidavit, page 102 - 104, paragraph 144 – 144.6)***

a. the provincial executive has failed since November 2021 to impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services.

b. the provincial executive has failed since November 2021 to impose a recovery plan aimed at securing the municipality's ability to meet its financial commitments.

c. Despite request no recovery plan has been provided, and as is evident from the meeting held on 30 September 2022, there does not appear to be any plan at all to address the constitutional crisis, and specifically the issues of the failure of the

municipality to meet its obligations to provide basic services and to meet its financial obligations.

d. the provincial executive has failed since November 2021 to provide the necessary legislative measures, including a budget or any revenue-raising measures, necessary to give effect to a recovery plan. Insofar as any such measures have in fact been put in place, these have quite evidently been ignored by the municipality and the provincial executive has failed to take any required steps in this regard. The provincial executive has not utilised the relevant provision of the Constitution to dissolve the Municipal Council, to appoint an administrator, to approve a temporary budget or revenue-raising measures or any other measures to give effect to a recovery plan to provide for the continued functioning of the municipality.

e. The provincial executive has failed since November 2021 to take responsibility for the implementation of any recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

f. Insofar as any such mandatory steps may have been taken, the facts and the Constitutional crisis that the municipality currently finds itself in demonstrate incontrovertibly that the provincial executive has not adequately exercised the powers and performed the functions referred to in section 139(5) of the Constitution.

[99]. Based on the available information, the provincial executive has failed since November 2021, to comply with or to exercise any of the powers and functions required by 139(1) of

the MFMA. The provincial executive has failed to promptly: ***(Founding affidavit, page 104, paragraph 145 – 145.2)***

a. to request the Municipal Financial Recovery Service-

i. to determine the reasons for the crisis in its financial affairs;

ii. to assess the municipality's financial State;

iii. to prepare an appropriate recovery plan for the municipality;

iv. to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and

v. to submit to the MEC for finance in the province-

(aa) the determination and assessment referred to above (in a.i. and a.ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to above (in a.iii. and a.iv) within a period, not to exceed 90 days, determined by the MEC for finance: and

b. to consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.A

[100]. The facts indicate quite clearly that a voluntary intervention in terms of section 139(1) of the Constitution is not an option, and that the provincial executive cannot and does not

exercise the necessary powers and perform the necessary functions: ***(Founding affidavit, page 80 - 83, paragraph 108 – 108.11, and the attachments referred to in such paragraphs)***

a. Ditsobotla does not keep full and proper records of its affairs. This has resulted in repeated disclaimed Auditor-General of South Africa ("**AGSA**") opinions being issued. According to the AGSA's Material Irregularities Status Report, as of 15 April 2022, the Municipality's failure to correct its financial accounting failures is substantially harming the institution. In the opinion of the Auditor-General, the municipality's financial position was **so poor that it disclosed a material uncertainty regarding its ability to continue operations**. Ditsobotla has also been identified as one of twenty-four public institutions that have failed to make any progress in resolving material irregularities over the last audit period.

b. According to the AGSA's General Report, issued on 15 June 2022, Ditsobotla's audit outcome has been identified as a *repeat disclaimed opinion*, under circumstances where the accounting officers have taken *little or no action*. The audit outcomes have remained disclaimed outcomes and unchanged since at least 2016.

c. Unauthorised expenditure increased from R87.1 million (2019) to R134 million (2020). Fruitless and wasteful spend increased from R153.9 million (2019) to R209.1 million (2020). Irregular spending increased from R119.9 million (2019) to R159.9 million (2020). No further entity specific opinions have been made

available since publication of the AGSA General Report. It appears, however, that there has been no improvement.

d. Municipal workers regularly face problems with the prompt payment of salaries. At date of the founding affidavit August 2022 and September 2022 salaries had not been paid.

e. The failure to pay employees, the lack of any presence of an appointed administrator, and the anarchy resulting from the dissolving of the municipal council, have resulted in unsupervised desperate employees misusing their positions in the municipality to conduct unlawful collection practices with the hope of 'securing' their salaries.

f. Services, even emergency services, have ground to an abrupt halt.

g. The municipal offices have been closed, and no one is supervising the municipality.

h. The provincial executive continued to withhold the municipality's equitable share.

i. Ditsobotla remains in breach of its contractual and public duty to pay Eskom. Ditsobotla's outstanding account with Eskom is currently almost R1 Billion in arrears, and the amount due and owing by Ditsobotla to Eskom as of 19 September 2022 is **R897 804 049.87**. The situation is dire.

j. The municipality has persistently and continuously been in breach of its service delivery obligations. However, the collapse of governance within Ditsobotla has now reached new heights, and the failure to deliver basic municipal services and

the consequent breaches of the rights of the community of Ditsobotla have become extreme. There is a constitutional crisis.

[101]. The complete collapse of the municipality and the complete failure to provide any basic municipal services is endangering public health, safety, and the environment. ***(Founding affidavit, page 83, paragraph 109)***

[102]. It appears that there is a dispute between the three levels of government regarding the required intervention. The stalemate, disputes and loss of leadership has led to a situation where the people and community of Ditsobotla are suffering and experiencing severe prejudice. It is their rights which are being breached on a daily basis, and their constitutional rights which are being infringed. ***(Founding affidavit, page 83, paragraph 110)*** In the dust of apparent dissensus between the three levels of government, the Constitution is clear: section 139(7) of the Constitution directs that the national executive must intervene. It is urgently necessary for the courts to step in and provide an effective remedy.

[103]. Whilst government pontificates, the community of Ditsobotla is suffering and without a remedy. I respectfully state that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a further constitutional crisis. The flagrant breach of the state's positive constitutional duties requires the implementation of systemic relief. ***(Founding affidavit, page 84, paragraph 111)***

[104]. The current collapse in municipal government at Ditsobotla has shifted the need for mandatory intervention from a constitutional priority to a constitutional emergency. The main features of the crisis in Ditsobotla are (1) the severe and persistent financial

mismanagement at Ditsobotla, (2) the refusal by the provincial executive to implement mandatory intervention, (and insofar as any mandatory intervention has been invoked, the complete failure on the part of the provisional executive to exercise the powers and functions required in terms of section 139(5) of the Constitution), (3) the severe cash-flow problems facing the municipality, and the subsequent failure to pay employees, Eskom and the relevant Water authorities, (4) the closing of the municipal offices, (5) the failure to ensure that an administrator is duly appointed to ensure that basic municipal services can continue and (6) the dispute between the municipal council and the provincial executive regarding those intervention steps already taken by the province. ***(Founding affidavit, page 84, paragraph 112)***

[105]. Despite being under section 139(5) administration since November 2021 already, the provincial executive cannot, has not and does not, and has not and does not adequately, exercise the powers and perform the functions referred to in section 139(5) of the Constitution. Accordingly, the Constitution demands a section 139(7) mandatory intervention on the part of the national executive. The failure of the national executive to intervene in terms of section 139(7) of the Constitution constitutes a breach of section 139(7) of the Constitution.

REQUIREMENTS FOR AN INTERDICT

[106]. In the event that the court may find that certain of the relief sought by the applicants is interdictory in nature, I respectfully submit that the applicants have made out a case for an interdict. Whilst the applicants seek an interim order in these proceedings, pending the resolution of the crisis in the financial affairs of Ditsobotla and the securing of the ability

of Ditsobotla to meet its obligations to provide basic services, I respectfully submit that the applicants have in fact made out a case for both final and interim interdictory relief. ***(Founding affidavit, page 99, paragraph 128)***

[107]. In this regard, the applicants have made out a case in regard to the following requisites: ***(Founding affidavit, page 99 - 101, paragraph 129 -139)***

a. Various clear rights, including constitutional rights;

b. Apprehension of harm should the relief not be granted;

c. Balance of convenience;

d. No alternative remedy.

MEANINGFUL ENGAGEMENT

[108]. The applicants have been denied meaningful engagement. At best for the state respondents, they have ignored the applicants. However, the evidence demonstrates a more sinister motive of intentionally not engaging with the applicants and concealing vital information.

[109]. This is not good enough. Section 152(1) of the Constitution specifically provides that one of the objects of local government is to encourage the involvement of communities and community organisations in the matters of local government. ***(Section 152(1)(e) of the Constitution)***

[110]. Sakeliga and its supporters are aggrieved by the failure by all spheres of government to meaningfully engage with them over the last 18 months, but especially during the months preceding the collapse in Ditsobotla. Sakeliga's supporters are people and businesses

directly affected by state failure. Despite litigation having been initiated by Sakeliga and its supporters in the first application to seek long-term solutions, specific mandatory intervention, and court oversight in Ditsobotla, Sakeliga and its supporters have only been ignored. Whilst national and provincial executives plan, the residents of Ditsobotla face the consequences of failing municipal structures and constant service delivery failures. ***(Founding affidavit, page 109 - 110, paragraph 165 - 167)***

[111]. Not a single party to the first application informed Sakeliga of any of the developments in the provincial executive's 'intervention' plans. None of the state respondents informed any of the applicants about the fact that Ditsobotla had been placed under mandatory intervention in terms of section 139(5) of the Constitution (until the meeting on 30 September 2022, almost a year later). This has prejudicial consequences for the applicants. ***(Founding affidavit, page 110, paragraph 168 - 169)***

[112]. In a similar vein, the second applicant, CGGSJ, that focusses on the plight of the poor and vulnerable in Ditsobotla and the North West Province, is unable to provide any information to the communities affected by the decisions of government, due to the lack of engagement, feedback and communication on the part of any of the spheres of government. ***(Founding affidavit, page 110, paragraph 170)***

[113]. This directly implicates and negates 'accountability' of government.

[114]. Despite the engagement meeting and the request for clear undertakings and an open line of communication in order to prevent urgent litigation, government has again chosen not to respond to Sakeliga's demands. Nothing has changed. ***(Founding affidavit, page 110 - 111, paragraph 171)***

[115]. The applicants require the government to engage meaningfully with them and their supporters. This is a mechanism to resolve matters positively and in the interests of the state parties, the community of the municipality and the administration of justice. The applicants and the community of Ditsobotla have valuable contributions that they can make. The applicants have attempted to engage meaningfully to attempt to find effective solutions to the fundamental breaches. Absent meaningful engagement, the valuable contributions that the applicants can make in attempting to resolve the crisis and issues faced are lost. Absent meaningful engagement, the applicants and the community are left in the dark both figuratively and literally. ***(Founding affidavit, page 111, paragraph 172 - 173)***

[116]. The applicants and their supporters have a right to meaningful engagement, especially where state failures directly affect the dignity and constitutional rights of the community of Ditsobotla. ***(Founding affidavit, page 111, paragraph 174)***

URGENCY

[117]. The matter is urgent. The applicants and the community of the municipality shall not obtain substantial redress at a hearing in due course. ***(Founding affidavit, page 105 - 107, paragraph 146 – 157)***

[118]. The urgency in this matter lies in the fact of the recent total collapse of the Ditsobotla municipality and the disruption and failure to provide basic essential services to the people and communities of the municipality. ***(Founding affidavit, page 105, paragraph 146; Democratic alliance case, par [51])***

[119]. The application seeks to address the most urgent and detrimental problems in the municipality and to restore service delivery. ***(Democratic alliance case, par [58])***

[120]. The extent of the constitutional crisis renders the matter one of extreme urgency. It is imperative that the state be directed to remedy the serious breaches of its constitutional duties effectively. ***(Founding affidavit, page 36, paragraph 38)***

[121]. Fundamental human rights are being seriously breached on a daily and ongoing basis. This affects thousands of people at the most basic level. Further argument shall be advanced with reference to the facts set out in the founding affidavit that demonstrate the urgency of the matter. ***(Founding affidavit, page 105, paragraph 148)***

[122]. The community of the municipality, including the people and children in the jurisdictional area of the municipality, schools and businesses, and some of the most vulnerable, are directly affected by the constitutional crisis. It is urgently necessary for urgent court intervention. ***(Founding affidavit, page 105, paragraph 149)***

[123]. The crisis has reached a point where the health and safety of the community of the municipality is in jeopardy. In fact, this is no longer simply a threat to health and safety – people are becoming sick due to the complete collapse of the municipality and the health hazards that have ensued based on the complete collapse of basic sanitation and the water crisis. ***(Founding affidavit, page 105, paragraph 150)***

[124]. Children and the vulnerable are directly affected. The crisis has led to a situation where children are forced to walk miles with heavy buckets and vessels to collect water.

Schooling is affected. The dignity of all is seriously impacted. The crisis calls for urgent intervention. ***(Founding affidavit, page 105, paragraph 151)***

[125]. The situation is such that, absent an intervention, thousands of ordinary people stand to suffer irreparable harm. The situation has led to lawlessness, to vigilante gangs exploiting the collapse, and to the breakdown of law and order. Even the state respondents refer to the situation as that of 'gangsterism'. The state respondents cannot honestly contend that the matter is not extremely urgent. On their own version we have a serious crisis on our hands. ***(Founding affidavit, page 106, paragraph 152)***

[126]. The water crisis has not been resolved, and those grounds that rendered the matter urgent at the first hearing persist. The breach of the right to water impacts the right to dignity but in fact also the right to life. The factual consequences of such a breach are real and terrible – water is required for life; water is required for sanitation and health; water is required for a safe environment. Urgent intervention is required. ***(Founding affidavit, page 106 - 107, paragraph 153 - 154)***

[127]. In the matter of **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at par [9] (the "**East Rock case**"), it was held that:

> The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course, then the matter qualifies to be enrolled and heard as an urgent application. If however, despite the anxiety of an Applicant, he can be afforded a substantial redress in an

> application in due course, the application does not qualify to be enrolled and heard as an urgent application.

[128]. The continuing and pervasive nature of the constitutional crisis in Ditsobotla constitutes a serious and ongoing breach of fundamental human rights and renders the matter urgent. The applicants, their members, and the community of Ditsobotla will not achieve substantial redress at a hearing in the ordinary course. There is no conceivable remedy in the ordinary course which would provide substantial redress to a community in this position.

[129]. In the **East Rock case at par [7]**, the court addressed the meaning of absence of substantial redress as follows:

> It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case.

[130]. Should any of the respondents allege that the matter is not urgent, the court shall respectfully be requested to conduct an inspection *in loco* which shall reveal the crisis and collapse that has been set out in the founding affidavit.

[131]. The applicants have afforded the respondents as much time as is possible in the circumstances, and they cannot be prejudiced in this regard. No respondent has complained that they have not been afforded sufficient time to answer the application. In fact, the facts set out in the founding affidavit are practically uncontested. No party can seriously argue

that the matter is not urgent. In fact, the administrator has confirmed that the matter is of substantial urgency already.

CONCLUSION

[132]. An urgent remedy is called for. The municipality, the centre of the quality of life of every person who lives in its jurisdictional area, has collapsed.

[133]. The interests of the communities of Ditsobotla, including those of the business community that serves such communities and that forms part of such communities, must come first. (***Democratic alliance case, par [129]***)

[134]. An urgent remedy is essential to restore basic municipal services.

[135]. The conduct of the Municipality and those responsible for such conduct does / do not comply with legislative and Constitutional obligations. As a direct consequence fundamental human rights are breached and continue to be breached. The court is requested to grant a just, equitable and effective remedy.

[136]. The applicants seek a proper, fitting, suitable and effective remedy in this matter. (***Democratic alliance case, par [80]***)

[137]. The Constitution compels the primary remedy that the applicants seek.

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7 NOVEMBER 2022