62/763

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH WEST DIVISION, MAHIKENG)

Case No. UM192/2022

In the matter between:-

SAKELIGA NPC	1st Applicant
CENTRE FOR GOODS GOVERNANCE AND SOCIAL JUSTICE NPC	2nd Applicant
BAREND LOURENS SNYMAN	3rd Applicant

And

DITSOBOTLA LOCAL MUNICIPALITY	1st Respondent
THE MUNICIPAL MANAGER/ ACTING MUNICIPAL MANAGER OF THE DITSOBOTLA LOCAL MUNICIPALITY	2nd Respondent
PREMIER OF THE NORTH WEST PROVINCE	3rd Respondent
PROVINCIAL EXECUTIVE OF THE NORTH WEST PROVINCE	4th Respondent
MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS	5th Respondent
MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST PROVINCE: FINANCE	6th Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	7TH Respondent
MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	8th Respondent
MINISTER: NATIONAL DEPARTMENT OF FINANCE	9TH Respondent
MINISTER: WATER AND SANITATION	10TH Respondent
NGAKA MODIRI MOLEMA DISTRICT MUNICIPALITY	11th Respondent
ESKOM SOC LTD	12TH Respondent

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MAGALIES WATER BOARD	13th Respondent
THE ADMINISTRATOR: DITSOBOTLA LOCAL MUNICIPALITY	14TH Respondent

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FILING SHEET

Documents Filed: **First and Second Respondent's Answering Affidavit in respect of Part B**

Date of hearing: 23 and 24 March 2023

DATED at MAHIKENG on this the 21st day of March 2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: UM192/2022

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
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 SETTLEMENT AND TRADITIONAL AFFAIRS	Fifth Respondent
MEC : 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
NGAK MODIRI MOLEMA DISTRICT MUNICIPALITY	Eleventh Respondent

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ESKOM SOC LTD	Twelfth Respondent
MAGALIES WATER BOARD	Thirteenth Respondent
THE ADMINISTRATOR : DITSOBOTLA LOCAL MUNICIPALITY	Fourteenth Respondent

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FIRST AND SECOND RESPONDENTS' ANSWERING AFFIDAVIT IN PART B

I, the undersigned,

MOTHUSI OAGILE

state under oath that:

1 I am the second respondent, Mothusi Oagile, the Acting Municipal Manager of the first respondent ("**the Municipality**"). I am duly authorised to depose to this answering affidavit on my behalf and on behalf of the Municipality.

2 The facts stated in this affidavit are true and correct and, except where the context indicates otherwise, within my own personal knowledge. Where I rely on information that is not within my personal knowledge, such information has been gathered from the first and second respondents' records. Where I have obtained information from certain of the first and second respondents' employees, I shall cause confirmatory affidavits by such persons to be filed in conjunction with this answering affidavit.

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O.P

INTRODUCTION

3 What is before this Honourable Court is Part B of the application brought by the applicants. Part A was disposed of on the basis of the order issued by Djaje DJP on 2 March 2022 in which the following was ordered :

> *"1 THAT the matter is declared to be urgent.*
>
> *2 THAT, pending the outcome and final determination of Part B of this application, and the successful implementation of the provision of the basic service of providing water to the community of Ditsobotla, it is ordered:*
>
> *2.1 That the eleventh respondent, the Ngaka Modiri Molema District Municipality (the "Ngaka District Municipality"), be ordered and directed forthwith to take all such steps necessary and required, and as a matter of urgency, to supply and ensure the provision of sufficient potable bulk water to Ditsobotla.*
>
> *2.2 That Ngaka Modiri Molema District Municipality be ordered and directed to forthwith take all such steps as are necessary and required to ensure the sustainable provision of potable water to the community of Ditsobotla.*
>
> *2.3 That Ngaka Modiri Molema District Municipality is ordered and directed to restore the sustainable provision of potable water to the community of Ditsobotla on or before 17 March 2023, and to report back to this court on affidavit on or before 17 March 2023 regarding (a) its detailed plan of all steps necessary to restore the sustainable provision of potable water to the community of Ditsobotla, including but not limited to who will take such steps, how the restoration will be achieved, and when the steps shall be taken; (b) all steps that have been taken to restore the sustainable provision of potable water to the community of Ditsobotla; (c) whether the sustainable provision of potable water to the community of Ditsobotla has been achieved or not; (d) further steps that still need to be taken to restore the sustainable provision of potable water to the community of Ditsobotla.*
>
> *3 That the matter remain under case management for purposes of inter alia any subsequent re-enrolment of the application in terms of Part A of this application, and further directives if necessary.*

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4 That the remainder of the relief sought in the application be postponed sine die.

5 THAT the costs of Part A are reserved for purposes of determination at the hearing of Part B of the application."

4 The applicants describe Part B in the following terms:

> *"The applicants seek an urgent remedy to the remainder of the issues arising from the collapse of local government, financial crisis in Ditsobotla and the serious and persistent material breach of the obligations of Ditsobotla to provide basic services and to meet its financial commitments in Ditsobotla. Local government has entirely collapsed and provincial government has not and cannot exercise the powers and functions it has assumed. Urgent intervention is desperately needed but also constitutionally required" (para 47.2).*

5 There is another application referred to as "first application" from which Part B borrows extensively, if not exclusively (case number M311/2021).

6 The applicants rely on the first application to support Part B. A response to Part B of necessity also is a response to the first application. Because of time pressures and the lateness of this answering affidavit, it is not necessary for me to deal with each and every paragraph pleaded in Part B and the first application.

7 I will necessarily deal with the topics that arise but will ultimately submit that the premise of the first application and Part B has disappeared because of the invocation of section 139(1)(c) of the Constitution by the North West Provincial Executive Council on 13 September 2022. The Executive Council of the Province on 13 September 2022, resolved to invoke section 139(1)(c) of the Constitution in the Municipality with immediate effect (annexure CC21).

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8 The effect of invocation of section 139(1)(c) is that the erstwhile Municipal Council of the Municipality was dissolved; an administrator was appointed; by-elections were then held on 14 December 2022 and a new Municipal Council was elected. That new Municipal Council has been in existence since the by-elections were declared free and fair, which was 14 days after the by-elections. I note that the applicants do not seek the dissolution of the municipal council.

9 Any case made against the Municipality prior to 13 September 2022 has collapsed because those allegations related to the Municipal Council that managed the affairs of the Municipality prior to its dissolution.

10 No case has been made out against the newly and recently elected Municipal Council which is responsible for the affairs of the Municipality. Elsewhere in this affidavit I set out the various measures and initiatives underway to ensure that the Municipality discharges its constitutional responsibilities.

11 The applicants have, however, not amended their papers to reflect these fundamental and critical changes. The case was made against a Municipal Council that was dissolved. That case is not a case made against the council that was established in December 2022 and which has now adopted measures to ensure that basic service delivery is rendered by the Municipality.

12 It is important then to also state in this affidavit what measures have been adopted to ensure that the Municipality delivers on its constitutional obligations to the local community.

13 The following key timeline events are important ultimately for the resolution of the issues that arise in this application:

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13.1 On 13 September 2022, the Provincial Executive Committee dissolved the Municipality under section 39(1)(c).[1]

13.2 On 10 October 2022, an administrator was appointed to assume both the legislative and executive mandate of the Municipal Council thus dissolved.

13.3 By-elections of the new Municipal Council were held on 14 December 2022.

13.4 A newly elected Municipal Council was declared elected 14 days after 14 December 2022.

13.5 Consequently, the executive and legislative powers of the Municipal Council were to be exercised by the newly elected Municipal Council and the administrator was, of necessity, discharged from office.

13.6 During the time that the administrator was the primary actor for and on behalf of the Municipality, there was no Municipal Council as it was statutorily disabled for the time being because it had been dissolved.

14 The fact that the administrator chose not to oppose the Part B proceedings does not mean that the Municipality cannot now place a version, especially an important one, regarding its affairs before this Honourable Court. I deal with this aspect in some detail in the section dealing with condonation.

[1] 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 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.

15 The entire structure of the first application and Part B is premised upon the assumed accuracy of the various reports on which the applicants rely.

16 Those reports attack the conduct of the Municipality at the time. It is not insignificant that a new Municipal Council has since been established to manage the affairs of the Municipality. Whilst those reports may have been accurate insofar as the Municipality is concerned, it is important to bear in mind that the current Municipality does not stand accused of those malfeasance and there are demonstrable initiatives underway to ensure that the Municipality is in a position properly to discharge its constitutional obligations.

17 The Municipality opposes the application on the bases different from those advanced by the other state respondents. I am unaware of any changes that the state respondents have effected to their papers. They say nothing about the critical event of 13 September 2022 and what the effect thereof is on the relief sought by the applicants. It is thus significant that the only party that deals with those aspects and the various measures and initiatives undertaken by the Municipality is the Municipality.

18 Province has already filed its answering affidavit and it will make its own case. All that the Municipality wishes to say in these proceedings is that all the allegations upon which the first application and this application Part B are based relate to a municipality that was previously run by a council that was dissolved on 13 September 2022. The new council has formulated plans which are essentially aimed at achieving the objects set out in section 139(5)(a)(i) and (ii) as well as other constitutional obligations and obligations found in the Systems

Act (the Municipality's services) read with applicable provisions in the MFMA and in the Structures Act.

WHAT HAPPENED?

19 Insofar as the various reports and/or documents were issued by state functionaries or state departments, those cannot be contradicted. It is however important to place context to these documents:

19.1 I skip the question of water because it was dealt with separately and it is the subject matter of Part A. The parties were ordered by Djaje DJP to report back on 17 March 2023. It is also a significant point to bear in mind that all the functions previously discharged by the Municipality in relation to water have now reverted to the primary obligation bearer, being the district municipality, which is a respondent in this matter. That issue then has become moot on that account.

19.2 The COGTA report (report on the state of local government in the North West Province) annexure "CC12" (p 57 para 74) is dated 24 August 2020. It has been overtaken by events.

19.3 The Treasury report is dated 2019 (p 58 para 6; see too annexure "CC16").

19.4 The Auditor-General report is dated 2018 (p 62 para 82, annexure "CC17").

19.5 The Minister's affidavit (p 70 para 93 annexure "CC18").

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19.6 The crisis report dealing with the 2014/15 to 2018/19 financial years (p 272 annexure "CC19").

19.7 The analysis report dealing with the 2015/16 to 2019/20 financial years (p 298 annexure "CC20").

19.8 The Minister of Finance's letter to the Premier is dated 26 October 2021 (p 0091-122 annexure "CC24".)

20 All of the above reports have been overtaken by the dissolution of the Municipal Council in September 2022. A new Municipal Council was elected and that new Municipal Council has inaugurated programmes in order to make sure that the problems identified in these various reports are dealt with effectively.

21 So, it is not good enough, as the applicants appear to think, to plead that Ditsobotla has been (historically, which cannot be gainsaid) under a crisis of its financial affairs; bedevilled by service delivery issues. Such an allegation does not mean that the case made can be sustained against the current Municipality that was elected in December 2022 and which has inaugurated programmes to make sure that the Municipality delivers on its constitutional and statutory obligations. This is the fundamental fallacy and irremediable flaw in the case brought by the applicants.

22 The application is premised upon certain allegations concerning service delivery. They are set out in paragraph 36, 39, in particular 39.1 (water), 39.2 (unavailability of municipal staff), 39.6 (refuse collection), 38.8 (sewerage), 39.10 (salaries), 39.11 (Eskom debt); 39.13 (general decay in the maintenance of infrastructure).

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23 In the section following I deal with the progress that has been made by the Municipality under the new Municipal Council.

Sewerage

24 The problems related to sewerage have not been experienced since March 2022. Ditsobotla and District have held talks which have resulted in District being responsible for providing and maintaining the three waste treatment plants and Ditsobotla is responsible for unblocking pipes, drains and man-holes and attending to blockages at businesses and homes.

25 During February 2023 I visited the sewer plants in Lichtenburg, Blyderville and Coligny and I can confirm that the discharge that goes to the river does so after having been treated and tested so as to avoid contamination.

26 Moreover, there are engineers and microbiologists who have been hired to attend to the problems pertaining to the sewer system and to make sure it functions optimally. These functionaries conduct constant testing of the sewer systems and the discharge.

27 In some areas there are problems with backflow into toilets when there is high volume of water in the system. These problems arise whenever there is loadshedding because the pump station requires electricity to function and District, to my knowledge, is in the process of securing backup generators.

28 The Municipality and District are discussing initiatives to acquire back-up generators and solar powered back-up options to alleviate the consequences of loadshedding.

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Refuse removal and collection

29 The Municipality is attending to refuse collection within its jurisdiction. Refuse is being collected once a week.

30 Some of the challenges are caused by the fact that not all of the vehicles in the fleet are operational, but they will in time be so once they have been repaired.

31 Where refuse collection is not possible as a result, for instance, if a truck requiring repairs, there are plans to (i) place mass containers near the affected area and (ii) to collect whatever refuse people would have placed elsewhere other than in the mass containers. Where this has happened, such mass containers have been placed and the collection of refuse at illegal dumping sites was and is being attended to.

32 The Municipality is in talks with District to provide specialized vehicles to Ditsobotla though some of the funding that District receives and to which Ditsobotla, as a local municipality under District, is entitled. I will deal with this aspect more fully below where I deal with Ditsobotla's financial position.

Electricity

33 The problems of electricity are not unique to the Municipality. They affect all South Africans. National government has intervened on behalf of various municipalities in their commercial relationship with Eskom. Eskom continues to provide electricity to the Municipality.

Billing

34 The historical billing problems are being attended to.

35 The Municipality is currently working together with National and Provincial Treasury to ensure the following:

35.1 The Municipality's financial position is improved;

35.2 The Municipality is able to overcome any challenges related to its financial system; and

35.3 The Municipality's needs from a financial systems contractor are crystalized so that, upon the expiry of the contract with the current financial system provider, Ditsobotla can seek a service that meets all the requirements that are suited to its needs.

36 On 7 March 2023 National Treasury and the Municipality held a meeting where, among other things, plans pertaining to strengthening the Municipality's financial position were discussed. Further meetings between National Treasury and the Municipality on this aspect will be held.

37 Provincial Treasury has deployed five personnel to the Municipality to assist with the plans set out above. From the meeting on 7 March 2023, it was agreed that the five personnel would complete the process of resolving the issues with the financial system within four weeks.

Access to money

Equitable share

38 The Municipality is entitled to an equitable share of funds received from National Treasury on a quarterly basis.

39 The recent equitable share in the amount of R44 million was received on 15 March 2023. It will also be used for, among other things, the payment of salaries and of certain service providers whose services assist the Municipality in its service delivery.

40 Further equitable shares are expected to be received in June, September, and December 2023. These monies, in addition to the revenue currently being collected by the Municipality in relation to municipal services, will be used to ensure that the municipal staff is paid, and that service delivery continues and this will be done in compliance with the Municipality's annual budget.

District allocation

41 The Municipality is also entitled to a portion of the equitable share received by District, which District then subdivides among its local municipalities. In this regard, the Municipality has been allocated R21 million from District. This money, together with the revenue currently being collected by the Municipality in relation to municipal services, will be used to ensure that the municipal staff is paid, and that service delivery continues and this will be done in compliance with the Municipality's annual budget.

42 Moreover, District is utilising a transversal tender of the National Treasury for purposes of servicing and securing of specialized vehicles (as regards refuse removal) and other assets (such as generators and other back-up options for sewer pumps) will be achieved.

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Historical billing

43 In as far as the retrospective billing for municipal services is concerned, if the Municipality is able to recover all the money owed to it, it will raise approximately R300 million in revenue – which would assist in sustaining the daily operations of Ditsobotla.

44 I accept that it is unlikely that all of the R300 million will be recovered, but it is expected that a significant proportion will be recovered. This money owed to the Municipality will be used also to fund expenditure.

Conditional grants

45 On 01 July 2022 the Municipality was allocated an amount of R41 Million as a conditional municipal infrastructure grant for capital projects. These projects are:

45.1 The construction of the Putfontein community hall, the construction of the Tlhabologong community hall, the upgrading of Itsoseng's roads and storm water, the Blyderville roads network, the Springbokpan community hall, the construction of Boikhutso's stormwater network, the refurbishment of Itekeng's sports facility and the fencing of Itsoseng cemetery and installation of an ablution block at Itsoseng cemetery.

46 The Municipality has already received an amount of R5.8 million in respect of invoices submitted for the work done, which was used to pay for services rendered in respect of the capital projects.

47 From this fund the Municipality will be in a position to fund the capital projects.

Plans and budgets

48 Since the election of the newly elected Municipal Council, a Revenue Action Plan for the period January 2023 to July 2023 was produced. A copy thereof is attached and marked "**MO1**". It is intended to raise revenue so that the Municipality will have sufficient operational funds.

49 The Municipality's plans will also be reflected in an integrated development plan that is currently under review for tabling before the newly elected Municipal Council by the newly elected Mayor on or before 31 March 2023.

Assistance from district, provincial and national government

50 I also highlight the following programmes:

50.1 Municipal Infrastructure Support Agency (MISA) has deployed an engineer that is working with Ditsobotla's staff on all aspects related to infrastructure related issues;

50.2 Provincial COGTA has availed the services of units to deal with the following:

50.2.1 provision of free basic services;

50.2.2 preparation of the IDP & Budget, spatial planning and Land Use Management policies.

50.2.3 municipal finance and support for financial management and reporting;

50.2.4 performance management systems; and

50.2.5 public participation.

50.3 I state this to demonstrate that service delivery is an important constitutional duty to the Municipality is being taken seriously by the current administration.

CONSTITUTIONAL FRAMEWORK

51 The full legal argument will be delivered at the hearing of the matter. It is important, however, to highlight the following provisions of the Constitution which, in my respectful submission, bear upon the resolution of the issues that arise in this application.

52 The application is premised upon the invocation of section 139(5), (*6) and (7):

> *"(5) 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—*
>
> ...
>
> *(7) 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."*

53 What is clear from the aforegoing is that the following must be true (obtain):

53.1 A crisis in its financial affairs;

53.2 Serious or persistent material breach of its obligations to provide basic services; or

53.3 Serious or persistent material breach of its obligations to meet its financial commitments or admits that it is unable to meet its obligations or financial commitments.

54 A serious financial crisis in the financial affairs must always exist before section 139(5) can be invoked. In addition, a persistent material breach of the obligations to provide basic services and/or to meet financial commitments or an admission to the inability to do one or both of them must exist. It is only then that the provincial executive imposes a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services or to meet its financial commitments.

55 The provincial executive is obliged to 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 appoint an administrator, 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. If the provincial executive does not dissolve the Municipality under paragraph (b) then the Municipality must assume responsibility for the implementation of the recovery plan to the extent that the Municipality cannot or does not otherwise implement the recovery plan.

56 Subsection (4) provides for an instance where a Municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure the budget of those revenue-raising measures are approved, including

dissolving the Municipal Council and appointing an administrator and also approving a temporary budget or revenue-raising measures to provide for the continued functioning of the Municipality.

57 The complaint is not that the Municipality has failed to approve a budget or any revenue raising measures to give effect to the budget. Nor is the complaint that the Municipality has not or does not or cannot approve legislative measures including a budget or any revenue-raising measure.

58 Therefore, in the context of this application, there are only two plausible grounds for invoking section 139(5) and it is because either –

58.1 The Municipality because 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. These seem to be the grounds advanced by the applicants.

58.2 These grounds, however, are contested by the Municipality itself in the preceding section dealing with what has happened to date but more importantly the fact that the Municipal Council currently in charge was only installed in December 2022 and had only in real terms a period of about two months to resolve the difficulties experienced by the previous Municipal Council. The current Municipality has instituted measures to ensure that the Municipality overcomes the challenge in its financial affairs as well as the problems affecting the optimal provision of serious basic services.

59 Therefore, the application has become moot. It has been rendered moot by the fact that we are currently not dealing with a manager/ administrator who was responsible for the problems identified in the various reports underpinning this application. The current Municipal Council is a new council. It is only two months old and, importantly, it can demonstrate that measures are currently afoot to ensure that the Municipality discharges its obligations in accordance with the Constitution and other statutes.

60 The applicants have not made out a case against this current Municipality. Therefore, the case made against the Municipality prior to the dissolution of the Municipal Council has become moot.

61 Section 136(4) of the MFMA 56 of 2003 provides that if the Municipality, as a result of a financial 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, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139.

62 Section 139 of the MFMA in turn says that the provincial executive must—

> *(a) request a municipal financial recovery services –*
>
> *(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) 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 sub-paragraph (i) and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in sub-paragraph (iii) and (iv) within a period not exceeding 90 days, determined by the MEC for Finance; and

(b) Consult the mayor of the municipality to obtain the municipality's cooperation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan."

63 The process set out in section 139(5)(a) of the Constitution must be read with section 139 of the MFMA. It does mean then that as one of the provincial interventions the provincial executive must do what is set out in section 139(1)(a) of the MFMA and the MEC for Finance in the province must do what is set out in section 139(2) of the MFMA.

64 Section 140 of the MFMA deals with the criteria for determining serious or persistent material breach of financial commitments. It requires that all relevant facts be considered and also provides that the factors set out in section 140(2) singly or in combination may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments.

65 None of the factors in section 140(2) are, by virtue of their existence, dispositive of the question whether a municipality is in serious material breach of its obligations to meet its financial commitments in terms of sections 139 of the Constitution and of the MFMA, as section 140(1) of the MFMA states, these factors "may indicate" a serious material breach of the obligation to meet its financial commitments. Even if any of these factors were present, they would be so present as a result of the initial issues which led to the section 139(1)(c) intervention. As part of the "all relevant factors" consideration under section

140(1), the fact that the newly elected council has just assumed office, the steps this council has taken, the steps that it is presently taking as well as the plans it has put in place for the future are all relevant factors for consideration.

66 In any event, on the facts as they presently stand, a case under section 140(2) has not been made out. Therefore, any case based upon section 139(5) to invoke the measures provided in sub-paragraph (a), (b) and (c) must fail.

THE ALLEGED CONSTITUTIONAL BREACHES

67 The applicants appear to suggest rather tentatively that the following constitutional rights have been infringed by the Municipality's conduct.

67.1 The right to be productive members of the community within which they reside;

67.2 The right to conduct business;

67.3 The right to be economically sustainable and profitable;

67.4 To offered continued and sustainable employment to other members in their community;

67.5 To participate effectively in economic and social activities within the community;

67.6 To contribute to the growth and wellbeing of the community as a whole and to maintain a stable income to their business, employees and this affects families in particular (para 44 of the founding affidavit).

68 They also plead section 22 of the Constitution (para 132).

69 The Municipality denies that the challenges that bedevilled the erstwhile Municipal Council continue in respect of the new administration. The case made in October 2022 does not apply to the current Municipal Council. I have dealt extensively with the programmes under way to ensure that the Municipality discharges its constitutional and statutory obligations.

70 As stated above, Ditsobotla under the newly elected municipal council is providing basic services and it is doing so reasonably given the context and all other relevant factors. I submit that Ditsobotla is presently not in serious or persistent material breach of its obligations to provide basic services and further argument on this point will be made at the hearing of this matter.

71 I submit therefore based on the above that the applicants have failed to demonstrate a constitutional case based on the above rights.

RELIEF SOUGHT

72 In this section I deal with the relief sought by the applicants insofar as they seek the invocation of section 139(5) read with (7). The case is ultimately dependent on whether or not the jurisdictional facts necessary for the invocation of the claimed relief exist or not. I have already said that they do not.

73 Insofar as prayer 2 is concerned, I deny that the Municipality is in a financial crisis which has rendered it serious and persistent material breach of the obligations to provide basic services and to meet its financial commitments and unable to meet its obligations and financial commitments. I have set out what has happened since the new Municipal Council was elected.

74 For all the reasons discussed above, I deny that a case has been made out for prayers 3 and 4 as well as prayer 5.

75 Prayers 6, 7 and 8 also suffer from the same defects as the other prayers above.

76 There are measures afoot to ensure that basic service delivery is rendered by the Municipality.

77 The fundamental flaw with prayers 8.2 (appointment of a "special master") is that it is unconstitutional.

78 The Constitution is quite clear that the executive and legislative authority of a municipality is vested in its Municipal Council. A Municipal Council has the right to govern, on its own initiatives, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

79 The powers of the municipality are set out in section 156 of the Constitution read with Part B of Schedule 4 and Part B of Schedule 5.

80 Under section 160(1)()a), a Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the Municipality.

81 The above constitutional powers are reinforced in the MFMA, the Structures Act and the Systems Act. Full legal argument will be delivered on this aspect at the hearing of the matter.

82 The Constitution does not envisage a third party being superimposed upon the municipality to discharge the roles and responsibilities assigned to the Municipality. Only national government or the province can take over the

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functions of a municipality. The concept of a special master is unconstitutional and cannot be countenanced by this Honourable Court.

83 This unconstitutional entity called the special master cannot procure goods and services for and on behalf of a municipality. The obligation to procure services and goods or indeed the power is that of the Municipality and cannot be parcelled out to an unconstitutional body.

CONDONATION

84 The application was launched on 7 October 2022, at a time when the municipal council had been dissolved in terms of section 139(1)(c) of the Constitution. As a result, an administrator was subsequently appointed, and he assumed the powers of the municipal council. Thereafter, the new municipal council was elected on 14 December 2022 and held its first meeting on 9 January 2023.

85 As a matter of fact, the Municipality could only address this Court once its municipal council was elected and functional. It is for this reason that the Municipality could not have filed papers in Part B in 2022 and it is for the same reason that it was not present during the processes that led to the hearing date of 23 and 24 March 2023 being decided.

86 I, as Acting Municipal Manager, was only appointed on 2 February 2023. Once the municipality became involved in this matter, it first had to deal with Part A by appointing legal representatives, collating the relevant facts, consulting with its legal team and preparing and filing an answering affidavit and heads of argument in Part A.

87 In preparation of Part B, the Municipality had to undertake a process like that which was undertaken in respect of Part A. Given that the application predates the election of the new municipal council and my appointment as Acting Municipal Manager, the facts relied on in the founding affidavit are vast and largely relate to a period when there would have been the previous municipal council and, subsequently, the administrator. As a result, it has taken Ditsobotla considerably long to make attempts at verifying the facts and allegations pleaded in the founding papers. Indubitably, this has had an impact on the time required for the collation of facts for Ditsobotla to adequately and comprehensively respond to the allegations made in the founding and other affidavits.

88 The effect of the relief sought in Part B has vast implications for Ditsobotla and its newly elected Municipal Council. Moreover, it may derail the plans which are currently being put in place at Ditsobotla. Effectively, the Court is being requested to grant relief that has the effect of neutralising a Municipal Council that was elected in December 2022 (pursuant to section 139 of the Constitution) at a hearing in March 2023, based on allegations made in a founding affidavit deposed to in October 2022.

89 Given the declaratory orders sought against the Municipality as well as the extraordinary nature of the rest of the relief sought, it is in the interests of justice that Ditsobotla's answering papers be accepted by the Court. This is more so because Ditsobotla is in a unique position to provide the Court with the facts that are relevant to the determination of Part B. These include responses to the allegations in support of the relief sought by the applicants, the relevant facts as they presently stand at Ditsobotla as well as the legal response to the substantive

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orders sought in Part B. Thus, and with respect, a decision in this matter would greatly benefit from the papers filed by Ditsobotla and the newly elected council ought to be afforded an opportunity to properly place its version to the Court.

90 It is not insignificant that the relief sought in Part B has far-reaching implications for the provincial and national government and it has great implication for the Fiscus.

91 Any prejudice that may be suffered by the applicants (which is denied) does not outweigh the prejudice that would arise if Part B were decided without the issues (facts and law) raised by Ditsobotla not being considered.

92 I respectfully submit that Ditsobotla has made out a case for condonation.

CONCLUSION

93 The applicants have not made out a case for the relief sought, at least insofar as they seek to place the Municipality under the administration of the provincial or national government. The application has in any event been overtaken by events which are known to the applicants (Part A). The applicants also know that the Municipal Council that was responsible by and large for the Municipality from November 2021 was dissolved in September 2022. This they state very clearly in the founding affidavit.

94 They are aware of the existence of a new Municipal Council. I have stated quite extensively the initiatives and measures taken by the new Municipality to deliver on its constitutional and statutory obligations.

95 The application has been overtaken by events. The applicants are aware thereof. They should either have postponed the application *sine die* or have sought to adequately supplement their papers.

96 I ask that the application be dismissed with costs, including costs occasioned by the employment of two counsel.

DEPONENT

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at MMABATHO on this the 21 day of MARCH 2023, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

7244342-1

COMMISSIONER OF OATHS

Full names: MOLEFE OBAKENG PETER

Address: 105 BATLHAPING STR

Capacity: CONSTABLE

TIRELO YA MAPODISI A AFRIKA BORWA
COMMUNICATION AND LIAISON
2023 -03- 21
MMABATHO
SUID AFRIKAANSE POLISIEDIENS
SOUTH AFRICAN POLICE SERVICE

REVENUE ACTION PLAN FOR THE PERIOD: JANUARY 2023 – JULY 2023

PURPOSE OF THE ACTION PLAN

- The purpose of the action plan is to address the billing backlog
- Simultaneously identifying challenges that are hindering the billing process
- To ensure enhancement of revenue collection
- To ensure the implementation of the action plan by role players

KEY FOCUS AREAS

Revenue action plan is compounded by the following aspects which are key areas of Revenue Collection:

- **Billing**
- **Meter readings**
- **Debt and Income Management**
- **Clearances**
- **Journals**

KEY AREAS	ACTIVITY	TARGET/TIME FRAME	RESPONSIBLE PERSON
Billing	Billing will be conducted fortnightly to address the backlog	July 2022 billing to be conducted – 10 March 2023 August billing to be conducted - 17 March 2023 September billing to be conducted - 31 March 2023 October 2022 billing to be conducted – 10 April 2023 November 2022 billing to be conducted – 18 April 2023 December 2022 billing to be conducted – 25 April 2023 January 2023 billing to be conducted – 02 May 2023 February 2023 billing to be conducted – 10 May 2023 March 2023 billing to be conducted – 19 May 2023 April 2023 billing to be conducted – 30 May 2023 May 2023 billing to be conducted – 09 June 2023 June 2023billing to be conducted 1July 2023	Accountant: Metering and billing Assistant accountant: Metering and billing Senior Accountant: Metering, Billing, Debt and Income Management Revenue Manager
Meter readings	Meter readings obtained through walk ins and phone ins will be captured daily Meter reading files obtained from the service provider on key customers will be incorporated on the financial system monthly Meter readers will physically verify meter readings discrepancy	Cut-off date for meter readings capturing will be effected on or before the end of every month	Accountant: Metering and billing Assistant accountant: Metering and billing Meter readers Senior accountant: Metering, Billing, Debt and Income Management Revenue Manager
Income and Debt Management	All Receipting will be conducted daily	Cut-off date for payments receipting will be effected on or before the end of every month	Acting Accountant: Debt and Income Management Assistant: Direct Deposit Assistant : Consumer Deposit Senior Accountant: Metering, Billing, Debt and Income Management Revenue Manager

Clearances	Issuance of clearance certificate according to FIFO (first in first out) method	**Minimum** of Twenty (20) certificates daily – Ongoing process Depending on the availability of the books.	Assistant accountant: Clearances Acting Accountant: Debt and Income Management Senior Accountant: Metering, Billing, Debt and Income Management Revenue Manager
Journals	Pending journals will be processed daily to ensure that the consumers accounts are updated timeously Journals relating to Meter readings will be processed from metering and billing section Journals relating to receipting will be processed from debt and income section Journals relating to property rates will be processed from property rates sub-section	Ongoing process	Assistant Accountants: Metering and billing Assistant Accountant: Credit Control Assistant Accountant: Valuations Accountant: Metering and billing Acting Accountant: Debt and Income Management Accounts Officer: Metering, Billing, Debt and Income Management Revenue Manager

CONCLUSION

Through the implementation of the aforementioned plan the Municipality will be able to address the billing backlog. Furthermore, the Municipality will be able to collect sufficient revenue by billing and issuing statements of accounts to consumers timeously. The revenue team will work together with other stakeholders(relevant departments) to ensure the success of this action plan ***"teamwork is a key to success".***