IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No.: 1969/2021

In the matter between:

MAFUBE BUSINESS FORUM	1st Applicant
AFRIFORUM NPC	2nd Applicant

and

MAFUBE LOCAL MUNICIPALITY	1st Respondent
THE MUNICIPAL MANAGER: MAFUBE LOCAL MUNICIPALITY	2nd Respondent
THE ADMINISTRATOR: MAFUBE LOCAL MUNICIPALITY	3rd Respondent
THE EXECUTIVE MAYOR: MAFUBE LOCAL MUNICIPALITY	4th Respondent
THE MUNICIPAL COUNCIL: MAFUBE LOCAL MUNICIPALITY	5th Respondent
THE PREMIER OF THE FREE STATE PROVINCE	6th Respondent
EXECUTIVE COUNCIL FOR THE FREE STATE PROVINCE	7th Respondent
THE MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS,	

FREE STATE PROVINCE	8th Respondent
THE MEC: FINANCE, FREE STATE PROVINCE	9th Respondent
THE MEC: DEPARTMENT OF ECONOMIC DEVELOPMENT,TOURISM AND ENVIRONMENTAL AFFAIRS, FREE STATE PROVINCE	10th Respondent
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	11th Respondent
THE MINISTER OF FINANCE	12th Respondent
THE MINISTER OF HUMAN SETTLEMENTS, WATER & SANITATION	13th Respondent
THE MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES	14th Respondent
NATIONAL COUNCIL OF PROVINCES	15th Respondent
FEZILE DABI DISTRICT MUNICIPALITY	16th Respondent
THE PRESIDENT OFTHE REPUBLIC OF SOUTH AFRICA	17th Respondent

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 27 JANUARY 2022

DELIVERED ON: 28 APRIL 2022

INTRODUCTION AND RELIEF SOUGHT BY THE APPLICANTS.

[1] The primary relief sought by the applicants is that the national executive, more specifically the eleventh to fifteenth respondents as Ministers of four national departments, should intervene in terms of section 139(7) of the Constitution to the effect that the Mafube Local Municipality's Council be dissolved and be placed under administration of the National Government. The Applicants furthermore seek a supervisory/structural interdict requiring the national respondents to report back to court on their implementation of the relief sought. In terms of prayer 3 of their amended Notice of Motion, the applicants also seek an order that the first applicant be permitted to assist and oversee in the Mafube

Local Municipality's ("the Municipality") administration on a temporary basis, until it can demonstrate to the court that it can successfully execute its constitutional and legislative obligations. At the hearing of this application on 27 January 2022, the applicants no longer sought the dissolution of the Municipal Council of the Municipality. A draft order was handed up, marked "Draft Order C" which reads as follows:

"1. It is declared that:

1.1 The First Respondent the Mafube Local Municipality (hereinafter referred to as "the Municipality") together with the Second to Fifth and Sixteenth Respondents (collectively referred to as "the Local Respondents") are in breach of the constitutional, legislative and regulatory obligations towards their residents.

1.2 The conduct of the First Respondent, (including the Second to Fifth and Sixteenth Respondents), in failing to ensure the provision of services to its community in a sustainable manner; in failing to promote a safe and healthy environment for its community; in failing to structure and manage its administration, budgeting and planning processes; in failing to give priority to the basic needs of its community; and in failing to promote the social and economic development of its community, is inconsistent with the Constitution of the Republic of South Africa,1996; is in breach of s 152(1) and s 153(a) of the Constitution, as read with its supporting legislation in terms of the Local Government: Municipal Finance Management Act of 56 of 2003 (hereafter: "the LGMFMA") and the Local Government: Municipal Systems Act 32 of 2000 (hereafter: "the LGMSA"), and is declared invalid to the extent of these inconsistencies.

1.3 In terms of the provisions of section 139(1)(b) and s 139(4), read with s 139(5), of the Constitution, and read further with sections 139 and 140 of the LGMFMA, it is declared that the provincial intervention by the Sixth to Tenth Respondents has failed to ensure that the Municipality and the rest

of the Local Respondents meet the obligations to provide basic services and to meet their financial commitments.

1.4 The conduct of the Sixth to Tenth Respondents, in failing effectively to carry out their mandate in terms of section 139 of the Constitution and the LGMFMA, to intervene and resolve the issues of the First and the rest of the Local Respondents, is inconsistent with the Constitution and is declared invalid to the extent of these inconsistencies.

1.5 The jurisdictional facts for mandatory National intervention in the affairs of Mafube Local Municipality in terms of s 139(7) of the Constitution, as read with s139, s140 and s150 of the LGMFMA are now present and have consistently been present in the past; as a result of the failure of the First to Fifth and Sixteenth Respondents, as well as the Sixth to Tenth Respondents, to ensure that the First Respondent meets its constitutional obligations.

2. In terms of the provisions of s139(7) of the Constitution, read with the aforementioned provisions of the LGMFMA, the Eleventh to Fifteenth and Seventeenth Respondents ("the National Respondents") are directed forthwith to intervene in the affairs of the First Respondent – in the stead of Sixth to Tenth Respondents – by exercising the powers conferred by section 139(4) and (5) of the Constitution, as read with sections 139, 140 and 150 of the LGMFMA. The Eleventh to Fifteenth and Seventeenth Respondents ("the National Respondents") are specifically directed:

2.1 to approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the Financial Recovery Plan detailed in paragraph 2.2 below, to provide for the continued functionality of the Municipality.

2.2 to implement a recovery plan aimed at securing the Municipality ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the

Financial Recovery Plan already developed for Mafube Municipality (the plan is attached to the Founding Affidavit as Annexure "JJS26").

2.3 to take immediate action to ensure that any and all pollution of the Vaal River or any other water sources in the Municipality's vicinity – by the Municipality's sewage works - ceases immediately.

3. The Eleventh to Fifteenth and Seventeenth Respondents are specifically directed to, in accordance with section 139(5)(b)(ii) read with section 172(1)(b) of the Constitution, adopt the following measures until they can report back to this Court that the Mafube Local Municipality is able to discharge its Constitutional obligations effectively:

3.1 The Eleventh to Fifteenth Respondents are ordered to permit the First Applicant to use its expertise to assist with the Municipality's administration - in the terms as set out in the Mafube Stakeholders Compact attached to the founding affidavit as annexure "JJS21") – including, but not limited to:

3.1.1 Revenue raising and debt collection on the Municipality's behalf;

3.1.2 Administration of the Municipality's water treatment and sewage plants by experts of the First Applicant;

3.1.3 General administrative functions such as communications with the general public;

3.1.4 Expert assistance in specialised matters regarding municipal infrastructure;

3.1.5 Establishing and serving as an Oversight Committee, as contemplated in the Municipal Legislation and Regulations, so as to assist the Eleventh to Fifteenth and Seventeenth Respondents in their role to provide oversight and security of the Municipality's finances;

3.1.6 Assisting the Eleventh to Fifteenth Respondents and Seventeenth Respondent in implementing the Financial Recovery Plan (Annexure "JJS26");

3.1.7 Providing skills training to employees of the Municipality to ensure sustainable service delivery.

3.2 The relief contemplated in paragraph 3.1 above shall operate on an interim basis until the Eleventh to Fifteenth and Seventeenth Respondents have satisfied this court that the Mafube Local Municipality will be able to operate effectively, free of such assistance.

4. The Eleventh to Fifteenth and Seventeenth Respondents are ordered to report to this Court under oath and in writing on their progress in the implementation of this order, as well as the prospects of the Municipality being able to execute its own functions, every three months from the date of this order being handed down.

5 The First, Third, Sixth and Eleventh Respondents, as well as any other Respondents who oppose this application, are ordered, jointly and severally to pay the costs of this application on an attorney and own client scale, including the costs consequent upon the employment of two counsel"

[2] In the event of the court not agreeing with the applicants' submissions regarding the interpretation of section 139(7) of the Constitution, then and in the alternative, the applicants seek an order in terms of "Draft order D", which is basically the same as "Draft order C" except that the reference to the jurisdictional facts present for mandatory national intervention in paragraph 1.5 refers to mandatory provincial intervention in terms of section 139(4) and (5).

[3] The failure of local municipalities, often plagued with numerous financial and operational hurdles, to provide service delivery to its residents and fulfil their executive obligations in terms of the Constitution, have been the subject of numerous court applications and debates in the media. The main issue in this application is the interpretation of section 139(7) of the Constitution and the question whether, if the jurisdictional facts for mandatory national intervention as provided for in section 139(7) are present, the court is entitled to leapfrog over the provincial government on the basis that the latter "cannot or does not, or does not adequately" exercise its obligations to intervene and whether such intervention may be sanctioned by the court.

[4] First applicant, the Mafube Business Forum, is a non-profit organization formed during August 2019 to address the dire circumstances in Frankfort and the neighbouring towns of Villiers, Tweeling and Cornelia (collectively known as "Mafube"). The first applicant represents various business interests in the area, amongst others, farmers, construction, engineering and local businesses. Second applicant is AfriForum (NPO), a non-profit organisation which identifies itself specifically as a civil rights organisation and acts on behalf of those of its members who reside within the area of the Municipality.

[5] The Municipality, cited as first respondent, is a category B municipality which shares its municipal executive and legislative authority with the Fezile Dabi District Municipality, the sixteenth respondent. The second respondent is the Municipal Manager of the Municipality. The Municipal Manager is the administrative head of the Municipality and executed his duties in conjunction with the third respondent, the Administrator who was appointed by the seventh and eight respondents. The fifth respondent is the Municipal Council of the Municipality ("the Municipal Council").

[6] The Premier of the Free State Province is cited as the sixth respondent in her capacity as the political and executive head of the Free State Province and of the Executive Council for the Free State Province, cited as the seventh respondent. The eight respondent is the MEC for Cooperative Governance and Traditional Affairs ("COGTA") for the Free State Province. The ninth respondent is the MEC for Finance for the Free State Province, cited in this application in her capacity as the provincial executive official whose mandate it is to facilitate and oversee the financial implications regarding the Municipality having been placed under administration. The tenth respondent is the MEC for Economic, Small Business Development, Tourism and Environmental affairs for the Free State Province.

[7] The eleventh respondent is the Minister of Cooperative Governance and Traditional Affairs. The Minister of Finance is the twelfth respondent ("the Minister of Finance" or "Treasury"). He is cited in his capacity as the national executive official mandated with overseeing national financial policy and compliance across all spheres of government and in particular, in terms of

ensuring that the municipality (and its administrator(s)) comply with the relevant national, provincial and local legislation relating to its financial requirements. The Minister of Human Settlements, Water and Sanitation is cited as the thirteenth respondent and the Minister of Environment Forestry and Fisheries is cited as the fourteenth respondent.

[8] The fifteenth Respondent is the National Council of Provinces, the national legislative body responsible for regulating and legislating with respect to the affairs of all provinces. The seventeenth respondent is the President of the Republic of South Africa ("the President"), who was joined in this application on 7 October 2021.

[9] The application is opposed by the first to eleventh, the thirteenth and fourteenth respondents. They filed one answering affidavit and are referred to by the parties and in this judgment as the "local and provincial respondents". Both the Minister of Finance and the President filed answering affidavits. The sixteenth respondent, the relevant district municipality only raised a legal point pertaining to the grant of the relief sought in prayer 3 of the Notice of Motion. The applicants filed two replying affidavits, the latter in response to the President's answering affidavit.

BACKGROUND.

[10] The application was issued on 4 May 2021. When the application was enrolled for hearing on the unopposed roll of the 29th July 2021, only the Minister of Finance had filed an answering affidavit. The remaining respondents requested a postponement of the matter to finalise their answering affidavits and for the matter to be heard during November 2021. This request was denied and the application was postponed for hearing to 16 September 2021.

[11] On 1 September 2021 the applicants filed a notice of intention to amend the Notice of Motion to meet an objection of non-joinder of the President as a party to the application and the legal point raised by the sixteenth respondent. At the time, the 27th of October 2021 had been proclaimed as election day. The Electoral Commission had accepted the recommendations of the Moseneke Report that the local government elections should be postponed to February 2022 or a later date. The Electoral Commissions' application to the

Constitutional Court to sanction the postponement of the local government elections was however dismissed.

[12] The local government elections took place on 1 November 2021, which lead to the argument by the local and provincial respondents that the primary relief, which is to dissolve the Municipal Council, has become moot. The application for an order dissolving the Municipal Council, which has been constitutionally elected on 1 November 2021, without substantiating facts placed before court regarding any the wrongs or failures by the newly elected municipal council, is argued to be legally incompetent.

[13] The Minister of Finance opposes the application on the basis that, even though the opposing government respondents accept that the Municipality is currently in financial distress, an appropriate response is a mandatory provincial intervention in terms of section 139(5) of the Constitution and not the primary relief sought by the applicants.

[14] On behalf of the President it is contended that the relief sought by the applicants is inconsistent with the constitutional and legislative scheme. The applicants have failed to demonstrate that the provincial executive has failed to adequately exercise its powers and functions in terms of the provisions of section 139(4) and (5) of the Constitution and have thus failed to make out a case for an intervention by national government under section 139(7) of the Constitution. Furthermore, the applicants cannot be granted the authority by the court to form part of an elected municipal administration. Consequently, the relief claimed in this regard is unconstitutional and unlawful.

THE SALIENT FACTS.

[15] The applicants aver that the municipality have a long history of problems pertaining to performing basic services such as refuse removal, managing dumping sites, pollution of the environment, repairing and maintaining sewage pumps/works. On 9 June 2004 the Municipality was ordered by the High Court of the Free State Division to repair sewage pumps servicing the Namahadi Township, situated at Frankfort. A similar order was issued on 2 August 2008.

[16] On 20 February 2014 this court, found the Municipality to be in contempt of its orders of 9 June 2004 and 2 August 2008. On 16 October 2015 a further high court order was issued pertaining to sewage spillage caused by the failing sewage works of the Municipality. Less than a year later, on 1 September 2016 yet another high court order was granted whereby the Municipality was compelled to take action and to rectify the multiplicity of problems relating to its sewage works. On 20 January 2017 the high court again found that the Municipality had not complied with its order relating to sewage spillage and has failed to properly operate and maintain the pumps at the sewage plant.

[17] The applicants furthermore argue that the Municipality has failed to maintain municipal infrastructure. The state of the roads in Frankfort is evident from photographs, appended to the founding affidavit, which illustrate the poor condition of a road surface and the presence of potholes. Photographs furthermore indicate sewage water overflowing from manhole covers into the streets of Frankfort. The problems encountered by the residents of the area are exacerbated by the malfunction of the municipalities' telephone/telefax system and website causing frustration in reporting complaints and declaring disputes regarding inaccurate municipal accounts received by some of the residents of Mafube.

[18] The applicants complained that the problems relating to sewage spillage and maintenance of the pumps at the sewage plant are closely linked to the Municipality having defaulted multiple times on the payment of its electricity bill with Eskom. Failure by the Municipality to make payments to Eskom culminated into numerous instances where Eskom discontinued the electricity supply to the Municipality. On 20 January 2017 this court granted first applicant the authority to make direct payments to Eskom in an effort to prevent electricity cut offs which would cause the pumps at the sewage plant to cease operating yet again.

[19] Not only has the Municipality been unable to execute its most basic constitutional functions regarding service delivery and maintaining the infrastructure, but due to serious maladministration and low levels of revenue collection, the Municipality had been unable to pay the salaries of its employees during 2014 and during 2020. The applicants contend that the Municipality

deducted pension fund contributions from the salaries of its employees, but failed to pay the pension fund contributions over to the pension fund. On 27 January 2016 a criminal case was opened under case number CAS 71/05/2015 for alleged fraud pertaining to money deducted from employers' salaries but not paid over to third parties. On 5 May 2016 this court granted an order under case number 3558/2015, in favour of the South African Municipal Workers Union Provident Fund (SAMWU), for an amount of R16 249 515.75 to be paid in respect of the deductions from workers' salaries by the Municipality.

[20] Employees of the Municipality embarked upon industrial action during the first week of November 2014 which intensified service delivery failures. On 10 May 2017 the municipal workers embarked on a violent strike and the unrest quickly spread to neighbouring towns which fall under the auspices of the Municipality. In Cornelia the resident mayor had to be evacuated for fear of his safety. During the unrest that erupted the office of the African National Congress in Cornelia fell victim to arsonists. On 23 July 2017 the municipal employees occupied the water treatment plant in Villiers and shut off water supply to the community. The urgent intervention by the MEC of COGTA was requested to salvage the situation experienced at the Villiers Waterworks. Apart from acknowledging the state of affairs no remedial action was forthcoming.

[21] The Municipality was described as the main culprit for the pollution of the upper Vaal River in a complainant, dated 30 November 2018, submitted to the South African Human Rights Committee. In a Quarterly Water Quality Status Report (the "Report") of the Vaal Dam Reservoir Catchment conducted by Rand Water for the period between 1 July 2019 and 31 December 2020, it was specified that all towns falling under Mafube, including Frankfort and Villiers contribute to the pollution of the Vaal River. The report indicates that water emanating from the Municipality's water treatment plant is marked as "unacceptable" in accordance with the Water Quality Guidelines. From the report (attached as an annexure to the founding affidavit) it is evident that unacceptable high levels of *e. coli* bacteria and faecal coliforms, amongst other undesirable contents, are recorded. The applicants contend that the state of affairs is of particular concern as it poses a serious health risk, even more so due to the Covid-19 pandemic.

[22] During October 2019 the Villiers Business Forum, which has since been amalgamated with the first applicant, in writing, requested authorisation from the Municipality to effect urgent repairs required at the Villiers Water Treatment Plant. Members of the community expressed their willingness and capability, due to their technical expertise, to assist the Municipality to remedy the deteriorating situation experienced at the Villiers Water Treatment Plant. The Municipality failed to reply to the request.

[23] During February 2019 an unemployed resident, Mr. Petrus Mazibuko began a clean-up programme in the Villiers area. Farmers and local businesses contributed equipment, fuel and items needed for the expansion of the clean-up process. At a public meeting held at Villiers on 14 March 2019, residents agreed on taking further proactive measures, within their means, to mitigate poor service delivery by the Municipality. Several meetings were held with the Municipality and members of the business community in an effort to improve the numerous problems encountered by the Municipality.

[24] The applicants contend that the situation in the Mafube area is exacerbated by the fact that no municipal accounts have been rendered by the Municipality for a considerable period of time. The first applicant proposed to assist with revenue generation and debt collection, as this was a major obstacle in the efforts of the struggling Municipality to provide services to the residents of the area. Pursuant to the judgment delivered in favour of SAMWU on 5 May 2016, the Sheriff attached some 14 farms, the property of the Municipality, to satisfy the judgment debt owed to SAMWU. On 2 October 2017 the office buildings of the Municipality as well as the residence of the mayor were attached by the Sheriff. A writ of execution was issued in favour of an engineering group against the Municipality on 10 September 2018.

[25] On 17 September 2019 the Standing Committee on Public Accounts ("SCOPA") summoned the Municipality and its administrator at the time, to a meeting held in Cape Town regarding the dire situation at the Municipality. The issues raised during the meeting were, *inter alia,* the Auditor General's repeated adverse findings regarding the Municipality's financial situation since 2014. The applicants contend that the second and third respondents failed to attend

several meetings scheduled by SCOPA to account for the Municipality's auditing and financial woes.

[26] Amongst the numerous issues raised by the applicants, which are also evident from the copy of the SCOPA meeting summary attached to the founding affidavit, are the payment made to the third respondent (the appointed Administrator) for a period during which no services were rendered as well as the transfer of an amount of R40 million from an ABSA Bank account to a First National Bank account operated by the Municipality without providing a reasonable explanation for such a transfer. Applicants further argue that the situation regarding of the financial maladministration at the Municipality remain in disarray as the Auditor General made a finding of "disclaimed audit opinion" in relation to the Municipality on 1 July 2020 due to a poor financial track record and wholly incomplete financial information provided to the Auditor General.

[27] The Municipality submitted its annual financial statements for the 2018/2019 and 2019/2020 period during February 2021, despite the employment of consultants and officials from the Free State Provincial departments to assist in finalising its financial statements. It is applicants' case that the Municipality is hopelessly insolvent as is evidenced by the numerous judgments granted against it and the fact that some of its immovable and moveable assets have been judicially attached. A further attachment order in the amount of R 61 153 440.27 against the Municipality in favour of Eskom, was granted on 17 August 2020.

[28] The local and provincial respondents do not take issue with the allegations of the alleged breach of constitutional obligations by the Municipality. However, since the provincial executive intervened during 2017, the pressing issues that beset the Municipality, *inter alia* the labour strike has been resolved and the collection of refuse and maintenance of infrastructure have commenced. Even though the discretionary intervention has restored the provision of basic services, such as repairs to water pipes and provision of refuse removal by purchasing a new compactor truck, the ideal stage pertaining to service delivery and maintenance of the Municipality's infrastructure has not been attained due to the financial crises experienced by the Municipality.

[29] On 6 April 2017 the eighth respondent announced in the Provincial Legislature that the Municipality was to be placed under administration in terms of section 139(1)(b) of the Constitution. Applicants complain that the provincial executive's decision to intervene and take over responsibility for the executive obligations of the Municipality, occurred without proof of any internal or Gazetted notice to indicate that the Municipality was under administration. A further aspect raised by the applicants is that the appointment of Mr. E M Notsi as administrator on 16 March 2017, appears to have occurred prior to the announcement that the Municipality was placed under administration. On 1 January 2020 Mr. M Moremi replaced the former administrator even though no public notification followed resulting in a lack of transparency, which is a further complaint raised by the applicants.

[30] The allegations that the Municipality is failing to provide reliable water and sanitation services are denied by the local and provincial respondents. Effective electricity services are provided by the Municipality through a third party and an effective sanitation maintenance team maintains the Municipality's sanitation infrastructure network. Even though the allegation that municipal accounts had not been issued for a considerable period of time is acknowledged, the challenges with regard to the printing and distribution of accounts have been addressed and the Municipality has been printing and issuing accounts since April 2021. The local and provincial respondents furthermore admit the problems experienced by the Municipality regarding its telephone lines and website connectivity, but contend that these issues have been receiving attention. The municipality has furthermore contracted an external service provider for repairing the mechanical pumps at the Municipal Water Treatment Plant.

[31] Since the discretionary intervention several changes and improvements followed. The pollution of the Vaal River remains a serious challenge facing municipalities alongside the river and according to the local and provincial respondents, the Villiers Waste Water Treatment Works is currently operating well. However, it is not in dispute that the Municipality is facing serious challenges even though service delivery has been improved. The financial state of the Municipality remains dire. It is therefore accepted by the local and

provincial respondents that the financial challenges facing the Municipality require a decision by the provincial executive for a mandatory intervention in terms of the provisions of section 139(4) and (5) of the Constitution.

[32] The Municipal Financial Recovery Service ("MFRS") was established in 2007 as part of National Treasury and performs the duties and functions assigned to it in terms of the Local Government: Municipal Finance Management Act[1] ("MFMA"). Subsequent to the Free State Provincial Executive had informed the MFRS of the section 139(1) intervention, the MFRS prepared a draft financial recovery plan for the Municipality and submitted same to the Municipality and the administrator(s) on 3 November 2017. The MEC for Finance of the Free State Province was responsible for approving the final financial recovery plan. Despite requests, the MFRS did not receive progress reports from the Municipality, its administrator(s) or provincial executive on the implementation of the financial recovery plan.

[33] On 11 December 2020, the Free State Provincial Executive Council resolved to terminate the section 139(1)(b) intervention with effect from 30 March 2021. Continued post intervention support as envisaged in section 154 of the Constitution was to be provided by the Free State Province. The Minister of Finance concedes, that the Municipality and the administrators failed to implement the financial recovery plan as is evident from the contents of the Handover Report, a copy of which is appended to the answering affidavit filed by the Minister of Finance. From the contents of the answering affidavit filed by the Minister of Finance it is evident that the financial position of the Municipality has not improved since March 2017 and has in fact worsened. The Municipality's financial situation is confirmed in the most recent report submitted by the Municipality to National Treasury in terms of section 71 of the MFMA. From the report it is evident that the Municipality owes creditors an amount of R 715 954 million.

[1] Act 56 of 2003.

RELEVANT LEGISLATION AND LEGAL PRINCIPLES.

[34] The Constitution established three spheres of government, being the national, provincial and local spheres.[2] Local government no longer exercise powers delegated to it by the national or provincial governments. Municipal councils are democratic assemblies exercising original legislative authority as has been acknowledged by the Constitutional Court in **Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others**[3] as follows:

> "The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government depended entirely on superior legislature. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates."[4]

[35] The term of office of a municipal council is five years.[5] In **City of Cape Town v Robertson**[6] the Constitutional Court emphasised that in the new constitutional dispensation, local government can no longer be considered as 'mere local authorities entrusted to provincial councils to administer'.[7] Despite its elevated status, the national, provincial and local spheres of government are 'distinctive', 'interdependent' and 'interrelated'.[8] However, local government's autonomy is not absolute and their 'interdependence' signifies the supervision of municipalities by other spheres of government. Each sphere performs supervisory functions, to varying degrees, over the others. The exercise of provincial autonomy is supervised by national government, while the local government, is supervised by both national and provincial governments. The national and provincial governments are however barred from compromising or

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[2] Section 40(1) of the Constitution.
[3] 1998 (12) BLCR 1458 (CC) at para 126.
[4] Fedsure at para 38.
[5] Section 159(1) Constitution and section 24(1) Local Government: Municipal Structures Act 117 of 1998.
[6] 2005 (2) SA 323 (CC).
[7] City of Cape Town v Robertson at [53]-[54].
[8] Section 40 (1) Constitution; City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2020 (6) SA 182 (CC) at [42].

impeding the ability or right of municipalities to exercise their powers or perform their functions. Both the national and provincial spheres of government must support and strengthen the capacity of municipalities to manage their own affairs and exercise and perform their functions.[9]

[36] Section 41(1) of the Constitution provides as follows:

> "All spheres of government and all organs of state within each sphere must-
>
> ...
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) not assume any power or function except those conferred on them in terms of the Constitution;
>
> (g) exercise its powers in a manner that does not encroach on the institutional integrity of the government in another sphere".

The Constitution entrusts each province with the general monitoring and support of local government within its borders.[10] These obligations are further set out in sections 105 and 106 the Local Government: Municipal Systems Act[11] (referred to as the "Systems Act"). Section 105 of the Systems Act provides as follows:

> "105. **Provincial monitoring of municipalities.**
>
> (1) The MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution to-
>
> (a) monitor municipalities in the province in managing their own affairs, exercising the powers and performing the functions;
>
> (b) monitor the development of local government capacity in the province; and
>
> (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise the powers and perform the functions."

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[9] Section 154(1) of the Constitution.
[10] Section 153 and 155(6)(a) and (b) of the Constitution.
[11] Act 32 of 2000.

[37] Section 106 of the Systems Act provides for a more intrusive form of monitoring which must be applied by the MEC to a specific municipality in certain circumstances. It must be applied if the MEC "has reason to believe that... maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality". The MFMA has added further supervisory duties in respect of financial management which are, however, distinctly subject to that of the national government. Unlike the general constitutional scheme that provides provinces with a principal supervisory role with regard to local government, the Constitution also accords the National Treasury an important supervisory function in terms of section 216(2). The powers and responsibilities of National Treasury in relation to municipalities are set out in Chapter 13 of the Constitution and section 5 of the MFMA.

[38] The applicants contend that the Provincial respondents' intervention in the Municipality in terms of section 139(1)(b) of the Constitution has failed and that they have also failed to escalate their intervention proactively as required in terms of the provisions of section 139(4) and (5) of the Constitution. Section 139(4) of the Constitution provides that:

> "(4) If 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 that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and: -
>
> (a) appointing an administrator until a newly elected Municipal Council has been declared elected; and
> (b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality".

[39] Section 139(5) of the Constitution provides as follows:

> "(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-

(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."

[40] The basis of the main relief sought by the applicants is premised on their interpretation of section 139(7) of the Constitution, which provides as follows:

"(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."

ARGUMENTS BY THE APPLICANTS.

[41] It is common cause that the Municipality is currently in financial distress. The crux of the dispute revolves around the interpretation of section 139(7) of the Constitution. Mr. Erasmus SC, counsel on behalf of the applicants, contends that on a plain reading of section 139(7), it simply does not stipulate that national intervention is only triggered after the provincial executive first undertook mandatory intervention in terms of the provisions of section 139(4) and (5), and

it failed. In **Natal Pension Fund v Edumeni**[12] Wallis JA explained that when one interprets, *inter alia,* legislative or constitutional provisions "... the inevitable point of departure is the language of the provision itself".[13] On a simple grammatical interpretation of section 139(7) it clearly provides for three alternative instances which compel national intervention, as is apparent from the use of the word "or", which appear twice in the first line of the section. According to the applicants the instances are the following:

41.1 where the province is unable to ("cannot"), or

41.2 fails completely to ('does not"), or

41.3 does not satisfactorily ("does not adequately") undertake mandatory intervention, where he restriction or facts for such intervention are indicated, the national government **must** undertake these in the province's stead. (Emphasis added)

[42] At the time of hearing of this application there is no decision that deals with national intervention. Mr. Erasmus SC referred to the matter of **Premier, Western Cape & Others v Overberg District Municipality & Others**[14] where the Supreme Court of Appeal held that section 139 of the Constitution permits and requires a provincial government to supervise the affairs of local governments and to act proactively in ensuring that local governments are not mismanaged and to intervene when things "go awry".[15] In **Overberg** the local government failed to approve the annual budget before the beginning of the financial year. The provincial executive took the decision, essentially by reason of its belief that it had no option based on a proper interpretation of section 139(4), to intervene, including dissolving the municipal council of the Overberg District Municipality, to ensure that the budget or revenue-raising measures are approved. Brand JA disagreed with the appellants interpretation of section 139(4) and held that the meaning of the section is quite plain in that:

> "It provides that, in the circumstances contemplated, the provincial executive must intervene. That is the imperative. Not that it must dissolve the council. Accordingly,

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[12] 2012(4) SA 593 (SCA).
[13] Natal Pension Fund v Edumeni at [18].
[14] 2011 (4) SA 441 (SCA).
[15] Premier, Western Cape v Overberg at [1].

> the executive is obliged to take some steps. It cannot do nothing. But the actual steps to be taken are left to the discretion of the executive. The only limitation imposed on that discretion is twofold. First, the steps must be 'appropriate', that is, the steps must be suitable. Secondly, these steps must be suitable for a particular purpose, that is, to ensure the approval of the annual budget."[16]

[43] With reference to **Premier, Gauteng and Others v Democratic Alliance and Others**[17] the applicants in the matter at hand contend that a proactive approach to intervention in section 139 confers a "duty" on the provincial executive to ensure that local government meets its executive obligations as is clear from the majority judgment of Mathopo AJ where the court held that:

> "The framers of the Constitution used the word 'may' in s 139(1) to not merely confer a discretion, but a power coupled with a duty"[18]

Therefore, even if the discretionary provision in section 139(1) confers a 'duty' upon the provincial executive, it follows that the peremptory provisions in section 139(4), (5) and (7) confer an even higher duty on the provincial and national executives. Mr. Erasmus SC argued that the provincial executive was obliged to do something about the state of affairs of the Municipality long ago to rectify its "persistent material breach of its obligations to provide basic services or to meet its financial commitments"[19]

[44] There is no need for a "total collapse"[20] of the Municipality before the provincial executive may intervene. To prevent a total collapse, the national executive must intervene where the provincial executive has failed to do so. The applicants contend that the jurisdictional facts warranting national intervention are present and have been present for some time. Section 152(1) of the Constitution explicitly sets out the objects of local governments and compels a municipality to achieve those objects namely:

> **"152 Objects of local government**
>
> (1) The objects of local government are -
>
> (a) to provide democratic and accountable government for local

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[16] Premier, Western Cape v Overberg at [19]
[17] 2022(1) SA 16 (CC).
[18] Premier, Gauteng v Democratic Alliance at [59].
[19] Section 139(5) of the Constitution.
[20] Premier, Gauteng v Democratic Alliance at [75].

communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1)."

[45] It is the applicants' case that there can be no doubt that the Municipality has failed the community in each of the aforesaid objects. The first applicant made several attempts to prompt the national executive to intervene, *inter alia* the following:

45.1 On 21 May 2020 a letter was addressed by the first applicant to the Minister of COGTA (Eleventh Respondent) to inform her of the situation at the Municipality and a reminder of her department's responsibility to intervene in terms of section 139(7) of the Constitution due to the provincial respondent's failure to remedy the dysfunctionality prevailing at the Municipality. No response was received.

45.2 On 26 November 2020 the first applicant addressed a further letter to the Minister of COGTA, wherein the factual background set out in the application, as well as the first applicant's willingness to assist the Municipality as recorded in the Compact, and the urgent need for intervention in terms of section 139(7), were restated. No response was forthcoming in spite of the fact that the letter was served by the Sheriff as well as service upon the Minister of Finance.

[46] Applicants' therefore argue that, as envisaged in section 139(7), the province in *casu* has not, alternatively, does not adequately "exercise their powers or perform their functions" provided for in sections 139(4) and/or (5) of the

Constitution, read with section 139 and Chapter 13 of the LGMFMA.[21] The dismal state of affairs has existed for almost five years since 2017 and the Municipality's finances has actually worsened after the Province's discretionary intervention in terms of section 139(1). The worsened financial predicament of the Municipality is confirmed by Treasury and alluded to by the President. The applicants contend that the Municipality is hopelessly bankrupt and the provincial executive acknowledges that the financial affairs of the Municipality are worrisome and agrees with the Minister of Finance's summation that a mandatory intervention by the province in terms of section 139(4) and (5) of the Constitution, read with section 139 of the MFMA, is warranted.

[47] The provincial executive has in fact conceded that it will, in consultation with the national sphere of government and the Municipality, take mandatory steps to intervene and restore the financial prudence in the Municipality and impose a financial recovery plan. However, despite the local and provincial respondents conceding the existence of the miserable state of affairs in its answering affidavit, deposed to by the Head of Department of Co-Operative Governance and Traditional Affairs in the Free State Provincial Government dated 5 August 2021, province has yet to implement such mandatory intervention. Therefore, the applicants contend that they have endeavoured all reasonable avenues to engage the officials of the Municipality, the administrators of the province and even the representatives from the National Department of COGTA, but to no avail.

[48] In **Unemployed People's Movement v Eastern Cape Premier and Others**[22] (the "**UPM**" case), the question whether a provincial government can be directed by court to intervene in accordance with section 139(5) of the Constitution, notwithstanding the assurance that such an intervention was already under way, was one of the issues to be determined by Stretch J. Similarly, as in the matter at hand, it was not in dispute that a number of crises have befallen the Makana Local Municipality ("Makana"). Makana had been plagued, over a significantly extended period, by a number of financial and operational crisis which had led to its failing to provide basic services and to meet its financial obligations. These

[21] Unemployed People's Movement v Eastern Cape Premier and Others 2020 (3) SA 562 (ECG) at [24].
[22] 2020 (3) SA 562 (ECG).

problems remained despite various interventions by the provincial executive under section 139 of the Constitution as well as numerous engagements by the applicants, the Unemployed People's Movement with the local and provincial authorities pleading with them to remedy the situation.

[49] Stretch J held that even though the municipal manager and several of the other respondents, referred to as the "municipal respondents" are or should actually be in the best position to advise the court on what has been achieved through the interventions and whether there is any merit in the allegations made by the applicants, they have instead opted to question the applicant's *locus standi* and the constitutionality of the applicants claim. The court referred to the stance taken by the "municipal respondents" as follows:

> "... based on the premise that, given the position adopted by the third respondent, and given the intended provincial intervention, dealing with the factual allegations contained in the founding affidavit would be 'superfluous. Apart from joining ranks with the provincial respondents on the absence of the jurisdictional requirements for the relief sought, and blaming the crisis on Makana's debt (and in particular one of some R68 million), the local respondents likewise take the point that for this court to compel the second respondent to invoke the provisions of s139(1)(c) of the Constitution would involve an impermissible intrusion by the judiciary on the constitutional obligations of provincial government, in disregard of the principle of separation of powers."[23]

[50] Regarding the need for declaratory orders sought by the applicants, reliance is once more placed on the **UPM** case where Stretch J made declarations of constitutional invalidity of the conduct of the local and provincial government for their failure to act in congruence with the Constitution in discharging their duties. Applicants contend that, not only is it necessary for a court to declare conduct unconstitutional where it clearly fails to comply with the Constitution, but courts are enjoined to do so by the Constitution as envisaged in section 172(1)(a) which provides as follows:

> "When deciding a constitutional matter within its power, a court: -
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

[23] Unemployed People's Movement v Eastern Cape Premier at [15].

(b) may make any order that is just and equitable..."

[51] In the **UPM** matter Stretch J further considered arguments advanced by the government respondents that the court's order would intrude upon the executive's domain and thus violate the separation-of-powers doctrine. The court held that the Constitution has empowered courts to be the ultimate referee on whether the Constitution or any other law has been breached. Section 34 of the Constitution entrenches the right of everyone to approach courts and to have their grievances resolved by an impartial court. The judiciary is tasked with overseeing compliance with the law by all branches of the state, its organs and the people of our country. The checks and balances embedded in the doctrine of separation of powers demand that courts must ensure that all branches of government act in accordance with the Constitution and therefore, when the Constitution requires that the judiciary decide upon a particular controversy, it can never amount to overreaching.[24]

[52] Regarding the constitutional and legislative requirements of community participation in local government the applicants argue that the Constitution itself provides for the "democratic will" of the residents to be "suspended" in section 139, in circumstances where the Municipality continually infringes on its residents' rights. Section 16 and 17 of the Systems Act. provides that:

> "A municipality must develop a culture of municipal governance that complements formal representative government with a system of participatory governance, and must for this purpose-
>
> (a) encourage, and create conditions for local community to participate in the affairs of the municipality..."

Furthermore, regarding community participation through local organisations, section 17(2) of the Systems Act provides that:

> "(2) A municipality must establish appropriate mechanisms, processes and procedures to enable the local community to participate in the affairs of the municipality..."

[53] On 26 September 2019 a meeting was held with representative from the provincial department of COGTA, the then Administrator of the Municipality,

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[24] Unemployed People's Movement v Eastern Cape Premier at [96]

representatives of the first applicant, the Villier's Business Forum and the District Agriculture Union. Thereafter a one-day workshop followed during October 2019 at which the first applicant proposed that it could assist the Municipality with revenue generation and debt collection. Representatives of the sixteenth respondent, COGTA, national and provincial, provincial treasury and relevant business forums attended the presentation. During November 2019 a "Mafube Stakeholders' Workshop" took place between the same stakeholders. These meetings culminated in the creation of an agreement called "Dawning of a New Day: The Mafube Stakeholders' Compact" (the "Compact").

[54] The Compact comprises a joint venture between Government and the Mafube business community and was aimed at addressing the Municipality's many challenges in a co-operative fashion and by involvement of the local community. During January 2020 further comments regarding the Compact were received from national treasury where after it was indicated that an official sign-off cession will follow during January 2020. However, attempts to conclude the Compact failed and the initial enthusiastic support by the Municipality and provincial stakeholders, to involve the local community and the first applicant in the affairs of the municipality, dwindled and at the end came to nothing.

[55] The applicants contend that the repeated exclusion of the first applicant from the council meetings and attempts to assist, coupled with the respondents reneging on the signing of the Compact, fly in the face of the applicable legislation. In **South African Municipal Workers Union v City of Cape Town and Others**[25] the Supreme Court of Appeal held that section 16 and 17 of the Systems Act foster a "... culture of participatory governance..." by the community as a whole in the decision-making processes.[26]

[56] In their replying affidavit, applicants contend that whatever marginal gains had been made by the discretionary intervention, these have deteriorated and regressed again since the intervention ended in March 2021. Despite the discretionary intervention the Municipality still fails to provide potable drinking water on a regular basis and therefore fails to provide in the most basic of human

[25] 2004 (1) SA 548 (SCA).
[26] At [10]-[11].

needs to its residents. On 29 July 2021 this court had to issue a mandatory interdict, compelling the Municipality to properly maintain its sewage works. Due to the Municipality's dire financial circumstances, it has been unable to purchase chemicals for the treatment of potable water. A local business had to assist with the required payment for the chemicals to avert a disaster due to province's failure to assist.

[57] Applicants insist that the relief sought is for them to be permitted, by court order, to assist the Municipality with the critical functions which it is struggling to perform for an extended period of time. There is no danger of applicants usurping the established democratic structures. During January 2022 the Municipality had yet to appoint a communications manager, a debt collection officer and set up a website to facilitate communication with the community. The community is prepared to offer help" free of charge" and has brought skills to the table as is evident from the contents of the Compact, but to no avail.

RESPONDENTS' OPPOSITION TO THE APPLICATION.

[58] Counsel on behalf of the local and provincial respondents, Mr Mokhare SC argued that the application was overtaken by time and renders the application moot or the relief claimed legally incompetent. It will be unconstitutional to make an order against the newly elected municipal council, which has just been elected by the electorate in November 2021, without any facts placed before court regarding the failures of this newly elected municipal council. The new municipal council must be given an opportunity to deal with the problems which they have inherited. The applicants did not file a supplementary affidavit to put facts before court regarding the failures by the new municipal council and merely now abandons the order sought regarding the dissolution of the municipal council.

[59] At the hearing of the matter, I raised the issue that the answering affidavit deposed to by the Director General of National Treasury on behalf of the Minister of Finance, has not been properly commissioned in that the commissioner omitted to complete the attestation clause by failing to state the place and the date of taking the declaration. The deponent initialled all the pages of the original

affidavit and the annexures thereto, signed the last page and so did the commissioner of oaths.

[60] With reference to **Lohrman v Vaal Ontwikkelingsmaatskappy**[27] and **FirstRand Auto Receivables (RF) Ltd v Makgobatlou**[28] Ms Hassim SC, counsel appearing on behalf of the Minister of Finance, submitted that there has been substantial compliance with the requirements pertaining to the commissioning of the affidavit. The non-compliance with the regulations of the Act made pursuant to the Justice of the Peace and Commissioner of Oaths Act[29] are directory only as supported by the full bench decision by Van den Heever J (as she was then) in **S v Munn**.[30]

[61] In the present matter, the stamp of the Commissioner clearly indicate that the Commissioner is a practising attorney and her full names and work address is thus provided[31]. Therefore, only the date on which the attestation occurred is unknown. From an e-mail pertaining to the filing of the said affidavit it can safely be assumed that this must have occurred on or shortly prior to 27 July 2021. It is clear therefore, in my view, that there was substantial compliance with the provisions of the regulations pertaining to the commissioning of the Minister of Finance's answering affidavit. I therefore accept the contents of the answering affidavit filed by the Minister of Finance as evidence in this application.

[62] On behalf of Treasury it is argued that the provincial executive acknowledges that the financial affairs of the municipality remain dismal and agrees with the Minister of Finance's summation that a mandatory intervention by the province in terms of section 139(4) and (5) is warranted. Ms Hassim SC emphasised that the facts in the **UPM** mater are not on par with the matter at hand on the basis that it is imperative to take into consideration that the election of the new municipal council, comprising of 15 the new democratically elected council members occurred during November 2021. This fact, which took place subsequent to the issuing of the applicants' application, is conveniently ignored

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[27] 1979 ALL SA 416 (T) at 423.
[28] 2021 ZAGPJHC 420 (8 September 2021).
[29] Act 16 of 1963.
[30] 1973 (3) SA 734 (NC).
[31] Liviero Civils (Pty) Ltd and Another v Amatola Water Boards (2614/2018) [2018] ZAECGHC 117 (20 November 2018).

and applicants still seek extra-ordinary relief even though the provincial executive stated their intention to intervene in terms of section 139 (4) and (5) of the Constitution. The relief claimed by the applicants unconstitutionally limits the authority of the newly elected municipal council and will enable the first applicant to usurp the powers, functions and duties reserved for the municipal council.

[63] Section 139(7) is not competent when regard is had to the proper interpretation thereof and the constitutional scheme of co-operative governance. Section 139(7) only permits national intervention in the affairs of a municipality if a mandatory intervention has been declared in terms of the provisions of sections 139(4) or 139(5) and the province is failing to adequately exercise its powers and perform the functions assigned to it in terms of a mandatory intervention. Furthermore, the remaining relief prescribing how the national government ought to exercise its power in the event of the relief being granted, is inappropriate and should not succeed. On the facts presented by the applicants there is no evidence that national government requires such directions from this court and constitutes an impermissible intrusion on the national government's powers.

[64] The contention on behalf of Treasury boils down to the argument that the applicants already speculate that provincial government will certainly fail if it has to intervene in terms of section 139(4) and (5) of the Constitution based on the allegation that the discretionary intervention failed to alleviate the problems experienced by the Municipality. Ms Hassim SC accentuated that the jurisdictional facts must exist and the procedures must be followed as held in the **Premier, Gauteng** matter prior to the exercise of public power: "Failure to observe the jurisdictional facts will result in the exercise of power being unlawful".[32] The step-by-step approach is not a novel approach. In the second Certification of the Amended Text of the Constitution of the Republic of South Africa[33] the Constitutional Court endorsed an interpretation of this section that required such an approach to interventions by the national executive.

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[32] Premier, Gauteng v Democratic Alliance at [69].
[33] 1996 (CCT37/96) [1996] ZACC 24; 1997 (1) BCLR 1; 1997 (2) SA 97 at paras 119 -120.

[65] On behalf of the President it is argued that the legislative scheme contemplates that the next lawful step after a discretionary provincial intervention is a mandatory intervention and thus supports the contentions regarding the interpretation of section 139(7) made on behalf of Treasury. The provisions of section 139 of the Constitution and the interventions provided thereunder must be construed in the context of the Constitution as a whole[34] and the interpretation of the provisions must be consistent with the scheme of the Constitution.[35] According to the President the applicants have failed to establish a case for national intervention preceding mandatory provincial intervention.

DISCUSSION.

[66] The Constitutional Court in **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others**[36] held that the three spheres of government are distinct from one another, yet interdependent and interrelated and each sphere is granted the autonomy to exercise its powers and perform its functions within the parameters of its defined space. Each sphere should not assume any power or function except those conferred on [it] in terms of the Constitution.[37]

[67] The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by sections 100 and 139 of the Constitution to undertake interventions and to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances. The Constitution entrusts provinces with the general monitoring and support of local government.[38] The instrument for intervening in local government is section 139 of the Constitution. Originally section 139 only permitted a provincial executive to intervene in a municipality when the latter failed to comply with an executive obligation. Two constitutional amendments however increased the scope for interventions during 1998[39] and 2003. The following four types of interventions are now

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[34] Premier, Gauteng v Democratic Alliance at [63] – [64] and [94].
[35] Matatiele Municipality v President of the Republic of South Africa (No2) 2007 (6) SA 477 at p487 – 488.
[36] [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC).
[37] At [43].
[38] Section 153 and 155(6)(a) and (b) of the Constitution.
[39] Section 1 Constitution Second Amendment Act of 1998.

provided for in terms of the Constitution and the MFMA:

(a) regular interventions in terms of section 139(1) of the Constitution, which include issuing a directive, assuming responsibility, and dissolving a municipal council;

(b) intervention procedures in the case of serious financial problems in terms of the MFMA, which may include imposing a financial recovery plan, assuming responsibility and dissolving a council;

(c) intervention in response to a municipality that has budgetary problems, including measures such as the mandatory dissolution of the municipal council and the adoption of a temporary budget or revenue-raising measures; and

(d) intervention in response to a municipality experiencing a crisis in its financial affairs, including measures such as the imposition of a financial recovery plan, a dissolution of the municipal council and assumption of responsibility.

[68] Section 139(5) was added to the Constitution in 2003 to address the meltdown of the financial core of a municipality. An intervention in the case of a serious financial problem is discretionary, but a mandatory duty is imposed on the provincial executive to intervene in the case of a serious financial crisis calling for more intrusive remedial steps. As this type of intervention is even more intrusive and compulsory, clear conditions are set as it can restructure how the particular municipality is governed and delivers services to the community.[40]

[69] The substantive requirements for an intervention in terms of section 139(5) are firstly that the municipality is in "serious or persistent material breach of its obligations to provide basic services"; and secondly the municipality is in "serious or persistent material breach of its financial commitments". The first obligation deals with the provision of, not all service obligations, but those that are "basic". The applicants contend that the requisite jurisdictional facts have existed for at least five years since 2017 and that basic service delivery remains appalling. There is a duty on municipalities to provide the following basic

[40] Steytler et al, Local Government Law of South Africa, Lexis Nexis, Issue 11, 15-46.

services: water, sanitation, electricity, public roads, storm water drainage and public transport.[41]

[70] I am of the view that the applicants have succeeded in making out a case that the municipality is in serious or persistent material breach of its obligation to provide basic services to the community. It is furthermore also in serious or persistent material breach of its financial commitments in that it is unable to comply with both contractual and statutory obligations, which, *inter alia* include the duty to pay for services rendered in terms of a contract (e.g., to pay Eskom for bulk electricity supplied) and the duty to make payment to the pension fund- or other contributions pertaining to its employees. These failures to comply with its financial commitments are clearly due to the Municipality's inability to send regular monthly statements to residents, raise revenue and to manage the financial affairs of the Municipality. The financial management is clearly in such a chaotic state resulting in a crisis in the financial affairs of the Municipality.

[71] In **Ngwathe Local Municipality v Eskom Holdings SoC Ltd and Others**[42] the court found that the municipality was clearly in a financial crisis and due to a debt amounting to R 274. 8 million, had admitted that it could not meet its financial commitments. Eskom, in a counter-application sought among other relief, a declaratory order that the Free State Provincial Executive be compelled to intervene in terms of section 139(5) of the Constitution on the basis that all the jurisdictional facts were present for compulsory intervention. Jordaan J however found that, even though all the requirements for a compulsory intervention were present, the relief to grant the declaratory order is refused "at this stage" because the premier, as head of the provincial executive, was not joined in the proceedings.

[72] Once the jurisdictional facts are present, the provincial executive must intervene. The applicants contend that notwithstanding the fact that the Municipality has been in severe and persistent breach of its financial commitments and is in serious or persistent material breach of its obligations to provide basic services, the province has failed to intervene and to exercise these

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[41] Oranje Watersport CC v Dawid Kuiper Local Municipality and Others [2018] ZANCHC42 (6 July 2018) at para 43.

[42] [2015] ZAFSHC 104 (28 May 2015).

powers or perform these duties adequately or at all.

[73] The President maintains that mandatory provincial intervention in terms of section 139(4) and/or (5) is imminent and contends that the application for relief sought in terms of national intervention, is premature. This also seems to be the gist of the argument put forth by both Treasury and COGTA. The history of events set out by the applicants provide a strong indication why national intervention is preferable. Provincial intervention in terms of section 139(1)(b) has not resolved the problems experienced by the municipality and at the time of the Handover Report during March 2021, it was already evident that mandatory provincial intervention, at the very least, was required.

[74] Applicants therefore argue that province" has been sitting on its hands" since March 2021, which necessitates national intervention. In any event, even though Treasury furnished a Financial Recovery Plan as early as November 2017, the Municipality and administrator(s) failed to implement such plan. Multiple provisions in the municipal legislation require active monitoring of local government and this was never done by province, which also provides further support for the applicant's argument that the provincial government cannot be relied upon to aid the Municipality.

[75] I, however, agree with the arguments raised by Ms Hassim and as pronounced in **City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others**[43] that the scope of intervention by one sphere of government in the affairs of another is highly circumscribed and that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances and then only temporarily and in compliance with strict procedures. The national executive is not granted open-ended power to take over the administration of a municipality whenever it deems it necessary. The two jurisdictional requirements must exist in order to trigger the valid exercise of powers provided for in section 139(7).

[76] In the **UPM** matter, the applicants sought an order directing the Eastern Cape Provincial executive to intervene in the Makana Municipality in terms of section 139(1)(c) of the Constitution. The court found that the jurisdictional facts for a

[43] 2010 (6) SA 182 (CC) at [44].

mandatory intervention in terms of section 139(5) were present and granted an order directing the provincial executive to institute mandatory provincial intervention and to take steps to dissolve the municipal council.

[77] Section 139(7) provides that the national executive must intervene "...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)". On the basis that the provision is phrased in the past tense and not in the future tense, it does not provide for an intervention if it appears to the national government that the province may not be able to exercise the functions at some point in the future. What is required is that facts exist to establish that the province cannot or has not exercised the powers and performed the functions which assessment cannot be made until such time as the province has been empowered to exercise the powers and perform the functions in subsections (4) and (5). Furthermore section 139(7) provides that in those circumstances "... the national executive must intervene in terms of subsection (4) and (5) in the stead of the relevant provincial executive." (Emphasis added)

[78] I agree with the interpretation of section 139(7) presented on behalf of the Minister of Finance and the other respondents that the national executive is only empowered to intervene in the affairs of the municipality if:

(a) the provincial executive has invoked the powers and functions in subsections (4) and (5) by implementing a mandatory provincial intervention; and

(b) the provincial executive has attempted to exercise the powers and perform the functions required for a mandatory intervention, but has not been able to adequately do so.

[79] Section 41(1)(e) of the Constitution provides that one sphere of government must respect the constitutional status, institutional powers and functions of government in other spheres. Applicants' argument that the province has failed to intervene successfully since the difficulties at the Municipality ensued many years ago, presupposes that province will inevitably fail to intervene successfully in terms of section 139(4) and/or (5) in the affairs of the Municipality. I am of the view that the judicial resolution of this question, which is a constitutional issue, should only be addressed as a matter of last resort and when the facts support

such an argument raised by the applicants[44].

[80] Mr. Erasmus SC argued that the same dilemma which Stretch J encountered in the **UPM** matter, is present, namely whether the court can attach any weight what so ever to the contention by the provincial respondents that an intervention in terms of section 139(4) and (5) is imminent. Stretch J explained the reason for the relief granted as follows:

> "[38] To my mind, it was imperative for the respondents to fully explain not only to this court, but more importantly to the applicant, what the status of the 2015 plan was and is, why it has been necessary to recommend another similar plan, what (if any) steps have been taken in terms of either of these plans, and how it is proposed that the new resolution will provide redress to the applicants when the history of this matter has shown that Council failed to implement the previous plan."

[81] The respondents do not dispute that the jurisdictional facts for mandatory intervention exists. The national and provincial spheres are not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures. This is the constitutional scheme in the context of which the powers conferred on each sphere must be construed. As in the **UPM** matter, I am satisfied that, as Mr Erasmus SC argued, "at least" an order for an intervention in terms of section 139(4) and/or(5) is called for under the circumstances.[45] I am satisfied that, not only is it necessary for courts to declare conduct unconstitutional where it clearly fails to comply with the Constitution, but courts are enjoined to do so.[46] I am in agreement with the submissions made by Mr Erasmus SC and Mr Eilers, who appeared with Mr Erasmus SC, that even though the provincial respondents concede that an intervention in terms of section 139(4) and/or (5) is to be implemented, no indication apart from the vague concession that such implementation is "imminent" has been forthcoming. As in the **UPM** matter, the applicants and the residents in the Mafube district have done their "level best"[47]

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[44] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at para 21.
[45] Unemployed People's Movement v Eastern Cape Premier at [92] and [96].
[46] Section 172(1)(a) of the Constitution.
[47] Unemployed Peoples Movement v Eastern Cape Premier at [62].

to obtain intervention by the provincial as well as the national executive to provide a solution for the ongoing difficulties experienced by the Municipality.

[82] It has been contended by the President that, applicants now, do not seek the dissolution of the municipal council and furthermore, as an alternative, seek (in accordance with Draft Order D) mandatory provincial intervention in terms of section 139(4) and/or (5) which relief was not included in their Notice of Motion. I, however, agree with Mr Erasmus SC that the relief sought in the alternative is consistent with the factual statements made and the court is therefore entitled to grant relief similar or less than that sought by the applicants in their Notice of Motion[48].

[83] I am of the view that the court is entitled by the provisions of section 172(1)(a) of the Constitution, when deciding constitutional matters to declare that the conduct by the respondents, where applicable, is inconsistent with the Constitution and to grant structural interdictory relief called for in terms of the constitutional and legislative provisions upon which the applicants rely for the relief. The provincial respondents have clearly not given effect to its constitutional obligations pertaining to the Municipality and has already decided to implement its intervention in the affairs of the Municipality in accordance with section 139 (4) and/or (5), but has not indicated in any clear terms exactly what and when it intends to do so. The order I intend to grant in this application goes toward ensuring that basic services be provided to the residents of the Mafube district and that the Municipality be financially capable of meeting its obligations and resolving the financial crises experienced for a considerable time.

[84] I do however agree with Mr Mokhare SC that the effluxion of time and the fact that the election that occurred on 1 November 2021, has impacted negatively upon the relief sought by the applicants regarding the structural interdicts to ensure assistance by the members of the first respondent. Even though the applicants have demonstrated, in terms of the requirements of a structural interdict, clear rights that accrue to themselves and the residents of the Municipality, and that a number of these rights are still being violated- directly and indirectly by abject failure of good governance by the Municipality, the fact

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[48] Amler's Precedents of Pleadings, (9th Edition) Part A: Principles of Pleadings, VIII Prayers.

that a new municipal council has since taken over the functions of the Municipality, requires that the municipal council should be provided with a fair and reasonable opportunity to address the problems that they have inherited since 1 November 2021.

[85] Local government provides a forum for local community participation in matters assigned to municipalities. On 1 November 2021 the members of the Mafube Municipal Council were democratically elected by those they serve. Municipal Government provides for grass roots democracy. The choices made by voters at municipal level must be respected. The new municipal council consists of 15 newly elected members with only 2 members who served on the previous council which, as Mr Mokhare SC argued, is a clear expression of the voters' dissatisfaction with their representatives on the previous municipal council. I am therefore of the view that it would be inappropriate and legally unsustainable to grant the orders in prayer 3 (including the subparagraphs) without any input from the first (Mafube Local Municipality), second (the Municipal Manager), fourth (the Executive Mayor) and fifth (the Municipal Council) respondents on the ground that the new municipal council obviously did not form part of the stakeholders' meetings regarding the Compact.

[86] The question remains to what extent do the first applicant and the members of the community want to assist the Municipality. In this regard the new municipal council must be ceased with these issues as they were not involved in the meetings which led to the drafting of the Compact. The Municipality should welcome any assistance by members of the community as it is laudable to propose assistance, without renumeration, to the struggling Municipality. In this regard applicants' failure to, at least, postpone the application for a period to ascertain from the newly elected municipal council what their stance is pertaining to the first applicants' proposals to assist the Municipality, is concerning. To my mind the failure to involve the present municipal council and its members renders this aspect of the application moot. The probability exists that the new municipal council will welcome any aid from experts in the community to improve revenue-raising, debt collection, general administrative functions and all the other aspects set out in the Compact.

[87] In **Afriforum NPC and Others v Eskom Holdings Soc Limited and Others**[49] Murphy J explained the doctrine of mootness and ripeness as follows:

> "[105] The doctrine teaches that the courts should decide only cases entailing a real, earnest and vital controversy between litigants and not entertain merely hypothetical cases or cases that are only of academic interest. The business of a court is generally retrospective; it deals with situations or problems that have already crystalised, and not with prospective or hypothetical ones. Any claim to be justiciable must present a real and substantial controversy which unequivocally calls for the adjudication of the rights asserted. Litigants should not approach a court if they have not been actually subjected to prejudice or face the real threat of prejudice as a result of legislation or conduct alleged to be unconstitutional or illegal.
>
> [106] The rules regarding mootness and ripeness are sub-rules of the doctrine which relate to the timing of an application – ripeness discourages a court from deciding an issue too early, mootness prevents a court from deciding an issue when it is too late. Ripeness requires a litigant to wait until a judicial decision can be grounded in concrete relief. A case is moot if it no longer presents an existing or live controversy. The rules apply equally in constitutional and administrative law.[50]

[88] The fact that the application was issued during May 2021 whereafter the municipal election occurred on 1 November 2021 implies, to my mind, that a change of facts has led to "a fear resting on speculative apprehensiveness" and not on a clear and actual controversy of a "probable threat of future harm" that the current municipal council will not accept the first applicant's proposal for assistance as set out in the Compact.[51]

CONCLUSION

[89] On 7 April 2022 it was announced in the media that the Cabinet has welcomed the decision of the Free State Provincial Executive to place Mangaung Metropolitan Municipality and the Enoch Mgijima Municipality under administration in terms of section 139(7) of the Constitution. Evidently the mandatory intervention in terms of section 139(5)(a) and (c) of the Constitution

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[49] [2017] 3All SA 663 (GP).
[50] Afriforum v Eskom at [105] and [106].
[51] Afriforum v Eskom at [107] and [108]

since December 2019 of the Mangaung Metropolitan Municipality failed which culminated in the direct involvement and takeover of responsibilities by national government. I mention this aspect, which occurred subsequent to the hearing of the matter at hand, merely on the basis of an announcement conveyed by the media. The court may take judicial cognisance of the said announcement, however the underlying facts and reason for the decision by the Free State Provincial Government are unknown.

[90] The timing of the applicants' application, in my view, hampered the ultimate success of the applicants' case in obtaining, at this stage, an order for national intervention of the Municipality.

[91] As to costs, there is no reason why costs should not follow the result only in respect of the relief granted. There is no reason why the national respondents and the sixteenth respondent be mulct with a cost order. However, concerning the national respondents and the sixteenth respondent, I find it apposite that a cost order should be made in accordance with the principle laid down in the matter of Biowatch Trust v Registrar Genetic Resources and Others.[52]

ORDER.

[92] The following order is granted:

"1. It is declared that:

1.1 The First Respondent the Mafube Local Municipality (hereinafter referred to as "the Municipality") together with the Second to Fifth and Sixteenth Respondents (collectively referred to as "the Local Respondents") are in breach of the constitutional, legislative and regulatory obligations towards their residents.

1.2 The conduct of the First Respondent, (including the Second to Fifth and Sixteenth Respondents), in failing to ensure the provision of services to its community in a sustainable manner; in failing to promote a safe and healthy

[52] 2009 (6) SA 232 (CC).

environment for its community; in failing to structure and manage its administration, budgeting and planning processes; in failing to give priority to the basic needs of its community; and in failing to promote the social and economic development of its community, is inconsistent with the Constitution of the Republic of South Africa, 1996; is in breach of s 152(1) and s 153(a) of the Constitution, as read with its supporting legislation in terms of the Local Government: Municipal Finance Management Act of 56 of 2003 (hereafter: "the LGMFMA") and the Local Government: Municipal Systems Act 32 of 2000 (hereafter: "the LGMSA"), and is declared invalid to the extent of these inconsistencies.

1.3 In terms of the provisions of section 139(1)(b) and s 139(4), read with s 139(5) of the Constitution, and read further with sections 139 and 140 of the LGMFMA, it is declared that the Provincial intervention by the Sixth to Tenth Respondents has failed to ensure that the Municipality and the rest of the Local Respondents meet the obligations to provide basic services and to meet their financial commitments.

1.4 The conduct of the Sixth to Tenth Respondents, in failing effectively to carry out their mandate in terms of section 139 of the Constitution and the LGMFMA, to intervene and resolve the issues of the First and the rest of the Local Respondents, is inconsistent with the Constitution and is declared invalid to the extent of these inconsistencies.

1.5 The jurisdictional facts for mandatory Provincial intervention in the affairs of Mafube Local Municipality in terms of s 139(4) and (5) of the Constitution, as read with s139, s140, s 146 to 149 of the LGMFMA are now present and have consistently been present in the past; as a result of the failure of the First to Fifth and Sixteenth Respondents, as well as the Sixth to Tenth Respondents, to ensure that the First Respondent meets its constitutional obligations.

2. In terms of the provisions of s139(4) and (5) of the Constitution, read with the aforementioned provisions of the LGMFMA, Sixth to Tenth Respondents ("the Provincial Respondents") are directed forthwith to undertake a mandatory provincial intervention into the affairs of the First Respondent by exercising the powers conferred by section 139(4) and (5) of the Constitution, as read with sections 139, 140 and 146 to 149 of the LGMFMA. The Sixth to Tenth Respondents are specifically directed:

2.1 to approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the Financial Recovery Plan detailed in paragraph 2.2 below, to provide for the continued functionality of the Municipality.

2.2 to implement a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the Financial Recovery Plan already developed for Mafube Municipality (the plan is attached to the Founding Affidavit as Annexure "JJS26").

2.3 to take immediate action to ensure that any and all pollution of the Vaal River or any other water sources in the Municipality's vicinity – by the Municipality's sewage works - ceases immediately.

3. The First to Tenth Respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved. This includes the costs consequent upon the employment of two counsel, where applicable. The Eleventh to Seventeenth Respondents and the Applicants are ordered to pay their own costs occasioned by the claims against the said respondents.

I VAN RHYN AJ

On behalf of the Applicants:	ADV. F J ERASMUS SC ADV P EILERS
Instructed by:	HENDRE CONRADIE INC
On behalf of the First - Eleventh & Thirteenth and Fourteenth Respondents	ADV.W.R.MOKHARE SC ADV T.M.NGUBENI
Instructed by:	STATE ATTORNEY BLOEMFONTEIN
On behalf of the Twelfth Respondent:	ADV A HASSIM SC ADV F HOBDEN
Instructed by:	STATE ATTORNEY BLOEMFONTEIN
On behalf of the Sixteenth Respondent:	ADV A. E AYAYEE ADV L MUKOME
Instructed by:	MODISE & MODISE ATTORNEYS BLOEMFONTEIN
On behalf of the Seventeenth Respondent:	ADV M LEKOANE
Instructed by:	STATE ATTORNEY BLOEMFONTEIN