

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

**CASE NO: M311/2021**

In the matter between:-

**SAKELIGA NPC**

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL:**

**NORTH WEST PROVINCE: COOPERATIVE GOVERNANCE**

**HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS**

1<sup>st</sup> Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL:**

**NORTH WEST PROVINCE: FINANCE**

2<sup>nd</sup> Respondent

**THE MINISTER: NATIONAL DEPARTMENT OF**

**COOPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS**

3<sup>rd</sup> Respondent

**THE MINISTER OF FINANCE**

4<sup>th</sup> Respondent

**DITSOBOTLA LOCAL MUNICIPALITY**

5<sup>th</sup> Respondent

**NALEDI LOCAL MUNICIPALITY**

6<sup>th</sup> Respondent

**THE PREMIER: NORTH WEST PROVINCE**

7<sup>th</sup> Respondent

**ESKOM SOC LIMITED**

8<sup>th</sup> Respondent

**MAGALIES WATER BOARD**

9<sup>th</sup> Respondent

**SEDIBENG WATER BOARD**

10<sup>th</sup> Respondent

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**FILING SHEET**

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*Filed by: Ms. B Moloto  
State Attorney, Mahikeng  
018 384 0269 / 083 730 0572*

DOCUMENT : ANSWERING AFFIDAVIT

DATED AT MMABATHO ON THIS THE 25 DAY OF AUGUST 2021

  
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25 Aug 21

COPY HEREOF RECEIVED ON THIS THE .....DAY OF AUGUST 2021

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FOR PLAINTIFF'S ATTORNEYS

***Filed by: Ms. B Moloto  
State Attorney, Mahikeng  
018 384 0269 / 083 730 0572***

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

**CASE NO: M311/2021**

In the matter between:

**SAKELIGA**  
Applicant

**NPC**

and

**THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST  
PROVINCE: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT  
AND TRADITIONAL AFFAIRS**  
Respondent

First

**THE MEMBER OF THE EXECUTIVE COUNCIL: NORTH WEST  
PROVINCE: FINANCE**  
Respondent

Second

**THE MINISTER: NATIONAL DEPARTMENT OF COOPERATIVE  
GOVERNANCE AND TRADITIONAL AFFAIRS**  
Respondent

Third

**THE MINISTER OF FINANCE**

Fourth Respondent

**DITSOBOTLA LOCAL MUNICIPALITY**

Fifth Respondent

**NALEDI LOCAL MUNICIPALITY**

Sixth Respondent

**THE PREMIER: NORTH WEST PROVINCE**

Seventh Respondent

**ESKOM SOC LIMITED**

Eighth Respondent

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**MAGALIES WATER BOARD**

Ninth Respondent

**SEDIBENG WATER BOARD**

Tenth Respondent

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**ANSWERING AFFIDAVIT**

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I the undersigned,

**PHIHADU EPHRAIM MOTOKO,**

hereby make oath and declare that:

1. I am a major male Head of Department, employed as such by the Department of Cooperative Governance and Traditional Affairs in the North West Province, with my office situated at 2<sup>nd</sup> Floor, West wing, Garona Building, University Drive, Mmabatho.
2. The facts I depose to in this affidavit fall within my personal knowledge, unless the contrary is stated or appears from the context, and are, to the best of my belief, both true and correct.

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3. Where I make allegations or submissions of a legal nature I do so on the advice of the first to third and seventh respondents' legal representatives, which I believe to be correct and accept.
4. I depose to this answering affidavit on behalf of the first to third and seventh respondents. The first respondent is the Member of the Executive Council for Cooperative Governance, Human Settlement and Traditional Affairs in the North West Province (MEC for COGHSTA), the second respondent is the Member of the Executive Council for Finance in the North West Province (MEC for Finance), the third respondent is the Minister of Cooperative Governance and Traditional Affairs (Minister of COGTA) and the seventh respondent is the Premier of the North West Province (Premier).
5. It is alleged at paragraph 24 of the founding affidavit that the Premier is "specifically joined" to these proceedings as the head of the provincial executive. When one has regard to the notice of motion and the founding affidavit, it is clear therefrom that Sakeliga NPC (Sakeliga), the applicant in this matter, does not seek any relief against the Premier on the merits. It is not surprising therefore that an allegation is made at paragraph 25 of the founding affidavit that Sakeliga does not seek a costs order against, inter alia, the Premier and that such order will only be sought in the event of the Premier electing to oppose the application. The Premier opposes the application despite the fact that no relief is sought against him on the merits. The reasons for his opposition will appear below.

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6. I have read the founding and supplementary founding affidavits of **PIETER JACOBUS LE ROUX** (Mr le Roux), deposed to on behalf of Sakeliga, and wish to respond to the allegations contained in the founding affidavit; the allegations in the supplementary founding affidavit do not require a response from the respondents on whose behalf I depose to this affidavit.
7. But I wish to deal with certain issues before I respond to the allegations in the founding affidavit.
8. The first relates to the late filing of this affidavit. I am advised that the period within which the affidavit should have been filed has lapsed. For this reason, the first to third and seventh respondents need to apply for condonation of the late filing of the affidavit.
9. The second issue relates to the relief sought in prayers 2 to 5 of the notice of motion. As I shall demonstrate, that relief offends against the principle of legality and it is incompetent for this honourable Court to grant it. It is apparent that the relief sought at prayer 6 depends on the granting of the relief sought at prayers 3 and 4. Since the relief sought in the latter prayers cannot be granted, it must follow that the relief sought at prayer 6 also cannot be granted. Apparently, the relief sought in prayers 7 to 16, insofar as the MEC for COGHSTA, the MEC for Finance and the Minister of COGTA are

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concerned, also depends on the granting of the relief sought in prayers 2 to 6. It follows that that relief also cannot be granted. I will therefore request that the application against these respondents be dismissed with costs.

10. The third issue is a point *in limine* relating to the non-joinder of the North West provincial executive council. I have stated that Sakeliga does not seek any relief against the Premier on the merits, although it alleges that he is “specifically joined” as the head of the provincial executive. The relief sought at prayers 2 to 5 is competent only against the North West provincial executive council. It has not been joined as a party in these proceedings and no relief is sought against it. It should have been joined. In the event that this Court does not dismiss the application for the reasons set out in the preceding paragraph, then the Court should dismiss it for the non-joinder of the North West provincial executive council. Alternatively, the Court should not entertain the application on the merits and determine it unless and until Sakeliga has joined the provincial executive council as a party hereto. The failure of Sakeliga to join the provincial executive council to these proceedings was grossly negligent, to say the least. In the event that the Court upholds the point *in limine*, then it should direct Sakeliga to pay the first to third and seventh respondents’ costs.

11. I now proceed to deal with the above three issues in turn.



## CONDONATION

12. I am advised that this affidavit should have been filed within 15 (fifteen) days after a notice of intention to oppose was filed on behalf. Due to the fact that it was or would be impossible for this affidavit to be finalised, commissioned and filed within that period, the first to third and seventh respondents' attorneys, the State Attorney, Mahikeng requested Sakeliga's attorneys for an indulgence and extension of two weeks to file it. The indulgence was granted. The State Attorney later approached Sakeliga's attorneys for a further indulgence to file the affidavit by or on 19 August. That request was also granted.
13. I do not deem it necessary to set out the reasons which resulted in the initial request for an indulgence herein. But should the first to third and seventh respondents be required to provide those reasons they will file a supplementary answering affidavit, with the leave of the Court, setting out those reasons.
14. The first to third and seventh respondents were initially represented by senior counsel and one junior counsel. On or about 22 July a decision was taken to introduce another junior counsel in the matter. This was motivated by the fact that the latter junior counsel is conversant with some of the issues relating to the fifth respondent, the Ditsobotla Local Municipality. He has represented the MEC for COGHSTA in legal proceedings against that municipality in this

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Division. Obviously, counsel needed to peruse the papers and familiarise himself with the matter.

15. The first consultation regarding this matter was held on 07 July 2021. The second consultation was held on 29 July. Ms Nthabiseng Mekgwe is the attorney that has been assigned to deal with this matter on behalf of the first to third and seventh respondents at the State Attorney's office. She had attended the first consultation. She could not attend the second consultation. According to Ms Mekgwe, the reason for this was that she had fallen ill. She consulted with Dr Sebogodi regarding her illness. Dr Sebogodi then referred her to Lancet Laboratories at Victoria Hospital to test for the coronavirus. Ms Mekgwe attended at Victoria Hospital for the test. On 28 July she received her results which indicated that she had tested positive for the virus. She was later admitted at the hospital due to complications arising from the coronavirus and was discharged on Sunday, 15 August. Ms Mekgwe was contacted telephonically to obtain this information. I am unable to attach her confirmatory affidavit as she is still recovering at home. If Sakeliga disputes the allegations relating to Ms Mekgwe, which I doubt will be done, her affidavit and test results will be placed before this Court at a later stage.

16. As a result of her illness Ms Mekgwe could not attend to handling this matter. On 29 July her colleague Ms Bonolo Moloto attended the consultation on her behalf. On the same day Ms Moloto addressed a letter to Sakeliga's attorneys asking for a further indulgence to file these opposing papers on 19 August.

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The letter was delivered by email. I attach copies of the email and letter both marked "**MR1**".

17. On 10 August Ms Moloto had a telephonic conversation with Mr Pèter Wassenaar of Sakeliga's attorneys. It emerged during that conversation that Ms Moloto had sent the letter to an incorrect email address. As a result, Mr Wassenaar had not received it. Ms Moloto then forwarded the letter to Mr Wassenaar's correct email address on the same day (10 August). Mr Wassenaar acknowledged receipt thereof after about three minutes. He indicated that he would refer Ms Moloto's letter to his client (Sakeliga) and that he held instructions to apply for a date on the unopposed roll. However, he promised to revert to Ms Moloto "as soon as possible" regarding his instructions. Mr Wassenaar only reverted by a letter dated 18 August, which was emailed to, among others, Ms Moloto on the same day, in which he stated, among others, that Sakeliga was giving the first to fourth and seventh respondents until close of business ("office") on 25 August to file their opposing papers. I attach copies of the emails exchanged between Ms Moloto and Mr Wassenaar on 10 August marked "**MR2**" and copies of Mr Wassenaar's email and letter of 18 August marked "**MR3**".
18. In her letter Ms Moloto provided Ms Mekgwe's illness as the only reason for seeking a further indulgence from Sakeliga's attorneys. However, that was not the only reason. During the second consultation reference was made to certain documents which were not provided to counsel before or during the

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first consultation. Counsel advised that the documents were relevant to this case and requested to be provided therewith. The documents are voluminous and counsel obviously needed time to peruse them and consult thereon. They would then have to prepare this answering affidavit and hold a further consultation to finalise the draft answering affidavit. The documents were also a reason for requesting a further indulgence from Sakeliga's attorneys. Ms Moloto made a mistake by not referring to them in her letter.

19. I must say that the purpose for requesting indulgences to file this answering affidavit late was not to delay the hearing of this matter. The request was motivated by a desire for the first to third and seventh respondents to place material information before this Court to enable it to determine the application properly.
20. When first to third and seventh respondents asked for indulgences it was thought that they should file a substantive affidavit dealing with the application on the merits. Indeed a draft affidavit was prepared on that basis. However, I am advised that as counsel were discussing the matter on Monday, 16 August they realised that it is incompetent for the Court to grant the relief sought in prayers 2 to 6 of the notice of motion. For this reason, a totally different approach had to be taken and the draft affidavit had to be changed. I submit that the failure to file this affidavit was a blessing in disguise to the Court and all the parties. If the affidavit was filed on time, the fact that it is incompetent for the Court to grant the relief sought in those prayers will not have been

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raised. The Court might have granted an order which it was incompetent for the Court to grant and which might be impossible to enforce.

21. The fact that a different affidavit had to be prepared meant that another consultation had to be held to finalise it before it is commissioned and filed. This resulted in it being impossible to file the affidavit on or by 19 August. It is not due to any deliberate decision or gross negligence on the first to third and seventh respondents' part that the affidavit will be filed late but their desire to ensure that the Court is placed in a better position to properly determine this application.
22. As I shall demonstrate, the first to third and seventh respondents have strong prospects of success on the relief sought against them. Sakeliga will not suffer any material prejudice if they are granted condonation. It is not entitled to the relief sought in prayers 2 to 5. The fact that the first to third and seventh respondents are raising this issue is also for Sakeliga's own benefit as it will be impossible for it to enforce the order sought against the first to third and seventh respondents if it is granted. They are the ones that will suffer prejudice if the order is granted because they might be directed to do that which the law does not empower them to do, or they might be found to have failed to discharge their purported obligation in terms of section 139(5) of the Constitution read with the relevant provisions of the MFMA when there is no such obligation on them in the first place. The interests of justice demand that their version that it is incompetent for the Court to grant the relief sought

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against them in the notice of motion be placed before the Court. And their version can only be placed before the Court if the late filing of this affidavit is condoned.

23. For the above reasons, I request this honourable Court to condone the late filing of this affidavit.

### **INCOMPETENCE OF THE RELIEF SOUGHT AGAINST FIRST TO THIRD RESPONDENTS**

24. Sakeliga relies mainly on section 139(5) of the Constitution and section 139 of the MFMA against the first to third respondents in this application. It goes without saying that the power conferred by the two sections constitute public power. In terms of the constitutional principle of legality public power can only be validly exercise if it is sourced in law. In ***Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*** 1999 (1) SA 374 (CC) at paragraph 58 Chaskalson P expressed the principle thus:

"It seems central to the conception of our constitutional order that the legislature and ***executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. ...***"  
(Emphasis added.)

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25. Needless to say, the MEC for COGHSTA and the MEC for Finance are members of the executive at the provincial level while the Minister of COGTA is a member of the executive at national level. As the Constitutional Court held in ***Fedsure***, they can only exercise those powers or perform those functions conferred upon them by the law. If the law does not specifically confer certain powers or functions on them, then to exercise or perform them would be inimical to the rule of law which is a foundational principle of the Constitution and of which the principle of legality is a part.
26. Since the principle of legality prohibits the first to third respondents from exercising powers or performing functions which have not been specifically conferred upon them by the law, it follows that they cannot be held to have failed to fulfil an obligation which is not imposed on them by the law. It also follows that the Court cannot direct the first to third respondents to exercise powers or perform functions which are not conferred on them by the law. Indeed, as the Supreme Court of Appeal held in ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) at paragraph 15, “in exercising the judicial function ***judges are themselves constrained by the law***” (emphasis added).
27. It follows that in order for Sakeliga to be granted the relief sought against the first to third respondents at prayers 2 to 5 of the notice of motion, it must prove that they have the powers or are obliged to perform the functions set out in section 139(5) of the Constitution and section 139 of the MFMA. I am

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advised that it must make out its case in the founding affidavit. Sakeliga has failed to do so. I proceed to demonstrate why I say this.

28. Sakeliga has instituted proceedings against, inter alia, the MEC for COGHSTA, the MEC for Finance and the Minister of COGTA. These proceedings relate mainly to the affairs of the Ditsbotla Local Municipality and Naledi Local Municipality, in particular the alleged failure of the two municipalities to fulfil their constitutional obligation to render basic services to their communities due mainly to their being in financial distress. The two municipalities are cited as the fifth and sixth respondents respectively.
29. The relief sought against the MEC for COGHSTA and the MEC for Finance in prayer 2 is that their purported failure to implement a mandatory intervention in terms of section 139(5) of the Constitution read with section 136(4), 139 and 140 of the MFMA in the respondent municipalities be found to be inconsistent with sections 2, 10, 24, 139(5), 195 and 237 of the Constitution.
30. In prayer 3 Sakeliga seeks an order directing the MEC for COGHSTA to intervene in the two municipalities in terms of the relevant provisions of the MFMA and to take over their basic service delivery obligations. In prayer 4 it seeks an order directing that the intervention to be implemented be a mandatory intervention as envisaged in section 139 of the MFMA. A mistake is made in prayer 4 that the intervention is referred to in prayer 1 of the notice of motion. The latter prayer says absolutely nothing about intervention but

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seeks a declaratory order that the respondent municipalities be found to be in serious or persistent material breach of their obligations to provide basic services and to meet their financial commitments. In the event that the respondent municipalities, their administrations and/or councils resist the intervention, Sakeliga seeks that the municipal councils be dissolved and administrators be appointed to take control of the municipalities.

31. In prayer 5 Sakeliga seeks an order directing the Minister of COGTA and the fourth respondent (the Minister of Finance) to: determine the reasons for the crisis in each of the respondent municipalities' finances; assess each of the municipalities' financial status; instruct the Municipal Financial Recovery Service within the National Treasury to prepare recovery plans for the municipalities; recommend appropriate changes to the municipalities' budgets and revenue raising measures that will give effect to the recovery plans as developed and to submit to the MEC for Finance the determination and assessment , together with the recovery plans and recommendations, referred to above.
32. In prayer 6 Sakeliga seeks an order directing the MEC for COGHSTA to file a report in the court file relating to this case every sixty (60) days after the date of the order sought in the notice of motion. The report should set out the steps taken by the respondents in recovering the respondent municipalities and should provide updates on the implementation of the developed financial recovery plans. This relief is apparently based on or motivated by the relief

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sought in prayers 3 and 4 requiring the MEC for COGHSTA to implement a mandatory intervention in the respondent municipalities.

33. Insofar as the relief sought against the Minister of Finance is concerned, I understand that he is represented by a different legal team. As I have said, I depose to this affidavit on behalf of the MEC for COGHSTA, the MEC for Finance, the Minister of COGTA and the Premier. Therefore, whatever I say concerning the relief sought against both the Minister for COGTA and the Minister of Finance should be construed as only referring to the Minister of COGTA. The Minister of Finance or any person deposing to an answering affidavit on his behalf will deal with the relief sought against him.
34. I am not aware of any legislation that empowers the MEC for COGHSTA and the MEC for Finance to implement mandatory intervention in municipalities. I am further not aware of any legislation that empowers the Minister of COGTA to perform the functions or to exercise the powers referred to in prayer 5 of the notice of motion. Indeed, section 139(5) of the Constitution and the relevant provisions of the MFMA do not confer any such powers or functions on us. I proceed to deal with those provisions to substantiate this allegation.
35. The heading of section 139 of the Constitution is "Provincial intervention in local government". Subsection (5) imposes an obligation on the "relevant provincial executive" to implement a mandatory intervention in a municipality if the municipality, as a result of a crisis in its financial affairs, is in serious or

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persistent material breach of its obligation to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments. Section 139(5) is quoted in the founding affidavit. For this reason I do not deem it necessary to quote it in full in this affidavit.

36. Section 139 of the MFMA similarly imposes an obligation on the “provincial executive” to implement a mandatory intervention in a municipality if the 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.
37. The “provincial executive” is required to promptly request the Municipal Financial Recovery Service to: determine the reasons for the crisis in its financial affairs; assess the municipality’s financial state; prepare an appropriate recovery plan for the municipality; recommend appropriate changes to the municipality’s budget and revenue raising measures that will give effect to the recovery plan; and submit to the MEC for finance in the province the determination and assessment as a matter of urgency and the recovery plan and recommendations within a period determined by the MEC for finance but that period may not exceed 90 days (section 139(1)(a) of the MFMA).

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38. The “provincial executive” must also promptly 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 (section 139(1)(b) of the MFMA). In terms of section 139(2) of the MFMA the MEC for finance must submit a copy of any request to the Municipal Financial Recovery Service and of any determination and assessment received by him or her to the municipality, the Cabinet member responsible for local government (in this case the MEC for COGHSTA) and the Minister of Finance.
39. It is clear then that section 139(5) of the Constitution and section 139(1) of the MFMA places a duty to place a municipality under a mandatory intervention on the “relevant provincial executive” or the “provincial executive”.
40. The question may be asked what is meant by the “relevant provincial executive” or the “provincial executive”. The answer can be found in section 132 of the Constitution. In terms of subsection (1) thereof “[t]he Executive Council of a province consists of the Premier, as head of the Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature”. As I understand the subsection, the provincial executive council comprises of the Premier as its head and all the MECs appointed by the Premier. Thus, the Premier alone does not constitute the provincial executive council. The individual MECs or some of them also do not constitute the provincial executive council.

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41. It follows that section 139(5) of the Constitution and section 139 of the MFMA confer the power to implement mandatory intervention in municipalities only on the Premier and all the MECs of a province as a unit. It further follows that one member or two members of the executive council does not or do not have the power to implement mandatory intervention in municipalities.
42. It is clear from what I have set out above that the MEC for COGHSTA and the MEC for Finance do not have the obligation to implement mandatory intervention in municipalities in terms of section 139(5) of the Constitution and the relevant provisions of the MFMA. Therefore, they could not have failed to fulfil a non-existent obligation and their purported conduct could not be inconsistent with sections 2, 10, 24, 139(5), 195 and 237 of the Constitution. It follows that this honourable Court cannot grant the order sought in prayer 2 of the notice of motion.
43. The MEC for COGHSTA does not have any authority to implement intervention, let alone mandatory intervention, in municipalities. He also does not have the power to take over the service delivery obligations of municipalities pursuant to interventions implemented in those municipalities. Section 139(5)(c) of the Constitution and section 146(3)(b) of the MFMA empower the provincial executive, not the MEC responsible for local government, to assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not implement the

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recovery plan. It follows that this Court cannot grant the relief sought in prayers 3 and 4 of the notice of motion.

44. The relief sought in prayer 5 is based on section 139(1) of the MFMA. It is clear from the section that only the Municipal Financial Recovery Service has the power to perform the functions set out at paragraph (a)(i) to (v). No mention is made of the Minister of COGTA in the section. For these reasons, the Minister for COGTA cannot be directed to perform the functions or exercise the powers set out in subsection 1(a). It follows that the Court cannot grant the relief sought in prayer 5.
45. As I have said, the relief sought in prayer 6 is apparently based on the relief sought in prayers 3 and 4. Because it is incompetent for this Court to grant the relief sought in the latter prayers, it must follow that it also cannot grant the relief sought in prayer 6. The MEC for COGHSTA cannot be directed to file reports within the stipulated period unless there is an order directing the proper party to implement mandatory intervention in the respondent municipalities.
46. I submit that the granting of the relief sought in prayers 7 to 16 depends on the relief sought in prayers 2 to 5. Unless and until a proper party (the North West provincial executive council) is directed to implement mandatory intervention in the respondent municipalities, the relief sought in the former

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prayers cannot be granted. I am advised that counsel will present argument on this issue at the hearing of this application.

47. For the above reasons, I submit that Sakeliga has not made out a case for the relief sought against the first to third respondents. The application must therefore be dismissed on this basis alone. I also submit that costs should follow the result. I am advised that our counsel will present argument to the Court on the issue of costs.

#### **NON-JOINDER OF THE PROVINCIAL EXECUTIVE COUNCIL**

48. I have stated that section 139(5) of the Constitution and section 139 of the MFMA confer the power to implement mandatory intervention in municipalities on the “relevant provincial executive” or the “provincial executive”. In the present proceedings that is the North West provincial executive council.
49. The Premier, the MEC for COGHSTA and the MEC for Finance are members of the North West provincial executive council. But, as I have said, the provincial executive council is constituted by the Premier and all the MECs of a province. Therefore, the mere fact that the Premier, the MEC for COGHSTA and the MEC for Finance have been cited in these proceedings does not necessarily mean that the North West provincial executive council is a party to these proceedings. As I have stated, although Sakeliga has allegedly

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“specifically joined” the Premier as the head of the provincial executive council, it does not seek relief against him on the merits in that capacity. There are other MECs who should have been joined but are not parties to this application. Therefore, the North West provincial executive council is not before this Court. It must have been joined to these proceedings.

50. It goes without saying that the North West provincial executive council has a direct and substantial interest in the relief sought in these proceedings. It is the only party in the province that has the authority to implement mandatory intervention in municipalities. The relief sought in prayers 2 to 5 of the notice of motion has the effect of divesting it of that authority. If the relief is granted, Sakeliga might seek to enforce it against the North West provincial executive council as it will be impossible for Sakeliga to enforce it against the first to third respondents.

51. I must say that I am surprised that Sakeliga has not joined the North West provincial executive council as a party to these proceedings. It has quoted section 139(5) of the Constitution and section 139 of the MFMA from which it is clear that only a provincial executive council has the power to implement mandatory intervention in municipalities. Nowhere in those sections is the MEC for COGHSTA and the MEC for Finance empowered to implement mandatory intervention in municipalities, nor is the Minister for COGTA empowered to perform the functions or exercise the powers set out in section 139(1)(a) of the MFMA.

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52. I submit that the point *in limine* should be upheld and the application dismissed with costs. Alternatively, the relief sought in the notice of motion should not be granted unless and until Sakeliga has joined the provincial executive council to these proceedings. If Sakeliga had joined the provincial executive council to the proceedings, then there would have been no need for the first to third and seventh respondents to raise this point *in limine*. It was grossly negligent of Sakeliga not to join the provincial executive council despite its clear knowledge that it has a direct and substantial interest in these proceedings. Sakeliga must therefore be directed to pay our costs relating to the point *in limine*.

53. I now turn to deal with the allegations in the founding affidavit.

54. But before I do so, I must point out to the Court that the allegations I make in this affidavit relate only to the Minister of COGTA , the MEC for COGHSTA and the MEC for Finance. The allegations made in the founding affidavit do not relate to the Premier at all. Therefore, my responses should not be interpreted to relate or apply to him as well. My responses should also not be interpreted to relate to the North West provincial executive council. The latter is not a party to the proceedings, as I have said. The provincial executive council has not met and taken a decision regarding these proceedings. The first to third and seventh respondents' legal team has also not consulted with

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it. Therefore, I cannot speak on its behalf when I do not know what its stance would be regarding the proceedings.

55. If the point *in limine* is upheld and Sakeliga is directed to join the North West provincial executive council to these proceedings, it will obviously have to amend the notice of motion and file another supplementary founding affidavit. In the event it does so, I submit, the first to third respondents will be entitled to file a supplementary answering affidavit to deal with the new relief sought in the amended notice of motion and the new allegations in the further supplementary founding affidavit. To the extent that I do not deal with some of the allegations in the founding affidavit, I should not be understood to admit them. I may not deal with them because they are misguided or do not relate to the first to third respondents.

#### **AD PARAGRAPHS 1 AND 2 THEREOF**

56. I note the allegations in those paragraphs.

#### **AD PARAGRAPH 3 THEREOF**

57. I deny that all the allegations or facts in the founding affidavit are both true and correct. As appears from what I have said above, some of the facts are based on a misconception of the law.

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**AD PARAGRAPH 4 THEREOF**

58. For the reasons appearing above, some of the legal submissions Mr le Roux makes are completely wrong.

**AD PARAGRAPHS 5 AND 6 THEREOF**

59. I admit that this Court has jurisdiction over the first to third and seventh respondents but deny, for the reasons appearing above, that it has jurisdiction to grant the relief sought in prayers 2 to 5 of the notice of motion and the prayers that follow thereafter.

**AD PARAGRAPHS 7 TO 13 THEREOF**

60. I bear no personal knowledge of the allegations in those paragraphs and cannot admit or deny them.

**AD PARAGRAPH 14 THEREOF**

61. I deny that Ms Boitumelo Moiloa is the present acting MEC for COGHSTA. It is apparent that Mr le Roux makes the allegation merely based on the report attached to the founding affidavit as annexure "X3". That report was signed by Ms Moiloa on 24 August 2020 when she was the acting MEC for COGHSTA. The previous incumbent MEC for COGHSTA was Mr Gordon Kegakilwe who passed away on 06 July 2020, hence Ms Moiloa's appointment to act in that position.

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62. Mr le Roux deposed to the founding affidavit on 24 May 2021. At that time the MEC for COGHSTA was Mr Mmoloki Cwaile who was appointed in November 2020. He has since been replaced by Ms Lenah Miga.

**AD PARAGRAPHS 15 AND 16 THEREOF**

63. I admit the allegations in those paragraphs.

**AD PARAGRAPH 17 THEREOF**

64. I admit that Mr Tito Mboweni was the Minister of Finance when Mr le Roux deposed to the affidavit. However, he has since been replaced by Mr Enoch Gondongwana following a cabinet reshuffling by the President.

**AD PARAGRAPHS 18 TO 23 THEREOF**

65. I note the allegations in those paragraphs.

**AD PARAGRAPHS 24 AND 25 THEREOF**

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66. Subject to reiterating that no relief is sought against the Premier but he opposes the relief sought in prayers 2 to 5 due to the incompetence thereof and that the North West provincial executive has not been joined to these proceedings, I note the allegations in those paragraphs.

**AD PARAGRAPH 27 THEREOF**

67. I reiterate that it is incompetent for this Court to grant the relief sought in prayers 2 to 5 of the notice of motion and that the relief in the remaining prayers cannot be granted as the granting thereof is dependent on the relief sought in the former prayers.

**AD PARAGRAPHS 28 AND 29 THEREOF**

68. I admit that Ms Moiloa signed annexure "X3" but reiterate that she is no longer the acting MEC for COGHSTA. Therefore, it is incorrect to refer to her as the first respondent.
69. I bring it to the attention of the Court that the provincial executive council intervened in some of the municipalities in terms of section 139(1)(b) of the Constitution. Therefore, the interventions may have resulted in the

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improvement of those municipalities. In any event, this case only relates to the Ditsobotla and Naledi local municipalities.

**AD PARAGRAPHS 30 AND 31 THEREOF**

70. I am not aware that Sakeliga has placed evidence before this Court to substantiate the allegation that the respondent municipalities are plagued by corruption.

71. I admit that according to annexure "X3" the respondent municipalities are in financial distress.

**AD PARAGRAPH 32 THEREOF**

72. The allegations in that paragraph constitute an expression of an opinion.

**AD PARAGRAPHS 33 TO 37 THEREOF**

73. I deny the allegation that the dire nature of the current crisis results from state failure at all levels of government insofar as we are concerned. The allegation seems to be based on our purported failure to implement mandatory

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intervention in the respondent municipalities. I reiterate that we do not have the power to do so.

74. I note the remaining allegations in those paragraphs. We reserve the right to respond thereto if the Court directs Sakeliga to join the provincial executive council to these proceedings and Sakeliga amends its notice of motion and files a supplementary founding affidavit.

**AD PARAGRAPH 38 THEREOF**

75. I have already dealt with the relief sought against the first to third respondents above and demonstrated that it is incompetent for this Court to grant it.

**AD PARAGRAPHS 39 TO 50 THEREOF**

76. It is clear or at least apparent from the allegations made in those paragraphs that Sakeliga is fully aware or ought to be fully aware that the provincial executive council must have been joined as a party to these proceedings.

**AD PARAGRAPHS 51 TO 85 THEREOF**

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77. I note the allegations in those paragraphs insofar as they correctly set out what is stated in annexure "X3".

78. If a need arises for us to file a supplementary answering affidavit, we may deal with the allegations.

**AD PARAGRAPH 86 THEREOF**

79. I deny that the first to third respondents failed to intervene. If they failed to do so, it is because they do not have the power to intervene. They merely play an oversight role. As I have said, the power to intervene in municipalities is the exclusive preserve of provincial executive councils.

80. The allegations made in the first and second sentences of that paragraph constitute nothing but an opinion.

**AD PARAGRAPHS 87 THEREOF**

81. Before these proceedings were instituted the North West Department of Finance had appointed Thuso Financial Consultants to prepare a financial recovery plan in respect of the Ditsobotla Local Municipality and Pamoja IMI MAT Consortium to prepare one in respect of the Naledi Local Municipality.

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Those reports were prepared and consultations were held with the officials of the two municipalities in July in relation thereto. This shows that the MEC for COGHSTA and the MEC for Finance were not sitting on their laurels as Sakeliga insinuates. I do not deem it necessary to attach copies of the reports to this affidavit since Sakeliga consider them to be meaningless. But the reports will be produced if the MEC for Finance is required to do so. The first and second respondents reserve the right to deal with the reports in a supplementary answering affidavit should a need arise for one to be filed.

#### **AD PARAGRAPHS 88 AND 89 THEREOF**

82. Mr le Roux alleges that mandatory interventions are required and that consideration should be given to dissolving the councils of the respondent municipalities. Yet Sakeliga has not joined the only party that has the power to exercise those powers.

#### **AD PARAGRAPH 90 TO 90.31 THEREOF**

83. We, together with our legal team, have not consulted with the officials of the respondent municipalities. I understand that the municipalities are represented by their own legal teams. Therefore, I elect not to respond to the allegations in those paragraphs at this stage.

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**AD PARAGRAPHS 91 AND 92 THEREOF**

84. I reiterate that the Minister of COGTA does not have the power to intervene in municipalities.

**AD PARAGRAPHS 93 TO 98 THEREOF**

85. I have stated that I only depose to this affidavit on behalf of the Minister of COGTA, the MEC for COGHSTA and the MEC for Finance insofar as the merits are concerned. Therefore, I elect not to respond to the allegations in those paragraphs as they relate to the Minister of Finance who, as I have said, I understand is represented by a different legal team.

**AD PARAGRAPHS 99 TO 106.7 THEREOF**

86. I note that Sakeliga does not seek to compel compliance with its requests for access to information in this application.
87. I reiterate at this stage that the MEC for COGHSTA and the MEC for Finance do not have the power to intervene in municipalities and that only the North West provincial executive council has the power to do so.

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88. The MEC for COGHSTA, then Mr Cwaile, did not make a deliberate decision not to respond to Sakeliga's request for access to information. The failure to respond was merely an oversight on my part to refer the request to the Chief Directorate for Local Government within our department which could have responded thereto.
89. I deny that no new discretionary intervention was implemented in the respondent municipalities. On or about 23 March 2021 the provincial executive council took a decision to place the Ditsobotla Local Municipality under administration in terms of section 139(1)(b) of the Constitution. Former MEC Cwaile then addressed a letter dated 13 April to Mr G J Moatshe informing him of the decision to appoint him as the administrator. Mr Moatshe accepted the appointment on 14 April. On 13 April former MEC Cwaile wrote a letter to Ms Esther Mmota, the Speaker of the Ditsobotla Local Municipality of the decision to place that municipality under administration and requested her to invite the councillors to a virtual meeting with him on 15 April.
90. The Ditsobotla Local Municipality then instituted urgent legal proceedings in this Division against the chairperson of the provincial executive council, the MEC for COGHSTA and Mr Moatshe under UM103/2021. It also instituted urgent legal proceedings against, inter alia, the chairperson of the provincial executive council, the MEC for COGHSTA, Mr Moatshe and the Minister of COGTA under case number UM 108/2021.

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91. In the proceedings under case number UM103/2021 that municipality seeks, inter alia, an order declaring the decision to place it under administration unlawful and reviewing and setting aside the decision.
92. In the proceedings under case number UM108/2021 the municipality sought an order, inter alia, suspending Mr Moatshe's appointment and interdicting the implementation of the decision to place it under administration pending the finalisation of the review proceedings under case number UM103/2021.
93. I understand that the Ditsobotla Local Municipality was granted the interim relief sought in case number UM108/2021 and that the review application has not yet been finalised.
94. I do not deem it necessary to attach the papers relating to the proceedings referred to above to this affidavit. Suffice it to state that if it becomes necessary to do so, the papers will be placed before the Court at the hearing of this application. Sakeliga's attorneys may visit the Registrar's office and ask for the files relating to those proceedings to confirm the correctness of the above allegations.
95. The provincial executive council had also taken a decision to place the Naledi Local Municipality under administration in terms of section 139(1)(b) of the Constitution. The National Council of Provinces did not approve the

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intervention. In terms of section 139(2)(b)(ii) of the Constitution the intervention had to end.

#### **AD PARAGRAPHS 107 AND 108 THEREOF**

96. Suffice it to state that annexures "X36" and "X37" deal with affairs of municipalities within the province and not the province per se, I note the allegations in those paragraphs insofar as they correctly set out the contents of those annexures. I must point out, however, that the contents of annexure "X37" constitute inadmissible hearsay evidence and that it does not appear that the allegations of corruption have been tested in court.

#### **AD PARAGRAPHS 110 TO 128 THEREOF**

97. I reiterate that the relief referred to in those paragraphs depends on the granting of the relief sought in prayers 2 to 5 of the notice of motion which it is incompetent for this Court to grant. Therefore, the Court cannot grant the relief sought in those paragraphs.
98. We reserve the right to deal with the allegations in those paragraphs should Sakeliga be directed to join the provincial executive council to these proceedings. Suffice it to state at this stage that: Sakeliga has not provided

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any reasons why it considers Advoca Auditors to be the only party that is competent to be appointed as the special master in the event the Court decides that one should be appointed; there is an institution that was specifically created for the purpose of assisting municipalities to discharge their obligations and can be appointed as special master should the Court direct that one should be appointed; and, the facts of the cases relating to the appointment of special masters that will allegedly be relied upon differ materially from the facts of this case.

#### **AD PARAGRAPHS 129 TO 133 THEREOF**

99. For the reasons appearing above, I deny that Sakeliga is entitled to the relief sought in the notice of motion, in particular against the first to third respondents.
100. The fact that a litigant is non-profit company, that it relies on donations from its members to conduct its affairs, that litigation is costly, that consultation and preparation for the litigation requires many days and that organs of state allegedly failed to fulfil their obligations cannot constitute justification for an order of costs on attorney and client costs. If the contention by Sakeliga was correct, then a punitive costs order would be justified in the majority if not all legal proceedings instituted by non-profit companies or organisations against organs of state for their alleged failure to fulfil their constitutional or statutory obligations.

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101. But as I have demonstrated, Sakeliga cannot be granted an order on the merits against the first to third respondents on the founding papers as they stand. Therefore, it is not entitled to an order for costs, let alone on an attorney and client scale.

WHEREFORE I pray that the application be dismissed with costs, including the costs of two counsel.

  
DEPONENT

I certify that the deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at MAHIKENY on the 25<sup>TH</sup> day of **AUGUST 2021**, the- regulations contained in Government Notice R1258 dated 21 July 1972, as amended, having been complied with.

  
Commissioner of Oaths

Full names: **ANITA HARDING**  
Designation: **Practicing Attorney**  
**Commissioner of Oaths**  
Motho House, 56 Shippard Street  
Mahlabateng, 2745  
Tel: 011 811 5555  
Area: **758/201/100**  
Date: **25/8/2021**

" MR ! "



Department:  
Justice and Constitutional Development  
**REPUBLIC OF SOUTH AFRICA**

**OFFICE OF THE STATE ATTORNEY: MAHIKENG**  
Private Bag X 51 MMABATHO, 2735 • East Gallery, 1<sup>st</sup> Floor, Mega City, MMABATHO  
Tel (018) 384-0161, Fax (018) 381-1615

Your ref : P J WASSENAAR/ES/QB0616  
Our ref : 0955/21/P3  
Enq : Ms. N MEKGWE  
E-mail : [NMekgwe@justice.gov.za](mailto:NMekgwe@justice.gov.za)

Thursday, 29<sup>th</sup> July 2021

**URGENT**

**KRIEK WASSENAAR & VENTER INC.**  
**APPLICANT'S ATTORNEYS**  
**EMAIL: [peter@kriekprok.co.za](mailto:peter@kriekprok.co.za)**  
**Cc : [litiqation1@smilstanton.co.za](mailto:litiqation1@smilstanton.co.za)**

Dear Sir/Madam

**RE: SAKELIGA // MEC FOR COGTA & 9 OTHERS**

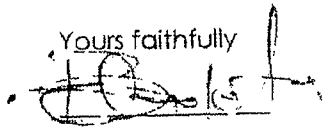
**REQUEST FOR FURTHER INDULGENCE TO FILE OPPOSING PAPERS**

1. The above refers.
2. We hereby bring to your attention that we will not be able to file our opposing papers as agreed, that is on the 30<sup>th</sup> July 2021, due to the fact that the instructing attorney, Ms. Mekgwe is currently under quarantine for Covid-19 and the writer hereof has temporarily taken over the matter to assist in finalizing the said papers.
3. In light of the above, we request further indulgence to finalise drafting the papers, until the **19<sup>th</sup> August 2021**, to file the answering affidavit.
4. We await your response herein.

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Yours faithfully



Ms. B Moloto

For the Office of the State Attorney



REPUBLIC OF SOUTH AFRICA

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"MR 2"

## **Moloto Bonolo**

---

**From:** Moloto Bonolo  
**Sent:** Tuesday, 10 August 2021 14:23  
**To:** 'peter@kriekprok.co.za'  
**Cc:** 'litigation1@smitstanton.co.za'  
**Subject:** FW: RE: URGENT REQUEST! SAKELIGA // MEC FOR COGTA & 9 OTHERS  
**Attachments:** CCF20210729.pdf  
  
**Importance:** High

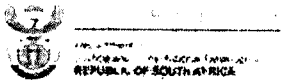
Good day Mr Peter

As per our telephone conversation with the writer hereof on the 10<sup>th</sup> instant, kindly see our email below which was sent on the 29<sup>th</sup> July 2021, and the attachment thereof.

Kindly acknowledge receipt herein.

*Ms. Bonolo Moloto*

**Ms. Bonolo Moloto**  
**Office of the State Attorney, Mahikeng**  
**Tel: 018 384 0269**  
**Cell: 0837300572**



**From:** Moloto Bonolo  
**Sent:** Thursday, 29 July 2021 17:23  
**To:** 'peter@kreikprok.co.za' <peter@kreikprok.co.za>  
**Cc:** 'litigation1@smitstanton.co.za' <litigation1@smitstanton.co.za>; Mekgwe Nthabiseng <NMekgwe@justice.gov.za>  
**Subject:** RE: URGENT REQUEST! SAKELIGA // MEC FOR COGTA & 9 OTHERS  
**Importance:** High

Good day

**Your ref: P J WASSENAAR/ES/QB0616**

The above matter refers.

Kindly find attached hereto a letter for your *urgent* attention.

*Regards*

**Ms. Bonolo Moloto**  
**Office of the State Attorney, Mahikeng**  
**Tel: 018 384 0269**

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Cell:0837300572



UNITED  
REPUBLIC OF SOUTH AFRICA

## Moloto Bonolo

---

**From:** Peter Wassenaar <peter@kriekprok.co.za>  
**Sent:** Tuesday, 10 August 2021 14:32  
**To:** Moloto Bonolo  
**Cc:** litigation1@smitstanton.co.za  
**Subject:** RE: RE: URGENT REQUEST! SAKELIGA // MEC FOR COGTA & 9 OTHERS

Dear Ms Moloto

I acknowledge receipt. Please note that your previous email was directed at the wrong email address and would not have shown proper delivery.

I will refer your letter to my client. As already stated, I hold instructions to apply for a date on the unopposed roll.

I will, however, revert as soon as possible regarding my instructions.

Yours faithfully / Die uwe



Peter Wassenaar  
Kriek Wassenaar & Venter Ing  
Direkteur / Director

- (t) (+27) 12 803 4719 (c) 0829204474
- (a) Third Floor, HB Forum Building, 13 Stamvrug Street, Val de Grace, Pretoria
- (p) Postnet Suite # A7, Privaatsak / Private Bag X592, Silverton, 0127 • BTW Reg: 4020260685 • Reg: 2012/030418/21



**From:** Moloto Bonolo <BMoloto@justice.gov.za>  
**Sent:** Tuesday, 10 August 2021 14:29  
**To:** Peter Wassenaar <peter@kriekprok.co.za>  
**Cc:** litigation1@smitstanton.co.za  
**Subject:** FW: RE: URGENT REQUEST! SAKELIGA // MEC FOR COGTA & 9 OTHERS  
**Importance:** High

Good day Mr Peter

As per our telephone conversation with the writer hereof on the 10<sup>th</sup> instant, kindly see our email below which was sent on the 29<sup>th</sup> July 2021, and the attachment thereof.

Kindly acknowledge receipt herein.

*Respectfully*

Ms. Bonolo Moloto  
Office of the State Attorney, Mahikeng

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MH

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## Moloto Bonolo

---

**From:** Elbie Swanepoel <elbie@kriekprok.co.za>  
**Sent:** Wednesday, 18 August 2021 16:33  
**To:** Zingisa.Zenani@treasury.gov.za; Zenani Zingisa; Mekgwe Nthabiseng; Moloto Bonolo  
**Subject:** SAKELIGA NPC / MEC FOR COOPERTIVE GOVERNANCE AND TRADITIONAL AFFAIRS & OTHER  
**Attachments:** State Attorney sent 2021-08-18.pdf  
**Sensitivity:** Private

Good day,

We refer to the above and attach hereto a letter for your attention.

Regards,



**ELBIE SWANEPOEL**

**Kriek Wassenaar & Venter Ing**

**Regsekretaresse / Legal Secretary**

- (t) (+27) 12 803 4719 • (f) (+27) 86 596 8516
- (a) 3de Vloer / 3rd Floor, HB Forum Gebou / Buidling, Stamvrugstraat 13 Stamvrug Street, Val de Grace, Pretoria, 0184
- (p) Postnet Suite # A7, Privaatsak / Private Bag X592, Silverton, 0127 • BTW Reg: 4020260685 • Reg: 2012/030418/21



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**KRIEK WASSENAAR & VENTER ING**  
Prokureurs • Aktevervaardigers • Attorneys • Conveyancers

Our ref: PJ Wassenaar/es/QB0616  
Your ref:

18 August 2021

**THE STATE ATTORNEY (PRETORIA)**  
**OBO 4<sup>TH</sup> RESPONDENT**  
**PRETORIA**

By e-mail: [Zingisa.Zenani@treasury.gov.za](mailto:Zingisa.Zenani@treasury.gov.za)  
[ZZenani@justice.gov.za](mailto:ZZenani@justice.gov.za)

**THE STATE ATTORNEY (MMABATHO)**  
**OBO 1<sup>ST</sup> – 3<sup>RD</sup> AND 7<sup>TH</sup> RESPONDENTS**  
**MMABATHO**

By e-mail: [NMekgwe@justice.gov.za](mailto:NMekgwe@justice.gov.za)  
[BMoloto@justice.gov.za](mailto:BMoloto@justice.gov.za)

Sir/Madam

**SAKELIGA NPC / MEC FOR COOPERTIVE GOVERNANCE AND TRADITIONAL AFFAIRS & OTHER**  
**MAHIKENG HIGH COURT CASE NO: M311/2021**

1. We refer to the various requests for further time received from the two offices of the State Attorney in the above matter.
2. Our client has instructed us to require that the 1<sup>st</sup> – 4<sup>th</sup> and 7<sup>th</sup> respondents now file their opposing affidavits. The respective respondents have failed to comply with the filing agreements between the parties. Our client requires that the respondents file opposing papers by no later than close of office on 25 August 2021. Failing thereto our client will require that the respective respondents apply to the High Court for condonation for late filing of their papers.
3. Our client cannot accept further delays and will proceed to apply for a date on the unopposed roll if the parties fail to now file papers. Our client has indulged the respondents as far as is open to reason and we do not deem our request to be unaccommodating.

[www.kwv-inc.com](http://www.kwv-inc.com)

(t) (+27) 12 756 7566 • (f) (+27) 86 596 8799 (a) 3<sup>rd</sup> Floor, HB Forum Building, 13 Stamvrug Road, Val de Grace, Pretoria 0184  
(p) Postnet Suite # A7, Privaatsak / Private Bag X592, Silverton, 0127 • BTW Reg: 4020260685

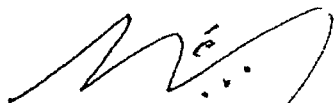


(B Proc. List)

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4. We await the filing of your clients' opposing papers.

Yours faithfully



**KRIEK WASSENAAR & VENTER INC**  
PÉTER WASSENAAR – DIREKTEUR / DIRECTOR  
(f) 086 596 8514  
(e) [peter@kriekprok.co.za](mailto:peter@kriekprok.co.za)  
Elektronies gemaak Elektronies gemaak

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