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**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 SETTLEMENTS AND TRADITIONAL AFFAIRS**

**1<sup>st</sup> Respondent**

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

**2<sup>nd</sup> Respondent**

**THE THE MINISTER OF COOPERATIVE  
GOVERNANCE AND 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**

2  
9<sup>th</sup> Respondent

**SEDIBENG WATER BOARD**

10<sup>th</sup> Respondent

**FILING SHEET**

**Document presented for filing:**

1. Fourth Respondent's Answering Affidavit.

**DATED at PRETORIA this 25<sup>th</sup> day of AUGUST 2021.**



**ATTORNEY FOR 4<sup>TH</sup> RESPONDENT**

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**MMABATHO**

**Ref: Ms Mekgwe (B. Moloto)**

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

**AND**

**TO: KRIEK WASSENNAR & VENTER INC.**

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Ref: KRI19/0002/21

**AND**

**TO: STATE ATTORNEY – MMABATHO**

**Attorneys for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Respondents**

First Floor, East Gallery, Mega City Complex

Cnr Sekame Road &, Dr James Moroka Drive

MMABATHO

**Ref: Ms Mekgwe (B. Moloto)**

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

Case No: M311/2021

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**SAKELIGA NPC**

Applicant

and

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

**HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS**

First Respondent

**THE MEMBER OF THE EXECUTIVE**

**COUNCIL: NORTH WEST PROVINCE: FINANCE**

Second Respondent

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

Third Respondent

**THE MINISTER OF FINANCE**

Fourth Respondent

**DITSOBOTLA LOCAL MUNICIPALITY**

Fifth Respondent

**NALEDI LOCAL MUNICIPALITY**

Sixth Respondent

**THE PREMIER: NORTH WEST PROVINCE**

Seventh Respondent

**ESKOM SOC LIMITED**

Eighth Respondent

**MAGALIES WATER BOARD**

Nineth Respondent

**SEDIBENG WATER BOARD**

Tenth Respondent

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**FOURTH RESPONDENT'S ANSWERING AFFIDAVIT**

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I, the undersigned,

**DONDO MOGAJANE**

do hereby make oath and state that:

- 1 I am an adult male Director-General of the National Treasury, whose Executive Authority is the Minister of Finance, the fourth respondent in this matter.
  
- 2 By virtue of my position, I am duly authorised to make this affidavit on behalf of the fourth respondent and to oppose this application on behalf of such respondent.
  
- 3 The facts to which I depose are within my own knowledge, or derived from records under my control, and are true and correct. Where I deal with questions of law, I do so on the advice of the fourth respondent's legal representatives.
  
- 4 I have read the founding affidavit filed on behalf of the applicant in this matter. I shall respond only to the allegations of fact contained in the founding affidavit insofar as they relate to the fourth respondent.

- 5 My failure to deal with any allegation in the founding affidavit should not to be construed as an admission thereof. Such an allegation is denied to the extent that it is inconsistent with what is stated in this affidavit.
- 6 Before responding to the allegations in the founding affidavit, I set out a brief background to this application.

### **BACKGROUND TO THIS APPLICATION**

- 7 The applicant in its notice of motion asks this Honourable Court to find the fifth respondent (Ditsobotla Local Municipality) and the sixth respondent (Naledi Local Municipality) to be in serious and persistent breach of their obligations to provide basic services and to meet their financial commitments in terms of section 139(5) of the Constitution read with sections 136(4), 139 and 140 of the Local Government: Municipal Finance Management Act, no 56 of 2003 ("**MFMA**").
- 8 The relief the applicant seeks against the fourth respondent is that this Honourable Court directs, *inter alia*, the fourth respondent to:
  - 8.1 determine the reasons for the crisis in each of the affected municipalities' financial affairs (*prayer 5.1*);
  - 8.2 assess each of the municipalities' financial status (*prayer 5.2*);
  - 8.3 instruct the Municipal Finance Recovery Service of the fourth

respondent to prepare a recovery plan for the affected municipalities  
(*prayer 5.3*);

8.4 recommend appropriate changes to the municipalities' budgets and revenue raising measures that will give effect to a recovery plan, as developed (*prayer 5.4*);

8.5 and submit to the second respondent the determination and assessment referred to above with the recovery plan and recommendations (*prayer 5.5*).

9 The applicant also asks this Honourable Court to direct the fourth respondent, amongst others, to provide copies of all reports and recovery plans prepared with reference to the recovery of Ditsobola and Naledi local municipalities to the applicant.

10 Further, the applicant asks this court to appoint Advoca Auditors as a so-called special master in respect of the Ditsobola and Naledi local municipalities with certain duties outlined in its notice of motion (*prayers 8 - 13*).

11 Before discussing the legal framework and the relief sought by the applicant, I pause to mention that:

11.1 The fourth respondent acknowledges that local government has a pivotal role to play in the realisation of our democracy. It is the sphere of government closest to the people and impacts on the day to day lives of

people.

- 11.2 In the last decade, the performance of many municipalities has unfortunately become synonymous with failure which in turn threatens the legitimacy and credibility of both political and administrative leadership. These have been evident in the findings between the Auditor-General, the National Treasury and the Department of Cooperative Governance.
- 11.3 The state of municipal finances is at a critical state and provincial and national government recognise that urgent and critical measures are required to ensure that there are sound and sustainable financial management processes as envisaged in the MFMA.
- 11.4 The fourth respondent has been working with provincial Treasury departments to create systems and mechanisms that will assist and support interventions and which will ultimately ensure that municipalities are placed in a position where they can properly run their own finances.
- 11.5 Though the relief sought in this application is inappropriate because it seeks to subvert the constitutionally mandated structures for intervention, the fourth respondent acknowledges that poor financial management in local government undermines service delivery, destroys public confidence and results in the wasting of public funds.
- 11.6 The fourth respondent has initiated programmes and initiatives aimed at

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equipping provincial governments to intervene effectively in local government such that those municipalities have the structures to be able to effectively and independently run their own finances and therefore govern as contemplated in the Constitution.

12 To address fully the relief sought against the fourth respondent it is important that I outline the constitutional structure for governance and intervention. The essence of the fourth respondent's opposition to the relief sought against him is that:

12.1 Prayer 5 is premature and legally incompetent. The constitutional structure for intervention contemplates that the provincial government will intervene in the affairs of a municipality and only if that fails, will the national executive step in. The relief sought in prayer 5 seeks an order for the national executive to intervene in Ditsobola and Naledi local municipalities in circumstances where the jurisdictional trigger for such intervention as set out in the Constitution has not been met.

12.2 Prayers 8 to 12 relating to the appointment of a special master raise a myriad of problems and is inappropriate because the Constitution has already designed a mechanism to intervene in dysfunctional municipalities. It also unreasonably undermines separation of powers.

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## THE CONSTITUTIONAL STRUCTURE FOR GOVERNANCE AND INTERVENTION

### The Constitutional structure for governance

- 13 Government authority vests in three spheres of government: the national, provincial and local spheres. These spheres are distinctive, interdependent and interrelated. Every organ of state within such a sphere must respect the constitutional status, institutions, powers and functions of government in the other spheres and must exercise its powers in a manner that does not encroach on the functional or institutional integrity of the others. Section 151 of the Constitution deals with the status of municipalities and states as follows:
- (1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.*
  - (2) The executive and legislative authority of a municipality is vested in its Municipal Council.*
  - (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.*
  - (4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. (Own emphasis)*
- 14 Municipalities have the autonomy to allocate resources to meet the basic needs of communities and respond to local priorities while giving effect to national objectives.

- 15 The principal reason why the governance space of municipalities is protected is that members of the municipal councils are democratically elected by the local community to serve and are required to understand the priorities and needs of the communities that they serve, in order to service their needs.
- 16 Notwithstanding the protected governance space, the Constitution contemplated and foreshadowed that there may be a need to intervene in the affairs of an errant or dysfunctional municipality.
- 17 The Constitution provides a mechanism to deal with dysfunctional municipalities. Those mechanisms are carefully circumscribed in section 139 of the Constitution.

#### The constitutional structure for intervention

- 18 The principal instrument for intervening in local government is section 139 of the Constitution which provides for general and specific powers of making decisions and acting on behalf of a municipal council. Section 139 of the Constitution read with Chapter 13 of the MFMA set out a sliding scale of corrective measures when a municipality fails to govern and is unable to deliver on its constitutional mandate.
- 19 While section 139 of the Constitution does permit intervention by the provincial government in the municipal sphere, this is a limited and tightly constrained power. It may only be invoked temporarily, in exceptional circumstances and in

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compliance with strict procedures. Section 139(1) of the Constitution provides that:

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

- (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.*
- (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.

.....

- 7) If a provincial executive cannot 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 section (4) or (5), in the stead of the relevant provincial executive."

20 The key principles to be drawn from the constitutional structure for intervention are the following:

20.1 First, the Constitution's primary mechanism for intervention in municipalities is for provincial government to intervene in the affairs of local government. It is only in the event that provincial government fails where, in terms of section 139(7) of the Constitution, national government may intervene in provincial government's stead.

20.2 Second: The Constitution contemplates a sliding scale of interventions from less intrusive means such as issuing a directive to more drastic measures such as assuming a municipality's executive obligations or dissolving the municipal council. These measures of intervention include:

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20.2.1 Discretionary intervention contemplated in:

- (a) Section 139(1)(a) where a provincial executive can take appropriate steps to ensure that a municipality fulfils a constitutional obligation by issuing a directive.
- (b) Section 139(1)(b) where a provincial executive assumes responsibility for a municipal obligation to the extent it is required to do so.
- (c) Section 139(1)(c) where a provincial executive can, in exceptional circumstances, dissolve a Municipal Council and appoint an administrator until a Council is newly elected.

20.2.2 Mandatory intervention in terms of:

- (a) Section 139(4) where the provincial executive must intervene if a municipality cannot or does not fulfil an obligation in terms of a revenue-raising measure to give effect to the budget.
- (b) Section 139(5) where the provincial executive must intervene in response to persistent and material breach of financial commitments. In terms of this type of intervention, the provincial executive must:
  - (i) Impose a recovery plan in accordance with national legislation.

- (ii) Dissolve the Municipal Council if the municipality cannot or does not approve legislative measures necessary to give effect to the recovery plan and appoint an administrator until a newly elected Municipal Council has been declared elected;
- (iii) If the municipal council is not dissolved assume responsibility for the implementation of the recovery plan to the extent that the municipality fails to do so.

20.3 Third: only in the event that the Provincial executive does not adequately exercise the powers and functions in terms of section 139(4) and 139(5) is the national executive required to intervene in the stead of the provincial government.

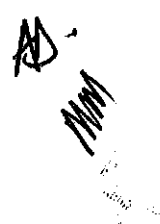
21 Having discussed the constitutional structure for governance and intervention, I turn to discuss the steps taken by the province in respect of Ditsobola and Naledi local municipalities.

**The province is in the process of initiating a mandatory intervention**

22 On 17 May 2021, the second respondent submitted a memorandum to the chairperson of the Executive Council. The subject of the memorandum was the implementation of section 139(5) of the Constitution read with Chapter 13 of the MFMA. This memorandum is attached as "DM1".



- 23 The purpose of the memorandum was to provide an update on progress in relation to the implementation of the mandatory intervention in 13 municipalities (including the fifth and sixth respondent) identified as facing severe financial problems requiring the implementation of the mandatory interventions in terms of section 139(5) of the Constitution, read together with chapter 13 of the MFMA.
- 24 According to section 136(1) of the MFMA, if the MEC for local government in a province becomes aware that there is a serious financial problem in a municipality, the MEC must promptly:
- 24.1 Consult the mayor of the municipality to determine the facts;
  - 24.2 Assess the seriousness of the situation and the municipality's response to the situation; and
  - 24.3 Determine whether the situation justifies or requires a provincial intervention in terms of section 139 of the Constitution
- 25 In determining whether the municipality's financial situation justifies or requires a provincial intervention in terms of section 139 of the Constitution, the results of the assessment of the following sections should be considered:
- 25.1 MFMA section 138 – Sets out the criteria for determining serious financial problems; and
  - 25.2 MFMA section 140 – Sets out the criteria for determining serious or persistent material breach of financial commitments.

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Steps taken in respect of fifth respondent and sixth respondent

26 The North West MEC: Finance had a meeting with the mayor and councillors of the fifth respondent on 8 July 2021 and sixth respondent on 6 July 2021, to engage on the diagnostic assessment of the state of affairs at the municipality and to present the intention to invoke section 139(5)(a) and (c) of the Constitution read with section 139 of the MFMA. It was agreed that:

- 26.1 The Mayor would table the MFMA section 138 and 140 feedback report to the Municipal Council within 30 days and submit the Council resolution to the Provincial Treasury;
- 26.2 The municipalities committed to work with the Provincial Treasury to determine the root cause and the extent of their performance failures;
- 26.3 The municipalities agreed to the preparation and implementation of financial recovery plans to address the financial crisis;
- 26.4 The municipalities agreed that the Provincial Treasury working in collaboration with National Treasury could conduct the *status quo* analysis which will inform the preparation of the financial recovery plan;
- 26.5 The municipalities agreed to the establishment of the political oversight structure comprising of political office bearers from the three spheres of government - namely the National Minister of Finance and the Minister Co-operative Governance as well as their deputies; the North West Provincial MEC's for Finance and Co-operative Governance and the

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local mayors and councillors - as well as the technical multi-disciplinary implementation task team comprising of senior officials from the three spheres of government to oversee the entire process.

- 27 The second and third respondents will conduct quarterly reviews on the implementation of the financial recovery plan (still to be prepared) and to assess the progress in addressing the identified financial problems.
- 28 Subsequent to the MEC's sessions with all the identified municipalities including the fifth and sixth respondent, the Provincial Executive Council ("PEC") will in due course make a decision to invoke Mandatory Intervention in terms of section 139(5)(a).
- 29 The Provincial Treasury may in the interim conduct the *status quo* assessment report in line with section 154 of the Constitution which can be used to inform the preparation of a financial recovery plans. Section 154 of the Constitution provides that national and provincial government must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Naledi Municipality is receiving support in terms of section 154 of the Constitution.
- 30 Once a resolution to invoke a mandatory intervention has been taken by the PEC, in terms of section 139(1)(a) of the MFMA, the PEC must request the Municipal Finance Recovery Services ("MFRS") to assist with the preparation of

a financial recovery plan. In terms of section 139(1)(a)(v)(bb) of the MFMA the recovery plans and recommendations must be prepared within a period, not exceeding 90 days, determined by the MEC for Finance.

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

### **THE RELIEF SOUGHT IN PRAYER 5 IS PREMATURE**

- 32 The fourth respondent submits that the relief sought in prayer 5 which seeks to direct the Minister of Finance and the third respondent to take steps to intervene is premature because:

32.1 it subverts the constitutional structure for intervention by seeking to direct the national sphere of government to intervene while the provincial sphere of government has not completed the constitutionally mandated steps for intervention;

32.2 Only if the Provincial Executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in sections 139(4) or (5) can the national sphere of government intervene in terms of section 139(7) of the Constitution;



- 32.3 It follows that in order for section 139(7) to be of any application, a provincial intervention in terms of section 139(4) or section 139(5) must have taken place.
- 33 A mandatory intervention in terms of section 139(5) is likely to effect meaningful change in the affairs of the Ditsobotla and Naledi Municipalities for the following reasons:
- 33.1 Firstly, the powers granted to the province under section 139(5) are far-reaching and the functions mandatory;
- 33.2 Secondly, a mandatory intervention will secure National Treasury and the MFRS's involvement and oversight.
- 33.2.1 Section 141(2) of the MFMA provides that "only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention. The MFRS unit is within National Treasury. "
- 33.2.2 The financial recovery plan must be submitted to the Minister of Finance in terms of section 143(3)(b) of the MFMA; and
- 33.2.3 The financial recovery plan is binding on the Municipality in the exercise of both its legislative and executive authority. It must adhere to the spending limits and revenue targets, and implement the budgetary and revenue raising measures put in place by the recovery plan in terms of section 146 of the MFMA.

- 33.3 Thirdly, once the section 139(5) intervention has taken place, the national executive is required to assess whether the provincial executive is adequately exercising its powers and performing its functions under the sub-section. If the provincial executive fails to do so, national government is then obliged to act in terms of section 139(7) and section 150 of the MFMA.
- 34 National government must provide the provincial executive with an opportunity to use the powers under section 139(5) to restore functionality in the municipality. An intrusion by the national executive into the section 139 process is a last resort.
- 35 Moreover, the power to invoke and implement an intervention in terms of section 139(7) of the Constitution lies with the national executive. Neither the President, nor the national executive, have been joined as respondents in this application. No order invoking the intervention contemplated in section 139(7) of the Constitution can be granted in the absence of the President and the Cabinet.
- 36 If the court directs the fourth respondent as contemplated in prayer 5 of the notice of motion it will have to assume that the intervention by the Province is inadequate and has failed and that the jurisdictional requirements for national intervention have been met. There is no legal or factual basis for the Court to make such an assumption. The order sought is premature.

## THE APPOINTMENT OF A SPECIAL MASTER

37 The applicant in prayers 8 to 12 of the notice of motion asks this Honourable Court to appoint Advoca Auditors as a special master. The special master will have the following duties:

Collecting and overseeing the ringfencing in separate municipal bank account all municipal income generated from sale of electricity and the sale of water;

37.1 Effecting the distribution of the municipal income and ringfenced received to:

37.1.1 Eskom and/or other supplier of bulk electricity to the municipality on receiving a proper invoice from the supplier;

37.1.2 Magalies Water and or any supplier of bulk water service to the municipality on receiving a proper invoice from the supplier;

37.1.3 Paying contractors required to conduct emergency maintenance to the sanitation, storm water, electricity and water reticulation networks within the municipalities; and

37.1.4 Transferring the balance available for distribution after the payments of the suppliers to the municipality in question.

37.2 Provide within 14 days after each month-end, a proper account in respect of all money received and collected of electricity and/or water

from the community within the municipal area of the relevant municipality and all money paid.

37.3 To open a bank account on behalf of the municipalities and to take control of the bank account.

37.4 To appoint and pay contractors to conduct maintenance.

37.5 To incur all necessary expenditure to maintain the sanitation and other reticulation networks within the areas of the municipalities.

37.6 To claim all costs including expenditure incurred in the performance of their duties.

37.7 To engage with other people in the necessary performance of the functions of a special master.

38 In what follows, I deal with why the appointment of a special master in the circumstances of this matter is premature and legally incompetent.

**The appointment of a special master is not appropriate in the circumstances of this case**

39 I respectfully submit that the appointment of the special master is not appropriate in the circumstances of this case for a number of reasons:

39.1 First, the appointment of the special master would be stripping the



municipality of its power outside of mechanisms provided for in the Constitution for intervention. As highlighted above, the provincial government with the assistance of national government is busy with a mandatory intervention to assist with the failing municipalities.

- 39.2 Second, the appointment of the special master overreaches in that it assumes that the constitutionally mandated process such as the mandatory intervention by the province has failed, without presenting sound evidence of such failure to this Honourable Court. Further, the submissions for the appointment of a special master makes the assumption that national government's mandatory intervention will fail.
- 39.3 Third, the special master is sought to be appointed without a proper vetting process to verify the proposed appointees' qualifications to deal with complex local government governance matters.
- 39.4 As, the proposed special master will not be working on a *pro bono* basis, the municipality will incur additional costs that are not part of the budgeting process. The appointment will be done without a proper procurement process for services contrary to how public procurement of services should take place. The applicant simply imposes its preference on the parties and the Court.
- 39.5 Fourth, the appointment of the special master and the ring-fencing of funds will effectively mean that some creditors are prioritised over others. This approach fails to take into account that income generating

services are used to assist the municipality in the delivery of other municipal services deemed to be community services and thus do not generate income, such as parks, recreational facilities, street lighting and other similar services are not income generating. Ordering this arrangement will undermine the municipalities' constitutional and statutory obligations to people living in their territories.

39.6 Fifth, a municipality is the only entity entitled to make collections. Section 8(2)(d) of the MFMA sets out that all money collected by a municipal entity or other external mechanism on behalf of the municipality, must be paid into the municipality's primary bank account. This means that Advoca Auditors cannot be appointed to collect as this would be in contravention with the MFMA.

39.7 The only way that Advoca Auditors could collect money on behalf of the municipality would be if the fourth respondent exempted the fifth and sixth respondents from the provisions of the MFMA. However, the fourth respondent does not believe that the jurisdictional requirements of section 177 of MFMA are present. The section provides that the fourth respondent may "where practicalities impede the strict application of a specific provision of this Act, exempt any municipality or municipal entity from, or in respect of, such provision for a period and on conditions determined in the notice." There is not even a request by the applicant for such an exemption.

- 39.8 The applicant in its papers has not made out a case that shows that there are practicalities which impede the strict application of a specific provision.
- 39.9 Further, in terms of section 10 of the MFMA, control of the municipal bank account is the responsibility of the Accounting Officer. The monitoring of the Financial Recovery Plan must be undertaken by the North West Provincial Treasury and National Treasury in line with the reporting requirements for Financial Recovery Plans.
- 40 The remedy sought by the applicant is extraordinary. It not only strips the municipalities of the powers but also intrudes on the powers of Provincial and National government to intervene as constitutionally mandated.
- 40.1 First, the contemplated special master would assume some of the responsibilities ordinarily exercised by the municipal manager who, in terms of section 60 of the MFMA, is the accounting officer and has various obligations and fiduciary duties (61 and 62 of the MFMA).
- 40.2 Second, the Constitution allows for the appointment of an administrator where the municipal council is dissolved. The administrator, in the place of the municipal council, would exercise the same legislative and executive authority as the council as contemplated in 11(3) of the Municipal Systems Act 32 of 2000. For example, an administrator (if the PEC decides to dissolve the municipal council) would have the

following powers which would overlap with the anticipated functions of the special master:

- 40.3 undertake all functions that are the executive obligations and all the legislative powers and functions of the Municipal Council;
- 40.4 undertake all statutory executive obligation functions of the Mayor;
- 40.5 undertake all fiscal and financial management functions at the municipality, including being signatory to all primary and secondary municipal banking account;
- 40.6 implement governance systems and procedures including oversight over the administration;
- 40.7 ensure effective implementation of financial systems, policies and procedures;
- 40.8 implement a system for the appropriate internal controls and approval of all expenditure;
- 40.9 set out a specific strategy to address the financial and service delivery problems of the municipality, including a strategy to reduce unnecessary expenditure and to increase the collection of revenue;
- 40.10 oversee all budgetary processes and approve temporary budget and revenue raising measures until new council is duly elected;



40.11 Ensure compliance with norms and standards as provided for in MFMA and financial ratios set by National Treasury and statutory compliance inclusive of opening and managing of bank accounts of the municipality.

41 As is evident from the list of functions that an administrator would have, there will be significant overlap between the statutorily created structures and the proposed functions of the special master. What the applicant is essentially asking is for this Court to denude the statutory and constitutional structures and to place their powers in the hands of a hand-picked special master who will exercise governance responsibilities. This is impermissible.

#### **AD SERIATIM RESPONSES**

42 The fourth respondent has no knowledge of the facts underlying this application and cannot admit the allegations contained therein.

43 The fourth respondent has dealt thematically with the relief sought against him in the notice of motion. To the extent that there are any further allegations pertaining to the Minister of Finance not dealt with above, those allegations are specifically denied.

#### **CONCLUSION**

44 In the circumstances, the relief sought against the Minister of Finance is misconceived and falls to be dismissed.

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## provincial treasury

Department:  
Provincial Treasury  
North West Provincial Government  
Republic of South Africa

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### OFFICE OF THE MEC

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**TO : CHAIRPERSON  
NORTH WEST EXECUTIVE COUNCIL**

**FROM : HON. MOTLALEPULA ROSHO  
MEC FOR FINANCE**

**SUBJECT : IMPLEMENTATION OF SECTION 139(5) OF THE CONSTITUTION READ WITH  
CHAPTER 13 OF THE MUNICIPAL FINANCE MANAGEMENT ACT – MANDATORY  
INTERVENTIONS**

#### 1. PURPOSE

The purpose of the submission is to provide an update on progress in relation to the implementation of the mandatory interventions in thirteen (13) Municipalities identified as facing severe financial crisis. Implementation of the mandatory interventions is in terms of Section 139(5) of Constitution of the Republic of South Africa, read together with Chapter 13 of the Municipal Finance Management Act.

#### 2. BACKGROUND

The Provincial Treasury tabled a Handover Report which communicated to the 6<sup>th</sup> Administration, the status report of municipal financial sustainability and performance. The report confirmed that the following municipalities are operating under severe financial crisis:

- a. Tswaing Local Municipality
- b. Maquassil Hills Local Municipality
- c. Naledi Local Municipality



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- d. Ramotshere Local Municipality
- e. Lekwa-Teemane Local Municipality
- f. Bojanala Platinum District Municipality
- g. Madibeng Local Municipality
- h. Mahikeng Local Municipality
- i. Mamusa Local Municipality
- j. Kgetleng Local Municipality
- k. Dr Ruth Segomotsi Mompati District Municipality
- l. Ditsobotla Local Municipality
- m. City of Matlosana Local Municipality

The Executive Council<sup>1</sup> considered the report tabled by the Provincial Treasury on the status report of municipal financial sustainability and performance at its meeting 01/2019 held on Wednesday, 25 September 2019 at 9:00 in the municipal chamber, Madibeng Local Municipality, Brits. EXCO resolved as follows:

- EXCO agreed to the mandatory interventions in terms of Section 139(5) of the Constitution read with Section 139 of the MFMA in respect of the twelve (12) identified municipalities.
- EXCO noted and agreed on the recommendations on the municipal financial sustainability report and agreed to the implementation inclusive of consultation regarding the MFMA intervention.

There have been significant developments since the above resolution of the Executive Council, Provincial Treasury has concluded numerous engagements with different key stakeholders with a view of soliciting different interpretations and understanding regarding implementation of Section 139(5) of Constitution of the Republic of South Africa, read together with Chapter 13 of the Municipal Finance Management Act.

The most recent engagement regarding the implementation of Section 139(5) of the Constitution read together with Chapter 13 of the MFMA was critical in deepening the understanding and application of the critical legislation. The engagement was conducted through a roadshow by the National Treasury and National Department of CoGTA led by Deputy Ministers, Dr. David Maseondo and Mr Obed Bapela. The purpose of Roadshow was to bring awareness to EXCO on implementation of the appropriate intervention instruments based on the applicable legislation and solicit support from EXCO on the implementation of the relevant and appropriate intervention mechanisms.

<sup>1</sup> Executive Council has the same meaning and refers to the *provincial executive* as it appears in the Constitution and the Municipal Finance Management Act.

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The roadshow also highlighted the challenges affecting the local government environment and reflected on the roles and responsibilities of each sphere of government in resolving these challenges through appropriate legal instruments. The roadshow further discussed matters relating to the available legislative tools forming part of the Early Warning Systems to detect and address municipal financial performance failures as well as presentation on the new approach to development of recovery plans including managing implementation of municipal recovery plans.

### **3. DISCUSSION**

The Executive Council had adopted a resolution which communicated that municipalities which have been confirmed to be operating under financial crisis as confirmed by the financial health assessment conducted in terms of Section 140(2)(c) of the Municipal Finance Management Act, must be placed under mandatory intervention in terms of the provisions of Section 139 of the Municipal Finance Management Act read together with Section 139(5) of Constitution of the Republic of South Africa.

The above financial management failures can be attributed to amongst others the following factors;

- (a) A widespread lack of financial controls and project monitoring;
- (b) Deliberate lack of accountability by the political and administrative municipal leadership;
- (c) Accountability was not adequately practised and enforced by leadership and the failure of key controls continued;
- (d) Millions were spent to improve the outcomes, but there were no consequences for poor performance;
- (e) Deteriorating accountability and financial management coupled with weakened oversight is at the centre of the significant regressions in audit outcomes; and
- (f) Systemic breakdown in the discipline of financial controls.

These could be summarised into a few key common factors contributing to problems in municipal finance:

- (a) Weak or dysfunctional governance systems and institutions;
- (b) Poor leadership - both political and administrative;
- (c) Lack of effective monitoring and oversight; and
- (d) An obvious disregard for the legal framework knowing that unethical and corrupt behaviour will not be met with any consequences.

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History and experience to date has indicated that there is neither an easy nor clear-cut solution to overcoming these challenges. Previously employed interventions have not yielded any sustainable improvements primarily due to political and administration discontinuity and instability. As a result, the situation continues to deteriorate. Compounding the problem is the disjuncture in the support efforts by different departments to address the gaps identified.

The Provincial Treasury and the department of Cooperative Governance and Traditional Affairs must work jointly to ensure greater synchronization of efforts involved in executing legally mandated responsibilities with regard to interventions, support, monitoring and oversight to local government as required by relevant legislation.

The Provincial government will be failing in its fiduciary duties if it does not utilise the provisions of the legal framework to intervene where the jurisdictional facts for invoking section 139 of the Constitution read together with Chapter 13 of the MFMA are prevalent in a municipality. The Provincial government will also be failing if it allows the 'culture of non-payment' to persist under the perception that there are no consequences for poor financial management. Poor financial management and poor service delivery are almost always preceded by failures in municipal governance. Therefore, it is imperative that a collective and coordinated intervention response by the Provincial Treasury, COGTA and SALGA is implemented.

The Provincial Government has, in trying to address and resolve these municipal performance failures, provided support and capacity building strategies in line with Section 154 of the Constitution as well as intervening in the administration of these municipalities in terms of Section 139(1) of the Constitution read together with Section 137 of the Municipal Finance Management Act. These support and capacity building as well as intervention measures have been able to yield the required outcomes in some areas of concern, the challenge however remains that the positive outcomes have been too trivial and therefore could not be sustained by municipalities.

Municipal performance continue to deteriorate despite the above-mentioned support and capacity building as well as discretionary intervention measures that have been implemented by the Provincial Government. Municipal performance has deteriorated to a level where most municipalities are no longer considered as going concerns due to the severity of the financial crisis that these municipalities are facing.

Section 139(5) of the Constitution states that;

*"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 Executive Council:-*

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*(a) must 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 a newly elected Municipal Council has been declared elected; and*
- (ii) approve a temporary budget or revenue-raising measures to give effect to the recovery plan, and for the continued functioning of the municipality;*

*(c) if the Municipal Council is not dissolved in terms of paragraph (b), the provincial executive may assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan. "*

While Section 139(1) of the Municipal Finance Management Act states that;

*"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 Executive Council must promptly request the Municipal Financial Recovery Service to;*

- (i) determine the reasons for the crisis in its financial affairs;*
- (ii) assess the municipality's financial state;*
- (iii) prepare an appropriate recovery plan for the municipality;*
- (iv) recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and*
- (v) to submit to the MEC for finance in the province, the determination and assessment referred to in subparagraphs (i) and (ii) above, as a matter of urgency and submit the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) above, within a period, not to exceed 90 days."*

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### 4. MOTIVATED SUBMISSION

Poor financial management in local government undermines service delivery, destroys public confidence and results in a wastage of public funds and resources. It causes financial distress in municipalities which renders municipalities unable to execute their mandate in terms of the Constitution and other legislation. Municipalities must strive, within its financial and administrative capacity, to ensure the provision of services to communities in a sustainable manner.

This is to ensure that municipalities comply with the requirements of Section 152(1)(b) of Constitution of the Republic of South Africa. It is still concerning that during the 2020/21 Budget process, seventeen (17) Municipalities could not table and approve funded budgets. At the heart of this problem are challenges in governance and leadership associated with poor municipal revenue management practices which undermine the ability of municipalities to collect adequate revenue and remain financially solvent.

Poor revenue management undermines municipal service delivery by reducing funds required for maintenance, renewal of assets and new infrastructure investments. Outstanding debt has grown steadily over time and has now reached proportions that threaten the ability of municipalities to deliver services and meet financial commitments. In terms of section 139 of the MFMA, the mandatory interventions will be triggered by a financial crisis in a municipality, as provided by the criteria in Section 140 of the MFMA, which result in a serious or persistent material breach of the municipality's obligations to provide basic services, or to meet its financial commitment or the municipality admits that it is unable to meet its obligations or financial commitments. As indicated above, support provided to municipalities as well as the discretionary interventions that have been invoked thus far have failed to address the financial problems.

Therefore, mandatory interventions are required to turn around the municipality from its financial crisis. Municipalities must strive, within their financial and administrative capacity, to ensure the provision of services to communities in a sustainable manner. This is to ensure that municipalities comply with the requirements of Section 152(1)(b) of the Constitution of the Republic of South Africa. It is however very concerning that 15 Municipalities in the province are unable to ensure provision of services to communities in a sustainable manner coupled with the reality that these municipalities have been unable to develop and implement sufficient appropriate sound financial management measures that are aimed at ensuring sustainable provision of quality services to the communities.

Section 135 of the Municipal Finance Management Act categorically states that the primary responsibility to avoid, identify and resolve financial problems in a municipality rests with the municipality itself. The state of municipal performance failures clearly demonstrates that municipalities have failed to avoid, identify and resolve financial problems to the state of severe financial crisis that municipalities are currently confronting.

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Provincial support and intervention measures have in most instances caused a sense of complacency within municipalities. Municipal officials in many cases may have relegated themselves to the sides whilst the intervention/support team performed duties on their behalf resulting in no skills being transferred, and consequently no improvements and sustainable performance. The latter is evident from the poor performance displayed by municipalities once the support is withdrawn.

Section 140(2)(C) of the Municipal Finance Management Act states that a municipality is in serious material breach of its obligations to meet its financial commitments if the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be prescribed or, if none is prescribed, more than two per cent of the Municipality's budgeted operating expenditure.

The above clause states that a municipality is in serious material breach of its obligations to meet its financial commitments if the municipality's creditors balance is more than an amount as may be prescribed. The municipality is in serious material breach of its obligations and financial commitments if the municipality's creditors balance is more than two per cent (02%) of the municipality's budgeted operating expenditure. Provincial Treasury has conducted an assessment to confirm if municipalities are still in serious material breach of their obligations to meet their financial commitments and below is an outcome of the assessment.

MUNICIPALITY	Creditors as at 30 June 2021	Operating Expenditure Budget (2021/22 Tabled MTRF Budget)	Percentage (Creditors/Operating Expenditure Budget)
1 Lekwa-Teemane Local Municipality	484 990 409	182 884 000	268%
2 Kgetlengrivier Local Municipality	385 689 583	176 292 000	202%
3 Dikobotle Local Municipality	745 703 289	386 201 000	183%
4 Mamusa Local Municipality	223 556 392	160 647 408	139%
5 Naledi Local Municipality	691 643 379	466 066 000	148%
6 Dr Ruth Segomotsi Mompati District Municipality	862 828 285	515 836 515	128%
7 Maquassi Hills Local Municipality	496 703 048.00	422 026 000	118%
8 Tswaing Local Municipality	234 729 229	232 380 000	101%
9 Madibeng Local Municipality	1 833 669 088	1 979 230 000	83%
10 Mankeng Local Municipality	688 184 895.00	981 258 140	70%
11 City of Matielosa Local Municipality	1 930 822 304.00	3 189 644 000	61%
12 Moses Kotane Local Municipality	305 927 828.00	581 141 877	53%
13 Moretele Local Municipality	169 113 306.00	391 786 000	43%
14 Rustenburg Local Municipality	1 902 111 000	5 330 188 768	36%
15 Bojanala Plathum District Municipality	111 820 587.00	334 647 000	33%
16 Ramotshere Moema Local Municipality	130 261 011	377 801 000	34%
17 Ngaka Modiri Molema District Municipality	286 996 529	1 106 971 000	26%
18 Kagisano-Molopo Local Municipality	38 128 654	148 437 000	26%
19 Ratlou Local Municipality	39 612 056.00	158 908 000	25%
20 JB Marks Local Municipality	479 583 861.00	1 438 966 238	33%
21 Greater Taung Local Municipality	43 280 672	243 706 028	18%
22 Dr Kenneth Kaunda District Municipality	30 384 530.00	204 186 000	15%

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The above table indicates and confirms that all Municipalities in the Province operate under severe financial crisis and consequently are unable to meet their financial commitments as their creditors' balances are more than two per cent (02%) of the budgeted operating expenditure.

### **5. IMPACT OF COVID-19 ON THE SUSTAINABILITY OF MUNICIPALITIES**

Revenues of municipalities have always been under severe pressure, the impact of COVID-19 pandemic has threatened the financial sustainability of the institutions, particularly municipalities. The fragile state of the economy had caused economic decline which negatively affected productivity in various spheres. Many sectors were already under pressure due to the state of the economy and the situation was amplified by the down grading of the credit status of the country by the rating agencies. During the lockdown period, many municipalities found it difficult to read meters, bill customers and collect what was due. Consumption of services by commercial and Industrial customers reduced drastically. Contributions towards capital programs were hindered and expenditure came to a standstill. The consequential damage of the lockdown has seen unemployment numbers increasing, further reducing disposable household income and increasing the indigent household numbers.

The household bill for trading services became unaffordable and arrear consumer debtor numbers spiked sharply. The need to respond to humanitarian requirements became essential thus increasing the overtime costs for services being rendered. The reality was that secondary cities municipalities that are highly dependent on their own funding, were the most affected during the lockdown. Their funding was dependent on income from services rendered to consumers. Due to the socio-economic situation that ensued during the lockdown period, consumers were unable to pay for services and credit control mechanisms were suspended by the municipalities as directed by government. This had caused financial strain on the municipalities.

The strain that municipalities are currently experiencing in their operations as a result of the COVID-19 pandemic is further demonstrated by the declining financial health of municipalities with a direct related increase in the state of financial distress as depicted in the state of Municipal financial health above.

### **6. MANDATORY INTERVENTION**

The Executive Council has already resolved that the municipalities which are facing severe financial crisis must be placed under intervention in terms of Section 139(5) of Constitution of the Republic of South Africa read together with Section 139 of the Municipal Finance Management Act.

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Implementation of Section 139 of the Municipal Finance Management Act will require certain key activities to be conducted to ensure that the financial positions of municipalities improve during the intervention, the following key critical activities will be conducted pursuant to compliance with Section 139 of the Municipal Finance Management Act:

- (i) make a determination of the reasons for the crisis in its financial affairs;
- (ii) conduct an assessment of the municipality's financial state;
- (iii) prepare an appropriate recovery plan for the municipality;
- (iv) recommend appropriate changes to the Municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
- (v) submit the above to the MEC for Finance in the Province

The above clearly indicates that there is a financial crisis, MFMA Section 139 requires that specific steps must be followed. These include:

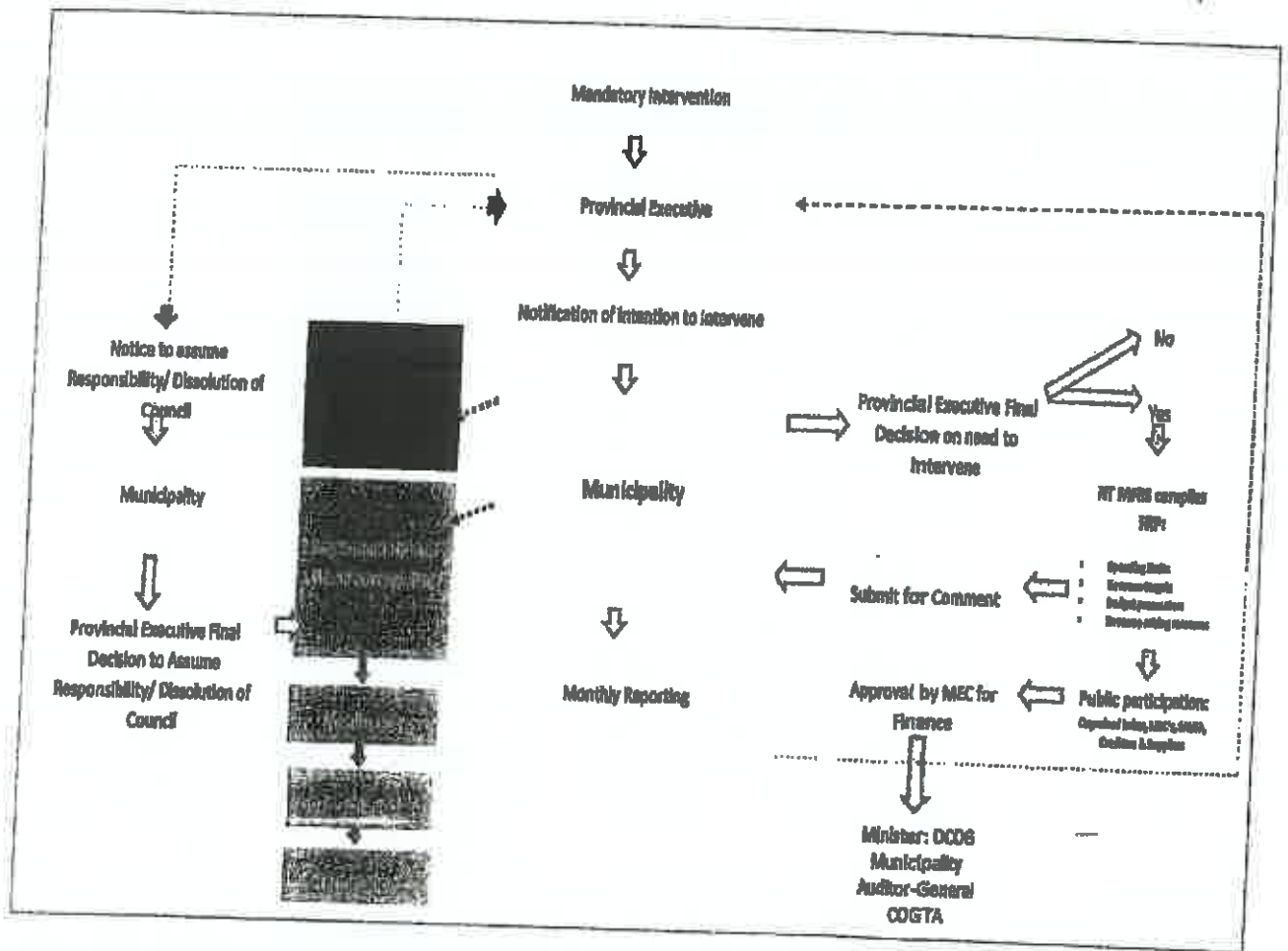
- requesting the Municipal Financial Recovery Service (MFRS) to determine the reasons, assess the municipality's financial state, and prepare a financial recovery plan (which will include any needed changes to the budget and revenue measures); and
- Consulting the mayor to obtain the municipality's co-operation.

If the criteria in Section 140 are met, the Executive Council must promptly request the Municipal Financial Recovery Service to prepare a financial recovery plan within 90 days. A failure by the municipality to abide by the terms of a mandatory recovery plan provides grounds for further intervention in terms of Section 139(5)(b) or (c) of the Constitution, which enables the dissolution of the municipal council, appointment of an administrator, and imposition of a temporary budget or alternatively assumption of responsibility for the implementation of the financial recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

If the Provincial Executive Council cannot or does not adequately exercise the powers or perform their functions in terms of section 139(4) and or 139(5) of the Constitution, this will automatically trigger a mandatory intervention by the national executive in terms of Section 150 of the MFMA. Section 139(8) of the Constitution enables national legislation to regulate the implementation of the provisions for intervention, which has been enacted in the form of Chapter 13 of the MFMA.

When 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 Executive Council must initiate a mandatory intervention process as outlined below:

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The above table illustrates processes that will be followed pursuant to implementation of mandatory intervention. The implementation of mandatory interventions involves different measures and processes which includes conducting a financial health assessment, development of a status quo assessment report, development and implementation of a recovery plan. Dissolution of a municipal council is provided for under Section 139(5)(b) of the Constitution and that is not the preferred approach in terms of the submission, but it must be emphasised that the main objective of government is to assist, support municipalities in addressing and resolving matters of financial crisis being experienced by municipalities as a result of failures in implementation of financial management prescripts.

The dissolution of a municipal councils is provided for as part of Section 139(5) measures in an event that the municipal Council does not implement the financial recovery plan imposed. The submission does not support the dissolution of any municipal councils elected by the communities through the democratic processes, but rather the imposition and implementation of the financial recovery plan provided as provided for in the legislation.

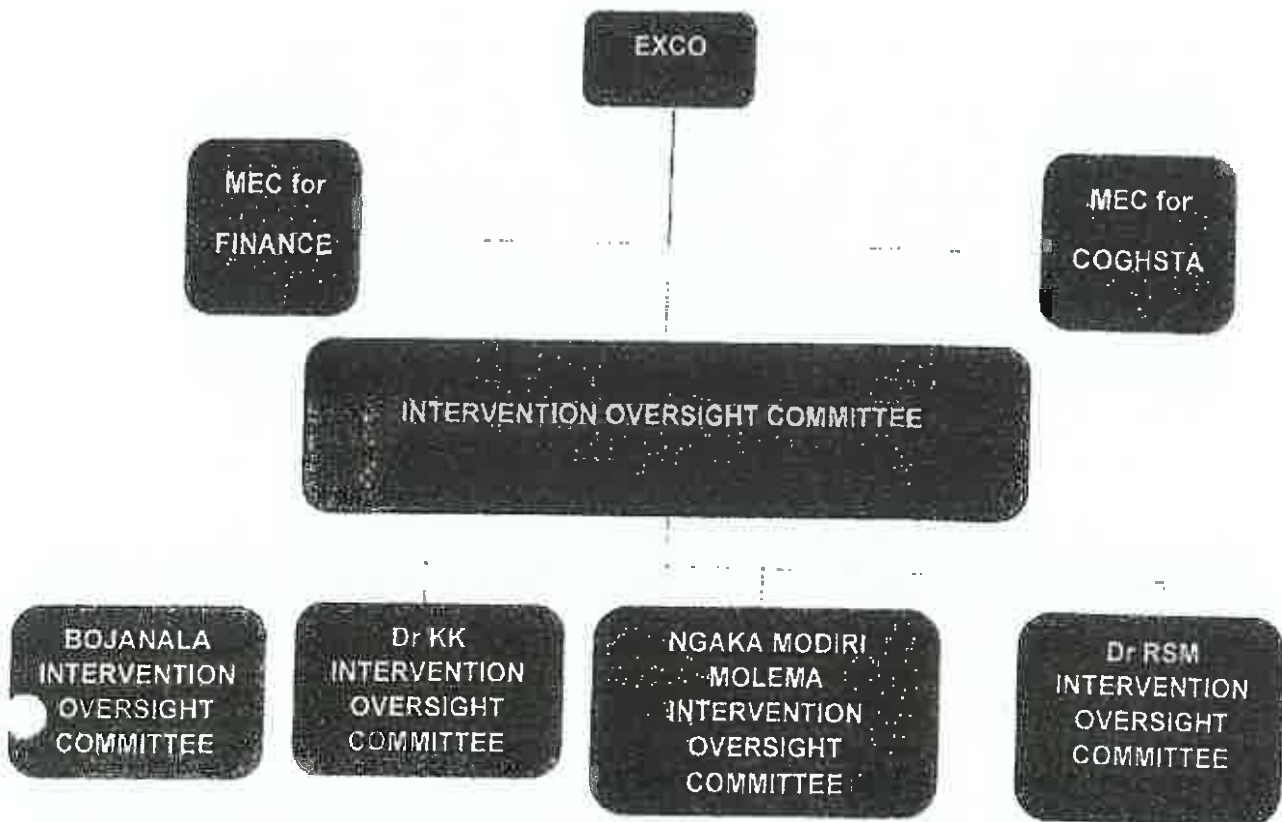
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# IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT

## 6.1. INTERVENTION OVERSIGHT STRUCTURE

The current capacity of the municipal finance management unit has been strengthened and has the capacity to implement mandatory intervention. The structure below, is a provincial political structure reporting to MEC Finance and CoGHSTA to provide political guidance during the intervention. The political intervention team includes all Mayors at district level, SALGA and Mayors of the affected municipalities. A similar structure will be established at technical level.



The municipal intervention team will be appointed at each municipality as per the Provincial Treasury's municipal financial recovery services resourcing strategy. The intervention team will consist of specialists covering the four pillars of municipal sustainability, namely, Governance, Municipal Capacity, Financial Management and Service delivery. The team will be led by the Coordinator who will be a specialist in public administration or municipal finance.

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### **7. TRANSITIONAL ARRANGEMENTS**

Eleven (11), except Bojanala and Dr Ruth District Municipalities, of the thirteen (13) municipalities were placed under Section 139 (1)(b) intervention of the Constitution by the Executive Council. The intervention at four (4) of these municipalities (Kgetleng, Madibeng, Tswaing and Lekwa Teemane) ended on 30 June 2020. Ratlou Local Municipality was also placed under discretionary intervention which ended on the 30 June 2020. The municipality is excluded from the above list as it does not meet the criteria utilized to determine serious financial crisis as outlined in Section 140 of the MFMA. Exclusion from a list of Municipalities facing severe financial crisis does not indicate that there are no financial, governance, institutional or service delivery problems, as a result the Executive Council may implement a discretionary intervention in line with Section 137 of the MFMA read together with Section 139(1) of the Constitution in order to address the identified financial challenges.

There are four (04) Municipalities (Madibeng, Kgetleng, Tswaing and Ditsobotla L M) which are still under discretionary intervention in terms of Section 139(1)(b) of the Constitution as read together with Section 137 of the Municipal Finance Management Act. Section 139(3) of the Municipal Finance Management Act states that, a mandatory intervention supersedes any discretionary provincial intervention provided that a financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention. As part of the transitional arrangements, the intervention as stated above should continue with provision that the Provincial Treasury provides support by compiling and support the municipality to implement the financial recovery plans at these municipalities. The Executive Council should immediately place all municipalities identified to be in financial crisis under mandatory intervention. These municipalities are:

- (a) Dr Ruth Segomotsi Mompati District Municipality
- (b) City of Matlosana
- (c) Ramotshere Molloa L M
- (d) Mamusa L M
- (e) Lekwa Teemane L M
- (f) Maquassi Hills L M
- (g) Mahikeng L M
- (h) Bojanala Platinum District Municipality
- (i) Naledi L M

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Provincial Treasury working in collaboration with National Treasury will prepare the status quo reports for the mandatory interventions for all the municipalities where the Executive Council has intervened in terms of Section 139(1)(b) of the Constitution. The form of intervention will be gradually converted from the discretionary to a fully-fledged mandatory intervention on a phased in approach to ensure that the Executive Council duly comply with the provisions of Section 139(5) of the Constitution, read with Section 139 of the Municipal Finance Management Act.

### **8. COOPERATIVE GOVERNANCE**

The Provincial Treasury has procured the services of a panel of Municipal Financial Management Service Providers to capacitate and assist in executing the duties of Municipal Finance Recovery Services of the Provincial Treasury which includes the preparation of financial recovery plans.

A collaborative approach to municipal interventions is urgently needed. The questions that seem to continually arise in this space are as follows:

- a. What have we done to strengthen and promote collaboration?
- b. How do we get to the true essence of the "spirit of co-operative governance"?

Unless a collaborative approach that assumes that all stakeholders share a common purpose with pooled resources and from a single point of departure is adopted, the intervention will be fragmented and isolated with little impact to the municipality. This collaborative approach will ensure an efficient, effective and financially sustainable local government that adequately fulfils its legal mandate. The common purpose requires underlying principles to ensure an integrated effort and the following principles are proposed for a collaborative approach:

- a. That the spirit of co-operative government is recognized and upheld by all stakeholders involved in the space of local government;
- b. That each stakeholder's contribution is underpinned by their legal framework.

Apart from collaboration between departmental stakeholders, of greater importance is the accountability of the political and administrative leadership. Considering that in many instances, governance instability manifests in a financial crisis, governance issues must be dealt with decisively.

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### 9. IMPLEMENTATION READINESS

The Provincial and National Treasury developed an implementation road map, which outlines the process to be followed during the implementation. The following milestones have been achieved to date:

- Conducted financial health assessment and identified Municipalities operating under financial crisis as defined by Section 140(2)(c) of the Municipal Finance Management Act;
- Presented to and notified the Executive Council of the outcomes of the financial health assessment wherein Municipalities that have been identified operating under financial crisis as defined by Section 140(2)(c) of the Municipal Finance Management Act where presented;
- Conducted consultative sessions with Mayors of Municipalities that have been identified operating under financial crisis as defined by Section 140(2)(c) of the Municipal Finance Management Act;
- Conducted consultative sessions with the National and Provincial Department of Cooperative Governance and Traditional Affairs;
- Conducted consultative sessions with the National Treasury and solicited support from the Minister of Finance through the National Treasury's Municipal Finance Recovery Services (MFRS);
- Completed the procurement of Municipal Finance Specialists to assist and support the Provincial Treasury with planning, implementation and monitoring of the mandatory interventions;
- Participated in the National Treasury's Municipal Finance Recovery Services Roadshow wherein the Deputy Minister of Finance presented to the Executive Council on implementation of Section 139 of the Constitution as read together with provisions of Section 137 and Section 139 of the Municipal Finance Management Act.

The above processes were conducted in order to ensure that there is total compliance to the provisions of the Constitution as well as all the related legislations and regulations. Completion of these processes has allowed the Provincial Treasury to proceed with implementing necessary preparatory processes pursuant to complying with provisions of Section 139 of the Constitution. Implementation will be done in a phased in approach as follows:

PHASE	ACTIVITIES	TIME FRAME	PROGRESS
1	Conduct an update on the financial health of municipalities	February – May 2021	Ongoing
2	Conduct Status quo assessment to determine the extent of the crisis	June – August 2021	Ongoing

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3	Compile Financial Recovery Plan	September – November 2021	Ongoing
4	Implementation and Imposition of the Financial Recovery Plan	November 2021 – Until the crisis is resolved	Ongoing
5	Implementation Monitoring and review	Continuous every quarter	Ongoing

### 10. CONSULTATIONS

Since the resolution of the Executive Council authorising implementation of mandatory interventions, the Provincial Treasury has conducted extensive internal and external consultations with the following stakeholders;

#### 10.1. INTERNAL CONSULTATIONS

##### 10.1.1. NATIONAL TREASURY

Provincial Treasury has had numerous engagements with the National Treasury regarding the outcomes of the handover report as well as the related implications thereof. Provincial Treasury has formally notified the Minister of Finance about the resolution of the Executive Council to implement the mandatory interventions in line with the provisions of Section 139 of the MFMA, in the above mentioned thirteen (13) municipalities.

This notification is in line with the requirements of Section 139(6) of Constitution of the Republic of South Africa. In that letter the Minister is requested to activate and provide the services of the Municipal Financial Recovery Services to amongst other perform activities as outlined in section 139(1)(a) and 141(2)(3) and (4) in supporting the Provincial Government in implementing the mandatory intervention. The Minister of Finance has in his response, committed to support the Provincial Government in implementing the mandatory interventions in all municipalities identified as having financial crisis.

##### 10.1.2. DEPARTMENT OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

Discussions were held with both the National and Provincial Department of Cooperative Governance and Traditional Affairs where in the provisions of the constitution as well as the legislation were thoroughly discussed. Matters relating to provision of human resources and clarification of roles and responsibilities between the Provincial Treasury and the Provincial Department of Cooperative Governance and Traditional Affairs were also discussed and resolved on.

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### **10.1.3. EXECUTIVE COUNCIL**

Numerous submissions and presentations have been made to the Executive Council with regards to the state of municipal finances as well as the requirements of the Constitution and the Legislation in instances where Municipalities are facing severe financial crisis as well as the related mandate and responsibilities of the Executive Council.

### **10.2. EXTERNAL CONSULTATIONS**

#### **10.2.1. MUNICIPALITIES**

Provincial Treasury has conducted engagements with the affected municipalities in October 2019, wherein the financial crisis was confirmed by the municipalities and the impact of the mandatory intervention was explained to the affected municipalities. Further engagements were also conducted during the Mid-Year budget and performance assessments which were convened in January and February 2020, wherein performance of municipalities as at the end of December 2019 were assessed to determine if there any notable improvements since the determination and confirmation of financial crisis.

Municipalities were consulted further through formal letters which have been conveyed notifying municipalities that the Provincial Treasury will be conducting status assessments of municipal financial health. The letter also requested municipalities to acknowledge and concur to this process through a formal Council Resolution. Most municipalities have agreed to the process, while the remaining municipalities are still processing this important matter through their Councils.

#### **10.2.2. NORTH WEST BRANCH OF THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA)**

The North West branch of the South African Local Government Association was also consulted, and the leadership of SALGA was briefed on the outcomes of the handover report on municipalities as well as the identified areas of performance failures. It was further explained to the leadership of SALGA that interventions are aimed at reversing and resolving the identified performance failures in order to ensure that Municipalities' ability to provide basic services and settle their financial obligations and commitments is secured. The importance of political structures in ensuring oversight through governance processes was emphasised to the leadership of SALGA and the MEC for Finance implored on the leadership of SALGA to heighten their oversight in order to ensure that interventions are executed as agreed and that they achieve their intended mandate.



## **IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT**

### **11. IMPLICATIONS**

#### **11.1. FINANCIAL IMPLICATION**

National Treasury has allocated R10 million to the Provincial Treasury (Municipal Finance Management unit), the allocation is intended to provide support and capacity to the Provincial Treasury in executing the recovery plan functions. However, given the number of municipalities that the mandatory interventions must apply to, as well as the magnitude of the work that has to be executed during the intervention, it is anticipated that the R10 million allocation might not be sufficient to enable the Provincial Treasury to adequately execute the intervention. Therefore, the R10 million allocation will be utilized towards augmenting the budget allocated by the Provincial Treasury for preparation, implementation and monitoring of Recovery Plans in Municipalities.

#### **11.2. PERSONNEL IMPLICATION**

Based on the above discussion it is evident that a collaborative approach is required to ensure that the Strategy on Municipal Financial Sustainability and Interventions is resourced in an effective and integrated manner. Furthermore, a multidisciplinary intervention team supported by officials from Cooperative Governance and Traditional Affairs and Provincial Treasury is required to ensure effective implementation and sustainability. The resourcing and implementation of the intervention team should provide a more medium to long-term focus towards greater financial sustainability based on a key set of financial indicators

#### **11.3. POLITICAL IMPLICATION**

Section 139(7) of the Constitution requires the National Executive must intervene in terms of Section 139(5) of Constitution, in instances where the Executive Council has failed to intervene in line with Section 139(5) of Constitution. This provision of the law empowers the national government to intervene in municipalities within the North West province jurisdiction, should the North West Executive Council fail to implement the mandatory intervention as required by the Constitution and the MFMA.

Intervention by the national government in municipalities where the North West Executive Council has failed to implement the mandatory intervention will result in severe political embarrassment and backlash from the communities as the North West Executive Council will be viewed and regarded as being weak and indecisive. It is based on the above that it is recommended that the North West Executive Council considers implementing mandatory intervention as per Section 139 of the MFMA, wherein the North West Executive Council will implement a mandatory intervention and impose a financial recovery plan aimed at securing the municipality's ability to meet its obligations to meet its financial commitments.

## **IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT**

In order to avoid any confusions and complications in implementing the mandatory interventions, it is recommended that the North West Executive Council mandates both the MEC for Finance and the MEC for Cooperative Governance, Human Settlements and Traditional Affairs to engage the affected Municipalities and clearly articulate the terms of reference regarding the mandatory intervention.

### **11.4. LEGAL IMPLICATIONS**

Section 136(4) of the MFMA states that; - 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, as a result of which the conditions for an intervention in terms of section 139(5) of the Constitution are met, the Executive Council must intervene in the Municipality in accordance with section 139 of the MFMA.

In order to implement Section 139 of the MFMA, the Executive Council must have, in line with Section 140 of the MFMA, made a determination and confirmed that the Municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than two per cent of the Municipality's budgeted operating expenditure.

Provincial Treasury has conducted an assessment in terms of Section 140 of the MFMA and subsequently confirmed that there are sufficient grounds for a mandatory intervention to be implemented, as a result the intervention will be consistent with the requirements of the Constitution and all applicable legislative provisions of the MFMA as indicated above.

## **12. GOVERNMENT PRIORITIES**

### **12.1 NATIONAL STRATEGY AND PRIORITIES**

The support to municipalities through mandatory intervention is consistent with the National Government priorities of promotion of sustainable financial management processes and practices in Municipalities.

### **12.2 PROVINCIAL STRATEGY AND PRIORITIES**

The Provincial Government has the responsibility to support and capacitate municipalities through mandatory intervention as part of ensuring sustainable and responsive local government.



## **IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT**

### **13. CONCLUSION**

The state of Municipal finances is at a critical state and at an all-time lowest, it therefore is important that urgent critical and drastic measures are implemented to ensure that sound and sustainable financial management processes as envisaged by the objects of the MFMA are achieved.

This requires for an urgent structured intervention to assist, support and capacitate these municipalities to ensure that this serious financial crisis is addressed and municipalities are in a position to adequately execute their constitutional and legislative mandates. The National Treasury has conducted engagements with the Executive Council as part of its roadshows that seeks to provide guidance on provincial intervention in municipalities.

The Executive Council is urged to consider this submission on mandatory intervention in line with the presentation and guidance of the National Treasury and as a matter of urgency, implement mandatory interventions in municipalities identified as operating under severe financial crisis so as to avoid the continued collapse and dilapidation of the state and functionality of municipalities across the Province.

In view of the Municipal Intervention Roadshow undertaken by the National Treasury, the following activities should inform future interventions including key milestones that should be achieved through the intervention with specific reference to Section 139 (5) of the Constitution read together with Chapter 13 of the MFMA:

- Review the implementation of the provisions of Section 139 of the Constitution as a measure and a framework to prevent a collapse in the municipalities' financial management, rather as an intervention of last resort when municipalities' financial management has already collapsed;
- Determine the level of allowable municipal failures before an intervention is initiated must be set and be raised significantly;
- The Provincial Treasury together with COGHSTA should conduct regular assessment of financial problems in terms of the thresholds contained in Sections 138 and 140 of the MFMA to promptly identify municipalities facing financial challenges or crisis and conduct the necessary immediate investigations in cases where thresholds were breached;
- The Province should participate and make necessary submissions towards ensuring that a standardised and clear regulations and framework governing implementation of Section 139 of the Constitution is developed and correctly applied and implemented;

## **IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT**

- Implementation and ensure application of the NT MFRS Simplified Approach to implementation interventions in terms of Section 139 of the Constitution and to further ensure implementation of a collaboration framework which clearly specify the relationship, roles and responsibilities of stakeholders in the implementation of Section 139 of the Constitution read together with Chapter 13 of the MFMA;
- Consultation process with NCOP will be initiated in line with the legislation in support of the implementation plan;
- Quarterly FRP reviews will be conducted in terms of Section 147 of the MFMA to assess the effectiveness of the financial recovery plans currently implemented and consider amendment;
- Effect amendment of the current FRPs as informed by the quarterly review by the MEC and align the Provincial S154 Support Package to the amended FRPs

### **14. RECOMMENDATIONS**

**It is recommended that Executive Council;**

- Agree that the most appropriate intervention will be implemented in response to the outcomes of the assessment of financial problems conducted in terms of Sections 138 and 140 of the MFMA and that serious financial crisis must always be addressed by implementing the provisions of Section 139(5) of the Constitution read together with Section 139 of the MFMA;
- Agree that provisions of Section 139(1) of the Constitution read together with Section 137 of the MFMA will only be implemented in instances where only a financial problem has been identified;
- Endorse the implementation of the mandatory interventions at the following municipalities identified as operating under serious financial crisis:

(j) Dr RSM District Municipality

(k) City of Matlosana

(l) Ramotshere Molloa L M

(m) Mamusa L M

(n) Lekwa Tsamane L M

(o) Maquassi Hills L M

(p) Mahikeng L M

(q) Bojanala

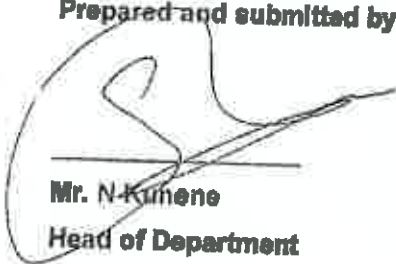
(r) Naledi L M



## IMPLEMENTATION OF SECTION 139 OF THE MUNICIPAL FINANCE MANAGEMENT ACT

- Support and agree that the Provincial Treasury further consult with the above-mentioned municipalities as a feedback session for an engagement on the outcome of the financial health and status quo assessments;
- Agrees to preparation and implementation of financial recovery plans to address financial crisis in the above municipalities identified as operating under serious financial crisis in line with the NT MFRS Simplified Approach
- Agrees to the establishment of the political intervention oversight structure including the establishment of the technical multi-disciplinary intervention task team to support the political intervention oversight structure;

Prepared and submitted by:



Mr. N. Kunene  
Head of Department

Date: 16/05/2021

Submitted by:



Ms. M. Rosho  
MEC for Finance

Date: 17/05/2021