



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not reportable
CASE No.:1623 /2024**

In the matter between:

THE DEMOCRATIC ALLIANCE
Applicant

and

**PREMIER OF THE FREE STATE PROVINCE
THE MEC: HUMAN SETTLEMENTS, COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS,
FREE STATE PROVINCE**

First Respondent

Second Respondent

**PROVINCIAL EXECUTIVE OF THE
FREE STATE PROVINCE**

Third Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS,**

Fourth Respondent

**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**

Fifth Respondent

THE NATIONAL EXECUTIVE

Sixth Respondent

FREE STATE PROVINCIAL LEGISLATURE

Seventh Respondent

**NATIONAL COUNCIL OF PROVINCES OF THE
REPUBLIC OF SOUTH AFRICA**

Eighth Respondent

COUNCIL OF THE MATJHABENG MUNICIPALITY

Tenth Respondent

NATIONAL TREASURY

Eleventh Respondent

Neutral citation: XXX

Coram: Van Rhyn J

Heard: 15 August 2024

Delivered: 22 OCTOBER 2024

Summary: Declaratory order – s172(1)(a) of the Constitution -breach of duties of municipality of s52(2) and s153(a) of the Constitution. Application for postponement for a period of one year– principles restated.

ORDER

1. It is declared that:

1.1 The Matjhabeng Municipality has breached s 152(2) of the Constitution, in failing to strive, within its financial and administrative capacity to:

- 1.1.1 ensure the provision of services to its community in a sustainable manner;
- 1.1.2 promote social and economic development; and
- 1.1.3 promote a safe and healthy environment

and its conduct is declared invalid to the extent of these inconsistencies.

2. It is declared that the Matjhabeng Municipality has breached s 153(a) of the Constitution, in failing to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community, and its conduct is declared invalid to the extent of these inconsistencies.

3. It is declared that the Matjhabeng 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 and to meet its financial commitments.
4. It is declared that the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province have failed to comply with the duties to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution, and their conduct is declared invalid to the extent of these inconsistencies.
5. It is declared that the Minister of Cooperative Governance and Traditional Affairs, the President of the Republic of South Africa and the National Executive have failed to comply with the duties to intervene in the Matjhabeng Municipality in terms of s 139(7) and (5) of the Constitution, and their conduct is declared invalid to the extent of these inconsistencies.
6. The Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province are ordered to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution and submit a written notice of such intervention to the Minister, Free State Provincial Legislature and National Council of Provinces of the Republic of South Africa in terms of s 139(6) of the Constitution within seven (7) days of the intervention.
7. If the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province do not comply with the duties under prayer 6 above within seven (7) days, the Minister of Cooperative Governance and Traditional Affairs, President of the Republic of South Africa and the National Executive are ordered to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution within seven (7) days.

8. The Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province, alternatively, the Minister of Cooperative Governance and Traditional Affairs, President of the Republic of South Africa and the National Executive are required to:

8.1 prepare a financial recovery plan for the Matjhabeng Municipality, including complying with its duties to make requests to the Municipal Financial Recovery Service of the National Treasury and consult with the Mayor of the Matjhabeng Municipality under s 139 of the Local Government: Municipal Finance Management Act 56 of 2003; and

8.2 within six months of this court order, file a copy of the financial recovery plan with this Court.

9. If the Matjhabeng Municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province, alternatively, the Minister of Cooperative Governance and Traditional Affairs; President of the Republic of South Africa and the National Executive must:

9.1 dissolve the council of the Matjhabeng Municipality, appoint an administrator until a newly elected council for the Matjhabeng Municipality has been declared elected, and 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 Matjhabeng Municipality; or

9.2 assume responsibility for the implementation of the recovery plan to the extent that the Matjhabeng Municipality cannot or does not otherwise implement the recovery plan.

10. The first, second, third, fourth, ninth and tenth respondents jointly and severally are ordered to pay the costs of the application on scale C, such costs to include the costs occasioned by the employment of two counsel.

JUDGMENT

Van Rhyn J

[1] This is an opposed application brought by the Democratic Alliance (the DA), a registered political party, for a declaratory order and further ancillary relief concerning the serious and persistent material breach by the Matjhabeng Municipality of its duties to ensure the provision of services to its community in a sustainable manner, the failure to promote social and economic development, the failure to promote a safe and healthy environment and that it has failed to structure and manage its administration, budgeting and planning processes in order to give priority to basic needs of its community.

[2] The fifth respondent, the President of the Republic of South Africa, and the sixth respondent, the National Executive filed notices to oppose the application on 17 April 2024 but did not file any answering affidavits. The Free State Provincial Legislature, cited as the seventh respondent, the National Council of Provinces of the Republic of South Africa, cited as the eighth respondent, and National Treasury, cited as the eleventh respondent filed notices to abide with the decision of the court.

[3] The application is opposed by the first respondent, the Premier of the Free State Province (the Premier), the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government, cited as the second respondent (the MEC), the third respondent, the Provincial Executive of the Free State (the Provincial Executive), the fourth respondent, the Minister of Cooperative Governance and Traditional Affairs (the Minister), the ninth respondent, Matjhabeng Municipality and the Council of the Matjhabneg Municipality cited as the tenth respondent.

[4] The Matjhabeng Municipality comprises the towns of Welkom, Virginia, Odendaalsrus, Hennenman, Ventersburg and Allanridge. The DA contends that the Matjhabeng Municipality is, as a result of a crises in its financial affairs, in serious or

persistent material breach of its obligations to provide basic municipal services and to meet its financial commitments. The DA seeks a declaratory order under s 172(1)(a) of the Constitution concerning the breach by the Matjhabeng Municipality of its duties under ss 152(2) and 153(a) of the Constitution as set out in the notice of motion.

[5] The Auditor General of South Africa issued a qualified audit report regarding the financial statements, as on 30 June 2023, of the Matjhabeng Municipality. In respect of service charges, it was opined that insufficient appropriate audit evidence for water and electricity included in service charges were available as the municipality did not have adequate processes for the billing of water and electricity consumption. This was due to the inability to read water and electricity meters regularly which resulted in consumers being billed for water and electricity consumption based on estimates for extended periods.

[6] In respect of payables from exchange transactions it was noted that the Matjhabeng Municipality did not correctly account for trade payables in terms of the Standard of Generally Recognised Accounting Practice (GRAP) 1, *Presentation of Financial Statements*, due to the municipality not recording the suppliers' invoices in the accounting records for the corresponding period. The figure of trade payables disclosed in the financial statements was understated by R49 167 522. Note 45 to the financial statements indicates that a nett loss of R1 115 679 647 was incurred for the year ending 30 June 2023. From the said date, the municipality's total liabilities exceed its total assets by R4 197 678 664 whilst the total current assets cover only 21% of its total current liabilities.

[7] Matjhabeng Municipality owed Eskom an amount of R5 630 675 806 on 30 June 2023. The debt in 2022 amounted to R 4 763 669 846. The debt in respect of Bloem Water in 2022 amounted to R4 897 035 157. The amount due to Bloem Water accumulated to R5 436 424 698 in 2023. The Auditor General indicated as follows with reference to the aforesaid liabilities: 'These events or conditions, along with other matters as set forth in note 45, indicate that a material uncertainty exists that may cast significant doubt on the municipality's ability to continue as a going concern.'

[8] Material electricity losses of R89 357 033 were incurred due to the status or condition of the electricity network, weather conditions and load on the system as well as non-technical losses such as theft and vandalism. Water losses of R239 831 884

were incurred due to metering inefficiencies, aging pipeline infrastructure, burst pipes, leakages and unmetered connections. The Matjhabeng Municipality is the defendant in various legal claims which causes material uncertainty as to the outcome and financial impact in respect of the financial statements.

[9] The Matjhabeng Municipality incurred fruitless and wasteful expenditure in the amount of R339 841 917 mainly due to interest and penalties on late payments to suppliers. This amount has increased since the previous financial statements (2022: R180 736 298). The irregular expenditure in the amount of R146 754 378 was mainly due to non-compliance with supply chain management regulations. It was noted that reasonable steps were not taken to prevent irregular expenditure as required by s 62(1)(b) of the Municipal Finance Management Act¹ (MFMA). The Auditor General found that an effective system of internal control for revenue and debtors was not in place as required by s 64(2)(f) of the MFMA.

[10] It was furthermore found that the municipality did not always pay money owed within 30 days as required by s 65(2)(e) and that, in terms of s 140(2) of the MFMA the Matjhabeng Municipality is in serious breach of its obligations to meet its financial commitments. An adequate management, accounting and information system was not in place which recognised expenditure when it was incurred as required in terms of s 65(2)(b) of the MFMA. It was furthermore found that some of the unauthorised expenditure incurred by the municipality was not investigated to determine if any person is liable for the expenditure, as required by s 32(2)(a) of the MFMA. Similarly, irregular expenditure incurred was not investigated to determine if any person is liable for the expenditure as required in terms of s 32(2)(b) of the MFMA. An effective system of internal control for assets was not in place as required by s 63(2)(c) of the MFMA.

[11] The qualified audit opinions issued by the Auditor General of South Africa on 14 January 2023 and 29 January 2024 concluded that there was material uncertainty regarding the Matjhabeng Municipality's ability to continue as a going concern. The water supply system is in disrepair. Due to failing infrastructure the municipality loses 56% of the water it procures. Only three of the 13 Wastewater Treatment Plants and 11 out of the 56 sub-stations are operational. Approximately 30% of the streetlights do not function. Sewage flows into rivers and compromises local buildings and schools as well

¹ Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

as the Odendaalsrus Correctional Centre. In total 1543km of sewer pipes are blocked and 80% of the manholes within the stormwater system are blocked. Residents do not have an effective way to seek redress and report issues due to a non-operational customer-care centre.

[12] In the practice note filed on behalf of the first, second, third, fourth, ninth and tenth respondents (the opposing respondents) the nature of the dispute is identified as an application to compel or interdict the respondents to impose a financial recovery plan which application is opposed by the respondents on the grounds that the respondents have intervened in the Matjhabang Municipality and in a short time, much progress has been made to improve the dire situation of the said municipality. The respondents therefor seek a further period of 12 months to see the recovery steps to fruition.

[13] The Municipal Manager of Mathjabeng Municipality, Lonwabo Ngonqo deposed to an affidavit on behalf of the opposing respondents. In essence, no attempts are made at denying or disputing the factual allegations and accusations levelled by the DA against the respondents. On behalf of the opposing respondents, it is argued that the current administration came into office on 29 November 2021. The problems at the municipality emanates from a decline in the formal economy arising from major mines in the area having shut down. R2.8 billion has been spent in the past five years on service providers as the municipality does not have the internal capacity nor the fleet to service the needs and provide services to the community. Having regard to the fact that the current administration came into office during November 2021, it is evident that the current administration has already been in office for two years and approximately eight months, during which period there has not been substantial improvement.

[14] It is contended by the opposing respondents that the project management unit, in charge of infrastructure projects of the municipality, was outsourced at a cost of R500 000.00 per month. This has been terminated. The preparation of the annual financial statements was outsourced and a cost of R900 000.00 per month. This practice has also been terminated and employees at the municipality are now tasked to perform this function. There is, however, no indication when exactly the contracts of the service providers came to an end and no reason is provided why the outsourcing was not ceased at an earlier stage. The municipal manager was appointed on 1 January 2023, being more than a year with no significant improvement in the financial situation at the

municipality. The current chief financial officer has been in the employment of the municipality since December 2017.

[15] The municipality has entered into a debt recovery plan with ESKOM to address the backlog of R5 billion. A payment plan has been accepted by ESKOM and the municipality is paying approximately R40 million to Eskom per month. The Minister explained that it is considered more prudent and appropriate to implement focused and targeted supportive and intervention programs jointly with other sector departments in the spirit of cooperative governance to support municipalities to execute and manage its affairs. In this regard the Minister and provincial COGTA developed a Municipal Support and Intervention Plan (MSIP) to facilitate the implementation of the State of Local Government Report which provides for Government's involvement to support and strengthen the capacity of municipalities to perform their functions.

[16] A copy of the MSIP is appended to the answering affidavit of the Minister. Regarding the financial viability of the Matjhabeng Municipality, the status pertaining to the closing balance to ESKOM is indicated as R5 392 459 327.87 as at the end of March 2023. The status of the closing balance at the end of March 2024 is indicated as R5 882 565 820.03. The closing balance of the amount owed to the Vaal Central Water Board at the end of March 2023 was R5 330 280 485.73. The status of the closing balance in respect of the debt to the Vaal Central Water Board amounted to R5 960 790 589.66 at the end of March 2024.

[17] In order to achieve coherent government in the Republic of South Africa, the Constitution makes provision for principles of cooperative government. The commitment of the spheres of government of the Republic and the provision of coherent government entails that the upper spheres should supervise the lower spheres in order to prevent the decline of government in the Republic. Accordingly, provincial government as the sphere of government closest to local government supervises local government to ensure harmony in the functioning of government.

[18] Any municipality bears the primary responsibility to identify, avoid, and solve all of its financial problems.² While the causes of financial distress at municipal level can be complicated and varied, the solution inevitably includes bringing its revenues and

² Section 135(1) of the MFMA.

expenditures into alignment. The municipal council, as a governing body, has primary accountability and responsibility for the government and performance of the municipality. The municipal council is therefore primarily responsible for identifying, avoiding and solving any municipal financial distress as it arises.

[19] Section 139(5) of the Constitution introduces the concept of a financial crises as a municipality's failure to fulfil its mandate to provide basic services or to fulfil its financial obligations because of its financial situation, or when the municipality admits that it is unable to do so. Sections 139 and 140 of the MFMA provide further guidance on what constitutes a 'crisis' in a municipality's financial affairs. Section 139(1) the MFMA provides 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 provincial executive must . . .'. This subsection goes on to specify what the provincial executive must do.

[20] For a proper appreciation of the import of the intervention decision, I must quote s 139 of the Constitution in full:

'Provincial intervention in local government

(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.

(2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b)-

- (a) it must submit a written notice of the intervention to-

- (i) the Cabinet member responsible for local government affairs; and
- (ii) the relevant provincial legislature and the National Council of Provinces, within 14 days after the intervention began;

(b) the intervention must end if–

(i) the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that those 14 days.

(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.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to–

(a) the Cabinet member responsible for local government affairs; and

(b) the relevant provincial legislature and the National Council of Provinces, within seven days after

the intervention began.

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

(8) National legislation may regulate the implementation of this section, including the processes established by this section.'

[21] Both s 139(5) of the Constitution and s 139(1) of the MFMA are mandatory – the provincial executive *must* act in the circumstances described. Both the Constitution and the MFMA refer to a 'serious or persistent material breach' of a municipality's obligations. Concerning a 'serious material breach', s 140(2) of the MFMA provides that some factors are indicative of a municipality not fulfilling its financial obligations which include the following: the municipality is not paying lenders or investors when due; the municipality does not meet its contractual obligations; the municipality does not pay monies when due, which individually or cumulatively, adds up to more than 2% of the municipality's current operating expenses budget; the municipality's non-payment has or is likely to have an adverse impact on the availability or price of credit to the local government sector.

[22] As regards a 'persistent material breach', s 140(3) of the MFMA adds that this is a continuous or recurring failure of a municipality to pay its debts and that this failure substantially impairs the ability of a municipality to procure goods, services or credit on usual commercial terms. The 'serious or persistent material breach' must be rooted in a financial crisis, but the crisis can manifest in service delivery failures or in financial failures. However, when the problems escalate and become more serious or persistent, then action in accordance with the MFMA is no longer discretionary – it is required. Intervention comprises the most powerful form of supervision of local government.

[23] It is not disputed that Matjhabeng Municipality is facing a serious crisis. Both the DA and the opposing respondents have set out the facts to sketch the disastrous state of affairs. The opposing respondents admit that a crisis in the financial affairs of the municipality exist and this has resulted in serious and persistent material breaches of its obligations to provide basic services or to meet its financial affairs. This state of affairs had already prompted the fourth respondent to implement the MSIP aimed at securing the Matjhabeng Municipality's ability to meet its obligations to provide basic services and its financial commitments.

[24] In reply, the DA contends that notwithstanding the debt recovery plan entered between Matjhabeng Municipality and ESKOM in terms whereof the municipality will make monthly payments of R40 million to ESKOM, even without any interest on the said amount, it would take more than 125 months which is in excess of 10 years to pay off its debt to ESKOM. In any event the monthly payment of R40 billion to ESKOM would, in all likelihood, cause further financial problems and will also harm the municipality's capacity to provide basic services to the community.

[25] The respondents admit that a crisis exists in the financial affairs of the Matjhabeng Municipality and that this has resulted in serious and persistent material breaches of the municipality's obligations to provide basic services or to meet its financial affairs. The opposing respondents, more specifically the municipal manager and employees at the Matjhabeng Municipality, who are, or should be in the best position to advise this court on the reason for the financial problems encountered by the municipality and the best solution to overcome the financial and service delivery crisis, merely opted to blame the economic situation in the area as well as crime, poor infrastructure and poor revenue collection, to name but a few, as reasons for the current situation.

[26] The opposing respondents propose that the MSIP has been put in place and that a period of 12 months is needed to bring the plan to fruition. The opposing respondents did not explain why the financial crisis experienced by the Matjhabeng Municipality has not improved notwithstanding the implementation of the MSIP during 2023. In deciding whether the interest of justice demand the postponement of this application it is vital for the court to consider the following requirements:

- (i) the imperative for matters before court to be finalised without undue delay³;
- (ii) the broader public interest,⁴ and
- (iii) the prospects of success on the merits.⁵

[27] An application for postponement must always be bona fide and not simply used as a tactical manoeuvre for purposes of obtaining an advantage to which the applicant for postponement is not legitimately entitled.⁶ In *Mwelase v Director-General for the*

³ *National Police Service Union v Minister of Safety and Security* 2001 (8) BCLR 775 (CC) at para 4.

⁴ *Lekolwane v Minister of Justice and Constitutional Development* [2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.

⁵ *Ibid* para 17.

⁶ *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmSC) at 315 E-F.

*Department of Rural Development and Land Reform*⁷ it was held that the vulnerability of those who suffer most from failures to act '... underscores how important it is for courts to craft effective, just and equitable remedies.'⁸ Besides making bald and unsubstantiated assertions that it would be just, fair and in the interest of justice to postpone the application, no compelling reasons have been demonstrated. During the past year no significant improvement in the financial situation of the municipality has been achieved. In fact, quite the opposite appears from the MSIP report, appended to the opposing respondents' affidavit. To my mind the opposing respondents failed to present any justifying grounds for the postponement of this application for another year.

[28] In the premises it goes without saying that it is not in dispute that section 172(1)(a) of the Constitution is relevant, and that this court is obliged to declare the Matjhabeng Municipality's conduct constitutionally invalid. The DA further seeks declarators that the Premier, the MEC, the Minister, the President and the National Executive have failed to comply with their duties under ss 139(5) and 139(7) of the Constitution to intervene in the Matjhabeng Municipality. Section 154 of the Constitution requires the national and provincial governments to support and strengthen the Matjhabeng Municipality's capacity to manage its own affairs, exercise its powers and perform its functions.

[29] Neither the Minister nor the Provincial respondents dispute the DA's case that the Matjhabeng Municipality has breached its duties under ss 152(2) and 153(a) of the Constitution. On 26 September 2023 the National Council of Provinces (the NCOP) adopted a motion called upon the Provincial Executive to immediately intervene in the Matjhabeng Municipality under s 139(5) of the Constitution by taking over the finances of the municipality through a competent and qualified individual who can oversee the financial turnaround in the interest of its residents. The DA further addressed a demand to the Provincial Executive and the Minister on 16 November 2023 to comply with its duty to intervene in the Matjhabeng Municipality under s 139(5) of the Constitution, failing which the Minister must intervene in its stead in terms of s 139(5) and (7) of the Constitution. This demand has been rejected.

⁷ *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC).

⁸ *Ibid* para 49.

[30] The provincial respondents contend that their failure to have intervened in the affairs of the Matjhabeng Municipality is justified by the unspecific prejudice this would inflict upon the service delivery programme adopted by the municipal council. I am not convinced that any gains have been made in advancing service delivery during the past year with the result that the DA has made out a proper case for intervention. In any event, the provincial respondents have not denied the averments that, as result of a crisis in its financial affairs, the Matjhabeng Municipality is in serious or persistent material breach of its obligations to provide basic municipal services and to meet its financial commitments. In the result, their duty to intervene in terms of s 139(5) of the Constitution is peremptory.

[31] Furthermore the Minister does not dispute the allegations concerning the state of despair at the Matjhabeng Municipality. Section 139(7) requires the Minister, the President and the National Council to intervene in the stead of the provincial respondents. I am convinced that the triggers contained in s 139(7) are present and there is no discretion as to whether to intervene as intervention is constitutionally required in the prevailing circumstances.

[32] The opposing respondents do not dispute that the jurisdictional facts for mandatory intervention are present. In the premises mandatory intervention is what is called for. In *Fose v Minister of Safety and Security*,⁹ the Constitutional Court held as follows:

'Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.'¹⁰

[33] The Constitution demands of all those on whom it imposes obligations to fulfil those obligations diligently and without any delay.¹¹ In this matter the respondents have failed to raise any, let alone a real, genuine and good-faith dispute of fact concerning the DA's version. I am of the view that the court is entitled in terms of the provisions of s

⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

¹⁰ *Ibid* para 19.

¹¹ Section 237 of the Constitution.

172(1)(a) of the Constitution, when deciding constitutional matters, to declare that the conduct by the respondents, where applicable, is inconsistent with the Constitution and to grant structural interdictory relief called for in terms of the constitutional and legislative provisions upon which the DA rely for the relief. The order I intend to grant in this application goes toward ensuring that basic services be provided to the residents of the Matjhabeng Municipality and that the municipality be financially capable of meeting its obligations and resolving the financial crises experienced for a considerable time.

[34] Turning to the issue of costs, there is no reason why costs should not follow the result and should include the costs of two counsel on scale C.

ORDER:

[35] In the result the following order is made:

1. It is declared that:
 - 1.1 The Matjhabeng Municipality has breached s 152(2) of the Constitution, in failing to strive, within its financial and administrative capacity to:
 - 1.1.1 ensure the provision of services to its community in a sustainable manner;
 - 1.1.2 promote social and economic development; and
 - 1.1.3 promote a safe and healthy environment
 and its conduct is declared invalid to the extent of these inconsistencies.
2. It is declared that the Matjhabeng Municipality has breached s 153(a) of the Constitution, in failing to structure and managed its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote of the social and economic development of the community, and its conduct is declared invalid to the extent of these inconsistencies.
3. It is declared that the Matjhabeng 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 and to meet its financial commitments.
4. It is declared that the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State

Province have failed to comply with the duties to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution, and their conduct is declared invalid to the extent of these inconsistencies.

5. It is declared that the Minister of Cooperative Governance and Traditional Affairs, the President of the Republic of South Africa and the National Executive have failed to comply with the duties to intervene in the Matjhabeng Municipality in terms of s 139(7) and (5) of the Constitution, and their conduct is declared invalid to the extent of these inconsistencies.

6. The Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province are ordered to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution and submit a written notice of such intervention to the Minister, Free State Provincial Legislature and National Council of Provinces of the Republic of South Africa in terms of s 139(6) of the Constitution within seven (7) days of the intervention.

7. If the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province do not comply with the duties under prayer 6 above within seven (7) days, the Minister of Cooperative Governance and Traditional Affairs, President of the Republic of South Africa and the National Executive are ordered to intervene in the Matjhabeng Municipality in terms of s 139(5) of the Constitution within seven (7) days.

8. The Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province, alternatively, the Minister of Cooperative Governance and Traditional Affairs, President of the Republic of South Africa and the National Executive are required to:

8.1. prepare a financial recovery plan for the Matjhabeng Municipality, including complying with its duties to make requests to the Municipal Financial Recovery Service of the National Treasury and consult with the Mayor of the Matjhabeng Municipality

under s 139 of the Local Government: Municipal Finance Management Act 56 of 2003;
and



8.2 within six months of this court order, file a copy of the financial recovery plan with this Court.

9. If the Matjhabeng Municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, the Premier of the Free State Province, the Member of the Executive Council for Human Settlements, Cooperative Governance and Traditional Affairs, Free State Provincial Government and the Provincial Executive of the Free State Province, alternatively, the Minister of Cooperative Governance and Traditional Affairs, President of the Republic of South Africa and the National Executive must:

9.1 dissolve the council of the Matjhabeng Municipality, appoint an administrator until a newly elected council for the Matjhabeng Municipality has been declared elected, and 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 Matjhabeng Municipality; or

9.2 assume responsibility for the implementation of the recovery plan to the extent that the Matjhabeng Municipality cannot or does not otherwise implement the recovery plan.

10. The first, second, third, fourth, ninth and tenth respondents jointly and severally are ordered to pay the costs of the application on scale C, such costs to include the costs occasioned by the employment of two counsel.



I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

Appearances

On behalf of the Applicant:

ADV. N FERREIRA

ADV. D SIVE

Instructed by:

**SYMINGTON & DE KOK ATTORNEYS
BLOEMFONTEIN**

On behalf of the First, Second, Third, Fourth,
Ninth and Tenth Respondents:

ADV. N A CASSIM SC

ADV. E B YAWA

Instructed by:

**STATE ATTORNEYS
BLOEMFONTEIN**