IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO.: 553/2019

In the matter between:

THE UNEMPLOYED PEOPLES MOVEMENT **Applicant**

and

THE PREMIER

PROVINCE OF THE EASTERN CAPE **1st Respondent**

THE EXECUTIVE COUNCIL FOR

THE PROVINCE OF THE EASTERN CAPE **2nd Respondent**

THE MEC FOR COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

PROVINCE OF THE EASTERN CAPE **3rd Respondent**

THE MEC FOR TREASURY, ECONOMIC

DEVELOPMENT AND TOURISM

PROVINCE OF THE EASTERN CAPE **4th Respondent**

THE NATIONAL COUNCIL OF PROVINCES	**5th Respondent**
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**6th Respondent**
THE MINISTER OF FINANCE	**7th Respondent**
MAKANA MUNICIPALITY	**8th Respondent**
THE EXECUTIVE MAYOR MAKANA MUNICIPALITY MR MPHALWA	**9th Respondent**
THE MUNICIPAL MANAGER MAKANA MUNICIPALITY MR MENE	**10th Respondent**
THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	**11th Respondent**
THE SOUTH AFRICAN METAL WORKERS UNION	**12th Respondent**

THE INDEPENDENT MUNICIPAL

AND ALLIED TRADE UNION **13th Respondent**

THE COUNCIL OF MAKANA MUNICIPALITY **14th Respondent**

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA **15th Respondent**

JUDGMENT

STRETCH J:

[1] This is an opposed application brought by the Unemployed Peoples Movement ("the UPM") for the following relief:

a. Declaring that Makana Municipality ("Makana")[1] is in breach of section 152 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") in that it has failed to ensure the provision of services to its community in a sustainable manner and has failed to promote a safe and healthy environment;
b. Declaring that Makana is in breach of section 153(a) of the Constitution in that it has failed to structure and manage its administration, budgeting and

[1] Makana Municipality is cited as the eighth respondent in these proceedings. It is common cause that it is a municipality established pursuant to the provisions of section 155 of the Constitution read with section 12 of the Local Government Municipal Structures Act 117 of 1988. Makhanda (until recently known as Grahamstown) is the largest town in the Makana local municipality. It is also the seat of the municipal council (the 14th respondent).

planning processes in order to give priority to basic needs and promote the social and economic development of its community;

c. Declaring that all the jurisdictional facts for mandatory intervention in terms of section 139(1)(c) of the Constitution and sections 139 and 140 of the Local Government Municipal Finance Management Act 56 of 2003 ("the MFMA") are present at Makana;

d. Directing the second respondent (the Executive Council for the Province of the Eastern Cape), to intervene in terms of section 139(1)(c) of the Constitution read with section 139 and 140 of the MFMA and to inter alia appoint a competent and experienced administrator for Makana forthwith;

e. Directing the eighth, ninth and tenth respondents (Makana, its mayor and its municipal manager), and any other respondents opposing the application to pay joint and several costs of suit, the one paying the other to be absolved, including the cost of three counsel on the attorney and client scale.

[2] The fifth, seventh, 11th, 12th, 13th and 15th respondents do not oppose the application. The application is opposed by the first four respondents (referred to as "the provincial respondents or provincial government"), the sixth respondent (the Minister of Cooperative Governance and Traditional Affairs, hereinafter referred to as "CoGTA"), and the eighth, ninth, tenth and 14th respondents (hereinafter referred to as "the municipal respondents or local government").

The applicant's locus standi

[3] According to the founding affidavit of UPM's chair, the movement is an association with perpetual succession and is authorised by its constitution to organise and mobilise the unemployed masses, to explore alternatives which undermine unemployment, to expose corruption on the part of government officials, and to "take the necessary steps to prevent poor people from suffering the worst effects of unemployment, poverty, starvation, homelessness and similar social ills".

[4] The association is also authorised to litigate and to act as the guardian of and the protector of democracy at Makana. Its members, who live within Makana's jurisdiction, are the recipients of service delivery from Makana, and associate themselves with the Grahamstown Residents Association ("GRA") and the Grahamstown Business Form ("GBF") in their dealings with Makana and issues relevant to the failure to deliver essential services, and issues relevant to any financial mismanagement by Makana's officials.

The nature of the application

[5] It is not in dispute that a number of crises have befallen Makana. According to UPM, this is as a result of Makana's failure to adhere to the principles of good governance. This has resulted in Makana having persistently been in material breach of its obligations to provide basic services to Makhanda and to meet its financial obligations over a significantly extended period.[2]

[6] UPM alleges that numerous requests have been made for provincial intervention in terms of s 139 of the Constitution. The third respondent (the MEC) appointed administrators in the past, but the problem was not alleviated. The application, based in essence on the Constitutional rights of the people of Makhanda to a healthy environment, health care, food, water and social security[3] is accordingly for this court to declare that Makana has failed to fulfil its executive obligations, and to compel the executive council (the second respondent) to intervene in terms of section 139(1)(c) of the Constitution read with sections 139 and 140 of the MFMA.

[7] In this respect the UPM relies on certain Constitutional provisions supported by other subordinate legislation. As the applicability and the relevance of the legislation relied on is of particular important to the outcome of this matter, I think it is prudent to outline the legislation referred to by the various parties from the outset. I shall begin with the Constitution (emphasis in italics is mine):

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[2] It is alleged that when the application was launched in February 2019, Makana's debt had risen to an unsustainable amount in the region of R170 million.

[3] Sections 24 and 27.

THE CONSTITUTION ACT, 1996

139 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 the Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or 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.

...

(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.

152 Objects of local government

(1) The objects of local government are-

(a) To provide democratic and accountable government for local communities;
(b) To ensure the provision of services to communities in a sustainable manner;
(c) To promote social and economic development;
(d) To promote a safe and healthy environment; and
(e) To encourage the involvement of communities and community organisations in the matters of local government.

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

153 Developmental duties of municipalities

A municipality must-

(a) 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
(b) Participate in national and provincial development programmes.

156 Powers and functions of municipalities

(1) A municipality has executive authority in respect of, and has the right to administer –

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5[4]; and
(b) any other matter assigned to it by national or provincial legislation.

172 Powers of courts in constitutional matters

(1) When deciding a constitutional matter within its power, a court-

(a) Must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency;
(b) Make any order that is just and equitable, including-

(i) An order limiting the retrospective effect of the declaration of invalidity; and
(ii) An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

LOCAL GOVERNMENT:
MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003[5]

CHAPTER 13
RESOLUTION OF FINANCIAL PROBLEMS

Part 2: Provincial interventions

[4] Part B of schedule 4 refers inter alia to air pollution, building regulations, electricity and gas reticulation, local tourism, municipal planning, municipal health services, municipal public transport, municipal public works, storm-water management systems in built-up areas and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems. Part B of schedule 5 inter alia refers to cleansing, control of public nuisances, facilities for the accommodation, care and burial of animals, fencing and fences, local amenities, municipal parks and recreation, municipal roads, noise pollution, public places, refuse removal, refuse dumps and solid waste disposal, street trading, street lighting, traffic and parking.
[5] Hereinafter referred to as the MFMA

136 Types of provincial interventions

(1) If the MEC for local government becomes aware that there is a serious financial problem in a municipality, the MEC must promptly-

(a) consult the mayor of the municipality to determine the facts;
(b) assess the seriousness of the situation and the municipality's response to the situation; and
(c) determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution.

(2) If the financial problem has been caused by or resulted in a failure by the municipality to comply with an *executive obligation* in terms of legislation or the Constitution, and the conditions for an intervention in terms of section 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality. If the provincial executive decides to intervene section 137 applies.

(3) If the municipality has failed to approve a budget ... the provincial executive must intervene ... in accordance with section 26.

(4) 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 meet its financial commitments,* or admits that it is unable to meet its obligations or financial commitments, as a result of which the conditions for an intervention in terms of *section 139(5)* of the Constitution are met, the provincial executive must intervene in the municipality in accordance with section 139.

137 Discretionary provincial interventions

(1) If the conditions for a provincial intervention in a municipality in terms of section 139(1) of the Constitution are met and the

provincial executive decides in terms of section 136(2) of this Act to intervene in the municipality, the provincial executive must take *any* appropriate steps referred to in section 139(1) of the Constitution, including - ...

138 Criteria for determining serious financial problems

139 Mandatory provincial interventions arising from financial crises

(1) 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 provincial executive must promptly-

(a) request the Municipal Financial Recovery Service –
(i) to determine the reasons for the crisis in its financial affairs;
(ii) to assess the municipality's financial state;
(iii) to prepare an appropriate recovery plan for the municipality;
(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and
(v) to submit to the MEC for finance in the province-

(aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and

(b) Consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the

approval of a budget and legislative measures giving effect to the recovery plan.

2) The MEC for finance in the province must submit a copy of any request in terms of subsection 1(a) and of any determination and assessment received in terms of subsection (1)(a)(v)(aa) to-

(a) the municipality;
(b) the Cabinet member responsible for local government; and
(c) the Minister.

3) An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention.

140 Criteria for determining serious or persistent material breach of financial commitment

(1) When determining whether the conditions for a mandatory intervention referred to in section 139 are met, all relevant facts must be considered.
(2) The following factors, singly or in combination, may indicate that a municipality is in serious material breach of its obligations to meet its financial commitments:

(a) The municipality has failed to make any payment to a lender or investor as and when due;
(b) The municipality has failed to meet a contractual obligation which provides security in terms of section 48;
(c) 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; or
(d) The municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.

(3) Any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent breach of its obligations to meet its financial commitments.

(4) Subsections (2) and (3) do not apply to-

(a) Disputed obligations to which there are pending legal actions between the municipality and the creditor, provided that such actions are not instituted to avoid an intervention; or

(b) Obligations explicitly waived by the creditor.

141 Preparation of financial recovery plans

(1) Any suitably qualified person may, on request by the provincial executive prepare a financial recovery plan for a discretionary provincial intervention referred to in section 137.

(2) Only the Municipal Financial Recovery Service may prepare a financial recovery plan for mandatory provincial intervention referred to in section 139. ...

142 Criteria for financial recovery plans

(1) A financial recovery plan must be aimed at securing the municipality's ability to meet its obligations *to provide basic services* or *(sic) its financial commitments,* and such a plan, whether for *mandatory or discretionary* intervention-

1.1. must-

(i) identify the financial problems of the municipality;

(ii) be designed to place the municipality in a sound and sustainable financial condition as soon as possible;

(iii) state the principal strategic objectives of the plan, and ways and means for achieving those objectives;

(iv) set out a specific strategy for addressing the municipality's financial problems, including a strategy for reducing

unnecessary expenditure and increasing the collection of revenue, as may be necessary;

(v) identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from;

(vi) describe the anticipated time frame for financial recovery, and milestones to be achieved; and

(vii) identify what actions are necessary for the implementation of a plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties; ...

(2) In addition, a financial recovery plan-

(a) for mandatory intervention must-

(i) set spending limits and revenue targets;

(ii) Provide budget parameters which bind the municipality for a specified period or until stated conditions have been met; and

(iii) Identify specific revenue-raising measures that are necessary for financial recovery, including the rate at which any municipal tax and tariffs must be set to achieve financial recovery; ....

LOCAL GOVERNMENT:
MUNICIPAL SYSTEMS ACT 32 of 2001[6]

To provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all; to define the legal nature of a municipality as including the local community within the municipal area, working in partnership with the municipality's

[6] Hereinafter referred to as the "MSA"

political and administrative structures; to provide for the manner in which municipal powers and functions are exercised and performed; to provide for community participation ... and to provide for matters incidental thereto.

Preamble

Whereas the system of local government under apartheid failed dismally to meet the basic needs of the majority of South Africans;
Whereas the Constitution of our non-racial democracy enjoins local government not just to seek to provide services to all our people but to be fundamentally developmental in orientation;
Whereas there is a need to set out core principles, mechanisms and processes that give meaning to developmental local government and to empower municipalities to move progressively towards the social and economic upliftment of communities and the provision of basic services to our people, and specifically the poor and the disadvantaged;
Whereas a fundamental aspect of the new local government system is the active engagement of communities in the affairs of municipalities ... and in particular the planning, service delivery and performance management;
Whereas the new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles;
Whereas there is a need to ensure financially and economically viable municipalities;
Whereas there is a need to create a more harmonious relationship between municipal councils, municipal administrations and the local communities through the acknowledgement of reciprocal rights and duties;
Whereas there is a need to develop a strong system of local government capable of exercising the functions and powers assigned to it; and
Whereas this Act is an integral part of a suite of legislation that gives effect to the new system of local government;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows - ...

1 Definitions

...

'basic municipal services' means a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety of the environment;

...

'executive authority' in relation to a municipality, means the municipality's executive authority envisaged in section 156 of the Constitution, read with section 22 of this Act;

...

'financially sustainable' in relation to the provision of a municipal service, means the provision of a municipal service in a manner aimed at ensuring that the financing of the service from internal and external sources, including budgeted income, grants and subsidies for the service, is sufficient to cover the costs of –

(a) the initial capital expenditure required for the service;
(b) operating the service; and
(c) maintaining, repairing and replacing the physical assets used in the provision of the service;

...

'local community' or **'community'** in relation to a municipality, means that body of persons comprising –

...

(c) the residents of the municipality;
(d) the ratepayers of the municipality;
(e) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in the local affairs within the municipality; and
(f) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality, and includes,

more specifically, the poor and other disadvantaged sections of such body of persons;

...

'MEC' means a member of a provincial Executive Council;

'MEC for local government' means the MEC responsible for local government in the province;

'Minister' means the national Minister responsible for local government; ...

4 Rights and duties of municipal councils

(1) The council of a municipality has the right to –

(a) govern on its own initiative the local government affairs of the local community;
(b) exercise the municipality's executive and legislative authority, and to do so without improper interference; ...

(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to-

(a) exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;
(b) provide, without favour or prejudice, democratic and accountable government;
(c) encourage the involvement of the local community;
(d) strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;
(e) consult the local community about-

(i) the level, quality, range and impact of municipal services provided by the municipality ...; and
(ii) the available options for service delivery;

(f) give members of the local community equitable access to the municipal services to which they are entitled;
(g) promote and undertake development in the municipality;
(h) promote gender equity ...;
(i) promote a safe and healthy environment in the municipality; and
(j) contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.[7]

5 Rights and duties of members of the local community

(1) Members of the local community have the right-...
(a) ...to-...

(i) contribute to the decision-making processes in the municipality; and
(ii) submit ... recommendations, representations and complaints to the municipal council ...;

(b) to prompt responses to their ... communications ...
(c) to be informed of decisions of the municipal council ... affecting their rights, property and reasonable expectations;
(d) to regular disclosure of the state of affairs of the municipality, including its finances;
(e) to demand that the proceedings of the municipal council and those of its committees must be-

(i) open to the public ...;
(ii) conducted impartially and without prejudice; and
(iii) untainted by personal self-interest;

[7] Referring to environmental rights, and rights to property, housing, health care, food, water, social security and education.

(f) to the use and enjoyment of public facilities; and

(g) to have access to municipal services which the municipality provides, provided the duties set out in subsection (2) are complied with. ...

6 Duties of municipal administrators

(1) A municipality's administration is governed by the democratic values and principles embodied in section 195(1) of the Constitution.

(2) The administration of a municipality must-

(a) be responsive to the needs of the local community;

(b) facilitate a culture of public service and accountability amongst staff;

(c) take measures to prevent corruption;

(d) establish clear relationships, and facilitate co-operation and communication between it and the local community;

(e) give members of the local community full and accurate information about the level and standard of municipal services they are entitled to receive; and

(f) inform the local community how the municipality is managed, of the costs involved and the persons in charge.

11 Executive and legislative authority

(1) The executive and legislative authority of a municipality is exercised by the council of the municipality, and council takes all the decisions of the municipality subject to section 59.[8]

[8] Section 59 refers to certain delegations.

(2) ...

(3) A *municipality* exercises its legislative or executive authority by-

(a) developing and adopting policies, *plans*[9], strategies and programmes, including setting targets for delivery;
(b) promoting and undertaking development;
(c) establishing and maintaining an administration;
(d) administering and regulating its internal affairs and the local government affairs of the local community;
(e) implementing applicable national and provincial legislation and its by-laws;
(f) *providing municipal services to the local community*, or appointing appropriate service providers in accordance with the criteria and process set out in section 78;
(g) monitoring and, where appropriate, regulating municipal services where those services are provided by service providers other than the *municipality*;
(h) preparing, approving and implementing its budgets;
(i) imposing and recovering rates, taxes, levies, duties, service fees and surcharges on fees, including setting and implementing tariff, rates and tax and debt collection policies;
(j) *monitoring the impact and effectiveness of any services, policies, programmes or plans;*
(k) establishing and implementing performance management systems;
(l) promoting a safe and healthy environment;
(m) passing by-laws and *taking decisions* on any of the above-mentioned matters; and
(n) doing *anything else* within its legislative and executive competence.

(4) A decision taken by a municipal council ... must be recorded in writing.

...

[9] Italics are not in the original text and have been inserted from time to time for emphasis and later reference.

25 Adoption of integrated development plans

(1) Each municipal council *must,* within a prescribed period after the start of its elected term, adopt a single, inclusive and strategic plan for the development of the municipality ...

26 Core components of integrated development plans

An integrated development plan must reflect –

(a) the municipal council's *vision for the long term development* of the municipality with special emphasis on the municipality's most critical development and internal transformation needs;
(b) an assessment of the existing level of development of the municipality, which must include an identification of communities which do not have access to basic municipal services;
(c) the council's development priorities and objectives for its elected term ...;
(d) the council's development strategies ...;
(e) a spatial development framework ...;
(f) the council's operational strategies;
(g) applicable disaster management plans;
(h) a financial plan ...;
(i) the key performance indicators and performance targets determined in terms of section 41. ...

34 Annual review and amendment of integrated development plan

A municipal council –

(a) must review its integrated development plan-
...annually ... and to the extent that changing circumstances so demand; and
...may amend its integrated development plan in accordance with a prescribed process.

35 Status of integrated development plan

(1) An integrated development plan adopted by the council of a municipality-

(a) is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development in the municipality;
(b) binds the municipality in the exercise of its executive authority ...

36 Municipality to give effect to integrated development plan

A municipality must give effect to its integrated development plan and conduct its affairs in a manner which is consistent with its integrated development plan....

38 Establishment of performance management system

A municipality *must*-

(a) establish a performance management system that is ... commensurate with its resources; best suited to its circumstances; and in line with the priorities, objectives, indicators and targets contained in its integrated development plan;
(b) promote a culture of performance management among its political structures, political office bearers and councillors and in its administration; and
(c) administer its affairs in an economical, effective, efficient and accountable manner. ...

39 Development of performance management system

The executive committee or executive mayor ... or a committee of councillors appointed by the municipal council *must*-

(a) manage the development of the municipality's performance management system;

(b) assign responsibilities in this regard to the municipal manager; and
(c) submit the proposed system to the municipal council for adoption...

44 Notification of key performance indicators and performance targets

A municipality, in a manner determined by its council, *must* make known, both internally and to the general public the key performance indicators and performance targets set by it for purposes of its performance management system. ...

54 Code of Conduct for councillors

The Code of Conduct contained in Schedule I applies to every member of a municipal council.[10] ...

59 Delegations

A municipal council *must* develop a system of delegation that will maximise administrative and operational efficiency and provide for checks and balances ...'

[8] It is not in dispute that Makana is (and has been for some time) seriously distressed and that the people of Makhanda are facing real crises including a financial one. The parties are *ad idem* that sections 139 and 140 of the MFMA provide for mandatory provincial intervention arising from such crises.

[10] The preamble to the code of conduct states, inter alia, that councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities, and to meet the priority needs of communities by providing services equitably, effectively and sustainably within the means of the municipality. In fulfilling this role councillors must be accountable to local communities and report back at least quarterly to constituencies on council matters, including the performance of the municipality in terms of established indicators.

The background facts and circumstances

[9] Because it has not been disputed that Makana is facing serious crises, it is not necessary for me to traverse the background to these in detail, notwithstanding and not ignoring the substantial efforts which various role-players and members of the UPM have made to illustrate the ongoing problem on behalf of the people of Makhanda. The timeline and supportive documentation furnished by the applicant sketches the following disastrous state of affairs:

- **April 2014**: Provincial Treasury deploys an acting chief financial officer to Makana.

- **25 August 2014**: The applicant and the Public Service Accountability Monitor (PSAM) from Rhodes University write an open letter to the MEC for Local Government and Traditional Affairs, the mayor and the councillors of Makana Municipality with regard to long term governance and accountability failings calling for intervention in terms of s 139 of the Constitution.

- **6 October 2014**: Ms Pam Yako assumes duties as Makana's administrator under s 139(1)(b) of the Constitution.

- **November 2014**: Local business woman Daphne Timm delivers a presentation on the lack of service delivery and the staff crisis in Makana.

- **26 January 2015**: The chair of the Makana Civil Society Coalition (Vuyani Zondani) writes an open letter to the administrator dealing with crisis intervention aspects such as work streams, the recruitment and appointment of senior staff, bankruptcy[11], auditor-general reports[12], the Kabuso report[13] and also inviting a report back meeting by 15 February 2015.

[11] The latter notes that in 2005 Makana received the national Vuna award for excellence in service delivery, and that it had financial reserves of more than R50 million and some 350 employees. By the end of 2014 Makana was bankrupt, owing over R150 million (over R57 million to Eskom alone) whilst the number of employees had risen to over 1500. This has not been disputed.

- **19 February 2015**: The Makana Civil Society Coalition (the "MCSC") writes a letter to CoGTA reporting the need for intervention and various problems for consideration in **advance** of the Chair's visit planned for 25 February.[14]

- **February 2015**: The Provincial Executive institutes what it describes as an intervention in terms of s 139(1)(b) of the Constitution. In this regard the relevant portions of the 100 page Plan read as follows:[15]

'MAKANA LOCAL MUNICIPALITY
DRAFT FINANCIAL RECOVERY PLAN

FEBRUARY 2015

EXECUTIVE SUMMARY[16]

INTRODUCTION

The Eastern Cape Provincial Executive has instituted an intervention in terms of section 139(1)(b) of the Constitution in respect of Makana Local Municipality (Makana). The intervention occurred in response to the crises Makana is facing including difficulties in providing basic services and long term financial sustainability.[17]

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[12] Reference is made to the auditor-general reports for the last three years, identifying unauthorised, irregular, fruitless and wasteful expenditure, as well as financial mismanagement and illegal appointments (and that the need to take criminal action has been ignored), and demanding recommendations from the administrator regarding criminal sanctions by 31 January 2015. This has not been disputed.

[13] The administrator is reminded that she undertook to ensure that the Kabuso Forensic Report would be finalised and made public by end February 2015 and is requested to confirm this and release a media statement to reassure rate payers that she is abiding by her undertaking.

[14] Particular concerns are addressed, such as Council's re-appointment of an impugned Municipal Manager, the awarding of annual bonuses in the absence of performance assessment agreements, the water crisis and the deterioration of infrastructure, habitual financial management transgressions, the inability of Council to address unlawful financial conduct, failure to implement remedial recommendations, failure on the part of Council to address the legitimate grievances of historically previously disadvantages communities, and the cost to ratepayers to challenge tender irregularities in court. None of the aforesaid has been disputed.

[15] When I say relevant portions, I mean those portions which point towards a mandatory intervention, and also those portions which deal with the role of Council.

[16] Emphasis has been added in italics.

[17] The wording is taken from s 139(5) of the Constitution providing for mandatory intervention.

The municipality is faced with numerous financial problems which impact, amongst others, on its ability to meet its financial commitments and the provision of basic services.

Given the above and the *urgency* to ensure service delivery to communities and financial viability and sustainability, the development and the implementation of a Financial Recovery Plan (Plan) has been seen as a *critical* way forward for Makana.

The Makana recovery plan generally follows a logical well thought out process. There are, however, some issues that need to be raised for consideration (see discussion below).

The quality of a municipal recovery plan depends *(heavily)* on having reliable status quo information, with the most important information pertaining to the municipal business areas impacting directly on *water services, namely human resources, service delivery (technical) and finance.*

An Administrator was appointed and assumed duty on 6 October 2014 and an Acting Chief Financial Officer was deployed by the Eastern Cape Provincial Planning and Treasury to Makana in April 2014.

Methodology in developing the Financial Recovery Plan

Given the nature of the *financial problems* an independent and detailed assessment needed to be undertaken to ensure that the key objective of developing a holistic Plan was indeed achieved and which also meets the requirements of Section 142 of the Municipal Finance Management Act (MFMA)....

The approach adopted in the development of the Plan was a consultative approach that involved a detailed analysis of relevant documentation as well as engagements with amongst others the Executive Mayor, Administrator, and other Senior Officials of Makana.[18] This initially culminated in the development of a Status Quo Report in November 2014.

Nature and Extent of Strategies identified

[18] See the wording of s 139 of the MFMA dealing with mandatory provincial interventions.

The assessment had identified a number of key strategies that must be outlined, developed and implemented in the short, medium and long term to address the challenges faced by Makana and to follow a path of *financial and service delivery* recovery and sustainability.

Further, and due to the long term nature of some of the strategies identified, the focus in the short term adopted the Pareto Principle (20% of activities that will contribute 80% to the successful implementation of the Plan) to ensure that the strategies adopted will have the greatest impact and can be undertaken within the financial and human resource capacity and capability of Makana.

It should be noted that any other strategies not immediately addressed in this Plan should still be *addressed in the long term and should not be ignored. Key strategies highlighted in the Plan must all be implemented by Makana as this is a holistic and integrated plan , and the final outcome must be to ensure financial and service delivery sustainability.* The strategies had to therefore ensure that the objective of *financial and service delivery improvement* can be achieved in the shortest possible timeframe and that they at least addressed the following:-

1. Reduction in expenditure ...

2. Increasing revenue ...

3. Ensuring proper administrative and governance arrangements are in place to manage and address the key *financial and service delivery* challenges of the municipality.

Key Strategies Considered in the Plan

The Plan including the implementation thereof is critical to achieving the objective of financial and service delivery sustainability.

Further ... the following overarching strategies to address the challenges faced by the municipality are contained in the Plan:-

...

The combined impacts of these strategies are intended to address the core and underlying causes that triggered problems at Makana.

Successful implementation will also require *greater political oversight, efficient and effective administration and governance arrangements to drive and sustain the implementation of the service delivery mandate and community expectations of Makana. ...*

Implementation of the Financial Recovery Plan

It is emphasised that the responsibility to implement the Plan rests with the municipality. *The Plan must be monitored by Council, the Mayor and the Administrator (until exit) and Municipal Manager to ensure successful implementation....*

Oversight by Council and other structures in the municipality also needs to be strengthened to ensure proper governance, service delivery and budget implementation, and early warning systems are developed, implemented and corrective measures are taken timeously. Regular, robust and honest interaction must be enforced and sustained beyond this turnaround period at Makana.

Risks Associated with the Plan

...The financial recovery plan proposes changes, particularly with regard to financial administration, budgeting, financial discipline and governance. *There will also be a need for a regular review of the risks identified to ensure timely mitigation measures are instituted by the Administrator (until exit), Municipal Manager and Political Leadership...*

Monitoring and Evaluation

Various elements of this Plan must be fully implemented and institutionalised in a coherent and holistic manner.... Progress reports on the implementation of the Plan must be signed

by administrator (until exit) and Municipal Manager before submission to Council, National and Provincial Treasures and Department of Co-operative Governance and Traditional Affairs in Eastern Cape on a monthly basis. A *review of the Plan* should be undertaken at regular intervals and be *updated* as and when more accurate and up to date information is obtained.

Should the municipality delay or fail to implement the Financial Recovery Plan the Provincial Government must consider alternative measures, including the extension of the term of office of the current administrator or the appointment of a new administrator or the dissolution of Council.

Background to the Makana Local Municipality

...At the heart of Makana is the city of Grahamstown ...Grahamstown is famous as one of the leading cultural, educational and tourist centres and host of the National Arts Festival in South Africa, as well as being the primary location of Rhodes University.

Makana has faced, and continues to confront, various challenges in terms of service delivery, administration and finance. Many of these have recurred over long periods of time and have been highlighted repeatedly in Makana's annual and audit reports following the statutory audits by the Office of the Auditor-General.

Given the seriousness of the challenges and in an attempt to ebb the decline, the *Eastern Cape Provincial Executive* instituted a *mandatory*[19] intervention in line with section 139(1)(b) of the Constitution.

The intervention occurred in response to *many crises* facing Makana, including difficulties in providing basic services and long term financial sustainability.[20]The challenges in summary include:

- The provision of basic services[21] (including water and sanitation);

[19] As referred to in s 139(5) of the Constitution read with sections 139 and 140 of the MFMA.
[20] Ibid
[21] Ibid

- Financial management and credit control (including deteriorating Auditor-General outcomes); [22]

- Allegations of nepotism and corruption;

- Governance and political oversight;

- Communication and community and key stakeholders; and

- Strengthening and improving the functioning of the administration.

An Administrator was appointed and assumed duty on 6 October 2014 and an Acting Chief Financial Officer was deployed by Province to Makana Local Municipality in April 2014.

Given the above and the *urgency to ensure service delivery to communities and financial viability and sustainability,* the development of a *Financial Recovery Plan* (Plan) in line with section 139 and *141(2)* of the MFMA, has now been seen as the *critical* way forward for the turnaround and sustainability of Makana.[23]

Makana is faced with numerous financial problems which impact, amongst others, on its ability to meet its financial commitments and basic service delivery obligations. The Eastern Cape Province and Makana identified a need to develop a holistic and integrated Plan to assist with a recovery from the current financial and service delivery challenges.[24]

The National Treasury's Municipal Financial Recovery Service was therefore requested to assist in the development of this Plan,[25] which commenced with a status quo assessment aimed at obtaining a better understanding of the overall challenges and root causes of the *financial and service delivery problems.*[26]...

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[22] Ibid

[23] Ibid. There can no longer be any uncertainty. Section 141(2) which is specifically cited in the Plan deals only with financial recovery plans for mandatory provincial intervention referred to in s 139. Indeed this is exactly what it says at ss (2) of s141: "Only the Municipal Financial Recovery Service may prepare a financial recovery plan for the *mandatory provincial intervention* referred to in section 139.

[24] Ibid

[25] Ibid

[26] Ibid

Status Quo Assessment

The purpose of the status quo assessment was to assess the institutional, service delivery, infrastructure, and financial challenges on the performance of Makana, with a view to inform the development of a holistic Plan for Makana.

Makana, amongst others, has and still experiences challenges in all the areas mentioned below, which negatively impacts on its *financial stability and ability to deliver basic services sustainability.*

Governance

Governance and oversight within the municipality must be strengthened for improved decision making and service delivery. Engagements with the municipality reflected that there is an issue of postponement of Council and Committee meetings which have led to delays in crucial processes and the implementation of decisions within the municipality. ...

Adherence to the scheduled dates of Council and Committee meetings is critical. There is also a need for an improvement in Council resolutions being tracked and the implementation thereof monitored.

The implementation and enforcement of a code of conduct for councillors is critical. The review of the system of delegations should address the political component as well. ...

It is critical to address the inadequacy of the minutes as well as the delay in the availability and distribution of the minutes of Council and Portfolio Committees to expedite implementation thereof.

The culture of poor or non-performance and the perception that transgressions were an accepted norm within the municipality should be addressed. *This would assist in improving service delivery, financial management and audit outcomes.*

The Audit Committee of Council is starting to be functional, it has four members and the last meeting was held end of February 2015. There is a need for improvement in the effectiveness of the Audit Committee of Council to ensure compliance with section 166 of MFMA. *The Council of the municipality should urgently address this matter.* The work of the

Audit Committee is critical to respond to council on any issues raised by the Auditor-General in the audit report.

The municipality should develop a communication strategy, and a public participation communication (internally and externally) programme should be enhanced. This would assist to stabilise community protest amongst others.

Service Delivery and Infrastructure Planning

The municipality has experienced a number of challenges with respect to financial management ... The service delivery diagnostic report highlighted significant weaknesses in key service delivery ... There were significant gaps in a number of the necessary municipal business management activities, such as governance and risk management, human resource management, information, communications and technology planning, asset management, forward financial planning, strategy planning and business performance management. It should be noted that each of these present opportunities for improvement at the municipality. *It is critical that the administration and municipal council are committed to such business improvement.*

Makana Municipality should move away from short term erratic and reactionary planning to long term stable and sustainable planning and a proactive approach to service delivery.

In total it is estimated that R800 million is required to upgrade the services in the Makana Local Municipality's area of jurisdiction. It is suggested that the associated listing of requirements be *reviewed and prioritised.*

For the upgrades to be successful it would be necessary to implement a project management unit which would be responsible for the procurement as well as the day to day management of all the projects necessary to get Makana into a situation where they could provide communities with the required services. ...

A summary of critical areas related to water and sanitation, electricity and energy, roads and storm water is as follows: ...

Makana should therefore develop a long term financial plan, which will, amongst others, indicate the realistic funding mix to finance the backlogs and the most cost effective way in which expansion of services can be undertaken. ...

Understanding the Financial Challenges

The financial sustainability challenges faced by Makana Local Municipality are due to *poor financial management, operations and administrative inefficiencies, lack of proper leadership, poor planning, and lack of accountability, amongst others. ...*

Overall poor or non-implementation of administrative systems, procedures, processes, financial controls, poor budgeting, an inadequate delegation framework, poor asset management, weaknesses in governance and oversight together with non-compliance with relevant legislative framework, contributed to the current financial status of the municipality, and if not urgently addressed will lead to further deterioration in the municipality's financial and service delivery sustainability.[27]

The implementation of this financial recovery plan is critical to secure the municipality's ability to provide basic services and meet its financial obligations.

Finally, from a financial and service delivery perspective, the implementation of this Plan is critical to secure Makana's ability to provide basic services and meet its obligations as regards its financial commitments.

Conclusion

Given the state of affairs of Makana, which has deteriorated over the past six years, a number of strategies must now be developed, refined and implemented in the short, medium and long term through the financial recovery plan.

For the purpose of this Plan, implementation timeframes are defined as follows:

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[27] Which is exactly what has happened.

Description	Timing
Immediate to Short Term	Current to 30 June 2015
Medium Term	Up to 30 June 2016
Long Term	Up to 30 June 2017

In this regard, and given the nature of the *financial* and *service delivery* problems at Makana, *immediate focus* must be on addressing the following key issues:

- Improve governance and political oversight;
- Filling of critical senior management positions in particular a permanent Municipal Manager and Chief Financial Officer;
- Organisational structure review;
- Improved system of delegations;
- Improved supply chain management practices and processes;
- Revenue enhancement with a concerted focus on revenue growth and collection;
- Improved expenditure management;
- Restructure of the budget;
- Address audit outcomes; and
- Improvement in asset management and infrastructure development of all services...

Nature and Extent of Strategies Identified

... It should be noted that any other strategies not immediately addressed in this Plan should still be addressed in the long term and should not be ignored. Key strategies in the Plan must all be implemented as this is a holistic and integrated plan; and the final outcome must be to ensure the financial resilience in the long term as illustrated below...

The strategies had to therefore ensure that the objective of a financial and service delivery improvement can be achieved in the shortest possible timeframe and that they at least addressed the following:

1. Reduction in expenditure on non-essentials and non-revenue generating activities, and optimising current spending within the municipality to accelerate economic growth and job creation;

2. Increasing revenue through improved collections and billing efficiencies; and

3. *Ensuring proper administrative and governance arrangements are in place to manage and address the key financial and service delivery challenges in Makana.*

Key Strategies considered in the Plan

This Plan is therefore critical to achieve the objective of financial and service delivery turnaround and sustainability.

Further, and as informed by the status quo assessment, the following overarching strategies to address the challenges faced by Makana are therefore contained in the *financial recovery plan:*

1. Enhancing the operations of Makana through ... improved governance and political oversight ...

2. Improving financial sustainability ...

3. Enhancing asset management ...

4. Improving financial administration through ...addressing audit related issues pertaining to the functioning of the Internal Audit and the Audit Committee, amongst others.

The combined impacts of these strategies are intended to address the core and underlying problems, which precipitated the challenges at the municipality.

Successful implementation will also require *greater political oversight, efficient and effective administration and governance arrangement to drive and sustain the implementation of the service delivery mandate and community expectation of Makana.* These strategies are also intended to respond to challenges facing Makana and are addressed in the *financial recovery plan* the details of which are further elaborated upon below.[28] ...

Strategy one: Enhancing the Operations of the Municipality through ...

Improved Governance and Political Oversight ...

The area of governance and oversight within Makana Local Municipality must be strengthened for improved decision making and service delivery. The governance model of the municipality, *in particular the political component,* needs to be *reviewed, refined and fully implemented* to speed up decision making and to separate the political and administrative arrangements of the municipality.

The postponement of Council and Committee meetings should be addressed in order to expedite decision making and also to comply with legislative activities within the required timelines. Capable personnel should be made available to provide adequate administrative support to Council and Portfolio Committees. *There is also a need for an improvement in Council resolutions being tracked and associated implementation aspects being effectively monitored.* The implementation and enforcement of a code of conduct for councillors is critical. The review of the system of delegations should address the political component of the municipality as well.

The Audit Committee of Council of the municipality is not functional and there is a need for improvement in the effectiveness of the Committee to ensure compliance with section 166 of MFMA....

Oversight within Makana by both Councillors and Management needs to be strengthened to ensure proper governance and that the service delivery and budget implementation plans are implemented, early warning systems are introduced, and corrective measures are taken timeously, where applicable....

[28] The detailed implementation plan is set out in section seven thereof.

Risks Associated with the Plan

... The financial recovery plan proposes changes, particularly with regard to financial administration, budgeting, financial discipline and governance. ...

- **Community and Stakeholders:** There is a risk that there may be community and ratepayer resistance to certain aspects of the Plan; such as budget cuts and the need to increase tariffs for vigorous revenue collection actions. This risk can be managed by effective, improved and consistent communication by Councillors and officials of the municipality within the community. The municipality must communicate effectively with the community on all aspects of the Plan and provide regular feedback on progress, *including the submission of this Plan to the Provincial Legislature. Councillor support for the Plan is also required to ensure that there is a collective mind set to support and communicate all aspects of the Plan when Councillors engage with community members...*

General

The purpose of this section of the Plan is to set out a monitoring and evaluation process to ensure that the financial recovery plan is implemented and that the milestones and outputs specified are realised.

Regularity of Reporting

Progress reports on the implementation of the Plan must be submitted by the Administrator (until exit) and Municipal Manager to Council on a monthly basis. The Executive Mayor and Council must also implement corrective measures and exercise greater oversight to ensure full implementation. These reports should also form part of the quarterly report submitted by

the Mayor to Council in terms of section 52 of MFMA on the implementation of the budget and the financial state of affairs of Makana.

The Administrator (until exit) and Municipal Manager must also submit progress reports on the implementation of the Plan *to Provincial Treasury and CogTA in the Eastern Cape Province with National Treasury's Municipal Finance Recovery Service copied, on a monthly basis....*

Non Implementation of the Plan

Should Makana municipality delay or fail to implement this Plan, the Provincial Government must consider alternative measures, including the extension of the term of office of the current administrator or the appointment of a new administrator or the dissolution of Council...

Updating of the Plan

... The responsibility for updating the Plan rests with the municipality. The Administrator (until exit) and Municipal Manager must forward any future updated or revised Plan to the Eastern Cape Provincial Treasury and Department of Co-operative Governance and Affairs with the National Treasury's Municipal Financial Recovery Service copied, and until such time as Makana is turned around and is on the path to *service delivery and financial recovery...*

Conclusion

The financial recovery plan must be submitted by the Administrator, Municipal Manager for *adoption by Council and immediate implementation by Makana municipality*. Finally, Makana must move away from short-term and reactionary planning to a long term stable and sustainable planning framework, hence the municipality must prioritise the development of a long term financial plan and credible IDP.'

- **25 February 2015**: The Chair of the CoGTA Committee for Co-operative visits Makana.

- **3 March 2015**: The Makana Civil Society Coalition (MCSC) addressess a further letter to the CoGTA Chair in essence traversing the Kabuso forensic report, the appointment of the municipal manager and the financial recovery plan. The letter addresses the following:

(1) The status of the Makana Section 139(1)(b) intervention and the implications going forward given that it was declared null and void during the NCOP committee recommendations in its report back to parliament on Wednesday the 25th of February 2015 based on the fact that procedural requirements of section 139(2)(a)(ii) and 139(6)(b) of the Constitution were not met.

(2) Kabuso Forensic Report – ... the **Administrator** ...had given the MCSC assurance that the Final version of the Kabuso Report will be tabled in public at a Council meeting before the end of February 2015. We are now in March and this has not been the case. ...

(3) ...

(4) Financial Recovery Plan (MFMA) – The MCSC understand that in December last year, Councillors submitted legally motivated proposals to the Administrator (Ms Pam Yako) to prevent creditors from instituting costly litigation against a financially distressed Makana Municipality...

... Given the habitual MFMA financial misconduct transgressions committed over a period of time in Makana, the MCSC contend that any attempt or intention by Council and officials to cover up alleged corrupt activities by not acting against implicated officials and Councillors is a recipe for serious conflict between the local community and municipal administration.

...In this regard, the MCSC is proposing that you urgently demand a written report from the Administrator on these matters. Alternatively, you subpoena the Administrator and Executive Mayor to personally appear before the NCOP's Select Committee. As Chairperson of the NCOP SC on COGTA, you are empowered by Section 139(1)(b) to impose your oversight obligations.

...Regarding the financial recovery plan ... Councillors have on several occasions submitted MFMA related proposals to the Administrator to invoke

MFMA .. debt relief and restructuring ... Apparently the submission of the proposals were to stop creditors preying on an already cash strapped municipality. The MCSC understand that the proposals were not submitted to Council for consideration.

...section 152(3) provides that "an application in terms of subsection (1) may be for the purposes of section 139(5) of the Constitution be regarded as an admission by the municipality that it is unable to meet its financial commitments."

The MFMC contend that the only way to decisively manage the municipal creditor crisis and the incurring of legal cost is to invoke the abovementioned legal remedies.

...The MCSC is concerned that the Administrator since commencing with the intervention duties didn't ensure that a Financial Recovery Plan as prescribed in the MFMA has not been developed as part of the Section 139(1)(5) constitutional provision ...

The MCSC contend that the Section 139(1)(b) intervention will not succeed because: ...

(g) The Administrator's terms of reference are not consistent with the constitutional requirements. ...

(h) The current Councillors' behaviour around the Kabuso Report shows that the corruption is just too entrenched ...

(i) There is little evidence of any change in Makana despite the five months of intervention at considerable cost to tax payers ...

It seems unlikely to the MCSC and the people represented by all the groups subscribing to MCSC that anything less than a section 139(1)(c) Administration can work.

Honourable Chairperson, now you are cognizant of the issues and the lack of progress to turn around Makana Municipality, we appeal to the NCOP[29] to take the necessary action. The MCSC is suggesting that the MEC for COGTA in the Eastern Cape be accordingly and urgently advised to review the Intervention and the Administrator's terms of reference.'

- **1 September 2015**: The select committee on CoGTA releases a report on the notice of intervention issued in Makana in terms of section 139(1)(b) of the

[29] NCOP (the National Council of Provinces) is the fifth respondent herein. It has not opposed the application.

Constitution. The report states that on 17 March 2015, the Eastern Cape Department of Local Government and Traditional Affairs tabled to the Office of the Chairperson of the National Council of Provinces (NCOP), a notice of intervention in terms of section 139(1)(b) of the Constitution. NCOP referred the notice to the select committee on CoGTA for consideration and a report. The select committee observed that the MEC for Local Government and Traditional Affairs had regularised the appropriate intervention and had complied with the legislative prescripts as approved by the NCOP. In particular, the report states:

'Our firm view as the Select Committee is that *poor financial management and lack of controls and accountability systems impacts negatively on service delivery for communities,* from lack of provision of water and other services, to inadequate funds for technical equipment for servicing basic infrastructure.'

The Select Committee accordingly made the following recommendations:

(a) It approved intervention in Makana in terms of section 139(1)(b) of the Constitution.
(b) It recommended fast-tracking of the appointment of skilled personnel and the resuscitation and encouragement of public participation in the municipal decision-making process.
(c) It suggested that the MEC for Local Government and Traditional Affairs should table quarterly progress reports to the NCOP and the Provincial Legislature on the status of the intervention in Makana, including the "termination of the intervention report".

- **8 September 2015**: In an application brought by the Makana Unity League against Makana, its administrator, the mayor and the municipal manager, the Grahamstown High Court grants an order (by consent) directing Makana to comply with the conditions of a permit granted on 10 September 1996 for the development and operation of the Grahamstown waste disposal site in the district of Albany, with extensive and detailed structured relief. In particular, the order directs Makana to call a council meeting to discuss the contents of the order within three days and to develop a proper management plan of the site to be implemented forthwith and completed within 60 days. Makana is also specifically

ordered to report to the High Court once a month on the progress with giving effect to the order.[30]

- **14 March 2016**: The municipal manager delivers a presentation to the Grahamstown Residents Association.

- **During March 2016**: Ms Yako is substituted with another administrator purportedly in terms of section 139(1)(b) of the Constitution.

- **24 June 2016**: a moratorium is placed on the payment of overtime but it continues regardless.

- **15 November 2017**: Gladys Mpepo, Nosigqibo Soxujwa and Sithembele Sithunda (on behalf of UPM) address a memorandum to Makana, its council, the mayor, the acting municipal manager and the MEC for CoGTA, calling for corrective action and accountable governance. The memorandum accuses Makana of having, for far too long, displayed an inability or unwillingness to respect laws and strategies aimed at improving its governance to optimise public delivery and accountability. It states that as a result, human rights are being violated and under-performing public servants and those implicated in corruption are not being held accountable.[31] It mentions that the MEC for CoGTA had, that same day, given Makana 14 days to provide reasons why it should not be placed under administration.[32] The memorandum once again pleads with the addressees to:

  (a) Implement the findings and recommendations of the Kabuso forensic investigation final report;
  (b) Commission an independent investigation to establish the primary cause of repeated water outages, where funds allocated to address water supply challenges had been spent with no accountability on the part of officials;
  (c) *Implement* the Financial Recovery Plan *adopted* more than two years before;
  (d) That CoGTA, in consultation with the Provincial Legislature and NCOP, consider "*more drastic action* as required by the Constitution";

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[30] No reporting has occurred in compliance with the structured mandamus.
[31] The memorandum refers, inter alia, to the September 2015 Parliamentary report above and the purported section 139(1)(b) intervention.
[32] Presumably in terms of section 139(1)(c) of the Constitution.

(e) Release the full terms of reference/mandate of the administrator about to be appointed;
(f) Independently investigate the lack of provision of housing to qualifying applicants;
(g) Be transparent in its dealing with the people of Makana, with *due regard* for the Financial Recovery Plan;
(h) Respond to the requests by 30 November 2017.[33]

- **28 March 2018**: Makana holds a special Council meeting dealing with the report of its acting municipal manager (D.M. Pillay). The report in turn traverses water shortages due to the drought exacerbated by water leaks throughout Makana resulting in "huge wastage of treated water". It bemoans the lack of response from the Provincial Disaster Management Centre for both long and short term drought relief describing the Province's stance as "very demoralising especially when this matter should be receiving priority". The report deals extensively with the main problems facing Makana in the categories of lack of water, sewerage outlets, refuse dumping, road conditions, electricity maintenance, lack of urgency, lack of finance and the improper management thereof and fruitless and wasteful expenditure. The report ends with the following comment:

  'The challenges of Makana are complex. It is very evident as a result of poor decisions taken by the previous Council and a lack of decisive management on some of the issues that face the municipality has resulted in the challenges and problems being faced. Service delivery has to be the number one priority. Communities' needs cannot be ignored. Service delivery has to occur on a daily basis for a sustained impact. It will be very difficult for the municipality to be sustainable and successful if the business sector stop investing in the municipal area or worse still, if they have to leave.
  It is therefore *crucial* that the problems are tackled with a real sense of *urgency* and decisive decision taking. Until that is done, there is going to be very little chance in turning the situation around.'

- **7 May 2018**: The Legal Resources Centre ("LRC"), acting on behalf of the UPM, addresses a letter of demand to CoGTA's MEC (the third respondent) with a copy to the acting municipal manager, D.M. Pillay. It is a long letter. However, for

[33] Once again, none of the serious allegations reflected in this letter have been disputed by any of the respondents. Neither has it been disputed that there was no response to the letter.

purposes of this judgment, I am constrained to reproduce it in full. It reads as follows:

'RE: SECTION 139(5) INTERVENTION IN MAKANA LOCAL MUNICIPALITY ONGOING SERVICE DELIVERY FAILURES

1. We act for the Unemployed People's Movement ("UPM"). The UPM is a non-profit human rights organisation operating mainly in the Eastern Cape and Kwazulu-Natal. It is a voluntary association comprised mainly of unemployed people and social activists who are concerned about the welfare of unemployed and vulnerable people. UPM has over 2000 members. It's head offices are in Grahamstown.

2. UPM aims to create awareness regarding the constitutional rights of poor people and to advocate for their enforcement. It does so by lobbying governmental authorities on issues relating to labour and economic policies which affect the socially and economically disenfranchised who are also often the unemployed. Since August 2014 the UPM has repeatedly marched, written letters, and held meetings with municipal officials in an attempt to have the problems plaguing Makana Municipality addressed.

BACKGROUND

3. This letter addresses serious concerns regarding the municipality's failure to adhere to the principles of good governance; the inability of the municipality to provide basic services; and the municipality's failure to meet its financial obligations.

4. Makana municipality has exhibited gross service delivery failures, financial mismanagement, and a failed administration for more than a decade. With debt spiralling to more than R200 million, the Makana Council acknowledged the extent of the problem and in August 2014 requested provincial intervention. On 6 October 2014 an administrator was appointed in terms of section 139(1)(b) of the Constitution for nine months (Ms Yako), and a second administrator (Mr Gomomo) was

appointed for a term which ended in July 2016. Both administrators produced "final reports" highlighting numerous further interventions and reforms required in order to make Makana functional. A number of other reports have also been produced highlighting necessary interventions:

4.1 Yako's April 2015 report concluded with 'Areas for Improvement' which stated that almost every defective area of performance still required a great deal of resources, leadership and oversight in order to get Makana anywhere near functional. Her report concluded numerous recommendations to ensure better municipal management and service delivery. Many of the recommendations have still not been adhered to by the municipality.

4.2 On 24 February 2015 a Forensic Investigation Report into Makana Municipality by Kabuso was launched to look into unauthorized expenditures. The report detailed various aspects that are serious challenges for the municipality, such as unplanned recruitments within the municipality where individuals were employed outside of the organogram and "Grants in Aid of Special Projects" resulting in unnecessary and unauthorized payments.

4.3 The Makana Municipality 2015/2016 Annual Report indicates that senior managers had not signed their Performance Agreements. Moreover, the council did not approve the Municipality Performance Management Policy Framework. While senior managers have now signed agreements, it appears that the system has not been cascaded to lower levels as the organogram review process has not been finalized and Council has not approved the revised performance management policy framework.

4.4 The Makana Municipality 2015/2016 Annual Report also expected that every household has access to waste collection services. The municipality is expected to collect refuse from every household on a regular basis. Refuse collection is still sporadic and large illegal dumping sites are not managed.

4.5 The 2016 Auditor General's Report regarding Makana's finances indicated that employee related costs were overstated by R17,7 million; fruitless and wasteful expenditure totalled R9,9 million, and unauthorised expenditure totalled R253,7 million. It is not surprising that the municipal debt requiring servicing is over R200 million.

4.6 Makana's 2016/2017 annual report provides that the municipality is in a process of implementing the "Financial Recovery Plan" and its "Revenue Enhancement strategy" to improve and enhance financial health and stability. Despite this the municipality's financial standing has shown no improvement.

4.7 The Provincial Treasury Report on Makana's 2017/18 budget highlights that R32 million of the budget is actually unfunded and therefore illegal. It also makes numerous observations about capital grants that should not be included and "straight line" budgeting – which means the budget fails to make allowance for the timing of revenue versus expenditure.

4.8 The August 2017 report by "REVCO" – a service provider for the collection of debts owed to Makana – raises serious concerns about, inter alia, the failure to improve the management of metered services with 80% of meters being "estimated" in April 2017, the inability to quantify the financial impact associated with unbilled/non-revenue and unaccounted for distribution losses due to the non-availability of key data and financial reports; and irrecoverable debts amounting to more than R145 million still recorded on the books.

5. Very few, if any, tangible improvements have been felt by the citizens of Makana as a result of the interventions. Service delivery continues to deteriorate with water outages, appalling road maintenance, the failure to collect refuse timeously and the inability to manage waste sites and illegal dumping all ongoing concerns. Less than 18 months ago after the Gomomo administration, service delivery deteriorated to such an extent that a further intervention was made when an acting Municipal Manager Ted Pillay was parachuted in from the district municipality of Sarah Baartman for a three month stint to try and turn the municipality around. Mr Pillay's intervention was scheduled to end at the end of April 2018, but our

clients have been advised that Mr Pillay will remain in place until a new municipal manager is appointed.

6. The UPM is extremely concerned that despite three interventions and numerous reports detailing the steps that must be taken to revive the municipality and effect service delivery, the municipality is still in a state of administrative, financial, and managerial collapse. Poor waste collection leaves Grahamstown East in a permanent state of unhygienic filth. Illegal dumping sites are not managed, controlled or cleaned, and large swathes of land are breeding grounds for disease. Water interruptions continue to plague hundreds of households. Road maintenance is inconsistent and has led to citizens attempting to fix the massive potholes in the roads themselves. *And none of these problems can be fixed while there are no funds* (my emphasis), largely due to an unaffordable wage bill due to the number of municipal employees doubling in the past eight years.

7. Makana continues to limp along financially by diverting funds collected for electricity and due to Eskom, to pay salaries and other unaffordable expenditure. As Eskom calls in the debt which Makana owes it (approximately R58 million) and threatens to cut off power supply, the municipality uses money received from National Treasury via the Equitable Share to pay Eskom debt. This is hugely problematic as the Equitable Share is supposed to pay for service delivery to the poor. The ongoing misappropriation of funds to cover up historical maladministration results in ongoing prejudice to the most vulnerable.

8. Mr Pillay's "Report to Special Council Meeting" dated 28 March 2018 assesses the "situation" in the municipality. The report raises numerous serious concerns such as "continual (sewage) spillages in many parts of Grahamstown", a state of disrepair, crumbling road infrastructure, potholes throughout the town"; non expenditure of the municipal infrastructure grant which "will result in the equitable share in 2018/2019 being reduced" and a problem with refuse dumping whereby "filthy conditions are a breeding ground for disease and the poor are the most vulnerable".

CONSTITUTIONAL AND STATUTORY OBLIGATIONS

9. Makana municipality is in breach of section 152(1) of the Constitution. The municipality has failed to ensure the provision of services to the Makana community in a sustainable manner and failed to promote a safe and healthy environment. Nor does it adhere to section 153(a) of the Constitution which provides that:

> *'A municipality must 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.'*

10. The Makana municipality staff establishment is inconsistent with section 66(1) and 66(3) of the Local Government Municipal Systems Act 200 of 2000 as the staff establishment has not been approved by council.

11. An effective system of expenditure and control, including procedures for approval is not in place, as required by section 65(2)(a) of the Local Government Municipal Finance Management Act (MFMA). Adequate management, accounting and information systems are not in place to recognise expenditure when incurred, as required by section 65(2)(b) of the MFMA. Reasonable steps are not taken to prevent unauthorised, irregular and fruitless and wasteful expenditure as required by section 62(1)(d) of the MFMA. As Mr Pillay himself points out in his 28 March 2018 report, the unauthorised and irregular expenditure cannot even be determined at this stage and a "complete review of the SCM orders and tenders" must be done.

12. Many senior managers have not signed Performance Agreements, and the council did not approve the Municipality Performance Management Policy Framework. It appears Makana currently does not have a Performance Management Policy Framework as mandated by the Local Government: Municipal Systems Act. The municipality is therefore in contravention of section 38(1) of the Systems Act.

13. *The "Financial Recovery Plan" ("FRP") and "Revenue Enhancement Strategy" have not been complied with* (emphasis added).Both are legally significant documents that should have guided Makana decision-making and should have been treated as *'live' documents requiring review and updating as progress was made. One year after the election of the present Council (July 2017), councillors were canvassed about the FRP and few Councillors were even aware of the existence of the FRP* (my emphasis).[34]

DEMANDS

14. While there are glimmers of hope that the municipality's rapid decline may have been slowed, our client still believes that the deplorable state of affairs in the municipality *warrant a section 139(5) intervention* (my emphasis). As you are aware, this section of the Constitution provides that ...[35].

15. The persistent failure to meet the basic service delivery requirements which the citizens of Makana, particularly the poor and unemployed citizens are entitled to, is inexcusable. Our clients make the following demands, failing which we hold instructions to approach the high court for an order directing the MEC to carry out an intervention in terms of section 139(5):

    15.1 Within 14 days, the municipality must produce a written report detailing:

        15.1.1 the current state of Makana's administration and financial management;

        15.1.2 *whether a "recovery plan" is being followed and if so it should be attached to the report;*(my emphasis)

        15.1.3 the steps taken and being taken by the municipality to ensure accountable, responsive and open municipal

[34] It is significant that none of the respondents have denied or disputed the correctness of the contents of this letter, particularly where reference is made to the ignorance of councillors regarding the existence of the financial recovery plan.

[35] The letter repeats s 139(5) of the Constitution as set forth at the beginning of this judgment.

governance as per the recommendations in the final report by Ms. Yako;

15.1.4 whether the Special Investigations Unit has been approached to provide a forensic investigation in order to conduct an investigation into the serious maladministration in the municipality (highlighted by the Kabuso report which was never acted upon) in order to root out corrupt municipal employees that are hampering service delivery;

15.1.5 What steps are being taken to reduce the unsustainably high number of employees in the municipality;

15.1.6 a list of all the service providers rendering services on behalf of the municipality that are financed under the "special projects" budget, as well as a list of all recipients of "grants in aid". The list must be accompanied by a description of sufficient depth on each project or grant so that our clients can determine whether the circumstances of awarding the special project or grant are reasonable,

15.1.7 Written clarification on the length of Mr Ted Pillay's secondment to Makana Municipality, the terms of reference of his appointment, clarification of his powers, and the legal status of his intervention.

15.1.8 An explanation of what will happen when Mr Pillay's secondment ends, how the new municipal manager's performance will be monitored, and an *indication of whether the provincial government is already considering an intervention in terms of s139(5) of the Constitution.*[36]

16. Our client sincerely hopes that you will respond and engage with the UPM in a constructive manner.'

- **3 July 2018**: A Council resolution is adopted to investigate allegations of misconduct relating to the director of engineering and infrastructure.

[36] Emphasis added.

- **1 August 2018**: Three months later, the Minister of Cooperative Governance and Traditional Affairs (the sixth respondent) responds to the letter from the LRC as follows:

'Dear Mr Mc Connachie

DEMAND FOR AN INTERVENTION IN TERMS OF SECTION 139(5) OF THE CONSTITUTION IN MAKANA LOCAL MUNICIPALITY

Your letter dated 08 May 2018, relating to the above matter, has reference.
Kindly be informed that I have taken note of the contents of your letter regarding the alleged ongoing service delivery failures and non-adherence to the principles of good governance occurring at the Makana Local Municipality, and your demand for an intervention at this municipality in terms of section 139(5) of the Constitution.
I have also taken note of the examples you have stated or listed to prove that this municipality is in serious or persistent material breach of its obligations to provide basic services or to meet its financial obligations, which is a precondition for an intervention in terms of this section.
However, in view of the fact that the invocation of constitutional interventions is a provincial competence, except under special circumstances prescribed in section 139(7) of the Constitution, I have referred your demands to the Premier of the Eastern Cape.
The Provincial Executive will assess the situation in the municipality and, thereupon, consider instituting an intervention, if necessary.[37] If the Provincial Executive considers it unnecessary to institute the intervention at this municipality, the Premier will provide me with reasons for such a decision and also state the alternative steps the Provincial Executive intends to take, or has already taken, to assist the municipality to overcome its financial problems, if any, for my consideration and subsequent feedback to you.
Thank you for bringing this matter to my attention, and I look forward to further cooperation with your organisation and the Unemployed People's Movement in all matters affecting local government.

[37] My emphasis. It is significant that none of the respondents have explained what became of this undertaking and why it was only after the launching of this application, that the provincial executive allegedly resolved to resort to such an intervention.

Your office is welcome to contact Sonwabile Nkayitshana: Deputy Director: Intervention on Tel: (012) 336-5611 or mail: sonwabile@cogta.gov.za for more information related to this matter.
Kind regards
(sgd)
DR ZWELINI L MKHIZE MP
MINISTER
DATE: *01-08-18*'

- **8 August 2018**: Attorneys Chris Baker & Associates write a letter to the mayor, the municipal manager and the speaker advising that following the resolution adopted on 3 July, the acting municipal manager (Mr Pillay) mandated them to investigate the aforesaid allegations of misconduct. What follows is a detailed 17 page letter outlining the attorneys' findings and proposed charges relating to unauthorised salary increases and appointments, fraudulent misrepresentations, fruitless and wasteful expenditure, insubordination, interference with the investigation and various contraventions of Makana's supply chain management (SCM) policy and regulations and the MFMA.

  The letter proposes that the attorneys' report be placed before Makana's council (the 14th respondent) and that council should resolve as follows:

  1. That the allegations are of a serious nature and that disciplinary proceedings be instituted against Mr Mlenzana;
  2. That the municipal manager be authorised to appoint an independent presiding officer and an evidence leader.

- **9 November 2018**: Makhanda residents march on the city hall and hand over a memorandum which is accepted on behalf of the MEC (the third respondent). The memorandum calls upon the second respondent to dissolve the Makana Municipal Council and appoint an administrator until the election of the new Council, in terms of s 139(1)(c) of the Constitution, stating that Makana's council had failed to meet its executive obligations, in that it was unable or unwilling to:

- Exercise Makana's executive and legislative authority and use Makana's resources in the best interests of the community;

- Provide, without favour or prejudice, democratic and accountable government;
- Ensure that municipal services are provided to the community in a financially and environmentally sustainable manner;
- Consult the community about the level, quality, range and impact of municipal services and the available options for service delivery;
- Give the community equitable access to the municipal services to which they are entitled;
- Promote and undertake Makana's development and a safe and healthy environment.[38]

- **26 February 2019**: The applicant launches the application which forms the subject matter of this enquiry. Attached to the application papers are the annexures which I have already referred to, as well as a substantive intervention plan formulated by Dr Sooliman from Gift of the Givers dated 23 February 2019, this court's order dated as far back as 8 September 2015, a letter from the applicant's attorneys pertaining to contempt of court proceedings, and a number of photographs and supporting documentation and confirmatory affidavits.[39]

- **26 April 2019**: The first to fourth respondents ("the provincial respondents") deliver their opposing answering affidavit, deposed to by Gabisile Gumbi-Masilela, the head of the Eastern Cape Department of Cooperative Government and Traditional Affairs, and in his capacity as the provincial authority responsible for local government in the Eastern Cape.

- **7 May 2019**: the eighth, ninth, tenth and 14th respondents ("the municipal respondents") deliver their opposing answering affidavit, deposed to by Makana's municipal manager, Mr Moppo Mene, who was only appointed in the post in August 2018.

- **10 May 2019**: the sixth respondent delivers his opposing answering affidavit, deposed to by the Minister of CoGTA, Dr Zwelini Mkhize.[40]

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[38] The call to action is copied to Dr Zweli Mkhize (the sixth respondent), Mr Oscar Mabuyane (the ANC chair for the Eastern Cape) and the MEC for Human Settlements. The respondents have not challenged the grounds set forth for dissolving council.

[39] The application including annexures comprises 672 pages.

[40] Dr Nkosazana Dlamini-Zuma substituted Dr Mkhize less than three weeks later.

- **24 May 2019**: the applicant delivers its replying affidavit.

- **5 June 2019**: the first to fourth respondents deliver a supplementary answering affidavit.

[8] The respondents admit that a crisis exists in the financial affairs of Makana, and that this has resulted in serious and persistent material breaches of Makana's obligations to provide basic services or to meet its financial affairs. According to the deponent to the third respondent's affidavit, this state of affairs prompted the third respondent, on 10 April 2019, to recommend to the second respondent that a recovery plan be imposed "aimed at securing the Municipality's ability to meet its obligations to provide basic services and its financial commitments pursuant to the provisions of section 139(5) of the Constitution", read with sections 139 and 140 of the MFMA. The affidavit is instructive. It continues to read as follows:

> 'A memorandum in which this course of action is recommended to the Second Respondent would have served before the Executive Council at its meeting which was scheduled for 26 April 2019. However, due to the fact that the members of the Executive Council are all out of town on visits to various parts of the Eastern Cape Province as a result of the floods, that meeting has been cancelled and the Premier has not yet decided on a new date for the meeting.
>
> I therefore propose to file a supplementary answering affidavit once the outcome of the meeting is known and I fully expect to inform the Court at that time that the Second Respondent will follow the section 139(5) Constitution route and that I have been mandated to oppose the application on behalf of the Provincial Respondents.
>
> The Provincial Department of Cooperative Governance and Traditional Affairs have *(sic)* gone to great lengths to provide the Honourable Court with as much information as possible regarding provincial attempts to assist the Municipality. To facilitate this process Whitesides Attorneys, the Provincial Respondents' correspondent attorneys in Grahamstown, wrote a letter date

> 16 April 2019[41] ... in which they requested an extension to file answering papers by 6 May 2019. By that date it was also expected to be able to inform the Honourable Court of the outcome of the Executive Council meeting scheduled for 26 April 2019, which has had to be cancelled for reasons mentioned hereinabove.
>
> Regrettably Wheeldon, Rushmere & Cole Inc, the Applicant's attorneys of record, only responded to the aforesaid letter on 24 April 2019, the day on which the answering affidavits were due, and denied an extension ...
> Since the Applicant's attorneys of record declined to agree to allow the First to Fourth Respondents more time, this affidavit will be filed immediately upon having been deposed to and, once the Executive Council meeting has been held, a supplementary affidavit, informing the Court of the outcome thereof, will be filed at that point in time.'

[9] The affidavit thereafter addresses what purports to be a criticism of the applicant for having invoked the wrong section of the Constitution in support of the relief it seeks. This seems to be the sole basis for the opposition from all the respondents, it being common cause that Makana is facing several crises which have resulted in breaches of its obligations to provide basic services. The allegations made against its council (including why it should be dissolved) have also not been disputed or defended. That really is the long and the short of it. The deponent further points out that the executive council cannot be compelled to intervene in terms of section 139(1)(c) as prayed for by the applicant. It is contended that the provincial executive has a discretionary power to intervene and is not obliged to do so. Also, the existence of exceptional circumstances is a jurisdictional fact which must exist before council can be dissolved, in the sense that the circumstances have to be "markedly unusual or specially different".[42]

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[41] Curiously, the request for an extension omits to mention what I would have considered to have been the most pressing reason, being that a memorandum in which a course of action in terms of section 139(5) of the Constitution would be serving before the executive council at its meeting scheduled for 26 April 2019, and that an extension until 6 May would facilitate the ventilation of the very important outcome of this meeting, not only for this Court, but for all the parties concerned. Instead the request somewhat surprisingly, reads as follows: 'We refer to the above matter in which our papers are due by 24th April 2019. We have received instruction that with the Easter Weekend coming up it is going to be very difficult to meet the time limit and the very next week has a Public Holiday in the middle being the 1st May 2019. We have been instructed to request an indulgence and extension to file our answering papers by 6th May 2019.'

[42] An extract from *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others*, case no. 231/2009 (5 August 2009) at paras 76 and 79.

[10] The deponent contends that the upshot of *Mnquma* is that:

a. Consideration must be given to other forms of intervention which are effective but less intrusive;
b. There must be a causal connection between the conduct of the municipal council and the continued failure to meet with the executive obligation;
c. The question must be asked whether the municipality will be able to fulfil its obligations post intervention.

[11] The deponent expresses, on behalf of all the provincial respondents, that they are deeply concerned about, and not at all indifferent to, Makana's plight. To illustrate this deep concern, the deponent highlights the following assistance which provincial government (as opposed to local government) has rendered to Makana:

- During 2014 the second respondent (the executive council) intervened in terms of section 139(1)(b) without dissolving council. Indeed, it is common cause that the MEC appointed Ms Yako as an administrator for 18 months. It is alleged that this was a positive step which resulted in the stabilisation of administration, a tripartite arrangement amongst community organisations, councillors and municipal officials, the improvement of municipal infrastructure grants from National Treasury, the development of a water and sanitisation road map which revealed that R400 million was required to "turn the situation around", negotiating with key creditors such as Eskom and the auditor-general to avoid litigation, and the development of a delegation framework, a compliance register and a performance management framework[43] as well as the allocation of R72 million for infrastructure investment.

- The *fons et origo* of the serious water crisis, so it is contended, is a drought which has been the worst in recorded history. Here the provincial government played a central role by harnessing the support of the National Department of Cooperative Governance and Traditional Affairs together with MISA[44], the

[43] Which the Makana Council rejected
[44] The Municipal Infrastructure Support Agency

National Department of Water and Sanitation together with Amatola Water[45], the Kagiso Trust for cash flow management, and the Eastern Cape Development Corporation (the "ECDC") to assist in the promotion of Makana's "local economic development".

- The Kagiso Trust has in turn developed K'DOS, a data optimisation system which provides Makana with online access to a cost-effective database which apparently equips Makana with a reliable solution to improve its business integrity, revenue and revenue collection, reduce debt and "manage the provision of free basic services to the poorest of the poor." Data is regularly updated to ensure consistent access to accurate trending information. Fourteen municipal officials were loaded onto the system and trained. The system was used to verify "indigent" information in the registration process, resulting in the overstatement of the municipal indigent register being reduced by 25 per cent, and the understatement of the indigent register being improved by 30 per cent (the logic of which, regrettably escapes me). Data cleansing also resulted in several accounts being traced, updated and brought into current status. Problems with faulty meters were largely resolved and outstanding debtors were reduced.[46] More than half a million rand was "saved" as a result of over-billing(?) The Kagiso Trust trained 20 municipal officials "to be able" to deal with customer query management, credit control and distribution loss calculations.

- The Kagiso Trust also funded a programme to develop capacity and improve functional performance in the areas of local economic development ("LED"), community engagement and indigent management. LED's focus appears to be cohesion amongst the community, business and government. I am advised that MISA seconded an engineer to assist with "coordination of inputs" and technical advice due to the fact that Makana's council had suspended its technical director. MISA also assisted with the cleaning of lines and supplies and services transformers at the James Kleinhans Water Treatment Works.

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[45] Amatola Water is purportedly an entity of the National Department of Water and Sanitation which was established to assist the Department to deliver on its "mandate" and which is intended to assist Makana to address the challenges associated with water shortages.

[46] The example used is that the monthly collection rate improved from 63 per cent in July 2018 to 114 per cent in January 2019 (fortunately it is not necessary for me to accurately comprehend how this improvement was calculated).

- At the time the affidavit was deposed to in April 2019, the Department of Water and Sanitation had allocated R78 million for the upgrade of the water treatment works to store 20 mega-kilolitres of water, and had allocated R35 million for water conversion and refurbishment of the water treatment plant. It is alleged that it has been working with Gift of the Givers (more about this later) and has allocated R22 million for drought relief and the identification of new boreholes.

- The office of the first respondent has provided funding for the involvement of Amatola Water and the ECDC, tasked with the upgrading, rehabilitation, refurbishment, operation and maintenance of basic service infrastructure supplies of electricity, water and sanitation. Amatola has involved experts who ensure that the water quality is acceptable and that the treatment plant operates at full capacity. Bulk water is extracted from the Fish River and delivered to the eastern part of Makana which is a major problem area. The ECDC assists in the implementation of sewer infrastructure upgrades. The assistance of Amatola would be for a period of three months after which an assessment would be conducted to inform the way forward.[47]

- According to the affidavit, as at April 2019 an amount of R12 million was required over a six month period for the secondment of technical personnel and R3million to fill a number of critical positions at Makana.

- The third respondent's department had also established that R10,2 million would be required to upgrade or replace dysfunctional equipment, provide proper tools, supply chemicals, secure infrastructure and staff and implement proper meter reading and revenue collection.

- R11 million was required to ensure supplementation of water supply through integration boreholes, to refurbish filters and to provide additional pumps at the water works. The Gift of the Givers drilled two such boreholes[48] and it is

[47] All things being equal such an assessment would have been done at the latest end July 2019.

[48] According to the applicant's replying affidavit, the Gift of the Givers Foundation (an African non-governmental disaster relief organisation) had in fact drilled 11 boreholes and supplied Jojo tanks filtration systems and bottled water to the people of Makhanda after it had been declared a disaster area in February 2019. Makana had requested the organisation to prepare an intervention plan, which it did, pointing out that it would provide funding but that government co-funding was much needed as the project would cost between R23 million and R30 million. Makana agreed. By May 2019 the organisation had spent R15 million on the project. Makana, who, according to the municipal manager had received R12 million funding from the Department of Water and Sanitation, however paid between R1,2 million and R1,3 million to a consultancy

anticipated that the first respondent's office would make available R12 million for 11 additional boreholes.

- In summary the projects which needed to be implemented for short term support would cost in the region of R71,2 million.

- As far as the third respondent is concerned medium to long term plans in respect of water and sanitation include engaging MISA to review its framework and supporting Makana to address over-staffing involving employees with "no capacities".

- In summary, the Department of Water and Sanitation funds numerous projects such as the provision of R237,6 million through the Regional Bulk Infrastructure Grant (RBIG) to upgrade and refurbish the James Kleinhans water treatment works. It is averred that this programme was completed in March 2019. The treatment works is currently operating at 150 per cent of its capacity but still cannot supply Makhanda's requirements. RBIG funding is also required for the Belmont Valley waste water treatment works. It is further alleged that R10 million in funding was made available for drought relief and completion of interventions were projected for end June 2019.

- The affidavit also refers to R15 million funding being required for the refurbishment of the Riebeeck East water treatment works, and R10 million for Alicedale. As at April 2019 drought mitigation funding of R12 million had been made available. Overall urgent intervention spread across the water supply value chain would require funding in the region of R51 million.

- A further R5 million was required short term to refurbish a "dilapidated" electrical infrastructure. The medium to long term support plans involved grant funding from the National Department of Energy in the region of R8,5 million. For Eskom to approve the notified maximum electricity demand, Makana needs to make a part-payment of R7 million in respect of its R27,4 million debt to Eskom with a

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firm which had been "studying underground water" and R7 million to yet another unnamed company for boreholes which had in fact already been drilled by Gift of the Givers. Gift of the Givers was accordingly constrained to withdraw from Makhanda during May 2019. The municipal manager was quoted as having stated that Makana "never promised money to Gift of the Givers" but that "these guys came in very handy, and they helped us substantively". According to the applicant Gift of the Givers had been providing at least two informal settlements with water. After their withdrawal the occupants were forced to draw water from a well contaminated by raw sewerage, a pervasive problem in Makhanda.

further payment of R700 000 for an increase. A preliminary assessment of the cost of securing short term functionality of the Makhanda electricity supply system, which, according to the provincial respondents, calls for urgent intervention, is R22,7 million.

- The sixth respondent (the minister of CogTA) has allocated R10 million through MISA for upgrading and refurbishing the CBD streets which have simply not been maintained over an extended period. As at April 2019 there had been no progress due to the fact that bidders "took MISA to court claiming that it did not follow the correct procurement process". The achievement of short-term functionality of the roads and storm-water facilities requiring urgent intervention would cost R5 million.

[12] Accordingly, the stance of the provincial respondents is summarised in the following words:

'In summary, at this stage the Municipality is faced by the following challenges:

- The infrastructure is aging and this leads to escalation of overtime costs and service delivery challenges.
- The municipality has huge debts and is unable to settle them, as a consequence of which financial sustainability is at risk.
- The financial system is old and the reliability of data poor, which results in low revenue collection rates.

Although the support that has been rendered to the Municipality by multiple stakeholders is expected to yield fruitful results, a mandatory intervention involving the *development*[49] of a Financial Recovery Plan is regarded as also necessary.'

[13] The recently appointed Makana municipal manager deposed to an affidavit on behalf of the eighth, ninth, tenth and 14th respondents ("the municipal respondents").

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[49] Emphasis added.

Significantly, no attempt is made at exonerating these respondents or defending them. Nor are any attempts made at denying or disputing the factual allegations and accusations levelled by the applicant against the municipal respondents. The municipal respondents, who are, or should be in the best position to advise this court on what has been achieved at the coalface, and whether there is any merit in the applicant's allegations, have instead elected to question the applicant's *locus standi*[50] and the constitutionality of its claim, based on the premise that, given the position adopted by the third respondent, and given the intended provincial intervention, dealing with the factual allegations contained in the founding affidavit would be "superfluous". Apart from joining ranks with the provincial respondents on the absence of jurisdictional requirements for the relief sought, and blaming the crisis on Makana's debts (and in particular one of some R68 million) the local respondents likewise take the point that for this court to compel the second respondent to invoke the provisions of s 139(1)(c) of the Constitution would involve an impermissible intrusion by the judiciary on the constitutional obligations of provincial government in disregard of the principle of separation of powers. Having said that, the local respondents conclude that this court should "permit" the provincial respondents, in the exercise of their constitutional powers, to intervene and to assist Makana "to get its affairs in order". They are silent on the declaratory relief sought in terms of the Constitution and the principle of legality.

[14] The sixth respondent (the Minister of CoGTA), has also elected not to traverse CoGTA's contribution to Makana's welfare, purportedly in the light of the intended mandatory provincial intervention in terms of section 139(5) of the Constitution, and makes common cause with the other respondents in this regard, stating that the provincial government must be permitted the requisite latitude to properly investigate the reasons for dysfunctionality and then to tailor provincial intervention to address those reasons. Significantly (and I will return to this submission shortly), the sixth respondent contends that, in relying on s 139(1), the applicant ought only to succeed in this drastic relief if it can demonstrate that the decision by the provincial executive to intervene under section 139(5) is susceptible

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[50] In the light of the attack on the applicant's legal standing having been abandoned at the hearing (and correctly so in terms of the dictates of the Constitution and the definition of a community in the MSA), I do not deem it necessary to dwell on the point any longer.

to review. In other words, so it is argued, as soon as the decision by the provincial executive is taken, it will supersede any discretionary provincial intervention. The penultimate paragraph of the affidavit bears repetition:

> 'The applicant does not make out a case for the relief sought. In any event, from a substantive perspective, the relief sought will not serve the purpose of averting a crisis in the municipality. If anything, dissolving the municipality without meeting the threshold requirement of section 139(1)(c) or, in the case of mandatory intervention, without following the sequence prescribed in section 139(5) is bound to cause further instability to an already precarious municipality.'

[15] The applicant, in reply, has concluded, and correctly in my view, that the failure by the respondents to dispute its factual allegations must be taken as an admission that Makana has failed to fulfil its constitutional obligations to its people. That goes without saying. I do not think any of the respondents take issue with this conclusion. It also seems to me that the respondents (certainly on the papers) do not take issue with the declaratory relief sought in paragraphs one and two of the notice of motion. I am also inclined to agree with the applicants that none of the respondents have pointed to a single practical step which has been taken by Makana or any of the other respondents since the launching of the application, to alleviate the immediate difficulties faced. I will return to this point in due course.[51]

[16] The applicant in reply, blames Makana's financial and operational crises on a persistent breach of its obligations due to maladministration and mismanagement which has resulted in the collapse of almost every facet of its spheres of operation. In emphasising that Makana has been placed under administration twice previously without any success, the applicant points out that the final reports of both administrators amount to lists recording defective performance in nearly every area of governance. This failure, so the applicant argues, is attributable solely to Makana, its mayor, its municipal manager and particularly its council, and I quote:

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[51] It is so that the provincial respondents have made reference to impressive ideas. They have however, also in the main referred to the escalating need for finance, which in my view could have been reduced by timeous and prompt action as called for time and time again by the people of Makhana.

'The fourteenth respondent [council] has failed to administer the municipality with anything resembling competence. It has also manifestly failed to implement the very recovery plans which have been proposed and adopted to rescue the municipality.[52] ...The question accordingly arises as to the basis upon which any of the respondents believe that a new recovery plan administered and implemented by the very same municipal council, will be the panacea to the ever worsening problems faced by the Makana Municipality and its citizens. There is no such basis in fact.

In the circumstances ... the relief anticipated by sections 139(1)(a) and (b) and section 139(5) of the Constitution, has previously been implemented and has failed.

...

Any solution which does not dissolve the municipal council and implement effective administration in the Makana Municipality in the form of an administrator empowered to give effect to proper administrative policies is doomed to failure. This is demonstrated by the previous failures in putting the municipality under administration without dissolving the municipal council and appointing an effective administrator. ... The provincial government has twice before utilised the latitude afforded it and implemented tailored interventions which have had no impact. This is because the governance, management and administrative structures, which are the cause of the failures, have been left in place to implement the interventions. They have failed to do so.'

[17] The applicant thereafter deals with the important meeting of the executive council which was initially scheduled for 26 April 2019 to consider and approve interventions in terms of section 139(5), and that a supplementary affidavit was to have been filed by no later than 10 May 2019 confirming the outcome of the meeting and verifying the entire case made out in opposition to the relief sought. The applicant points out that as at 24 May 2019 (when it deposed to its reply) no such affidavit had been filed, with the result that there is no resolution before this court for the adoption of s 139(5) as envisaged and undertaken by at least the provincial respondents.

[52] In this regard the applicant refers to the financial recovery plan produced by the first administrator, which was adopted by the Council in March 2015, just before the second administrator was appointed in July 2015.

[18] On 5 June 2019 the provincial respondents delivered a supplementary answering affidavit.[53] The affidavit refers to the fact that the anticipated important meeting to resolve Makana's fate, as only the provincial respondents were apparently empowered to do, which had been scheduled for 26 April, was cancelled due to the unavailability of the second respondent, and the first respondent had not at the time decided on a new date. The second respondent did eventually hold a meeting at which a resolution was apparently taken, recorded as follows on what purports to be the first respondent's letterhead:

'TOP SECRET

TO: Chief State Law Advisor
HOD: COGTA

Re: Section 139(1)c Intervention in Makana Local Municipality
(Unemployed People's Movement)

Herewith resolutions taken at the Special Executive Council meeting held on 29 May 2019 for your consideration and action. You are hereby requested to furnish this office with a status report, where required, on the implementation of the resolutions relevant to your department:

RESOLUTIONS: It was resolved that –

1. *The first to fourth respondents should oppose the application for a court order compelling the Provincial Executive to intervene in the Makana Local Municipality in terms of Section 139(1)(c) of the Constitution;*
2. *The filing of the answering affidavit deposed by the HOD of COGTA be approved;*
3. *Necessary steps be taken in terms of Section 139 of the MFMA to prepare for the imposition of a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic*

[53] There is no indication, *ex facie* the papers, whether leave to deliver a fourth set of papers had been applied for, or was granted. Despite this unsatisfactory state of affairs, the other parties did not oppose an application for condonation, and the papers were accordingly received into evidence.

services and its financial commitments in terms of section 139(5) of the Constitution; and

4. *Particulars of the steps that have been taken and are being taken at provincial government level to assist the Municipality be provided to the court.*

All responses are to be submitted **electronically on the Implementation Report submitted to your departments, by no later than Friday, 14 June 2019.** Please direct any further enquiries in this regard to Mr Monde Nkasawe at 082 303 55 00.

Kind regards

MS N.T.M. MBINA-MTHEMBU **DATE**

DIRECTOR-GENERAL AND CABINET SECRETARY

LEADING DEVELOPMENT WITH EXCELLENCE AND INTEGRITY'

[19] The document is unsigned and undated. I am advised that this is so because the usual procedure in respect of executive council resolutions is that the council meets and minutes are prepared. These are then forwarded to the director-general who checks and approves the draft minutes for distribution to the members of the executive council at their next meeting. Once the minutes are adopted at the next meeting, resolutions are prepared for signature by the director-general who distributes them to the heads of department. These are referred to as mere matters of internal protocol, the head of department of CoGTA giving the assurance on oath that resolutions are not re-debated and their substance is not altered by these subsequent processes.

[20] In support of the application for condonation, the deponent states that he was advised that the Judge President of this Division called a meeting on 6 May 2019 at which he directed that all outstanding affidavits in the matter be filed by 10 May 2019

and that the matter be set down in the normal course thereafter.[54] The deponent then goes on to explain why it was impossible for the provincial respondents to comply with the directive. There being no record of the directive, the meeting and its purpose in the court file, this court is somewhat compromised in making a proper value judgment regarding these events, particularly as there is nothing before me to suggest that the relevance of the council meeting, and the importance of the resolution with respect to the final determination of the matter by the judge ultimately seized therewith, was discussed with and/or considered by the Judge President. Nor is there any record of the correspondence with the Judge President, which culminated in the meeting with him, as alluded to by the deponent and confirmed on oath by the State Attorney. Be that as it may, I am in the premises constrained to accept the explanation given for the delay, particularly in the absence of any real opposition to the granting of condonation.

[21] At the hearing of the application before me, the opposing respondents were divided into three teams. The practitioners for the applicant were led by Smuts SC. The practitioners for the first to fourth respondents (the provincial respondents) were led by Heunis SC. The practitioners for the sixth respondent (the Minister of CoGTA) were led by Pillay SC. The practitioners for the eighth, ninth, tenth and 14th respondents (the municipal respondents) were led by James SC.

The principle of subsidiarity

[22] At the outset Ms Pillay raised the principle of subsidiarity. I will deal with this briefly inasmuch as the opposition based on this principle was not supported by the other respondents. According to this principle, so it is contended, the applicant must rely on the provisions of subsidiary legislation as a first port of call and is not permitted to rely directly on the Constitution. To put it differently, it is contended that any relief sought would have to be in relation to section 137 of the MFMA. The terms within which such relief ought to be sought has not however, been suggested. Mr

[54] Regrettably, there is no reference in the court file to this meeting, why the attorneys were summoned thereto and what transpired thereat. Nor is there a written copy of the purported directive in the court file, which is the practice in this Division when directives are issued at judicial meetings with legal representatives, for purposes of transparency and completeness and as a contemporaneous record of what transpired, if nothing else.

Smuts in response has contended that the relief which the applicant seeks is not directly related to the MFMA, which is not designed to deal with the kind of collapse of governance which the applicant complains of. Be that as it may, I am satisfied that the applicant is seeking its relief in terms of section 172 of the Constitution which inter alia states that if this court finds any conduct to be inconsistent with the Constitution it must declare that conduct to be invalid to the extent of the inconsistency and thereafter may make any order which is just and equitable. Having regard to the history of the complaints in this matter which I have been at pains to set out, and the unacceptable lack of response to these, I am advised that the complaints raised by the applicant are directed at the inconsistency of ongoing conduct with respect to the Constitution, and that such conduct is deserving of a declaration of invalidity. With regard to the entire matrix of this case and the Constitutionally entrenched rights of the applicants, I am not persuaded that the applicants are non-suited with respect to the relief which they seek.

The status of any proposed action in terms of s 139(5) of the Constitution

[23] With respect to the actual relief sought, the respondents appear to be *ad idem* that the applicant is barred from seeking relief in terms of section 139(1)(c) of the Constitution (which is in terms of it wording discretionary) because the provincial respondents have already elected to take action in terms of section 139(5) of the Constitution, which is peremptory.

[24] To my mind, this is, at the end of the day, the crisp issue which this court is called upon to consider and determine.

[25] In this regard, and with the benefit of a transcript of the record at my disposal, I am in a position to deal fully with the submissions made by the respective parties on this point. The applicant has been criticised in argument, for continuing to pursue the relief which it sought from the outset, after having been advised as follows in the answering affidavit on behalf of the provincial respondents:

> 'On 10 April 2019 the Third Respondent decided, for reasons which follow, to oppose the application and to recommend to the First, Second and Fourth, Respondents that

they, too, oppose the application. He also resolved to recommend to the Second Respondent that, as a result of the crisis in the financial affairs of the Makana Municipality ("the Municipality") which has resulted in serious and persistent material breaches of its obligations to provide basic services or to meet its financial affairs, a recovery plan be imposed aimed at securing the Municipality's ability to meet its obligations to provide basic services and its financial commitments pursuant to the provisions of section 139(5) of the Constitution ... read with sections 139 and 140 of the ..MFMA.

A memorandum in which this course of action is recommended to the Second Respondent would have served before the Executive Council at its meeting which was scheduled for 26 April 2019. However, due to the fact that the Members of the Executive Council are all out of town on visits to various parts of the Eastern Cape as a result of the floods, that meeting has been cancelled and the Premier has not yet decided on a new date for the meeting.

I therefore propose to file a supplementary answering affidavit once the outcome of the meeting is known and I fully expect to be able to inform the Court at that time that the Second Respondent will follow the section 139(5) of the Constitution route and that I have been mandated to oppose the application on behalf of the Provincial Respondents...

Since the Applicant's attorneys of record declined to agree to allow the First to Fourth Respondents more time, this affidavit will be filed immediately upon having been deposed to and, once the Executive Council meeting has been held, a supplementary affidavit, informing the Court of the outcome thereof, will be filed at that point in time.'

[26] The applicants, in response to the gist of the aforesaid, pointed out that:

a. The factual matrix which they set out in their founding papers was not seriously challenged by the respondents.
b. The extent of the financial crisis faced by Makana has not been denied.
c. The fact that Makana has been placed under administration twice between 2014 and 2017 and that those administration processes had no significant or lasting effect on Makana has not been denied, together with

various other practical problems which were also not denied, as well as the fact that there has been a manifest failure to intervene or to plan or to take steps during the four years in which the drought conditions have persisted.

d. The failure to dispute these facts must be construed as an admission on the part of Makana that it has failed to fulfil its constitutional obligations towards its citizens, entitling the applicant to the declaratory relief it seeks, particularly as none of the respondents have pointed to a single practical step which Makana or any of the other respondents have taken, since the launching of the application, to alleviate the immediate difficulties faced.

e. A further consequence which flows from the admission of the factual matrix by the respondents is that they admit that there is not only a single crisis facing Makana, but a multitude of crises.

f. Section 139(5) applies only to circumstances where a municipality is in persistent breach of its obligations as a result of a crisis in its financial affairs.

g. Accordingly, although section 139(5) of the Constitution could have been relied on by the applicant, it has chosen to proceed on the basis of section 139(1)(c) because of the myriad of crises it relies on in bringing the application. In addition to being in persistent breach in performing its duties due to a financial crisis, Makana is also in persistent breach of its obligations due to an abject failure in its management and administration capacity which has resulted in the collapse of almost every facet of its spheres of operation.

h. The first administrator, appointed in terms of section 139(1)(b) of the Constitution, produced a revenue enhancement plan together with a supporting action plan, both of which were adopted in December 2014. In March 2015 a financial recovery plan, also produced by the first administrator, was indeed adopted by the 14th respondent (ie Council). Despite the adoption of these plans, and the appointment in July 2015 of a second administrator, the final reports of both administrators amounted to lists recording defective performance in nearly every area of governance. This failure is attributable solely to the eighth, ninth, tenth

and 14th respondents and/or their predecessors in title, but particularly to the 14th respondent which has *manifestly failed to implement the recovery plans which have been proposed and adopted to rescue Makana.* The question accordingly arises as to the basis upon which any of the respondents believe that a new recovery plan administered and implemented by the very same defunct council, will be the panacea to the ever worsening problems faced by Makana and its citizens.

i. In the circumstances, so the replying affidavit states, the relief anticipated by sections 139(1)(a) and (b) and section 139(5) of the Constitution, has previously been implemented but has failed. [55]

[27] In the light of the aforesaid, the applicant then married its proposed intervention to sections 139 and 140 of the MFMA, pressing for a "mandatory" provincial intervention. It also referred to a previous request for a detailed update on Makana's indebtedness to major creditors and whether Makana was complying with the aforesaid financial recovery plan which had been approved after the first administration intervention, and how matters in fact worsened thereafter. Indeed, it once again referred to the letter demanding the appointment of an administrator in terms of section 139(5) of the Constitution, which had apparently been referred to the Premier on 1 August 2018, followed by silence. A petition for intervention in terms of section 139(1)(c) was also met by silence. No acknowledgment. No response. No action.

[28] It seems clear therefore, that the applicants did not simply ignore the resolution to recommend a section 139(5) intervention as envisaged by the answering affidavit. It dealt therewith, under the complaint referred to by its counsel as a consistent pattern of "same old, same old" indifference, with appropriate and relevant illustrations of the failure of previous turnaround strategies. It did not in

[55] According to the papers the Makana draft financial recovery plan dated February 2015 (which comprises 100 pages) refers to section 142 of the MFMA as well as the development of a financial recovery plan in line with sections 139 and 141(2) of the MFMA, which was, at the time considered as "a critical way forward for the turnaround and sustainability of Makana", and that the National Treasury's Municipal Finance Recovery Service had been requested to assist in the development of the aforesaid plan, "which commenced with a status quo assessment aimed at obtaining a better understanding of the overall challenges and root causes of the financial and service delivery problems". It was, as part of this plan, concluded that it be submitted for adoption by Council and immediate implementation by Makana.

reply, deviate from its plight that "what we have here is a municipal council that cannot and will not do its job. It needs to go and systems ought to be put in place so that when a newly elected government comes into office it can serve the interests of the people and honour the executive obligations imposed on local government".[56]

[29] Ten days after the reply had been filed, the provincial respondents delivered a supplementary answering affidavit stating that an executive council meeting had eventually taken place, and that the purpose of the supplementary affidavit was to introduce the foreshadowed resolution and to explain the meaning and import thereof. I have already dealt with the contents of the resolution. What I am particularly concerned about, is that the resolution is the last document in evidence before me. There has been no application to supplement further (which I would gladly have granted) to illustrate to this court, and more importantly to the applicants, what the fate of the resolution has been, and particularly whether the "*fait accompli*" intervention on which the respondents now seek to rely to illustrate that the applicant persists in barking up the wrong tree, (which resolution was taken more than three months after the application was brought), is intended to meet the applicant's constitutionally based concerns.

[30] By virtue of the provisions of section 139(5) the proposed recovery plan (which is intended to bind the municipality in the exercise of its legislative and executive authority, albeit only to the extent necessary to solve a financial crisis) must be prepared in accordance with national legislation. Thereafter the municipality must be called upon to approve the proposed legislative measures, including a budget or any revenue-raising measures necessary to give effect to the recovery plan. In the event of such approval having been granted, and only if the municipality thereafter fails to implement the plan, the provincial executive must assume responsibility for the implementation of the recovery plan. The provincial executive is also obliged to intervene by dissolving the municipal council, if the municipality cannot or does not approve the aforesaid legislative measures, whereafter it must appoint an administrator until a newly elected council has been declared so elected. In the interim the provincial executive must approve a temporary budget or other measures to give effect to the recovery plan in order to facilitate the continued

[56] Transcript of argument 22:17-22

functioning of the municipality. Once any of the aforesaid means of intervention have been decided on, the provincial executive must submit a written notice of such intervention to the cabinet member responsible for local government affairs, the relevant provincial legislature and the national council of provinces, within seven days from the onset of the intervention, because the national executive must usurp the aforesaid functions if the provincial executive does not adequately exercise the powers and perform the functions when it usurps the functions of a municipality which has failed to implement the recovery plan.

[31] Now, the simple point which the applicant has sought to make with its "same old, same old" contention, is exactly that. The only portion of section 139 of the Constitution which specifically deals with a financial recovery plan is section 139(5), the implementation of which was described as a critical way forward for Makana when the 100 page draft plan was put up in February 2015, albeit sometimes under the auspices of section 139(1)(b) of the Constitution, sometimes under section 139 of the MFMA and at other times in terms of section 139(5) of the Constitution. Indeed, by way of background the introduction to the draft plan reads as follows:

> 'An Administrator was appointed and assumed duty on 6 October 2014 and an Acting Chief Financial Officer was deployed to Makana Local Municipality in April 2014. Given the above and the urgency to ensure service delivery to communities and financial viability and sustainability, the development of a Financial Recovery Plan (Plan) in line with sections 139 and 141(2) of the MFMA, has now been seen as a critical way forward for the turnaround sustainability of Makana.'

[32] Section 139 of the MFMA deals with mandatory provincial interventions arising from financial crises. The wording of the introduction to ss (1) thereof is verbatim the same as that of section 139(5) of the Constitution, dealing with mandatory interventions.[57] Any suggestion that the February 2015 recovery plan was not intended to be a mandatory plan is safely put to bed by the reference therein also to section 141(2) of the MFMA, which reads as follows:

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[57] Incidentally, in terms of section 139(1)(a)(v)(bb) of the MFMA the latest purported recovery plan and recommendations ought already to have been submitted to the MEC for finance in the province by the time the application was argued.

> 'Only the Municipal Financial Recovery Service may prepare a financial recovery plan for a mandatory provincial intervention referred to in section 139.'

[33] In this regard, the final introductory paragraph of the 2015 recovery plan reads as follows:

> 'The National Treasury's Municipal Finance Recovery Service was therefore requested to assist in the development of this Plan, which commenced with a status quo assessment aimed at obtaining a better understanding of the overall challenges and root causes of the financial and service delivery problems.'

[34] This begs the question which the applicant has asked and answered: What happened to the 2015 mandatory intervention, which type of intervention the respondents now allege is the most powerful, all-encompassing and appropriate intervention of all possible interventions, way superseding any intervention which the applicant seeks in terms of section 139(1)(c)? The applicant's answer is: "same old, same old" ... followed by "who knows what they thought they were doing" in 2015, and whether that was any different to what is proposed by way of this resolution.

[35] Differently put, the further dilemma which this court faces in the absence of concrete evidence regarding the upshot of the somewhat unexpected resolution allegedly taken by the provincial respondents, is whether this court can attach any weight whatsoever to the tendered resolution when the long term finalisation of the urgent 2015 plan (which in terms of the plan itself was timed to have been completed by 30 June 2017), is not traversed at all by the respondents, and is, in any event, contended by the respondents not to have been a mandatory intervention despite the overwhelming probabilities that that is exactly what it was intended to be. To take it a step further, are the respondents (who themselves seemed somewhat confused regarding the appropriate pairing of subordinate legislation with the Constitution) entitled to contend that the applicants are non-suited simply because they have averred that the jurisdictional facts set forth in sections 139 and 140 of the MFMA for a mandatory intervention are present, when they seek relief in terms of section 139(1)(c) of the Constitution which deals with discretionary intervention? I think not.

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

[37] I say this because it has been contended in argument on behalf of the provincial respondents that there is nothing to suggest that if a financial disaster like this one triggers "this kind of intervention"(that is, in terms of section 139(5)), that it is restricted to financial matters, and that it cannot deal with matters such as the administration or governance or "whatever else, because if those matters are the root causes of the financial calamity then clearly they can be addressed." To illustrate, counsel during argument proceeded to use as an example the issue raised by the applicant, that the municipal structure is bloated to the extent that there are thrice as many employees employed by "the council or the municipality" as there really should be. It is contended that if this is identified for purposes of financial recovery in terms of ss (5) intervention, then the financial recovery plan can address this. The problem is that this is in fact one of the many issues which were identified in what appears to me to have been a perfectly adequate, comprehensive and detailed recovery plan put up in 2015. Indeed, this was pertinently addressed by the applicant in its letter of 15 November 2017 addressed to the local and provincial respondents. This lengthy attempt at communication in fact refers to the 2015 plan at least twice in the following contexts:

> 'Today (15 November 2017) the Daily Dispatch reported that Eastern Cape MEC for COGTA Hon. Fikila Xasa has written to Makhana Municipality giving them 14 days to provide reasons why they should not be placed under administration.
> History would suggest that this might again be another costly exercise with no significant improvements.

The Unemployed People's Movement nevertheless remains committed to working forwards towards lasting solutions to the serious problems facing Makana Municipality. We therefore call upon the above parties to ensure the following:

(1) ...

(2) ...

(3) Implementation of the Financial Recovery Plan previously adopted and as yet, we believe, not adequately respected.

(4) ...

(5) ...

(6) ...

(7) ...

(8) That the Municipality provide the public with a detailed update on its indebtedness to major creditors, and how this will be managed, with due regard for the Financial Recovery Plan;

(9) That each arm of government to whom this letter is addressed, respond in writing to the UPM's requests as detailed above, on or before 30 November 2017.'

[38] As is evident from the timeline which I have sketched hereinbefore, this letter, like so many others, was simply ignored. It was only, almost a year later, when the LRC, in desperation, demanded the appointment of an administrator in terms of section 139(5) of the Constitution, that the CoGTA Minister responded saying that the demand for intervention had been referred to the Premier as the invocation of constitutional intervention lay within provincial competence. As I have said, thereafter again complete silence, ultimately and understandably, culminating in the residents marching on the city hall on 6 November 2018 to hand over a memorandum calling on the provincial respondents to dissolve the Council and appoint an administrator until the election of a new Council, albeit in terms of section 139(1)(c) of the Constitution.

[39] To my mind, and despite the respondents' valiant attempts to distance themselves from the 2015 plan, that plan walked like a duck and it quacked like a duck. I have little doubt that it was designed and intended to be a mandatory intervention as I have already pointed out. That is why the three final paragraphs thereof significantly read as follows:

'25 Non Implementation of the Plan

Should Makana municipality delay or fail to implement this Plan, the Provincial Government must consider alternative measures, including the extension of the term of office of the current administrator *or the appointment of a new administrator or the dissolution of Council* (emphasis added to stress the provisions of section 139(5)(b)).

26 Updating the Plan

This plan may be updated as and when more accurate information is obtained, where identified strategies need to be updated, and when risks and implementation barriers have not been anticipated.

The responsibility for updating the Plan rests with the municipality (my emphasis). The Administrator (until exit) and Municipal Manager most forward any future updated or revised Plan to the Eastern Cape Provincial Treasury and Department of Co-operative Governance and Affairs with the National Treasury's Municipal Financial Recovery Service copied. Provincial Treasury, working jointly with the Department of Co-operative Governance and Affairs Eastern Cape, may also provide additional comments on the Plan over the course of its implementation as part of its monitoring role, with the National Treasury's Municipal Financial Recovery Service copied, and until such time as Makana is turned around and is on the path to *service delivery and financial recovery* (emphasis added).

27 Conclusion

This financial recovery plan must be submitted by the Administrator, Municipal Manager for adoption by Council and immediate implementation by Makana Municipality. Finally, Makana must move away from short-term and reactionary planning to a long term stable and sustainable planning framework, hence the municipality must prioritise the development of a long term financial plan and credible IDP.'.

[40] On 28 March 2018 the acting municipal manager presented an assessment of the Makana situation to a special council meeting. Virtually every complaint referred to in the applicant's affidavit is traversed in this report. Therein it is stated that the integrated development plan ("IDP") for 2018/19 was being reviewed and that a draft IDP would be presented to Council on 28 March 2018. It further states that whilst the development priorities for 2018/2019 would remain unchanged, the municipality had to focus on certain strategic agenda items presented by the acting municipal manager. It concludes as follows:

> 'There are many other issues that are receiving the attention of the Acting MM. These are too numerous to enumerate.
> The Acting Municipal Manager has been actively engaging with the communities and the various stakeholders. Most of the areas of Makana have been visited. The challenges of Makana are complex. It is very evident as a result of poor decisions taken by the previous Council and a lack of decisive management on some of the issues that face the municipality has resulted in the challenges and problems being faced.
> Service delivery has to be the number one priority. Communities' needs cannot be ignored. Service delivery has to occur on a daily basis for a sustained impact. It is be *(sic)* very difficult for the municipality to be sustainable and successful if the business sector stop investing in the municipal area or worse still, they have to leave.
> It is therefore crucial that the problems are tackled with real sense of urgency and decisive decision taking. Until that is done, there is going to be very little change in turning the situation around.
>
> **RECOMMENDATION:**
>
> a) THAT THE Council NOTE the report on the assessment/situation at Makana Local Municipality.'

[41] This report, at the very least, acknowledges the imperative that the responsibility for updating the plan rests with the municipality. On the other hand the 13 page letter dated 7 May 2018 from the LRC acting at the time for the applicant suggests the following:

a. That Council had not approved the [revised] Municipality Performance Management Policy Framework.

b. That Makana's 2016/2017 annual report stated that Makana was in the process of implementing the financial recovery plan and its revenue enhancement strategy to improve and enhance financial health and stability. Despite this Makana's financial standing had shown no improvement.

c. That Makana was in breach of its constitutional obligations in terms of sections 152 and 153 of the Constitution, and of its statutory obligations in terms of sections 38 and 66 of the MSA and sections 62 and 65 of the MFMA.

d. That the financial recovery plan (FRP) and revenue enhancement strategy had not been complied with, commenting that "both are legally significant documents that should have guided Makana decision-making and should have been treated as 'live' documents requiring review and updating as progress was made. One year after the election of the present Council (July 2017) councillors were canvassed about the FRP and few Councillors were even aware of the existence of the FRP.

[42] At that stage the applicant's representative demanded a written report within 14 days, detailing the current state of Makana's administration and financial management and requested that any recovery plan which was being followed should be attached to the report. Amongst several other requests it also required an *'indication of whether the provincial government is already considering an intervention in terms of s139(5) of the Constitution* (my emphasis), failing which the applicants intended approaching this court for an order directing the MEC to carry out an intervention in terms of section 139(5). It is not clear whether the intervention was envisaged in terms of section 139(5)(a) or (b). Regard being had to the relief now being sought in terms of section 139(1)(c) purportedly because section 139(5)(a) only binds Makana in the exercise of its legislative and executive authority to the extent necessary to solve the crisis in its financial affairs, I am inclined to believe that the relief which the LRC was referring to was dissolution of Makana's Council and the appointment of an administrator in terms of s139(5)(b) on account of

Council's failure to approve measures necessary to give effect to the 2015 recovery plan, as already illustrated.

[43] As I have said a number of time before (if for no other reason than to add emphasis), CoGTA's minister referred the aforesaid demand to the Premier (being the first provincial respondent in the matter before me) whereafter there was no response forthcoming until after the applicant had filed its founding affidavit in the matter before me and after it had made a second demand on 6 November 2018.

[44] This is significant. I say so because I have been informed by counsel for the provincial respondents, that if the MEC for local government becomes aware that there is a serious financial problem in a municipality, the MEC must promptly consult the mayor, assess the seriousness of the response, and determine whether the situation justifies an intervention in terms of a non-specified s 139 intervention in terms of the Constitution. If a section 139(5) intervention is justified, the provincial executive must intervene with respect to the financial crisis and the service delivery problems.

[45] Having now gone full circle, it is clear to me that this is exactly what happened in 2015. The only problem is that the recovery plan which was imposed (even if it was from time to time referred to as a s 239(1)(b) intervention) was clearly not given effect to by the Municipal Council, which then prompted the applicants to approach this court, albeit in terms of relief in terms of section 139(1)(c) of the Constitution.

[46] As I understand it, the provincial respondents purport to say that it was only in May this year, after the application was launched, that they saw the need for a mandatory s139(5) intervention. In my view, and insofar as their trickling responses have been confusing, this is nothing more than a red herring. On a proper and complete reading of the 2015 financial plan it is as clear as daylight that the 2015 intervention was intended to be a peremptory response to a section 139(5) crisis in Makana's financial affairs which caused it to be in serious and persistent breach of its obligations to provide basic services or to meet its financial commitments. This plan was ignored, not only then, but also conveniently in the proceedings before me.

[47] The provincial respondents' counsel has contended that now that there has been this critical revelation "the matter would have to go to the municipal financial recovery service for them to do all of what they are required to be done".[58] The papers are of course silent on this aspect. If the resolution had been passed, I would have expected, as stated before, an application to supplement the papers not only to illustrate that the applicants are missing the point, but also that the provincial respondents are getting things done, in a manner which is expected of responsible parties facing crises which, for the first time, they have identified as crises requiring mandatory intervention, and then only after this application was launched. This court has been told, in no uncertain terms, that there is nothing that it can do now to assist these desperate applicants except to sit back and perhaps require (as was done previously to no avail) the municipality and provincial government to make reports to this court as to the progress.

[48] It is contended on behalf of the provincial respondents that on the applicant's own showing the previous interventions were section 139(1)(b) interventions and that there has been no failed s139(5) intervention. It is contended that the only reference to section 139(5) was in the letter written by the LRC representing the applicant at that time, and that the demand then for the appointment of an administrator "was the correct thing to have done", because although the steps taken by Province have been set out in minute detail, the provincial respondents have now come to the conclusion (post the launching of the application) that what had been done was far from satisfactory or adequate. Significantly, it is contended that what the present application has arguably done was to "put before the powers that be a comprehensive description and assessment of the situation", and that the applicant is non-suited from continuing to pursue permissible relief, without seeking to review the prescriptive steps which the respondents are purported to have taken in response to the application by way of, as presently advised, nothing more than a resolution with some clout.

[49] Counsel for the provincial respondents, in justifying s139(5) intervention as "the most far reaching possible intervention provided for in the Constitution", has conceded that, if need be, the municipal council can be dissolved in terms of the very

[58] This was provided for in the 2015 plan.

same section in order to execute a recovery plan. According to the authors Steytler and De Visser, a s139(5) intervention is called for when the financial problems have reached crisis proportions calling for more intrusive mandatory remedial steps, in which case the intervention may entail both executive and legislative measures, the latter requiring the dissolution of the council. The authors go on to say the following:

> 'A financial crisis can, of course, be dealt with by the application of section 139(1); to have a functioning transparent financial management system is an executive obligation imposed by the MFMA. What section 139(5) seeks to do is to isolate specific incidences of an executive failure (the most serious cases which undermine the functionality of the municipality) and make the intervention obligatory. The harm that section 139(5) thus seeks to address is the meltdown of the financial core of a municipality. ... This section 139(5) intervention is powerful as it can reshape how the municipality is governed and delivers services. Armed with a financial recovery plan which deals with all matters to make the municipality functional, a provincial executive council has all the tools available for a section 139(5) intervention.'[59]

[50] According to the learned authors, a s 139(5) intervention rests on two legs. Firstly, one of two outwardly manifested jurisdictional facts has to be present in that the municipality has to be in serious or persistent material breach of its obligations to provide basic services; alternatively, the municipality has to be in serious or persistent material breach of its financial commitments. The second jurisdictional fact requires that either or both of these two factual situations must have been caused by a crisis in the municipality's financial affairs. They continue as follows:

> 'The intervention is thus aimed to correct the "financial crisis" as that would lead to the resolution of the two problems. A two-step process of proof is thus required: first, the Province must prove that either of the two preliminary triggers is present, and then, secondly, show that they are symptoms of a financial crisis. ... [T]he Constitutional Court has turned a number of municipal functions into obligations as they respond to enforceable socio-economic rights. Thus, there is a duty on municipalities to provide water, sanitation, electricity, roads, storm water drainage and transport. The breach of these obligations is qualified in three ways: First, the breach must be "material", that is to say, it must go to the core of the obligation and

[59] Steytler & De Visser: *Local Government Law of South Africa*, Issue 11, November 2018: 15 – 46,47

> not the incidental. Secondly, even if it is material, it must also be "serious". In contradistinction to the qualifier "persistent", a single breach may be sufficient provided that it has reached a quantifiable level of magnitude. A minor or peripheral breach will not suffice. Thirdly, even where the breach is not serious, but happens "persistently" or continuously, the criterion has been met. ...[A] direct reference to *an obligation* to provide basic services is introduced in the 2003 amendment to section 139 of the Constitution, but then only obliquely. One of the grounds for a provincial intervention in a municipality including the dissolution of its council, is 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*". A provincial executive must then impose a recovery plan "aimed at securing the municipality's ability to meet its obligations to provide basic services." The underlying assumption of section 139(5) is that there is an obligation to provide basic services and the failure to do so because of a financial crisis provides a basis for an intervention' (emphasis in the original text).[60]

[51] Finally, the learned authors make it perfectly clear that section 139(5) is tailor-made for particularly serious situations. As pointed out by counsel for the provincial respondents, situations "such as the one which Applicant itself has described in its papers filed of record." As succinctly put by Mr Heunis, a s139(5) intervention "covers the field". Whilst it is alleged that such an intervention is underway, by implication it has been conceded by the respondents that should I find that it is not, I have the power to order the provincial executive to have recourse to section 139(5).[61]

[52] Counsel for the respondents (and particularly for the provincial respondents) have gone to extraordinary lengths to illustrate to this court that the s 139(5) route is sensible, logical, practical and obvious in the circumstances. I am indebted to counsel in this regard. I am inclined to agree. Because of what I am about to say however, I am not about to be steered away from what transpired before and during 2015. Because of this I am also not inclined to criticise Mr Smuts for alluding, during argument, to previous failed attempts at invoking section 139(5)(a).

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[60] *Op cit* 15-50 and 17-8

[61] Presumably because it is couched in mandatory terms vis-à-vis the provincial respondents.

[53] Relying on the respondents' helpful contentions and heads of argument on when a section 139(5) intervention is justified, I reiterate the following:

a. On 25 August 2014 the applicant wrote an open letter to CoGTA's MEC, and the mayor and council of Makana, the headnote of which expresses the need for provincial government intervention in terms of s 139.
b. On 26 January 2015 the Makana Civil Society Coalition wrote a further open letter to Makana's administrator referring to "crisis" intervention and that towards the end of 2014 Makana was "bankrupt, owing R150 million" and in particular R57 million to Eskom, constituting a debt which was "more than 60% higher than the highest other defaulting municipality in the Eastern Cape, and double the total owed to Eskom by all municipalities in the Western Cape put together. The letter notes that the bankruptcy, water crisis and dysfunctional service delivery had been widely reported in the national media, causing huge reputational damage to the city. It suggests that an open meeting be held, inviting the cited respondents to account in respect of progress made to meet objectives set forth in the turnaround Strategy Plan of October 2013. This was followed by another letter three weeks later to the member of parliament and chair of CoGTA's steering committee. It refers to the "crisis situation with regards to the continued governance and service delivery failings which led to the collapse of the municipality". It refers to a "distressed" municipality going back ten years, and to the addressees oversight visit planned for 25 February 2015. The relevant portions read as follows:

'The MCSC and local community want a successful result-based intervention. The MCSC is suggesting that the MEC and the NCOP's Select Committee on COGTA broaden the Administrator's terms of reference to achieve the desired results. The Administrator must be empowered and capacitated to:

(a) Act against Councillors and officials who are not supporting the intervention;

(b) Act against recalcitrant Councillors and officials who failed to execute their constitutional and legislative duties;

(c) Act against Councillors and officials implicated in financial misconduct;

(d) To submit strict remedial measures to Council for immediate implementation; and

(e) To assist Council and administration to implement systems, mechanisms and procedures to improve good governance (i.e. to ensure that the municipality is compliant).

(f) Fill key positions without fear of political interference in order that the very best available personnel are appointed.

The above suggested actions cannot be realised under the current section 139(1)(b) intervention which is limited. The MEC should consider invoking section 139(1)(c). This is only possible if the MEC with support from the select committee decides to review and extend the Administrator's mandate.

The situation in Makana is dire. This isn't a hollow contention. The local community is entitled to be served by Councillors and officials who for a very long time have deprived the local community from enjoying enshrined constitutional rights...

The MCSC ... want a comprehensive intervention plan ... The MCSC and the community of Makana want an intervention plan with unambiguous intentions.'

c. This was followed by a third letter dated 3 March 2015 making specific reference to the financial recovery plan in terms of the MFMA. It refers in particular to fruitless and wasteful expenditure, the criminal elements of "habitual" financial misconduct and the irregular appointment of consultants, irregular donation expenditure and irregular payment of legal fees. It refers to the invocation of s139(5) of the Constitution and verbatim quotes the entire ss (5), and stresses that s139(1)(b) will not succeed, and that it seems unlikely that anything less than a s139(c) administration can work.

d. On 1 September 2015 CoGTA's select committee reported on a notice of intervention in terms of s139(1)(b) dated 17 March 2015, stating that the National Council of Provinces (the fifth cited respondent herein who has not opposed the relief sought) approves intervention in terms of s139(1)(b), recommending that the CoGTA MEC should table quarterly progress to the NCOP and the provincial legislature on the status of the intervention in Makana, including a *termination of intervention report* (emphasis added).

e. As I have said, the applicant attached a lengthy and detailed draft financial recovery plan (dated February 2015) to its papers. With respect to the plan, the applicant's deponent stated the following:

> 'On the 15th of November 2017 the applicant addressed a letter to the erstwhile executive mayor, the acting municipal manager, and the MEC, and a copy of the letter is attached hereto marked annexure "AK7". This letter lists the problems then experienced at the municipality and especially the issue of repeated water outages across large parts of the municipality, where funds allocated to address this problem had already been spent.
> The applicant also requested a detailed update of the municipality's indebtedness to major creditors and whether the municipality was complying with the financial recovery plan that had been approved after the first administration intervention. I attach hereto a draft plan, which was adopted, marked annexure "AK7A"'.[62]

f. Although the executive summary introducing the plan states that the Provincial Executive has instituted intervention in terms of section 139(1)(b) of the Constitution in response to "the crises Makana is facing including difficulties in providing basic services and long term financial sustainability", reference to that subsection is only made once again thereafter, and in somewhat ironical juxtaposition to the respondents' present case.[63]

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[62] The averments that the financial recovery plan was both approved and adopted, have not been disputed.
[63] I refer to the extracts from the Plan mentioned earlier on in this judgment.

[54] The aforementioned lengthy and repeated extracts from the plan itself, to my mind, make it abundantly clear that as far back as 2015 a plan was devised by the respondents which has all the makings of intervention in terms of s139(5) and not section 139(1)(c) of the Constitution. I am accordingly not inclined to agree with the submission bycounsel for the provincial respondents, ie that the applicants "tried to sneak in" s 139(5) in their replying papers only. Nor can the applicant be faulted for referring to previous interventions and the purported current undertakings to intervene as the "same old, same old" story. On the contrary, it appears from the papers that this is exactly what is happening. The applicant's counsel in reply, for example, referred specifically to page 144 of the papers dealing with the 2015 recovery plan which, having been attached at the very first opportunity to the applicant's founding papers, in no uncertain terms describes the plan as a financial recovery plan, and as mandatory intervention to deal with the provision of basic services and the meeting of financial commitments. It refers to the appointment of an administrator, and to sections 139 and 140 of the MFMA, and most significantly, it refers to the fact that the National Treasury's Municipal Recovery Service had been requested to assist in the development of the plan, which commenced with a status quo assessment aimed at obtaining a better understanding of the overall challenges and root causes of the financial and service delivery problems.[64]

[55] To my mind, and having carefully perused the provisions and purposes of the 2015 plan, I was somewhat taken by surprise by the approach adopted by the respondents in their answering papers. As I have said, it is clear from the answering papers and from the respondents' contentions, that the parties agree that Makana has and is experiencing a crisis in its financial affairs, and that it was and is not meeting its obligations to provide basic services or meeting its financial obligations (which constitutes a serious and persistent breach of its constitutional obligations). In the premises it goes without saying that it is not in dispute that s 172(1)(a) of the Constitution is relevant, and that this court can, and indeed is obliged to declare Makana's conduct constitutionally invalid. Such a finding would effectively

[64] These are all terms which are associated with and married to mandatory provincial intervention in terms of section 139(5).

correspond with the relief the applicant seeks in the first two prayers of its notice of motion.

[56] The applicant's third prayer seeks a further declarator that the jurisdictional facts for mandatory intervention in terms of section 139(1)(c) and sections 139 and 140 of the MFMA are present.

[57] I am alive to the respondents' contention that s 139(1)(c) purports to provide for discretionary intervention and that it should not be read in conjunction with sections 139 and 140 of the MFMA which essentially provide for mandatory interventions.

[58] I am also alive to the respondents' contention that I should not and cannot direct the Provincial Executive Council (the second respondent) to intervene in terms of section 139(1)(c) read with sections 139 and 140 of the MFMA. It is the justification provided for contending that such intervention is incompetent that requires elucidation. The applicant has effectively conceded that sections 139 and 140 of the MFMA should not be married to section 139(1)(c) of the Constitution, and has opted for an order which either excludes any mention of sections 139 and 140 of the MFMA, or that I should find that although the wording of intervention in terms of s139(1)(c) is discretionary, it may be interpreted to include a mandatory intervention in the sense that this court has the power to direct the respondents to resort to it. The respondents on the other hand have contended that the applicants cannot simply abandon the misquoted/misunderstood sections, that section 139(1)(c) was never intended to be mandatory, and that this court cannot order the respondents to take steps which in terms of the Constitution are discretionary, particularly when the provincial respondents decided, subsequent to the delivery of this application, to resolve that mandatory steps would be taken in terms of section 139(5). They furthermore contend that relief from this court in terms of section 139(1)(c) cannot co-exist with purported mandatory steps taken by the executive to impose a recovery plan.[65]

[65] After the court had adjourned to consider its judgment, it received a letter from the municipal respondents' attorneys, accusing the applicant's counsel of advancing an entirely new argument in reply, which had not been raised in the founding and replying papers. Nor had it been raised in the heads of argument or during the principal submissions. The respondents accordingly requested to submit further oral or written argument.

[59] As I have said, the applicant's papers refer predominantly to planned action by the respondents, labelled in the main in terms of s139(1)(c) of the Constitution, but very categorically described by using the precise wording reflected in section 139(5) thereof. So much then for the pot calling the kettle black. This is also not, to my mind, a case where the applicant raised the co-existence of discretionary intervention in terms of a court order, and mandatory intervention in terms of executive steps.

[60] Indeed, the applicant has been persistent in its prayer for intervention in terms of section 139(1)(c), rightly or wrongly. In response to this the respondents have not pleaded, as one may have expected after reading the applicant's detailed annexures, that an extensive and detailed mandatory financial recovery plan (designed to address all of the applicant's grievances) had been in place since 2015, and that the respondents would indeed be farming backwards by resorting to the somewhat less aggressive and less extensive discretionary intervention referred to in section 139(1)(c), and that in any event, no court had reviewed and set aside the 2015 plan and the steps taken in respect thereof, if any. What I would also have expected, was for the respondents to respond to the applicant's averments and explain why this 2015 plan appears not to have been adhered to to the extent expected or required to effect a turnaround; alternatively, to explain why there has been another resolution for mandatory intervention and what steps have been taken in respect of such resolution if any. I say this because the purported action which appears to have been taken by the provincial respondents is clearly a knee-jerk reaction to this application. The history which I have sketched hereinbefore, and which is largely common cause, reflects that the applicant and in particular the people of Makhanda whom the Constitution purports to protect, have done their level best and appear to have exhausted every remedy available to them, in order to obtain some sort of a reaction from the respondents, either to be met with no reaction whatsoever, or by the "same old, same old" story.

Despite my reservations in this regard, I allowed all the parties a months' extension to furnish me with written argument on whether an order in terms of s 139(1)(c) could co-exist with a decision (albeit on the papers in the form of a resolution only) to invoke the provisions of s 139(5).

[61] It has been contended by the respondents that the applicants are non-suited in the relief they seek, because they did not seek to set aside the "mandatory intervention" which is now, at the 11th hour claimed to be in place by way of a resolution which is alleged to have been taken on 29 May 2019 (more than three months after the launching of the application),[66] and which the provincial respondents confidently claim to be "dispositive" of the applicant's application.[67] It has also, conveniently, been contended by the respondents that the applicant must make out a case for the relief which it seeks in its founding papers and is in essence, bound by that relief.[68]

[62] I have some difficulty in understanding exactly what it is that the respondents expect from the applicants. It cannot, in my view be expected of the applicants to seek review of a regime which, by all accounts, has progressed no further than having been mentioned in the context of a triad of resolutions. If it was or is intended to be the respondents' suggestion that the applicants ought to have sought relief reviewing and setting aside the 2015 plan, they certainly have not said so. On the contrary, according to them, mandatory relief has never been in place, and is the subject of a resolution which was taken on 29 May 2019, inviting responses thereto by 14 June 2019.[69] Indeed the very wording of the resolution which appears to have been prompted by the launching of the application appears to mirror that of the 2015 plan and smacks of "same old, same old".[70] It speaks in the future tense of the taking

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[66] And not, I might add, without delay. It appears from the answering papers that although the third respondent elected to oppose the application on 10 April 2019 and to recommend urgent mandatory action in terms of section 139(5), and to place such an urgent memorandum before a previously scheduled executive council meeting on 26 April 2019, the members of the executive council all happened to be "out of town" on that day which resulted in cancellation of the scheduled meeting. One would have thought that, having decided to oppose the application on the confident grounds relied on by the respondents, the meeting would have been rescheduled there and then. But no. According to the provincial respondents' answering affidavit no further meeting had been rescheduled at the time of the signing thereof, in true "same old, same old" form.

[67] Indeed, the respondents are so confident that they have nipped the application in the bud, that they have decided that to respond to the factual averments reflected in the applicant's papers, would be "superfluous" and an exercise in futility (see para 27 of the answering affidavit on behalf of the first to fourth respondents, and para 9 of the municipal respondents' affidavit).

[68] This point was stressed in argument when the applicant's counsel effectively sought to abandon reference to sections 139 and 140 of the MFMA in the relief sought.

[69] The tenor or the responses to the resolution, if any, have not been placed before this court, and are, to date, unknown.

[70] What is significant, albeit somewhat disturbing, is that the respondents have made no reference whatsoever to their 100 page financial recovery plan, which (it is not disputed) had been approved and adopted after the first administration intervention. this plan ever existed, particularly in the form and containing the substance reflected ex facie the document itself.

of "necessary" steps for the "imposition" of a recovery plan "aimed" at securing Makana's ability to "meet its obligations to provide basic services and its financial commitments"*(sic).* This of needs be begs the question: What happened to the 2015 mandatory recovery plan which also made specific provision for mutation, upgrading and evolvement as and when contingencies arose? Is this just another empty "same old, same old" promise, to pacify the people?

[63] The other issue which deserves mention is the somewhat unwarranted attack on the applicant's counsel for submissions made after senior counsel for some of the respondents had made their submissions and had been granted leave to be excused prior to argument in reply.[71]

[64] With the benefit of a transcript of the proceedings, I make the following comments: It has been contended throughout on behalf of the applicant that the solution offered by section 139(1)(c) of the Constitution is "apposite, is just and equitable and appropriate." In this respect the applicant's counsel wrapped his closing argument in convention up as follows:

> 'MR SMUTS: We say that your Ladyship will have regard to the solution proffered by the applicants, by the respondents, and see if that addresses the issue, and if it doesn't, where there has been a violation of the rights, where there has been unlawful activity, which there plainly is, then section 172 of the Constitution requires that your Ladyship must declare such activity to be unlawful, and of course once your Ladyship declares it to be unlawful then your Ladyship is empowered by the Constitution beyond any subordinate legislation, to issue an order which is just and equitable. ... The facts are not in dispute. What is also important M'Lady is that this municipality has been placed under administration twice, there have been turnaround strategies before. What we have as the prevailing circumstances today follows on those interventions, those interventions which sought to allow the continued existence of the municipal council and tag on some form of administration and a turnaround strategy, and they failed, they failed dismally. And it can't be disputed that they failed. ... the municipal council is faced with these allegations of the utter

[71] I digress to mention that junior counsel for the respondents remained and indeed assisted the court as and when their input was required. What I am referring to is the submission in reply made by the applicant's counsel that relief in terms of section 193(1)(c) can co-exist with a government organ decision to apply section 193(5).

collapse of the infrastructure. They have an opportunity to say to Your Ladyship there are problems but we're addressing them by methods A, B, C or D, or they're occasioned by a financial crisis which, with the best will in the world, prevents us from addressing these issues. They tell your Ladyship nothing. They say they're surprised that the province thought that they weren't particularly good, but in the light of the province's approach, well here we go, don't interfere with the province because there's a separation of powers issue. There is no explanation M'Lady, none from the municipal authorities as to the collapse. ... The UPM is extremely concerned that despite three interventions and numerous reports detailing the steps *that must be taken* (emphasis added) to revive the municipality and effect service delivery, the municipality is still in a state of administrative, financial and managerial collapse. .... It's a management ability, competence, failure to exercise executive authority crisis.

... Yes, yes, but with respect we can hang labels on which section and which Act of the Constitution it purports to apply. In practice the appointment of an administrator with a recovery plan while the municipality carries the executive authority has not worked, and street corner psychology says to your Ladyship that one of the symptoms of insanity is doing the same thing over and over and expecting a different result ... the label isn't good enough, section 139(5), 139(1)(b), 142 of the MFMA, the executive authority vested in the municipal council fails to address and deal with these sorts of challenges posed to it ...

What we have here is a municipal council that cannot and will not do its job, it needs to go and systems ought to be put in place so that when a newly elected government comes into office it can serve the interests of the people and honour the executive obligations which are imposed on local government ... I respectfully submit that every aspect of running the municipality is wanting and that the municipality has now reached a state of disaster. The Council in particular is responsible for the present state of affairs. ... And so when Your Ladyship is told that the magic answer lies in the section 139(5) intervention, your Ladyship needs to assess that against the failure of previous turnaround strategies while the municipal council stays in operation... these cannot be people who can be entrusted a moment longer with the executive authority.... We have no evidence that any step whatsoever has been taken since this resolution ... on the 29th of May 2019 .. . this was the prompt intervention required by the MFMA.

> With respect we are unable to rely in this city upon any commitment by the provincial authorities unless Your Ladyship should direct them to do what is obviously necessary ... one can't rely on them absent an order by Your Ladyship. ... Even if we were suddenly to have a functioning finance office down the street here it would not address the violation of the constitutional rights which have been illustrated.'

[65] Many of the submissions made in answer to the above revolved around provincial government stepping into the shoes of the municipality for purposes of the newly advocated recovery plan and that the imposition of the plan is a provincial executive responsibility, because the municipal councils in municipalities are both legislative and executive authorities. In addressing the alleged resolution which had been taken subsequent to the commencement of these legal proceedings (as opposed to the 2015 financial plan), counsel on behalf of the provincial respondents stated as follows:

> 'MR HEUNIS: Now with respect there is nothing to suggest firstly, that if a financial disaster like this one triggers this kind of intervention that you cannot, that the financial recovery plan ... is restricted to financial matters, and that it cannot deal with matters such as administration or governance or whatever else, because if those matters are the root causes of the financial calamity then clearly they can be addressed. Let us take for example from our learned friend's founding affidavit. This municipal structure is bloated to the extent that there are thrice as many employees employed by the council or by the municipality as there really should be. Now if that is identified for purposes of financial recovery in terms of subsection (5) intervention, well then the financial recovery plan can address that. ... there is also nothing to suggest that if the financial crisis is a result or partially the result of a failure to fulfil financial obligations you can't have recourse to subsection (5) because the section that really deals with executive obligations is subsection (1). ...
>
> Firstly, if the MEC for Local Government in the Province becomes aware that there is a serious financial problem in a municipality the MEC must promptly consult the mayor, assess the seriousness of the response, determine whether the situation justifies or requires an intervention in terms of a non-specified section 139 of the Constitution. ..if, as our learned friends say, and we don't take issue with them in that regard ... that a financial crisis there certainly is, and as a consequence of that and maybe other things too, there is a service delivery problem of major proportions ...

your Ladyship will immediately recognise the exact same wording as your Ladyship finds in subsection (5) of section 139 of the Constitution. ...

COURT: But Mr Heunis just take it slowly. So you say there was a resolution at the end of May?

MR HEUNIS: Correct M'Lady.

COURT: In terms of this section?

MR HEUNIS: Correct M'Lady.

COURT: What would be the next step then?

MR HEUNIS: The municipal finance, the matter would have to go to the municipal finance recovery service for them to do all of what they are required to be done, then it goes to the [interrupted] ...

COURT: And do we know whether that has happened?

MR HEUNIS: I don't know M'Lady. It is not on the papers. ... we are not indifferent to this and the fact that we are not indifferent to this is illustrated thereby that we have *now taken or we are going to take a decision to have recourse to subsection (5) of section 139 so that we can deal with this thing properly* (emphasis added) ... there is a statutory body, not the executive council ... a different specially created statutory body that deals with a recovery plan, (a) by determining what is required, and (b) by what has to be done, and that then, and then that has to go to the MEC for Finance, why, because the provincial government has to fit the bill for the intervention.

COURT: Then let me ask you this Mr Heunis, assuming I am with you in your submissions, does this court have the power to accelerate these steps in terms of section 139?

MR HEUNIS: With respect M'Lady I think not, with respect M'Lady I see where you are going and I am not, I don't resist where Your Ladyship is going, I don't think you can, and the reason why I submit that you cannot is because they are statutory prescribed periods, like the 90 day period.

COURT: So I can't truncate them?

MR HEUNIS: I don't think your Ladyship can truncate them because they are determined by a law of parliament and parliament in its wisdom has decided 90 days should fit all sizes as it were. But your Ladyship could arguably require as was done previously in respect of the municipality, the provincial government, to make reports to the court as to the progress.

COURT: Well it seems not to have worked.

MR HEUNIS: ... So such a financial recovery plan must and then there are a number of things that it has to do, identify the financial problems and I would highlight ... identify the human and financial resources needed to assist in resolving financial problems and where those resources are proposed to come from and also identify what actions are necessary for the implementation of the plan distinguishing between actions to be taken by the municipality and actions to be taken by other parties.

Discretionarily it may provide for the liquidation of assets, it may provide for special measures to prevent unauthorised, irregular and fruitless and wasteful expenditure and other losses, and identify actual and potential revenue sources. ... The applicant made a link between sections 139(1)(c) of the Constitution and 139 and 140 of the MFMA. It should have made the link, because that is the only link that there is to be made, between section 139(5) and 139 and 140 of the MFMA. ... 139 and 140 of the MFMA track 139(5) of the Constitution and are divorced from 139(1)(c). ...

It must have been discovered or must have come to the knowledge of the applicant when the answering affidavits were filed .. there should have been co-operation and not a continuance of the case ... The statutorily prescribed thing is being done ... *There is also no dispute between the parties about what has gone wrong* (emphasis added)... .. The first to fourth respondents identify with that. They say: "Although the support that is being rendered to the municipality by multiple stakeholders is expected to yield fruitful results a mandatory intervention involving the development of a *financial recovery plan* (my emphasis) is regarded as also necessary." ...

Now our learned friend ... argues that the relief anticipated by sections 139(1)(a) and (b) and section 139(5) has previously been implemented and has failed ... it is

not the same animal. This is a different beast altogether ... This is what I referred to as an attempt to sneak in as it were a reference, and I say that respectfully, to section 139(5) M'Lady. ... There was no failed 139(5) intervention previously. ... And then what we say is that we have come to the conclusion that it is not sufficient and that we have to have recourse to 139(5) ...

COURT: And when did you come to that conclusion?

MR HEUNIS: No, after the application was launched M'Lady and arguably the application assisted in the sense that it put before the powers that be a comprehensive description and assessment of the situation ...
The court cannot say to the executive government that I know you have had, you are having recourse to 139(5) but I am now ordering you to have recourse to 139(1)(c) in circumstances where the executive, the provincial executive is constitutionally charged with having recourse to 139(5) ... *if need be you can dissolve the municipal council in terms of the, for purposes of the execution of the recovery plan.*[72] ... It appears to be accepted by the opposing respondents that the Makana Municipality is in a state of crisis. I would say that is fair. ... the facts, as presented by the applicant and largely not contested by the respondents render a section 139(5) intervention compulsory and that is really the end of the matter. ... What section 139(5) seeks to do is to isolate specific incidences of an executive failure the most serious cases which undermine the functionality of the municipality and make the intervention obligatory. The harm section 139(5) thus seeks to address is the meltdown of a financial core of a municipality. Moreover the issues in hand were deemed so serious and critical to the sustainable existence of a municipality.

COURT: Let me ask you this. Are you saying the applicant's recourse ought to have been to section 139(5)? Is that what I understand you to say, that they should have brought an application for me to make a declarator and issue a *mandamus* in terms of 139(5)?

MR HEUNIS: If they wanted the court process to achieve that, yes with respect, Your Ladyship is exactly right. But I am going a bit further. I am saying that from the, when the applicant was alerted to this and the applicant was alerted to this when the answering affidavits were filed, it should have realised its mistake. In fact I am sure it

[72] Italics added

did, but it should not have soldiered on. To have soldiered on in the circumstances where the provincial government is intervening in terms of the right section is sufficiently, with respect, reckless to justify ... a costs order in our favour and including the cost of two counsel.'

[66] This stance was also supported during argument presented on behalf of the Minister of CoGTA (the sixth respondent), stressing that once the applicant was aware that there had been a "139(5) decision" it ought to have brought an application to review that alleged decision instead of soldiering on. According to counsel there is a discretionary financial recovery plan which is in existence and must continue until a mandatory plan is adopted. With respect to the relief sought by the applicant, the following similar submissions were made:

'MS PILLAY: The scheme of the Constitution and the MFMA clearly envisage that there cannot be concurrent interventions... The primary purpose of an intervention is to provide a practical route designed to place the municipality on the road to recovery. And if there has to be more than one intervention there would no doubt self-evidently be chaos ... *a discretionary intervention cannot co-exist with a mandatory intervention* (my emphasis) ... And if the applicant wanted to investigate or probe the rationality, or the reasonableness of the 139(5) intervention, what ought to have happened M'Lady, is that a fresh application ought to have been brought, but in the absence of such an application, the court may not inquire into the reasonableness or rationality of the 139(5), and any attempt to seek an order compelling a discretionary intervention is incompetent. .... The import of a mandatory intervention is that what it does is it compels national treasury to become involved in assisting in the financial recovery of the municipality.'

[67] The following similar submissions were made on behalf of the municipal respondents:

'MR JAMIE: ...once we saw the provincial respondents' affidavit indicating that 139(5) intervention had been decided upon, it would have been superfluous for us to deal with the underlying complaint. ... And we know the underlying facts here M'Lady. The complaint has been raised that because of *inefficiency and ineffectiveness* (emphasis added) a large part of the municipal budget cannot be

used for its intended purposes, but has to be ring fenced and used to pay off Eskom, otherwise the electricity will be cut off and that is the sort of *financial mismanagement* (emphasis added) which the applicant complained about to demonstrate why the municipality cannot carry out its other obligations. ...

The intervention sought by the applicant in the *mandamus* that it seeks is a totally blunt weapon which will not result in the desired outcome ... this will simply displace at great cost and disruption to an already (on the papers) dysfunctional entity. The removal ad hoc of a relatively recently elected counsel, the parachuting in of an administrator for a period of ... three months and its replacement with another counsel. And there has been no attempt, either on the papers, on in oral argument to explain to you why that is a good idea. And why, more importantly M'Lady, it will be an effective idea, or an effective intervention. And we submit on the papers and given the fact that the very same supposedly inept, inefficient, non-attendant administrative staff are going to remain in place. We ask, not rhetorically, how does the removal of an elected body which may not by law interfere with the administration, or the carrying out of administrative functions which are being complained about, how is that going to address the complaint? ... it is for the provincial government ... to decide on whether it will intervene and what sort of intervention it will require. ... And that is why you have no authority proffered in this court, or on the part of the applicant for any court having made such an order in this country. We say it cannot be done. ... If you were to make the order it would lead to the absurd, with respect, results, M'Lady, that we would have two interventions at once. We would have the 139(5) intervention, because it is not sought to be set aside, we would have that intervention and at the same time you would have a court ordered intervention in terms of 139(1)(c). *And one only needs to state that to see how that could never be M'Lady* (my emphasis). ...

It is for provincial executive M'Lady, to decide what would be most appropriate to speedily, efficaciously ensure the fulfilment of the obligation. It is totally terrain into which a Judge should not enter M'Lady. Provincial executive presumably knows best the status of its municipalities ...There is an arsenal of weaponry available to the provincial executive as to how to deal with this problem. And I am making the submission in argument that on the facts of the matter it might well be the case that 139(1)(b) is more appropriate. In fact it appears M'Lady, on its face to be more appropriate than 139(1)(c), but where Mr Smuts for the applicant and I disagree on this, the fact M'Lady, is that it is not for us to decide, or for you with great respect. It is for the provincial executive to decide. *And they may still so decide* (italics added).

> Whether the court is inclined to make an order as sought in paragraphs 1 and 2 of the notice of motion M'Lady, we leave up to the court, we have not offered an argument in that regard. I would however observe M'Lady, that to the extent that what is required is that the court make an order that the law, or conduct that is inconsistent is invalid to the extent of its inconsistency, it does not seem to me with respect that that would hang easily M'Lady, with the sort of photos we found here, is the court then going to be asked to make a declaration that such act, or conduct, i.e. the failure to carry out these obligations is invalid? That does not seem to sit easily with the wording of 172(1)(a), but whatever the position in that regard M'Lady, the second part, in other words, the *mandamus* is discretionary, the court may make any order which is just and equitable.'

[68] As I have mentioned, subsequent to the answering submissions on behalf of the provincial and municipal respondents and CoGTA, and prior to the delivery of the reply on behalf of the applicants, senior counsel for the provincial and municipal respondents were granted leave to extricate themselves from the proceedings. Thereafter, and in exercising his right of reply, counsel for the applicant made the following submissions:

> 'MR SMUTS: Your Ladyship has, with respect, heard no argument from any of our learned friends as to how the section 139(5) intervention which thus far since the launching of this application in February has involved no more than an in principle decision to adopt such an intervention. How that will address aspects of the utter failure of the municipal counsel of Makana Municipality to meet its executive obligations other than those involving finance. ...
>
> One needs to recall that when these proceedings were launched in February of this year and reports that accompanied it, the national treasury report reflected a whole host of inadequacies and shortfalls, notwithstanding correspondence addressed by attorneys on behalf of the applicant. Notwithstanding a direct approach to the president, or to the minister which was referred to the premier without response. Notwithstanding a petition directed at the end of last year to the municipality and the premier, nothing was done until this application was launched. And this application then was required to set out in full the circumstances that prevailed, those circumstances involved a host of failures of the executive obligation, including a

financial crisis. ... In the previous turnaround strategy to which Your Ladyship referred, the draft financial recovery plan of February 2015 ... said this...:

"Makhanda has faced and continues to confront various challenges in terms of service delivery, administration and finance." ... And interestingly when we are criticised for saying what is proposed now as the same old, same old, and Your Ladyship is told 139(5) is utterly and completely different from that which has gone before, because this now involves the municipal finance recovery service, well, if your Ladyship has regard to the last paragraph on page 144, Your Ladyship is advised in this recovery plan that the *national treasury's municipal finance recovery service is therefore requested to assist in the development of this plan which commenced with the status quo assessment and obtaining a better understanding* (italics added). Are we wrong with respect to say that it is the same old, same old? ...

COURT: But I need to get absolute clarity on this Mr Smuts, are you saying that that ... financial recovery plan was in terms of section 139(5)?

MR SMUTS: ...the crux of our submission is who knows what they thought they were doing ... Mr Heunis ... said this now involves ... the national treasury's municipal finance recovery service. It is a different ball game. But this turnaround strategy, this recovery plan tells us that is exactly what was done and as Your Ladyship correctly points out it refers to s139. So even if they thought they were doing a 139(1)(b) what is not evident to Your Ladyship is how, if anything ever happens as a result of this resolution that Your Ladyship is told has been taken, how this will be any different. ... Your Ladyship can seek to address that which a section 139(5) intervention is not designed or required or equipped to address. I am not, with respect, on behalf of the applicant saying to Your Ladyship we want to review it, in any event our learned friends are correct, this is not a review application. The section 139(5) intervention came right at the end of these proceedings.

COURT: So you are saying that if the executive seeks to invoke section 139(5) this court can simultaneously invoke s139(1)(c) ... to deal with the other problems.

MR SMUTS: With the rest of the problems, they are not incompatible with respect.

COURT: So they can exist side by side?

MR SMUTS: There is no indication of why they should be incompatible ... For as long as it is contended that 139(5) is invoked, there can be no relief in respect of other violation of rights, with respect is a violation of our constitution and the necessary availability of a remedy for a violation of rights.
COURT: Well, now that he is gone, what do you say about Mr Jamie's submissions?[73]

MR SMUTS: ... The submission was made by our learned friend Mr Heunis, and Mr Jamie associated himself therewith, that the applicant only wants to replace one counsel with another ... Yes, that is rather simplistic. In the first instance the belief, or the suggestion that a community which has been abused to the extent that it is, is going to re-elect the same people, is one with respect difficult to stomach ...

COURT: But Mr Jamie says it is not the counsel's fault.

MR SMUTS: Yes, well of course with respect the Municipal Systems Act at s 11(1) says the executive and legislative authority of a municipality is exercised by the counsel of the municipality, it is its job. It does not help to say it is [not] proper in the code of conduct for a counsellor to try and give an instruction to a member. It also says that a counsellor can, if the counsel so instructs him to do, but it is the counsel as a whole.We are not asking for the removal of a member of counsel. We are saying the counsel is not performing its executive role. It is not fulfilling its executive authority. It must be dismissed entirely. And with respect then there is an election. It is this counsel that has failed to give effect to its executive obligations as are defined in the *Mnquma* Judgment. And it is this counsel which has not been accountable to its citizens. It is this counsel which must be removed. If a 139(5) intervention premised on the manifest failures that we are told the new counsel will inherit is in place, this counsel will be assisted by certain intervention, but with respect the new council will have to be held accountable because it has an obligation to provide services.

Section 11(3)(f) of the Municipal Systems Act says that it exercises its legislative or executive authority, inter alia by providing municipal services for the local community.

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[73] As is clear from that which I have already quoted from the transcript, counsel for the municipal respondents, without being prompted to do so, volunteered the contention that intervention by the executive in terms of section 139(5) cannot exist side by side with a court order in terms of section 139(1)(c). The same submission was made, without having been prompted to do so, by counsel for CoGTA.

This one has not. ... Yes, because of course the 139(5) intervention came even after our replying affidavit. There has been no intervention at all when the application was launched. ...

To the extent that both our learned friends, Mr Heunis and Mr Jamie relief upon the fact that this is a recently elected counsel, we are closer to the next election in term so local government than we are to when this counsel was elected in 2016. And so why they are recently elected we do not know. And why it should make a difference, if they are dysfunctional, we submit is not apparent either. ... Our learned friend, Mr Jamie said that the order sought would return irresoluble conflict. We submit it is not so. It is so that section 139(1) requires appropriate steps and we say to Your Ladyship, that the constitutional assembly thought that 139(1)(c) was one such appropriate step. It is not enough to say yes there is a crisis and an intervention is required, but that is the provincial prerogative, when the province has plainly resolved not to address it, then with respect in accordance with Justice Cameron's decision and Justice O'Regan's decision the court is obliged by the Constitution to intervene. And we say, our submission is the Constitution itself provides a solution.

If Your Ladyship is not persuaded that the constitutional obligation is an appropriate one the constitution charges Your Ladyship with a decision, with the obligation to make a just and equitable decision. ... But in any event even if Your Ladysmith is not with us ... the vindication of rights in respect of which the applicant approached Your Ladyship, if the applicant was wrong in that regard it was certainly bona fide in that regard. It believed that this was a proper approach in terms of which the rights of the ordinary, the poor, the indigent in this city could and should be vindicated. And if Your Ladyship finds that it was wrong, it was a bona fide attempt to vindicate constitutional rights and Your Ladyship certainly will not order that the Unemployed Peoples Movement carry the costs ...'

[69] Subsequent to argument in reply, the attorneys for the municipal respondents complained that the applicant's counsel (with respect to the co-existence of relief in terms of section 193(1)(c) and steps in terms of section 193(5)), had *raised* an entirely new and novel argument which was not raised in the founding or replying affidavits, nor was it raised in the heads of argument, nor was it raised in counsel's principal submissions. Despite my reservations in this respect I allowed all the

parties to submit further written argument on the question of the co-existence of the two subsections.

[70] As I have said (and this is borne out in the extensive portions of the transcript which I have referred to), the applicants have always maintained, rightly or wrongly, that appropriate relief in the circumstances would be in terms of section 193(1)(c). It is indeed the respondents, and in particular the provincial ones, who introduced the suggestion of alternate steps in terms of section 193(5) only after the applicant had committed itself to its grounds of application. It was to this end, as I understand it, that counsel for the respondents, and particularly counsel representing CoGTA and the municipal respondents, raised for the first time in answering argument that the two subsections cannot co-exist. It is indeed these submissions, raised in answering argument, which prompted this court to invite comment from Mr Smuts in reply. In the circumstances I am inclined to agree with Mr Smuts that the criticisms raised by the attorneys for the municipality are misplaced. The applicant has not deviated from its stance that intervention is called for in terms of section 139(1)(c). This appears to be based on the applicant's belief that this is the only type of intervention which is likely to adequately address the crises which Makana currently faces, and more importantly (and I will deal with this in due course), the applicant's belief that intervention in terms of section 139(5) is designed to address a financial crisis only.

[71] It is trite that the rules pertaining to argument in trials apply *mutatis mutandis* to opposed applications. Rule 39(10) of the Uniform Rules of this court reads as follows:

> 'Upon the cases of both sides being closed, the plaintiff [applicant] or one or more of the advocates on his behalf may address the court and the defendant [respondent] or one or more advocates on his behalf may do so, after which the plaintiff [applicant] or one advocate only on his behalf may reply *on any matter arising out of the address of the defendant [respondent] or his advocate.*'[74]

[72] Indeed, it is perfectly regular and happens as a matter of course, that a presiding official will call upon the respondent to comment on particular aspects

[74] Emphasis added

raised by the applicant in his opening argument, and likewise call upon the applicant in reply, to comment on aspects raised by the respondent as the second speaker. Be that as it may, I deemed it fair and appropriate to allow all the parties to submit further written argument[75] on the point, the upshot of which is, as expected, in line with what was argued before me.

Co-existence of discretionary and mandatory intervention

[73] It was once again pointed out on behalf of the applicants that at the date of the launching of the application no steps to intervene had been taken by the provincial respondents. Even after the launching of the application no action was taken by them in any particular haste. In their initial answering affidavit, they refer only to a recommendation, in principle, to intervene. It was only after the filing of the applicant's replying affidavit that the provincial respondents delivered a supplementary affidavit deposed to by the HOD of CoGTA, to which was attached an unsigned, undated and unconfirmed document purportedly prepared by the director-general and the cabinet secretary to the office of the premier (for the consideration and action of the chief state law advisor to the CoGTA head of department) stating that resolutions had been taken at the special executive council meeting held on 29 May 2019, to take necessary steps in terms of section 139 of the MFMA to prepare for the imposition of a recovery plan aimed at securing Makana's ability to meet its obligations to provide basic services and to meet its financial commitments in terms of s 139(5) of the Constitution, and calling for responses by Friday 14 June 2019.

[74] In the premises I am inclined, as I have said, to agree with the applicant that it was impossible for it to have anticipated how the respondents were likely to behave in response to the application, particularly taking into account their admittedly chequered history and the fact that the form and substance of previous interventions has been anything but a picture of clarity. It is quite correctly contended on the applicant's behalf that the issue of a proposed new intervention in terms of section

[75] Mainly because senior counsel for the municipal and provincial respondents had already left the arena when this point was traversed, and notwithstanding the fact that attendant junior counsel failed to raise any concerns *in facie curiae*.

139(5) only arose after the replying affidavit had been filed and the matter was in effect closed and ripe for hearing. Insofar as this new s 139(5) intervention is alleged to be underway, the applicant submits that s139 contemplates the co-existence of different forms of intervention. In particular, it is pointed out that section 139(5) expressly makes provision for and contemplates the co-existence of an intervention in the financial affairs of the municipality together with an intervention which dissolves the municipal council. It is furthermore submitted that a failure to dissolve Makana's council will inevitably lead to the failure of the proposed s 139(5) intervention as has happened before, due to the single fact that the management and administration of Makana has remained in the hands of an incompetent council. The applicant contends that the provincial and municipal respondents are attempting to shield themselves from the responsibility for the myriad of admitted crises in Makana by cowering behind a technical application of s 139(5), notwithstanding that the form of intervention contemplated in that section (and in the absence of the dissolution of council) went no further than the paper it was written on. Differently put, the argument suggests that the application and interpretation of s 139 as proffered by the respondents manifestly fails to achieve the aims of the Constitution by failing to vindicate the infringed rights of the citizens of Makana and calls upon this court to forge new tools and be innovative in its remedies to achieve the best results for these citizens.

[75] In their supplementary written argument, the provincial respondents repeat their contention that a court order in terms of section 139(1)(c) will detract from the provisions of s139(5), which only allows for dissolution of 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 a recovery plan. It is contended that this court will effectively amend ss(5) if it orders such intervention, and that the purported intervention which has formed the subject matter of the latest resolution has in any event superseded any discretionary provincial intervention, the effect of which is that the two subsections cannot co-exist.

[76] It is furthermore contended that if this court were to order provincial intervention in terms of section 139(1)(c), the order could be rendered meaningless by executive action because such intervention can be set aside by the cabinet

member responsible for local government or the National Council of Provinces (the fifth respondent which significantly, has not opposed this application), pursuant to the provisions of s139(3)(b) of the Constitution, the effect of which this court cannot suspend. Furthermore, it is contended that the structure of ss(5) does not permit of a dissolution of a municipal council at the outset. In truncated terms it requires, inter alia, the mandatory imposition of a recovery plan (aimed at securing the municipality's inability to meet its obligations to provide basic services or meet its financial commitments), which binds the municipality in the exercise of its legislative and executive authority to the extent necessary to solve the crisis in its financial affairs. It is accordingly argued that a significant part of ss (5) will be rendered meaningless if I were to order simultaneous intervention.

[77] Furthermore, the relevant provisions of national legislation (the MFMA) also militate against simultaneous recourse by a Provincial Executive, due to the fact that sections 137 and 139 of the MFMA have detailed disparate provisions dealing with these separate interventions. The provincial respondents submit that the detailed procedures provided for in section 139 of the MFMA bear testimony to the fact that the intervention provided for in section 139(5) of the Constitution is significantly more drastic than that provided for in section 139(1)(c) of the Constitution, as it bears testimony to the fact that a municipal council is not ipso facto dissolved as a consequence of a section 139(5) intervention. It is argued that simultaneous intervention will make it impossible to give effect to certain statutory provisions since there will be no council to consult in respect of and to comment on a financial recovery plan as required by the MFMA.[76]

[78] In the course of written argument, the provincial respondents again made much of the fact that the applicant has to make its case in its founding affidavit, despite the fact that s139(5) intervention was only alluded to by the respondents in their answering papers, and then only vaguely at best. Indeed, the citation relied on by the respondents in this regard is inclined to be supportive of the applicant's case and the point which the applicant has been attempting to emphasise all along. It reads as follows:

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[76] But contrast counsel's submission referred to at fn 72.

'When, as in this case, the proceedings are launched by way of notice of motion, it is the founding affidavit which a Judge will look to to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

> " ... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".'

[79] Simply put, according to the respondents they were not called upon to meet a case to the effect that intervention in terms of section 139(1)(c) of the Constitution can co-exist with intervention in terms of section 139(5) thereof. It is also contended that the doctrine of separation of powers could not have prevented a court, if it were persuaded that those facts were present, from ordering the provincial government to act in accordance with section 139(5), particularly in that the case made on the papers (by both parties) is one for section 139(5) intervention, and not section 139(1)(c) intervention.

[80] Significantly, the point is well taken by the respondents that the primary responsibility of a court is not to make decisions reserved for, or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This is especially the case where the decision in issue is policy-laden as well as polycentric.[77] The provincial respondents further argue that the doctrine of separation of powers militates against this court becoming involved to the extent prayed for by the applicant, particularly since the executive council has invoked its own authority *to remedy the situation which has prompted this application*, albeit with recourse to a different section of the Constitution providing for different and more drastic powers.

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[77] International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others 2012 (4) SA 618 (CC) para 95

[81] Finally, the provincial and the municipal respondents contend in their written argument that the costs of further argument were incurred as a consequence of the "re-opening" of the matter as a result of a point not taken in the papers filed of record, nor in heads of argument or even in the applicant's main oral argument. It is also contended that this "new and different ground for relief raised in reply and necessitating further costs" is entirely without merit and that, in the circumstances it is in the interests of justice to order costs against the applicant.

[82] I reiterate that the so-called "point" was not raised by the applicant. It was raised by counsel for the municipal respondents and the sixth respondent. Indeed, it is in my view unlikely that it would have been addressed by Mr Smuts in reply at all, but for this court pertinently asking him to comment on the issue of co-existence which was both raised and subsequently shot down by the aforesaid counsel..[78]

[83] Having put that issue to rest, I am of the view that the gravamen of the respondents' collective submissions is adequately encapsulated in the following extract from written argument filed on behalf of the municipal respondents:

> 'To the extent that the Court accepts that the Makana Municipality is "in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments", it would appear that the provincial respondents have no discretion in the matter and must authorise a section 139(5) intervention. This is because of the use of the word 'must' in section 139(5). ... The two cannot be implemented alongside each other for the simple reason that there is no provision in the Constitution or the legislation which provides for such a dual process. At best, the provincial executive has a discretion to choose, if the facts support such a step, to proceed in terms of section 139(1) or it can, on its own decide to intervene in terms of

[78] Whilst on the topic, I am constrained to express my disappointment at the failure on the part of the legal representatives for CoGTA and the municipal respondents to admit that they were the first to point out the problems related to co-existence, if for no other reason than to ensure that no stone was left unturned during argument. Indeed, the letter of complaint (the effect of which was exacerbated by the submission in written argument that "the further argument is the direct result of the submissions of the applicant who addressed new argument in reply"), is disingenuous. I might also mention that the municipal respondents who aired this dissatisfaction in the first place, submitted their written argument seven days late (without any hint of an apology), due to an apparent oversight, but more significantly perhaps, in true "same old, same old" style. The introduction to their written argument in any event appears to miss the point altogether. It has never been the applicant's argument, nor has there been any suggestion that this court has the power to direct the second respondent (the Provincial Executive) to intervene in Makana's affairs both in terms of sections 139(1)(c) and 139(5) of the Constitution.

> section 139(5) or be compelled in terms of an order of court to intervene. ... In any event, the provisions of section 139(5)(b) are provided for with the important prerequisite that there must first be a recovery plan [139(5)(a)] aimed at securing the municipality's ability to meet its obligations to provide basic services, and its financial commitments. It is only in the event that the municipality cannot or does not approve such a plan that the far more serious step of dissolution is allowed. ... Even in such scenario however, the provincial executive concerned may elect not to dissolve the Municipal Council but to assume responsibility for the implementation of the recovery plan itself, as provided for in section 139(5)(c).'

Summing up

[84] To finally sum up then, the applicant seeks from this court, firstly, a declarator that Makana is in breach of s 152(1) of the Constitution, in that it has failed to ensure the provision of services to its community in a sustainable manner and has failed to promote a safe and healthy environment. The respondents have not disputed this.

[85] Secondly, the applicant seeks a declarator that Makana is furthermore in breach of s 153(a) of the Constitution in that it has failed to structure and manage its administration, budgeting and planning processes to give priority to the basic needs of the community, and that it has failed to promote the social and economic development of the community. The respondents have also not disputed this.

[86] Thirdly, the applicant seeks a declarator that the jurisdictional facts for "mandatory" intervention in terms of section 139(1)(c) of the Constitution read with sections 139 and 140 of the MFMA are present. The respondents do not dispute that the jurisdictional facts for mandatory intervention are present. What they do take issue with is that the provisions upon which the applicant relies in the Constitution, refer to discretionary intervention, which provisions the applicants have paired with sections 139 and 140 of the MFMA which refer to mandatory intervention. In the premises mandatory intervention is what is called for, and this is what the respondents are apparently offering by saying that they have resolved to intervene in terms of s 139(5), which fits hand in glove with section 139 and 140 of the MFMA.

[87] Fourthly, the applicants seek an order (based on the above) directing the provincial executive council (the second respondent) to intervene and to *inter alia* forthwith appoint a competent and experienced administrator for Makana. In this respect the applicant is of the view that I have the power to direct intervention (contending that mandatory intervention can be read into s 139(1)(c) and that it is entitled to abandon its reference to sections 139 and 140 of the Constitution). The applicant in principle has not warmed to the counter-offer so to speak, of a s 139(5) intervention without further structured relief, based on a factual history which not only has not been disputed, but which has not even been addressed with any degree of interest. The applicant also (having previously expressed its intention to seek intervention in terms of s 139(5) as recently as April 2018), seems to have been persuaded that such intervention was not designed to relieve the very real basic service delivery grievances addressed in the application papers, and that in any event, such intervention would amount to "same old, same old" without the appointment of a committed administrator and council.

[88] The respondents, on the other hand, contend that section 139(5) does not only refer to financial problems, that serious times call for serious measures, and that nothing less than a s 139(5) intervention will suffice.

[89] I agree. And that is precisely why this process was set in motion as far back as 2015. I repeat that none of the respondents have denied or disputed the averment made by the applicant's deponent, that the 2015 financial recovery plan had been approved after the first administration intervention. This being the position, I find it particularly disconcerting that the respondents have made no mention of the plan in their papers or in their heads of argument. Indeed, when I questioned counsel for the provincial respondents on the status thereof, I gained the distinct impression that the topic did not sit well with the respondents, and was best avoided. The existence of the plan, and the fact that it has been avoided/ignored, together with the suggestion that a new and future recovery plan is the way to go, cannot, with due application of checks and balances, be ignored. As I have said, the plan complies with all the criteria for, and contains detailed reference to s 139(5) mandatory intervention. It is specifically described as a "financial" recovery plan, which is not the wording of section 139(1)(b), as suggested. The introduction thereto reflects the

exact wording of s 139(5). It provides for both financial and service delivery improvement, which is not only what s 139(5) caters for, but what the people of Makhanda have been in critical need of for a substantial period of time.[79]

[90] The provincial respondents have given this court the assurance that a section 139(5) intervention is underway. Insofar as there exists a degree of paucity on the papers with respect to persuasive and admissible evidence in this respect, I am inclined to fortify this assurance with an order to that effect, and particularly one which is designed to encourage the provincial respondents to make use of the 2015 recovery plan as a "living" document (as was so accurately and appropriately suggested by the LRC). Such a course of action should not present insurmountable difficulties to the provincial respondents. I have spent some time scrutinising this lengthy and detailed plan. The provincial executive (the second respondent), during 2015 expressed the view that the recovery plan follows a logical, well thought out process. Once again, I agree. It is the product of an independent and detailed assessment, the development of which was no doubt a costly and time consuming exercise. As stated in the plan, according to the provincial executive, the key objective of developing a holistic plan which meets the requirements of s142 of the MFMA was indeed achieved back there. Relevant documents were analysed in detail. Critical role players were consulted including the executive mayor. An initial report was prepared "to assess the institutional, service delivery and infrastructure, and financial challenges impacting on the performance and service delivery imperatives of the municipality, with a view to inform the development of a holistic Plan for the Makana".[80] It pertinently traverses short, medium and long term challenges. The provincial executive refers to it as a holistic and integrated plan, the final outcome of which *must* be to ensure *financial and service delivery sustainability* "in the shortest possible timeframe". It is stated that the plan and the *implementation* thereof is *critical* to achieve the objective of financial and service delivery

[79] The respondents have also been at pains to persuade the applicant that s139(5) intervention is designed to make good the persistent breach on the municipality's part of its constitutional obligations to provide basic services to the people, and properly so, in my view. The fact that the recovery plan binds the municipality in the exercise of its authority only to the extent necessary to solve its financial crisis is neither here nor there in the greater scope of things. The sole purpose of the plan is to secure the ability to meet service delivery obligations, which obligations are peremptory and ought to be complied with by a municipality and particularly a council fortified with enthusiasm to give substantive effect to the recovery plan.

[80] See the first page of the executive summary introducing the plan.

sustainability. It speaks to strategies, the combined impact of which is intended to address the core and underlying causes which are triggering problems at Makana. However, it is stated in no uncertain terms that successful implementation will also require greater political oversight, efficient and effective *administration* and governance arrangements to drive and sustain the implementation of the service delivery mandate and community expectations of Makana. Oversight and monitoring by council is a necessary ingredient. Significantly, the penultimate paragraph of the executive summary states the following:

> 'Should the municipality *delay or fail* to implement the Financial Recovery Plan, the Provincial Government *must* consider alternative measures including the extension of the term of office of the current administrator, or the appointment of a new administrator or *the dissolution of Council* (emphasis added).[81]

[91] Of particular significance in my view, is the fact that the plan (as expressed therein) is quite capable of being tweaked as and when more accurate information is obtained, where identified strategies need to be updated, and when risks and implementation barriers have not been anticipated. But the responsibility for updating the plan rests with the municipality. All that needs to be done is for the administrator and the municipal manager to forward an updated or revised plan to Provincial Treasury and CoGTA, with a copy to the National Treasury's Municipal Finance Recovery Service. Provincial Treasury, working jointly with CoGTA, may also provide additional comments on the plan over the course of its implementation as part of its monitoring role, with the National Treasury's Municipal Financial Recovery Service copied, and until such time as Makana is turned around and is on the path to service delivery and financial recovery.[82]

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[81] It is not in dispute that administrators were appointed in the past but without the dissolution of council. It is also not in dispute that both these administrators produced reports highlighting numerous interventions and reforms required to make Makana functional. It is not disputed that Makana's 2016/17 annual report stated that it was in the process of implementing the financial recovery plan, but it was never complied with. Finally, it is not in dispute that a year after the election of the present council (July 2017), councillors were canvassed about the financial recovery plan and very few of them were even aware of the existence thereof. More specifically, the entire content of the applicant's letter, inter alia enquiring whether the recovery plan and a s139(5) intervention were being followed, and CoGTA's response, referring the letter of demand to the Premier (dated 1 August 2018) with nothing further from any of the respondents, is not in dispute.

[82] See page 63 of the recovery plan.

Checks and balances and the separation of powers

[92] By virtue of the provisions of section 172 of the Constitution, this court, having been mandated to declare Makana's ongoing conduct as invalid and inconsistent with the Constitution, may make any order that is just and equitable in the circumstances. Section 165 of the Constitution vests judicial authority in the courts, which are independent and subject only to the Constitution and the law. The section also stipulates that courts are enjoined to apply the Constitution and the law impartially and without fear, favour or prejudice.[83] The adoption of our Constitution ensures that South Africa continues to develop as a state in which political power is restricted in various ways and in which the Constitution serves as the standard for the legitimate exercise of public power.[84] The respondents have elected not to deny the various complaints and accusations levelled against them, and particularly at the Makana council. In the premises I am constrained to accept that there is merit in these accusations and that the complaints are valid and supported by sufficient evidence to show, on a balance of probabilities:

(a) That the foundations in the form of the recovery plan put up by the second respondent in the form of a mandatory intervention have been in place since 2015;
(b) That the plan itself, as well as the relevant legislature, make provision for provincial government to dissolve the municipal council and appoint an administrator should the municipality delay or fail to implement the financial recovery plan;
(c) That Makana has failed to or delayed the implementation of the 2015 recovery plan;
(d) That in addition to the aforesaid, Makana, and in particular its council, has failed to ensure the provision of services to its community in a sustainable manner, has failed to structure and manage its administration, has failed to manage its budgeting processes, and has failed to give priority to the basic

[83] See also the prescribed text of the oath or solemn affirmation of judicial officers in schedule 2 of the Constitution.
[84] See *Constitutional Law of South Africa:* Woolman *et al, 2ed volume 1 at 12-1*

needs of its community and to promote the social and economic development of the people of Makhanda;

(e) That the jurisdictional facts for a mandatory intervention in terms of section 139(5)(a) are (and have been) present as pleaded by the respondents;

(f) That the jurisdictional facts for the dissolution of the Makana municipal council and the appointment of an administrator are (and have been) present as provided for in terms of s 139(5)(b) of the Constitution.

[93] It is contended that since, objectively, the facts which trigger a mandatory intervention in terms of section 139(5) of the Constitution are present in Makana, it was incumbent upon the provincial government to intervene consistently with the provision of that subsection as well as sections 139 and 140 of the MFMA. As succinctly stated by Mr Heunis:

> 'It had no choice. Furthermore, the doctrine of separation of powers could not have prevented a court, if it were persuaded that those facts were present, from ordering the provincial government to act in accordance with section 139(5). ... The constitutional obligation on the provincial executive to intervene in the affairs of a municipality derives from section 139(5) of the Constitution.... The judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.'[85]

[94] In short, the Constitution has empowered courts to be the ultimate referees on whether the Constitution or any other law has been breached. Separation of powers and provisions intended to serve as checks and balances do not mean that the branches of government leave each other untouched. The judiciary is tasked with overseeing compliance with the law by all branches of the state, its organs and all inhabitants of the Republic. When the Constitution requires that the judiciary decide a particular controversy, it can never amount to overreaching. If it is trespass at all, it is one that the Constitution itself allows. The branches of government are not in competition with one another. Rather they are symbiotic. They are part of a beautiful

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[85] See *International Trade Administration Commission v SCAW South Africa (Pty) Ltd and Others* 2012 (4) SA 618 (CC) para 94.

mosaic which will work only if we bring all our public goodness to the fore. It is the daily business of courts to make rulings on wide and divergent disputes provided they can be resolved by application of the law. Section 34 of the Constitution entrenches the right of everyone to approach courts and to have their grievances resolved by an impartial court. Courts safeguard the public interest and help preserve and deepen the democratic project. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether, in formulating and implementing such policy, the state has given effect to its constitutional obligations.[86] If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. Courts have required the executive to give effect to the socio-economic claims of the poor and vulnerable. The checks and balances embedded in the doctrine of separation of powers demand that courts must ensure that all branches of government act in accordance with the Constitution and other law. This is so because the Constitution is the blueprint of our transformative and democratic project. The lifeblood of our democratic project is clean and people-centred governance, the rule of law, democratic oversight and accountability and a dedicated, honest and prudent use of public resources to achieve social justice and equality. "Ours is a never and never again Constitution. Its hope is that there will be justice, peace, work, bread, water and salt for all."[87]

[95] The order which I intend making is intended to be both just (in promoting a healthy and cooperative system of checks and balances) and equitable (in attempting to ensure that the relief granted will promote, rather than interfere with good governance in the best welfare interests of the people of Makhanda.

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[86] As per Cameron J in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC): '(T)here is a higher duty on the state to respect the law to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious certainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right and it must do it properly.'

[87] Extracts in this paragraph have been taken (with due acknowledgment) from an address by Deputy Chief Justice Moseneke at the Annual Law Dean's Distinguished Lecture given at the University of the Western Cape on Friday, 17 July 2015.

[96] In *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 19 the Court discussed the right to appropriate relief 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.'

Costs

[97] As far as the question of costs is concerned, it is clear from the evidence that the respondents have been resting on their laurels for an inordinately lengthy period of time, to the direct and substantial prejudice of the people of Makhanda. I have no doubt that, but for the resolute and determined intervention of the applicant in launching this application on behalf of the citizens of Makhanda, "same old, same old" would have remained the order of the day, with Makana continuing to deteriorate at the rate it has been doing. The applicants, for whom right and proper references to the "correct" sections of the Constitution mean very little in the absence of a holistic approach to their Constitutionally entrenched rights, have triggered this judicial mandatory intervention, and have been substantially successful in doing so. The respondents on the other hand, have been extremely dilatory in complying with the relevant imperatives set forth in the Constitution, and when compelled to show their hand, have elected to pursue an avenue of escape which is not citizen friendly and does not assist this court in making an order which is designed to promote the quality of life of the people of Makhanda. I am accordingly of the view that a costs order (which in my view is also just and equitable having regard to the unchallenged factual matrix with which I have been presented) in the applicant's favour must follow.

ORDER

A. The conduct of the Makana Municipality (the eighth respondent) in failing to ensure the provision of services to its community in a sustainable manner, in failing to promote a safe and healthy environment for its community, in failing to structure and manage its administration, budgeting and planning processes, in failing to give priority to the basic needs of its community, and in failing to promote the social and economic development of its community, is inconsistent with the 1996 Constitution of the Republic of South Africa, is in breach of sections 152(1) and 153(a) of the Constitution, and is declared invalid to the extent of these inconsistencies.

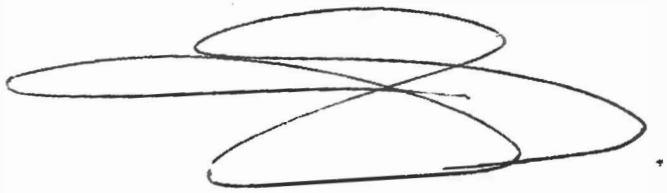
B. It is declared that the jurisdictional facts for mandatory intervention in the affairs of Makana Municipality in terms of section 139(5) of the Constitution read with sections 139 and 140 of the Local Government Municipal Finance Management Act 56 of 2003, are present and have consistently been present in the past.

C. In terms of the provisions of section 139(5)(a), read with the provisions of section 139(6), of the Constitution, and read further with the aforementioned provisions of Act 56 of 2003, the Provincial Executive for the Province of the Eastern Cape (the second respondent) is directed to forthwith implement a recovery plan aimed at securing Makana Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the Financial Recovery Plan developed for Makana Municipality (dated February 2015), the purpose of which was to achieve the objective of the municipality's financial and service delivery sustainability.

D. In terms of the provisions of section 139(5)(b) read with the aforementioned provisions of the Constitution, and read further with the aforementioned provisions of Act 56 of 2003, the second respondent is directed to forthwith dissolve the Municipal Council of Makana Municipality (the 14th respondent), to appoint an administrator until a newly elected Municipal Council has been declared elected, and to approve a temporary budget or revenue-raising

measures or any other measures intended to give effect to the aforesaid recovery plan to provide for the continued functionality of Makana Municipality.

E. The first, second, third, fourth, sixth, eighth, ninth, tenth and 14th respondents are directed to jointly and severally pay the costs of this application, the one/more than one, paying the other/others to be absolved.



I.T. STRETCH
JUDGE OF THE HIGH COURT

Date heard: 12 September 2019
Dates supplementary written argument received: 30 and 31 October and 8 November 2019
Date handed down: 14 January 2020

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