IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18577/2020

In the matter between:

DEMOCRATIC ALLIANCE	First Applicant
RANDALL MERVYN WILLIAMS	Second Applicant
CHRISTO MAURITZ VAN DEN HEEVER	First Applicant
ZWELIBANZI CHARLES KHUMALO	First Applicant
and	
THE PREMIER FOR THE PROVINCE OF GAUTENG THE EXECUTIVE COUNCIL FOR THE	First Respondent
PROVINCE OF GAUTENG	Second Respondent
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Third Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Fourth Respondent
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG	Fifth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Sixth Respondent
AFRICAN NATIONAL CONGRESS	Seventh Respondent
ECONOMIC FREEDOM FIGHTERS	Eighth Respondent
CONGRESS OF THE PEOPLE	Ninth Respondent
AFRICAN CHRISTIAN DEMOCRATIC PARTY	Tenth Respondent
PAN AFRICANIST CONGRESS OF AZANIA	Eleventh Respondent
FREEDOM FRONT PLUS	Twelfth Respondent
ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE ANC	Thirteenth Respondent

ALL TSHWANE COUNCILLORS WHO ARE MEMBERS OF THE EFF	Fourteenth Respondent
THE REMAINING TSHWANE COUNCILLORS	Fifteenth Respondent
SPEAKER OF THE GAUTENG PROVINCIAL LEGISLATURE	Sixteenth Respondent
ELECTORAL COMMISSION	Seventeenth Respondent
MPHO NAWA N.O.	Eighteenth Respondent

FOUNDING AFFIDAVIT: SECTION 18 APPLICATION

I, the undersigned,

RANDALL MERVYN WILLIAMS

do hereby make oath and say as follows:

1 I am a member of the Democratic Alliance of South Africa ("the DA") in Gauteng. I am a councillor in the City of Tshwane Metropolitan Municipality Council ("the Council"). I remain duly authorised to depose to this affidavit on behalf of the DA.

2 The DA is a political party which has a number of representatives in the Council. I am a member of the DA.

3 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are true and correct, to the best of my knowledge and belief.

4 Where I make submissions on the law, I do so on the advice of the applicants' legal representatives.

PURPOSE OF THIS APPLICATION

5 This is an urgent application in terms of sections 18(1) and 18(3) of the Superior Courts Act 10 of 2013, for on order that the first, second, fifth, eighth and fourteenth respondents' respective applications for leave to appeal to the Constitutional Court as well as their respective conditional applications for leave to appeal to the Supreme Court of Appeal, shall not suspend the execution of paragraphs 2 to 5 of the order of the judgment of this Court delivered by the Full

Bench of this Court per Mlambo JP; Potterill J; and Ranchod J on 29 April 2020 ("the Judgment").

6 The administrator of the Municipality (Mpho Nawa) was not a party to the urgent application. He had not been appointed at the time that it was launched. In fact, the Dissolution Decision had not yet come into effect at the time the urgent application was launched. As Mr Nawa has since been appointed and assumed office, he arguably has an interest in this application. Therefore, he is cited as the eighteenth respondent. His principal place of business is at Tshwane Municipality.

7 This application has been brought on an urgent basis. The applicants understand that, in general, it is required that the Court which gave the order sought to be appealed against – that is the Full Bench – which is required to determine whether to grant leave to execute in terms of section 18. The applicants will therefore, after the launch of this application, write to the Judge President and ask for directions regarding the hearing of this application before the Full Bench.

BACKGROUND FACTS

8 The factual background to this application is set out in the affidavits in the main application, and in particular the affidavits deposed to by myself, on behalf of DA. In order to avoid burdening the papers unnecessarily, I will not repeat the contents of those affidavits here, and I respectfully ask that the contents of those affidavits be read as incorporated herein.

9 On 5 March 2020 the first respondent ("the Premier") announced that the Gauteng Executive Committee ("the Gauteng EC") had resolved to dissolve the

City of Tshwane Metropolitan Municipality ("the Municipality") and appoint an administrator in terms of section 139(1)(c) of the Constitution ("the Dissolution Decision").

10 This was unlawful and the applicants applied to have this decision reviewed and set aside.

11 The root cause of the difficulties faced by the Municipality was the refusal of ANC and EFF councillors to attend (or remain at) Council meetings. As a result, the applicants also sought mandatory interdicts compelling those councillors to attend and remain in attendance at meetings of the Council.

12 On 29 April 2020 this Court made an order which:

12.1 Reviewed and set aside the Dissolution Decision.

12.2 Directed the ANC and EFF councillors to attend and remain in attendance at all Council meetings.

12.3 Suspended the above orders until 5 days after level 5 of the nationwide lockdown was lifted.

12.4 Directed that the Dissolution Decision would have no impact on the entitlement of councillors to receive their salaries and benefits.

13 Level 5 of the national lockdown ended on 30 April 2020. As a result, the orders were due to come into effect on 8 May 2020.

14 At 15h00 on 7 May 2020 the fifth respondent ("the MEC") held a press conference at which he announced that he, the Premier, and the Gauteng EC had decided

to bring an urgent appeal against the Judgment directly to the Constitutional Court. A copy of the press release is annexed marked **FA1**.

15 The MEC made an unsigned copy of the application for leave to appeal to the Constitution Court available to the media at the press conference. Nonetheless the complete application was not provided to the applicants until 17h59 on 7 May 2020. A copy of the leave to appeal application (without annexures) is annexed marked **FA2**.

16 On 8 May 2020, the eighth and fourteenth respondents filed a conditional application for leave to appeal the Judgment to the Supreme Court of Appeal. They did so despite the fact that they did not oppose the application before this Court. A copy of this application (without annexures) is annexed marked **FA3**.

17 On the same day (8 May 2020), the eighth and fourteenth respondents filed an application for leave to appeal the Judgment directly to the Constitutional Court. A copy of this application (without annexures) is annexed marked **FA4.**

18 On 11 May 2020, the first, second and fifth respondents also filed a conditional application for leave to appeal to the Supreme Court of Appeal. A copy of this application (without annexures) is annexed marked **FA5**.

19 It is clear from what follows that this section 18(3) is urgent. If this application is not heard as one of urgency, the order granted by this Court will be frustrated, the relief that the applicants have obtained will become meaningless and serious and irreparable harm will follow.

20 I am advised that an application of this nature is required to demonstrate that:

20.1 There are exceptional circumstances which justify the execution of this Court's order pending the determination of the application for leave to appeal;

20.2 The applicants will suffer irreparable harm if the order is not put into execution pending the appeal; and

20.3 The respondents will not suffer irreparable harm in the event that the order is put into execution pending the appeal.

21 All three requirements are met in this case.

22 In addition, I am advised that this Court will take into account the respondents' prospects of success on appeal. As I demonstrate in what follows, the prospects of a successful appeal are extremely poor.

EXCEPTIONAL CIRCUMSTANCES

The nature of the decision this Courtdemo set aside

23 It was common cause before this Court that the Dissolution Decision was what our courts have repeatedly described as the "*most drastic step*" possible in an intervention into the affairs of a Municipality[1] – the full and immediate dissolution of the Municipal Council; the appointment of an administrator to fulfil its functions; and a direction that fresh elections take place.

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[1] *Premier, Western Cape and Others v Overberg District Municipality and Others* 2011 (4) SA 441 (SCA) at para 20 ("*Overberg*")

24 The effect of this decision is to undo the votes of the residents of Tshwane and to force fresh elections.

25 The effect of this decision from a constitutional standpoint is extraordinary.

25.1 Local government is one of the three spheres of government created by the Constitution. Section 41(g) of the Constitution sets out the general rule that neither the national nor provincial sphere of government may encroach on the functional or institutional integrity of a local government.

25.2 Section 139(1)(c) of the Constitution provides an exception to this is. It allows a provincial government to dissolve a municipality where the municipality has failed to fulfil an executive obligation in terms of the Constitution (or legislation) and where there are exceptional circumstances justifying the dissolution. This is the most drastic remedy a provincial government has to interfere in a municipality.

26 On this basis alone, the present case is an exceptional one. The dissolution decision held to be unlawful by this Court involved the most serious incursion into the autonomy of the Tshwane Municipality and electorate imaginable. For that dissolution decision to remain operative and in effect ending appeal would seriously aggravate the incursion concerned and breach the rights of the citizens of Tshwane to have in place the municipal government they elected.

The extraordinary power wielded by the administrator

27 Until such time as the appeal is decided in favour of the applicants, or a fresh by-election is held, the administrator is in complete control of every aspect of the functioning of the Municipality.

28 Section 35(1) of the Structures Act provides that if a municipal council is dissolved the MEC for local government must appoint one or more administrators and must define their powers via a notice published in the provincial gazette.

29 I have not been able to locate any notice defining the administrator's powers. If it exists, I invite the respondents to put it up.

30 All I have been able to find is a document, annexed marked **FA6**, ("the Authorisation") in which Mr Nawa purports to set out the authority and priorities of his administration. I do not traverse the validity of this document. However, it shows the extent of the power the administrator purports to wield. Specifically, it sets out that he assumes:

30.1 all executive functions of the Council.

30.2 all statutory functions of the executive mayor.

30.3 the power to appoint a municipal manager.

30.4 all fiscal and management functions of the Municipality.

30.5 all governance systems including oversight over his administration.

30.6 the authority to approve all decisions of the municipal manager.

30.7 the authority to develop a turnaround strategy for the municipality.

30.8 the authority to prepare the municipal valuation roll.

30.9 the authority to review the organisational structure of the municipality.

30.10 the authority to assess and negotiate contractual relationships with service providers.

30.11 the authority to review and finalise all litigation.

31 Given the dissolution of the Council (and as I explain in greater detail below), there is no oversight over the exercise of this power.

The timelines

32 If this application is not granted, the effect will be that an unelected Administrator will be in total control of every function of the Municipality, for an indeterminate period of time. For the reasons set out below, there is a real risk that he will remain in control of the Municipality for the bulk of the remainder of this Municipal Council's term, which is due to end when the next local government elections are held in 2021.

33 In terms of section 159(2) of the Constitution, if a municipal council is dissolved in terms of national legislation an election must be held within 90 days of the date that it was dissolved. The MEC confirmed in his media statement of 5 March 2020 that the election would be held within 90 days of the dissolution.[2]

34 The by-elections for the Council were due to be held on 10 June 2020. However:

34.1 On 4 May 2020, to curb the spread of the coronavirus, the Electoral Court authorised the holding of these elections beyond the period of 90 days contemplated in the Structures Act, but not beyond 120 days of the date

[2] Annexure "FA5" to the main application, pp 001-113 to 001-114.

of the Electoral Court's order. A copy of this order is annexed marked **FA7**.

34.2 This means that the holding of the relevant by-elections may already occur as late as 1 September 2020 (120 days from 4 May 2020).

34.3 However, the order specifically grants the applicants leave to approach the court on the same papers for an extension of the period within which by-elections may be held.

34.4 It is virtually inevitable that the fresh by-elections will not be held by 1 September 2020. It has been credibly reported that the government expects the COVID-19 pandemic to peak in September 2020. I annex, marked **FA8**, an article from The Citizen in which the National Department of Health is quote indicating that the coronavirus outbreak in South Africa will not reach its peak until early September 2020.

34.5 If so, there is virtually no prospect that the by-elections will be held before September. It is overwhelmingly likely that they will again be postponed, into 2021.

35 Fresh local government elections are due to be held in 2021. I expect, based on previous election dates, that the 2021 local government elections will occur in April or May 2021. Assuming that the by-elections are not held this year, that will mean that the Administrator will remain in control of the Municipality for the bulk of the remainder of this Council's term; and far in excess of the 90 day period contemplated by the Constitution.

36 It is impossible to tell how quickly the appeal will be determined:

36.1 The Gauteng Province has sought leave to appeal directly to the Constitutional Court on an urgent basis seeking the setting aside of this court's order.

36.2 However, the Province is alert to the possibility that it will not be permitted to bypass the Supreme Court of Appeal and go directly to the Constitutional Court on an urgent basis. As a result, it has also brought a "conditional application for leave to appeal", which it will argue before this Court, to seek leave to appeal to the Supreme Court of Appeal, if the Constitutional Court dismisses its application for direct appeal.

36.3 The Economic Freedom Fighters and all councillors who are members of the EFF have followed the same process as the Gauteng Province: they have sought direct leave to appeal to the Constitutional Court; and have sought conditional leave to appeal to the Supreme Court of Appeal from this Court. They have done so despite the fact that they were properly cited and served with the papers in this court but did not file any notice of intention to oppose and did not participate actively in the hearing before this court.

36.4 Remarkably, the EFF and its councillors do not say a single word in their applications for leave to appeal to explain their failure to oppose the application before this Court. I submit that this demonstrates that the EFF is not serious about opposing the relief that this court granted. Instead it is entering the matter at this stage to secure a political advantage by extending the period during which the administrator remains in control of the municipality.

36.5 Neither the Provincial Executive nor the EFF and its councillors has given any indication that they intend to conduct their application for leave to appeal in this Court or in the SCA urgently.

36.6 As a result, if the Constitutional Court does not grant the application for direct appeal, they will then have to go through the process of obtaining the leave of this court, and if that leave is refused (as is likely), will petition the Supreme Court of Appeal for leave to appeal. If the SCA refuses that application, they will no doubt approach the Constitutional Court again for leave. If the SCA grants the application there is no indication in the conditional application for leave to appeal that they intend to prosecute it as an urgent appeal. As a result, there can be no assurance that any appeal will be decided as a matter of urgency.

36.7 It would be surprising if these convoluted appeals processes are concluded within a year.

37 The fact that the Provincial Executive and EFF and its councillors have sought urgent leave for a direct appeal to the Constitutional Court does not change the position:

37.1 First, the Constitutional Court has repeatedly held that it is not well suited to disposing of urgent matters and is unlikely to convene urgently for the purpose of disposing of this one, particularly in circumstances in which its ability to function and operate is severely constrained as a result of the coronavirus pandemic.

37.2 Second, even if the by-elections occur before the determination of the appeal, that weighs in favour of the grant of the section 18 order. If the by-elections occur before the appeal has been decided and the appeal fails, any by-elections results would have to be set aside and the IEC and the State (and numerous political parties) would have incurred the cost of conducting unnecessary by-elections only for those to be set aside and the existing municipal council to be restored in their positions.

38 As a consequence, it is highly likely that, if the Judgment is not implemented pending the appeal, the Administrator will remain in control for the bulk of the remainder of the term of this local government, and far in excess of the 90 day period contemplated by the Constitution. The effect will be to frustrate the effect of this Court's order and render it meaningless in the applicants' hands.

Conclusion on extraordinary circumstances

39 I therefore submit that the facts of this matter are truly exceptional:

39.1 The decision to dissolve the municipality is the most drastic step possible that a province can take in interfering into the affairs of a municipality. In itself this renders the matter exceptional.

39.2 As a result of the dissolution decision, the municipality is governed by the administrator, who wields extraordinary power to control every aspect of the municipality's function, including its constitutionally original legislative and executive functions. He does so in circumstances in which there is no accountability or oversight over his conduct whatsoever.

39.3 As a result of the convoluted appeal procedures pursued by the Gauteng Province and the EFF and its councillors, together with the effects of the coronavirus, the administrator will be in total control of every function of the municipality for an indeterminate period of time, which will extend far beyond the 90 day period contemplated by the Constitution. It may result in an unelected administrator remaining in power for the majority or the whole of the remainder of the term of the municipal council.

39.4 If that is permitted to occur, the judgment which the DA and its councillors obtained from this court will become meaningless in its hands and be rendered moot. And the rights of the citizens of Tshwane will have been violated without any remedy.

IRREPARABLE HARM TO THE APPLICANTS AND THE RESIDENTS OF TSHWANE

40 If the order is not put into operation pending the appeals, the applicants will suffer the following irreparable harm during the interim:

40.1 First, there is severe harm to the separation of powers and the autonomy of local government.

40.2 Second, allowing the Dissolution Decision to remain in force pending appeal has potentially devastating consequences for the City’s finances.

40.3 Third, the administrator is currently in a position to take decisions and make commitments that will bind the municipality for all future purposes, even after his departure when the appeal fails. This form of harm is

irreparable. It is particularly unacceptable given that the administrator has never been elected; was appointed by the Gauteng Province, which is governed by the African National Congress, which did not win a majority to govern Tshwane in the last municipal elections; and because the administrator is exercising his powers effectively in secret, with no duty to account to anybody and no oversight over his conduct.

40.4 Fourth, despite demands, the administrator refuses to pay the councillors' salaries. As a result, councillors are unable to meet their financial obligations or support their families during this interim period.

40.5 Fifth, under the administrator, the council has effectively ceased to function and respond to its residents and it is clear that the administrator has failed to put in place any plan to do so.

The separation of powers harm

41 The dissolution decision has self-evidently severe consequences for the separation of powers and democracy.

41.1 Local government is an important repository of grass roots democracy.

41.2 The residents of Tshwane are entitled to be represented and governed by their elected officials, not by an administrator appointed by the provincial government.

41.3 It is highly relevant that the provincial government is controlled by the political foes of the applicants who, the High Court found, had deliberately sought to make Tshwane ungovernable in the first instance by unlawfully

walking out of meetings to break the quorum and prevent decisions from being taken.

41.4 As set out above, if the order is not put into operation, this severe separation of powers harm will prevail for an indeterminate period.

41.5 In the meantime, the administrator wields vast power. In particular he has the power to spend money and to adjust budgets. Naturally, his decisions may differ from those of the elected government and may or may not be consistent with their policies or priorities. Either way, upon its return when the appeal is dismissed, Council will be forced to deal with the consequences of any decisions taken by the administrator.

42 For so long as this Court's order is suspended by the appeal, this harm is perpetuated and continues.

The risk to the City's finances

43 Allowing the section 139 Dissolution Decision to remain in force pending the appeals also has potentially devastating consequences for the City's finances.

44 The City has issued a number of credit notes of a value R2,17 billion. In terms of those notes, a dissolution of the Municipal Council in terms of section 139 of the Constitution is an event of default, which entitles the noteholders to exercise their rights. The City may accordingly become immediately liable to repay billions of rands if this Court's order setting aside the Dissolution Decision is not put into operation pending the appeal. I attach an extract from the 2019 financial statements which confirms this as Annexure **FA9**.

45 This risk is particularly acute at the moment given the considerable liquidity constraints in the markets as a result of the economic challenges being faced. In light thereof lenders may well wish to exploit the opportunity to seek to claim back the money concerned from the City.

Decisions that bind the City going forward

46 The administrator is unelected and unaccountable. Yet he wields extraordinary power over the Municipality for so long as the order of this Court remains suspended due to the appeal. It is utterly untenable that, pending the determination of the appeals, he should be permitted to continue to make decisions on behalf the Municipality, which do not accord with the will of the electorate.

47 The most problematic category of decision that the administrator has the power to continue to make are those which that will bind the Municipality even after the appeal is unsuccessful and the elected councillors return to office. Those decisions will then be imposed on the Council, subverting the democratic will of the people even once their elected councillors are returned to office.

Approval of budget

48 Section 16 of the MFMA requires the Council to approve the budget for the Municipality before the start of the municipality's financial year. The Municipality's budget in this instance is meant to be tabled, debated and finalised by the Council during May 2020.

49 Section 23 of the MFMA then requires the Council to consider the views of the local community relating to the budget. This is done through a public participation

process and once that public participation process has been completed, the Council must give the mayor an opportunity to respond to the submissions, and if necessary to revise the budget and table the amendments for considering by the Council.

50 The approval and finalisation of the Municipality's budget is an important decision that is taken by the Council after consulting with the residents of the Municipality. The MFMA provides for strict timelines and processes within which the Municipality must approve its annual budget.

51 Given that the Municipality is under administration and the Council has been dissolved, the Council will not have an opportunity to debate the budget for 2020/2021 and approve the integrated development plans ("IDP") and the medium term revenue and expenditure framework ("MTREF") for 2020/2021.

52 Regulation 6.7.4(b) of the directions issued to address, prevent and combat the spread of COVID-19 in South Africa issued in terms section 27(2) of the Disaster Management Act 57 of 2002 directs municipalities to ensure that communities are consulted, using media platforms, to provide comments on the draft IDP and budget for the municipality. A copy of these amended regulations is annexed as **FA10**.

53 There is no indication that the public participation meetings regarding the annual budget and the IDP have been arranged, as the administrator has not communicated this to the residents of the Municipality. Even if the administrator were to do so, what is clear is that he has no mandate from the citizens of Tshwane and is not accountable to them – he is appointed by the Provincial Government.

54 If this public participation process does not take place and a budget is not approved by the Council, the Municipality would have contravened the provisions of the MFMA in this instance.

55 Worse than this, if the administrator approves the budget without oversight from the Council (and the relevant oversight council committees), when the Council finally resumes office after the appeal is dismissed, it will be saddled with the consequences of this.

56 The Council will have no alternative but to comply and work in accordance with that budget, even though it had no control over the adoption of that budget. The residents of the Municipality will also be subject to a budget that they were not consulted on prior to its approval.

The appointment of a municipal manager

57 The power to appoint a municipal manager vests in a municipal council. The municipal manager is a critical position in a municipality. He serves as the head of the administration of the municipality and is responsible for the development of an economical, effective, efficient and accountable administration. Once appointed by the Administrator, the Municipal Manager cannot be removed when the Council comes back into office after the appeal is dismissed.

58 The appointment of a municipal manager would tie the Council's hands and force it to rely on a key official which it did not select or appoint.

59 Therefore, the assumption of this power will cause irreparable harm to the applicants and is inconsistent with the caretaker nature of the administrator's authority.

Preparation of the municipal valuation roll

60 The municipal valuation roll is an instrument contemplated by section 30 of the Local Government: Municipal Property Rates Act. It determines the value of each property in the municipality. As such, it essentially determines the value of the rates the Municipality will collect.

61 Valuations rolls are typically in force for four years and are always valid for a full financial year.

62 As such, the administrator's determination of the valuation roll will bind the Council on its return. It will also have significant and prolonged effect on the Municipality as well as its ratepayers.

63 Therefore, the assumption of this power will cause irreparable harm to the applicants and is inconsistent with the caretaker nature of the administrator's authority.

Assessing and negotiating contractual relationships with service providers

64 I do not know precisely what the Administrator is doing in relation to contractual relationships. This is because he has not accounted at all to the parties that were in the now-dissolved Tshwane Council or the citizens of Tshwane.

65 Should the administrator enter in binding agreements with services providers this will tie the hands of the Council upon its return.

66 What is more, the award of these contract may well provoke litigation from suppliers seeking to review and set aside the relevant decision. This litigation will

not be finalised within the interim period and will become the problem of the elected government.

67 Therefore, the assumption of this power will cause irreparable harm to the applicants and is inconsistent with the caretaker nature of the administrator's authority.

Review and finalisation of pending litigation

68 I also do not know precisely what the Administrator is doing in relation to pending litigation. Again this is because he has not accounted at all to the parties that were in the now-dissolved Tshwane Council or the citizens of Tshwane.

69 Any decision taken in respect of pending litigation are likely to bind the elected government upon its return. In fact, it may be entirely impossible to reverse many of these decisions.

70 Therefore, the assumption of this power will cause irreparable harm to the applicants and is inconsistent with the caretaker nature of the administrator's authority.

The development of a turnaround strategy and the review of the Municipality's organisational structure

71 Yet again, I do not know precisely what the Administrator is doing in relation to the turnaround strategy and the review of the Municipality's organisational structure. Again this is because he has not accounted at all to the parties that were in the now-dissolved Tshwane Council or the citizens of Tshwane.

72 The development of a turnaround strategy is also not consistent with the administrator's caretaker capacity. The implementation of a broad turnaround strategy will limit the capacity of Council's ability to implement its own strategy on its return. At the very least this is likely to lead to significant wasted expenditure.

73 Similarly, should the administrator restructure the Municipality this will tie the hands of the Council upon its return.

74 Therefore, the assumption of this power will cause irreparable harm to the applicants and is inconsistent with the caretaker nature of the administrator's authority.

Other decisions with future consequences

75 The administrator has commenced a process to fill certain vacancies in the Municipality. In the light of there being no approved budget in place, it is unclear how these new advertised positions would be funded once they are filled. A copy of these advertised position is annexed as **FA11**.

76 But more importantly, because of the lack of accountability and transparency under which the administrator operates, it is simply impossible for the applicants to know with any certainty whether he has taken or is other decisions with long-term financial and other consequences. For all the applicants know, he could be entering into agreements on behalf the Municipality; procuring goods and services on behalf of the Municipality; selling Municipal assets; or hiring new employees. It is simply impossible to know. Yet any such decision will be

enforceable against the Municipality in future, including after the appeal fails and the Councillors return to office.

77 From annexure FA6 it also appears that the administrator intends to take the following steps which will have a lasting impact, tie the hands of the elected government, and be inconsistent with his caretaker role:

77.1 Fast tracking the recruitment of service personnel including establishing an in-house security service.

77.2 Re-evaluating the Municipality's ICT infrastructure including determining whether this should be in-house or outsourced.

77.3 Determining the panel for legal service providers.

77.4 Determining contracts for: vehicle fleet providers; ICT providers; and broadband providers.

77.5 Reengineering supply chain management structures and processes.

77.6 Restructuring the metropolitan police department.

77.7 Approving the Municipality's spatial development framework.

77.8 Approving the 2020/2021 integrated development plans and budgets.

78 Should the decisions outlined above be taken, the Council will be forced to adhere to them or reverse them. The decision may be financially impossible, or they may diverge from the Council's strategy and priorities. They may be legally bound to adhere to them.

79 To make matters worse, there has not been any proper public participation in these contemplated decisions.

Absence of accountability and oversight

80 The Council is supposed to be accountable to the residents of the Municipality and all council documents and decisions taken should be available to the residents of the Municipality at all times. Currently there is no evidence to indicate that decisions or resolutions taken by the administrator are published. There is also no political oversight to any of these decisions taken by the administrator.

81 Since the administrator took office, none of the resolutions relating to any potential projects have been published on either the Municipality's website or placed on the Municipality's central repository, and as things stand no one in the Municipality has any information as to the decisions that are being taken by the administrator in the Municipality. The management of the Municipality is currently being done by the administrator (without any transparency) and there is no accountability towards the residents in the Municipality.

82 The Audit and Performance Committee that initiates forensic investigations within the Municipality accounts directly to the Council. With no Council in place the Audit and Performance Committee cannot fulfil its functions and duties. It cannot provide its reports to the City Manager who then needs to implement the recommendations within these reports.

83 If the orders are not put into operation, this will stymie current corruption investigations initiated as a result of the previous ANC administration's

maladministration of the Municipality from being finalised. These investigations include the finalisation of several contracts such as the appointment of PEU Capital Partners (Pty) Ltd that the province blames this Council for, even though it was concluded under the previous ANC-led Council.

84 There is also no oversight by the Municipal Public Accounts Committee while the Council is dissolved.

85 The absence of these oversight committees demonstrates the fundamental problem: the administrator is fulfilling both executive and oversight functions simultaneously. Even if the 139(1)(c) decision was justifiable, the Constitution only contemplates that such a situation will prevail for a maximum of 90 days. If this application does not succeed, it will last for a much longer time than 90 days.

86 As things stand, the administrator and his staff are largely accounting to the themselves because it is impossible for the Gauteng Province to replace the crucial work that is done by the various oversight committees.

The salaries

87 On 25 March 2020 the DA wrote to the administrator explaining that the councillors remain entitled to their salaries and benefits and demanded that these be paid on time. The administrator refused to do so.

88 Following the Judgment, on 1 May 2020, the DA again demanded that salaries and benefits be paid. A copy of this demand is annexed marked **FA12**.

89 At a meeting between the administrator and the Speaker of the Council ("the Speaker") held on 4 May 2020 the administrator undertook to investigate the non-

payment of Councillors' salaries and revert to the Speaker by the end of 4 May 2020.

90 On the same day (4 May 2020), the DA sent a follow up letter to the administrator requesting confirmation that Councillors' salaries had been paid as required by paragraph 5.2 of the order in the Judgment. A copy of this letter is annexed marked **FA13**.

91 On 5 May 2020, the Speaker sent a letter to the administrator confirming the important aspects of what was discussed in their meeting of 4 May 2020. A copy of this letter is annexed marked **FA14**. A confirmatory affidavit deposed by the Speaker is also annexed to this application.

92 On 7 May 2020 the administrator indicated that the councillors' salaries would be paid. However, to date no councillors have received their April salaries.

93 It appears that the Administrator now takes the view that that because of the pending applications for leave to appeal, he will not pay any further salaries. That means that May 2020 salaries will not be paid, nor will any salaries for as along as this matter takes to resolve.

94 The failure of the administrator to pay the councillors' salaries is causing ongoing, serious and irreparable prejudice to the councillors.

95 Although some councillors are full time and others are part time, all of them receive remuneration. Full time councillors receive monthly salaries of between R 64 068,20 and R 87 522.00 depending on whether they hold additional positions (such as members of the mayoral committee and committee chairs) and part time councillors receive R 32 583.387

96 The majority of councillors rely exclusively on this remuneration to support themselves and their families. While the needs of each councillor will vary, they include:

96.1 Rent or bond payments for their residences.

96.2 Payments for water, electricity, and municipal rates.

96.3 School and university fees for their dependents.

96.4 Medical aid.

96.5 Groceries.

97 Councillors cannot seek employment while the appeal is pending, because, if the appeal is unsuccessful, they will return to office as councillors. As set out below, many of them continue to serve their constituents. What is more, it is not practical or ethical for councillors to seek employment knowing that, should the appeal succeed, they would be forced to leave such employment to return to their duties as councillors.

98 In any event, this the worst possible time to be seeking alternative employment:

98.1 The economy is in freefall, and unemployment is skyrocketing. Very few employers will consider taking on new employees in these circumstances.

98.2 It is practically impossible to seek new employment at least until the national lockdown has ended and the South African economy has begun to improve.

99 Councillors are also not entitled to compensation from the unemployment insurance fund.

100 Therefore, if this application is not granted the councillors will lose a significant portion of their income. They will be unable to satisfy their creditors, pay school fees or home loans, or buy groceries. The irreparable harm to the councillors and those who depend on them is palpable.

The Administrator's failure to establish alternative systems to perform the work of Councillors

101 The administrator has not put in place any system or structure to replace the work done by councillors to represent their ward constituents. This work includes:

101.1 Escalating service delivery concerns raised by residents.

101.2 Addressing the deaths of indigent people.

101.3 Providing proof of residence which is needed to apply for social relief.

102 The critical role of ward councillors has become even more apparent in the light of the national lockdown as numerous residents did not have adequate access to food or the means to apply for social relief or essential worker permits.

103 The administrator has failed to establish systems to handle municipal complaints and issues from residents. As a result, residents have flooded their local ward councillors with complaints, which fall into the following categories (i) leaking sewerage; (ii) burst water pipes; (iii) street lights not working; and (iv) incorrect

billing related to water and electricity consumption. I attach a copy of the complaints submitted to councillors during the last few days as annexure **FA15**.

104 The residents sent all these complaints to their local ward councillors. The ward councillors would normally assist the residents in addressing the complaints and disputes by escalating (and addressing) them with the relevant department within the Municipality on behalf of the residents. With the Council having been dissolved and the ward councillors being out of work, they cannot assist the residents with any of these issues. It is left to the administrator to do this and the administrator does not have any systems in place to handle these complaints.

105 By contrast, once this Court's judgment is put into effect, the applicants are ready and able to take leadership of the Municipality and return it to stability.

105.1 Prior to the MEC announcing the Gauteng EC's intention to apply for leave to appeal, the applicants had begun preparing to recommence governing the Municipality.

105.2 On 4 May 2020 the Speaker met with the administrator to discuss the transfer of authority to the Council.

105.3 The Speaker informed the administrator of her intention to call a Special Municipal Council meeting on 9 May 2020 to elect an executive mayor and appoint an acting municipal manager.

105.4 The administrator indicated that he intended to support all plans to get the Council functioning but advised he was awaiting a directive from the provincial executive regarding the Judgment, which he hoped to receive by 6 May 2020.

105.5 The Speaker confirmed the discussions of this meeting in a letter dated 5 May 2020, which is already annexed above as FA14. In her letter the Speaker also requested that the administrator issue a notice calling a Special Municipal Council meeting for 9 May 2020. This never occurred.

106 These efforts show that the applicants are able to ensure a proper, democratic, government is returned to the Municipality.

THE RESPONDENTS WILL NOT SUFFER IRREPARABLE HARM

107 There is no basis to believe that any of the respondents will suffer irreparable harm if the Judgment is implemented.

108 The general position is that a municipality is governed by its elected municipal council. An intervention by a provisional government is an exceptional situation. Implementing the Judgment would preserve the general position pending the outcome of any appeal process.

109 What is more, the root cause of the difficulties faced by the Council was the failure of the ANC and EFF councillors to attend and remain in attendance at Council meetings.

110 The Judgment includes a mandatory interdict compelling those councillors to attend meetings. As such it is most unlikely any of the past difficulties will recur.

111 The ANC and EFF councillors will also not suffer irreparable harm. The Systems Act imposes a clear obligation on councillors to attend and remain in attendance at Council meetings. Therefore, requiring them to do so does not cause any

harm. On the contrary, granting leave to execute will result in them being paid their salaries.

112 Therefore, implementing the Judgment will not cause any irreparable harm to any of the respondents.

THE PROSPECTS OF SUCCESS ON APPEAL

113 I am advised that this court will also have regard to the prospects of success in the pending appeal in determining whether to grant or refuse an operation order.

114 The Gauteng EC has put forward its case on appeal in its application for leave to appeal directly to the Constitutional Court, the body of which is attached to this affidavit. I submit that this court should have regard to the body of that affidavit for the purpose of assessing the prospects of success on appeal.

115 The Gauteng EC's affidavit in the Constitutional Court directs vitriol at the applicants and at the judgment of this court and is full of righteous outrage. But it is notable primarily because of the extent to which it is based upon misrepresentations, omissions and misunderstandings of the facts, of the judgment of this court, and of the correct legal position. I am advised and submit that once those misunderstandings and misrepresentations are cleared away, very little remains of the proposed appeal.

116 This Court gave careful and clearly substantiated reasons for its decision. The ratio of this court's judgment was the following:

116.1 This court held that it was common cause that the municipal council had reached a deadlock and that the reason for the deadlock was the walkout

from council meetings by ANC and EFF councillors depriving the municipality of its quorum (judgment of this court paras 7 and 8).

116.2 This court held that the jurisdictional facts which must be established in order to trigger section 139(1)(c) are inability or failure to fulfil an executive obligation and exceptional circumstances (judgment of this court para 35).

116.3 The court held that there must be an objective correlation between the dissolution and the fulfilment of the stated executive obligation. This is a function of rationality, and follows from the language of the section (judgment of this court para 35).

116.4 As a result, it is necessary to identify the relevant executive obligation in order to allow the court to determine whether such had been breached and to determine whether the objective jurisdictional fact was present justifying the dissolution (judgment of this court paras 37 and 38).

116.5 The first occasion upon which the relevant executive obligations were attempted to be identified by the respondents was in the answering affidavit (judgment of this court para 41).

116.6 The purported reliance on these obligations in the answering affidavit was too vague to allow the court to determine whether any executive obligation had not been fulfilled (judgment of this court para 43).

116.7 This court then conducted a careful analysis of the pleadings in relation to each of the grounds relied upon by the Gauteng EC for the purpose of determining whether it had been established on the papers that any one

of them demonstrated a failure by the municipality to fulfil an executive obligation (judgment of this court paras 47 to 80).

116.8 This court held correctly that on the pleadings, no proper case had been made out by the Gauteng EC.

116.9 This court held that the section required the province to demonstrate that it had considered and rejected less intrusive means such as those contained in section 139(1)(a) and (b) of the Constitution. This the Province did not do (judgment of this court paras 81 to 88).

116.10 This court held that the dissolution decision must be capable of resolving the relevant executive obligation which it was found had not been fulfilled (judgment of this court paras 89 to 94).

116.11 The court expressly declined to make any finding on the procedural fairness ground of review or the allegation of ulterior purpose (judgment of this court paras 104 to 106).

117 The heart of this Court's judgment was the straightforward application of the Plascon-Evans rule to the pleadings. This Court held that the Gauteng EC had failed to demonstrate that there was a failure to fulfil an executive obligation on the part of the Municipal Council sufficient to justify dissolution of the Council (Judgment of this Court, paragraphs 47 – 80). The Province therefore failed to establish the jurisdictional fact necessary for the exercise of its power to dissolve the Council.

118 Given the careful and narrow basis upon which this court found and substantiated its order, the contents of the Gauteng EC's application for leave directly to the Constitutional Court is surprising and contrived.

118.1 The Gauteng EC addresses vast swathes of its affidavit to the issue of procedural fairness (application for leave to appeal at paras 11, 39, 43, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100). Bizarrely, the majority of the application for direct leave to appeal is aimed at attacking the DA's argument on procedural rationality. But this court expressly did not decide that point and devoted only a single paragraph of its judgment to the issue (judgment of this court para 104). That paragraph says only that this court declined to make any finding on the issue.

118.2 The Gauteng EC accuses this court of introducing "*a free-wheeling proportionality analysis for reviews under the principle of legality – itself a sea change in administrative law"* (application for leave to appeal at para 14). But this is a fundamental misrepresentation of the legal consequences of this court's judgment. This court did not make any finding with consequences for legality review in general. This Court's judgment is specifically located within the text and context of a decision to dissolve a municipal council under section 139(1)(c). Its analysis and findings are based squarely on the text of that section. It is the section, not this Court, which requires that any intervention must be appropriate but also that exceptional circumstances must be present before dissolution is permissible.

118.3 The Gauteng EC says that the requirement of proportionality *"finds no support in section 139(1)"* (leave to appeal para 17). Again it ignores the text which requires appropriate steps and exceptional circumstances.

118.4 The Gauteng EC's application for leave to appeal goes on at length about the distinction between review under the principle of legality and under administrative action, saying that the standard of review of a decision under section 139(1)(c) is rationality (application for leave to appeal paras 38 and 39). This is correct as far as it goes. But it omits the fact that it was also a review for legality: in other words, failure to comply with the provisions of section 139(1)(c), properly interpreted.

118.5 And in addition, rationality review is not identical in respect of each and every executive decision which is being subject to review. An executive decision occurs in a particular statutory context. This court had to interpret section 139(1)(c), not merely apply the ordinary test for review of the exercise of public power. As a result, this court did not lay down a general approach for conducting all future rationality reviews. Its judgment is limited to the question of whether the province had complied with section 139(1)(c) of the Constitution.

118.6 The Gauteng EC's submission to the Constitutional Court to the effect that this court extended all of the requirements of section 139(1)(c) to every rationality or legality review (paras 39 to 41 of the application for leave to appeal) is an obvious misrepresentation of this Court's findings. It seeks to divorce this court's findings from the particular constitutional context in which it occurred.

118.7 The Gauteng EC then conducts an extended attack, not on this Court's reasons, but on the DA's approach in its heads of argument – which are clearly irrelevant for the purposes of leave to appeal, which lies against the order and reasons of this court not against the approach taken by the DA in its heads of argument (application for leave to appeal at para 43-44).

118.8 The Gauteng EC says, with apparent astonishment, that based on this court's reasoning, before it may dissolve a municipality, a provincial government must identify specific statutory provisions and constitutional obligations; and must go even further and determine whether or not the obligation is executive. It makes the submission as if this court had invented this requirement out of thin air (application for leave to appeal paras 45 to 51). But the requirement that an executive obligation must be breached is expressly provided for in the text of the constitutional provision. It was not invented by this court. It is the approach of the Gauteng EC which is divorced from the text of section 139, not that of this court or the judgments which this court relied upon.

118.9 The Gauteng EC then complains that this court accepted that the council's leadership was deadlocked. It concludes that the court should have stopped there and found that as soon as a council is deadlocked, a dissolution decision by the province is justified (application for leave to appeal para 57). Truly, this would be "free-wheeling" license for provincial dissolutions of municipalities: on this version, the text of section 139 may be disregarded, and as soon as a council deadlocks, it may be dissolved.

118.10 The Gauteng EC asserts that any one of the nine unfulfilled obligations it relied on in the dissolution decision would have justified dissolution (again without attempting to pin any one of them to any particular statute or provision of the Constitution) (Application for leave to appeal at paras 65 to 75). But it once again wishes the facts it wants to rely on into existence. As this court held and as we made clear in the carefully pleaded paragraphs of our heads of argument before this court, there was simply no proper factual basis on any of the nine reasons for this court to find a failure of an executive statutory or constitutional obligation sufficient to justify dissolution.

118.11 The Gauteng EC accuses the DA of reading into the section a requirement that it must be shown that the decision will ensure that the relevant obligation will be fulfilled and calls this *"an unprecedented requirement of but for causation for executive decision-making"* (leave to appeal para 43). But of course, once again the Gauteng EC has lost sight of the text of section 139 which specifically provides that the appropriate steps must *"ensure fulfilment of that obligation"*.

119 There is also one extraordinary (and no doubt deliberate) omission from the Gauteng EC's application for leave to appeal to the Constitutional Court.

119.1 It disregards, almost entirely, the cause of the collapse of functioning of the Tshwane Municipal Council. It was common cause on the papers before this court that the deliberate conduct of EFF and ANC councillors in collapsing the quorum of meetings had resulted in the inability of the council to function as a deliberative body.

119.2 This omission verges on constituting a misrepresentation: the Gauteng EC informs the Constitutional Court, for example, that the meeting in January 2020 collapsed (at paragraphs 23 – 27 of the application for leave). It pointedly declines to explain what was common cause on the papers, and not denied by the councillors themselves – namely that the collapses were a deliberate strategy to cause chaos and anarchy by the EFF and ANC councillors

120 We accordingly submit that the application for leave to appeal, while dressed up in colourful and emotional language, is ultimately doomed to failure.

120.1 It misrepresents and omits critical facts which constituted the basis of this court's decision.

120.2 It misreads and distorts the effect of this court's judgment.

120.3 It's primary concern is procedural fairness, an issue not reached by this court.

120.4 It fails to recognise that the decision being reviewed was not any ordinary executive decision such as the setting of export policy or a decision to implement electronic tolling systems. This is a decision which occurred in a particular constitutional context and is the most drastic intervention by one level of government possible.

120.5 It ignores the text of section 139(1)(c) while accusing this court of doing the same.

120.6 Most fundamentally, it disregards entirely the primary basis of this court's finding, namely its careful assessment of the facts according to the Plascon-Evans rule.

121 I am accordingly advised and submit that the prospects of the appeal are very poor. This weighs heavily in favour of granting the order in terms of section 18.

CONCLUSION

122 In the light of what is set out above the applicants have shown that they are entitled to have the Judgment implemented pending the finalisation of any appeals.

123 Therefore, the applicants are entitled to the relief sought.

WHEREFORE I pray that the application be granted as prayed for

_____
RANDALL MERVYN WILLIAMS

I hereby certify that the deponent knows and understands the contents of this affidavit and that it is to the best of the deponent's knowledge both true and correct. This affidavit was signed and sworn to before me at _____ on this the ____day of MAY 2020, and that the Regulations contained in Government Notice R.1258 of 21 July 1972, as amended by R1648 of 19 August 1977, and as further amended by R1428 of 11 July 1989, having been complied with.

_____
COMMISSIONER OF OATHS
Full names:
Address:
Capacity: