



Date:	14 July 2020
To:	Hon Thembeni Nxangisa MPL MEC for COGTA Free State Province
Cc:	Hon Sisi Ntombela MPL The Premier Free State Province
Cc:	Kopung Ralikontsane Director General Free State Province
From:	Hon Leona Kleynhans MPL Member of the Official Opposition Free State Provincial Legislature
Subject:	Maluti-a-Phofung Municipality Intervention

Dear MEC Nxangisa,

1. I am extremely disappointed in the decision of the Free State EXCO to lift the Section 139(1)(b) intervention in Maluti-a-Phofung Municipality as of 1 July 2020. I believe that this decision is irrational as the objectives of the Terms of Reference as signed by the Premier Sisi Ntombela, and as assented to by Minister Dr Zwelini Mkhize on 20 March 2018 have not been met. The Municipality remains in a financial crisis as specified in Section 138 of the Municipal Finance Management Act 56 of 2003.

1.1. In his letter to Premier Sisi Ntombela, as presented in the Maluti-a-Phofung Council on 17 April 2018, Minister Mkhize specifically makes reference to the following (hereinafter referred to as Annexure "A"):

"The serious financial problems in the municipality, which have had a severe negative impact in its service delivery mandate."

"(b) Since this intervention was prompted by the municipality's financial problems, the provisions of 141 and 145 of the Municipal Finance Management Act of 2003, relating to recovery plans, should apply."



“Prioritise the signing of a realistic re-payment plan between Maluti-a-Phofung and Eskom to avoid the disrupting of electricity supply by Eskom scheduled for 23 March 2018 due to the R2,7b outstanding debt owed by Maluti-a-Phofung”.

- 1.2. I submit to you that the serious financial problems in the Municipality remain, and that these problems continue to have a severe negative impact in its service delivery mandate. No re-payment plan was entered into with Eskom, and Maluti-a-Phofung continues to make insignificant payments to Eskom despite the debt now having grown to R5,3b.
2. On 22 October 2018, the High Court in Bloemfontein issued an order confirming a settlement agreement between *Harrismith Business Forum and Thirteen Others vs Eskom SOC Limited and Twelve Others*, with Case No 1453/2018 (hereinafter referred to as Annexure “B”). The agreement states:

“The municipality and the administrator hereby acknowledge and admit that:

1.1 as a result of a crisis in the financial affairs of the municipality, the municipality is in serious and persistent breach of its obligations - 1.1.1.1 to provide basic services; and 1.1.1.2 to meet its financial commitments; and 1.1.2 unable to meet its obligations and financial obligations;’

1.2 all the jurisdictional facts for a mandatory intervention in terms of section 139(5) of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) and section 139 of Local Government: Municipal Finance Management Act, Act 56 of 2003 (‘the MFMA’) are present.”

- 2.1. This judgement also ordered that a consultative committee be established under chairmanship of the Minister of COGTA to include: *“2 representatives of the Municipal Finance Recovery Service, 2 representatives of Free State Provincial Government, 2 representatives of National Government, 2 representatives nominated by Eskom, 2 representatives nominated by Nersa, 2 representatives of the municipality, and 5 representatives of the applicants”*. The purpose of this consultative committee was intended to lead to the adoption of a recovery plan, and the implementation of steps to achieve the financial recovery of Maluti-a-Phofung and its ability to pay its debts to Eskom.
- 2.2. To date no agreement could be reached on the recovery plan.
- 2.3. It is clear that all parties to this settlement were in agreement that the conditions in Maluti-a-Phofung were such that Section 139(5) of the Constitution must be implemented. The court ordered a reprieve, during which the consultative committee could try to find a solution to the financial crisis in Maluti-a-Phofung. No solution has been found.
- 2.4. On reading the court judgement, it is clear that lifting the intervention, before a recovery plan is agreed upon by the Consultative Committee, and implemented by government, would be in breach of the court order.



2.5. Section 138 of the MFMA –

“Section 138 - Criteria for determining serious financial problems

When determining for the purposes of Section 137 the seriousness of a financial problem, all relevant facts must be considered, and the following factors, singly or in combination, may indicate a serious financial problem:

- (a) *The municipality has failed to make payments as and when due;*
- (b) *The municipality has defaulted on financial obligations for financial reasons;*
- (c) *The actual current expenditure of the municipality has exceeded the sum of its actual current revenue plus available surpluses for at least two consecutive financial years;*
- (d) *The municipality had an operating deficit in excess of five per cent of revenue in the most recent financial year for which financial information is available;*
- (e) *The municipality is more than 60 days late in submitting its annual financial statements to the Auditor-General in accordance with Section 126;*
- (f) *The Auditor-General has withheld an opinion or issued a disclaimer due to inadequacies in the financial statements or records of the municipality, or has issued an opinion which identifies a serious financial problem in the municipality;*
- (g) *Any of the above conditions exists in a municipal entity under the municipality’s sole control, or in a municipal entity for whose debts the municipality may be responsible, and the municipality has failed to intervene effectively, or*
- (h) *Any other material condition exists which indicates that the municipality, or a municipal entity under the municipality’s sole control, is likely to be unable for financial reasons to meet its obligations”.*

2.6. I would state without fear of contradiction that all of the above conditions continue to exist, which continues to make an intervention in terms of Section 139(5) of the Constitution mandatory.

3. On 19 April 2020, former Administrator Blake Mosley-Lefatola, appointed in July 2019 in terms of a Joint National Provincial Intervention, signed his Close-Out Report for Maluti-a-Phofung Municipality in terms of Section 139(1)(b) intervention (hereinafter referred to Annexure “C”). In this report Mr Lefatola states:

3.1. *“It is our considered view that to restore MaP to a position of financial sustainability, customer centric and sustainable service delivery within a framework of compliant corporate governance, is a project which will take a minimum of two years”.*

3.2. **“Financial Management.**



One of the most critical challenges facing the municipality relates to financial management which could only be described as catastrophic. The following as at the end of July 2019 provides an insight into the financial affairs of MAP:

- There was very little revenue collection i.e 30% in 18/19 financial year with the municipality relying primarily on the Equitable Share to cover its operational expenses.*
- There was a backlog of third party payments who were owed R10m.*
- SARS was owed R72m.*
- Creditors were owed approximately R4,6b (Eskom debt R4,2b, DW&S R346m and other service providers R124m).*
- Debts owed to the municipality in total was R1,3b (Business owe R320m, Govt owes R289m, Residential R723m) The municipality is thus insolvent in that the Liabilities far exceeds its Assets.*
- Absence of Debtor and Creditor Strategy.*
- Poor financial controls and accounting. The last audited statement was for the financial year 2016/17, and the 2017/18 and 2018/19 audited financial statements were outstanding.*
- An unfunded and deficit budget for the 2019/20 financial year.*
- Abuse and mismanagement of supply chain management processes*
- Outdated valuation roll.*
- Outdated asset management register.*
- Backlog in billing for approximately 8 months”.*

3.3. The Close-Out Report proceeds to detail various actions which have been undertaken to improve the financial situation in the Municipality. On page 18 the report states as follows:

“However, this progress pales in comparison to the remaining outstanding challenges that first and foremost indicate that the municipality is still financially bankrupt. Its liabilities still exceed its assets.”

“Secondly, the municipality – despite the modest improvement in revenue collection over this 8-month period – still does not generate enough monthly income to cover its monthly expenditure. There continues to be an over-reliance of the quarterly equitable share to cover salaries and other operational expenditure. Limited cash flow or no cash at all prohibits investment in service delivery initiatives. A significant milestone would be if the municipality can generate enough revenue on a monthly basis to cover its monthly expenditure. It is advisable that the municipality and council adopts a Financial Revenue Recovery Plan which will indicate a roadmap of how finances are to be improved including the tabling of monthly revenue targets that are to be achieved”.

3.4. The Close-Out Report further asks the following question:



“Should the Section 139(1)b into MaP be revoked?”

“Taking all the above into consideration, the immediate revocation of the Section 139(1) b intervention may be premature and runs the risk of reversing the few gains that have been made”.

‘It may be more prudent and practical to allow the intervention continue for a further period – preferably up until the commencement of the 22/23 financial year or until after the next local government elections- where after a further review can take place to assess whether a revocation should be effected. This will allow both Provincial and National Government to continue to direct and oversee the recovery process within the municipality, to assess whether there is a continued upward trend towards recovery or whether there is a regression and a slide back to the past”.

“As the information contained in this report firmly indicates, despite the limited progress registered within this short time, the municipality is far from being out of the hoods”.

3.5. It is clear that Mr Lefatola is of the opinion that revoking the Sec 139(1)(b) intervention in Maluti-a-Phofung would be reckless, and that in fact a Section 139(5) intervention should be instituted.

4. Maluti-a-Phofung Council irregularly appoints a MM and CFO (hereinafter referred to as Annexure “D”):

Despite the clear instruction contained in the Section 139(1)(b) terms of reference as tabled in the Maluti-a-Phofung Council on 17 April 2018 (Annexure “A”) that: *“The Department of Cooperative Governance and Traditional Affairs (COGTA) has since appointed Mr Moses Moremi, as EXCO Representative that will be exercising both the executive and legislative powers of the Maluti-a-Phofung Council on the behalf of the Free State Executive Council”*, the Maluti-a-Phofung Council, at a Special Council meeting convened on 26 March 2020, proceeded to appoint a MM, Mr Mothamaha, and a CFO, Ms Mazinyo (Baleni). MEC Nxangisa attended this Council meeting. Council clearly did not have the executive powers to appoint a MM or a CFO. Neither do the appointees possess the necessary qualifications to undertake the highly complex recovery of Maluti-a-Phofung Municipality.

5. On 25 March 2020, MEC Nxangisa signed an appointment letter, appointing Mr Amos Goliath as the new administrator in Maluti-a-Phofung (hereinafter referred to as Annexure “E”). The attached document titled; *‘Administrators powers and functions for Maluti-a-Phofung Local Municipality’*, differs substantially from the original intervention document signed by Premier Sisi Ntombela in 2018. It can be argued that this is an entirely new intervention.

6. On 11 June 2020, MEC Nxangisa responded to a question I had filed on 27 May 2020 on the replacement of the administrator in Maluti-a-Phofung (hereinafter referred to as Annexure “F”). In the response, the MEC stated that Mr Lefatola had been employed in the Office of the Deputy President, that Council had the authority to appoint a MM and Senior Manager in terms of interim regulations issued by the Minister of COGTA, and that a due diligence study on the water entity,



and a reviewed organogram had not been tabled in Council. The MEC furthermore reported that the current collection rate in the Municipality was 40% - despite this being calculated seven months earlier. The MEC reported the current total debtors as R1,8b and the current total creditors as R5,3b. The MEC also reported the current debt to Eskom as R5,3b.

7. Based on the responses provided to this question, it is clear that a severe financial crisis still prevails in Maluti-a-Phofung Municipality.
8. Progress Report on Section 139(1)(b) of the Constitution Intervention in Maluti-a-Phofung Municipality to the NCOP Select Committee on Cooperative Governance and Traditional Affairs (Water and Sanitation and Human Settlements) by HA Goliath, Administrator on 12 June 2020 (hereinafter referred to as Annexure "G").
 - 8.1. During this presentation, Mr Goliath revealed allegations of extreme political interference, illegal payments to contractors, reversals of suspensions, the newly 'appointed' MM and CFO starting duties without the knowledge of the then Administrator, changing of signatories on bank accounts, payments made without supporting documentation, fraudulent increases in their own salary packages by new MM and CFO, etc.
 - 8.2. The report states as follows:

"Major risks identified by the administrator include:

 - *Uninterrupted delivery of potable water.*
 - *Uninterrupted delivery of electricity.*
 - *Servicing Eskom debt.*
 - *Cash flow management and financial sustainability.*
 - *Political interference in administration.*
 - *Employee costs and claims against municipality.*
 - *Pending legal action by Harrismith Business Forum.*
 - *Pending legal action by ALPA (urgent court interdict application for non-compliance with a court order to keep NMD for industrial area in Harrismith below 9MVA – 2/6/2020.*
 - *AFRI – Electricity distribution licence.*
 - *If the intervention is to continue, there is a need for clarification of role of/need for Administrator in Section 139(1)(b) intervention by governments role players and legislature".*



8.3. In addition to these issues, it should also be noted that 70% of pre-paid customers in Maluti-a-Phofung are not paying for electricity. The combination of illegal connections, and non-paying pre-paid customers' means that the system is severely overloaded resulting in transformer explosions and power outages lasting for days. This has resulted in the Municipality having to order an additional 60 transformers for the winter months.

9. In its report to the NCOP Select Committee on 12 June, Eskom explains all the actions it has undertaken to assist and support Maluti-a-Phofung to repay its debt (hereinafter referred to as Annexure "H"). However, Maluti-a-Phofung Municipality is not even paying its current account, thus the debt to Eskom continues to grow exponentially:

- *"MaP overdue debt increased from R92m as at March 2013 to R4,8b as at January 2020".*
- *"Due to the payment holiday taken by the municipality, the debt has grown exponentially".*
- *"Due to no payment arrangement and non-service of the current account, interest charges are astronomical".*
- *"The debt has grown by R1,1b since March 2019".*
- *"The only substantial payment made was on the return of the attached assets, which was about 30% on the month consumption".*
- *"MaP have a payment level of only 6% comprising of payments made by the 12 applicants as per court order – which is about R6m per month - is less than 5% of the monthly consumption of MaP and Municipal direct payments – approximately R2m per month."*

10. On 22 June, I wrote to the Minister of Finance, and National Treasury, alerting the Minister to the unfunded budget again adopted by the Maluti-a-Phofung Council (hereinafter referred to as Annexure "I"). The budget proposes a R790 million deficit which translates to 29% of budgeted expenditure, unrealistic revenue projections, R1,8m irrecoverable debtors, non-payment of Eskom, huge increase in councillors remuneration, Council contesting the appointment of a valuer, Maluti-a-Phofung water bank account has been attached by SARS, etc.

11. Conclusion:

11.1. Despite all of the above which confirms the extremely dire situation in Maluti-a-Phofung Municipality you confirmed to the Public Accounts Committee on 10 July 2020 that the Section 139(1)(b) intervention in Maluti-a-Phofung has been lifted and the administrator withdrawn.

11.2. It is very clear that although there has been a slight improvement in the financial situation in Maluti-a-Phofung, these improvements hardly constitute a tremendous success. In fact, to revoke the intervention now is premature, reckless and irrational.



11.3. I put it to you MEC that if your intention is to resume the industrial scale looting of the period 2013-2018, then this lifting of the intervention will certainly achieve that goal.

11.4. If, however, your intention is to protect the residents of Maluti-a-Phofung from a failed Municipality and the resultant failure of services, as envisioned by Section 139 of the Constitution, then it is clear that Section 139(5) must be instituted immediately to protect the small achievements of the intervention team, and continue the restitution of proper systems of government and financial control.

11.5. I hereby request that you will, with the powers vested in you through Section 139 of the Constitution, immediately institute Section 139(5) intervention in Maluti-a-Phofung. The relevant section reads:

*“(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 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 the 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

(iii) 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”.

11.6. Should this intervention not be announced within 14 working days, by the 31 July 2020, I shall be forced to request that a national intervention in terms of Section 139(7) of the Constitution be instituted.



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11.7. I would also again reiterate my view that the lifting of the Sec 139(1)(b) intervention in Maluti-a-Phofung Municipality, is in breach of an order of the High Court in Bloemfontein on 22 October 2018.

11.8. In addition to the matters set out in this letter, I urge you to also consider the pending internal disciplinary proceedings, the investigations underway by the Special Investigating Unit and the Priority Crime Investigating Directorate into activities during the period 2013 to 2018, and an investigation currently being undertaken by the Public Protector into the expenditure of disaster funding and conditional grant funding during the period 2015 to 2019.

11.9. I trust that, in view of the current situation in Maluti-a-Phofung, and the injunction conferred on provincial and national government by Section 139 of the Constitution, that they must intervene in such a situation, and the fact that you have no choice but to institute Section 139(5), you will do so without delay.

Yours faithfully,

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