GAUTENG PROVINCE
CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS
REPUBLIC OF SOUTH AFRICA

Media Statement on the Constitutional Court judgment pertaining to the decision of the Gauteng Executive Council to dissolve the municipal council of the City of Tshwane Metropolitan Municipality

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Let us welcome you all to this important media briefing, called to publicly announce our response in relation to the Constitutional Court's Judgment pertaining to the decision of the Gauteng Executive Council on 4 March 2020 to dissolve the Municipal Council of the City of Tshwane Metropolitan Municipality and the subsequent public disinformation campaign embarked upon by the opposition to the Provincial Government following the release of the Judgment.

Firstly, it is imperative to underscore that the Provincial Government respects the Constitution as the supreme law of the land and embraces the principle of separation of powers. We also recognise and appreciate the important role of the judiciary as the custodian of the rule of law.

The historical background that led to the EXCO decision to dissolve the Municipal Council of the City of Tshwane is well established and will, for the sake of convenience, not be repeated here, safe to once again patently note that the dysfunctionality, over many months, which paralysed the Municipal Council to the point it was unable to fulfil its executive obligations in terms of the Constitution and legislation, left the EXCO with no option but to intervene in terms of section 139(1)(c) of the Constitution and dissolve the municipal council accordingly. In fact, it is common cause that all the Courts (the North Gauteng High Court, The Supreme Court of Appeal and now the Constitutional Court) confirmed that the municipal council was dysfunctional, deadlocked, and paralysed.

It is therefore worrying and disconcerting that opponents of the Provincial Government are now deliberately spewing a false narrative by going on various public platforms to create the impression that the Con Court has issued only one "unanimous judgment" that found the dissolution decision of EXCO unlawful. This is completely devoid of any truth and should be rejected. In fact, such

uncouth behaviour borders on ill-discipline and shows a great disrespect towards the Con Court as a whole. In the circumstances, we deem it appropriate to convey to the public, as we hereby do, the real and irresistible facts pertaining to the Con Court judgment. Firstly, the Con Court did not deliver one "unanimous judgment". The Court handed down three judgments and to that end, to put the matter in perspective, we deem it also appropriate to borrow verbatim from the Court's summary of these three judgments:

"In the **[first] judgment** penned by Mathopo AJ (with Khampepe J, Majiedt J, Theron J and Victor AJ concurring), the Constitutional Court had to determine whether the dissolution decision was lawful and whether the mandamus granted by the High Court was an appropriate remedy. The Court identified four jurisdictional facts, in terms of section 139(1)(c) of the Constitution, that had to be established for the dissolution decision to be lawful. The first was the establishment of a failure to fulfil an executive obligation. The second was the taking of an "appropriate step". The third was the existence of exceptional circumstances, and the fourth was that the exceptional circumstances had to warrant the dissolution. The Court found that three of the jurisdictional facts had been established, but that the dissolution was not warranted in the circumstances. Thus, the dissolution decision was found to be unlawful. As for the remedy, the Constitutional Court set aside the High Court's mandamus and substituted it with an order compelling the MEC to invoke his powers in terms of item 14(4) of Schedule 1 of the Systems Act, appointing a person or a committee to investigate the cause of the deadlock of the municipal council.

The **second judgment** penned by Jafta J (with Mhlantla J and Tshiqi J concurring) identified that the collapse of council meetings revealed a deep-rooted inability to address political issues within the Council, leading to its dysfunctionality. As from November 2019, the Council was unable to take any decision for months, including those necessary for the fulfilment of executive obligations, until the provincial executive of Gauteng intervened pursuant to section 139(1) of the Constitution and dissolved the Council in March 2020.

The second judgment held that the discretion conferred upon a provincial executive by section 139(1) was wide. The section required that "any appropriate" steps were to be taken. A dissolution of the Council would have been an appropriate step if it was likely to fulfil the executive obligation and exceptional circumstances warranted the dissolution. The second judgment therefore disagreed with the finding made by the High Court and the majority judgment that the dissolution was not appropriate because there were other steps which the Province could have taken to address the issue of non-fulfilment of executive obligations. The second judgment held that once the conditions for dissolution

were met, there can be no sound basis to hold that the exercise of the power to dissolve the Council was unlawful or inappropriate.

The second judgment further addressed the High Court's failure to determine the remaining grounds of review, namely that the dissolution was procedurally unfair and irrational, and that the Gauteng Provincial Government was actuated by an ulterior motive in taking the decision to dissolve the Council. On the basis of the rule that our courts decline to decide on appeal issues not determined by the court of first instance, the second judgment considered it fair to limit the reversal of the High Court's order to the extent of its decision and remit the remainder of the matter to the High Court.

In the result, the second judgment would have granted an order granting leave to appeal, upholding the appeal, setting aside the order of the High Court, and remitting the matter back to the High Court for determination of the other grounds of review.

In a **[third] judgment**, Mogoeng CJ (with Madlanga J concurring) said that while he agrees that a failure to fulfil an executive obligation and the existence of exceptional circumstance are preconditions for a proper or appropriate dissolution in terms of section 139(1)(c), he disagrees that section 139(1)(a) and (b) are indispensable preconditions to dissolution. He held that there are cases where (a) and (b) must first be explored and section 139(1)(c) resorted to only if (a) and (b) fail to yield the desired result. The correct approach is in his view the adoption of an option that would realistically result in the executive obligation being fulfilled.

He agrees that the dissolution of the municipal council was extraordinary but contends that it was the only appropriate and effective remedial step to take in view of the municipality's undisputed dysfunctionality. He held that time simply does not permit the luxury of overly protracted litigation that could otherwise have been effectively ended by this Court's just and equitable order. In his view, both the High Court order and that proposed by the main judgment constitute a constitutionally impermissible encroachment into the terrain exclusively reserved for the Executive.

He held that he would accordingly grant leave, uphold the appeal and set aside the order of the High Court with no order as to costs, but order the DA to pay the EFF's costs, including costs occasioned by the employment of two counsel."

In light of the above it is very clear that the Court was not unanimous in its Judgements, but the Court was *ad idem* (in agreement) that that the Municipal Council was dysfunctional, that it failed to execute

its executive obligations and that exceptional circumstances existed. The first judgment was, however, of the view that the Province should have invoked or explored less intrusive means (such as providing support to the municipality in terms of section 154(1) of the Constitution or taken active steps by engaging the municipality in accordance with relevant provisions of cooperative governance as embedded in Chapter 3 of the Constitution, other than dissolving the municipal council, and hence, notwithstanding the fact that exceptional circumstances existed, found that the dissolution was not warranted. The second and third judgments, however, respectfully disagreed with the reasoning of the first judgment in this regard. The reasoning of the second and third judgments penned by Jafta J and Mogoeng CJ, respectively, is very sound and it is no wonder that the opponents of the Province deliberately choose to refrain from mentioning same.

They will therefore be well advised to read all three Judgments properly instead of going on an unbecoming misinformation campaign to deceive the public.

We appreciate that before reaching its decision, the Court had regard to the Constitutional framework in which the respective spheres of government must operate. The Court reaffirmed that ours is a government consisting of 3 spheres, which are distinctive, interdependent, and interrelated. Further, that ours is a constitutional democracy that must be nurtured by encouraging cooperative governance amongst the 3 spheres. The Constitution undeniably obligates each sphere to provide effective and efficient services to the public. It goes without saying that each sphere does not exist in a vacuum, but within a context of service delivery to the people. Failure to provide these services on its own is a failure to meet the constitutional obligations and is a violation of the Constitution, the rectification of which resides with another sphere of government. It is common cause that the Con Court recognised and reaffirmed this. In light thereof, the Court found that the intervention was, in all material respects, more than justified.

It is undisputed that all the Courts that dealt with this case accepted that the municipal council was dysfunctional and that despite attempts by the provincial government to intervene by taking the appropriate steps to remedy the situation, the dysfunctionality continued unabated. In all Judgements the Court also accepted that the dysfunctionality resulted in the public not receiving the services that the Constitution dictates must be provided by the municipality, meaning that the municipality was failing dismally to fulfill its executive obligations.

It must be borne in mind that those who were failing in their constitutional obligations to the people of Tshwane will not accept the reasoning of the Court. They also would not accept the fact that the Court,

in all three Judgements, found that Council was severely dysfunctional. What they fail to recognise or conveniently overlook is that the first judgment took an approach that serves to guide government on how to manage the tensions that exist between the different spheres, especially where one sphere is failing the people. On this premise, the first judgment took an approach that more patience must be exercised, albeit with rigorous interrogation of the issues. In this way, the preservation of the autonomy of the 3 spheres and the principles of co-operative governance would be sustained better. However, the third judgment, eloquently penned by the Chief Justice, debunked this reasoning of the first judgment, affirming that given the state of dysfunctionality of the Council, the Province was justified to act in the manner that it did. He concluded that by the afore-mentioned reason alone, the Province was justified and lawfully entitled to dissolve the Municipal Council.

Accordingly, and having studied the judgment, the MEC will consult the Premier and EXCO on the way forward, especially on the Order that the MEC must invoke his powers to conduct a full investigation into the cause of the deadlock and dysfunctionality of the Municipal Council of the City of Tshwane.

In closing, we would like to categorically refute and dismiss the constant, unfounded attacks on the competency and integrity of the team of Administrators deployed in Tshwane for the duration of the intervention. This was a team of technically proficient, qualified, skilled, seasoned Administrators who restored stability and governance to the City of Tshwane, whilst working amidst the unique environment of Covid-19, hence one of them is still continuing to help the City of Tshwane in the position of Acting City Manager.

Despite the mischievous insinuations and conjecture, they managed the finances of the municipality in a responsible, reasonable, and above reproach manner, with large creditors such as Eskom and Rand Water having been paid in full during the period in which they ran the municipality, all other creditors having been paid within 30 days and the repayment of loans and payments being up to date. The debtors and creditors book of the municipality were impeccably managed, and they left the municipality in a sound financial position, contrary to the fallacious narrative that we have seen being continuously promulgated.

Thank you

Contact:

Castro Ngobese
Spokesperson: MEC for Human Settlements, Urban Planning and CoGTA
Mobile: 0609977790
Email: castro.ngobese@gauteng.gov.za