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BER – IN THE MEDIA – 20 JULY 2026

Municipal curators: The banking lesson SA's cities need

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South Africa faces challenges with failing municipalities. But unlike the well-established system of appointing curators for failing banks, municipal interventions are hampered by complex legal frameworks and political constraints, often leading to inefficient outcomes.

- *This article first appeared in News24 on 20 July 2026*

Successive finance ministers have found the problems of municipalities very frustrating. "Every year, we're fighting with municipalities," Enoch Gondongwana was heard to remark during the latest, bruising round, after the announcement that 69 municipalities would have their July equitable shares withheld due to non-compliance.

In contrast, when a bank fails, the finance minister appoints a professional curator on the advice of the banking regulator, and the curator gets on with the job. The extent of the finance minister's "fight" typically amounts to having to do little more than sign a letter. Court attempts to halt curatorships usually fail.

South Africa has developed one of the world's more effective bank-resolution frameworks. Yet when municipalities fail, causing far greater and more direct harm to ordinary citizens, we rely on an intervention system so legally complex and politically constrained that it often fails before it begins.

Bondholders in African Bank pretty much got all their money back, as did the ordinary people that deposited their hard-earned money in VBS. City of Johannesburg ratepayers have not been quite so fortunate.

While a failing bank is a problem, a failing municipality is arguably even more serious. People go without electricity, water and sanitation; public money goes missing.

If a bank fails, it gets a curator. They (it is often actually a team) assume the management of the bank. The curator has sweeping powers to renegotiate contracts, investigate malfeasance and generally do whatever is necessary to get the bank back on its feet. Our curatorship powers closely mirror those used internationally, and so foreign bank shareholders understand the system well. Where there have been court challenges, these have almost always found in favour of the curator. It is similar in insurance.

And if a municipality fails? Well, it is not even clear what it gets. One court case – **the Executive Council of the Western Cape Province and Others vs Kannaland** – spent an inordinate amount of time trying just to correctly define what an "administrator" is and when one could be appointed.

The courts have found the law to be fiendishly complex, unnecessarily so.

The starting point is section 139 of the Constitution, which lets a province step in when a municipality fails. Potentially the first problem is that the Constitution assumes that the province is the first line of defence. With provinces themselves under administration and in messy coalitions, these powers of intervention are probably best exercised by the national government. The Constitution does allow for this in section 139(7), and indeed even compels the national government to act if the province is dragging its feet.

But then things get worse.

There are multiple possible scenarios, each with its own trigger, its own procedure and its own safeguards. An ordinary failure to fulfil an executive obligation falls under section 139(1); a failure to adopt a timeous a budget falls under 139(4), which forces the council to be dissolved; and a genuine financial crisis falls under 139(5). At least section 139(4) and (5) interventions have subsidiary legislation to guide us. Section 139(1) has no accompanying legislation - the department of Cooperative Governance and Traditional Affairs (COGTA) has been working on a draft bill for about a decade. This is partly why so much discretion is left to the provincial minister, the National Council of Provinces (NCOP) and Minister of COGTA.

Which subsection applies decides everything that follows – who must act, whether the council must be dissolved, whether the province has a veto, and whether the (NCOP) has to be informed. Interventions have often been set aside because the many complex boxes in the law were not ticked.

The courts have repeatedly complained that there is no coherent framework tying this together. In the **Overberg** and **Mnquma** matters they found the wording uncertain and its application inconsistent. And because it is almost always the province that must hold the pen, interventions tend to turn on political appetite rather than the merits of the case.

For instance, in cases like Makana and, more recently, **Ngwathe**, residents and civil-society groups had to go to court to compel a reluctant province to act at all, while in the case of the 2021 Tshwane dissolution, the Democratic Alliance argued that that the province was overreaching itself and enthusiastically trying to destablise an opposition-run metro.

National Treasury has made significant strides towards harmonising the system of interventions. A Municipal Financial Recovery Service (MFRS), established at the National Treasury under Chapter 13 of the Municipal Finance Management Act (MFMA), must prepare a financial recovery plan for a distressed municipality and monitor how it is carried out.

But it is a pale shadow of a curatorship. It acts only on request; its plan still has to be implemented by the very council whose failures made it necessary; and it runs on a very small permanent staff, leaning on seconded experts - where it can find them. It can advise, but it cannot take over. Nobody steps in to assume management, renegotiate the contracts and chase down the missing money the way a bank curator does.

A curator system can easily be created within the confines of the Constitution. Arguably section 139(1)(b) creates the ability for the provincial or national government to take over municipal functions. But the MFMA doesn't quite go far enough in explaining *how*. A simple way would be for the law to prescribe that the National Treasury can appoint a curator who assumes the functions of the municipal manager and CFO – the two functionaries that are at the front-line of delivery.

Because most municipal failures ultimately become fiscal failures, the National Treasury already possesses the relevant expertise through the MFRS and is better placed than provincial administrations to oversee financial turnarounds.

A curator would not replace democratic accountability or elected councils. But it would ensure that the professional administration responsible for finances and service delivery could keep functioning while political disputes are resolved. This would give the national government far more power to take early steps to turn around our failing municipalities.

The other lesson from bank curatorships is that you must intervene early – before there is nothing left in the vault. The same applies in municipalities, intervening when a municipality is on the way down will make a turnaround a lot easier than waiting for it to crash, as the law currently requires. This would hopefully leave the Minister of Finance with fewer fights.

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