



cooperative governance

Department:
Cooperative Governance
REPUBLIC OF SOUTH AFRICA

Application of Section 139 of the Constitution

Select Committee: Cooperative Governance and Traditional Affairs

23 July 2019



Overview of Presentation

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Background:- Constitution

- ❖ Section 139 of the Constitution provides that when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the provincial executive (PEC) may intervene by taking any appropriate steps to ensure fulfilment of that obligation;
- ❖ Section 139 of the Constitution prescribes five methods or instruments in which the PEC may invoke an intervention in a municipality, namely:
 - Issuing of a Directive: section 139(1)(a);
 - Assuming responsibility: section 139(1)(b);
 - Dissolving the Municipal Council: (section 139(1)(c);
 - Taking appropriate steps to ensure that the budget or revenue-raising measures are approved: section 139(4); and
 - Imposing a recovery plan and possible dissolution of the Municipal Council: section 139(5).
- ❖ Since the advent of the Constitution, section 139 of the Constitution was first invoked in 1998 by the Northern Cape PEC. Since then to date, there have been 142 invocation of section 139 of the Constitution by the PECs across the provinces, averaging 7 municipalities per annum.
- ❖ Majority of the current 40 municipalities subjected to the interventions are in terms of section 139(1)(b) of the Constitution, thirteen of those, further subjected to section 139(5) of the Constitution dealing with financial provisions, and these provisions complemented by the provisions of the MFMA.

B2B: Municipalities that are *not* doing well: Potential targets of section 139 of the Constitution

- ❖ Serious governance, service delivery and administration challenges since 2000;
- ❖ Lack of capacity in administration, poor leadership and oversight by councils;
- ❖ High political in-fighting and instability;
- ❖ Municipalities are not stable, do not provide quality services to their communities, and are not financially viable;
- ❖ Disclaimers as audit outcomes for the past five financial years ;
- ❖ Frequent service delivery protests in the past three years in almost all the local municipalities;
- ❖ Allegations of nepotism and corruption;
- ❖ Communities demand changes in political leadership or that Province places the municipalities under section 139 administration;
- ❖ Challenges of political-administrative interface;
- ❖ Non-compliance with rules and regulations;
- ❖ High vacancy rates;
- ❖ High levels of incompetency among staff;
- ❖ Extremely low levels of capital budget spending;
- ❖ Inappropriate spending of budgets;
- ❖ Overall disregard for financial and supply chain management regulations.



Categories of the nature of problems experienced

Governance	Political infightings, conflict between top management and councillors, HR management
Financial	Fraud and misuse of municipal funds and property, lack of proper financial systems, revenue collections, A-G disclaimers, non-adoption of budget.
Service Delivery	Related to section 152/153 of the Constitution that clearly set out the service delivery obligations of municipalities



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Key Observation: Generic success and challenges

- The interventions are a solution to fixing the municipalities who find themselves dysfunctional in their operation and governance systems. Some of the main challenges or failures of the interventions are, amongst others, the following:
 - ❖ Provinces have inadequate or weak monitoring systems and are unable to monitor the performance of municipalities and support those municipalities appropriately in accordance with diagnostic outcomes of monitoring such municipalities.
 - ❖ When the PEC takes resolutions to intervene in terms of the constitutional provisions, more often than not, there are no resource allocation for the implementation of an intervention;
 - ❖ Provinces tend to deploy one person as an Administrator without concomitant experts per the diagnosis of the challenges encountered in the municipality, such as financial or human resource experts where required; and this Administrator, more often than not, relies on municipal personnel to execute his/her mandate. At times, these municipal personnel are sceptical and very reluctant, and most times, uncooperative to assisting the Administrator;
 - ❖ Relevant sector departments are not coming on board during the intervention phase, or their plans are not aligned to those of the municipalities they are servicing.
 - ❖ There is resistance and obstructionist tendencies from Municipal Councils and municipal personnel to an extent that there is no cooperation, and at times, bordering on illegal activities such as destroying documentation and issuing of illegal instructions to other municipal officials against the Administrator's work.



Key Observation: Generic success and challenges

- ❖ Lack of sound political-administrative interface impacts negatively on implementation of interventions, as at times, only a section of the municipality welcomes the intervention.
- ❖ Lack of regulatory framework or legislation to give effect to section 100 and 139 of the Constitution is contributing as a legislative vacuum.
- ❖ Except in very few instances, the vast majority of interventions were conducted in terms of the general section 139(1)(b) of the Constitution, and far much less on financial provisions, as if only pointing to mainly failures of governance.
- ❖ The simpler process of invoking a “Directive” in terms of section 139(1)(a) to deal quickly with the apparent challenges in a municipality without taking much time, were not often issued or were at least not part of the documentation for review by the Minister. The value and status of the “Directive” might need to be re-examined in terms of emphasis. Thus, provinces fail to invoke a lighter version of intervention in the form of Directive at an early stage in terms of section 139(1)(a) of the Constitution for the purpose of directing the municipalities what they should do and what they should not do before the situation could become worse in those municipalities.
- ❖ Some of the interventions could have been prevented if early effective provincial warning systems are in place, leading to proper monitoring, oversight and support. If the IMSI Bill was already an Act, this concern would probably not exist because this Bill has provisions on early warning systems.



Key Observation: Generic success and challenges

- ❖ Effectiveness of the interventions have more often than not, been questioned. Are the interventions curative; or are they reactive; or were they simply temporary take-overs for purposes not provided for in the Constitution in terms of intervention criteria, thus used for political reasons?.
- ❖ NCOP seems to have played a key role in providing objectivity, mediation, and on-site investigations. This begs the question as to whether this effective NCOP role in analysing the circumstances of the interventions, could this not be done by the provincial legislatures as part of their monitoring and assistance role?
- ❖ The limitation of section 139(1) of the Constitution to failures to fulfil an “executive obligation” led to difficulties when the provinces interpret (a) what constitutes an “executive obligation”; and (b) and what powers and functions may not be usurped by the intervention processes.
- ❖ There is uncertainties regarding the nature of, and required intensity of the intergovernmental checks and balances, i.e. the review by the Minister and the NCOP.
- ❖ There was little indication that provincial legislatures exercised oversight over the PEC’s actions in terms of section 139 of the Constitution.



Key Observation: Generic success and challenges

- ❖ Some provinces have not been able to submit regular progress reports and the final close-up reports once the interventions have been revoked for the purposes of monitoring the effectiveness of the interventions.
- ❖ The communities subjected to interventions in the municipalities have often not been informed during or when an intervention is invoked, and more particularly so where their Municipal Council is subjected to a dissolution.
- ❖ The Constitution does not prescribe the time period within which a municipality could be subjected to an intervention, particularly in terms of section 139(1)(b).
- ❖ Furthermore, there is no prescribed type of recourse and/or interventions in instances where Municipal Council fails to constitute itself to elect office bearers after Local Government Elections;
- ❖ The 28 day period for the Minister to approve or disapprove limits the Minister to conduct Minister's own investigations to gather further particulars pertaining the intervention.
- ❖ Local government oversight and support is an area where the competencies of all three spheres of government overlap. Tensions and miscommunications are inevitable.



Key Observation: Generic success and challenges

- ❖ Sometimes, the PEC would invoke an intervention at a given municipality, running for a period of six months, to a year or more, and later terminate it. Then, after several months or a few years later, the same municipality is subjected to another intervention by the PEC for reasons similar to the previous intervention.
- ❖ Most of the provincial department responsible for local government, are ill-equipped and allocated far much less budget to fulfil their mandate, and as a result, they are unable to fully implement the provisions and implications of invocation of section 139 of the Constitution.
- ❖ The review of interventions makes it very clear that the involvement of communities, local business and civil society is crucial for the success of the intervention. Most, if not all, interventions are characterised by a complete breakdown in communication between the local citizens and the municipality. An incoming administrator needs to regain the trust of the community.
- ❖ Interpretation of section 139 of the Constitution differs from one province to another, and such interpretation is subject to what the province think is right.



Key (ideal) success factors

- ❑ The review of interventions to date has led to a number of key success factors or principles that should underpin the strategy on how to approach interventions.
- ❑ Some of these principles are to be implemented through section 139(8) legislation and others through policy or through Guidelines on the application of section 139.
- ❑ The section 139(8) legislation is not in place, suffice to indicate that the Municipal Finance Management Act, 2003 deals with certain aspects of the provisions of section 139 of the Constitution, particularly on finance matters. Constitutionally and policy approach, the following aspects are critical:
 - ❖ The establishment of an early warning system for the municipal failure and distress and also emphasizing and strengthening the monitoring and support functions.
 - ❖ Intervention is a targeted response to a failure to fulfil obligations, whereby the most appropriate step is chosen out of the variety offered by section 139 of the Constitution.
 - ❖ There is clarity amongst all stakeholders on the legal basis, appropriate steps and procedural requirements of section 139 of the Constitution.
 - ❖ Provincial Executives have due regard to intergovernmental checks and balances within and outside section 139 of the Constitution.



Key (ideal) success factors

- ❖ Provincial Executives adopt an incremental approach (where appropriate) with, in principle, the issuing of a 139(1)(a) directive as a regular first step.
- ❖ There is timely submission by the PEC of complete documentation to the Minister, NCOP and Provincial Legislature.
(The effective and immediate oversight over the actions of the PEC is exercised by the Provincial Legislature.
- ❖ The NCOP guards the fair and effective implementation of the intervention by means of an objective review and by means of useful recommendations to the Provincial Executive.
- ❖ The role of the PEC and/or its representatives at the municipal level is clear for all stakeholders.
- ❖ Interventions are carried out with an 'intergovernmental approach', with the involvement of the district municipality (where applicable) as a key strategy.
- ❖ Interventions are carried out with a strong focus on participation with the local community in the implementation of an intervention.
- ❖ The PEC ensure that there is a sound exit strategy after the intervention in terms of section 139(1) of the Constitution, with a role for the district municipality in the 'after care' (where applicable).



Recommendations

- It is recommended that the Select Committee:
- (i) Notes the application of 139 of the Constitution;
 - (ii) Notes the challenges encountered in the application of section 139 of the Constitution; and
 - (iii) Supports the processing of the IMSI Bill giving effect to section 100 and 139 of the Constitution.

THANK YOU



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