



REPORT TO THE AD HOC COMMITTEE OF THE  
NATIONAL COUNCIL OF PROVINCES

MUNICIPALITIES CURRENTLY SUBJECTED TO  
INTERVENTIONS IN TERMS OF SECTIONS 139 OF THE  
CONSTITUTION AND THE MUNICIPAL FINANCE  
MANAGEMENT ACT, 2003

23 July 2019

# **APPRAISAL ON MUNICIPALITIES SUBJECTED TO INTERVENTIONS IN TERMS OF SECTION 139 OF THE CONSTITUTION, COMPLEMENTED BY THE MUNICIPAL FINANCE MANAGEMENT ACT, 2003 IN CERTAIN INSTANCES**

## **1. Introduction**

- 1.1 The report presents progress on interventions by the respective Provincial Executive Councils (PEC) in the municipalities within their jurisdictions applied in terms of section 139 of the Constitution, and in some instances, complemented by the provisions of the Municipal Finance Management Act, 2003
- 1.2 The report is prepared for the Ad Hoc Committee of the National Council of Provinces (NCOP) for the purpose of providing insight and apprise on interventions in those municipalities; and
- 1.3 Provide general analysis of the success and challenges in the application of section 139 of the Constitution.

## **2. Application of section 139 of the Constitution**

- 2.1 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 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 are complemented by the provisions of the MFMA.
- 2.2 This section 139 of the Constitution prescribe the manner and instances on which the PEC may intervene in a municipality when a Municipal Council or the municipal administration fails to execute their executive obligations in terms of the Constitution or legislation.
- 2.3 Section 139 of the Constitution prescribes five methods or instruments in which the PEC may invoke an intervention in a municipality, namely:
  - (a) Issuing of a Directive: section 139(1)(a);
  - (b) Assuming responsibility: section 139(1)(b);
  - (c) Dissolving the Municipal Council: (section 139(1)(c);
  - (d) Taking appropriate steps to ensure that the budget or revenue-raising measures are approved: section 139(4); and
  - (e) Imposing a recovery plan and possible dissolution of the Municipal Council: section 139(5).
- 2.4 The Municipal Finance Management Act, 2003 has added provisions complementing the prescripts of section 139(4) and (5) of the Constitution

alluded to above, which deals more with financial interventions into the municipalities. Other sector legislation, such as the Housing Act, 1997 and the South African Police Services Act, 1995 also makes cross-referencing to section 139 of the Constitution, calling upon either provincial Members of the Executive Councils (MECs), or the relevant Minister, to can be able to invoke section 139 of the Constitution when a particular criteria set, satisfy the invocation of such an intervention given as a mandate emanating from such legislative prescripts.

### **3. Triggers and the review of section 139 practice**

From the review of some of the section 139 interventions, it can be concluded that the nature of the problems experienced by municipalities can be grouped into the following three broad categories.

#### **(a) Governance/ Institutional**

3.1 Governance problems range from political in-fighting to political mismanagement and include incidences of Municipal Council's inability to perform as required by the Constitution or legislation, non-performance of top management and conflicts between top management and councillors. The challenge around problems of a governance nature is that these are difficult to track through monitoring systems (monitoring system has not been tailored to track governance / institutional issues and largely the focus is on financial monitoring) and often manifest themselves through administrative or financial difficulties experienced by the municipality, lack of proper organisational structure and vacant post in management position. In most instances, provinces learn of governance problems experienced by municipalities, through political channels, either by word of mouth or by the lack of decisions emanating from the municipality.

#### **(b) Financial**

3.2 The most glaring difficulty experienced by most municipalities is financial non-viability. Often this has been due to lack of adequate systems and capacity to effectively manage the financial situation at the municipality. The result is typically that the municipality does not raise sufficient revenue due to poor budgeting, poor tariff policies, weak billing systems, poor infrastructure management e.g. water losses, lack of internal control e.g. related to revenue management, fraud and misuse of municipal funds due to lack of risk

management and lack of credit control/ failure to implement credit control and debt collection policies. In most instances, financial triggers have been picked up through established monitoring mechanisms like a myriad of National Treasury financial reports and Audit reports. Since the advent of section 139(4) and (5) of the Constitution in 2003 dealing with financial difficulties, only few known invocation of these sections were undertaken, questioning why these instruments are infrequently applied.

**(c) Service Delivery**

3.3 Sections 152 and 153 of the Constitution clearly set out the service delivery obligations of municipalities. In certain instances services are not provided in a sustainable manner. Tariffs are not cost reflective. There is little or no spending on repairs and maintenance resulting in distribution losses or services not rendered. There have been no instances where lack of service delivery has triggered an intervention. This is unusual as it is certain that some municipalities are not delivering services effectively and are failing their consumers. It can be speculated that the reasons for this include:

- (i) Lack of monitoring systems relating to services delivery
- (ii) Lack of consumer empowerment
- (iii) Greater urgency of governance and administrative issues

**(d) Outcomes of the interventions**

3.4 Due to a lack of proper monitoring coupled with a lack of a regulatory framework on reporting and intervening in general, it is difficult to conclude that interventions have been successful over the years or not. There has been no empirical reports to support the notion that interventions were a success immediately after the revocation of the interventions.

**4. Applications by the Provincial Executive Council**

4.1 The prerogative to invoke section 139 of the Constitution lies with the PEC in each province. Once a municipality satisfies an intervention the criteria for the invocation of section 139 of the Constitution, the first step is for the PEC to take a resolution to intervene in a municipality within its jurisdiction. After having

taken such a resolution, the PEC must inform the Minister and the NCOP on its decision to intervene in a specific municipality. This is in terms of section 139(2) of the Constitution. The PEC would normally provide sufficient reasons to deduce why that particular municipality must be placed under an intervention in terms of section 139 of the Constitution. The Minister has 28 days to can approve/disapprove the intervention by the PEC into a particular municipality, whilst the NCOP has 180 days to consider such. The PEC has 14 days within which to inform the Minister and the NCOP of such an intervention once there is assumption of responsibility by the province into the municipal affairs.

4.2 As a norm, when the Minister approves an intervention by the PEC into a particular municipal affair, the Minister attaches conditions to the approval such as that:

- (a) The MEC, through the Administrator/Provincial Representative, must closely monitor and assist the municipality in overcoming all challenges and shortcomings as were identified in the MEC's submission to the Minister. The Administrator/Provincial Representative are further required to submit bi-monthly reports to the Technical Interventions Steering Committee (TISC), if established for this purpose, composed of national and provincial CoGTA departments, sector departments and government agencies to monitor progress, identify challenges and provide support as and when required;
- (b) The MEC must regularly informs the Minister of any further developments on this intervention, and that the Department be provided with quarterly progress reports on the intervention from the date of inception and a close-out report upon its revocation;
- (c) The Administrator and other representatives of the PEC in the municipality work together with the Back to Basics (B2B) Task Team designated in their respective province to deal with both the challenges which necessitated these interventions, and other challenges that may be identified during the course of the intervention;
- (d) The MEC closely monitors and assists the municipality in overcoming its challenges and shortcomings, guided by the B2B approach, until the

Administrator and other representatives of the PEC have fulfilled their functions, as per their respective mandates; and

- (e) The intervention ends as soon as the municipality is capable of fulfilling or exercising the obligations that were the subject of the intervention.

## **5. Terms of Reference**

5.1 One of the most important substantive documents that must be developed in the invocation of section 139 of the Constitution, are the Terms of Reference (ToRs) for the interventions, and mainly so, for the Administrator. The ToRs provides the fuller details as to how the interventions must be carried out, and all the executive obligations to be executed by the Administrator on behalf of the PEC in that particular intervention. More often than not, the ToRs are informed by the challenges that brought about the consideration of invoking intervention provisions, and they must reflect and mirror what necessitated the interventions.

5.2 Most, if not all the interventions have developed ToRs for the Administrator within which they provide the mandate of the work to be done. The ToRs are separate from a contract that is signed by the Administrator and the intervening provincial government, thus the contract deals with conditions of the (temporary) employment of the Administrator and the provincial government. In this regard, the ToRs are also used as a yardstick to monitor performance of the Administrator and progress on the application of section 139 of the Constitution.

## **6. Municipal Financial Recovery Plans**

6.1 In terms of section 139(5) of the Constitution, or the prescripts of the MFMA supporting the constitutional provisions, requires the development and implementation of a Municipal Financial Recovery Plan. After the development of this Municipal Financial Recovery Plan, it must be adopted by the Municipal Council, failing, the provincial government must make sure this plan is applied and effected in the municipality.

6.2 In other instances, given the magnitudes of challenges encountered in a particular municipality, the PEC would direct on the development of a Municipal

Recovery Plan for that municipality. This financial and/or recovery plan is an instrument used to monitor progress on mitigating against the reasons for intervening in that municipality.

- 6.3 In terms of the report obtained from the National Treasury as a responsible organ of state for the development of the Municipal Financial Recovery Plans in terms of the MFMA, half (20) of the municipalities subjected to the interventions in terms of section 139 of the Constitution have been assisted by the National Treasury to develop such since 2018. Their implementations varies from one municipality to another.

## **7. Interventions Task Teams and Municipal visits**

- 7.1 Most of the provinces establishes Interventions Task Team/Committee in the province once there is an intervention in a municipality, composed mainly of the provincial government officials, mostly from provincial CoGTA's, national representatives (B2B and Interventions units), provincial and National Treasuries, municipal employees and the appointed Administrator, amongst others. The Task Team would normally hold monthly meeting on these interventions, and provide progress reports on the success of the interventions, and most importantly, on the challenges still being encountered in the municipality. Thus, the monthly Task Team meetings are a mechanism wherein monitoring and mitigating against those challenges are being undertaken. Municipal site visits are carried out as and when necessary by the provincial and national government. Reports are generated as to the progress of interventions in such municipalities. Some of the Task Team meetings are held directly within the intervened municipal space.
- 7.2 The NCOP has developed a system of undertaking an *in-loco* inspection of the intervention once the intervention has been pronounced and the PEC has duly informed the NCOP. Because the NCOP has 180 days to can approve/disapprove the intervention of the PEC into the municipalities, the NCOP sends a delegation to go and inspect and interrogate the reasons provided for the intervention. It is at this points that the Department also follows through on this standardized NCOP *in-loco* visits as and when there is an intervention in any municipality. Thus the Department derives some monitoring,

and a sense of current conditions and circumstances in the municipalities at the time of an intervention. The Minister is given 28 days to approve/disapprove an intervention as a result, the Minister does not have enough time latitude to can fully satisfy whether the interventions reasons provided by the PEC are sufficient enough to can investigate the causes of the municipal failures.

## **8. Monitoring steps**

- 8.1 In the absence of systematic mechanism to support municipalities under intervention, provinces tend to use different approaches depending on availability of funds. Provinces with capacity as part of their ongoing support, second technical staff to provide dedicated support where necessary. The weakest link in providing support are the sector departments. Most often than not, their support plans are not in line with the immediate needs required to turn around the municipality.
- 8.2 Support to a municipality under administration is regarded as add-on to their plans and options, although the Constitution prescribes that the decision to take over administration of municipality is a collective decision of the PEC constituted of the Premier and all MECs of sector departments. The MEC responsible for local government is merely implementing that decision and in many cases, these MEC are left alone to deal with challenges even though they may be related to such powers and functions as water and sanitations, roads, transport or finance related challenges. Failures of section 139 interventions are attributed to lack of proper planning and monitoring by the PEC prior and during its decision on how resources in monetary value or technical support would be deployed to the municipality.

## **9. Successes and failures of Intervention**

- 9.1 The success of interventions is usually evident during the period of interventions. For example, recently Mafube appointed a Municipal Manager after more than 5 years without one, however the municipalities is still under serious financial distress. Another success of intervention is uMzinyathi DM and Edumbe LM where there is an improvement in financial management and officials are made to account.

9.2 However, after revocation and or termination of an intervention, some, if not most municipalities tend to regress and or be at worse a situation than they were prior the interventions. For instance Ditsobotla LM, Tswaing LM; and Mpofana LM have been placed under interventions for more than once and it appears that Water Service Authority (WSA) Districts are the culprits of interventions with Umzinyathi DM and Ngaka Modiri Molema DM having been subjected to intervention more than 2 times.

## **10. Status of Intervention**

10.1 Over the past 2 financial, there has been an increase in number of municipalities placed under administration in terms of the section 139 of the Constitution for various reasons, with challenges ranging from lack of service delivery, financial mismanagement, and poor governance, political instability and administration deficiencies. Financial mismanagement and failure to pay creditors, salaries and third parties at these municipalities is a big challenge.

10.2 Currently, there are 40 municipalities across the country subjected to interventions in all the 9 provinces, with the North West and KwaZulu-Natal having the highest number of interventions in their municipalities at 13 and 10 respectively. Annexure A the table below provides a brief on each municipality and progress on intervention in terms of section 139 of the Constitution.

## **11. Key observation on interventions and generic challenges experienced during the invocation of section 139 of the Constitution**

11.1 The interventions are a solution to fixing 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:

- (i) 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.
- (ii) 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.
- (iii) 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.

- (iv) 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.
- (v) 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.
- (vi) Lack of sound political-administrative interface impacts negatively on implementation of interventions, as at times, only a section of the municipality welcomes the intervention.
- (vii) Lack of regulatory framework or legislation to give effect to section 100 and 139 of the Constitution is contributing as a legislative vacuum.
- (viii) 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;
- (xi) 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.
- (x) 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.
- (xi) 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?.

- (xii) 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?
- (xiii) 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.
- (xvi) 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.
- (xv) There was little indication that provincial legislatures exercised oversight over the PEC’s actions in terms of section 139 of the Constitution.
- (xvi) 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.
- (xvii) 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.
- (xviii) 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).
- (xxi) 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.
- (xx) 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.
- (xxi) Local government oversight and support is an area where the competencies of all three spheres of government overlap. Tensions and miscommunications are inevitable.

- (xxii) 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.
- (xxiii) 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.
- (xxiv) 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.
- (xxv) 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.

## **11. Key (ideal) success factors**

11.1 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 of the Constitution. The section 139(8) legislation is not in place yet, 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:

- (a) The establishment of an early warning system for the municipal failure and distress and also emphasizing and strengthening the monitoring and support functions.
- (b) 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.
- (c) There is clarity amongst all stakeholders on the legal basis, appropriate steps and procedural requirements of section 139 of the Constitution.

- (d) PEC have due regard to intergovernmental checks and balances within and outside section 139 of the Constitution.
- (e) PEC adopt an incremental approach (where appropriate) with, in principle, the issuing of a directive in terms of section 139(1)(a) of the Constitution as a regular first step.
- (f) There is timely submission by the PEC of complete documentation to the Minister, NCOP and Provincial Legislature when invoking an intervention.
- (g) The effective and immediate oversight over the actions of the PEC is exercised by the Provincial Legislature.
- (h) 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 PEC.
- (i) The role of the PEC and/or its representatives at the municipal level is clear for all stakeholders.
- (j) Interventions are carried out with an 'intergovernmental approach', with the involvement of the district municipality (where applicable) as a key strategy.
- (k) Interventions are carried out with a strong focus on participation with the local community in the implementation of an intervention.
- (l) The PEC ensure that there is a sound exit strategy after the intervention in terms of section 139 of the Constitution, with a role for the district municipality in the 'after care' (where applicable).

### **13. North West municipalities: Peculiarity**

13.1 CoGTA North West was issued with a directive as part of the section 100 of the Constitution invoked in that province due to its failure to support municipalities. As a preliminary step towards measures for municipal good governance, the former MEC CoGTA issued a "Directive" in terms of section 139(1)(a) of the Constitution to all the 22 municipalities in North West province.

13.2 The "directive" to all those municipalities required the municipalities to address the following matters:

- (i) Post Audit Action Plans;
- (ii) Appointment of senior managers;
- (iii) Acceleration of spending on infrastructure grants;
- (iv) Development of financial recovery plans;
- (v) Review of bloated municipal organizational structures;

- (vi) Implementation of Back to Basics Support Plans; and
- (vii) Improve service delivery to communities to curb service delivery protest.

- 13.3 Subsequently, due to collapse in service delivery and poor governance both administrative and political 13 of the 22 municipalities in the province are subjected to section 139(1) of the Constitution, some linked to sub-section (5) or the MFMA provisions.
- 13.4 Amongst the 13 municipalities, Kagisano-Molapo Local Municipality objected to the intervention and took the provincial government to court for invoking section 139 of the Constitution in that municipality. On 18 July 2019, the court ruled against the provincial government.
- 13.4 The effect of this judgement might have far wider implications for the remainder of the intervention invoked in terms of section 139 of the Constitution.
- 13.5 the judgement indicated that PEC does not have powers to invoke section 139 of the Constitution to the municipality due to the fact that at time of taking this decision, the PEC was subjected to intervention in terms of section 100 by National Government. The court declared the decision of PEC null and void and it was set aside. The implication of the court judgement on the remaining 12 municipalities is that those interventions ceases to exist unless if the PEC appeal the decision.

#### **14. CONCLUSION**

- 14.1 Section 139 of the Constitution is a very intrusive instrument into the governance of the two spheres of government, namely, interventions into the affairs of a provincial organ of state; and interventions into the affairs of a municipal organ of state. ; -----
- 14.2 The Constitution establishes a system of co-operative government in the Republic, constituted as national, provincial and local spheres of government. In terms of the principles of co-operative government set out in Chapter 3 of the Constitution, each sphere of government must respect the constitutional status, powers and functions of another sphere. Each sphere of government must exercise its powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. All spheres of government must provide effective, transparent, accountable and coherent government for the Republic as a whole, and co-operate with each other by assisting and supporting one another. In this regard

section 125(3) of the Constitution obliges the national government to assist provinces to develop the administrative capacity required for the effective exercise of their powers and functions, whilst section 154(1) obliges both the national government and the provincial governments to support and strengthen the capacity of municipalities to manage their own affairs.

- 14.3** In order to address breakdowns in effective, transparent, accountable and coherent governance in the provincial and local spheres of government, the Constitution makes provision for processes of intervention by the higher sphere in circumstances where a province or municipality fails to fulfil certain constitutional or statutory obligations. These processes are dealt with in section 100 and section 139 of the Constitution.
- 14.4** The Constitution furthermore makes provision for national legislation to regulate these interventions. Section 100(3) provides that national legislation may regulate the process established by section 100, and section 139(8) provides that national legislation may regulate the implementation of section 139 as well as the processes established by it.
- 14.5** Currently there is no national legislation regulating interventions in provinces in terms of section 100. In the case of municipalities, Chapter 13 of the Local Government: Municipal Finance Management Act, 2003, regulates section 139 interventions in municipalities but only where the cause of the intervention is of a financial nature. There is no legislation to regulate interventions in municipalities arising from other causes. In this regard, the Department is at an advanced stage to the processing of the Bill by the Cabinet and through to parliamentary processes. This Bill will assist in overcoming most of the challenges encountered in the application of both sections 100 and 139 of the Constitution.

**Annexure A: Summary of interventions undertaken in terms of section 139 of the Constitution as at July 2019**