

**UNIVERSITY OF WESTERN CAPE LAW FACULTY**

**THE ROLE OF PROVINCES IN THE USE OF INTERVENTIONS IN TERMS OF  
SECTION 139(1)(A)-(C) OF THE CONSTITUTION**

**A research paper to be submitted in partial fulfilment of the requirements for the degree of  
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## **ABSTRACT**

The fragmented approach of provinces in the use of legislation and policies, coupled with the uncertainty of key terms in the context of section 139(1) of the Constitution, have resulted in provincial executives not being consistent or not always complying with the use of the steps necessary for interventions in terms of section 139(1) of the Constitution. In order to assess the impact of the fragmented approach and uncertainties on how provincial executives apply the abovementioned steps, this study answers eight questions designed to test the way in which provincial executives applied the aforementioned steps and the effectiveness of the use of aforementioned interventions. The assessment is based on the tallies from the answers to the eight questions, and the grouping of these answers in accordance with the tallies. Each of the three main groups characterises how the relevant provincial executives applied the steps necessary for the use of interventions in terms of section 139(1) of the Constitution for the last five years. The fourth group assesses the effectiveness of such interventions. The answers are derived from the data relating to the notices to the Minister and NCOP, and complemented by the progress reports from the Minister and NCOP. The findings of the four groupings are as follows: the first group presented the steps which present no difficulty in terms of compliance; the second group presented the steps which provincial executives mostly complied with but which at times present some difficulty; and the third group presented those steps which are problematic. The fourth group determined that the effectiveness of the role of provinces in the use of interventions in terms of section 139(1) of the Constitution is questionable due to the repetition and duration of a number of interventions. In order to address the issue of non-compliance by provincial executives with the steps necessary for the use of interventions, the study recommends the drafting of legislation and formulation of clear policy guidelines which will ensure a consistent, coherent and uniform approach when invoking interventions.

**Key words:** Role of provinces, Invoke, Interventions, Constitution, Corrective measures, Executive obligations, Local government, Directive, Assumption of responsibilities, Procedural requirements.

# TABLE OF CONTENTS

<b>LIST OF TABLES .....</b>	<b>5</b>
<b>LIST OF ABBREVIATIONS AND ACRONYMS.....</b>	<b>6</b>
<b>CHAPTER ONE.....</b>	<b>7</b>
INTRODUCTION.....	7
1 <i>Problem statement</i> .....	7
2 <i>Background of the study</i> .....	9
3 <i>Significance of the problem</i> .....	12
4 <i>Research questions</i> .....	13
5 <i>Answer and argument</i> .....	13
6 <i>Methodology</i> .....	14
7 <i>Limitations</i> .....	14
8 <i>Organisation of the study</i> .....	15
<b>CHAPTER TWO.....</b>	<b>16</b>
FRAMEWORK FOR SECTION 139(1) INTERVENTIONS.....	16
1 <i>Introduction</i> .....	16
2 <i>Interpretation of section 139(1)</i> .....	17
2.1 <i>Failure to fulfil an executive obligation</i> .....	17
2.2 <i>'Appropriate steps'</i> .....	20
3 <i>Rules and principles when using section 139(1) interventions</i> .....	21
4 <i>Applying the 'appropriate steps' in terms of section 139(1)</i> .....	22
4.1 <i>Prior notice before the intervention</i> .....	22
4.2 <i>Applying section 139 (1)(a) interventions</i> .....	23
4.3 <i>Applying section 139(1)(b) interventions</i> .....	24
4.3.1 <i>Prior notice</i> .....	25
4.3.2 <i>Assumption of responsibility</i> .....	25
4.3.3 <i>Procedural requirements after assumption of responsibility</i> .....	26
4.3.4 <i>The position after the assumption of responsibility</i> .....	27
4.4 <i>Applying section 139(1)(c)</i> .....	28
4.4.1 <i>Prior notice</i> .....	28
4.4.2 <i>Dissolution of the Council in terms of section 139(1)(c)</i> .....	28
4.4.3 <i>Procedural requirements for the dissolution</i> .....	29
4.4.4 <i>After the dissolution</i> .....	30
5 <i>Ending the intervention</i> .....	30
6 <i>Summary</i> .....	30
<b>CHAPTER THREE.....</b>	<b>332</b>
THE COMPLIANCE OF SECTION 139(1) INTERVENTIONS.....	32
1 <i>Introduction</i> .....	332
2 <i>Provincial breakdown of section 139 interventions, 1998–2014</i> .....	33
2.1 <i>Section 139 interventions from January 2009 till March 2014</i> .....	33
2.2 <i>Steps necessary for the use of interventions</i> .....	34
2.2.1 <i>Identifying the nature of the problem</i> .....	34
2.2.2 <i>Legal basis for the intervention</i> .....	37
2.2.3 <i>Applying the Appropriate Step</i> .....	37
2.2.4 <i>Notices</i> .....	40
3 <i>Compliance with section 139(1)</i> .....	45
4 <i>Tally of the answers</i> .....	50
5 <i>Summary</i> .....	55
<b>CHAPTER FOUR.....</b>	<b>57</b>
ANALYSING THE DATA.....	57
1 <i>Introduction</i> .....	57
2 <i>Analysis of data retrieved</i> .....	57
2.1 <i>The use of the directive</i> .....	57

2.1.1 Significance on the use of the directive .....	58
2.2 The use of the prior notice.....	58
2.2.1 Significance of tallies for issuing prior notices .....	59
2.3 The issuing of notices in terms of section 139(2)(i-ii).....	59
2.3.1 The issuing of notices to the Minister.....	59
2.3.2 The issuing of notices to the NCOP.....	60
2.3.3 Significance of tallies for notices to the Minister and the NCOP .....	60
2.4 Identifying the failure in the notice to the Minister and the NCOP .....	60
2.4.1 Categorisation of failure .....	61
2.4.2 Significance of identifying the failure .....	63
2.5 Linking the failure at the municipality to a legislative obligation.....	63
2.5.1 Significance of tallies for identifying the legal obligation .....	65
2.6 Linking the failure to an ‘executive obligation’ as defined in <i>Mnquma</i> .....	65
2.6.1 Significance of relating the failure to an ‘executive obligation’ .....	69
2.7 Approval or disapproval by the Minister within time-frame .....	70
2.7.1 The approval or disapproval by the NCOP within time-frame .....	70
2.7.2 The significance of dis/approvals by Minister and the NCOP within time-frames.....	70
2.8 The requests for extension of the intervention .....	71
2.8.1 Significance of the request for extension of the interventions.....	71
3 Summary .....	72
<b>CHAPTER FIVE .....</b>	<b>73</b>
FINDINGS AND RECOMMENDATIONS.....	73
1 Introduction.....	73
2 Findings to the answers.....	73
2.1 Grouping of the answers.....	73
2.2.1 Findings of group one .....	76
2.2.2 Findings of group two .....	76
2.2.3 Findings of group three.....	76
2.2.4 Findings of group four.....	76
3 Other findings of the study.....	77
3.1 Uncertainty regarding key terms .....	77
3.1.1 ‘Executive obligations’ .....	77
3.1.2 ‘Appropriate steps’ .....	77
3.2 Monitoring mechanisms .....	77
3.3 Fragmented approach.....	78
4 Recommendations .....	78
4.1 Legislation .....	78
4.2 Clarity of key terms .....	79
4.3 Uniform Approach.....	79
4.4 Directive to be given more consideration.....	79
5 Summary .....	80
<b>BIBLIOGRAPHY.....</b>	<b>81</b>

## LIST OF TABLES

Table 1	Provincial Breakdown of Section 139 Interventions (1998 – 2014).....	32
Table 2	Provincial Breakdown of Section 139 Interventions (2009 – 2014).....	33
Table 3	Provincial breakdown of interventions in terms of section 139(1)(a)-(c) (2009 – 2014).....	37
Table 4	Dates pertaining to the various steps necessary for the use of interventions... ..	41
Table 5	Overview of answers to the eight questions.....	47
Table 6	Did the provincial executive make use of the directive? .....	49
Table 7	Was a prior notice issued before the section 139 (1) (a) – (c) intervention?.....	50
Table 8	Were notices submitted to Minister within the stipulated time-frames?.....	50
Table 9	Were notices submitted to the NCOP within the stipulated time-frames? .....	51
Table 10	Is the failure identified in the notice to the Minister and NCOP? .....	51
Table 11	Does the failure relate to a legislative obligation? .....	52
Table 12	Does the failure in the notice relate to an ‘executive obligation as defined in <i>Mnquma</i> ?.....	52
Table 13	Did the Minister dis/approve the intervention within the specified time-frame? .....	53
Table 14	Did the NCOP disapprove the intervention within the specified time-frame? .....	53
Table 15	Did the provincial executive request an extension for the intervention? .....	54
Table 16	Categorisation of failure at municipalities .....	61
Table 17	Linking the failure to a legislative obligation .....	63
Table 18	Interventions where the failure relate to an executive obligation .....	66
Table 19	Interventions where the failure does not relate to an ‘executive obligation’ .....	67
Table 20	Grouping of the steps necessary for use of interventions in terms of S 139 (1) .....	74

## LIST OF ABBREVIATIONS AND ACRONYMS

COGTA	Cooperative Governance and Traditional Affairs
IDP	Integrated Development Plan
MEC	Member of the Executive Council
MFMA	Municipal Finance Management
MSA 1998	Municipal Structures Act 1998
MSA 2000	Municipal Systems Act 2000
NCOP	National Council of Provinces
NGO	Non-Governmental Organisation
NMMF	National Municipal Managers Forum
SALGA	South African Local Government Association
UWC	University of the Western Cape

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# Chapter One

## Introduction

### 1 Problem statement

The Constitution provides for provinces to ‘strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions’.<sup>1</sup> The Constitutional Court placed the support given by provinces to local government within a supervisory context when it stated that ‘the provinces must assert legislative and executive power to promote the development of local government ... and may assert such powers by regulating municipal executive authority, to see to the effective performance by municipalities’.<sup>2</sup> In this regard, De Visser and Steytler state that provincial executives should have the discretion to exercise intervention measures as a ‘necessary measure when a municipality fails to govern and thus jeopardises the enterprise of development’.<sup>3</sup> Section 139 of the Constitution provides for the provincial executive to take any ‘appropriate steps to ensure the fulfilment of the failed executive obligations’.<sup>4</sup> These steps are defined in section 139(1)(a)-(c) of the Constitution as: the issuing of the directive in terms of section 139(1)(a); the assumption of responsibility in terms of section 139(1)(b); and the dissolution of the council in terms of section 139(1)(c).

In the case of *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* the High Court held that the steps taken by the relevant authority in terms of section 139(1) ‘must be appropriate and therefore fit the situation’ in order to ensure the fulfilment of the failed obligation.<sup>5</sup> Due regard should therefore be given to the nature of the executive obligation that was not fulfilled, the interests of those affected, and the interests of the municipality concerned. Due regard should also be given to the extent of the corrective

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<sup>1</sup> S 154 (1) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution).

<sup>2</sup> *In Re Certification of the Constitution of the Republic of South Africa*, 1996. (10) BCLR 1253 (CC) para 371.

<sup>3</sup> De Visser J & Steytler N *Local Government Law of South Africa* (2012): 15-18 (2).

<sup>4</sup> S 139 (1) 1996 Constitution.

<sup>5</sup> *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAE. para 68 (hereafter *Mnquma*).

measures which serve to ensure the problems are resolved.<sup>6</sup> In the absence of policy directives and clear guidelines the provinces have been unclear about how to interpret these requirements and therefore uncertain of how to apply such requirements when intervening in terms of section 139(1)(a)-(c) of the Constitution.

Due to the above, there is uncertainty with regard to the role of provinces when they follow the procedural requirements necessary for the use of interventions in terms of sections 139(1)(a)-(c) of the Constitution. The *Mnquma* judgement, discussion documents by the South African Local Government Association (SALGA),<sup>7</sup> as well as the Fifth National Municipal Managers Forum (NMMF)<sup>8</sup> on April 2013 indicated that there were various uncertainties with the application of the steps necessary for the use of interventions in terms of section 139(1) of the Constitution. This is especially true with the application of key terms in subsection (1) of section 139 such as ‘appropriate steps’ and ‘executive obligations’. For example, in *Mnquma* Judge Van Zyl held that the provincial executive wrongly considered the failure by the municipality to constitute executive obligations when he stated that the ‘executive obligations are confused with the statutory obligations’.<sup>9</sup>

Due to the aforementioned confusion, the dissolution in terms of section 139(1)(c) of the Constitution in *Mnquma* was declared invalid and set aside. Furthermore, the NMMF and discussion documents by SALGA, which had been developed from empirical data and lessons learned from past interventions, stated that directives in terms of section 139(1)(a) were often not issued due to the uncertainties. What is not clear is whether these uncertainties apply to all the procedural steps necessary for the use of interventions in terms of section 139(1)(a)-(c) or if they apply to only some – and if so, which? This thesis addresses this issue. It focuses on how in the last five years provincial executives followed the steps necessary for interventions in terms of section 139(1)(a)-(c). The aim of the study is to determine the role of provinces in the use of these interventions.

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<sup>6</sup> *Mnquma* para 75.

<sup>7</sup> South African Local Government *The Application of sections 100 and 139 of the Constitution: The need for legislation in terms of sections 100(3) and 139(8)* (2014) 6.

<sup>8</sup> South African Local Government Association *Fifth National Municipal Managers Forum Intergovernmental Monitoring, Support and Interventions Bill* (2013).

<sup>9</sup> *Mnquma* para 65.



## 2 Background of the study

Since the first intervention in 1999 by the Eastern Cape Provincial Executive in the Butterworth Transitional Local Council, not much data has been collated to assess how provinces have used interventions in terms of section 139(1)(a)-(c) of the Constitution. Various authors have written about some of the uncertainties and challenges relating to section 139(1) interventions.

De Visser argues that one of the challenges relating to the duration of the intervention is that a ‘minimum intervention approach’<sup>10</sup> should be adopted, meaning that the intervention should cease once the reasons for the intervention no longer exist. Further to this, De Visser argues that the provincial executive, when resorting to section 139 interventions, must be guided by the principles of co-operative government.<sup>11</sup> In this regard he says that the NCOP plays a supervisory as well as a controlling role and should end the intervention when it is of the opinion that the continued intervention infringes on the institutional integrity of the municipality. It follows that the intervention should not only end as soon as possible but ‘should also occur in the least intrusive manner’.<sup>12</sup>

Steytler contends that section 139 interventions should have three aims.<sup>13</sup> He argues that one of the aims should be consultation and resorting to the intervention as a measure of last resort. Also, the integrity of local government as an independent sphere of government is important and should serve to protect municipalities from provincial interference. Lastly, he claims that the aim of the interventions should be restorative rather than punitive. Provinces should exhaust all avenues of consultation to remedy the failed obligations and be mindful of local governments’ institutional integrity before they resort to section 139 interventions.

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<sup>10</sup> De Visser J *A Legal Analysis of Provincial Intervention in a Municipality* (LLM thesis, University of the Western Cape, 1999) 40.

<sup>11</sup> De Visser J *A Legal Analysis of Provincial Intervention in a Municipality* (LLM thesis, University of the Western Cape, 1999) 19.

<sup>12</sup> De Visser J *A Legal Analysis of Provincial Intervention in a Municipality* (LLM thesis, University of the Western Cape, 1999) 39.

<sup>13</sup> Steytler N ‘Establishing a regulatory framework for provincial intervention in terms of section 139 of the Constitution’ available at <http://www.pmg.org.za> (accessed 7 July 2013).

Mettler argues that the practice of intergovernmental relations between the three spheres of government was seen as in its ‘infancy’ stage when interventions were initiated in 1998.<sup>14</sup> In this regard, he argues there is now a window of opportunity to shape the relations in such a way that it ‘facilitates the obligations placed at the door of provincial government in relation to local government’.<sup>15</sup> In his view some challenges that relate to interventions are due to the fragmented pieces of legislation which can be associated with the supporting mechanisms of section 139 interventions. A more serious problem, he argues, is the fact that some of the legislation dates from the advent of the 1996 Constitution so that some aspects, particularly the part concerning intervention, do not comply with section 139 of the Constitution.<sup>16</sup> There is thus an overwhelming need to establish a coherent, uniform and effective system in terms of section 139 interventions, which in Mettler’s view is indispensable for the successful outcomes of such interventions.

The Constitution grants the NCOP and the Minister considerable powers over interventions in view of the oversight role. Section 139(2) and (3) state that the Minister and NCOP should approve the intervention within specified time-frames and should they not approve or disapprove the intervention within these time-frames such interventions should end. Further to this, the NCOP is tasked to ‘review the intervention regularly and make any appropriate recommendations to the provincial executive’.<sup>17</sup> According to Murray and Hoffman-Wanderer, the NCOP expanded its oversight role and adapted it to that of an intergovernmental facilitator, thus providing cooperation between different spheres of government and assisting in resolution of conflicts outside the courtroom’.<sup>18</sup> Murray and Hoffman-Wanderer argue that in assuming such facilitating roles there are ‘no formal rules or written procedures governing the assessment of an intervention by the NCOP’.<sup>19</sup> For this

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<sup>14</sup> Mettler J ‘Provincial-municipal relations: A few challenges’ (2006) vol 7 (2) *Law, Democracy & Development* 12.

<sup>15</sup> Mettler J ‘Provincial-municipal relations: A few challenges’ (2006) vol 7 (2) *Law, Democracy & Development* 6.

<sup>16</sup> Mettler J ‘Provincial-municipal relations: A few challenges’ (2006) vol 7 (2) *Law, Democracy & Development* 6.

<sup>17</sup> S 139(2)(c) 1996 Constitution.

<sup>18</sup> Murray, C., & Hoffman-Wanderer, Y. (2007). The National Council of Provinces and provincial intervention in local government. *Stellenbosch Law Review= Stellenbosch Regstydskrif*, 18(1), 10

<sup>19</sup> Murray C & Hoffman-Wanderer (2007), The National Council of Provinces and Provincial Intervention in Local Government 20.

reason she claims that the 'NCOP committees in their oversight roles tend to be flexible'.<sup>20</sup> For example, she argues that they do not 'insist upon the issuance of a formal directive, neither do they scrutinise the specific grounds cited as justification for the intervention'.<sup>21</sup> Thus the legislative provisions that the municipality are not complying with may not be precisely stated.

In March 2013 at the Fifth NMMF, the salient features for the development of the Intergovernmental Monitoring, Support and Intervention Bill were presented by SALGA to the Forum. One of these features focused on the uncertainties with regard to the procedural requirements by provinces in terms of section 139 interventions. For example, it was observed by the Forum that directives were often not issued by provinces due to uncertainties with regard to the procedural requirements. Other important features related to the incapacity of provinces to deal with their mandate of supporting local government, such as lack of skills and funds. Also, that there was a lack of targeted monitoring and oversight before the invocation of section 139 interventions. This meant that the effectiveness of the interventions was questioned as it was not clear if the interventions were curative or simply temporary takeovers. In addition, there was little indication that the provincial legislatures exercised oversight over the provincial executive's actions in regard to section 139 interventions. The Forum concluded that had the proper support and monitoring mechanisms been in place, early warning systems would have prevented at least some of these interventions.<sup>22</sup>

The abovementioned authors and presentations have dealt normatively with the challenges and uncertainties related to the role of provinces in terms of section 139 interventions. What is lacking though is the data analysis or evidence to ascertain the impact of the uncertainties on the use of the procedural requirements in terms of section 139(1)(a)-(c). This study seeks to fill this gap by analysing the data for the last five years which relates to the use of interventions by provinces in terms of section 139(1)(a)-(c). It does so by assessing the information available in the notices to the Minister and NCOP and progress reports from the NCOP. The information from these sources serves to determine whether or not provinces complied with the procedural requirements necessary for such interventions in the last five

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<sup>20</sup> Murray C & Hoffman-Wanderer (2007), *The National Council of Provinces and Provincial Intervention in Local Government* 20.

<sup>21</sup> Murray C & Hoffman-Wanderer (2007), *The National Council of Provinces and Provincial Intervention in Local Government* 21.

<sup>22</sup> South African Local Government Association (2013). *Fifth National Municipal Managers Forum: Intergovernmental Monitoring Support and Interventions Bill*.

years but also assesses the role of provinces in the use of interventions in terms of section 139(1)(a)-(c) of the Constitution.

### **3 Significance of the problem**

The provision of basic services such as water, sanitation and electricity are essential for most communities, especially those in disadvantaged areas. It is for this reason that any uncertainties which could hamper or delay the provision of such services could result in protests and violence from dissatisfied communities. To avoid the unnecessary loss of lives and costs associated with protests, identifying and solving the problems related to the steps necessary for the use of interventions in terms of section 139(1) of the Constitution is therefore of extreme importance to both provinces and municipalities.

Provinces must use section 139 interventions as a last resort in order to restore essential basic services in those municipalities which are in distress. Should these measures prove to be ineffective, it could result in municipalities feeling the wrath of dissent from communities for lack of service delivery. Such dissent usually leads to communities staging protest actions which ultimately erupt into violent uprisings. A recent study by the Community Law Centre of the University of the Western Cape presented data which indicated that the countrywide protests could largely be attributed to protesters being aggrieved with municipalities not providing basic services to communities.<sup>23</sup> These protest actions not only increased in frequency in 2012 but in most instances turned violent.<sup>24</sup> Even though the study did not link the protest actions to the non-fulfilment of executive obligations, municipalities as the closest form of government to communities would feel the brunt of such violent protest actions. Furthermore, should the role of provinces to support and monitor local government be constrained or hampered as a result of provincial executives not complying with the procedural requirements, the interventions could be prolonged and the cost of the intervention to the municipalities increased. Clearer procedures for section 139 interventions would enable provinces to apply the interventions in a more uniform and effective manner. This in turn would lead to provinces restoring essential basic services more speedily in those municipalities experiencing difficulties, thereby saving costs and curbing uprisings.

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<sup>23</sup> De Visser J et al 'MLGI Protest Barometer' (2012) 7 vol 14 (3) *Local Government Bulletin*.

<sup>24</sup> De Visser J et al 'MLGI Protest Barometer' (2012) 7 vol 14 (3) *Local Government Bulletin*.

## 4 Research questions

The main research question of this study is this: how do provinces use the instrument of interventions in terms of section 139(1)-(c) of the Constitution? The study addresses this question by way of two subquestions:

- i) Have provinces followed the procedural requirements necessary when intervening in terms of section 139(1)(a)-(c)?
- ii) Which of the procedural requirements were particularly difficult to comply with when provincial executives applied the steps necessary for the use of interventions in terms of section 139(1)(a)-(c)?

## 5 Answer and argument

The answers to the above research questions are determined by analysing the data which relates to interventions in terms of section 139(1)(a)-(c) over the last five years. More specifically, the answers will be derived by analysing data concerning: the reasons forwarded by the relevant provinces justifying the interventions; the legal basis for invoking the interventions; notices and dates of the notices to the interested parties; the dates of prior notices; the dates of interventions; the dates for disapproval of interventions by the Minister and National Council of Provinces; and requests for extensions of the interventions. This data allows the study to assess whether provinces complied with the procedural steps necessary to invoke interventions in terms of sections 139(1)(a)-(c) of the Constitution for the last five years.

The necessary procedural steps are as follows: the use of the directive; the issuing of the prior notice; the notices to the Minister and the NCOP; identifying the failure in relation to the 'executive obligation'; approving or disapproving the intervention; requests for extension for the interventions. The second purpose of the data will then come into play in that such data is used to answer the research questions mentioned above. For example, if the data indicates that the legal basis for the intervention by the province was based on the assumption of responsibilities in terms of section 139(1)(b), the study would check if the relevant province issued prior notices to allow the municipality to make representations. The study would then check if the Minister for Local Government, the provincial legislature and the NCOP had been notified within the time-frames specified in the Constitution. The dates for the approvals or disapprovals by the Minister and the NCOP are also checked for compliance with the time-

frames. The findings will indicate which of the procedural requirements in terms of section 139(1)(b) were complied with and which not. In this way the data which relates to research questions (i)-(iii) allows an assessment of how provinces used interventions in terms of section 139(1)(a)-(c) of the Constitution and which requirements were complied with. The study analyses data available from those provinces that have invoked sections 139(1)(a)-(c) of the Constitution in the period January 2009 to March 2014.

## **6 Methodology**

This is a desktop study which focuses on an analysis of primary and secondary sources. The primary sources are policy documents, legislation and official documents. The NCOP, COGTA, SALGA and the relevant provincial authorities furnish the information which relates to the use of intervention in terms of section 139(1)(a)-(c) of the Constitution for the last five years. Secondary source material includes the work of authors that focuses on the role of provinces in the use of interventions in terms of section 139 of the Constitution.

The data mentioned above is used to assess which of the procedural steps provided for in section 139 of the Constitution were complied with and which not. More specifically, these procedural steps relate to: the directive issued in terms of section 139(1)(a); the assumption of responsibilities in terms of section 139(1)(b); and the dissolution of the municipal council in terms of section 139(1)(c). Each of the section 139(1)(a)-(c) interventions for the last five years would be assessed against the steps necessary for the use of interventions in terms of section 139(1) of the Constitution. The statistics derived from the data establish the trends and patterns for the use of interventions by provinces in terms of section 139(1)(a)-(c) of the Constitution for the last five years.

## **7 Limitations**

The study relies on information retrieved from the notices to the Minister and the NCOP which contain information relating to the intervention in terms of section 139 (1) of the Constitution. In addition, information contained in the progress reports from the NCOP and COGTA pertaining to these interventions were also used for the study where necessary. These notices and reports were scanned and emailed to the researcher by the NCOP and COGTA in Pretoria. This created problems for the researcher as certain notices or reports required for the study would either be missing or information illegible or omitted. Where notices or reports of certain interventions were not available the information required to

answer certain questions was lacking and the subsequent questions could not be answered. This impacted severely on the answers to some questions, specifically the dates for the approvals by the Minister and the NCOP. The answers to such questions therefore indicate 'uncertain'. In addition, where the information on the notices or reports was illegible or omitted (such as dates for notices, approvals or disapprovals) and where such information was required to answer certain questions, the answers once again indicate 'uncertain'.

## **8 Organisation of the study**

Chapter One provides the problem statement, significance of the problem, research questions, answer and argument to the problem, literature survey, substantiation of the argument and the methodology. Chapter Two deals with the legal framework for section 139 of the Constitution, particularly the procedural requirements that provincial executives have to comply with when it uses the instrument of interventions in terms of section 139(1)(a)-(c) of the Constitution. Chapter Three presents the data which relates to the use of the procedural steps necessary for the use of interventions in terms of section 139(1)(a)-(c). Such data is available from NCOP, COGTA and SALGA as well as those provinces that intervened in municipalities for the last five years. Chapter Four analyses the data presented in Chapter Three and the data which relates to research questions (i)-(iii). Chapter Five provides the key findings of the study and makes recommendations in response to the uncertainties and challenges relating to section 139(1)(a)-(c) interventions.



# Chapter Two

## Framework for Section 139(1) Interventions

### 1 Introduction

According to De Visser and Steytler, ‘interventions serve as a necessary measure to govern when a municipality fails to govern’ by providing support with regard to the delivery of services and good governance for those local authorities which are in distress.<sup>25</sup> The Constitutional Court in the *Second Certification* judgement stated that the provincial executive ‘is fully entitled, if not obliged, to do what is necessary to ensure that the Constitution and legislation consistent with the Constitution are adhered to’.<sup>26</sup> The 1996 Constitution thus provides for three types of intervention. First, section 139(1) of the Constitution provides for regular intervention ‘where a municipality fails to fulfil an executive obligation’, which is a provincial discretionary intervention. Secondly, in terms of section 139(4), if the municipality fails to approve a budget or any revenue raising measures the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or revenue raising measures are approved. This is a mandatory intervention and includes the dissolution of the municipal council. Lastly, in terms of section 139(5) the provincial executive is obliged to intervene in instances ‘where a municipality admits it is unable to, or due to a crisis in its financial affairs, is in breach to provide services or meet its financial obligations’. The use of each of these section 139 interventions is circumscribed by rules and principles and must take place in the spirit of sound intergovernmental relations.<sup>27</sup>

This thesis looks specifically at the role of provinces when it applies the steps necessary for the use of interventions in terms of section 139(1) of the Constitution. Hence, it is important to understand the various rules and principles which have to be applied by provincial executives in the use of section 139(1) interventions. In *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others*, section 139(1) formed the subject matter of the dispute between the litigating parties and addressed some of the most important aspects

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<sup>25</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-18 (2).

<sup>26</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* para 118.

<sup>27</sup> S 41(h) 1996 Constitution.



in the context of subsection 1 of section 139 of the Constitution. Thus, this chapter first provides an interpretation of key words such as ‘the failure to fulfil an executive obligation’, as well as the rules and principles which apply when provincial executives use interventions in terms of section 139(1) of the Constitution. Thereafter, the chapter looks at the application of each ‘appropriate step’ in terms of section 139(1)(a)-(c) as well as the procedural requirements that the Constitution prescribes for the various types of interventions. Lastly, it summarises the steps necessary when provincial executives use interventions in terms of section 139(1) of the Constitution. These steps are designed in the form of questions with the aim to assess if provincial executives followed the steps necessary for the use of interventions in terms of section 139(1) of the Constitution.

## **2 Interpretation of section 139(1)**

According to Van Zyl J in *Mnquma*, the wording of subsection 1 of section 139 is ‘central to a determination of the validity of the decision to intervene’<sup>28</sup> in a municipality. The wordings which are of importance in the context of subsection 1 section 139 are discussed below.

### **2.1 Failure to fulfil an executive obligation**

Subsection (1) of section 139 provides that the provincial executive may intervene ‘when a municipality cannot or does not fulfil its executive obligations in terms of the Constitution or legislation’. From this context the provincial executive is only allowed to intervene when the municipality fails to fulfil an executive obligation. In *Mnquma*, Van Zyl J states that this ‘statutory precondition or jurisdictional fact is a necessary prerequisite’ and therefore needs to be in ‘existence’ before the provincial executive may exercise its authority to intervene.<sup>29</sup> In *South African Defence and Aid Fund and Another v Minister of Justice* Corbett J says that the ‘jurisdictional fact consists of a fact, or state of affairs, which objectively speaking, must have existed before the statutory power could validly be exercised’.<sup>30</sup> The *Mnquma* judgement makes it clear that the existence of the jurisdictional fact in terms of section 139(1) is not left to the ‘discretion of the provincial executive but is an objective fact which is independently triable by a Court’.<sup>31</sup> Furthermore, the High Court in *Mnquma* held that the

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<sup>28</sup> *Mnquma* para 17.

<sup>28</sup> *Mnquma* para 49.

<sup>30</sup> *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (A) at 34 A to 35 D.

<sup>31</sup> *Mnquma* para 50.

‘duty is on the authority concerned (which in terms of section 139(1) is the provincial executive) ... to satisfy the Court that the required jurisdictional fact did in fact exist’, and the Court may declare the intervention invalid if it concludes differently.<sup>32</sup>

Further, it is clear from subsection (1) of section 139 that the failure by the municipality must relate to an executive obligation. In *Mnquma* Van Zyl J states that the failure by the municipality to fulfil an executive obligation includes ‘the inability to effectively fulfil an executive obligation’.<sup>33</sup> In his view the failure to fulfil an executive obligation should as a result include the ‘situation where the municipality attempted to perform an executive obligation but was unsuccessful’.<sup>34</sup> However, Van Zyl J in *Mnquma* cautions that ‘relating the failure by the municipality to an executive obligation is problematic’.<sup>35</sup> In this regard, the High Court judge in *Mnquma* cautions that ‘executive obligations are at times confused with the *statutory obligations or duties*’ of the municipality.<sup>36</sup> In the judge’s view the statutory obligation is aimed at ensuring the effective performance of executive obligations and does not necessarily result in failure to fulfil an executive obligation.<sup>37</sup> Hence, Van Zyl J in *Mnquma* argues that the mayor’s failure to submit an annual performance report of the various departments constitutes non-compliance with a statutory obligation but does not necessarily result in failure to fulfil an executive obligation. In *Mnquma* the High Court determined that the ‘alleged failure was wrongly considered to constitute an executive obligation’ and the decision to dissolve the municipality was declared invalid by the Court.<sup>38</sup>

What is clear in *Mnquma* is that the term ‘executive obligation’ in the context of subsection 139(1) was a contentious issue between the litigating parties. This has led to Van Zyl J in *Mnquma* charging that the ‘executive obligation is problematic’ and that the counsel for the respective parties expressed different opinions about the definition of the term.<sup>39</sup> In order to provide more clarity with regard to the term ‘executive obligation’ the High Court in *Mnquma* holds that the ‘type of failures that empower the provincial executive to intervene

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<sup>32</sup> *Mnquma* para 50.

<sup>33</sup> *Mnquma* para 52.

<sup>34</sup> *Mnquma* para 52.

<sup>35</sup> *Mnquma* para 54.

<sup>36</sup> *Mnquma* para 65.

<sup>37</sup> *Mnquma* para 65.

<sup>38</sup> *Mnquma* para 90.

<sup>39</sup> *Mnquma* para 54

are limited to those obligations that are executive in nature'.<sup>40</sup> In *Mnquma* Van Zyl J further states that the meaning accorded to the word 'executive obligation' must be found within and against the background of the constitutional framework of the sections dealing with local government'.<sup>41</sup> Thus, the judge in *Mnquma* contends the word is 'used in the context of an obligation of a public nature that is imposed on a municipality in terms of the Constitution or legislation'.<sup>42</sup> The Constitution mandates local government to provide basic services and improve the well-being of members of its communities.<sup>43</sup> Thus, the executive decisions of municipal councils will ordinarily have a direct effect on the lives and opportunities of those living in the communities, for example a service such as waste management. This is illustrated in section 139(1)(b) which links the executive obligation to the 'maintaining of essential national standards or meeting established minimum standards for the rendering of a service'.<sup>44</sup>

At local government level there is no separation of executive and legislative functions and both the executive and legislative authority of the municipality are vested in its municipal council.<sup>45</sup> Thus, municipal councils exercise both the executive and legislative functions which include: local government matters listed in Part B of schedule 4 and Part B of schedule 5;<sup>46</sup> any other matter assigned to municipals by national or provincial legislation;<sup>47</sup> and the making and administering of by-laws.<sup>48</sup> The duties of local government to provide services at a local level is 'exercised within these functional areas with the aim ... to implement and administer legislation in relation thereto, provide the services associated therewith, provide an administration to do so, develop policy in relation thereto and initiating by-laws to effectively govern within these functional areas'.<sup>49</sup> In *Mnquma* Van Zyl J states that this view is confirmed by section 11(3) of the Municipal Systems Act and corroborates what is meant

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<sup>15</sup> *Mnquma* para 64.

<sup>41</sup> *Mnquma* para 59.

<sup>42</sup> *Mnquma* para 57.

<sup>43</sup> Ss 152, 153 1996 Constitution.

<sup>44</sup> S 139(1)(b)(i) 1996 Constitution.

<sup>45</sup> S 152 1996 Constitution.

<sup>46</sup> S 156(1)(a) 1996 Constitution.

<sup>47</sup> S 156(1)(b) 1996 Constitution.

<sup>48</sup> S 156(2) 1996 Constitution.

<sup>49</sup> *Mnquma* para 64.

by the term ‘executive obligation’.<sup>50</sup> Therefore, local government’s duty to provide and administer services is closely associated with the ‘executive obligations’ of municipalities.

## 2.2 ‘Appropriate steps’

Once the provincial executive has decided to intervene, the provincial executive has the discretion to apply the ‘appropriate step’ to remedy the failure at the municipality. Section 139(1) provides that the provincial executive may intervene by taking ‘any appropriate steps’, which include issuing a directive to the municipality;<sup>51</sup> the assumption of responsibility for the relevant obligation;<sup>52</sup> and the dissolution of the municipal council.<sup>53</sup> In *Mnquma* the High Court held that these appropriate steps are ‘alternative forms of interventions’<sup>54</sup> and as such the ‘intervention must fit the particular circumstances of the case’.<sup>55</sup> Accordingly, the *Mnquma* judgement stated that the appropriate step ‘must take into consideration the nature of the executive obligation that was not fulfilled, the interests of those affected and the interests of the affected municipality’.<sup>56</sup>

Another appropriate step would arise when the provincial executive has no other recourse than court action to execute the obligation. For example, the municipal council of the Abaqulusi Municipality refused to accept the election of a councillor even after a section 139(1)(a) directive instructed it to do so.<sup>57</sup> However, there is still much uncertainty as to what constitutes an ‘appropriate step’, as was highlighted in the discussion document by SALGA.<sup>58</sup> This issue will be further explored in the chapters that follow.

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<sup>50</sup> *Mnquma* para 64.

<sup>51</sup> S 139(1)(a) 1996 Constitution.

<sup>52</sup> S 139(1)(b) 1996 Constitution.

<sup>53</sup> S 139(1)(c) 1996 Constitution.

<sup>54</sup> *Mnquma* para 72.

<sup>55</sup> *Mnquma* para 75.

<sup>56</sup> *Mnquma* para 75.

<sup>57</sup> .Provincial Government of KwaZulu Natal: Notice in terms of section 139(1)(b) of the Constitution. 2013/03/20

<sup>58</sup> South African Local Government *The Application of sections 100 and 139 of the Constitution: The need for legislation in terms of sections 100(3) and 139(8)* (2014) 6.

### 3 Rules and principles when using section 139(1) interventions

When provincial executives institute corrective measures in terms of section 139(1) of the Constitution, important rules and principles have to be adhered to. The power to intervene is a discretionary one, indicated by the use of the word ‘may’ in subsection (1) of section 139. Should the provincial executive intervene in terms of section 139(1) the discretionary measures exercised by the provincial executive should be suited to the situation, which is premised on a ‘rational relationship between the exercise of the power and the purpose for which it was given’.<sup>59</sup> It is clear therefore that even though section 139(1) makes provision for the provincial executive to take any appropriate step to fulfil the executive obligation the provincial executive is not obliged to exercise it.

Chapter Three of the Constitution emphasises that the principle of cooperative governance and intergovernmental relations should be ‘observed and adhered to by national, provincial and local spheres of government’<sup>60</sup> as all the spheres are ‘distinctive, interdependent and interrelated’.<sup>61</sup> In *Mnquma* the judge correctly alluded to the fact that cooperative governance not only relates to the provision of support and assistance to local governments, but also involves an aspect of supervision.<sup>62</sup> In the same way, section 155(6)(a)-(b) of the Constitution provides for the provincial governments to monitor and support local government as well as promote the development of local government to perform their own affairs.

In addition to the above, section 151(2) of the Constitution also provides for the municipality to govern on its own initiative the local government affairs of its community.<sup>63</sup> This autonomous nature of municipalities is further underlined by section 151(4), which provides that ‘national and provincial government may not compromise or impede a municipality’s functions’. Thus, in *Mnquma* Van Zyl J stated that local government enjoys a ‘measure of self-government, is mandated to be developmental and functions in co-operation with and

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<sup>59</sup> *Pharmaceutical Manufacturers of SA: In Re: Ex Parte President of the Republic of South Africa supra* at para [90].

<sup>60</sup> S 40(2) 1996 Constitution.

<sup>61</sup> S 40(1) 1996 Constitution.

<sup>62</sup> *Mnquma* para 45.

<sup>63</sup> S 151(3) 1996 Constitution.

under the supervision of national and provincial governments'.<sup>64</sup> It is important that when the provincial executive resorts to any intervention measures it respects the autonomous sphere of local government. For example, 'where intervention takes the form of dissolution, the municipal council is to ensure that no inroads are made without good reason (exceptional circumstances) into the autonomy of local sphere of government'.<sup>65</sup> In *Mnquma* the High Court held that the way the provincial executive applied the intervention was an encroachment on the autonomy of the municipality which ultimately contributed to the declaration by the Court to invalidate the decision to dissolve the Municipal Council.<sup>66</sup>

Finally, it is imperative that the provincial executive addresses only the 'present and not past failures' in municipalities when it identifies the failed executive obligation.<sup>67</sup> In the *City of Cape Town v Premier of the Western Cape* Swain J stated that the nature of the failure of the obligation should be 'framed in the present tense, being concerned with an on-going failure and not a past failure'.<sup>68</sup> This view was echoed in *Mnquma* when the High Court disapproved of the provincial executive's reliance on past failures.<sup>69</sup> The steps necessary for each of the appropriate steps in terms of section 139(1)(a)-(c) will be discussed below.

## **4 Applying the 'appropriate steps' in terms of section 139(1)**

### **4.1 Prior notice before the intervention**

Before applying any of the 'appropriate steps' in terms of section 139(1)(a)-(c) a municipality should have the opportunity to respond to the concerns which relate to the failure to fulfil the executive obligations. This is in line with the *audi alter partem* rule which is fundamental to South African law and affords the affected party the chance to voice their opinion with regard to the concerns raised. Furthermore, Chapter Three of the Constitution, which deals with intergovernmental relations, requires all organs of government to have respect for each

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<sup>64</sup> *Mnquma* para 48.

<sup>65</sup> *Mnquma* para 79.

<sup>66</sup> *Mnquma* para 100.

<sup>67</sup> *Mnquma* para 53.

<sup>68</sup> *City of Cape Town v Premier of the Western Cape and Others* (5933/08) [2008] ZAWCHC 52; 2008 (6) SA 345 (C) para 7.

<sup>69</sup> *Mnquma* para 94.

other's 'institutional integrity'.<sup>70</sup> In this regard it requires the various departments in government to 'inform one another of, and consult on matters of common interest'.<sup>71</sup> Accordingly, before the provincial executive applies any of the steps in terms of section 139(1)(a)-(c), it should inform the municipality by way of a prior notice and allow it to respond to the concerns identified in the notice. Only after representations by the municipality have been considered can the 'appropriate step' be taken in terms of section 139(1)(a)-(c). The 'appropriate step' taken by the provincial executive should 'fit the situation' identified by the problems in the notice. The prior notice should:

- 'identify the executive obligations in respect of which the municipality is failing;
- describe the extent of non-fulfilment;
- indicate the intention of the provincial executive to start a section 139 procedure;
- invite the council to make written representation; and
- contain a reasonable time period to make representations relating to the concerns'.<sup>72</sup>

## 4.2 Applying section 139 (1)(a) interventions

Should the opportunity to make representations not have the effect of adequately addressing the concerns relating to the failure of the executive obligation then the provincial executive may issue a directive in terms of section 139(1)(a). The directive serves as an instruction to the municipality 'describing the extent of the failure to fulfil the obligations and stating the steps which is (sic) required to meet such obligations'.<sup>73</sup> The directive is the least intrusive intervention in terms of section 139(1) but is important in that it lays the ground for further possible interventions. Such interventions however can only arise from the executive obligations that are not being fulfilled and which are founded in terms of 'legislation and the Constitution'.<sup>74</sup> Hence, the steps outlined in the directive create a legal obligation on the municipality which in turn is directly linked to the legal basis for such intervention or possible future intervention. Thus, the directive should:

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<sup>70</sup> S 41(e)(g) 1996 Constitution.

<sup>71</sup> S 41(h)(iii) 1996 Constitution.

<sup>72</sup> Department of Provincial and Local Government *Intervening in Provinces and Municipalities- Guidelines for the Application of section 100 and 139 of the Constitution* (2007) 18.

<sup>73</sup> S 139(1)(a) 1996 Constitution

<sup>74</sup> S 139(1) 1996 Constitution



- ‘state that the provincial executive is acting in terms of section 139(1)(a) of the Constitution;
- identify the executive obligations in respect of which the municipality is failing;
- respond to the representations made by the municipal council;
- outline the steps to be taken by the municipal council to ensure the fulfilment of the obligations referred to;
- afford a reasonable time period for the municipal council to take such steps;
- instruct the municipal council to report to the provincial executive on the implementation of the directive; and
- state that failure to implement the steps can be followed up by the assumption of responsibility in terms of section 139(1)(b)’.<sup>75</sup>

Provincial executives however, do not often issue section directives in terms of 139(1)(a) or at least they do not feature in the formal documentation of the intergovernmental review.<sup>76</sup> The *Mnquma* judgement made it clear that the directive is not a precondition for the assumption of responsibilities when the High Court stated that interventions in terms of section 139(1)(a)-(c) are ‘not a step in a process’.<sup>77</sup> This is in contrast to the Constitutional Court’s interpretation of section 100(1) which holds that the directive is a precondition for the assumption of responsibility.<sup>78</sup> Section 100(1) is the partner provision of section 139(1) and regulates the relationship between central and provincial governments. Despite its distinct advantages it seems that the directive in terms of section 139(1)(a) is under-utilised as a means to remedy the failure at the municipality.

### **4.3 Applying section 139(1)(b) interventions**

If the municipality fails to implement the directive, the provincial executive can proceed to assume the responsibility for the relevant failed executive obligation. However, before assuming responsibility in terms of section 139(1)(b) the municipality should be afforded the

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<sup>75</sup> Department of Provincial and Local Government *Intervening in Provinces and Municipalities- Guidelines for the Application of section 100 and 139 of the Constitution* (2007) 19.

<sup>76</sup> South African Local Government *The Application of Sections 100 and 139 of the Constitution: The Need for Legislation in Terms of Sections 100(3) and 139(8)* (2014) 7.

<sup>77</sup> *Mnquma* para 72.

<sup>78</sup> *In re Certification of the Amended Text of the Constitution of the Republic of South Africa* 1996 1997 2 SA 97 (CC) para 124



opportunity to make representations with regard to the problems identified in the directive. The prior notice follows below:

#### **4.3.1 Prior notice**

Before proceeding to assume responsibility it is incumbent on the provincial executive to notify the municipality of its intention to intervene at the municipality and the action to be taken to remedy the failure there. The notice should include:

- ‘an identification of the municipality’s failure to comply with one or more steps of the directive;
- an invitation to the municipality to make representations with regard to its efforts to comply with the directive; and
- a reasonable time period to make the representations’.<sup>79</sup>

#### **4.3.2 Assumption of responsibility**

The *Mnquma* judgement made it clear that the directive does not necessarily have to serve as precondition for the assumption of responsibilities in terms of section 139(1)(b) of the Constitution.<sup>80</sup> Also, should the provincial executive decide to continue with the intervention even after the municipal council submitted the representations relating to the prior notice for the assumption of responsibilities, then the provincial executive may proceed in terms of section 139(1)(b) of the Constitution. Section 139(1)(b) provides that the provincial executive may assume responsibility for the failed executive obligation to ‘the extent that it is necessary to maintain essential services or meet established minimum standards; prevent the municipality from taking unreasonable steps; or maintain economic unity’.<sup>81</sup> Hence, the provincial executive undertakes to assume responsibility for the relevant executive obligation that was not fulfilled in so far as it is allowed to in terms of section 139(b)(i)-(iii). In *City of Cape Town v Premier of the Western Cape* Swain J states that the purpose of the intervention is ‘remedial and not punitive’.<sup>82</sup>

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<sup>79</sup> Department Provincial and Local Government *Intervening in Provinces and Municipalities- Guidelines for the Application of section 100 and 139 of the Constitution* (2007) 20.

<sup>80</sup> *Mnquma* para 72.

<sup>81</sup> S 139(1)(b)(i)-(iii) 1996 Constitution.

<sup>82</sup> *City of Cape Town v Premier of the Western Cape and Others* (5933/08) [2008] ZAWCHC 52; 2008 (6) SA

### 4.3.3 Procedural requirements after assumption of responsibility

After the assumption of responsibility the Constitution provides that the relevant provincial executive must submit a written notice of the intervention to the Cabinet member responsible for local government affairs, the provincial legislature and the National Council of Provinces. The relevant provincial executives must notify the three organs of state within 14 days of the intervention began.<sup>83</sup> Should the Minister not approve or disapprove the intervention within 28 days then the intervention must end.<sup>84</sup> According to De Visser and Steytler the Minister is not permitted to add any but only subtract aspects related to the intervention.<sup>85</sup> In *Mnquma* it was held that the Minister for local government affairs was 'empowered to terminate any form of action taken against the municipality under section 139(1)'.<sup>86</sup> Such authority with regard to the assumption of responsibility lapses after 28 days have passed.

Furthermore, the provincial legislature also has to be notified within 14 days after the assumption of responsibilities in terms of section 139(1)(b).<sup>87</sup> According to De Visser and Steytler the notification serves two purposes: oversight by the provincial legislature of the provincial executive authority and to facilitate a decision by the NCOP for the approval or disapproval of the intervention.<sup>88</sup>

In addition to the provincial executive having to submit a written notice to the NCOP within 14 days of the intervention,<sup>89</sup> the Constitution also provides that the NCOP should approve or disapprove the intervention within 180 days. Should the NCOP not approve or disapprove within the specified time-frame then the intervention should end.<sup>90</sup> The purpose of the provincial executive having to notify the NCOP is twofold.<sup>91</sup> First, the notice serves to inform the NCOP that the municipality is faced with serious problems. This is in line with the principles of Chapter Three in the Constitution which provides for the organs of government

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345 (C) at para 7.

<sup>83</sup> S 139 (2)(a)(i) Constitution.

<sup>84</sup> S 139 (2)(b)(i) Constitution.

<sup>85</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-24.

<sup>86</sup> *Mnquma* para 82.

<sup>87</sup> S 139(2)(a)(ii) 1996 Constitution.

<sup>88</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-25.

<sup>89</sup> S 139(2)(a)(ii) 1996 Constitution.

<sup>90</sup> S 139(2)(b)(ii) 1996 Constitution.

<sup>91</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-26.

to inform and consult with each other. Secondly, informing the NCOP also serves to hold the Minister accountable for the approval or disapproval of the intervention even though such a decision cannot be overturned.<sup>92</sup> The NCOP may set terms for the approval of the interventions but in doing so is only permitted to subtract and not add aspects related to the intervention. The NCOP ‘must while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive’.<sup>93</sup>

#### **4.3.4 The position after the assumption of responsibility**

Having assumed responsibility for the failure of the executive obligations, the provincial executive emerges as the key decision-maker of the various role players. For instance the provincial executive has the discretion to decide on the duration and extent of the intervention. The NCOP assumes an oversight role tasked with the responsibility to regularly review the intervention and subsequently provide recommendations to the provincial executive.

Both the review and the approval by the NCOP are ‘intergovernmental checks and balances aimed at guarding the efficiency and integrity of the intervention processes.’<sup>94</sup> The NCOP assumes the power to regularly review and make recommendations and both the NCOP and the Minister assumes the power to set down terms for the intervention. Also, the NCOP may make ‘non-binding recommendations to the provincial executive’.<sup>95</sup> Hence, it cannot instruct the provincial executive what to do but rather what not to do. The roles of the NCOP and Minister therefore are to ‘act as a constraint’ which serves to ‘scrutinise the measures taken by the provincial executive’.<sup>96</sup>

Should the assumption of responsibilities not be appropriate to remedy the failure at the municipality the relevant provincial executive has the discretion to invoke section 139(1)(1)(c) ‘should exceptional circumstances warrant such a step’. The steps to apply section 139(1)(c) are outlined below.

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<sup>92</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-26.

<sup>93</sup> S 139(2)(c) 1996 Constitution.

<sup>94</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-26.

<sup>95</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-26.

<sup>96</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-26.

## 4.4 Applying section 139(1)(c)

If 'exceptional circumstances warrant such a step' the provincial executive can dissolve the municipal council in terms of section 139(1)(c) of the Constitution. The steps for the dissolution of the municipal council are outlined below.

### 4.4.1 Prior notice

In line with the cooperative principles outlined in Chapter Three of the Constitution the provincial executive should notify the Council in writing of its intention to dissolve the municipal Council. The notice should include:

- identification of the 'exceptional circumstances' in terms of section 139(1)(c) which the municipality did not comply with;
- motivation as to why the dissolution is necessary;
- an invitation to the municipal council to make written representations with regard to the 'exceptional circumstances'; and
- a reasonable time period for the making of representations.

### 4.4.2 Dissolution of the Council in terms of section 139(1)(c)

In the event of 'exceptional circumstances', section 139(1)(c) provides for 'dissolving the municipal council and appointing an administrator until a newly elected municipal council has been declared elected. The term 'exceptional circumstances' in the context of 139(1)(c) refers to the situation that is 'markedly unusual or specially different' and implies that dissolution of the council is the only appropriate step that would achieve the fulfilment of the executive obligation.<sup>97</sup> In *Mnquma* the High Court states that there are three important aspects that flow from the reading of paragraph (c) of section 139(1). These aspects relate to the fact that consideration should have been given to: 'other forms of intervention which are effective and less intrusive'; that there should be a 'causal connection between the conduct of the municipal council and the continued failure to comply with the executive obligation'; and the dissolution should serve as a remedy for solving the problem at the municipality.<sup>98</sup>

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<sup>97</sup> *Mnquma* para 81.

<sup>98</sup> *Mnquma* para 80.

In *Mnquma* Van Zyl J cautioned that careful consideration should be given before provincial executives resort to dissolution of the municipal council as it is more intrusive than the other forms of intervention. In this regard Murray argues that ‘dissolution ought to be a last resort ... which is due to the unusual situation forced on the provincial executive in order to implement the intervention effectively’.<sup>99</sup> Murray argues that ‘upon dissolution of the council in terms of section 139(1)(c) of the Constitution, the assumption of the legislative functions of the council seems to be a ‘necessary condition’ and as such the provincial executive may assume the legislative powers.’<sup>100</sup> She further argues that the council in this case not only loses its authority but that the councillors also lose their rights and obligations as members of the council. Thus a new council must be elected, but until such time an administrator who assumes the duties of the council should be appointed. The question then arises of whether dissolution in terms of section 139(1)(c), which is based on the non-fulfilment of an executive obligation, encroaches on both the executive and legislative functions of the council? Also, should the new administrator who assumes the power of the council assume both the executive and legislative functions of the council? According to De Visser & Steytler the administrator may ‘exercise the legislative and executive powers that are necessary to ensure the continuation of service delivery and municipal governance’.<sup>101</sup>

#### **4.4.3 Procedural requirements for the dissolution**

Should the provincial executive dissolve the municipality the provincial executive must inform the municipality in writing of such a decision. In addition, it also has to immediately notify the Minister responsible for Local Government, the relevant provincial legislature as well as the NCOP of the decision.<sup>102</sup> The dissolution becomes effective 14 days after the NCOP received the notice.<sup>103</sup> However, should the Cabinet member or the NCOP disapprove

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<sup>99</sup> Hofmann-Wanderer Y & Murray *Suspension and Dissolution of Municipal Councils under section 139 of the Constitution* (2007) 145.

<sup>100</sup> Hofmann-Wanderer Y & Murray *Suspension and Dissolution of Municipal Councils under section 139 of the Constitution* (2007) 142.

<sup>101</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-29.

<sup>102</sup> S 139(3)(a)(I)(ii) 1996 Constitution.

<sup>103</sup> S 139(3)(b) 1996 Constitution.

of the dissolution or not approve within 28 or 180 days respectively then the intervention is invalid.<sup>104</sup>

#### **4.4.4 After the dissolution**

After the dissolution, the MEC appoints an administrator who ensures the functionality of the municipality and the provision of services until a new council is declared elected. According to De Visser and Steytler the actions of the administrator are 'remedial in nature in anticipation of a new council'.<sup>105</sup>

## **5 Ending the intervention**

The provincial executive should end the particular intervention when the problems have been solved by the municipality. The intervention in terms of section 139(1)(b) ends when the municipality is able to: maintain the essential services or meet the minimum established standard of services; not prejudice the interests of other municipalities; and maintain economic unity. Accordingly, the recovery plan which was adopted when the provincial executive intervened in terms of section 139(1)(b) ceases as and when the municipality is able to implement the aforementioned plan by itself or when the objectives set out in the plan have been met. The provincial executive ends the intervention in terms of section 139(1)(c) when the newly elected council takes control of the executive and legislative functions of the municipality. The appointment of the administrator thus ends when the municipal council once again takes control of the municipality. Upon ending the intervention all interested parties such as the municipality, Minister of Finance, Minister of Local Government, any creditors with pending litigation, the provincial legislature as well as organised local government have to be informed by the MEC for Finance of the termination of the intervention.

## **6 Summary**

The purpose of interventions in terms of sections 139(1) is to enable provincial executives to put the affected municipality in a position to fulfil the failed executive obligation. These interventions are circumscribed by rules and principles which are enshrined in the

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<sup>104</sup> S 139(3)(b) 1996 Constitution.

<sup>105</sup> De Visser J & Steytler N *Local Government Law of South Africa* 2 ed (2012) 15-29.

Constitution and legislation. Should these rules and principles not be adhered to then the intervention may be terminated by the courts, the Minister or the NCOP. Complying with the requirements for the use of interventions is therefore not only necessary to avoid suspension of the intervention but also essential for the speedy remedy of the failed executive obligation.

In the following chapter the data acquired for the use of interventions in terms of section 139 (1)(a)-(c) from the beginning of 2009 until March 2014 will be presented. The data will assist in determining whether or not the relevant provincial executives followed the requirements necessary for the use of interventions in terms of section 139(1). In this way the answers ultimately determine the role of provinces for the use of interventions in terms of section 139 (1)(a)-(c) of the Constitution.





# Chapter Three

## The Compliance of Section 139(1) Interventions

### 1 Introduction

This chapter deals with the presentation of data related to the compliance for interventions in terms of section 139(1). The data for these interventions dates from January 1998 until March 2014. In this chapter eight questions are posed with reference to how provincial executives applied the steps necessary for the use of interventions in terms of section 139(1)(a)-(c) of the Constitution. These questions are posed in response to the uncertainty around the application of the steps necessary for the use of interventions (see Chapter Two, sections 2.1 and 2.2). In order to assess the impact of these uncertainties on the steps necessary for compliance with interventions in terms of section 139 (1), this chapter looks at the notices submitted by provincial executives to the Minister and the NCOP in terms of section 139(2)(a)(i)-(ii) for the last five years. The data acquired from these notices are complemented by the progress reports by the NCOP and COGTA for aforementioned interventions. Discussion documents from COGTA and SALGA are also used for the categorisation of the nature of the problems and breakdown of interventions in terms of section 139(1) of the Constitution. The data acquired from these reports, notices and discussion documents are used to answer the eight questions related to the requirements for compliance of interventions in terms of section 139(1)(a)-(c). Ultimately, the data allows an assessment to be made of the role of provinces in the use of interventions in terms of section 139(1) of the Constitution.

The data mentioned above is categorised in a manner that follows the steps necessary for the use of interventions in terms of section 139(1)(a)-(c). The data captured in Tables 3 and 4 includes: identifying the nature of the problems at the municipality; the legal basis for the intervention; the steps taken to remedy the problems; dates of prior notices to the municipality; dates of interventions; dates of notices informing the Minister and NCOP of the intervention; dates of dis/approvals by the Minister and NCOP; and dates of the termination of the interventions. The information acquired from abovementioned data is used to answer the questions related to the steps necessary for complying with interventions in terms of section 139 (1) of the Constitution.



The outcome of these answers determine whether the steps applied by the relevant provincial executives comply with the requirements as provided in the Constitution for the use of the particular interventions. Also, based on the answers the researcher is able to assess which of the procedural steps have proven to be difficult to apply and which not, as well as to ascertain if there were instances where the use of interventions in terms of section 139 (1) was applied outside of what is constitutionally permitted. Before categorising the data in accordance with the problems identified at the municipality, the provincial breakdown for the use of interventions in terms of section 139 is provided.

## 2. Provincial breakdown of section 139 interventions, 1998–2014

From January 1998 till March 2014 there have been 72 interventions undertaken by provinces in terms of sections 139, which include sections 139(1), (4) and (5) in Table 1 below. This amount represents an average of five interventions per annum. During this period 18 interventions were undertaken in KwaZulu-Natal followed closely by the North West with 15 interventions in terms of section 139. The Free State, Eastern Cape and Mpumalanga all undertook 10 interventions during this period, with the other provinces, namely, Western Cape (5), Northern Cape (2), Gauteng (1) and Limpopo (1), recording five or less. The provincial breakdown of these interventions from 1998 until March 2014 is presented in Table 1 below.

**Table 1: Provincial Breakdown of Section 139 Interventions (1998 – 2014)**

Province	No. of Interventions
North West	15
Free State	10
Gauteng	1
Northern Cape	2
Eastern Cape	10
Mpumalanga	10
KwaZulu-Natal	18
Western Cape	5
Limpopo	1
Total	72

SALGA: - *The Application of Sections 100 and 139 of the Constitution: March 2014*

## 2.1 Section 139 interventions from January 2009 till March 2014

Between January 2009 and March 2014 KwaZulu-Natal again recorded the highest number of interventions, 12, followed by North-West with nine and Mpumalanga with seven interventions in terms of section 139(1). Eastern Cape undertook five interventions while Free State recorded four interventions in terms of section 139(1). The Western Cape undertook three interventions of which two were undertaken in terms of section 139(4) and the other one in terms of section 139(1). Lastly Limpopo recorded only one intervention in terms of section 139(1) while Gauteng's only intervention was undertaken in terms of section 139(5). The interventions undertaken by provinces in terms of section 139(1), (4) and (5) of the Constitution for the last five years amount to 42. This represents an average of more than eight interventions per annum from 2009 until 2014, and shows an increase of three interventions per annum against the average of five between 1998 and 2014. The provincial breakdown of these interventions is presented in Table 2 below.

**Table 2: Section 139 interventions from (2009–2014)**

Province	Section 139 (1)	Section 139 (4)	Section 139 (5)	Total
North West	9			
Free State	4			
Gauteng			1	
Northern Cape	0			
Eastern Cape	5			
Mpumalanga	7			
KwaZulu-Natal	12			
Western Cape	1	2		
Limpopo	1			
Total	39	2	1	42

SALGA: *The Application of Sections 100 and 139 of the Constitution*: March 2014

## 2.2 Steps necessary for the use of interventions

The Constitution provides that provinces have to apply various steps for the use of interventions in terms of section 139(1) of the Constitution. These steps include: identifying the problems; the legal basis for the intervention; notices to the Minister and NCOP; and dis/approvals by Minister and NCOP. The various steps are discussed below.

### 2.2.1 Identifying the nature of the problem

In the notices by the relevant provincial executives to the Minister and NCOP in terms of section 139(2)(a)(i)-ii), the nature of the failures at the municipality are defined. These problems are grouped into the following broad categories namely, governance, financial and service delivery. These categories are also adopted in the discussion documents by COGTA and SALGA.<sup>106</sup> The categories in which the problems are grouped are outlined below.

#### (i) Governance

Governance problems range from political in-fighting to political mismanagement and include instances of Council's inability to perform as required by legislation. For example, in the case of the Umvoti municipality, persistent political in-fighting culminated in the unlawful election of office-bearers and the unlawful election of a new Speaker.<sup>107</sup> This was also the case at the Mngquma municipality where the two factions in the Council were in opposition to each other, with the one faction being led by the Executive Mayor and the other by the Speaker and the Chief Whip.<sup>108</sup> Also, in the case of Swellendam Municipality the quorum for decision-making was frustrated on numerous occasions, leading to the approval of the IDP, the tabling of the draft annual budget and the approval of the annual budget for 2012/13 not meeting the prescribed time-frames.<sup>109</sup> The above examples have resulted in the non-performance of top management and conflicts between top management and councillors resulting in a state of dysfunctionality at the municipalities.

However, the challenge with linking governance problems to an executive obligation is that these problems at times manifest themselves through a range of administrative or financial difficulties rather than difficulties of governance. For instance, problems pertaining to the intervention at the Sundays River Local and the Kou Kamma Municipalities are identified in

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<sup>106</sup> South African Local Government *The Application of sections 100 and 139 of the Constitution: The need for Legislation in terms of sections 100 (3) and 139 (8)* (2014) 6.

<sup>107</sup> Provincial Government of KwaZulu Natal: Notice in terms of section 139(2)(a) of the Constitution. 2013/07/18.

<sup>108</sup> Provincial Government of Eastern Cape: Notice in terms of section 139(2)(b) of the Constitution. 2013/04/03.

<sup>109</sup> Provincial Government of Western Cape: Notice in terms of section 139(2)(a) of the Constitution. 2013/08/29.

the notice to the Minister and NCOP as financial problems.<sup>110</sup> However these problems are directly attributed to poor governance as a result of political in-fighting between factions. Common threads identified in municipalities experiencing problems of a governance nature are: incapacity to correct institutional problems; no improvement in financial controls; non-compliance with legislation; audit disclaimers from the auditor general; and dysfunctional municipal councils. In most instances, provinces do not learn of governance problems through monitoring mechanisms but rather through political channels, word-of-mouth or by the lack of decision-making from the municipality. These governance problems have proved to be one of the most common cause for the use of interventions in terms of section 139(1).

### **(ii) Financial and administrative dysfunctions**

Besides governance, financial non-viability is quite often one of the difficulties experienced by municipalities in distress. This has often been due to administrative failures to effectively manage the financial situation at the municipality. The result is usually that the municipality does not raise sufficient revenue due to the administrative incapacity leading to weak billing systems, lack of credit control and poor tariff policies. This was the case at the Ugu, Uthukela and Umzunyathi municipalities, which resulted in these municipalities not being able to pay for services rendered by the entity Uthukela Water. In most instances, financial triggers have been picked up through established monitoring mechanisms such as annual Audit and National Treasury reports.

### **(iii) Service delivery**

Sections 152 and 153 of the Constitution clearly set out the service delivery obligations of municipalities whereas Parts B of Schedule 4 and 5 of the Constitution stipulate the functional areas of municipalities. The municipalities are usually not able to keep up with the high demand for these services leading to breakdowns of systems or services not rendered. Problem areas related to services may include little or no spending on repairs and maintenance. For example, at the Uthukela District Municipality only 2% of the budget was for repairs and maintenance while the norm is 8%-10%, resulting in the collapse of the

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<sup>110</sup> Provincial Government of Eastern Cape: Notice in terms of section 139(2)(a) of the Constitution.  
2014/04/03.

existing water infrastructure.<sup>111</sup> Other problems related to service delivery include: lack of monitoring systems; poor community relations; no reporting on the progress of IDP; and no consequences for maladministration and mismanagement. In the cases of the Madibeng, Moses Kotane, Ngaka and Tswaing, the failure by the leadership to take responsibility for the irregularities at the municipality resulted in service delivery protests.<sup>112</sup> In Madibeng, the protests resulted in the deaths of four members of the Madibeng community and the Council was subsequently changed.<sup>113</sup> However, lack of effective monitoring mechanisms has resulted in management rarely being held accountable for poorly managed service delivery or for community dissatisfaction with services. These three broad categories will be used for purposes of identifying the failure at the municipality.

### **2.2.2 Legal basis for the intervention**

Section 139(1) of the Constitution provides that the provincial executive may intervene in the event of the municipality failing to fulfil an executive obligation. The failure of the executive obligation must however be determined with reference to the Constitution or legislation which then becomes the legal basis for the use of the intervention in terms of section 139(1). In doing so, provincial executives tend to link the failures of the municipality to obligations that are ‘aimed at the effective performance of local government of its executive obligations rather than to the executive obligation itself’.<sup>114</sup> In *Mnquma* Van Zyl J states that these obligations or duties which tend to be confused with the executive obligations are *inter alia* contained in legislation such as the Municipal Structures Act and Municipal Systems Act.<sup>115</sup>

### **2.2.3 Applying the Appropriate Step**

Having identified the nature of the problem, the relevant provincial executive is then tasked to consider the appropriate mode of intervention to remedy the problems at the municipality.<sup>116</sup> The Constitution provides that the appropriate step in terms of section 139(1)

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<sup>111</sup> Provincial Government of KwaZulu Natal: Notice in terms of section 139(2)(a) of the Constitution. 2013/05/07.

<sup>112</sup> Provincial Government of KwaZulu Natal: Notice in terms of section 139(2) (a) of the Constitution. 2013/05/07.

<sup>113</sup> Provincial Government of North West: Notice in terms of section 139(2)(a) of the Constitution. 2010/03/10

<sup>114</sup> *Mnquma* para 65 (discussed in 2.1.1).

<sup>115</sup> *Mnquma* para 65.

<sup>116</sup> S 139(1)(a)-(c) 1996 Constitution.

should be considered ‘to fit the situation’ at the municipality. What is apparent in Table 3 below is that out of the 39 interventions from January 2009 to March 2014, 37 were undertaken in terms of section 139(1)(b). Very few of these interventions were undertaken in terms of section 139(1)(a) or (c). Of the outstanding two interventions, one was undertaken in terms of section 139(1)(a) and the other in terms of section 139(1)(c). The provincial breakdown of interventions in terms of section 139(1)(a)-(c) are shown in Table 3 below.

**Table 3: Provincial breakdown of interventions in terms of section 139(1)(a)-(c) (2009 – 2014)**

Name of Municipality	Nature of Problem	Legal Basis for Intervention	Appropriate Step
North West: 9 Interventions			
1. Ngaka	Governance, financial and administrative dysfunctionality	Ss 4, 29 Structures Act, S 23 LRA	139(1)(b)
2. Moses Kotane	Governance, financial and administrative dysfunctionality	S 4 Structures Act	139(1)(b)
3. Tswaing Local Municipality	Governance, financial and administrative dysfunctionality.	S 57 Management, S 71 MFMA, S 4 Structures Act	139(1)(b)
4. Madibeng Local Municipality	Governance, financial and administrative dysfunctionality.	S 4 Structures Act	139(1)(b)
5. Mafikeng Local Municipality	Governance, Financial and administrative, Service delivery	S 57 Performance Management Act Non-compliance with MFMA and Treasury regulations	139(1)(b)
6. Maquassi Hills LM (Kenneth Kaunda District)	Financial Administration, Governance and Service Delivery	Ss 51, 54A, 56 Systems Act	139(1)(b)
7. Matlosana Local Municipality	Governance, Financial Administration	Ss 51, 54A, 56 (MSA 2000)	139(1)(b)
8. Ditsobotla Local Municipality	Financial Administration, Governance and Service delivery	Ss 51, 54A, 56 Systems Act, S 139(1)(b) Constitution	139(1)(b)
9. Madibeng	Financial Administration, Governance and Service delivery	Withdrawn/disapproval by Minister	139(1)(b)
Free State: 4 Interventions			
1. Thabo Mafutsayane	Governance, and Financial Administration	Ss 39, 28, 32 Systems Act, Ss 71, 46 MFMA	139(1)(b)
2. Matlosana Local Municipality	Governance and Financial Administration	Ss 46, 39, 28, 29 Systems Act	139(1)(b)
3. Naledi Local Municipality (Motheo District)	Governance Council Dysfunctionality, Financial administration.	Ss 154, 46, 71 Systems Act	139(1)(c)
4. Masilonyana Local Municipality	Governance and Financial Administration	Ss 46, 39, 71 Systems Act, PMS Framework	139(1)(b)

Eastern Cape: 5 Interventions				
1. Mnquma Local Municipality (Amathole District)	Governance (Dysfunctional Council)	Financial	Ss 41(3), 152(1), 21 of the Constitution, Ss4(2)(a, b, d, f) Systems Act, Ss 21, 32, 73, 74, 99, 111, 112, 115, 131, 165, 172 MFMA	139(1)(c)
2. Alfred Nzo District Municipality	Governance, managemnet	Financial	uncertain	139(1)(b)
3. Kou-Kamma Local Municipality	Governance, management	Financial	S 154 Constitution, in Ss 133, 127 MFMA	139(1)(b)
4. Sunday's River Valley Local Municipality (Cacadu District)	Financial (Administration ), Governance		uncertain	139(1)(b)
5. Mnquma Local Municipality	Governance		S 36(5), S 29(1) Structures Act, Ss 52 55, 56, 59, 66(1), 67(4) , 70 Systems Act, Ss 60, 66, 68 72 MFMA	139(1)(b)
Mpumalanga: 7 Interventions				
1. PixleykaSeme (Gert Sibande District)	Governance and financial controls		S 55 Systems Act, S 56 Structures Act	139(1)(b)
2. Mkhondo Local Municipality	Governance and financial dysfunctionality		S 57 Manager's position	139(1)(b)
3. Lekwa Local Municipality	Governance and financial dysfunctionality		S 56 Structures Act, S 55 Systems Act	139(1)(b)
4. ThabaChweu Local Municipality (Ehlanzeni District)	Financial (Administrative Management)		S 55 Systems Act	139(1)(b)
5. Thembisile Hani (Nkangala District)	Financial (Administrative) and Governance		uncertain	139(1)(b)
6. Emalahleni Local Municipality (Nkangala District)	Governance, Service delivery and Financial (Administration)		S 55 Systems Act, S 56 (2) Structures Act	139(1)(b)
7. Bushbuckridge Local Municipality (Ehlanzeni District)	Service delivery; and Financial (Administration)		S 55 Systems Act S 56(2) Structures Act	139(1)(b)
KwaZulu-Natal: 12 Interventions				
1. Umhlabuyalingana Local Municipality	Governance and Financial (Administration)		Ss 51, 52 Systems Act S 152 Constitution, S 131, 136, 138 MFMA	139(1)(b)
2. Indaka Local Municipality (Uthukela District)	Governance and Financial (Administration)		S 51 Systems Act, S 152 Constitution Ss 121, 129 MFMA	139(1)(b)
3. Okhahlamba Local Municipality	Governance and Financial Administration		S 51 Systems Act S 152 Constitution, Ss136,	139(1)(b)



(Uthukela District)		121, 129, 165, 166 MFMA	
4. Umsunduzi Local Municipality	Governance and Financial (Administration)	Ss29, 71, 111, 134 MFMA, S 28 Systems Act	139(1)(b)
5. Mtubatuba Local Municipality (Umkha-nyakude District)	Governance and Financial (Administration)	Ss 51, 52 Systems Act	139(1)(b)
6. Imbabazane Local Municipality (Uthukela District)	Governance (Political party conflicts).	S 152 of the Constitution S 51, 73 Systems Act	139(1)(b)
7. Abaqulusi Local Municipality	Governance and Financial (Administration)	Ss 64(2)(g), 121 MFMA, Ss 46(1)(b-c), 54 Systems Act	139(1)(b)
8. Umzinyathi District Municipality	Financial (Administration)	Ss 121(2), 71, 142, 145, 147, 152, 137, 141, 141(3) MFMA	136(2) MFMA 139(1)(b)
9. Uthukela District Municipality	Financial (Administration) and Governance	Ss 71, 121, 136(2), 141, 142, 145, 147(1), 137 MFMA	136(2) MFMA 139(1)(b)
10. Ugu District Municipality	Financial (Administration) and Governance	Ss 131(2)(a), 71, 136(2), 141, 141(3), 142, 145 MFMA S 152 Constitution	136(2) MFMA 139(1)(b)
11. Umvoti Local Municipality	Governance	Ss 51, 152 of the Constitution	139(1)(b)
12. Indaka Local Municipality	Financial (Administration) and Governance	S 51 Systems Act, S 152 of the Constitution, Ss 121, 129 MFMA	139(1)(a)
Western Cape: 1 Intervention			
1.Swellendam local Municipality	Governance and Financial (Administration)	Ss 60, S54 A (2) Systems Act, S 60 MFMA	139(1)(b)
Limpopo: 1 Intervention			
1. Mogalakwena	Governance and Financial	S 139(1)(b) S 152 Constitution	139(1)(b)

*Data retrieved from NCOP and COGTA notices and progress reports (2009–2014)*

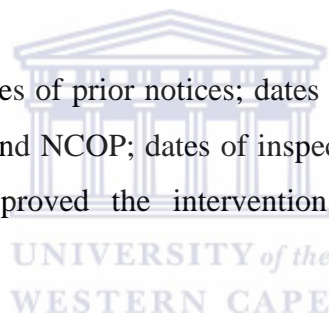
## 2.2.4 Notices

Section 41(h)(iii) of the Constitution provides that the various organs of government consult and inform each other on matters of common interest. In this regard, the prior notice to the relevant parties not only serves to provide the municipality the opportunity to respond to the concerns outlined in the notice but also to inform the parties of the intended actions as well as actions taken by the provincial executive. The notices to the Minister and the NCOP in terms of section 139(2)(a)(i)-(ii) however have to be served within specific time-frames (14 days). The time-frames also apply to the notices for the approvals or disapprovals by the Minister



(28 days) in terms of section 139(2)(b)(i) and NCOP (180 days) in terms of section 139(2)(b)(ii) after the intervention began. For purposes of this study the dates for the time-frames pertaining to the dis/approvals by the Minister and NCOP in terms of section 139 (2) (b) (i-ii) are measured against calendar days of the year. The shorter period of 14 days period within which the provincial executives have to submit written notices to the Minister and the NCOP in terms of section (2) (a) (i-ii) are measured against working days. Resorting to this measure would make provision for instances where interventions were signed by the relevant parties near or before weekends but the intervention process could effectively only commence on the Monday or at times even later in the corresponding week. In these instances, the measuring of these dates in the same way as those measured for calendar days, would not only result in such dates (relating to when the intervention process begins and ends) not only reflecting the incorrect dates for such processes but could also result in the already high figures for non-compliance in terms of section 139 (2)(a)(i-ii) being much higher than presently stated.

Table 4 overleaf refers to the dates of prior notices; dates on which the interventions began; dates of notices to the Minister and NCOP; dates of inspection; dates on which the Minister and NCOP approved or disapproved the intervention; and termination dates of the intervention.



**Table 4: Dates pertaining to the various steps necessary for use of the interventions**

Name of Municipality	Date of Prior notice	Date of intervention	Date of notice to Minister	Date of notice to NCOP	Date of approval by Minister	Date of inspection in loco	Date of approval by the NCOP	Date of termination of intervention
Pixley ka Seme		2009/02/26	2009/02/27	2009/02/29	2009/02/27	Uncertain	Uncertain	2010/10/19
Mquma	2009/02/27	2009/04/08	2009/04/16	2009/04/16	Uncertain	Uncertain	Interdict	Intervention invalid
Kou Kamma		2009/04/	Uncertain	Uncertain	Uncertain	Uncertain	Uncertain	Lapsed 18 May 2011
Alfred Nzo		2009/04/	Uncertain	Uncertain	Uncertain	Uncertain	Uncertain	31 Oct 2009
NgakaModoriMolema		2009/07/01	2009/07/09	2009/07/09	2009/07/10	2009/11/13	2009/11/17	2010/10/06
Mkhondo Local		2009/07/14	Uncertain	2009/07/14	Uncertain	2009/11/12	2009/11/17	2010/Dec
ThabaChweu Local		2009/10/26	2009/10/27	2009/10/27	Uncertain	No	No	2010/Dec
Lekwa Local		2009/10/26	Uncertain	Uncertain	Uncertain	Uncertain	Uncertain	Uncertain
Thabo Mofutsanyane		2009/11/04	2009/11/08	2009/12/03	2009/11/20	2010/02/24	2010/03/25	2010/11/23
Indaka Local		2009/11/24	Uncertain	2010/01/05	Uncertain	2010/03/18	2010/05/20	2013/12/04
Okhahlamba Local		2009/11/24	2009/12/10	2010/01/05	Uncertain	2010/03-19/	2010/05/20	2012/06/30
Umhlabuyalingana		2009/11/24	2009/12/10	2010/01/11	Uncertain	2010/03/17	2010/05/20	2011/06/30
Nala Local		2009/12/03	2009/12/08	2010/01/11	Uncertain	2010/02/25	2010/03/25	Lapsed 18 May 2011

Masilonyana Local		2009/12/08	2009/12/08	2009/12/08	Uncertain	2010/05/14	2010/05/21	Lapsed 18 May 2011
Sundays River Valley		2010/02/10	2010/02/11	2010/02/16	Uncertain	2010/05/25	2010/06/04	2011/12/31
Madibeng Local		2010/03/10	2010/03/17	2010/03/18	2010/03/18	2010/05/13	2010/05/21	Lapsed 18 May 2011
Moses Kotane Local		2010/03/10	2010/03/17	2010/03/18	2010/03/18	2010/05/26	2010/06/04	Lapsed 18 May 2011
Tswaing Local		2010/03/10	2010/03/17	2010/03/18	2010/03/18	2010/05/11	2010/05/21	Lapsed 18 May 2011
Msunduzi Local		2010/10/06	2010/10/21	2010/10/22	Uncertain	2010/11/09	2010/11/24	2011/12/31
Thembisile Hani		2010/04/16	2010/04/29	2010/04/29	Uncertain	2010/05/27	2010/06/04	No
Naledi Local		2010/05/05	2010/05/05	2010/05/07	2010/05/06	2010/05/14	2010/05/20	Lapsed 18 May 2011
Mafikeng Local		2010/07/01	Uncertain	2010/07/21	Uncertain	2010/09/14	2010/10/26	Lapsed 18 May 2011
Swellendam Local		2012/08/29	2012/09/17	2012/09/19	2012/09/17	NA	NA	2012/10/15
Mtubatuba Local		2012/09/19	2012/10/01	2012/10/01	2012/11/04	2013/03/6-8	2013/05/30	No /current
Imbabazane Local		2013/01/23	2013/01/23	2013/01/25	2013/03/05	2013/03/6-8	2013/05/30	No /current
Abaqulusi Local		2013/03/20	2013/03/20	2013/03/25	Uncertain	2013/08/16	2013/09/12	Uncertain
Bushbuckridge		2013/04/17	2013/04/18	2013/04/22	2013/05/25	2013/08/13	2013/09/12	No /current
Emalahleni Local		2013/04/17	2013/04/18	2013/04/22		2013/08/14	2013/09/12	No /current
Matlosana Local		2013/04/01	2013/05/14	2013/05/19	2013/05/25	2013/08/21	2013/09/12	Withdrawn Nov2013

Maquassi Hills		2013/04/01	2013/04/17	2013/04/19	2013/05/25	2013/08/21	2013/09/12	2014/06/03
Ditsobotla Local		2013/04/01	2013/04/17	2013/04/19	2013/05/25	2013/08/20	2013/09/12	No/current
Umzinyathi District		2013/03/20	2013/05/07	2013/07/17	2013/06/21	Uncertain	Uncertain	No /current
Uthukela District		2013/03/20	2013/05/07	2013/05/10	2013/07/05	Uncertain	Uncertain	No /current
Ugu District		2013/04/17	2013/05/07	2013/07/17	2013/06/05	Uncertain	Uncertain	No /current
Mnquma Local	2013/01/31	2013/03/19	Notice 4 months late	2013/04/03	Min- no sign	2013/08/27	2013/09/12	No /current
Umvoti Local		2013/07/17	2013/07/18	2013/07/25	Min- no sign	2013/08/15	2013/09/12	No /current
Indaka Local		2013/12/04	Uncertain	2014/04/16	Uncertain	No Yet	No Yet	Uncertain
Madibeng Local		2014/02/05	2014/02/07	2014/02/10	Disapproved	Disapproved	2014/07/31	D on 2014/3/7
Mogalakwena Local		2014/03/12	2014/03/17	2014/03/26	2014/05/20	Uncertain	Uncertain	Uncertain

Data retrieved from NCOP and COGTA notices and progress reports (2009 – 2014). Key: NA – not applicable; D - Disapproved

### 3 Compliance with section 139(1)

The questions which are answered in this chapter serve to verify if the use of interventions by provincial executives in terms of section 139(1)(a)-(c) complied with the requirements laid down in the Constitution. These answers are derived from the notices to the Minister and NCOP in terms of section 139(2)(a)(i)-(ii) as well as the progress reports from COGTA and NCOP which relate to aforementioned interventions for the last five years. Each question is answered with a 'yes', 'no' or 'uncertain'. A 'yes' answer indicates that the relevant provincial executive complied with the requirement pertaining to the particular question, whereas a 'no' answer indicates that it did not. Should any of the notices or reports not be available to determine an answer or the dates specified in the notices or reports are illegible or omitted then the answer to such questions is 'uncertain'. The questions are stated below.

#### **(i) Did the provincial executive make use of the directive in terms of section 139(1)(a)?**

The directive is the least intrusive measure in terms of section 139(1)(a) as it does not infringe on the functions of the municipality but merely instructs the municipality what to do in order to remedy the problems. This is in line with the 'constitutional imperative that the integrity of local government should be respected'.<sup>1</sup> The question therefore arises whether or not the municipality made use of the directive in terms of section 139(1)(a) of the Constitution.

#### **(ii) Was a prior notice issued before the section 139(1)(a), (b) or (c) interventions?**

Having identified the problems at the municipality the Constitution provides that the provincial executive should inform all parties of the prospect of the intervention in terms of section 139(1) and afford the municipality the opportunity to make representations with regard to the problems stated in the notice. The question relates to whether the municipality was issued with prior notice to make representations with regard to the problems identified in the notice which is in line with the *audi alterem partem* rule in our law.

#### **(iii) Were notices submitted to the Minister and NCOP within stipulated time-frames?**

Chapter Three of the Constitution requires all organs of government to consult and inform each other on matters of common interest (discussed in 2.2.1). The Constitution sets specific

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<sup>1</sup> *Mnquma* para 6.

time-frames for the provincial executive to forward the notices containing the relevant information to the relevant parties. The question is therefore whether these notices were submitted within the 14 day time-frames to the Minister and the NCOP in terms of section 139(1)(a)-(ii) of the Constitution.

**(iv) Is the failure identified in the notice to the Minister and NCOP?**

In *Mnquma*, Van Zyl J stated that the ‘first enquiry by the provincial executive is to identify the failure of the municipality’<sup>2</sup> with reference to the Constitution or legislation. Hence, the study examines whether the failure at the municipality (defined as the nature of the problems) is outlined in the aforementioned notices to the Minister and NCOP.

**(v) Does the failure relate to a legislative obligation that has been breached?**

As mentioned in (iv) above the failures identified in the notice must be determined with reference to the Constitution or legislation. The question then arises if the relevant provincial executive identifies the legal basis for the intervention in terms of section 139(1)(a), (b) or (c).

**(vi) Does the failure in the notice relate to an ‘executive obligation’ as defined in *Mnquma*?**

Van Zyl J in *Mnquma* states that the enquiry to address the failure should not only identify the problems at the municipality but such problems should ‘relate to the failure to fulfil an executive obligation’. The question then arises whether the problems identified in the notices do relate to an ‘executive obligation’ as defined in *Mnquma*.

**(vii) Did the Minister and NCOP dis/approve the intervention within the specified time-frame?**

Section 139(2)(b)(i)-(ii) spells out the time-frames in which the Minister and the NCOP have to approve or disapprove the use of interventions in terms of section 139(1). The question that comes to the fore is whether the intervention was approved or not within the time-frames by the Minister (28 days) and NCOP (180 days) as stipulated in the Constitution.

**(viii) Did the provincial executive request an extension for the intervention?**

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<sup>2</sup> *Mquma* para 87.

The period for the intervention in the notice to the Minister and NCOP is usually confined to six months to remedy the situation at the municipality. The question is whether the relevant provincial executives were able to address the failures at the municipality within the initial period mentioned in the notices to the relevant parties or if extension periods were requested in order to remedy the failed obligation.



Table 5 which follows below provides an overview of the answers to the eight questions. This is followed by the Tables 6-13 which project the percentages and totals of the answers to the eight questions.

**Table 5: Overview of answers to the eight questions**

Name of Municipality / Department	Did the provincial executive make use of directive?	Was prior notice Issued?	Were notices submitted within specified timeframe to Min/NCOP?	Is the failure identified in notices to Min/NCOP?	Does the failure relate to a legislative obligation that has been breached?	Does the failure relate to an executive obligation?	Did the Min/NCOP dis/ approve intervention within timeframe. Min/NCOP?	Did the provincial executive request extension for intervention?
PixleykaSeme	No	No	Yes/Yes	Yes	Yes	No	Yes/Yes	No
Mquma	No	Yes	Yes/Yes	Yes	Yes	No	Unc/Unc	No
Kou Kamma	No	No	Unc/Unc	Yes	Yes	No	Unc/Unc	Unc
Alfred Nzo	Unc	Unc	Unc//Unc	Unc	Unc	Unc	Unc/Unc	Unc
Ngaka	No	No	Yes/Yes	Yes	Yes	Yes	Yes/Yes	Yes
Mkhondo Local	Unc	Unc	Unc/Unc	Yes	Yes	No	Unc/Yes	No
ThabaChweu Local	No	No	Yes/Yes	Yes	Yes	No	Unc/Unc	No
Lekwa Local	Unc	No	Unc/Unc	Yes	Yes	No	Unc/Unc	No
Thabo Mofutsanyane	No	No	Yes/Yes	Yes	Yes	Yes	Yes/Yes	No
Indaka Local	No	No	Unc/No	Yes	Yes	No	Unc/Yes	Yes
Okhahlamba	No	No	No /No	Yes	Yes	No	Unc/Yes	Yes
Umhlabuyalingana	No	No	Yes/Yes	Yes	Yes	No	Unc/Yes	No
Nala Local	No	No	Yes/No	Yes	Yes	Yes	Unc/Yes	No
Masilonyana Local	No	No	Yes/Yes	Yes	Yes	No	Unc/Yes	No
Sundays River	No	No	Yes/Yes	Yes	Yes	No	Unc/Yes	No
Madibeng Local	No	No	Yes/Yes	Yes	Yes	No	Yes/Yes	No
Moses Kotane	No	No	Yes/Yes	Yes	Yes	Yes	Yes/Yes	No
Tswaing Local	No	No	Yes/Yes	Yes	Yes	No	Yes/Yes	No
Msunduzi Local	No	No	No /No	Yes	Yes	No	Unc/Yes	Yes
Thembisile Hani	No	No	Yes/Yes	Yes	No	No	Unc/Yes	Yes



Naledi Local	No	No	Yes/Yes	Yes	Yes	Yes	Yes/Yes	No
Mafikeng Local	No	No	Yes/Yes	Yes	Yes	Yes	Unc/Yes	No
Swellendam Local	No	No	Yes/No	Yes	Yes	Yes	Yes/Yes	No
Mtubatuba Local	No	No	Yes/Yes	Yes	Yes	No	No/No	Yes
Imbabazane Local	No	No	Yes/Yes	Yes	Yes	No	No/Yes	No
Abaqulusi Local	No	No	Yes/Yes	Yes	Yes	No	Unc/Yes	Yes
Bushbuckridge	No	No	Yes/Yes	Yes	Yes	No	No/Yes	No
Emalahleni Local	No	No	Yes/Yes	Yes	Yes	No	No /Yes	No
Matlosana Local	No	No	No /No	Yes	Yes	Yes	Yes/Yes	No
Maquassi Hills	No	No	No/No	Yes	Yes	Yes	No /Yes	No
Ditsobotla Local	No	No	No /No	Yes	Yes	Yes	No /Yes	No
Umzinyathi	Yes	Yes	No /No	Yes	Yes	Yes	No /Unc	No
Uthukela District	No	No	No /No	Yes	Yes	Yes	No/Unc	No
Ugu District	No	No	No /No	Yes	Yes	No	Yes/Unc	No
Mnquma Local	Yes	Yes	No /Yes	Yes	Yes	No	No /Yes	No
Umvoti Local	No	No	Yes/Yes	Yes	Yes	Yes	No /Yes	Yes
Indaka	Yes	No	Yes/Yes	Yes	Yes	No	Unc/Unc	No
Madibeng Local	No	No	Yes/Yes	Yes	Yes	No	Yes/Yes	No
Mogalakwena	No	No	Yes/Yes	Yes	Yes	No	No/Unc	No

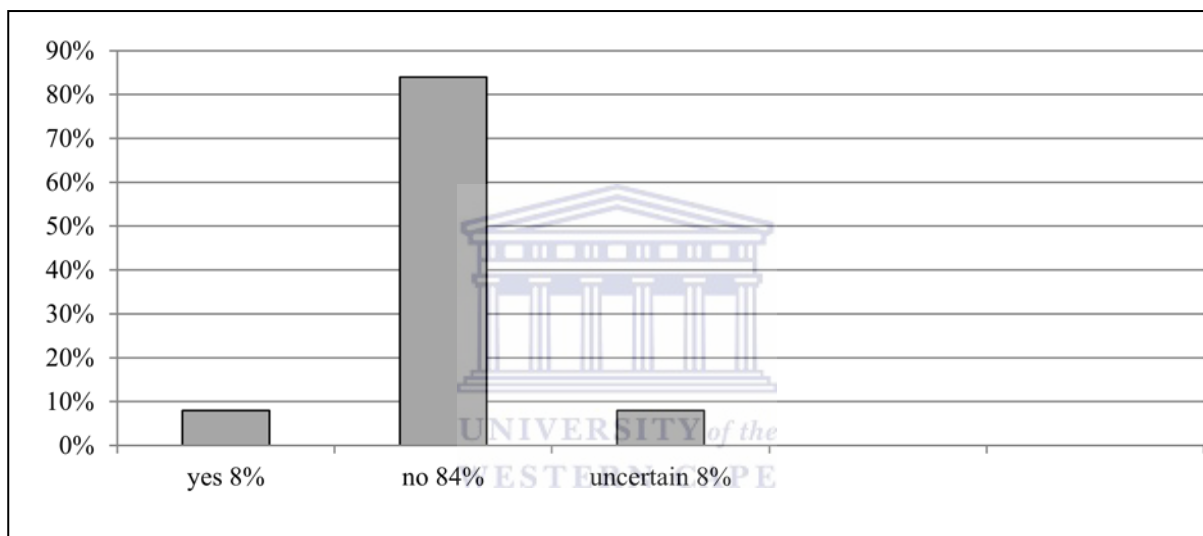
## 4 Tally of the answers

In this section the answers to the eight questions serve to assess whether the steps necessary for interventions in terms of section 139 (1) of the Constitution have been followed. The answers are tallied in three categories – ‘yes’, ‘no’ and ‘uncertain’ – and outlined below.

*Question 1: Did the provincial executive make use of the directive?*

Yes	No	Uncertain	Total
3 (8%)	33 (84%)	3 (8%)	39 (100%)

**Table 6: Did the provincial executive make use of the directive?**



Data collated for Question 1 indicates that out of the 39 interventions, 8% (3) made use of the directive, 84% (33) did not, while for 8% (3) of the interventions the required documentation was not available to determine an answer.

*Question 2: Was a prior notice issued before the Section 139(1)(a), (b) or (c) intervention?*

Yes	No	Uncertain	Total
3 (8%)	34 (87%)	2 (5%)	39 (100%)

**Table 7: Was a prior notice issued before the section 139 (1) (a) – (c) intervention?**

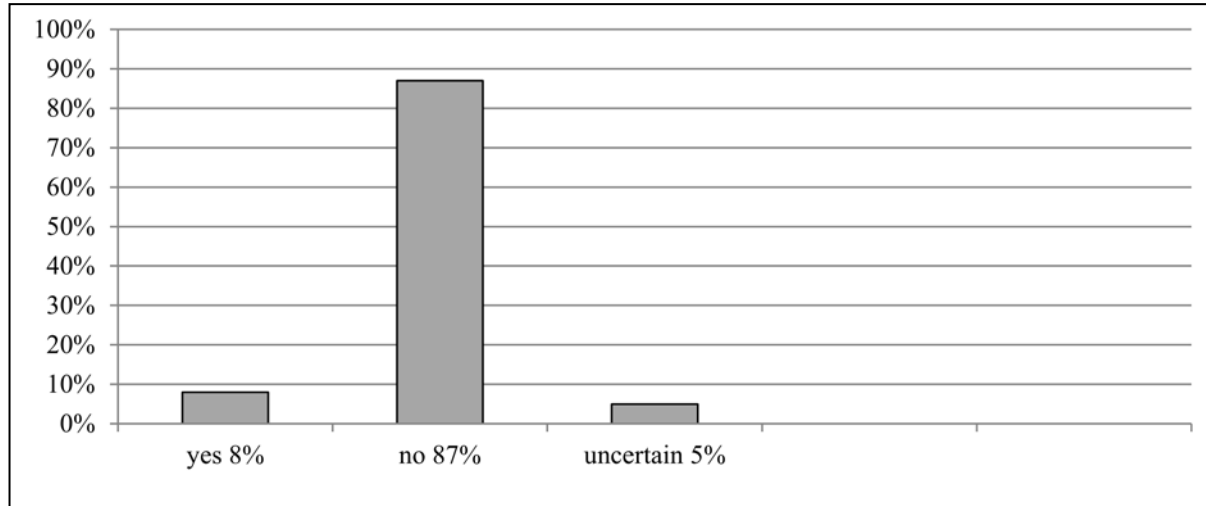


Table 7 indicates that 8% (3) of the interventions issued prior notices, 87% (34) did not, while for 5% (2) the required documentation was not available to determine an answer.

*Question 3a: Were notices submitted to the Minister within the stipulated time-frames?*

Yes	No	Uncertain	Total
25 (59%)	9 (26%)	5 (15%)	39 (100%)

**Table 8: Were notices submitted to Minister within the stipulated time-frames?**

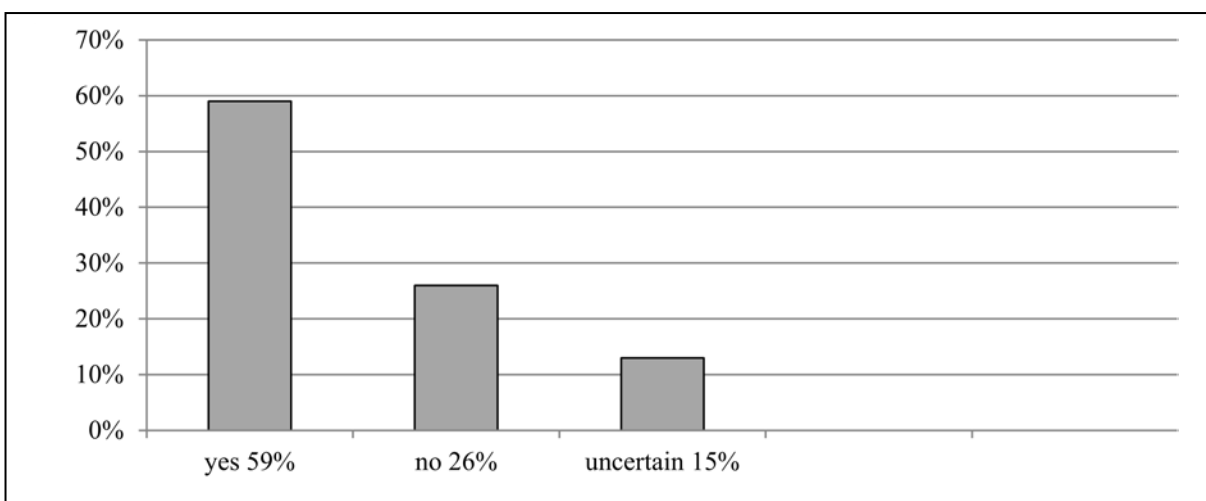


Table 8 indicates that for 59% (25) of the interventions, notice to the Minister was submitted within the time-frame, 26% (9) were not, and for 15% (5) no answer could be determined.

Question 3b: Were notices submitted to the NCOP within the stipulated time-frames?

Yes	No	Uncertain	Total
24 (62%)	11 (28%)	4 (10%)	39 (100%)

**Table 9: Were notices submitted to the NCOP within the stipulated time-frames?**

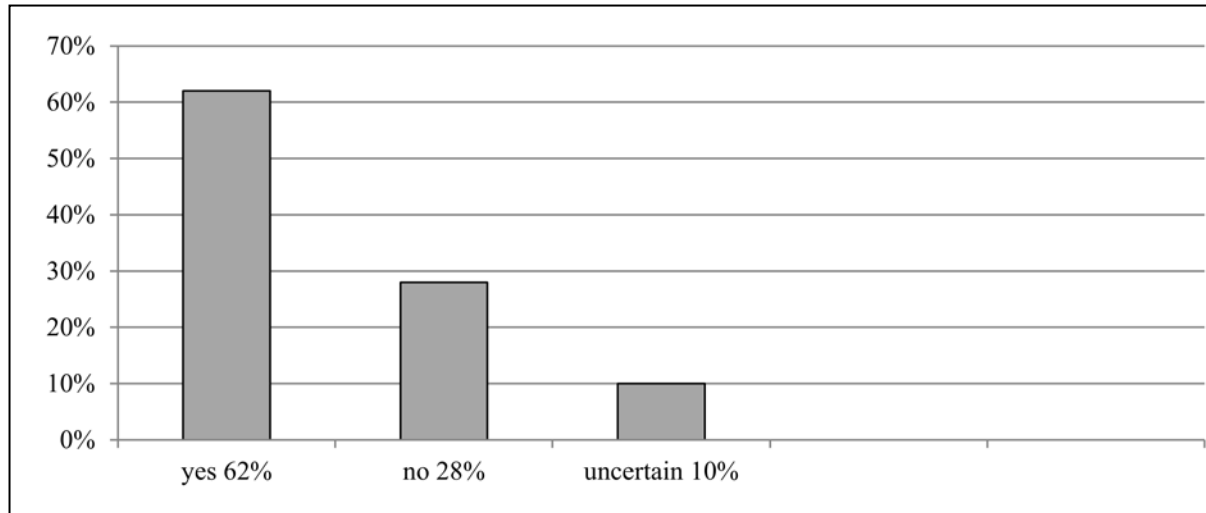


Table 9 indicates that for 62% (24) of the interventions, notices to the NCOP were submitted within the timeframe, 28% (11) were not, and for 10% (4) no answer could be determined.

Question 4: Is the failure identified in the notice to the Minister and NCOP?

Yes	No	Uncertain	Total
38 (97%)	0 (0%)	1 (3%)	39 (100%)

**Table 10: Is the failure identified in the notice to the Minister and NCOP?**

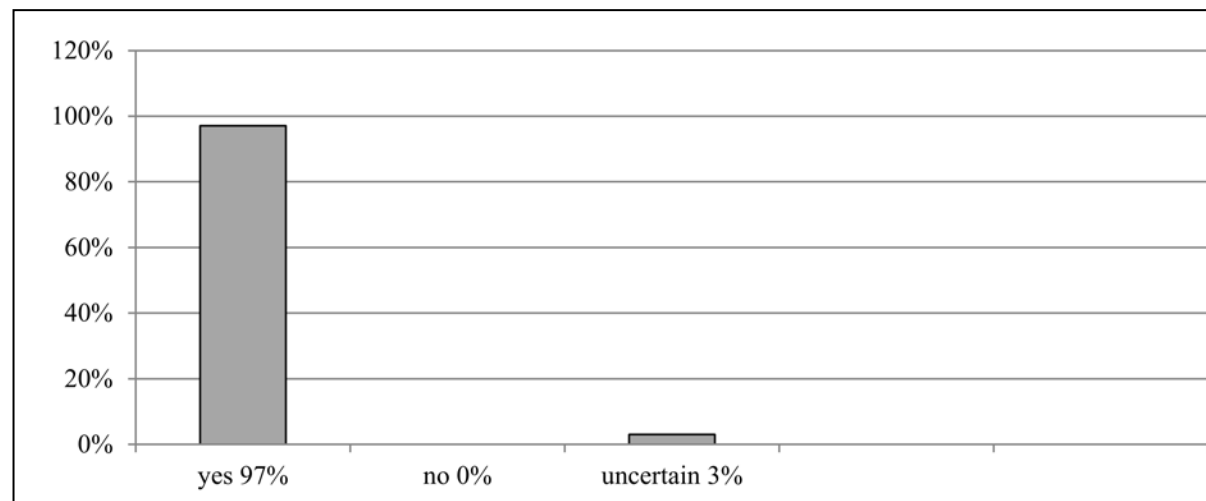


Table 10 indicates that out of the 39 interventions, 97% (38) of the failures were identified in the notice to the Minister and the NCOP, 0% (0) were not, while for 3% (1) of the interventions the required documentation was not available to determine an answer.

Question 5: Does the failure relate to a legislative obligation?

Yes	No	Uncertain	Total
37(94%)	1(3%)	1(3%)	39 (100%)

**Table 11: Does the failure relate to a legislative obligation?**

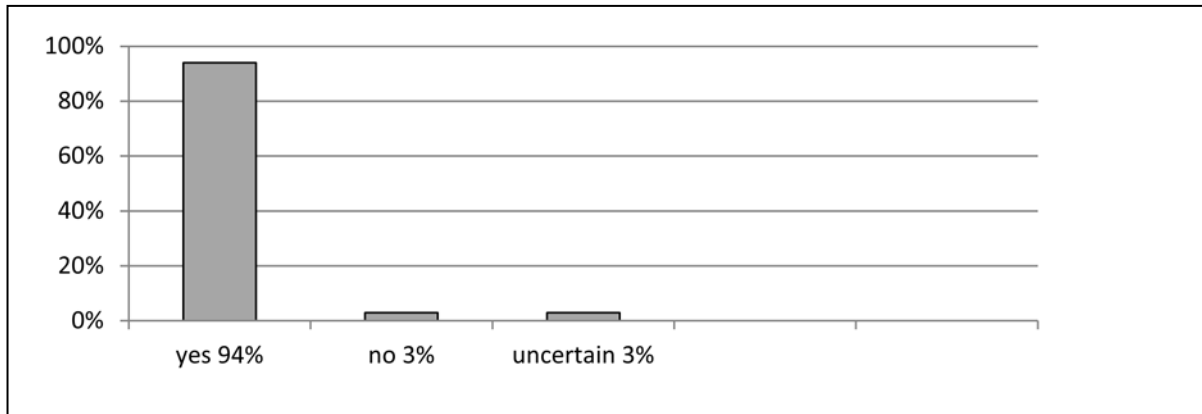


Table 11 indicates that for 94% (37) of the interventions the failure were linked to a legislative obligation that has been breached, 3% (1) were not, while for 3% (1) of the interventions the required documentation was not available to determine an answer.

Question 6: Does the failure relate to an 'executive obligation as defined in *Mnquma*?

Yes	No	Uncertain	Total
13 (33%)	25 (64%)	1 (3%)	39 (100%)

**Table 12: Does the failure in the notice relate to an 'executive obligation as defined in *Mnquma*?**

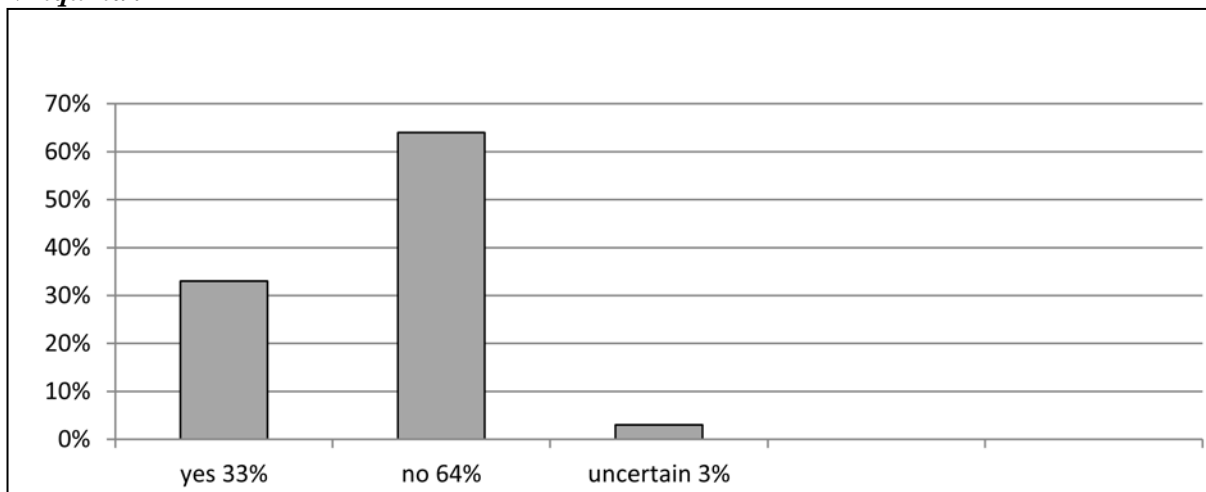


Table 12 indicates that provincial executives were able to relate the failure to an executive obligation as defined in *Mnquma* in 33% (13) of the interventions, 64% (25) were not able to do so, while for 3% (1) the required documentation was not available to determine an answer.

*Question 7a: Did the Minister dis/approve the intervention within the specified time-frame?*

Yes	No	Uncertain	Total
11 (28%)	11 (28%)	17 (44%)	39 (100%)

**Table 13: Did the Minister dis/approve the intervention within the specified time-frame?**

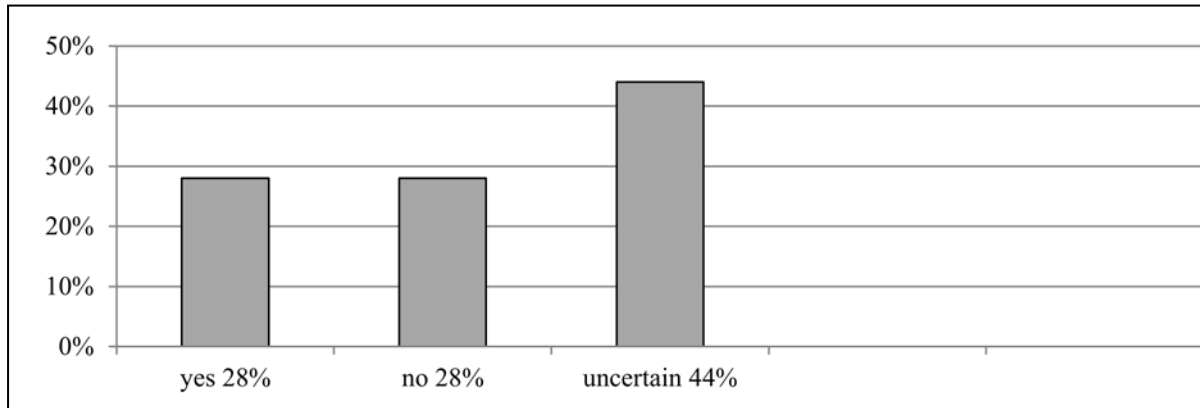


Table 13 indicates that the Minister approved or disapproved 8% (11) of the interventions within the specified time-frame, for 28% (11) the Minister did not, while for 44% (17) the required documentation was not available to determine an answer.

*Question 7b: Did the NCOP dis/approve the intervention within the specified time-frame?*

Yes	No	Uncertain	Total
28 (72%)	1 (3%)	10 (25%)	39 (100%)

**Table 14: Did the NCOP disapprove the intervention within the specified time-frame?**

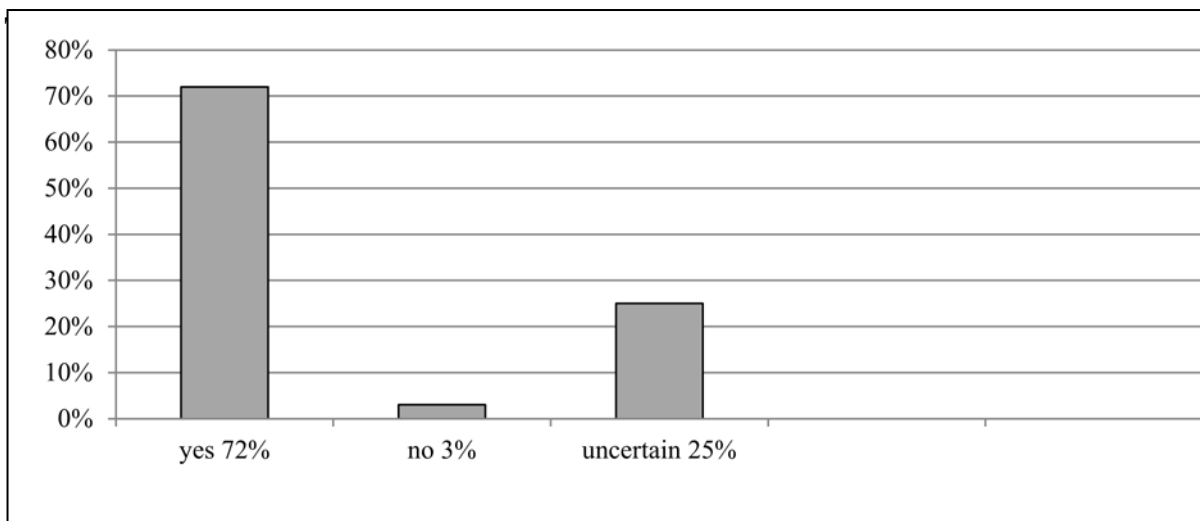
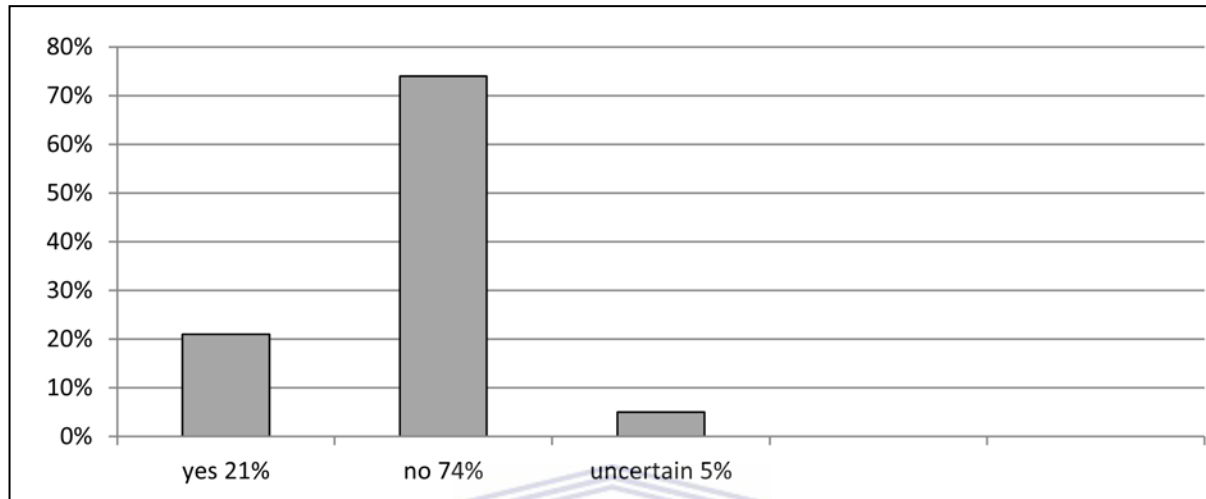


Table 14 indicates that 72% (28) of the interventions were approved or disapproved by the NCOP within the specified time-frame, in 3% (1) it did not, while in 25% (10) of the interventions the required documentation was not available to determine an answer.

*Question 8: Did the provincial executive request extension for the intervention?*

Yes	No	Uncertain	Total
8 (21%)	29 (74%)	2 (5%)	39 (100%)

**Table 15: Did the provincial executive request an extension for the intervention?**



The data collated for Question 8 indicates that for 21% (8) of the interventions, there were requests made for extensions, in 74% (29) no requests were made, while for 5% (2) of the interventions the required documentation was not available to determine an answer.

## 5 Summary

The five years between January 2009 and March 2014 have seen an increase for the use of interventions in terms of section 139 (1) of the Constitution. This has led to provinces playing an increasingly supportive and supervisory role over municipalities. Due to the uncertainty with the application of the requirements for the use of aforementioned interventions, eight questions were posed to assess the impact of such uncertainties on province's role in the use of interventions. The answers to the questions were derived from the notices to the Minister and the NCOP in terms of section 139(2)(i)-(ii) and from progress reports by the Minister and the NCOP for aforementioned interventions ranging from January 2009 to March 2014. The answers indicate that the steps taken in terms of section 139(1) were at times followed in accordance with the provisions laid down in the Constitution or legislation. However, the data also indicates that there are difficulties with the application of certain requirements which result in provincial executives not always complying with these requirements or complete non-compliance with such requirements which in terms of section 139(1) of the Constitution are necessary for the use of interventions. This has not only led to some

municipalities having to repeat interventions but also some interventions lasting at times for several years. These answers will be analysed and discussed in more detail in the following chapter.





# Chapter Four

## Analysing the Data

### 1 Introduction

This chapter analyses the data emanating from the notices to the Minister and the NCOP in terms of section 139(2)(a)(i)-(ii). The aim of analysing such data is to assess which of the steps necessary for the use of interventions in terms of section 139(1) of the Constitution were complied with and which were not. The progress reports by COGTA and the NCOP complement the data acquired from aforementioned notices between January 2009 and March 2014. By analysing the data, the answers to each of the eight questions were tallied and sorted into three categories. The placing of the answers into a particular category determines the extent of the compliance of provincial executives with the requirements provided for in the Constitution. In this way, the study is able to assess which of the steps necessary for the use of section 139(1) interventions have been complied with and which steps presented difficulties. In this way, the study ultimately assesses the role of provinces in the use of interventions in terms of section 139(1) of the Constitution. The outcome of the answers to the eight questions are analysed below but are preceded with a brief discussion of the analysis of data retrieved.

### 2 Analysis of data retrieved

Each of the eight questions needed to be answered with ‘yes’, ‘no’ or ‘uncertain’ and it is the outcome of these answers (as indicated in Table 5 of Chapter Three) which are analysed below.

#### 2.1 The use of the directive

Question 1 deals with the question if the relevant provincial executives made use of the directive before invoking the intervention in terms of section 139(1)(b) or (c). The directive, being the least intrusive intervention in terms of section 139(1) of the Constitution, is useful in that it not only serves as an instruction to the municipality to remedy the failed executive obligation but does so without having to assume the executive responsibilities of the affected municipality. In

this way, the provincial executive by invoking the directive is able to fulfil the dual functions of remedying the failure and respecting the independence and sovereignty of the municipality.

Based on the answers in Table 5, only the Umzinyathi, Mnquma, and Indaka municipalities were issued with a directive in terms of section 139(1)(a) of the Constitution. At the Umzinyathi and Mnquma municipalities (March 2013), the assumption of responsibilities in terms of section 139(1)(b) were preceded by the directive in terms of section 139(1)(a). However, at the Indaka municipality the intervention in terms of section 139(1)(b) was effected in November 2009, terminated in December 2013 after significant progress was made, but immediately resumed with the directive in terms of section 139(1) (a).

On the other hand, in the majority of the interventions (33 out of the total of 39 interventions) provincial executives did not make use of the directive in terms of section 139(1)(a) for the last five years. One of the main reasons is the difficulty and delay in placing programs on the agenda of the affected provincial executives. The trend is for provincial executives to sidestep the issuing of directives despite their usefulness and instead resort to interventions in terms of section 139(1)(b).

### **2.1.1 Significance on the use of the directive**

The relatively low percentage (8%) of the usage of the directive by provincial executives indicates that provinces fail dismally (84% of the time as per the research) to use the directive. Thus, the vast majority of provincial executives when resorting to interventions miss out on the opportunity to remedy the failure without infringing on the independence of the municipality. In addition, by not utilising the directive, the possibility of shortening the duration of the intervention is limited as provincial executives choose to resort to the sometimes drawn-out interventions in terms of sections 139(1)(b) or (c).

### **2.2 The use of the prior notice**

The cooperative principles in Chapter Three as well as the *audi alterem partem* rule in South African law require provinces to afford municipalities the opportunity to make representations with regard to problems identified in the notice. In addition to fulfilling the abovementioned roles, the prior notice also informs the affected municipality of the prospect of the intervention in terms of section 139(1)(a), (b) or (c).

With regard to the above, provincial executives issued prior notices before the use of interventions in terms of section 139(1)(a), (b) or (c) of the Constitution in only three (8%) of the interventions. These prior notices relate to the interventions at the Mnquma municipality in 2009 and a repeat of the intervention in 2013, as well as the Umzinyathi municipality. In the first instance, the provincial executive served the Mnquma municipality with prior notice only after the Mnquma municipality took legal action against the dissolution of the municipality. The repeat of the intervention at Mnquma in terms of section 139(1)(b) of the Constitution in 2013 was also preceded with a prior notice.

In the majority of instances (87% in Table 7) the relevant provincial executives did not issue prior notices before the use of interventions in terms of sections 139(1)(a), (b) or (c). In these instances such municipalities were thus denied the opportunity to make representations with regard to the problems identified in the notice. In the two outstanding interventions the study was unable to provide answers to determine if a prior notice was issued due to the relevant information not being available. The lack of information resulted in the two aforementioned interventions being categorised as 'uncertain'.

### **2.2.1 Significance of tallies for issuing prior notices**

In practical terms, the high percentage of non-usage of prior notices (87%) by provincial executives means that the affected municipalities are not informed or consulted on matters of interest as required by section 41(1)(h)(iii) of the Constitution. This is not only in clear contravention of the *audi alterem partem* rule in South African law but also goes against the values and goals of the cooperative principles in Chapter Three of the Constitution.

## **2.3 The issuing of notices in terms of section 139(2)(i-ii)**

### **2.3.1 Issuing to the Minister**

Section 139(2)(a)(i) of the Constitution provides that the relevant provincial executive must submit written notices to the Minister within 14 days after the intervention began. In the majority of the interventions in Table 13 (59%) the notices were submitted to the Minister within the specified time-frame. However, in nine interventions the notices were not submitted within the 14 working day time limit which effectively means that these nine interventions are in

contravention of the provisions in terms of section 139(2)(a)(i). This is largely due to provincial executives not adhering to these time-frames. Due to the unavailability of the information necessary to determine whether the relevant provincial executives submitted the outstanding notices to the Minister within the stipulated time-frames, five (15%) of the answers were categorised as ‘uncertain’.

### **2.3.2 The issuing of notices to the NCOP**

Section 139(2)(ii) of the Constitution provides that the relevant provincial executive must submit a written notice to the NCOP within 14 days. The data reflects that in 24 (62%) out of the 39 interventions, notices to the NCOP were submitted within the specified time-frame. However, in 11 (28%) of these interventions the notices were not submitted within the required time-frame. Despite these written notices not submitted to the NCOP within the specified time period these interventions still went ahead. For 4 (10%) of these interventions the relevant documentation was not available to this study and thus categorised as ‘uncertain’.

### **2.3.3 Significance of tallies for notices to the Minister and the NCOP**

The majority of the notices by the relevant provincial executives to the Minister and the NCOP were submitted within the specified time-frames. On the other hand, for nine of the 39 interventions the notices were not submitted to the Minister within the time-frame, while in the case of the NCOP the notices not submitted within the specified time-frame amounted to 11 interventions. Despite these interventions going ahead, the late submission of these notices to the Minister and the NCOP are in contravention of the provisions in terms of section 139(2)(a)(i)-(ii) of the Constitution, which could have an influence on the validity of the interventions if challenged in a court of law.

## **2.4 Identifying the failure in the notice to the Minister and the NCOP**

In the context of subsection 1 of section 139 of the Constitution the existence of the failed obligation is a prerequisite before the relevant provincial executive may exercise its discretion to intervene.<sup>1</sup> Identifying the failure at the municipality is therefore one of the most important

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<sup>1</sup> *Mnquma* para 50.

aspects of the provincial executives in the notices to the Minister and NCOP. Table 5 indicates that at the majority of the interventions (38 out of the 39 interventions) the relevant provincial executives were able to identify the failure at the municipality. Furthermore, there was no instance where the relevant provincial executives did not identify the failure at the affected municipalities. In practical terms this means that in all the interventions from January 2009 until March 2014 the relevant provincial executives identified the failures in the notices to the Minister and NCOP in terms of section 139(2)(a)(i)-(ii) of the Constitution. However, in the case of the intervention at the Nzo municipality, the answer tallied as ‘uncertain’ was due to documentation not being available to the study (Table 16). The failures mentioned above are categorised into three main areas and are discussed below.

#### **2.4.1 Categorisation of failure**

In the notices to the Minister and NCOP in terms of section 139(2)(a)(i)-(ii) of the Constitution provincial executives tend to categorise the failure into three main categories: problems of a governance nature, problems of financial and administrative nature, and those of a service delivery nature. Some municipalities experienced problems related to all three categories while others only experienced problems related to two or one of the categories. More specifically, the failures in 26 of the interventions were of a governance and financial nature; five of the 38 interventions were problems related to governance, service delivery and finances; four of the 38 interventions were of a governance nature only; three of the interventions were of financial nature; and the remaining one intervention was related to problems of a service delivery and financial nature. None of these municipalities experienced problems related to service delivery only. The categorisation of the failures in accordance with the problems at the municipalities is outlined below

**Table 16: Categorisation of failure at municipalities**

<b>Governance and Financial</b>	<b>Governance Service delivery &amp; Financial</b>	<b>Governance</b>	<b>Financial</b>	<b>Service delivery &amp; Financial</b>
Ngaka, Moses Kotane, Tswaing, Madibeng, Nala, Matlosana, Thabo Mafutsayane, Matlosana, Naledi, Masilonyana, Kou-Kamma, Sunday's River, PixleykaSeme, Mkhondo, Lekwa, Indaka, Okhahlamba, Umsunduzi, Mtubatuba, Abaqulusi, Uthukela, Ugu District, Indaka, Swellendam, Mogalakwena, Tswaing	Mafikeng MaquassiHills, Ditsobotla, Madibeng Emalahleni	Mnquma Mnquma Imbabazane Umvoti	ThabaChweu Thembisile Hani Umzinyathi	Bushbuckridge

Data retrieved from notices to Minister in terms of section 139(2)(a)(i) (2009 – 2014)

### **2.4.2 Significance of identifying the failure**

In almost all instances (97%) the relevant provincial executives identified the problems giving rise to the failure at the municipality. These failures were either of a governance, financial or service delivery nature. Some municipalities experienced problems related to all three categories, others experienced problems related to two or one categories only. In only one instance the study was unable to determine an answer due to the documents not being available. What is significant is that all the relevant provincial executives (except one) identified the failure at the municipality. In terms of section 139(1) of the Constitution the failure is a prerequisite for the relevant provincial executives to intervene.

### **2.5 Linking the failure at the municipality to a legislative obligation**

Further to identifying the failure, section 139(1) provides that such failure has to be ‘in terms of the Constitution or legislation’.<sup>1</sup> In this regard, in 37 (which accounts for 94%) of the interventions the relevant provincial executives were able to relate the failure at the affected municipality to a legislative obligation. On the two occasions where the provincial executive did not provide a legal basis for the interventions, this was either as a result of an omission by the relevant provincial executive (intervention at Thembisile Hani municipality) or due to the documentation necessary (intervention at Alfred Nzo municipality) to determine an answer not being available. In essence this means that the provincial executives mostly comply with the requirement to link the failed obligation to the provision in terms of the Constitution or legislation. Table 17 below demonstrates how the failure is linked to a legislative obligation.

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<sup>1</sup> S 139(1) 1996 Constitution.



**Table 17: Linking the failure to a legislative obligation**

<b>Municipality</b>	<b>Failure</b>	<b>Executive obligation</b>
PixleykaSeme	Governance and Financial	S 55 Municipal Systems Act, S 56 Municipal Structures Act
Mquma	Governance	Ss 41(3), 152(1), 21 of the Constitution, Ss4(2)(a, b, d, f) Municipal Systems Act Ss 21, 32, 73, 74, 99, 111, 112, 115, 131, 165, 172 MFMA
Kou Kamma	Governance and Financial	S 154 Constitution, Ss 133, 127 MFMA
Ngaka	Governance and Financial	Ss 4, 29 MSA 1998, S 23 LRA.
Mkhondo Local	Governance and Financial	S 57 Performance Management Act
ThabaChweu Local	Financial	S 55 Municipal Systems Act 2000
Lekwa Local	Governance and Financial	S 56 Municipal Structures Act, S 55 Municipal Systems Act
Thabo Mofutsanyane	Governance and Financial	Ss 39, 28, 32 Municipal Systems Act, Ss 71, 46 MFMA
Indaka Local	Governance and Financial	S 51 Municipal Systems Act, S 152 Constitution, Ss 121, 129 MFMA
Okhahlamba	Governance and Financial	S 51 Municipal Systems Act S 152 Constitution, Ss136, 121, 129, 165, 166 MFMA
Umhlabuyalingana	Governance and Financial	Ss 51, 52 Ss 51, 52 Municipal Systems Act S 152 Constitution, S 131, 136, 138 MFMA
Nala Local	Governance and Financial	Ss 46, 39, 28, 29 Municipal Systems Act 2000
Masilonyana Local	Governance and Financial	Ss 46, 39,71 S Municipal Systems Act 2000
Sundays River	Governance and Financial	Ss 51. 52 Municipal Systems Act
Madibeng Local	Governance, Service delivery and Financial	S 4 Municipal Systems Act 2000
Moses Kotane	Governance and Financial	S 4 Municipal Systems Act 2000
Tswaing Local	Governance and Financial	S 71 MFMA, S 4 Municipal Systems Act 2000
Msunduzi Local	Governance and Financial	Ss29, 71, 111, 134 MFMA, S 28 Municipal Systems Act 2000
Thembisile Hani	Financial	S 55 Municipal Structures Act 1998
Naledi Local	Governance and Financial	Ss 154, 46, 71 Municipal Systems Act
Mafikeng Local	Governance,	S 57 Performance Management Act
Swellendam Local	Governance and Financial	Ss 60, S54 A (2), Municipal Systems Act, S 60 MFMA
Mtubatuba Local	Governance and Financial	Ss 51. 52 Municipal Systems Act 2000
Imbabazane Local	Governance, Service delivery and Financial	S 152 of the Constitution, S 51, 73 Municipal Systems Act
Abaqulusi Local	Governance and Financial	Ss 64(2)(g), 121 MFMA, Ss 46 (1)(b-c), 54 Municipal Systems Act
Bushbuckridge	Service delivery and Financial	S 55 Municipal Systems Act, S 56(2) Municipal Structures Act
Emalahleni Local	Governance, Service delivery and Financial	S 56 (2) Municipal Structures Act 1998, S 55 Municipal Systems Act 2000
Matlosana Local	Governance and Financial	Ss51, 54A, 56 Municipal Systems Act 2000
Maquassi Hills	Governance, Service delivery and Financial	Ss 51, 54A, 56 Municipal Systems Act 2000

Ditsobotla Local	Governance, Service delivery and Financial	Ss 51, 54A, 56 Municipal Systems Act 2000, S 139 (1) (b) Constitution
Umzinyathi	Financial	Ss 121(2), 71, 142, 145, 147, 152, 137, 141, 141(3) MFMA
Uthukela District	Governance and Financial	Ss 71, 121, 136(2), 141, 142, 145, 147(1), 137 MFMA
Ugu District	Governance and Financial	Ss 131(2)(a), 71, 136(2), 141, 141(3), 142, 145 MFMA S 152 Constitution
Mnquma Local	Governance	Ss 36(5), S 29(1) Municipal Structures Act, Ss60, 66, 68 72 MFMA
Umvoti Local	Governance	Ss 51, 152 of the Constitution
Indaka	Governance and Financial	S 51 Municipal Systems Act, S 152 Constitution, Ss 121, 129 MFMA
Madibeng Local	Governance, and Financial	S 51 Municipal Systems Act, S 152 Constitution, Ss 121, 129 MFMA
Mogalakwena	Governance and Financial	S 139 (1) (b) S 152 Constitution

*Data retrieved from notices to Minister in terms of section 139(2)(a)(i) (2009 – 2014)*

Out of the 39 interventions, 37 of the notices to the Minister and NCOP provided a legislative obligation that has been breached. These obligations are contained in legislation such as Municipal Structures Act 1998<sup>1</sup>, Municipal Systems Act 2000<sup>2</sup>, Municipal Finance Management Act 2003<sup>3</sup> and the 1996 Constitution.<sup>4</sup>

### **2.5.1 Significance of tallies for identifying the legal obligation**

In almost all of the interventions the relevant provincial executives linked the failures in the notice to the Minister and the NCOP to specific statutory obligations. What is significant is that in all the notices to the Minister and NCOP except one the relevant provincial executives complied with the requirement in terms of section 139(1), which requires that the failed obligation has to be in terms of the Constitution or legislation.

### **2.6 Linking the failure to an ‘executive obligation’ as defined in *Mnquma***

Question 6 raises the question whether the failure of the municipality is linked to the ‘executive obligation’ as defined in *Mnquma*, According to the judge in *Mnquma* the mandate of local

<sup>1</sup> Ss 4, 29, 29(1) 36(5), 56, 56(2) of the Municipal Structures Act 1998

<sup>2</sup> Ss 4(a)-(d), 28, 29, 32, 39, 51, 52, 54A, 55, 56, 59, 60, 66(1), 67(4), 70, 71, 73 of the Municipal Systems Act 2000

<sup>3</sup> Ss 21, 29, 46, 60, 64 (2)(g), 66, 68, 71, 72, 74, 99, 112, 115, 121, 121(2), 127, 129, 131, 131(2)(a), 133, 134, 136 (2), 137, 138, 141, 141(3), 142, 145, 147, 147(1), 152, 165, 166, 172 of Municipal Finance Management Act 2003

<sup>4</sup> Ss 21, 41(3), 51, 139 (1) (b), 152, 152(1), 154, 1996 Constitution

government is to provide services and for this reason the ‘executive obligations’ of local government are of necessity related to those executive obligations which have a direct impact on citizens. These obligations are dealt with in section 156(1) of the Constitution and 11(3) of the Municipal Systems Act 2000 and are defined as effective administration, provision of services, implementation of by-laws, developing policy and good governance and leadership.<sup>5</sup> Table 18 below shows that in only 13 (33%) of the 39 interventions the relevant provincial executives were able to relate the failure to the ‘executive obligation’ as defined in *Mnquma*. The failures linked to the ‘executive obligation’ are shown in Table 18 below



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<sup>5</sup> *Mnquma* paras 61, 64.

**Table 18: Interventions where the failure relate to an executive obligation**

Municipality	Relating the failure to an ‘executive obligation’ as defined in <i>Mnquma</i>
Ngaka	Ineffective administration and poor governance hamper services
Thabo Mofutsanyane	Municipality failed to function effectively to maintain essential services & meet minimum standards
Nala	Undermining of the administration which makes it unable to provide services
Moses Kotane	Poor governance/leadership and administration on ability to provide services
Naledi	Assassination of speaker/attempted murder of municipal manager led to collapse of administration
Mafikeng	Non implementation of by laws which hampers effective governing of issues like hawking, nuisances
Swellendam	Failing to implement and administer legislation such as failure to appoint a municipal manager
Matlosana Local	Poor governance/leadership and administration impact negatively on services such as water
Maquassi Hills	Poor governance/leadership and administration impact negatively on services such as water
Ditsobotla	Poor governance/leadership and administration impact negatively on services such as water
Umzinyathi	Municipality insolvent not able to pay entity Uthukela Water
Uthukela District	Financial position is such that it is unable to pay creditors/services - such as water provision
Umvoti	Poor governance/leadership and administration impact negatively on services

*Data retrieved from notices to Minister in terms of section 139 (2) (a) (i) (2009 – 2014)*

Those provincial executives who did not link the failure to the executive obligation accounts for 25 (62%) of the interventions. In Table 20 below the provisions which have been wrongly relied on as constituting failure to comply to an ‘executive obligations’ are indicated as: rationale of local government; duties/appointments of officials; and to provide effective government. According to Van Zyl J in *Mnquma* these are ‘duties other than executive obligations ... and are misconstrued as executive obligations’.<sup>1</sup> These duties which according to *Mnquma* are not ‘executive obligations’ are firstly discussed and then outlined in Table 20.

### ***Rationale of local government***

In *Mquma* Van Zyl J argues that the ‘executive obligation’ is ‘intended to be limited to section 156(1) of the Constitution and 11(3) of the Municipal Systems Act 2000’. and to extend the meaning to the provisions would defeat such purposes.<sup>2</sup> On a reading of sections 21, 43, 152 and 154 of the Constitution, as well as sections 4 and 51 of the MSA 2000, it is

<sup>1</sup>*Mnquma* para 91

<sup>2</sup> *Mnquma* para 89.

clear that these provisions deal with the rationale and objects of local government rather than the term ‘executive obligations’ as defined in *Mnquma*.

### ***Duties/appointments of officials***

Sections 39, 52, 55, 56, 57, 59, 66, 67 of the Municipal Systems Act 2000 deals with labour laws and issues with regard to labour law. These provisions also deal with the appointment of municipal managers and their duties as well as human resources and the appointment of staff. It stands to reason that the provisions do not conform to the requirements which relate to ‘executive obligations’ as defined in *Mnquma*.

### ***Provide effective performance***

On a reading of the provisions in the MFMA (in Table 6) the failures relied on are duties or statutory obligations which are meant to provide effective government. For example, sections 21, 29, and 32 deal with budget process, recovery of unauthorised and wasteful expenditure respectively. Section 71 deals with the budget statements while sections 46, 131 121, 129 deal with submission of reports. The aim of these provisions as well as provisions such as the S51 of the Municipal Systems Act 2000 and S4 of the Municipal Structures Act 1998 is to provide effective performance by municipalities as envisaged in section 155 (7) of the Constitution and not to impose ‘executive obligations’ as defined in *Mnquma*.<sup>3</sup>

**Table 19: Interventions where the failure does not relate to an ‘executive obligation’**

<b>Municipality</b>	<b>Rationale of local government</b>	<b>Duties/appointments/of officials</b>	<b>Provide Effective Performance</b>
PixleykaSeme	S56 MSA 1998,	S 55 MSA 2000	
Mquma	S21, 43,152(1) Constitution, S4 MSA 2000		Ss 21, 32, 63, 65, 73, 74, 99, 111, 112, 115, 131, 165, 172 MFMA
Kou Kamma	S 154 Constitution		Ss 133, 127 MFMA
Mkhondo		S 57 Managers position	
ThabaChweu		S55 MSA 2000	
Lekwa		S55 MSA 2000,S56 MSA 1998	
Indaka	S152 Constitution, S51 MSA 2000		
Okhahlamba			S51 MSA 2000
Umhlabuyalingana	S 152 Constitution		Ss 51, MSA 2000, Ss 131, 136, 138 MFMA

<sup>3</sup> *Mnquma* para 91.

Masilyona		PMS Framework, S39 MSA 2000	S46, S71 MSA 2000
Sunday River			
Madibeng			S 4 MSA 1998
Tswaing		S57 Managers	S71 MFMA, S 4 MSA 1998
Msundusi			S29, 67, 71,111, 134 MFMA, S 28 MSA 2000
Thembisile Hani			
Mtubatuba			S 51 MSA 2000
Imbabbzane	S152 Constitution,S73 MSA 2000		S51 MSA 2000
Abaqulusi			Ss 64 (2) (g), 121MFMA, Ss46, 54 MSA 2000
Bushbuckridge		S55 MSA 2000, S56 MSA 1998	
Emalahleni		S55 MSA 2000, S56 MSA 1998	
Ugu District	S152 Constitution		Ss71, 131(2), 136(2),141,142, 145 MFMA
Mquma		Ss 52, 55, 56, 59, 66 (1), 67 (4) , 70 MSA 2000	Ss 60, 66, 68 72 MFMA
Indaka	S 152 Constitution		S 51 MSA 2000, Ss 121, 129 MFMA
Madibeng	S 4 MSA 1998		
Mogalakwena	S 152 Constitution		

Data retrieved from notices to Minister in terms of section 139 (2) (a) (i) (2009 – 2014)

### 2.6.1 Significance of relating the failure to an ‘executive obligation’

In *Mnquma* Van Zyl J defined the term ‘executive obligation’ in the context of section 139(1) as limited to the obligations in section 156(1) of the Constitution and 11(3) of the Municipal Systems Act 2000. The answers to the question if *the failure relates to an executive obligation* indicate that in 25 out of the 39 interventions the failure did not relate to an ‘executive obligation’ as defined in *Mnquma*. It thus seems that the definition of ‘executive obligation’ in *Mnquma* is difficult to maintain in practice. The remark by Van Zyl J in *Mnquma* that the term is ‘problematic’<sup>4</sup> point to this difficulty and the definition provided in the judgement seems to have done little to provide clarity or even a workable solution There is thus a need for uniformity and clarity for the term ‘executive obligation’ as section 139 (1)

<sup>4</sup>*Mnquma* para 64.

clearly provides that the executive obligation must be ‘in terms of the Constitution or legislation’.<sup>5</sup>

## **2.7 Approval or disapproval by the Minister within time-frame**

In terms of section 139(2)(b)(i) of the Constitution the Minister must approve or disapprove the intervention within 28 days after the intervention began. Table 13 indicates that the relevant provincial executives approved or disapproved 11 of the 39 interventions within the specified time-frame. The same amount (11), however, were not approved or disapproved by the Minister within the specified time-frame. Table 13 also indicates that contrary to what the Constitution states the interventions went ahead and did not end as provided for in terms of section 139(2)(b)(i). It is also clear that the tallies for the answers categorised as ‘uncertain’ for this particular question are quite high (44%) in relation to the answers for the other seven questions. This is mostly due to the difficulty with accessing information or the lack of cooperation from the department relating to the dates for the approval or disapproval of interventions by the Minister.

### **2.7.1 The approval or disapproval by the NCOP within time-frame**

In terms of section 139(2)(b)(ii) the NCOP must approve or disapprove the intervention otherwise it must end. The tallies for the approvals or disapproval by the NCOP looks different to that of the Minister. First, the tallies for compliance by the NCOP within the specified time-frame to approve or disapprove the interventions stand at 28 interventions (72%) as opposed to 11 (28%) for the Minister. Also, the tally (3%) for not complying within the specified time-frames for the approval or disapproval of the intervention dates is much less than the tally for the Minister. Lastly, the access to information for the dates for the approval or disapproval was far easier to obtain for the NCOP than those for the Minister. This despite the fact that ‘uncertain’ still accounted for 10 (25%) of the interventions due to the public information relating to the dates not being readily available from the relevant departments.

### **2.7.2 The significance of dis/approvals by Minister and the NCOP within time-frames**

It is clear that the time-frame within which the Minister has to approve or disapprove the intervention in terms of section 139(2)(b)(i) has proven to be challenging with the result that

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<sup>5</sup> S 139 (1) 1996 Constitution.



11 (28%) of the 39 interventions did not comply with the requirement. The tally for not complying would in all probability have been much higher if all the information to determine the answers to the dates for approvals or disapprovals had been available. As far as the NCOP is concerned, the dates for the approval or disapproval had been complied with in the majority (28) of the interventions, which in effect means that there would have been much less non-compliance of the dates for approvals or disapprovals of the intervention. What is quite clear though is that despite these interventions going ahead when the Minister or the NCOP has not signed within the specified time-frames, these interventions are in contravention of the provisions in terms of section 139(2)(b)(i) and its validity could be challenged in a court of law.

## **2.8 The requests for extension of the intervention**

Eight out of the 39 interventions had to be extended due to the problems not having been remedied within the initial period requested. The municipalities affected include Ngaka, Indaka, Okhahlamba, Msunduzi, Thembisile Hani, Mtubatuba, Abaqusi, and Umvoti municipalities. Some of these interventions had to be extended more than once, such as the Indaka and Okhahlamba municipalities. The intervention at Okhahlamba municipality started in November 2009 and ended in June 2012, whereas at Indaka the intervention started in November 2009 but only ended in December 2013. In addition to the request for extensions some of these interventions have had to repeat the interventions, such as at Indaka municipality which had an intervention in 2009 and then again in 2013. Other repeats include the interventions at Mquma, Ditsobola, and Madibeng municipalities. However, in 29 of the 39 interventions (74%) no requests were made for the extension of the interventions, which seems to suggest that in these instances the problems were remedied within the initial period requested. For two of the interventions, Alfred Nzo and Kou Kamma municipalities, the answers were categorised as 'uncertain' due to the lack of information

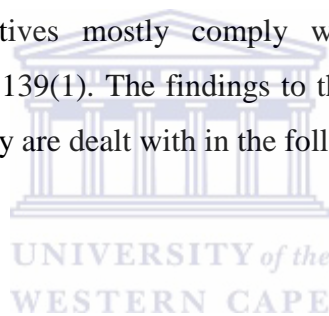
### **2.8.1 Significance of the request for extension of the interventions**

Those municipalities that had the interventions extended account for 21% whereas those without requests for extensions account for 74%. At face value these percentages suggest that most interventions were able to remedy the failure at the municipality within the initial period in the recovery plan, which is usually six months. In cases such as the Okhahlamba, the extensions lasted up to three years and in other cases even longer, as in the case at Indaka which lasted for four years. The stark contrast in percentages for those municipalities that

extended the interventions and those who did not is therefore misleading if the duration and the repeats of some interventions are taken into consideration.

### **3 Summary**

This chapter analysed the answers to the eight questions which serve to assess if provincial executives comply or not with the procedural requirements which are necessary for the use of interventions in terms of section 139(1) of the Constitution. For this reason the questions were structured in a manner that not only assists to assess if provincial executives complied with the steps necessary for the use of interventions in terms of section 139 (1) but also to assess the effectiveness of such interventions. The answers which are derived from the notices to the Ministers and the NCOP indicate that some of steps necessary for the use of interventions are not always adhered to, other steps have proven to be difficult or ‘problematic’ for provincial executives whilst some steps do not pose difficulty at all meaning that provincial executives mostly comply with these steps when invoking interventions in terms of section 139(1). The findings to these answers and the provision of recommendations where necessary are dealt with in the following chapter.



# Chapter Five

## Findings and Recommendations

### 1 Introduction

In Chapter Three, eight questions were presented to assess if the steps necessary for the use of interventions in terms of section 139(1) of the Constitution were applied in line with the provisions of the Constitution. The answers to these eight questions were tallied and subsequently analysed in Chapter Four. This chapter presents the findings to the study as well as recommendations where necessary. In doing so, this chapter examines the tallies to the 'yes', 'no' and 'uncertain' responses to each of the eight answers, and these are consigned in accordance with one of three groupings. The fourth grouping relates to the findings for the request for extension of the intervention. The findings for each of the respective groupings identify the steps pertaining to the group which form the basis of the key findings to the study. The recommendations at the end of this chapter are made in response to the key findings in each group.

### 2 Findings to the answers

The findings to answers in Table 6 are divided into three main groupings, with the fourth category consigned to the findings for extension of the particular interventions. The findings for the four grouping are outlined below after a discussion of the findings

#### 2.1 Grouping of the answers

The first group is restricted to those answers where the clear majority of the questions were answered 'yes', indicating that provincial executives complied in full or in most part with the step necessary for the use of the intervention. The second group is confined to those answers where the 'yes' is still in the majority but accompanied by a minority 'no'. The third group is confined to those answers where the clear majority was answered with 'no, indicating that

provincial executives have difficulty complying or do not comply at all with the particular step necessary for the use of the intervention. Group four pertains to those answers which do not fall into any of the three main categories above, as the question probes the issue of the extension rather than if the steps applied by the relevant provincial executive conform to the provisions of the Constitution. Table 18 outlines the groupings of the steps overleaf.



**Table 20: Grouping of the steps necessary for use of interventions in terms of S 139 (1)**

Group 1	Group 2	Group 3
Not problematic	Sometimes problematic	Highly problematic
<ul style="list-style-type: none"> <li>❖ Identifying the failure in notice in terms of section 139 (2).</li> <li>❖ Relating the failure to a legislative obligation.</li> <li>❖ Approval or disapproval of the intervention by the NCOP within timeframe</li> </ul>	<ul style="list-style-type: none"> <li>❖ Submitting notice in terms of S139 (a) (i) within timeframe</li> <li>❖ Submitting notice in terms of S139 (a) (ii) within timeframe</li> </ul>	<ul style="list-style-type: none"> <li>❖ Issue of prior notice</li> <li>❖ The use of the directive by the provincial executive</li> <li>❖ Relating the failure to the executive obligation as defined in Mnquma</li> <li>❖ Approval or disapproval of the intervention by the Minister within timeframe</li> </ul>

### **2.2.1 Findings of group one**

Group one consists of the steps which do not present any problems for provincial executives when complying with the provisions for the use of the intervention in terms of section 139(1) of the Constitution. It follows that provincial executives always comply or mostly comply with these steps which are necessary for the use of the intervention in terms of section 139(1). These steps include: *identifying the failure at the municipality; linking the failure to a legislative obligation; and approval or disapproval of the intervention by the NCOP.*

### **2.2.2 Findings of group two**

Group two consists of the steps which at times present problems in terms of section 139(1) but in most cases do not. These steps includes: *submitting the notice to the Minister within the specified timeframe; and submitting the notice to the NCOP within the specified timeframe.* Even though compliance with the respective steps in this group is in the majority, non-compliance with the step (even though this is in the minority) is in clear violation to the provisions of the Constitution.

### **2.2.3 Findings of group three**

Category three consists of the steps which present problems to provincial executives when complying with the provisions for the use of the intervention in terms of section 139(1) of the Constitution. It follows that provincial executives mostly do not comply with the step necessary for the use of the intervention, or at the least have difficulty complying with it. These steps includes: *the use of the prior notice before the intervention in terms of section 139 (1); the use of the directive in terms of section 139 (1) (a); relating the failure to an executive obligation as defined in Mnquma; and the approval and disapproval by the Minister of the intervention.* The non-compliance of these steps are in clear violation with the provisions of the Constitution or the cooperative principles enshrined in chapter three of the Constitution.

### **2.2.4 Findings of group four**

Group four addresses the findings for extension of the interventions by the relevant provincial executives. These findings indicate that even though the majority of provincial executives (74%) did not request to extend the particular interventions, 21% did request such extensions. Some of these interventions were extended on more than one occasion, with some of these

extensions repeating the particular intervention, such as the interventions at the Indaka municipality. It is these requests for extensions of some interventions, along with repetitions of some of them, which indicate that the effectiveness of the role of provinces in the use of interventions can be questioned, at least in these instances.

### **3 Other findings of the study**

#### **3.1 Uncertainty regarding key terms**

There is uncertainty regarding key terms in the context of section 139(1) of the Constitution, particularly ‘executive obligations’ and ‘appropriate steps’. This impacted on the use of such interventions. These two terms are discussed below.

##### **3.1.1 ‘Executive obligations’**

At present there is no clear definition in the Constitution or jurisprudence as to what constitutes an ‘executive obligation’ in a municipality other than what is defined in the *Mnquma* judgment. This has led to the scenario where provincial executives find it difficult to relate the executive obligations with the failure at the municipality, and in doing so tend to confuse it with duties other than those of the ‘executive obligations’.

##### **3.1.2 ‘Appropriate steps’**

The fragmented interpretation of intervention steps in terms of section 139(1)(a)–(c) has led not only to uncertainty about its application but overuse of one and at the expense of underutilisation of the other. For example, Table 3 indicates that out of the 39 interventions for the last five years, 36 accounted for interventions in terms of section 139(1)(b), whereas only one was invoked in terms of section 139(1)(a) and two in terms of section 139(1)(c). Also, the difficulty provincial executives have in invoking section 139(1)(a) prompts them to invoke section 139(1)(b) instead, in order to avoid unnecessary delays and uncertainty

#### **3.2 Monitoring mechanisms**

The provinces at times lack the capacity to adequately support and monitor local government, which can lead to the request for extension of the intervention or even repetition of the intervention. In addition, monitoring mechanisms are not always able to signal the failures at municipalities, with the result that provincial executive become aware of the problem areas only by word of mouth or when the municipality’s total collapse is imminent. What is curious

is that Table 14 indicates that municipal failures relating only to service delivery have never triggered an intervention. This can be attributed squarely to the lack of monitoring systems linked to service delivery. In certain instances some interventions could have been prevented if the mechanisms, processes and procedures in terms of section 105 of the Municipal Systems Act had been effective or the duration of the interventions shortened had the province been fully capacitated to support and monitor the affected municipalities.

### **3.3 Fragmented approach**

At present there are no guidelines for provinces when they invoke interventions in terms of section 139(1). This has resulted in some provinces being less compliant than others with certain requirements; in some instances section 139(1) was applied outside of what is constitutionally permitted. For example, in some provinces MECs have read section 139(1), in particular the power to dissolve councils, as a power that can be wielded with relatively little procedural rigour or prior engagement, as was the case at the Naledi municipality. This is corroborated by the graphs in Table 9, which indicate that in the majority of interventions very little or no prior engagement takes place before the intervention. The same result is evident with the directive, where in only two instances the directive in terms of section (1) (a) were invoked whilst table 9 indicates that in other instances the directive was completely disregarded.

## **4 Recommendations**

### **4.1 Legislation**

In order to address the issue of effective monitoring in terms of section 155(6)(a) of the Constitution, the principles in Chapter Three of the Constitution – which guide the establishment, systems and processes for monitoring – should be embodied in legislation instead of being mere principles. For example section 41(1)(h) of the Constitution which calls for the organs of government to consult and inform each other should be embodied in the legislation and ensure that the prior notice is a legislative requirement. This would be more effective than leaving it a matter for interpretation as to whether the principles of intergovernmental principles had been complied with. Legislative embodiment of the principles in Chapter three of the Constitution should be undertaken in conjunction with the



monitoring mechanisms, processes and procedures envisaged in section 105 of the Municipal Systems Act 32 of 2000.

## **4.2 Clarity of key terms**

The clarification of key terms such as the ‘appropriate steps’ and ‘executive obligations’ of the municipality would go a long way towards enabling provincial executives to conform to the provisions of section 139(1) of the Constitution. Hence, clear guidelines should be provided in policy directives from the Department; similarly, legislation should spell out what constitute ‘appropriate steps’ and ‘executive obligations’ in the context of subsection 1 of section 139 of the Constitution. A check if provincial executives complied with the requirements related to these two aspects should form part of the review by the Minister and the NCOP in terms of section 139(2)(c).

## **4.3 Uniform Approach**

The purpose of legislation and the provision of clear policy guidelines should be to ensure that provinces adopt a uniform approach to the procedural requirements for the use of interventions in terms of section 139(1) of the Constitution. Having the legal framework in place for a uniform approach would make the application of the requirements more consistent and coherent and thus easier to monitor. For example, a uniform approach would enable the NCOP to conduct regular reviews of the intervention efficiently and effectively. Uniformity would make the application of the requirements for using the interventions predictable and less confusing, and would require less guidance and involve fewer legal challenges.

## **4.4 Directive to be given more consideration**

The directive in terms of section 139(1) (a) is at present ‘underutilised’. More consideration should be given to it to remedy the failure at the municipality. In accordance with the *Mnquma* judgement, the directive is regarded as a formal intervention authorised by the provincial executive. The difficulty of putting the issue on the agenda of the provincial Cabinet to seek authorisation for the intervention in terms of section 139 (1)(a) plays a part in MECs passing over the directive, opting rather to invoke section 139(1)(b) of the Constitution. This situation could be rectified if MECs were empowered to invoke section 139(1)(a) without first having to seek authorisation from the provincial executive. This could be done by effecting the delegation of power from the provincial executive.

The principle of cooperative government essentially forms the basis for any intervention in terms of section 139(1)(a)–(c). Co-operative governance, however, should not only relate to supporting and monitoring the municipality. In performing their functions, the Constitution provides that provincial executives should do it ‘in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere’.<sup>1</sup> The directive is able to fulfill these dual functions in that it serves as an instruction to the municipality to fulfil the failed obligation and in doing so does not impede on the authority of local government. By delegating the power from executive provincial executives to effect interventions, the directive should be given more consideration by provincial executives unless it can be shown by the facts that the directive would not be functional.

## 5 Summary

The flexibility provinces enjoy with regard to legislation and policies when they invoke interventions under section 139(1) has led to a fragmented approach, with the result that such interventions are often used inconsistently or unconstitutionally. Coupled with the uncertainty around key terms in the context of subsection 1 of section 139 of the Constitution, provincial executives have found some steps necessary for the use of interventions ‘problematic’ or difficult to apply. This was corroborated in the *Mnquma* judgement, where relating the failure to the executive obligations was described as ‘problematic’<sup>2</sup> and the judge highlighted the need for clarification of the key in terms of section 139 (1) of the Constitution. In practice therefore, it happens that some steps necessary for the use of interventions are at times not complied with, or totally disregarded,

The overall situation justifies the call for a uniform approach for the use of interventions. This could be achieved by drafting legislation and clear policy guidelines that ensure a coherent, consistent and uniform approach when provincial executives invoke interventions in terms of section 139(1)(a)–(c) of the Constitution. The legislation should include clear guidelines for monitoring and support by provinces of local government in line with the guidelines and policy directives from COGTA, SALGA and NCOP. These should be drafted in an inclusive manner so that there is a workable consensus among the stakeholders who will be affected and those responsible for the implementation of such legislation.

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<sup>1</sup> S 41 (1) (g) 1996 Constitution

<sup>2</sup> *Mnquma* para 54.

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