

Testing the boundaries of municipal supervision: an analysis of section 106 of the Municipal Systems Act and provincial legislation

A research paper submitted in partial fulfilment of the requirements for award of the degree LLM in the Faculty of Law, University of the Western Cape.



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Declaration

I, Ashwin Jermain Reynecke, do hereby declare that this research paper is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for degree or diploma. Works of others cited or referred to are accordingly acknowledged.

Signed:

Date:



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Keywords

- Section 106 of the Municipal Systems Act
- Provincial supervision
- Local government
- Support of local government
- Provincial legislation
- Regulating local government
- Provincial government
- Intervention in local government
- Monitoring of local government
- Commission of inquiry



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Abbreviations

CC	Constitutional Court
LGTAS	Local Government Turn-Around Strategy
MEC	Member of the Executive Council
NCOP	National Council of Provinces



Chapter 1

Introduction

1.1 Background

Since the dawn of democracy, local government in South Africa has undergone radical change. Local government has been transformed from being a mere creature of statute into an autonomous sphere of government, which has been granted constitutional recognition. The drafters of the Constitution¹ had a vision of bringing government closer to the people to ensure the deepening of democracy and access to basic services for all communities. This position was clearly emphasised in the White Paper on Local Government, which outlined the developmental role of local government as follows:

[D]evelopmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within communities that are most often marginalised or excluded, such as women, disabled people and very poor people.²

The Constitution, together with the different statutes, has established local government as an autonomous sphere of government. The constitutionally recognised status of local government is given effect to in a number of statutes.³

The transformation of local government in South Africa has been reasonably successful. The 2011 census shows that there have been significant inroads in improving service delivery.⁴ Since this sphere of government was granted constitutional recognition it has managed to promote non-racialism, more communities have access to basic services and the intergovernmental fiscal system has been overhauled to bring more financial resources down to municipalities.

¹ 108 of 1996.

² Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (Government Gazette, Vol 393, No 18739 13 March 1998) 23.

³ Local Government: Municipal Structures Act 117 of 1998; Local Government: Municipal Systems Act 32 of 2000 (hereinafter Municipal Systems Act, and Local Government: Municipal Finance Management Act 56 of 2003.

⁴ Department of Statistics *Highlights of key results* (2011).

However, in 2009 more than 56% of South Africans lived in poverty.⁵ Local government is required to deliver certain services to the community but, in a number of provinces, poor access to refuse removal and other basic services are a reflection of the vulnerable socio-economic conditions prevailing in rural areas of provinces, and especially in those regions marked by Bantustan legacies.⁶ As a result of these failures there has been an increase in the number of municipalities which have been placed under administration.⁷

Concerns are being raised with regard to the ability of local government to manage its own affairs and deliver those services.⁸ These concerns cannot be ignored because municipalities are responsible for providing communities with basic services. If municipalities fail in carrying out this mandate, communities will suffer.

Local government thus has not yet fulfilled the developmental mandate which the drafters of the Constitution envisaged. Dissatisfaction with local government service delivery is often cited as a root cause behind the recent spate of protests, and only half of all South Africans indicate that they have confidence in this sphere.⁹

The main problems experienced by this sphere are the following: First, local government has not responded to the needs repeatedly raised by communities during protests and, as a minimum, failed to communicate clearly as to why these needs and concerns have not been adequately addressed.¹⁰ Secondly, the structures and processes to express dissent, put in place by local government legislation, are inadequate and have failed to provide space for the fair and inclusive expression of voice, particularly for the poor and marginalised of South Africa.¹¹ Thirdly, fraud and corruption paralysed some of the municipalities to such an extent that they are unable to provide basic services.¹²

⁵ Department of Cooperative Governance and Traditional Affairs *State of Local Government* (2009) 11.

⁶ Department of Cooperative Governance and Traditional Affairs *State of Local Government* (2009) 8.

⁷ In the Western Cape two municipalities were placed under administration. They are the Oudtshoorn Local Municipality (March 15, 2007) and Overberg District Municipality (July 13, 2010).

⁸ Department of Cooperative Governance and Traditional Affairs *Local Government Turn-Around Strategy* (November 2009) 11; Department of Cooperative Government and Traditional Affairs *State of Local Government* (2009) 11.

⁹ De Ryhoven S 'Doubt over local government capacity to deliver' available at <http://www.polity.org.za> (accessed 6 December 2012).

¹⁰ Good Governance Learning Network *Recognising community voice and dissatisfaction* (2011) 12.

¹¹ Good Governance Learning Network *Recognising community voice and dissatisfaction* (2011) 13.

¹² Good Governance Learning Network *Recognising community voice and dissatisfaction* (2011) 13.

Corruption in South Africa's public sector is at its highest since the change to a democratic system of government. Despite the remarkable achievements, local government is the sphere in which corruption has reached unprecedented heights.¹³ One of the biggest problems faced by this sphere relates to unauthorised, irregular, fruitless and wasteful expenditure.¹⁴ Corruption is against the ethos of any democratic system of government.

South Africa has a good legislative framework in order to fight fraud and corruption.¹⁵ However, laws are not enough: independent law enforcement and related anti-corruption agencies are fundamental pillars of a viable anti-corruption framework.¹⁶

The government recognised the problems which local government experiences. In response to this, government implemented Project Consolidate¹⁷ and Project Viability¹⁸, to mention but a few. These projects did not produce the desired results. In response to the numerous performance and viability failures amongst municipalities, and the deteriorating service delivery record, government decided that an urgent and comprehensive intergovernmental Local Government Turn-Around Strategy (LGTAS) for local government was needed.¹⁹ In addition, since 2007 there have been a number of stop-go efforts to review local government with the intention of revisiting and revising the White Paper on Local Government, although to date this process has not been completed and seems to have been stalled indefinitely.²⁰

Section 154 (1) of the Constitution requires both the national and the provincial governments by legislation or other means to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Provincial supervision, monitoring and support of local government is a Constitutional obligation in terms of sections 154 (1) and section 155 (6) and (7) of

¹³ Madonsela, T *Corruption and Governance Challenges: the South African Experience* paper presented the National Conference on Corruption and Governance Challenges (Nigeria, 21 January 2010).
¹⁴ Nombembe, T *General Report of the Auditor-General on Local Government*.
¹⁵ Constitution of South Africa, 1996; The Prevention and Combating of Corrupt Activities Act, 2004; Prevention of Organised Crime Act 1998; Protected Disclosures Act 2000; Promotion of Access to Information Act 2000.
¹⁶ Madonsela, T *Corruption and Governance Challenges: the South African Experience* paper presented the National Conference on Corruption and Governance Challenges (Nigeria, 21 January 2010).
¹⁷ Department of Provincial and Local Government *Project Consolidate*.
¹⁸ Department of Constitutional Development *Project Viability*.
¹⁹ Department of Cooperative Governance and Traditional Affairs *State of Local Government* (2009) 70.
²⁰ Good Governance Learning Network *Recognising community voice and dissatisfaction* (2011) 13.

the Constitution. There has been an increased need for provincial government to monitor and supervise municipal performance. The LGTAS identified weak oversight systems as one of the deficiencies that undermine local government.²¹ The importance of provincial supervision cannot be questioned. The need for supervision is highlighted by the fact that a number of municipalities are running into trouble with respect to financial management and satisfying their constitutional obligations. Basic obligations such as the passing of an annual budget and the necessary revenue-raising measures to cover the budget, have, at times, simply not been undertaken in municipalities. However, there is a fine line between monitoring municipalities with a view to capacitating them and intrusive supervision that is aimed at usurping municipal autonomy. This research paper will focus on the provincial government's obligation to supervise local government.

1.2 Problem statement

This research paper was inspired by the problems faced by local government in South Africa. When one considers the repeated failures of municipalities, as documented by the Auditor-General²² the national government and the provincial governments need to exercise better oversight over the governance of municipalities.²³ This research paper argues that amendments to the legislation dealing with municipal oversight will assist to address the problems faced by local government. Municipal oversight encompasses many different concepts. This research paper will examine one of the municipal oversight components, namely provincial supervisions of local government.

It will be shown that there are flaws in the current system of supervision. Some of the legislative provisions, section 106 of the Municipal Systems Act²⁴ and provincial legislation in particular, impede on the provincial governments ability to adequately supervise local government. This research paper will argue that the automatic application of provincial legislation curtails the power of the provinces to supervise

²¹ Department of Cooperative Governance and Traditional Affairs *Local Government Turn-Around Strategy* (November 2009) 18.

²² Auditor-General *Consolidated General Report on the local government audit outcomes 2009-10*.

²³ Stu Woolman & Yolandi Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 24B.

²⁴ Local Government: Municipal Systems Act 32 of 2000.

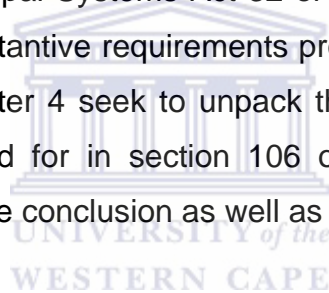
municipal performance. This research paper further argues that the MEC should be reluctant to appoint a serving judge to head an investigation in terms of section 106(1)(b) of the Municipal Systems Act. New innovative means must be developed in order to deal with the constant challenges faced by local government.

1.3 Methodology

This work is based on desktop research; therefore the primary and secondary sources are books, legislation, case law, policy documents and the internet.

1.4 Overview of the chapters

This research paper consists of five chapters. Chapter 2 explores the transformation of local government. Chapter 2 will focus on the constitutional status of local in the democratic dispensation. Chapter 3 provides a thorough analysis of section 106 of the Local Government: Municipal Systems Act 32 of 2000. This chapter provides an analysis of the important substantive requirements provided for in section 106 of the Municipal Systems Act. Chapter 4 seek to unpack the intergovernmental oversight provisions which are provided for in section 106 of the Municipal Systems Act. Chapter 5 consists of a concise conclusion as well as recommendations.



Chapter 2

The evolution of local government in South Africa

2.1 Introduction

The aim of this chapter is to briefly set out the historical development of local government from being a creature of statute to being an autonomous sphere of government. There will be a discussion of the most important concepts dealing with the supervision of local government. It will become apparent later in this research paper that there are certain provisions relating to supervision which limit on the autonomous status of local government.

When the transition to democracy came, local government had to be restructured. Since the transformation was to be on a uniform country-wide basis, national legislation was required. Over a short period a number statutes were enacted to provide a legislative framework for the new constitutional status of local government. The first statute in the series restructuring local government was the Local Government Transition Act.²⁵ The Local Government Transition Act provided a blueprint for the transformation of local government in South Africa.

2.2 Transformation of local government.

The transformation of local government was directed at removing the racial basis of government and making it a vehicle for the integration of society and the distribution of municipal services to all communities.²⁶ During the pre-constitutional era, local government was not recognised as a government in its own right. Today the constitutional status of local government differs materially from the time when Parliament was supreme as will be examined in the paragraphs below.

2.2.1 Local government in the old dispensation.

The unification of South Africa in 1910 sparked the birth of local government. The four British colonies were transformed into provinces. The provinces were tasked with the responsibility to put in place structures, functions and powers for local government. After the landmark elections in 1948, the National Party provided for the

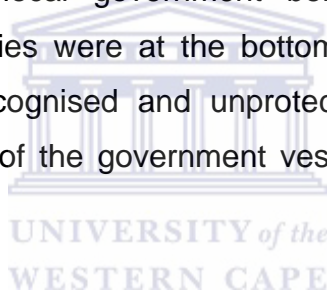
²⁵ 209 of 1993.

²⁶ Steytler & De Visser *Local Government Law* (2007)1-10 (hereinafter Steytler & De Visser (2007)).

development of separate local authorities for each of the four major racial groups.²⁷ These authorities were ineffective. The stark difference in socio-economic circumstances between the different racial groups was the catalyst for violent protests by communities.

The Constitutional Court (CC) stated that '[t]he genius lay in the system of apartheid zoning: major commercial and industrial areas were located in the white areas, and fell within the jurisdiction of white local authorities'.²⁸ The government of the day ensured that the heart of the country's economy was situated in areas dominated by the white minority.

Local government was regarded as a creature of statute, which derived its powers from national and provincial government.²⁹ Cameron JA, as he was then, aptly summed up the status of local government before the advent of the new constitutional era: 'municipalities were at the bottom of a hierarchy of lawmaking powers; constitutionally unrecognised and unprotected, they were by their very nature subordinate members of the government vested with prescribed, controlled government powers'.³⁰



Negotiations between the apartheid government and liberation movements began in the early 1990s.³¹ As a result of these negotiations, a platform was created for local government to be recognised as an autonomous sphere with the added responsibility of implementing the developmental mandate. The drafters of the 1993 interim Constitution ensured that South Africa would have its first democratic elections.³² The interim Constitution sought to break away from the racially based system of local government. The transformation process took place in accordance

²⁷ De Visser J *Developmental local government: a case study of South Africa* (2005) 271.

²⁸ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 at para 123.

²⁹ *CDA Boerdery v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) para 33. (hereinafter *CDA Boerdery v Nelson Mandela Metropolitan Municipality*)

³⁰ *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 32D.

³¹ De Visser J *Developmental local government: a case study of South Africa* (2005) 217.

³² When the first local government elections were held in 1994, local government was a racist institution giving effect to the special separation of blacks and whites. Bekink, B *Principles of South African local government law* (2006) 23.

with the Local Government Transition Act.³³ In terms of this Act, local government transformation took place in three phases:

- the pre-interim phase, which started with the negotiations of the transformation process and lasted until the first municipal election;
- the interim phase, which began with the first municipal elections and lasted until a new local government system had been designed and legislated; and
- the final phase, which began with the election of new local government structures under the newly designed local government system set out in the Constitution.³⁴

The 'old order legislation' remained in force and was systematically replaced by legislation which catered for a constitutionally recognised local government. As will be seen in the following paragraph, the face of local government was gradually changed through legislative provisions.

2.2.2 Local government in the new dispensation.

The Constitution of the Republic of South Africa, 1996 is bold in the responsibilities that it confers on municipalities. The drafters of the Constitution moved away from a hierarchal division of government power in favour of a new vision, in which local government is interdependent and inviolable (subject to permissible constitutional constraints), and has latitude to define and express its unique character.³⁵

The Constitution provides as follows:

In the Republic, government is constituted as national, provincial, and local spheres of government, which are distinctive, interdependent, and interrelated.³⁶

From this constitutional provision it is clear that local government is no longer a creature of statute. Suffice it now to say that the national and provincial spheres are

³³ Act 209 of 1993; *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 6.

³⁴ White Paper on Local Government (1998) 14; Bekink, B *Principles of South African local government law* (2006) 26; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 para 5. (herein after *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*)

³⁵ *CDA Boerdery v Nelson Mandela Metropolitan Municipality* para 38.

³⁶ S 40(1).

not entitled to usurp the functions of the municipal sphere except in exceptional circumstances, but only temporarily and in compliance with strict procedures.³⁷

However, the kind of autonomy vested in local government is subject to supervision. National and provincial government has been tasked with the responsibility to supervise local government.³⁸ The supervision envisaged by the drafters of the Constitution entails respecting the autonomy of local government. It is in this context where there appears to be a fine line between supervision and co-operation.

2.3 Difference between co-operation and supervision.

This research paper is concerned with the supervisory powers of the provincial government. The provincial government is required to assume different roles when exercising its supervisory powers. Provincial government's role may be divided into co-operation and supervision. On the one hand the provincial government is required to be a strategic partner by co-operating with local government and on the other hand it is required to act as a superior authority by exercising oversight. The distinction between these concepts is critical to this research paper. The following paragraphs will endeavour to illustrate the difference between co-operation and supervision in the context of this research paper.

2.3.1 Meaning of co-operation.

Prior to 1994, 'co-operative governance' and 'intergovernmental relations' were largely foreign terms in the South Africa political lexicon. However, in the new dispensation co-operation and intergovernmental relations became vital components of the South African governance system.³⁹

The White Paper on Local Government⁴⁰ identified the strategic purposes of intergovernmental relations as promoting and facilitating co-operative decision making; co-ordinating and aligning priorities, budgets, policies and activities across interrelated functions and sectors; ensuring a smooth flow of information thereby enhancing the implementation of policy and programmes and preventing and

³⁷ *City of Johannesburg v Gauteng Development Tribunal* 2010 (9) BCLR 859 (CC) para 44. (hereinafter *City of Johannesburg v Gauteng Development Tribunal*)

³⁸ S 155(7) Constitution.

³⁹ Chaskalson M *Constitutional Law of South Africa* (1996) 14-1.

⁴⁰ Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (Government Gazette, Vol 393, No 18739 13 March 1998).

resolving conflicts and disputes. Instead of the inherently conflicting intergovernmental relations that characterise many modern states, the Constitution actively promotes co-operation between the different levels of government.⁴¹

Co-operative governance means that the three spheres of government should work together to improve the lives of citizens. The concept of co-operation requires the different spheres to work together in order to fulfil their respective mandates. The Constitution mandates the three spheres to assist and support each other, share information and coordinate their efforts.⁴²

Co-operation between local government and provincial government operates in horizontal and vertical lines. For example, municipalities must not only co-operate with one another but with provincial government as well. These principles give expression to the attributes of 'distinctiveness, interrelatedness and interdependence' granted by the Constitution to the three spheres.⁴³ Co-operation also requires organs of state to exhaust all remedies before turning to the courts to resolve a dispute.⁴⁴ Section 41(2) of the Constitution stipulates that an Act of Parliament must establish or provide for processes, structures and institutions to promote and facilitate intergovernmental relations and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. The Act envisaged in section 41(2) of the Constitution was enacted in form of the Intergovernmental Relations Framework Act.⁴⁵

The South African intergovernmental system which is based on the principle of co-operative governance, oversight and mediation requires the National Council of Provinces (NCOP) to play a leading role in facilitating intergovernmental co-operation.⁴⁶ The NCOP is a uniquely South African institution.⁴⁷ One of the NCOP's primary functions is to serve as an intergovernmental forum for the provincial

⁴¹ Levy, N & Tapscott, C (Eds) *Intergovernmental Relations in South African: The Challenges of Cooperative Government* (2001) 1.

⁴² S 41(1)(h) Constitution.

⁴³ S 40(1) Constitution; De Visser J *Developmental local government: a case study of South Africa* (2005) 287.

⁴⁴ S 41(1) Constitution.

⁴⁵ Act 13 of 2005.

⁴⁶ Department of Provincial and Local Government *Implementation of the Intergovernmental Relations Framework Act* (2007) 9.

⁴⁷ Reddy, P 'Intergovernmental relations in South Africa' (2001) 20 *Politeia* 1 33.

legislature in Parliament.⁴⁸ The NCOP is the collective voice of the provinces and therefore it represents South African citizens indirectly in their roles as residents of the province.⁴⁹ This is mainly done through participation in the legislative process. However, it is not limited to this function. The NCOP has an important executive oversight function. The NCOP is required to scrutinise the actions of the executive to ensure that the executive, both national and provincial government, perform their functions within the legislative framework.

2.3.2 Meaning of supervision

As indicated earlier, both national and provincial government have supervisory responsibility over local government. This research paper is concerned with the provincial government's supervisory role. In the context of this research paper, 'supervision' means a process of provincial review of the actions of local government in order to measure the fulfilment by local government of obligations conferred by statute.⁵⁰ The notion of supervision requires the provincial sphere to operate in a vertical line with local government. Stated slightly differently: the provincial government will act as a higher authority in relation to local government. Supervision is, therefore different from co-operation. Supervision includes four distinct but interrelated activities: regulation, monitoring, support and intervention.⁵¹ Each of the components of supervision will be discussed briefly.

2.3.2.1 Regulation

Provincial government has regulatory powers over the exercise by municipalities of their executive authority to see to the effective performance by municipalities of their functions.⁵²

In the context of supervision, 'regulation' refers to national and provincial government setting the framework within which local government must exercise its autonomy.⁵³

⁴⁸ Murray *Constitutional law of South Africa* (2004) 22-128.

⁴⁹ Van Stavel *The role of the National Council of Provinces in the legislative process: an examination of its effectiveness in achieving its constitutional mandate* (2002) 17.

⁵⁰ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 370 (hereinafter *the First Certification judgment*).

⁵¹ Steytler and De Visser *Local Government Law of South Africa* (2007) 15-5.

⁵² S155(7) Constitution; *the First Certification judgment* at para 377.

⁵³ De Visser J *Developmental local government: a case study of South Africa* (2005) 170.

There is no clear definition of 'regulation' but the Court provided clarity in regard the meaning of regulation. In *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* the Court stated that the term 'regulate' connotes a broad managing or controlling rather than a direct authorisation function.⁵⁴ Swain J stated in *City of Cape Town v Premier of the Western Cape* that 'regulation' is forward-looking and does not include an investigation into past suspected misconduct.⁵⁵ Therefore, in the context of supervision, regulation can be regarded as a preventative measure.

Provincial government is granted substantial powers to regulate local government. The Constitution created a framework and the provincial sphere is compelled to exercise its powers within the confines of that framework. Section 108(1) of the Municipal Systems Act empowers the Minister to set essential national standards and minimum standards for any municipal service or for any matter assigned to municipalities in terms of section 156 (1) of the Constitution.

Again, this represents a limit on the autonomy of local government by allowing the national sphere to set standards. Section 154(2) of the Constitution requires that draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature. Ideally, the Minister should thus set those minimum standards after having consulted with all the relevant stakeholders.

2.3.2.2 Monitoring

Monitoring occurs when one sphere measures the compliance of another with legislative directives.⁵⁶

'The monitoring power is more properly described as the antecedent or underlying power from which the provincial power to support, promote and supervise local government emerges. Textually, the word "monitor" either appears alongside "support" or is made subject to provisions in which the

⁵⁴ *the First Certification judgment* at para 377.

⁵⁵ *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C) at para 48.10. (hereinafter *City of Cape Town v Premier of the Western Cape*)

⁵⁶ Department of Provincial and Local government *Practitioners Guide to Intergovernmental Relations in South Africa* (33).

support, promotional and supervisory roles are adumbrated. In its various textual forms “monitor” corresponds to “observe”, “keep under review” and the like’.⁵⁷

Section 155(7) of the Constitution contains a general monitoring power for both national and provincial government.⁵⁸ National government’s monitoring function is made subject to section 44 of the Constitution. The national government’s duty is, however, also implicit in the National Treasury’s responsibility to enforce financial measures that ensure both transparency and expenditure control in all spheres of government.⁵⁹

The monitoring of local government by the provincial government is necessary in order to pick up early signals of problems that require intervention by the appropriate authority.⁶⁰ Provincial government, when monitoring local government, is not necessarily required to take intrusive action. The information which the provincial sphere will solicit during its monitoring exercise will place the provincial sphere in a position to determine whether more drastic measures of supervision are required.⁶¹ A monitoring framework can include certain measures or tests at intervals to see whether municipalities are complying with national legislation, provincial legislation and the Constitution.⁶² This requires interaction between the different spheres. Local government in particular should play an important role by allowing the provincial government to exercise its monitoring function within the legislative parameters.

The provincial sphere’s obligation to supervise local government may be categorised into three categories. First, there is self-reporting. There are certain instances when the law requires the municipality to report to the provincial government.⁶³ The Municipal Finance Management Act contains a number of ‘self-reporting’

⁵⁷ *the First Certification judgment* para 372.

⁵⁸ De Visser (1999) 180; Steytler & De Visser in ‘Local Government of South Africa’ in Woolman, S *et al* *Constitutional Law of South Africa* (2005) 22-116.

⁵⁹ S 216(2) Constitution.

⁶⁰ Steytler & De Visser (2007) 260.

⁶¹ See S 139 Constitution.

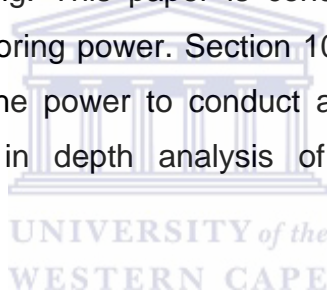
⁶² Department of Provincial and Local Government *A guideline on provincial-local government intergovernmental relations* (2003).

⁶³ Ss 25, 73 and 127 Municipal Systems Act; S 32 Municipal Systems Act.

measures.⁶⁴ For example, section 24(3) of the Municipal Finance Management Act requires municipalities to submit their approved budgets to the national treasury and the relevant provincial treasury. Legislative provisions will prescribe to municipality which information they must provide to the provincial sphere.

Secondly, requesting information is another tool which the province may use to monitor local government. There are certain statutory provisions which empower provincial government to request information from local government.⁶⁵ For example, section 105(2) of the Municipal Systems Act provides that the MEC for local government may require a municipality to submit information to a provincial organ of state. It is expected, in the spirit of co-operative governance, that the municipality should adhere to the request of the MEC.

Thirdly, the provincial government may decide to investigate a municipality. This is an intrusive form of monitoring. This paper is concerned with this aspect of the provincial government's monitoring power. Section 106(1) of the Municipal Systems Act provides the MEC with the power to conduct an investigation a municipality. Chapter 3 will provide an in depth analysis of the provincial government's investigative authority.



2.3.2.3 Support

The term 'support' derives much of its significance from section 154(1) of the Constitution, which compels national and provincial governments to 'support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions'.

Steytler and De Visser distinguish between two types of support.⁶⁶ First, there is support in the context of supervision. This is to prevent a 'decline in structure, powers and functions'. Secondly, there is support within the context of co-operation where local government is a partner in the achievement of a common goal. Provincial support for local government may take different forms. The provincial

⁶⁴ Ss 71, 72, 73, 70(2), 114 and 127 Municipal Finance Management Act.

⁶⁵ Ss 21(2)(e) and 74(1) Municipal Finance Management Act.

⁶⁶ Steytler & De Visser (2007) 15-15.

sphere may provide training, a specific service, advice by (for example, preparing model by-laws), and resources, including financial resources.⁶⁷

2.3.2.4 Intervention

'Intervention' is the unilateral interference by one sphere into the affairs of another sphere in order to remedy an unacceptable situation.⁶⁸ This is the most intrusive form of supervision.

'The thrust of section 139(1) of the Constitution is to enable a province to take whatever steps are necessary to get the municipality back on its feet and fulfilling its obligations. The section builds in both legal and political safeguards: objective tests for interventions are included in the section; a council may challenge any intervention that it believes is unwarranted under the Constitution in Court; and the relevant national Minister or the NCOP may terminate provincial action in a municipality taken under subsection (1). In addition, the principles of co-operative government in chapter 3 of the constitution require provinces to be circumspect in the use of their intervention powers'.⁶⁹

Section 139 of the Constitution provides the provincial executive with three options when a municipality cannot or does not fulfill an executive obligation in terms of the Constitution. First, the provincial executive may issue a directive to the municipal council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations.⁷⁰ The provincial executive has been granted the discretion to determine whether it wishes to issue a directive. Unlike the other methods of intervention, the issuing of a directive is not complex and does not have to adhere to strict procedural requirements. In my view, the provincial executive should try to utilise this method before resorting to the other methods of intervention in terms of section 139 of the Constitution.

⁶⁷ Smith, G *The role of a province in the new local government dispensation: a Western Cape case study* (unpublished LLM thesis, University of the Western Cape, 2002) 13.

⁶⁸ Department of Provincial and Local government *Practitioners Guide to Intergovernmental Relations in South Africa* (2007) 34.

⁶⁹ Hoffman-Wanderer, Y & Murray, C *Suspension and dissolution of municipal councils under section 139 of the Constitution* (2007) TSAR 141.

⁷⁰ S 139(1)(a) Constitution.

Secondly, the provincial executive may assume responsibility for the relevant obligation in that municipality.⁷¹ This is an attempt to remedy an unacceptable situation in a specific division or department in a municipality. The provincial executive is compelled to inform the Minister responsible for local government, the provincial legislature and the NCOP.⁷² It will become apparent in Chapter 3 that, unlike section 106 of the Municipal Systems Act, the legislature provided the NCOP with greater influence when the provincial executive decides to intervene in a municipality in terms of section 139(1)(b) of the Constitution. Section 139(2)(b) of the Constitution stipulate that the intervention *must* end if the Minister responsible for local government or the NCOP disapproves the intervention.

Lastly, the provincial executive may dissolve the Municipal Council and appoint an administrator until a newly elected municipal council has been declared elected.⁷³ In terms of section 139(3)(a), if an intervention took place in terms of section 139(1)(c) of the Constitution then the Minister responsible for local government, the provincial legislature and the NCOP must be informed immediately. The Minister and the NCOP has fourteen days within which to set aside the intervention.⁷⁴ This is the most intrusive method of intervention in terms of section 139 of the Constitution.

If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved.⁷⁵ The legislature made it mandatory for the provincial executive to intervene when a municipality fails to approve an annual budget or revenue raising measures necessary to give effect to the budget. The Court in *Premier of the Western Cape v Overberg District Municipality* held that the phrase ‘any appropriate steps’ does not imply the dissolution of the municipal council. The Court stated that ‘it could not have been the legislature’s intention that failure of a municipal council to

⁷¹ S 139(1)(b) Constitution.

⁷² S 139(2)(a) Constitution.

⁷³ S 139(1)(c) Constitution; *Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others* Case No. 231/2009 (unreported)(hereinafter *Mnquma Local Municipality and Another v The Premier of the Eastern Cape*)

⁷⁴ S 139(3)(b) Constitution.

⁷⁵ S 139(4) Constitution; *Premier of the Western Cape v Overberg District Municipality* 2011 JOL 27183 (SCA). (hereinafter *Premier of the Western Cape v Overberg District Municipality*)

approve a budget before the start of a financial year would invalidate the approval of a budget after the start of the financial year'.⁷⁶ The MEC still has the discretion and is not compelled to dissolve the municipal council in the event where there was a failure to approve the annual budget.

Section 139 of the Constitution contains various legal and political safeguards. There are strict substantive as well as procedural safeguards which must be adhered to in order to a lawful intervention to be possible.⁷⁷

Since provincial government has such significant powers in terms of intervention, it has the principal obligation to support local government.⁷⁸ It is up to the provincial executive to determine, on a case-by-case basis, which intervention, if any, is warranted. In exercising this discretion, the provincial executive should consider whether the council would be capable of fulfilling its obligations after the intervention is over.⁷⁹

2.4 Conclusion

This chapter highlighted the status of local government during the apartheid era as well as in the new democratic dispensation. It was illustrated that despite being a government in its own right, local government's powers to act are limited to the powers conferred by the Constitution. This chapter provided an analysis of the supervisory responsibility of provincial government towards local government. Although local government enjoys autonomous status, legislative provisions permit other spheres of government to intrude into the functional terrain of local government.

The Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* describes the relationship between other spheres of government and local government in the following way:

'What the [Constitution] seeks . . . to realise is a structure for local government that, on the one hand, reveals a concern for the autonomy and integrity of

⁷⁶ *Premier of the Western Cape v Overberg District Municipality* at para 48.

⁷⁷ S 139 Constitution; see also *City of Johannesburg v Gauteng Development Tribunal* para 66.

⁷⁸ Steytler & De Visser in *Constitutional Law of South Africa* 2 ed (2005) 22-117.

⁷⁹ Hoffman-Wanderer, Y & Murray, C 'Suspension and dissolution of municipal councils under section 139 of the Constitution' (2007) TSAR 141.

local government and prescribes a hands-off relationship between local government and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor local government functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy. This is the necessary hands-on component of the relationship'.⁸⁰

The Constitution thus seeks to find a balance between the provinces role to monitor local government but at the same time respecting the autonomy. This research paper focuses on one of the monitoring provisions, namely section 106 of the Municipal Systems Act. Section 106 of the Municipal Systems Act permits the provincial sphere to monitor local government.

Chapters 3 and 4 will discuss the substantive requirements and intergovernmental checks and balances which have been provided for in section 106 of the Municipal Systems Act in order to assess whether the provincial sphere are fulfilling its supervisory responsibility within the legislative framework. It will be argued that an amendment to the provincial legislation will assist in allowing the MEC to exercise its supervisory powers without being shackled by provincial legislation.



⁸⁰ *First Certification* judgment para 373.

Chapter 3

An analysis of section 106 of the Municipal Systems Act.

3.1 Introduction

Chapter 2 provided an analysis of the development of local government in South Africa. That chapter illustrated that local government is now regarded as a leading role-player in the governance of the country. This chapter will commence with a detailed analysis of section 106(1) of the Municipal Systems Act. Endeavours will be made to set guidelines for the application of section 106 of the Municipal Systems Act. This research paper will discuss the question as to who may invoke the section as well as the meaning of person(s) as provided for in section 106 of the Municipal Systems Act.

The Municipal Systems Act is one of many pieces of legislation enacted to give effect to the autonomous status of local government.⁸¹ One of the objectives of the Municipal Systems Act is to 'establish a framework for support, monitoring and standard setting by other spheres of government in order to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government'.⁸²

The central theme of this chapter is to ascertain the meaning of the different components of section 106 of the Municipal Systems Act. The provisions of section 106 of the Municipal Systems Act are not always clear. In order to ascertain what the meaning of section 106 of the Municipal Systems Act it is necessary to interpret the section. There are certain rules of interpretation which must be used as a guide when interpreting statutory provisions. The aim of interpretation, as stated in *Venter v R*, is to ascertain the intention which the legislature meant to express from the language which it employed.⁸³ The intention of the legislature is also to be established with reference to the context of the statute, which includes the enactment as a whole, the enactment in *pari materia* and the 'mischief' sought to be

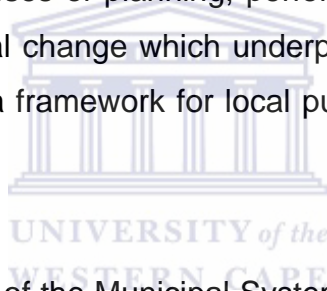
⁸¹ Act 32 of 2000.

⁸² Municipal Systems Act.

⁸³ 1907 TS 910 at 913; see De Ville J *Constitutional and Statutory Interpretation* (2000) 51 (hereinafter De Ville J (2000)).

remedied.⁸⁴ The Municipal Systems Act was enacted as part of a series of laws which aimed to transform local government and create a legislative framework for local government. All the different laws aimed to entrench the constitutional status of local government. Therefore, when interpreting the Municipal Systems Act it should be done in line with the aforementioned principles.

In response to the constitutional provisions relating to monitoring⁸⁵ the legislature included section 106 in the Municipal Systems Act. Meer J aptly stated that the aim of the Municipal Systems Act is 'to provide *inter alia* for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, . . .; to provide for the manner in which municipal powers and functions are exercised and performed; to provide for community participation; to establish a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government; to provide a framework for local public administration and human resource development'.⁸⁶



When interpreting section 106 of the Municipal Systems Act, the interpretation which will assist the municipality to fulfil its mandate should be preferred. Whenever there is ambiguity, preference should be given to the result which will better assist local government to perform its constitutional mandate. Therefore, when interpreting the provisions relating to local government, service delivery and community upliftment should always be considered.

3.2 Who has the primary responsibility to supervise local government?

In Chapter Two it was illustrated that the national and provincial governments are required to supervise local government. However, it is not clear who has been tasked with the primary responsibility. This paragraph will unpack the legal

⁸⁴ De Ville, J (2000) 52.

⁸⁵ S 155 Constitution.

⁸⁶ Long Title of the Municipal Systems Act; *Democratic Alliance v Minister of Local Government* 2005 JOL 13412 (C) para 5 (hereinafter *Democratic Alliance v Minister of Local Government*).

framework in an attempt to establish who has been tasked with the primary responsibility.

As indicated earlier, this chapter is concerned with the interpretation of section 106(1) of the Municipal Systems Act. There are different methods of statutory interpretation. Headings have, in certain circumstances, been used by our courts as an aid to interpret the sections of an Act which follow them, even though headings are not voted on or passed by Parliament. Where the intention of the legislature as expressed in any particular section is clear, then it cannot be overridden by the words of a heading. However, where the intention is doubtful, whether the doubt arises from ambiguity in the section itself or from other considerations, then the heading may become of importance.⁸⁷

The heading of chapter 10 of the Municipal Systems Act, in which section 106 appears, reads '*Provincial and National Monitoring and Standard Setting*'. The heading starts by first referring to *provincial* and then to *national* monitoring and standard setting. It follows, in my opinion, that the legislature deliberately positioned *provincial* at the start of section 106 of the Municipal Systems Act. This is an indication that the primary responsibility to monitor and set standards lies with the provincial sphere of government. It is clear that the national sphere has an important role to play in regard to monitoring of local government but the province is tasked with the primary responsibility. Support for this conclusion can be found in section 105(1) of the Municipal Systems Act which requires the MEC to put in place 'mechanisms, processes and procedures in terms of section 155(6) of the Constitution' for monitoring municipalities. The importance of the notion of primary responsibility will become clearer later in this chapter.

3.3 Section 106: Substantive requirements

The Municipal Systems Act contains substantive and procedural requirements which must be complied with for the MEC to lawfully use his or her powers. The principle of legality is of paramount importance in this regard. The lawfulness of the MEC's action will depend on his or her interpretation of section 106 of the Municipal

⁸⁷ *Chidi v Minister of Justice* 1992 (4) SA 110 (A) at 115.

Systems Act. Section 106 of the Municipal Systems Act, in its current form, is not always clear. The essential components of section 106(1) of the Municipal Systems Act will be unpacked. Section 106(1) read as follows:

- (1) *If an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must–*
- (a) *by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or*
 - (b) *if the MEC considers it necessary, designate a person or persons to investigate the matter.*
- (2) *In the absence of applicable provincial legislation, the provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), and the regulations made in terms of that Act apply, with the necessary changes as the context may require, to an investigation in terms of subsection (1)(b).*

The following paragraphs will analyse each of the key provisions of section 106 of the Municipal Systems Act. This chapter is concerned with the substantive provisions of section 106(1) of the Municipal Systems Act.

3.3.1 An MEC

The authority to determine whether there are sufficient grounds to invoke section 106 of the Municipal Systems Act is vested in the Member of the Executive Council (MEC) responsible for local government.

The executive authority of the province is vested in the Premier.⁸⁸ The Premier of the province is responsible for appointing the executive council, assigning their duties

⁸⁸ S 125(1) Constitution.

and functions and, importantly, may also dismiss them.⁸⁹ Despite the fact the MEC reports to the Premier, the power to request information or initiate an investigation in terms of section 106 of the Municipal Systems Act is vested exclusively in the MEC. This research paper will illustrate that the MEC's power to conduct an investigation in terms of section 106(1) are being curtailed primarily by two things: the amendments to the Municipal Systems Act and the content of provincial laws. The national Minister has been granted authority to conduct an investigation in terms of section 106 of the Municipal Systems Act.

3.3.2 Reason to believe

Section 106(1) of the Municipal Systems Act relies on the MEC to make a value judgment when considering whether or not to investigate a municipality. The MEC's decision must be supported by facts.

In order for the provisions of section 106(1)(b) of the Municipal Systems Act to be properly invoked, the MEC responsible for local government in the province, must have *reason to believe* that a *serious malpractice* occurred or was occurring in a municipality. Mere suspicion is not enough. It is accepted that the test as to whether there is *reason to believe* is an objective one and must be constituted by facts giving rise to such belief.⁹⁰

The belief in itself must be rational and/or reasonable. It has been recognised that the phrase 'reason to believe' places a much lighter burden of proof on the MEC than the phrase 'the Court is satisfied'.⁹¹ The MEC must be able to substantiate his/her actions by referring to the facts which were before him/her at the time when he/she decided to utilise the mechanisms of section 106(1) of the Municipal Systems Act.

In short, the pertinent question, therefore, is whether the reasonable MEC would have thought, on the basis of the information before him, that there is reason to believe that a serious malpractice had occurred or was occurring in the municipality.

⁸⁹ S 132(2) Constitution.

⁹⁰ *Democratic Alliance v Minister of Local Government* at para 25; see Steytler & De Visser (2007) 15-11.

⁹¹ *Democratic Alliance v Minister of Local Government* para 26; Steytler & De Visser (2007) 15-11.

This provision of section 106(1) of the Municipal Systems Act should be used as a yardstick by the MEC when considering whether to conduct an investigation. The MEC is compelled to act in terms of section 106(1)(a) or (b) of the Municipal Systems Act if one of the requirements of section 106(1) have been met. The following paragraph will examine the meaning of the phrase 'statutory obligation' as provided for in section 106(1) of the Municipal Systems Act. In addition, this paragraph will unpack the meaning of maladministration, fraud, corruption or any other serious malpractice in the context of section 106 of the Municipal Systems Act.

3.3.3 Statutory obligation

The MEC must act if a municipality *cannot or does not* fulfil a *statutory obligation*. The text of the Municipal Systems Act is not clear in regard to the meaning of statutory obligation. In light of this ambiguity, does a breach of *any* statutory obligation constitute sufficient grounds to trigger an investigation in terms of section 106(1) of the Municipal Systems Act?

There is a plethora of laws that aims to regulate local government in South Africa. There are certain provisions which are crucial in order for the municipality to function and ultimately deliver services to the community. In this regard the election of the executive committee is also critical to the functioning of the municipality.⁹² The Municipal Finance Management Act compels the municipality to open a bank account in the name of the municipality.⁹³ A municipality will not be able to function if the municipality's annual budget has not been approved.⁹⁴

There are also provisions which are important but not crucial to functioning of the municipality. For example, the accounting officer of a municipality must by no later than 10 working days after the end of each month submit to the mayor of the municipality and the relevant provincial treasury a statement in the prescribed format on the state of the municipality's budget.⁹⁵ If the accounting officer submits the statement on the 11th day, does that authorise the MEC to conduct an investigation in terms of section 106 of the Municipal Systems Act?

⁹² S 18 Municipal Structures Act.

⁹³ S 7 Municipal Finance Management Act.

⁹⁴ See Ss 24, 25 and 26 of the Municipal Finance Management Act.

⁹⁵ S 71(1) Municipal Finance Management Act.

Unlike section 139 of the Constitution which refers to an ‘executive obligation’, section 106 of the Municipal Systems Act refers to a ‘statutory obligation’. The reference to a statutory obligation includes the issues which were excluded in the case of *Mnquma v Premier of the Eastern Cape*.⁹⁶ In this case, the Court had to determine whether the decision by the Eastern Cape provincial executive to dissolve the municipal council of the Mnquma Local Municipality was lawful. The judgment thus suggests that the phrase ‘statutory obligation’ in section 106 of the Municipal Systems Act refers to any statutory obligation. However, the phrase ‘or any other serious malpractice’ suggests again that the statutory obligation must be serious in nature, before a violation could trigger the application of section 106 of the Municipal Systems Act.

The Court in the *Mnquma* judgment stated that executive obligations should not be confused with statutory obligations or duties that are aimed at ensuring the effective performance by local government of its executive obligations. The Court went further and stated that ‘non-compliance with a statutory obligation or duty aimed at ensuring the effective performance of executive obligations would not necessarily result in a failure to fulfil executive obligations’.⁹⁷ It is important to note that the *Mnquma* judgment dealt with section 139 of the Constitution and not section 106 of the Municipal Systems Act.

The MEC should apply his/her mind properly when considering whether to invoke section 106 of the Municipal Systems Act. It follows, in my view, that decision whether to investigate a municipality should be informed by a failure to adhere to an essential statutory obligation.

The investigation in terms of the said section must be triggered by a failure to adhere to compulsory or essential norms set in legislation. Therefore, before the MEC can request information or appoint a person(s), he/she must be able to identify a

⁹⁶ *Mnquma Local Municipality v The Premier of the Eastern Cape* para 65.

⁹⁷ *Mnquma Local Municipality v The Premier of the Eastern Cape* para 65; The courts distinction between executive obligations and statutory obligations has been criticised. Steytler & De Visser are of the view that it appears that the court overlooked the variation in ‘appropriate steps’ contemplated by section 139(1) of the Constitution. The court’s reasoning implies that the Provincial Executive may not send a directive in terms of section 139(1)(a) of the Constitution in response to a municipality’s failure to organise a council meeting resulting unless failure to organise a meeting has resulted in a breakdown of the municipality’s administration.

statutory provision which the municipality failed to adhere to. The provision in question must be fundamental to functioning of the municipality. A general reference to the municipality's failure to fulfil its statutory obligations will not suffice. Non-compliance with a statutory obligation is a factual question which must be determined having regard to the conduct, or the lack thereof, of a municipality.

3.3.4 Maladministration, fraud, corruption

The conduct which the MEC wishes to investigate must be at the level of seriousness indicated by the words '*maladministration, fraud or corruption*'.

Maladministration can be attributed to incapacity or inability on the part of the municipality's personnel. The mere possibility of maladministration would not justify the dissolution of the municipal council.⁹⁸ If it can be proved that certain individuals within the municipality have committed fraud or corruption, then they could be criminally prosecuted.

3.3.5 Any other serious malpractice

The MEC may act if there is '*any other serious malpractice*'. There are certain features which need to be present in order to satisfy this element.⁹⁹

The term 'serious malpractice' must be interpreted in the light of the preceding words '*maladministration, fraud, corruption*'.¹⁰⁰ The problem must relate to the management of the affairs, exercise of powers and performance of the functions of the municipality. There must be an internal problem in the municipality.¹⁰¹ The malpractice referred to must have been committed by a person holding a position of authority within the municipality.¹⁰² There should have been dishonesty, impropriety or perhaps breach of a fiduciary duty. The problem must have an element of severity.¹⁰³

⁹⁸ *Mnquma Local Municipality v The Premier of the Eastern Cape* para 26.

⁹⁹ Steytler & De Visser (2007) 15-12.

¹⁰⁰ *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C) para 48.14. (hereinafter *City of Cape Town v Premier of the Western Cape*)

¹⁰¹ Steytler & De Visser (2007) 15-12.

¹⁰² Steytler & De Visser (2007) 15-12.

¹⁰³ Steytler & De Visser (2007) 15-12.

3.4 The powers of the MEC in terms of section 106 of the Municipal Systems Act.

Where the requirements of section 106(1) of the Municipal Systems Act have been met, the Municipal Systems Act prescribes the steps which the MEC must take. Essentially the MEC has two options. The MEC may request information from the municipality or he/she may appoint person(s) to conduct an investigation.

3.4.1 Request for information

It is a fairly basic aspect of monitoring to be supplied with information and, in general, local authorities are legislatively compelled to either provide reports or to make specified documents readily available.¹⁰⁴

Which of the options, provided for in section 106(1) of the Municipal Systems Act, should the MEC exercise first? As indicated in chapter 2, the South African governance system is based on the principle of co-operative governance. The different organs of state in the spheres of government are required to co-operate with one another. Exchange of information between the different organs of state in the various spheres is an important component of monitoring. Chapter Two illustrated that co-operation between the spheres of government is an important part of intergovernmental relation in South Africa.

It follows, in my view, that the MEC should first follow the less intrusive approach provided for in section 106 (1)(a) of the Municipal Systems Act. The Municipal Systems Act does not explicitly oblige the MEC to do this but in order to give effect to the constitutional provisions relating to co-operative governance, sections 40 and 41 of the Constitution in particular, he/she should first request information. In the event of this approach failing, it may be necessary to invoke section 106(1)(b) of the Municipal Systems Act.

3.4.2 MEC's decision to appoint investigators

The MEC must consider it 'necessary' to initiate an investigation in terms of section 106(1)(b) (as opposed to enquiring into or resolving the matter in less intrusive fashion).

¹⁰⁴ Mettler, J 'Provincial-Municipal relations: A few challenges' (2001) *Law Democracy and Development* 219.

In the context of section 106 of the Municipal Systems Act, *necessary* would mean that a failure to act by the MEC would lead to a breakdown in the administration of the municipality. Where there is fraud or corruption occurring in a municipality, it is necessary that the MEC conducts an investigation in terms of section 106(1) of the Municipal Systems Act. It is not necessary for the MEC to conduct an investigation in terms of section 106(1)(b) of the Municipal Systems Act where the municipality failed to keep adequate records or failed to reply to a request for information. A request for information in terms of section 106(1)(a) of the Municipal Systems Act may be then the appropriate mechanism. The act or omission which the MEC wishes to investigate must relate to an essential component of the functioning of the municipality.

3.4.2.1 Who should be appointed?

The selection of the person or persons to conduct the investigation in terms of section 106(1)(b) of the Municipal Systems Act is fundamental to a lawful investigation.

The Municipal Systems Act does not prescribe who should be appointed to conduct an investigation in terms of section 106 of the Municipal Systems Act. Reference to the phrase *person or persons* indicates that the MEC should appoint a natural person as oppose to a juristic to conduct the investigation.¹⁰⁵ The MEC has discretion with regard to the composition and/or the selection of the person or persons who should conduct the investigation in terms of section 106 of the Municipal Systems Act. The legislature drafted section 106 of the Municipal Systems Act with the view to provide the MEC with flexibility when invoking section 106 the Municipal Systems Act. However, the discretion of the MEC to appoint a person or persons is not infinite.

An issue of particular concern is the appointment of judicial officers to head an investigation in terms of section 106 of the Municipal Systems Act. The appointment of a judge to head an investigation has been troublesome and has been the subject matter of litigation in at least one reported judgment.¹⁰⁶ The courts have emphasised

¹⁰⁵ Steytler & De Visser (2007) 15-14.

¹⁰⁶ *City of Cape Town v Premier of the Western Cape*.

that caution should be exercised when appointing judicial officers as chairpersons of investigative bodies.¹⁰⁷

In the event where the MEC decides to appoint a judicial officer in terms of section 106(1)(b) of the Municipal Systems Act, he/she should take cognisance of the doctrine of separation of powers.

The South African Constitution provides for the separation of powers between the legislature, the executive and the judiciary.¹⁰⁸ In dealing with the doctrine of separation of powers Bosielo J said:

'[I]n my view, it is imperative that in every modern democratic society, particularly ours which is still relatively young and nascent, that the Judiciary as a whole must not only claim, or purport to be, but must manifestly be seen to be truly independent. I venture to say that the attributes of judicial independence and impartiality lie at the very heart of the due process of the law.'¹⁰⁹

The Constitution stipulates that the Courts are enjoined to apply the Constitution and the law 'impartially and without fear, favour or prejudice'.¹¹⁰ In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹¹¹ it was stated that 'judicial officers may, from time to time, carry out administrative tasks' but the Court cautioned that '[t]here may be circumstances in which the performance of administrative functions by judicial officers infringes the doctrine of separation of powers'.¹¹² The fact that judicial officers are authorised to perform certain functions outside their judicial mandate does not imply that their conduct will not be reviewed.

¹⁰⁷ see *Local Government, Housing and Traditional Affairs (Kwazulu-Natal) v Umlambo Trading 29 CC and Others* 2008 (1) SA 396 (SCA) (hereinafter *Umlambo Judgment*); *South African Society for Personal Injury Lawyers v Heath* 2001 (1) BCLR 77 (hereinafter the *Heath Judgment*).

¹⁰⁸ *Heath Judgment* para 23.

¹⁰⁹ *Van Rooyen v de Kok NO and others* 2003 (2) SA 317 (T) at 323 D – E; For an in depth discussion of the development of the doctrine of separation of powers see O' Regan, K 'Checks and Balances reflections on the development of the doctrine of separation of power under the South African Constitution' *PELJ* 2005 (8) 1.

¹¹⁰ S 165, see Seedorf, S & Sibanda, S 'Separation of powers' in Woolman, S *et al Constitutional Law of South Africa* (2002) 12:26.

¹¹¹ 1999 (10) BCLR 1059 (CC).

¹¹² *President of the Republic of South Africa and Others v South African Rugby Football Union* 1999 (10) BCLR 1059 (CC) paras 107 and 114.

Before accepting an appointment to chair a commission of enquiry, or any other forum, a judge would have to be satisfied, after carefully examining the subject matter of the commission, as set out in its terms of reference, that the functions he or she is called upon to perform, are not incompatible with his or her judicial office.¹¹³ Judges have an obligation to ensure that they do not allow themselves to be used to settle political scores.

In the case of *City of Cape Town v Premier of the Western Cape*¹¹⁴ a commission was appointed in terms of section 106(1)(b) of the Municipal Systems Act. Judge Nathan Erasmus was appointed as the chairperson of the commission. The applicant challenged the appointment of Erasmus J, arguing that his appointment was in conflict with the doctrine of separation of powers. Swain J, with Nicholson J concurring, found the appointment of a serving judge to head the commission appointed in terms of section 106(1)(b) of the Municipal Systems Act, to be incompatible with the doctrine of separation of powers.¹¹⁵ The Court stated the following with regard to the appointment of Erasmus J as chairperson of the commission: 'The subject matter of the investigation quite clearly focuses on the conduct of the Democratic Alliance and its office bearers'.¹¹⁶ This matter was, therefore, a political battle between two political antagonists. It is quite clear that the appointment of a judge to chair the commission created the risk of judicial entanglement in the matters to be investigated, which were politically controversial.¹¹⁷

The Court has cautioned that the appointment of judges to conduct investigations is not desirable in instances. The case of *South African Society for Personal Injury Lawyers v Heath*¹¹⁸ concerns the constitutional validity of provisions governing the functioning of the Special Investigating Unit (SIU) headed by Mr Justice Heath, which was set up to investigate serious malpractices and maladministration within state institutions and in connection with state assets and public money. The applicants

¹¹³ *City of Cape Town v Premier of the Western Cape* para 178.

¹¹⁴ 2008 (6) SA 345 (C).

¹¹⁵ *City of Cape Town v Premier of the Western Cape* para 231.

¹¹⁶ *City of Cape Town v Premier of the Western Cape* para 202.

¹¹⁷ *City of Cape Town v Premier of the Western Cape* para 203.

¹¹⁸ 2001 (1) BCLR 77.

challenged the validity of the appointment of a judge or acting judge to head the Unit. The Court unanimously held that, in this case the appointment of a judge is in conflict with the doctrine of separation of powers. The applicant argued that there should be certain criteria in assessing whether a judge should be afforded non-judicial functions. They are whether the performance of the function:

- a) is more usual or appropriate to another branch of government;
- b) is subject to executive control or direction;
- c) requires the judge to exercise a discretion and make decisions on the grounds of policy rather than law;
- d) creates the risk of judicial entanglement in matters of political controversy;
- e) involves the judge in the process of law enforcement; or
- f) will occupy the judge to such an extent that he or she is no longer able to perform his or her normal judicial functions.¹¹⁹

The Court endorsed these criteria but cautioned against a blanket application of these criteria.¹²⁰

If the MEC appoints a commission he/she must have regard to the position which each person on the commission holds. They should be neutral in their approach and should not get involved in political disputes. As a result it is generally undesirable to have persons who hold a public office to be appointed to a commission of inquiry.

It is trite that the conducting the investigation should possess certain skills and expertise, *inter alia*, the ability to evaluate evidence and to form an opinion based on the available evidence. The person(s) tasked with the responsibility to conduct an investigation should judge each case on its merit. In the event where there is financial mismanagement it will be best to appoint a chartered or forensic accountant. They should possess the required skill and expertise to advise the municipality. Judges are not the only port of call when seeking a person with these skills and expertise. Serving judges should exercise caution in allowing themselves to be used to provide respectability to a political battle.

In light of the afore going discussion, I am of the view that the MEC should as far as possible steer away from appointing a serving judge to chair an investigation in

¹¹⁹ *Heath Judgment* para 29.

¹²⁰ *Heath Judgment* para 30.

terms of section 106(1)(b) of the Municipal Systems Act.¹²¹ It is very difficult, if not impossible, to imagine situations where the criteria set out in the *Heath* judgment will not be contravened when a serving judge is requested to head a commission of inquiry.

3.4.2.2 Investigative powers.

The Municipal Systems Act does not prescribe the ambit of the investigators' powers. In the Western Cape, the Western Cape Commissions Act¹²² allows the Premier by way of proclamation in the provincial gazette to make regulations and set out the commission's terms of reference. As will be illustrated later in this paragraph, this is significant.

In the event that the MEC appoints a person or persons to conduct an investigation in terms of section 106(1)(b) of the Municipal Systems Act, he/she or they will effectively be a creature of statute.¹²³ The investigation may not go beyond the boundaries set by the terms of reference of the empowering Act, in this instance the Municipal Systems Act, and/or the terms of reference. The provincial government sets regulations and define the terms of reference for a commission appointed in terms of section 106(1)(b) of the Municipal Systems Act by the MEC.

In the matter of *Minister for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council*¹²⁴ the Court was required to determine whether the MEC, after deciding to institute an investigation in terms of section 106(1)(b) of the Municipal Systems Act, had the power to suspend councillors pending the investigation. The Municipal Systems Act does not explicitly provide the MEC with the power to suspend councillors. The Court held that the test is whether the power to suspend councillors is reasonably necessary.

'When exercising his express power to investigate malpractice and non-performance without having an implied power to deal with circumstances

¹²¹ *City of Cape Town v Premier of the Western Cape* para 187.

¹²² 10 of 1998.

¹²³ *Konyn v Special Investigating Unit* 1999 SA 1001 (Tk) at 1008.

¹²⁴ 2007 (3) SA 436 (N).

which he has reason to believe will or are likely to hinder a proper functioning of the investigation will render the express power nugatory'.¹²⁵

This case illustrated that there may be situations where the MEC is allowed to exercise powers which are ancillary to the express provisions of the Act. The exercise of ancillary powers should be necessary in order to ensure that the MEC is able to perform his or her duties effectively.

3.5 The role of provincial legislation.

A further contentious issue in section 106 of the Municipal Systems Act relates to the applicability of provincial legislation. The relevance of the national Commissions Act, when dealing with investigations in terms of section 106(1) of the Municipal Systems Act, is not clear.

Section 106(2) of the Municipal Systems Act is clear in that the national Commissions Act is *only* applicable in the absence of applicable provincial legislation dealing with the appointment of a person or persons to conduct an investigation in a municipality.¹²⁶

The phrase 'with the necessary changes as the context may require' in section 106(2) of the Municipal Systems Act, a phrase which qualifies the operation of the national Commissions Act when it is made applicable by section 106(2) of the Municipal Systems Act, does not operate when there is applicable provincial commissions legislation.¹²⁷ Therefore, section 106(2) of the Municipal Systems Act will only come into operation where there is no provincial legislation dealing with commissions of inquiry. The following eight out of the nine provinces of South Africa had legislation dealing with commissions appointed by the relevant Premier in terms of s 127(2)(e) of the Constitution:

- the Provincial Commissions Act 3 of 1994 (Eastern Cape),
- the North West Commissions Act 18 of 1994,
- the Northern Cape Commissions of Inquiry Act 4 of 1996,

¹²⁵ *Minister for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council* 2007 (3) SA 436 (N) para 17.

¹²⁶ *Umlambo Judgment* para 24.

¹²⁷ S 106(2); see *Umlambo Judgment*.

- the Provincial Commissions Act 1 of 1997 (Gauteng),
- the Commissions Ordinance 5 of 1954 (Free State), as amended by the Commissions Ordinance Amendment Act 4 of 1998 (Free State),
- the Western Cape Provincial Commissions Act 10 of 1998,
- the Mpumalanga Commissions of Enquiry Act 11 of 1998,
- and the Kwazulu-Natal Commissions Act 3 of 1999.

In the remaining province, the Northern Province, corresponding legislation was promulgated in 2001 in the form of the Northern Province Commissions of Inquiry Act 4 of 2001. It is, therefore, clear that the majority of provincial legislation was adopted before the enactment of the Municipal Systems Act.

Section 106(2) of the Municipal Systems Act was the subject of litigation in *Minister of Local Government, Housing and Traditional Affairs (Kwazulu-Natal) v Umlambo Trading 29 CC and Others*.¹²⁸ The MEC of Kwazulu-Natal, acting in terms of section 106(1) of the Municipal Systems Act, called for an investigation into a project called 'The Mayor's Container Initiative' ("the Mayor's initiative") at ILembe District Municipality. Umlambo Trading 29 CC was awarded a tender to build the containers for the Mayor's initiative. The MEC appointed a firm of chartered accountants ('the investigators') to conduct the investigation into the Mayor's initiative. The investigators requested Umlambo Trading to provide them with, *inter alia*, their bank statements, which Umlambo refused to do. The investigators, purportedly acting in terms of section 106(2) of the Municipal Systems Act, subpoenaed the sole member of Umlambo. In terms of this subpoena, Umlambo was required to produce all the requested information, except the bank statements. A second subpoena was issued against Umlambo's bank for the production of Umlambo's bank statements.

The Court was required to determine whether the MEC had the authority to grant the investigators the power to subpoena witnesses.

The Supreme Court of Appeal confirmed the court *quo's* finding that the provisions of the national Commissions Act were not applicable due to the existence of the Kwazulu-Natal Provincial Commissions Act.¹²⁹ The Kwazulu-Natal Commissions Act makes provision for the province to appoint a commission of inquiry by the

¹²⁸ 2008 (1) SA 396 (SCA).

¹²⁹ Act 3 of 1999.

Premier.¹³⁰ Section 4(1)(a) of the Kwazulu-Natal Commissions Act, allows a commission of inquiry to subpoena witnesses. The Supreme Court of Appeal confirmed that the MEC did not have the authority to appoint a commission with coercive powers; those powers were vested in the Premier of the province by virtue of section 4(1)(a) of the Kwazulu-Natal Commissions Act.

In paragraph 3.3.1 it was illustrated that the MEC and not the Premier has the primary responsibility to initiate an investigation in terms of section 106 of the Municipal Systems Act. The Kwazulu-Natal provincial law allows for the appointment of a commission of inquiry. Contrary to the Municipal Systems Act, the power to appoint a commission of inquiry vests in the Premier of the province.¹³¹

As stated earlier, most provincial legislation relating to the appointment of commissions of inquiry was enacted prior to the Municipal Systems Act. The Kwazulu-Natal provincial legislation is explicit in regard to the appointment of a commission of inquiry whereas the Municipal Systems Act, section 106(1)(b), merely refers to the appointment of a person or persons. As a result the application of section 106(1)(b) of the Municipal Systems Act is curtailed by provincial legislation which requires the Premier to appoint a commission of inquiry.

The Western Cape has applicable legislation dealing with investigations, namely the Western Cape Commissions Act. In its current form the Western Cape Commissions Act mandates the Premier to appoint commission of inquiry. The provincial legislature should evaluate the Western Cape Commissions Act with a view to harmonise it with the Municipal Systems Act. One of the problematic aspects of current provincial legislation is the Premier's power to appoint a commission of inquiry. This is contrary to the flexible approach envisaged by the Municipal Systems Act.

The *Umlambo* judgment illustrated that the power of the MEC is severely curtailed by the automatic application of provincial legislation dealing with the appointment of commissions of inquiry. The power to appoint a commission is vested in the Premier of the province if there is *applicable provincial legislation* which deals with the

¹³⁰ S 2(1) Kwazulu-Natal Commissions Act.

¹³¹ S 1 Western Cape Provincial Commissions Act; S 1 North-West Commissions Act; S 2 Northern Cape Commissions of Inquiry Act; S 2(1) Kwazulu-Natal Commissions Act; S 1 Commissions Act (Eastern Cape).

appointment of a commission of inquiry. A person or persons appointed in terms of section 106(1)(b) of the Municipal Systems Act will be dependent on the Premier to provide them with the power to subpoena witnesses or any other ancillary powers which they require to conduct an effective investigation. The application of provincial legislation, in its current form, makes the application of section 106(1)(b) of the Municipal Systems Act impractical.

3.6 Conclusion

This chapter established that there are stringent requirements which must be complied with before section 106 of the Municipal Systems Act may be used as a means to conduct an investigation in a municipality. The wording of section 106 of the Municipal Systems Act and its positioning within the Act is significant in the context of municipal supervision. The reference to a *statutory obligation* in the section 106 of the Municipal Systems Act has the potential to create conflict. The Municipal Systems Act, in its current form, is not specific regarding what would constitute a statutory obligation in the context of section 106. The legislature should consider amending the Municipal Systems Act in order to provide clarity in regard to the meaning of the phrase *statutory obligation* as referred to in section 106 of the Municipal Systems Act. Clarity regarding this aspect will curb one of the loopholes in section 106 of the Municipal Systems Act and prevent unnecessary litigation.

The MEC essentially has two options when considering whether to invoke section 106(1) of the Municipal Systems Act. He/she can request information or appoint a person(s) to conduct investigation. This research paper argued that the MEC should as far as possible use the mechanism provided for in section 106(1)(a) of the Municipal Systems Act first before using the more intrusive form provided for in section 106(1)(b).

The composition of the person(s) tasked with the responsibility to conduct an investigation is critical to a lawful investigation. The discussion in this chapter illustrated that the MEC should exercise caution in appointing a serving judge to head an investigation appointed in terms of section 106(1)(b) of the Municipal Systems Act. Case law demonstrates that there is a risk in the appointment of a judge to head an investigation in terms of section 106(1)(b) of the Municipal Systems

Act. We have reached the point where new traditions need to develop which are in line with our new Constitution and the autonomous nature of local government. The MEC should apply his/her mind to the problem in the municipality and appoint a person(s) who has expertise in the specific field. For example, if the municipality faces problems with implementation of its budget, it may not be desirable to appoint a lawyer. The person(s) should possess the necessary skill and expertise in order to assist the municipality.

The applicability of the national Commissions Act in the context of the provincial supervision of local government was examined. The Municipal Systems Act makes the national Commissions Act automatically applicable in the absence of applicable provincial legislation. This scheme has resulted in a number of difficulties. First, this provision creates the erroneous impression that the Municipal Systems Act always requires the appointment of a commission of inquiry. However, section 106(1)(b) of the Municipal Systems Act merely provides for the appointment of a person(s) and not a necessarily a commission of inquiry.

Secondly, most provinces enacted provincial legislation dealing with the appointment of commissions of inquiries before the Municipal Systems Act was introduced. The provincial laws grant the Premier the authority to appoint a commission of inquiry.¹³²

It was argued that the overlap between these two provisions prevents the MEC from adequately fulfilling his or her supervisory role. The legislature should consider amendments to the provincial legislation in order to bring it in line with the Municipal Systems Act.

There are certain intergovernmental oversight provisions which must be adhered to in order for a lawful investigation to be conducted in terms of section 106 of the Municipal Systems Act. The following chapter will analyse the intergovernmental oversight provisions which are built into section 106(3), (4) and (5) of Municipal Systems Act.

¹³² S 1 Western Cape Provincial Commissions Act; S 1 North-West Commissions Act; S 2 Northern Cape Commissions of Inquiry Act; S 2(1) Kwazulu-Natal Commissions Act; S 1 Commissions Act (Eastern Cape).

Chapter 4

Intergovernmental oversight

4.1 Introduction

The previous chapter discussed the significance of section 106(1) of the Municipal Systems Act. Attention was given to the appropriate circumstances under which section 106(1) of the Municipal Systems Act may be utilised as a means to monitor local government.

Chapter Three illustrated that the MEC, in terms of section 106(1)(b) of the Municipal Systems Act, may appoint a person(s) to conduct an investigation in a municipality. However, the decision of the MEC is subject to intergovernmental checks and balances. This chapter will analyse the different intergovernmental oversight provisions which have been provided for in section 106 of the Municipal Systems Act. Specific attention will be given to sections 106(3), (4) and (5). This chapter will examine the responsibility of national government over the provinces performance of their supervisory responsibility over local government. Attention will be given to the role of the NCOP and the Minister responsible for local government with regard to the supervision of local government.

Section 106(3) and the subsequent subsections read as follows:

- (a) An MEC issuing a notice in terms of subsection (1)(a) or designating a person to conduct an investigation in terms of subsection (1)(b), must within 14 days submit a written statement to the National Council of Provinces motivating the action.*
- (b) A copy of the statement contemplated in paragraph (a) must simultaneously be forwarded to the Minister and to the Minister of Finance.*

- (4)(a) The Minister may request the MEC to investigate, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.*

- (b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which*

the Minister requested the investigation and must simultaneously send a copy of such report to the Minister, the Minister of Finance and the National Council of Provinces.

(5)(a) *Where the MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of subsection (4)(a), the Minister may in terms of this section conduct such investigation.*

(b) *The Minister must send a report detailing the outcome of the investigation referred to in paragraph (a) to the President.'*

4.2 The oversight role of the National Council of Provinces.

This paragraph aims to unpack the role of the NCOP when dealing with investigations in terms of section 106 of the Municipal Systems Act.

In order for any system of government to be successful it is imperative that there be a proper oversight system. In this regard the role of the NCOP is of paramount importance to ensure that the MEC does not abuse the power granted by section 106 of the Municipal Systems Act. An MEC issuing a notice in terms of section 106(1)(a) of the Municipal Systems Act or designating a person(s) to conduct an investigation in terms of subsection (1)(b), must submit a written statement to the NCOP motivating the action the decision to conduct the said investigation.¹³³ On receipt of the report the Select Committee on Co-operative Governance and Traditional Affairs (select committee) will be responsible for reviewing the report. This must be done in terms of Rule 101(4).¹³⁴

The NCOP has no authority to disapprove an investigation in terms of section 106(2) of the Municipal Systems Act. However, this does not mean that the NCOP has no oversight responsibility. The National Council of Provinces (NCOP) is composed of a single delegation from each Province consisting of ten members inclusive of the Premier.¹³⁵ In addition, provision has been made for the participation by ten part-time representatives from organised local government.¹³⁶ The NCOP, in which provinces

¹³³ S 106(3) Municipal Systems Act.

¹³⁴ The Rules of the NCOP available at http://www.parliament.gov.za/live/content.php?Category_ID=153 (accessed 20 October 2012).

¹³⁵ S 60 Constitution.

¹³⁶ S 67 Constitution.

participate in the national sphere of government, is expected to be a powerful institution of legislative intergovernmental relations. The legislative authority in the national sphere of government is vested in Parliament, comprising the National Assembly and the National Council of Provinces.¹³⁷ Through the notion of co-operative governance these spheres are joined under the Constitution.

The NCOP's oversight role is further supported by constitutional provisions which promote co-operative governance.¹³⁸ The NCOP has an obligation to ensure that the MEC acts within the scope of his/her powers granted by section 106 of the Municipal Systems Act. As an oversight body, the NCOP must ensure that the MEC has followed the appropriate procedure. The aim would be to ensure intergovernmental checks and balances aimed at guarding the integrity and efficiency of the procedure. The NCOP's role is to ensure that the MEC did not act capriciously. The members of the NCOP should apply their minds and determine whether a reasonable MEC, on the basis of the facts before him/her would have acted in the same manner.

The NCOP's executive oversight function is a derived function, in the sense that the Constitution is not specific about the NCOP's oversight role.¹³⁹ However, section 69 of the Constitution could assist the NCOP in order to conduct further investigations. Section 69 of the Constitution stipulates that 'the NCOP or any of its committees may summon any person to appear before it to give evidence on oath or affirmation or to produce documents'.¹⁴⁰ There is no rationality in allowing the NCOP to summon a person or institution to appear before it without it having the power to investigate. Therefore, when applying section 69 of the Constitution, the NCOP would be allowed to conduct investigations to ensure compliance with its oversight function. It is important that the NCOP does not carry out an investigation parallel to that of the MEC. The NCOP should exhaust all avenues to obtain the information which they require before using their power in terms of section 69 of the Constitution. This is the first safeguard which was built into the section to scrutinise the action of the MEC and prevent possible abuse of power on his/her part.

¹³⁷ S 44(1) Constitution.

¹³⁸ Ss 40-41 Constitution.

¹³⁹ Mathebula *Intergovernmental Relations Reform in a Newly Emerging South African Policy* (2004) 151.

¹⁴⁰ S 69(a) Constitution.

4.3 The oversight role of the Minister responsible for Local Government and the Minister of Finance.

In the spirit of co-operative governance, the Minister responsible for local government and the Minister of Finance must be informed of any investigation in terms of section 106(1) of the Municipal Systems Act. Similar to the role of the NCOP, the Municipal Systems Act is silent with regard to the functions of the Minister responsible for local government and the Minister of Finance when receiving a notice in term so section 106(3) of the Municipal Systems Act. However, the following paragraph will provide an interpretation of their respective roles.

The President has the authority to appoint Ministers who will form the cabinet.¹⁴¹ The Ministers are individually and collectively accountable to Parliament.¹⁴² The Minister responsible for local government is responsible for all matters relating to local government. In order for the Minister to properly account to Parliament is essential that he be informed of any action which may affect his/her portfolio.

The National Treasury, which is headed by the Minister of Finance, has a responsibility to enforce financial measures which are both transparent and ensure expenditure control in all spheres of government; without a system of monitoring, breaches of the measures would not be detected.¹⁴³ The National Treasury's financial oversight obligation is entrenched in the Municipal Finance Management Act.¹⁴⁴ It is possible that the investigation relates to the finances of the municipality. In this regard the Minister of Finance will be required to perform an oversight function and ensure that the National Treasury complies with its obligation in terms of section 216(2) of the Constitution.

Therefore, it is important that the respective Ministers be involved in all matters which may affect their portfolios.

4.4 The Minister's prerogative to request an investigation.

This paragraph will unpack the Minister's prerogative to request the MEC to conduct an investigation in terms of section 106(4) of the Municipal Systems Act.

¹⁴¹ S 91(1) Constitution.

¹⁴² S 92(2) Constitution.

¹⁴³ S 216 (2) Constitution.

¹⁴⁴ Act 56 of 2003 , S 5(6); Steytler & De Visser (2007) 15:6.

The Minister responsible for local government may request the MEC to investigate fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred or is occurring in a municipality in the province.¹⁴⁵ It would appear that there is no obligation on the MEC to conduct the investigation. The MEC may, therefore, legitimately refuse to conduct the investigation.

It is thus interesting to note that the MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date on which the Minister requested the investigation.¹⁴⁶ Section 106(4)(a) of the Municipal Systems Act stipulates that the Minister *may* request the MEC to conduct an investigation. Section 106(4)(b) of the Municipal Systems Act stipulates that the MEC *must* table a report detailing the outcome of the investigation. These two provisions combined suggest that the national Minister may demand an investigation in terms of section 106 of the Municipal Systems Act. When receiving a request from the Minister, in terms of section 106(4)(a) of the Municipal Systems Act, the MEC *must* conduct an investigation because he/she *must* table a report within 90 days.

The request from the Minister thus essentially amounts to an instruction. The national Minister has the authority to trigger an investigation in term of section 106 of the Municipal Systems Act by instructing the MEC to conduct an investigation. In light of the above, it is clear that section 106(4) of the Municipal Systems Act amounts to an intrusion into the autonomy of provincial government by the national sphere of government.

4.5 The Minister's prerogative to conduct the investigation.

This part of the research paper is concerned with the power of the Minister responsible for local government to conduct an investigation in terms of section 106(5) of the Municipal Systems Act. As explained in Chapter Three, paragraph 3.3.2, the MEC must act if he or she has *reason to believe* that there is fraud, corruption or any other serious malpractice. The Minister may act if in *his opinion* there is fraud, corruption or any other serious malpractice occurring.

¹⁴⁵ S 106(4)(a) Municipal Systems Act.

¹⁴⁶ S 106(4)(b) Municipal Systems Act.

Where the MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of section 106(4)(a) of the Municipal Systems Act, the Minister may, in terms section 106(5)(a) of the Municipal Systems Act, conduct such investigation.¹⁴⁷ The primary responsibility lies with the MEC to conduct an investigation. Where the MEC fails to comply with his obligations in terms of the Act, then the Minister may conduct the investigation himself.

The MEC will therefore have to satisfy a much stricter requirement. The Minister can simply act if 'in his opinion' fraud or corruption is occurring within the municipality. This is in contrast to the constitutional provisions which established local government as a government in its own right.

This provision creates the impression that national government can interfere in the domain of local government because the criteria stipulated in section 106(5) of the Municipal Systems Act are less stringent. The legislature is in essence weakening local government. Local government is at the mercy of the national sphere who may legitimately intrude into the autonomy of local government. Section 106(5) of the Municipal Systems Act is not in line with the autonomous status of local government. In addition, this provision has the potential to create conflict between national and local government.

It is submitted that the Minister must positively ascertain whether there is a factual basis supporting his opinion or suspicion. The Minister must first consult with the MEC and the Premier before deciding to use his/her powers in terms of section 106(5) of the Municipal Systems Act. This will provide the MEC with the platform to explain to the Minister why he/she did not conduct the investigation. The aim of such a consultation will be to facilitate intergovernmental discussions and to share information. The NCOP should be granted greater influence over this process.

¹⁴⁷ S 106(5)(a) Municipal Systems Act.

4.6 Conclusion

This chapter discussed the various intergovernmental safeguards which were built into section 106 of the Municipal Systems Act.

The NCOP is clearly a crucial part of the framework of intergovernmental institutions designed to ensure the effective functioning of the different spheres of government in South Africa.

The role of the Minister in terms of section 106(4) and (5) represents a potentially radical incursion into the autonomy of the province and local government and should be read narrowly so as not to empower the national government to interfere with the role the provincial government to supervise local government.¹⁴⁸ This is so because an expansive reading would be in conflict with the larger scheme of the Constitution which creates a system of co-operative government.



¹⁴⁸ *City of Cape Town v Premier of the Western Cape.*

Chapter 5

Conclusion and recommendations

Corruption is one of the biggest problems faced by local government in the post-apartheid era. Corruption and maladministration may have serious consequences for service delivery and will eventually directly affect the lives of the poor. This problem is particularly prevalent at local government level. Therefore provincial supervision over local government is very important.

This research paper sought to analyse the role of provincial government when supervising local government. The paper commenced with a brief overview of transformation of local government in South Africa. Emphasis was placed on the supervisory role of provincial government.

This research paper highlighted the fact that the provincial sphere of government has the primary responsibility to supervise local government. Section 106 of the Municipal Systems Act which provides for the supervision of local government by the provincial government and in certain instances the national government was unpacked. Specific attention was given to the role of the MEC in the application of section 106 of the Municipal Systems Act.

Provincial government is not able to adequately supervise local government due to a number of deficiencies in section 106 of the Municipal Systems Act in particular. The reference to a statutory obligation, as contained in section 106(1) of the Municipal Systems Act is unclear. It was recommended that it should be narrowly construed. Only statutory provisions which are essential to the functioning of the municipality should be considered by the MEC when contemplating whether to conduct an investigation.

The Municipal Systems Act provides for the appointment of *a person or persons*. The phrase *person or persons* compels the MEC to appoint a natural person(s) and not a juristic person. Concerns were raised regarding the appointment of serving judges to head commissions of inquiry appointed in terms of section 106(1)(b) of the Municipal Systems Act. This research paper argued that the appointment of a serving judge is

in conflict with the doctrine of separation of powers. The appointment of a commission of inquiry, headed by a judge, is not a requirement of the Act. The MEC has been given wide a scope by the Municipal Systems Act in regard to the person(s) who should conduct.

Section 106(2) of the Municipal Systems Act makes the provisions of the national Commissions Act *applicable in the absence of applicable provincial legislation*.

The automatic application of provincial legislation severely curtails the power of the provinces to supervise municipal performance. Section 106(1)(b) provides for the appointment of *a person or persons* but section 106(2) of the Municipal Systems Act makes the provisions of the national Commissions Act applicable which will result in the appointment of a commission of inquiry. However, the object of the section 106 of the Municipal Systems Act was not necessarily to provide for the appointment of a commission of inquiry but rather to provide the province with the necessary flexibility to supervise local government. The national Commissions Act, therefore, does not support the spirit and purpose of the constitutional status of local government.

Section 106 of the Municipal Systems Act is an important tool in the provincial government's arsenal in the fight against fraud and corruption; however due to the content of provincial law such as the Western Cape Commissions Act, this section is underutilised. The provinces have not used the provisions of section 106 of the Municipal Systems Act wisely. Section 106 of the Municipal Systems Act has the necessary flexibility but the provincial government is inclined to use the general commission legislation to conduct investigations in a municipality.

Provinces should adopt legislation which provide for an investigative regime which responds to section 106 of the Municipal Systems Act and which is suited to local government. This will eliminate the confusion regarding powers of the Premier and the powers of the MEC when supervising local government.

An evaluation of the Municipal Systems Act revealed that the request by the Minister to the MEC in terms of section 106(4) essentially amounts to an instruction while, there is no obligation on the part of the MEC to conduct an investigation when requested by the Minister, he or she must table a report within 90 days from the date on which the Minister requested the investigation.

In terms of section 106(5), the Minister is allowed to conduct an investigation in a municipality. This may be done if in the opinion of the Minister fraud and corruption is occurring in the municipality. There criteria which the Minister must satisfy is not as stringent as that of the MEC. The national sphere of government has been granted extensive supervisory powers over local government despite the fact that the provincial sphere has the primary supervisory responsibility.

This research paper illustrated that the performance of local government can be improved through better supervision from the provincial government. It was further illustrated that the powers of the provincial government are severely curtailed by provincial legislation. The revision of this aspect of the law will assist in improving the performance of municipalities.



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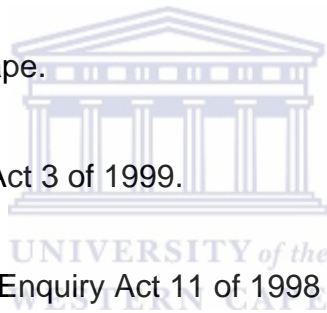
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