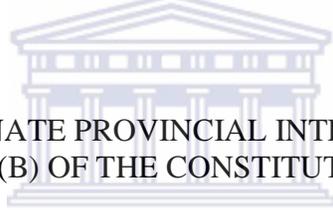


**UNIVERSITY OF WESTERN CAPE  
LAW FACULTY**

THE VETO POWER TO TERMINATE PROVINCIAL INTERVENTIONS IN TERMS OF  
SECTION 139 (2)(B) AND 139(3)(B) OF THE CONSTITUTION



UNIVERSITY of the  
WESTERN CAPE

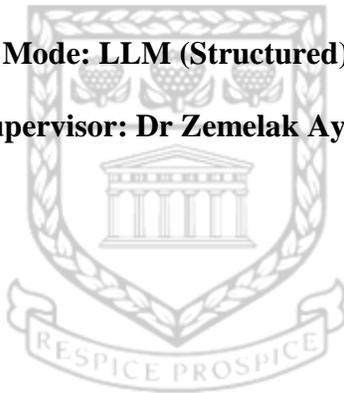
**A research paper to be submitted in partial fulfilment of the requirements for the  
degree of LLM  
in Multilevel Government Law and Policy**

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**Mode: LLM (Structured)**

**Supervisor: Dr Zemelak Ayele**



## KEY WORDS

Constitution

Intervention

Invoke

Method of assessment

Outcomes

Provinces

Minister responsible for local government affairs

National Council of Provinces

Terminate intervention

Veto-power



## LIST OF ABBREVIATIONS



ANC	African National Congress
COPE	Congress of the People
CoGTA	Department of Cooperative Governance and Traditional Affairs
DA	Democratic Alliance
DPSA	Department of Public Service and Administration
ExCos	Executive Committee members
NCOP	National Council of Provinces
PL	Provincial Legislatures
SALGA	South African Local Government Association



## DECLARATION

I, Shehaam Johnstone, declare that ‘The Veto Power To Terminate Provincial Interventions In Terms of Section 139 (2)(b) And 139(3)(c) of the Constitution’ is my own work and that it has not been submitted before for any degree or examination in any other University, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: \_\_\_\_\_  
Shehaam Johnstone  
December 2014

Signed: \_\_\_\_\_  
Dr Zemelak Ayele (Supervisor)  
December 2014



## ACKNOWLEDGEMENTS

I am grateful to the Almighty for endowing me with countless blessings.

I am grateful to the Provincial Government of the Western Cape, Department of Cooperative Governance and Traditional Affairs and Parliament for the provision of information and assistance.

To Dr Zemelak Ayele, a special thank you for drudging along on this journey.

WESTERN CAPE



## DEDICATION

I dedicate this dissertation to two special people that inspired me to push through inspite of all the obstacles 'Boet' (Faizel Karlie) and Naz (Nazleemah Karlie), I could never put into words how much *your words carried me...*

Further, I dedicate this to my comrade and soul mate (Daleel Abrahams) for always being there for me.

I dedicate this to my mom (Ferial Johnstone) and my dad (Jaghya Johnstone) for teaching me to always strive for my dreams.

Last but not least I dedicate this to my princess (Athraa Abrahams) my twins (Yaghya & Moghammad Aaqil- Abrahams) who refused to give up on me and sat with me for many hours in the study-room '*to help Mommy finish her varsity work*'. I love you, I love you...



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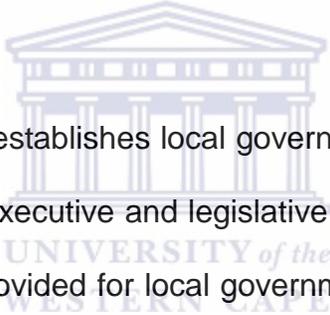
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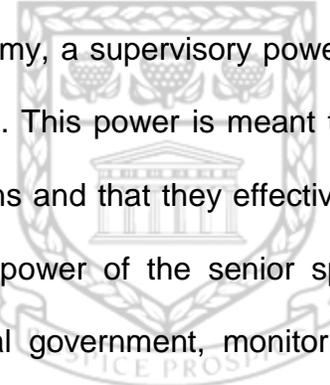


## Chapter 1: Introduction

### 1.1. Problem statement



The South African Constitution establishes local government as an autonomous sphere of government and vests both executive and legislative authority in municipal councils.<sup>1</sup> Carefully defined powers are provided for local government to govern its internal affairs without interference from provincial and national spheres of government<sup>2</sup> The Constitution also requires the other spheres of government to respect its autonomy and not to encroach into its competences.<sup>3</sup>



As an exception to local autonomy, a supervisory power is conferred on provincial and national spheres of government. This power is meant to ensure that municipalities act within their mandates and means and that they effectively deliver basic services to the communities. The supervisory power of the senior spheres of government includes regulating the activities of local government, monitoring that each municipality acts within its mandates and means, supporting whenever it requires support and intervening into local government when a municipality malfunctions.<sup>4</sup>

Intervention into a malfunctioning municipality by senior levels of government is thus one of the instruments of supervision that the senior spheres use to check illegalities and underperformances by a municipality. Accordingly, where a municipality errs in performing its executive obligations, section 139(1) of the Constitution is triggered which

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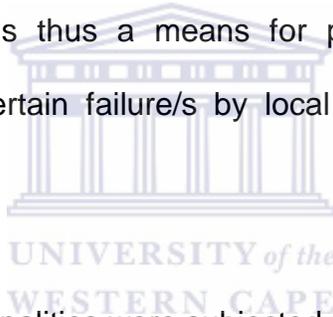
<sup>1</sup> S151(2) of the Constitution of the Republic of South Africa, 1996 (hereafter 1996 Constitution).

<sup>2</sup> S151(2) of the 1996 Constitution.

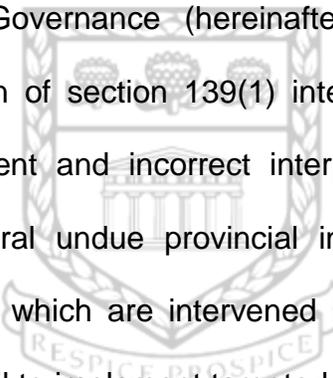
<sup>3</sup> S151(3) and (4) of the 1996 Constitution.

<sup>4</sup> S139(1) of the 1996 Constitution.

requires provincial governments to intervene without the consent of the malfunctioning municipality.<sup>5</sup> Section 139(1) is thus a means for provincial governments to take corrective action to remedy certain failure/s by local governments in performing its executive obligations.<sup>6</sup>



Accordingly, a total of 70 municipalities were subjected to section 139 interventions from 1998 to 2014, which include interventions in terms of section 139(1) where executive obligations were not fulfilled.<sup>7</sup> However, the interventions were not done in a consistent manner and in accordance with constitutional and legal prescription. As per the Department of Cooperative Governance (hereinafter CoGTA), there are serious shortcomings in the application of section 139(1) interventions. These shortcomings relate mainly to the inconsistent and incorrect interpretation of the law regulating intervention. This led to several undue provincial interventions, compromising the autonomy of the municipalities which are intervened by the provinces. For example, provincial governments often fail to implement targeted monitoring and support systems to detect early warning signals before invoking an intervention.<sup>8</sup> Instead of being curative in nature interventions result in temporary take-overs.<sup>9</sup> In addition, during 2013 one of the key findings of the National Management Forum workshop confirmed that there were various uncertainties with regards to the implementation of section 139.<sup>10</sup>



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<sup>5</sup> S139 (1)-(5) of the 1996 Constitution.

<sup>6</sup> S139(1) of the 1996 Constitution.

<sup>7</sup> Department of Cooperative Governance *Joint Workshop with the National and Provincial Legislatures "Application of section 139 of the Constitution, and the need for legislation to regulate its implementation" 2 November 2010* (2010) 7-8. (hereinafter Joint workshop with Legislatures).

<sup>8</sup> CoGTA Joint workshop with Legislatures (2010) 19 -21.

<sup>9</sup> CoGTA Joint workshop with Legislatures (2010) 11-12. .

<sup>10</sup> Department of Cooperative Governance 5<sup>th</sup> National Managers Forum *Intergovernmental Monitoring, Support and Interventions Bill 30 April 2013*(2013) 10 -11(hereinafter Managers Forum).

The danger here is that the intervention power in terms of section 139(1) may be abused by provincial governments.<sup>11</sup>

The good news is that the Constitution itself anticipates that provincial power of intervention may be abused.<sup>12</sup> Hence, it establishes a mechanism for intergovernmental checks to safeguard municipal autonomy against undue provincial intervention. This safeguard is the power of the Minister responsible for local government, at present the portfolio falls within the mandate of the Minister for CoGTA and the National Council of Provinces (hereinafter NCOP) to veto and terminate provincial intervention in terms of section 139(2)(b) and 139(3)(b) of the Constitution. Thus, the Minister or the NCOP may terminate those interventions in instances where either of them finds the intervention powers to be inappropriately used by a provincial government. Therefore the veto power is aimed at preventing undue interference into the autonomy of local governments, and ensures the principles of co-operative government and intergovernmental relations are adhered to.<sup>13</sup>

Despite significance in the constitutional objective of the Minister's and the NCOP's veto power up till now it is still not known whether and how often this power is exercised by the two institutions.

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<sup>11</sup> CoGTA Managers Forum (2013) 10 -12.

<sup>12</sup> S139(2) and (3) of the 1996 Constitution.

<sup>13</sup> S41 (h)(i)-(vi) of the 1996 Constitution.

## **1.2. Significance of the study**

The study aims to detect the outcomes for provincial and local governments when the veto power was invoked. This in turn provides evidence based information on the extent to which the intergovernmental checks and balances are working in practice. This is significant as the study measures the degree to which the veto power acts as a safeguard in protecting the autonomy and institutional integrity of local governments. While the data to be collated and presented will document the role and function currently performed by the Minister and NCOP it will also provide an opportunity to assess the legal framework.

## **1.3. Research question**

The main question that this study seeks to find answers to is whether and how the Minister and NCOP exercise their veto power to terminate interventions in terms of section 139(2)(b) and 139(3)(b) of the Constitution. With a view to answering this question other related questions will be raised and answered including: What is the constitutional and legal framework for exercising the veto power? How often is the veto power invoked? What procedure is followed by the Minister and NCOP when exercising the veto power in terms of section 139(2)(b) and 139(3)(b) of the Constitution? How consistent are the Minister and NCOP in terms of exercising this power? What were the outcomes in the instances where the veto powers were exercised by the Minister and the NCOP?

#### 1.4. Argument

The main argument of this paper is that provincial intervention powers as per section 139 were borne in the context of attaining the local government developmental mandate. Contrary to this purpose there is much abuse of provincial governments into the affairs of local government which warrant serious intergovernmental checks. These intergovernmental checks is to be championed by the Minister and NCOP by way of section 139(2)(b) and 139(3)(b) veto power. Notwithstanding the sound constitutional safeguards its efficacy lies in its implementation in practise. The argument is that the Minister and the NCOP have failed so far to fulfil their role as conceived by the Constitution.

#### 1.5. Literature survey

There are several works dealing with section 139 interventions. Yet none of these works is based on empirical studies.

De Visser and Steytler have written extensively on the legal requirements and procedures to be followed when invoking section 139 interventions.<sup>14</sup> The two authors also emphasise the supervisory and control role that the Minister and NCOP should play in protecting the integrity of affected municipalities, documented in their study conducted in 2004 which assessed the need for '*Establishing a regulatory framework for provincial interventions in terms of section 139 of the Constitution*'.<sup>15</sup> They also argue for

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<sup>14</sup> De Visser J & Steytler N (2012): 15 – 18(2) –(4).

<sup>15</sup> De Visser J & Steytler N (2012): 15 – 24 & 25.

extending the veto powers to all types of interventions.<sup>16</sup> De Visser and Steytler criticises the legal status and role of the veto power as no legal sanctions are associated with non-compliance of its provisions as per sections 139(2)(a) and 139(3)(a) of the Constitution.<sup>17</sup> However, the study undertaken by the authors does not focus on the actual implementation of the veto power by the Minister and NCOP. The present study, thus builds on theoretical concerns iterated for the functioning of the veto power by analysing empirical information for the veto power.

Murray, Bezruki & Ferrel 'et al' conducted an analysis on the functioning of the NCOP's general oversight role including its role in terms of section 139 in *Speeding Transformation: Monitoring and Oversight in the NCOP*. The analysis depicted the difficulties and the institutional growth of the NCOP.<sup>18</sup> Moreover, in 2007 Murray and Hoffman conducted an analysis specific to the review function of the NCOP which found the NCOP to perform well during the formative years of section 139(1).<sup>19</sup> The analysis was substantially based on data collected during the *Speeding Transformation: Monitoring and Oversight in the NCOP* study. The analysis on the review function by Murray and Hoffman related to instances when the NCOP approved section 139 interventions. Murray and Hoffman reported that in all but rare cases were the NCOP advised to invoke the veto power thus emphasising the need for this study.<sup>20</sup> While the

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<sup>16</sup> De Visser J & Steytler N (2012): 15 – 25 & 26.

<sup>17</sup> Steytler N 'Establishing a regulatory framework for provincial interventions in terms of section 139 of the Constitution' (2004) available at <http://www.pmg.org.za> (accessed 6 June 2013) 12.

<sup>18</sup> Murray, Bezruki & Ferrel et al *Interim Report- Speeding Transformation: Monitoring and Oversight in the NCOP in Report to the NCOP* (July 2004) 7 – 16.

<sup>19</sup> Murray C & Hoffman-Wanderer Y 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) *STELL LR* 24 – 26.

<sup>20</sup> Murray C & Hoffman-Wanderer Y (2007) 24 – 26.

study by Murray and Hoffman is useful in determining the methodology it falls short in two respects: first, since it only focuses on the NCOP and second, since its focuses on the review function rather than the veto power.

Mettler documents in his study *on Provincial-municipal relations: A few challenges* that despite the constitutional design promoting co-operative governance arrangements in practice centralisation still reign. This is a significant point because it would mean that the Minister and NCOP when exercising the veto power must refrain from partisan politics.<sup>21</sup> This is particularly so in instances where key decision-making is required that would have serious political consequences.<sup>22</sup> Malherbe supported this assertion and argues that the powers of national government in provincial affairs and provinces in local government affairs are increasingly being utilised for the purpose of centralisation.<sup>23</sup> In amplification the trends thus far for section 139(1) interventions in instances do not confirm improved intergovernmental arrangements.

## 1.6. Chapter Outline

This paper is divided into five chapters including this introductory chapter. Chapter two deals with the legal framework for section 139(1)(b)(c) interventions that deal with executive obligations where the veto power of the Minister and NCOP applies. The veto power conferred to the Minister and NCOP in section 139(2) and (3) will be discussed and the legal framework for the study will be outlined.

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<sup>21</sup> Mettler J 'Provincial-municipal relations: A few challenges' (2001) *Law Democracy and Development* 224.

<sup>22</sup> Mettler J (2001) 224.

<sup>23</sup> Malherbe R 'The Constitutional Distribution of powers' in De Villiers (ed) *Review of provinces and local government in South Africa: Constitutional Foundations and Practice* (2008)27 - 28.

Chapter three presents the data which relate to the veto powers invoked by the Minister and the NCOP for the last five years. Such data relate to the reasons, legal basis and the methods used by the Minister and NCOP in exercising the veto power in terms of section 139 (2) (b) and 139(3)(b) of the Constitution.

Chapter four will analyse the data presented in chapter three. From the analyses the key findings will follow outlining the processes, skills and capacity available to both the Minister and NCOP.

Chapter five will provide an evaluative summary of the efficacy of the institutions and extract the best practices where possible to inform further policy and/or legislative development. It will also seek to make recommendations on how to strengthen the veto power conferred to the Minister and NCOP.

### **1.7. Methodology**

The study is informed by desk top research which focuses on analysing primary and secondary sources. The primary sources relate to the collection and perusal of data from policy documents, legislation and official documents. The Minister and NCOP will be requested to furnish the relevant information relating to interventions terminated in terms of section 139(2)(b) and 139(3) (c) over the last five years (2010 to 2014). The secondary sources rely on the work of authors and other literature which focus on the application of section 139 interventions.

## Chapter 2: Legal Framework for exercising the veto power conferred to the Minister and NCOP

### 2.1 Introduction

The veto power in terms of sections 139(2) and 139(3) can only be exercised once a section 139 intervention is invoked.<sup>24</sup> However, the veto power only applies to section 139(1) intervention. The criteria to evaluate the veto power thus requires an evaluation of the legal and policy framework pertaining to section 139(1) interventions as it will inform the pre-determining factors to be taken into account for interventions. As it sets out, (i) when an intervention is justified; (ii) what measures must be taken by the Minister and NCOP upon receipt of the notice of intervention, and (iii) a framework for appropriate application of the veto power.

Moreover, section 139(1) creates distinguishable parameters in which the veto power must be exercised. This is critical in ensuring a balanced approach to uphold the autonomy of both local and provincial government. Section 41 of the Constitution requires all government spheres to respect the constitutional status powers and functions conferred to each other and not to encroach on the integrity of another sphere. This relates to the geographical, functional and/ or institutional integrity of each sphere that should co-operate with one another in mutual trust and good faith by fostering sound relationships with each other and coordinating actions between each other.<sup>25</sup> Sections 139(1) and 41 of the Constitution thus demand constant interplay, on the one

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<sup>24</sup> S 139 (1); 139(2) and 139(3) of the 1996 Constitution.

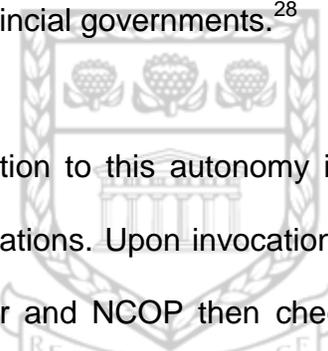
<sup>25</sup> S41(1)(iv) of the 1996 Constitution.

hand, between justifiably encroaching on responsibilities and powers from one sphere to another, and entrusting the responsibilities and powers conferred to that sphere by the Constitution, on the other.



The veto power is rooted in the reconfiguration of local government as an autonomous sphere of government.<sup>26</sup> The latter entrenched through representative democracy that affords the local community the right to elect their representatives in local councils.<sup>27</sup>

The decentralisation of local government powers are further entrenched in the Constitution since it is empowered to govern its own affairs without undue interference from either national and/ or provincial governments.<sup>28</sup>



Section 139(1) creates a limitation to this autonomy in the interest of promoting and protecting service delivery obligations. Upon invocation of section 139(1) interventions, the veto power i.e. the Minister and NCOP then checks for compliance with the co-operative governance principles. Thus, the veto power entails a complex arrangement of many constitutional principles that come into play.

This chapter outlines the policy and legal framework for section 139(1) interventions as it relates to the veto power and establish the criteria to assess the application of the veto power. In addition, it discusses the process for the exercise of the veto power.

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<sup>26</sup> De Visser J & Steytler N (2012): 1 -23.

<sup>27</sup> *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (12) BCLR 1399 (CC) para 115.

<sup>28</sup> Ministry for Provincial Affairs and Constitutional Development *White Paper on Local Government* (1998):38-46. (hereinafter the WPLG).

## 2.2 Legal and policy framework for section 139(1) interventions

The Constitution provides a broad overview of the imperatives for provincial intervention powers. To appreciate the importance of section 139(1) interventions, relevant provisions as provided for in the Constitution are quoted below, namely:

'Provincial intervention in local government:

(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-

- (a) issuing 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;
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
  - (i) maintain essential national standards or meet established minimum standards for the rendering of a service;
  - (ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
  - (iii) maintain economic unity; or
- (c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step'.<sup>29</sup>

The above-mentioned provisions explicitly state that interventions ought to provide a safeguard to protect and promote minimum standards of local government service delivery. Further, it must serve as a mechanism to maintain or re-establish democracy

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<sup>29</sup> S139 of the 1996 Constitution.

to ensure that local government fulfils its constitutional mandate.<sup>30</sup> Keeping this in mind, it implies that in some instances provincial governments must restore a municipality to financial health or ensure financial sustainability for a municipality.<sup>31</sup> In other instances it might imply that any signs of a dysfunctional local government must be addressed as a matter of urgency in order to promote accountability and to restore public faith in local government institutions.<sup>32</sup> The latter include actions directed at exposing and preventing corruption and maladministration at a municipality.<sup>33</sup>

Section 139 differentiates between three types of provincial interventions. First, section 139(1) applies to a failure to fulfil executive obligation/s, as discussed above. Secondly, section 139(4) applies to failure to approve a budget or any revenue raising mechanism as required by legislation and in this intervention process a council must be dissolved. Thirdly, section 139(5) exclusively deals with a crisis in the financial affairs of a municipality that may result in a failure to deliver services and/ or meet other constitutional obligations.<sup>34</sup> A further distinction is that the veto power only applies to section 139(1) interventions rather than those invoked by 139(4) or (5) of the Constitution. In fact, with respect to these interventions the Constitution cautions that if a provincial executive cannot or does not adequately exercise the powers or perform the functions in section 139(4) and (5), the national executive '*must intervene in the stead of the relevant provincial executive*' thus imposing a positive obligation to

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<sup>30</sup> S139(1) of the 1996 Constitution.

<sup>31</sup> S139(5) of the 1996 Constitution.

<sup>32</sup> Ss 152 and 153 of the 1996 Constitution.

<sup>33</sup> WPLG (1998):43.

<sup>34</sup> S139 of the 1996 Constitution.

intervene. In stark contrast to these interventions many restrictions are placed on 139(1) intervention.

Despite noticeable differentiation by the Constitution emerging jurisprudence entrenches a uniform approach of restraint to interventions.<sup>35</sup> For instance, in the *Premier of the Western Cape v Overberg District Municipality* case the Supreme Court of Appeal dealt with an intervention brought in terms of section 139(4). The Court had to decide whether the province was justified in dissolving the municipal council because it failed to adopt an annual budget by the prescribed timeframes. Nonetheless, the Court emphatically argued that despite the provision seemingly making it obligatory for provincial executives to dissolve the municipal council in these circumstances, it should not proceed without circumspection. Firstly, the Court discussed at length the process of 'appropriate steps' to be followed during the intervention process. Furthermore, the Court instructed that what is deemed appropriate must be informed by the facts and circumstances of each particular case.<sup>36</sup> Moreover, the Court held that all actions must be based on the principles of legality.<sup>37</sup> Accordingly the court reinstated the councillors effectively overturning the intervention.

Bearing the above in mind, it becomes evident that the autonomy of municipalities is to be protected notwithstanding the type of intervention being invoked. Further to this, the courts have entrenched a culture of respect for municipal autonomy. Therefore, the

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<sup>35</sup> *The Premier of the Western Cape v Overberg District Municipality* (801/2010) [2011] ZASCA 23 (18 March 2011) (hereinafter *Overberg Case*) and *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* (231/2009) [2009] ZAECBHC (hereinafter *Mnquma Case*).

<sup>36</sup> See *Overberg Case* at para 19 and *Mnquma Case* at paras 47 and 38.

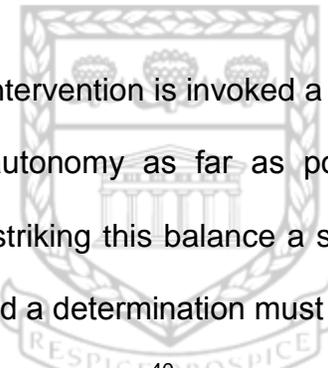
<sup>37</sup> See *Overberg* and *Mnquma Case*.

Constitutional Court eloquently states the most appropriate approach to be adhered to regarding provincial interventions *In Re: Certification of the Constitution of the Republic of South Africa*:



'What the NT [national text] seeks hereby to realise is a structure for [Local Government] LG that, on the one hand, reveals a concern for the autonomy and integrity of LG and prescribes a hands-off relationship between LG and other levels of government and, on the other, acknowledges the requirement that higher levels of government monitor LG 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'.<sup>38</sup>

Based on the above, when an intervention is invoked a balance must be struck between respecting the municipality's autonomy as far as possible while ensuring effective government at local level.<sup>39</sup> In striking this balance a so-called blanket or 'one size fits all' approach is inappropriate and a determination must be conducted on a case by case basis since each case is unique in nature.<sup>40</sup> Likewise, all cases of intervention must be governed by normative standards.<sup>41</sup>



The questions that arise are what constitutes a '*failure*', and what constitutes '*executive obligation*'. Moreover, when a council is dissolved in terms of section 139(1)(c) of the Constitution '*exceptional circumstances*' must be present to warrant the dissolution of

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<sup>38</sup> *In Re: Certification of the Constitution of the Republic of South Africa 1996–1996* (4) SA 744 (CC) para 373.

<sup>39</sup> Murray C & Hoffman-Wanderer Y '(2007) 7-8.

<sup>40</sup> De Visser J & Steytler N (2012) 15: 19 - 23.

<sup>41</sup> De Visser J & Steytler N (2012) 15: 19 - 23.

the council.<sup>42</sup> The Constitution offers provincial executives the discretion to intervene by taking ‘*appropriate steps*’ when such exceptional circumstances exist.<sup>43</sup> This begs the question what are the exceptional circumstances that are envisaged in the Constitution? What does ‘appropriate steps’ imply? Furthermore, what is the distinction between the executive and legislative obligations of a municipal council since a council exercises both these functions?<sup>44</sup>

Prior to the *Mnquma Local Municipality and Another v Premier of the Eastern Cape and Others* judgment a normative framework for section 139(1) intervention was lacking. This resulted in much uncertainty and inconsistency in its application. Limitations on the wording of section 139(1) in regard to *failure to fulfil an executive obligation*, had led to many difficulties in terms of interpretation.<sup>45</sup> However, the *Mnquma judgement* created much needed clarity with regards to the practical application of the law.

In *Mnquma* the Court defined the term executive to connote an execution of something such as, having the function of executing, especially as concerned with carrying out the laws or decree.<sup>46</sup> Therefore, once a municipal council fails to perform its executive obligation, the first substantive ground for an intervention is triggered. In determining what constitutes a ‘*failure*’ as mentioned above it does not relate to past failures, or

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<sup>42</sup> S159(2) of the 1996 Constitution.

<sup>43</sup> S139(1) of the 1996 Constitution.

<sup>44</sup> S151(2) of the 1996 Constitution.

<sup>45</sup> De Visser J & Steytler N (2012) 15: 19 - 23.

<sup>46</sup> *Mnquma Case* paras 62 - 63.

perceived failures.<sup>47</sup> The test to be applied is to measure the omission against the established norms and standards as set out in the legislative framework. For this reason, the Minister and NCOP must measure the failure of the executive function against these normative standards and determine whether the provincial executive acted appropriately or inappropriately for that matter by invoking the intervention in terms of section 139(1) of the Constitution.<sup>48</sup>

The term '*exceptional circumstances*' is not defined in the Constitution; however, in *Mnquma* the Court considered the nature and meaning of this.<sup>49</sup> The Court pronounced that what constitutes '*exceptional circumstances*' depends on the particular circumstances of the case.<sup>50</sup> It stressed that section 139(1)(c) is a measure of last resort in instances where an executive obligation cannot be fulfilled but for the dissolution of council.<sup>51</sup> It would therefore be necessarily assumed that milder forms of intervention must be considered prior to invoking this drastic step.<sup>52</sup> Despite this, it should be stressed that the legal standard to determine the appropriateness of this step is not reliant on the execution of prior forms of interventions.<sup>53</sup>

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<sup>47</sup> *City of Cape Town v Premier of the Western Cape and Others* (95933/08)[2008] ZAWCHC 52; 2008 (6) SA 345 (C) para 79.

<sup>48</sup> De Visser J & Steytler N (2012): 18 - 19.

<sup>49</sup> *Mnquma Case* at paras 74 - 79.

<sup>50</sup> *Mnquma Case* at para 77.

<sup>51</sup> *Mnquma Case* at para 78.

<sup>52</sup> *Mnquma Case* at para 68.

<sup>53</sup> *Mnquma Case* at para 69.

### 2.3 Assessment criteria for section 139(1) intervention

In *Mnquma* the Court held that what is *appropriate* must suit the situation, by taking into consideration the nature of the executive obligation that was not fulfilled, the interests of those affected and the interest of the affected municipality'.<sup>54</sup> Within this context it should be mentioned that recourse to court action - even though discouraged by the cooperative governance principles - may be an appropriate step if it would ensure the fulfilment of the executive obligation in the least intrusive manner.<sup>55</sup> In addition, the Court unequivocally stated that the steps articulated in section 139(1)(a); (b), and (c) are not successive steps, and should thus not be interpreted and/ or applied as such.<sup>56</sup>

As a consequence, issuing a directive per section 139(1)(a) was no longer viewed as a compulsory requirement. Previously a directive was issued by the provincial executive to the malfunctioning municipality to place it on terms and to request that an executive function be fulfilled or the threat of a more invasive intervention step is followed. However, the *Second Amendment Act* changed the wording in the text of section 139 of the Constitution, which resulted in a watering down of the legal status of the directive.<sup>57</sup> *Mnquma* interpreted the amended text and confirmed that a directive was no longer a binding requirement. In 2011, CoGTA introduced draft legislation to regulate section 139 and 100 interventions.<sup>58</sup> A list of preconditions was compiled that constitutes '*appropriate steps*' in the draft legislation. This list largely codifies the findings of the

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<sup>54</sup> *Mnquma Case* at paras 70 -72.

<sup>55</sup> *Mnquma Case* at paras 70-72.

<sup>56</sup> *Mnquma Case* at para 69.

<sup>57</sup> The Constitution of the Republic of South Africa Second Amendment Act 3 of 2003.

<sup>58</sup> Department of Cooperative Governance and Traditional Affairs *Draft Intergovernmental Monitoring, Support and Interventions* (Bill 31 May 2013) [B-12] .

*Mnquma* judgement.<sup>59</sup> However, during 2014 in *Mogalakwena Local Municipality v Provincial Executive Council Limpopo and Others*, the Gauteng High Court Division reached a different interpretation.<sup>60</sup> *Mogalakwena* distinguished itself from *Mnquma* since it dealt with a section 139(1)(b) intervention. The Court stated that:

‘...If the Legislature had intended to withdraw the safeguard previously expressed to exist by the Constitutional Court in relation to the requirement than an intervention under subsection 1(b) be preceded by a directive, it would have said so in clear and direct language and not contend itself with the excision of the conjunction “and” and the enactment of section 139(2)(b).’<sup>61</sup>

The Court reached this conclusion by referring to Supreme Court of Appeal judgements dealing with the interpretation of documents.<sup>62</sup> Additionally, it viewed the amendment of 139(1) to require greater emphasis on the separation of powers between the three spheres of government.<sup>63</sup> From the above-mentioned discussion the following deductions can be drawn, namely:

- If it is objectively established that grounds for intervention exists, the first leg of the enquiry is triggered;
- The Minister and NCOP will then move to the second leg of the enquiry, which is to determine whether the action undertaken by the provincial executive is appropriate, and;

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<sup>59</sup> See IMSI Bill.

<sup>60</sup> *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* [2014] JOL 32103 (GP) paras 18 – 20 (hereinafter *Mogalakwena Case*).

<sup>61</sup> *Mogalakwena Case* at para 20.

<sup>62</sup> *Mogalakwena Case* at para 19.

<sup>63</sup> *Mogalakwena Case* at para 21.

- What is ‘*appropriate*’ entails an assessment to measure the action taken against the benchmarks as set out in the Constitution and the *Guidelines on the application of section 100 and 139 interventions*. In addition, the Minister and NCOP will take into consideration whether the preconditions together with the appropriate steps invoked by the provincial executive justify the continued intervention in a municipality measured against the standards as set out in case law.

## 2.4 Legal process for exercising the veto power

Section 139(2) states ‘*if a provincial executive intervenes in a municipality in terms of section 139(1)(b) it must submit a written notice of the intervention to both the Minister, the NCOP and provincial legislature within 14 days after the intervention began*’.<sup>64</sup> It prescribes further that the intervention must end if the Minister disapproves of the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention. Thus, the intervention requires a so-called positive approval. Therefore, no legal obligation is placed on the Minister to articulate the basis for the veto. More critically, no communication is required from the Minister to the provincial executive or affected municipality. The Constitution may purposefully be vague to accommodate broad discretion for the Minister when exercising the veto power. However, to date the veto power has not received the necessary focus and remains an area that CoGTA is yet to address adequately.<sup>65</sup>

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<sup>64</sup> S139(2) of the 1996 Constitution.

<sup>65</sup> *Draft Intergovernmental Monitoring, Support and Interventions* (Bill 31 May 2013) [B-12].

Since the veto power is not addressed explicitly in the draft legislation; its application remains a contested area of interpretation. For example, if the Minister approves an intervention, the NCOP may still disapprove thereof within 180 days after the intervention was initiated or by the end of that period has not approved the intervention. Again, it should be noted that the intervention requires so-called positive approval. The NCOP should reach a decision independently from the Minister. It cannot overturn the decision of the Minister in a sense that the NCOP cannot approve the continuation of an intervention that the Minister has vetoed. The NCOP can only veto interventions that the Minister has approved. Emphasis is placed on narrowing down interventions rather than supporting an increase thereof.

Section 139(3) provides for instances when a Council is dissolved in terms of section 139(1)(c). It states that the provincial executive must immediately submit a written notice of the dissolution to the Minister, the NCOP and applicable provincial legislature. The dissolution takes effect 14 days from the date of receipt of the notice by the NCOP unless set aside by the Minister or the NCOP before the expiry of those 14 days. In practice the provincial legislature seems absent in the oversight role that it could fulfil.<sup>66</sup> The short timeframes could seriously undermine the veto power and the NCOP and Minister may not be in a position to make an informed decision. There seems to be no consistent practise where the provincial legislature submits its views to the Minister or the NCOP.<sup>67</sup> The provincial parliament must regularly exercise oversight over the

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<sup>66</sup> Department of Cooperative Governance *Joint Workshop with the National and Provincial Legislatures* "Application of section 139 of the Constitution, and the need for legislation to regulate its implementation" 2 November 2010 (2010) 12. (hereinafter Joint Workshop with Legislatures (2010)).

<sup>67</sup> CoGTA Joint Workshop with Legislatures (2010): 12.

provincial executive and should be in a position to inform the Minister and NCOP of troubles encountered by municipalities. Arguably, the mandate to be obtained by the provincial delegates to the NCOP accommodates the provincial parliament's views.

Moreover, the Minister and NCOP must consider the *provincial executive* and *legislative* powers since they cannot undermine provincial autonomy.<sup>68</sup> In *Premier of the Western Cape v the Minister of Police*, the Constitutional Court cautioned that where the Constitution confers powers to the provincial executive such authority cannot be unduly tampered with.<sup>69</sup> The Court instructed that all spheres of government must act in accordance with the spirit and letter of the constitutional scheme and utilise the intergovernmental principles appropriately.<sup>70</sup> The former demonstrates that the veto power cannot be exercised without circumspection. For this reason, the Minister and NCOP have to give credence to the principles that the Court amplified pertaining to the provincial executive authority. Essentially the role to be performed by the Minister and NCOP must be remedial in nature. Yet, given the protection of provincial autonomy, the veto power should also be perceived as a remedy to aggrieved municipalities when confronted with inappropriate interventions. It is bothersome that in the *Mogalakwena* case the aggrieved municipality failed to seek redress in terms of section 139(2) and opted to approach the courts for protection. Moreover, the Court failed to elevate the constitutional protection afforded to municipalities in this regard.<sup>71</sup>

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<sup>68</sup> Ss125(1); 128(1); 132; 110; 114; and 116 of the 1996 Constitution.

<sup>69</sup> *Premier of the Western Cape v the Minister of Police* 2013 (CCT 13/13)[2013]ZACC 33 paras 59 - 61.(hereinafter *Premier of the Western Cape Case*).

<sup>70</sup> *Premier of the Western Cape Case* at paras 62 - 63.

<sup>71</sup> *Mogalakwena Case* at paras 75-77.

## 2.5 The role and responsibilities of the Minister and NCOP

As guardian of intergovernmental relations, the Minister has an important role to play in monitoring the effectiveness of intergovernmental relations mechanisms.<sup>72</sup> Accordingly, the Minister must exercise oversight over general structures and procedures of intergovernmental relations. While the concept of separation of powers is too broad to be defined within the context of this study, the Minister from an executive arm must independently assess an intervention to decide whether to veto the intervention. This determination is of an executive nature and therefore falls subject to scrutiny by the NCOP. In executing this role, the Minister should ideally take into context the political landscape of the country and the national goals and objectives it wishes to achieve. The latter connotes a link in the accountability chain wherein the Minister must support provincial governments in executing their mandate.<sup>73</sup>

For its part, the NCOP should ideally be focussed on being an effective bridge between provinces and the national sphere of government. Moreover, it is the legislative arm and therefore holds the executive governments to account for its actions. The NCOP is constitutionally tasked with a dynamic and complex role.<sup>74</sup> For instance, despite holding the executive to account in the context of provincial interventions, the NCOP must ensure that the provincial interests are also taken into consideration. The multi-faceted

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<sup>72</sup> Intergovernmental Relations Framework Act 13 of 2005.

<sup>73</sup> *Premier of the Western Cape Case* at paras 59 – 64.

<sup>74</sup> Murray, C. and Simeon, R. "From Paper to Practice: The National Council of Provinces after its first year." 1999. *SA Public Law* 14, 96.

role that it performs contributes to the realisation of co-operative and effective government.<sup>75</sup>

When exercising the veto power, the Minister and NCOP must, in addition to the legislative and constitutional frameworks, apply the formal rules and written processes applicable to the relevant institutions.<sup>76</sup> The Minister is not obliged to implement the draft legislation as yet but is required to follow the guidelines for interventions. CoGTA has not communicated a standard operating procedure that should ideally be adhered to, and for that reason, the manner in which the Minister reaches his/ her decision is not formerly stated as yet. In some instances it is unclear whether CoGTA provides written reasons or notification of the decision to veto. This is not unlawful since the Constitution does not impose such a burden on the Minister but the position is different for the NCOP since it has to adhere to all processes prescribed for Parliament. All decisions taken by the NCOP, whether to approve or disapprove an intervention must be reached by the full house.<sup>77</sup> In addition, each delegation has one vote which it casts on behalf of the province by the head of its delegation.<sup>78</sup> Consequently, the NCOP should require each provincial delegation to produce a written instruction or mandates to confirm that the provincial legislature has authorised it to vote in a particular way.<sup>79</sup> The rationale for this approach is due to the nature of the NCOP.<sup>80</sup> Its role is to enable provincial

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<sup>75</sup> *Premier of the Western Cape Case* at para 72.

<sup>76</sup> S65 of the 1996 Constitution and *NCOP Rules of the National Council of Provinces 8<sup>th</sup> ed* (2007).

<sup>77</sup> S65(2) read together with section 70 of the 1996 Constitution.

<sup>78</sup> S65(1) of the 1996 Constitution.

<sup>79</sup> S65(2) of the 1996 Constitution.

<sup>80</sup> S42(4) of the 1996 Constitution.

governments to participate and lobby its interest in the national affairs.<sup>81</sup> When it relates to interventions its role is to protect the balance of powers between the national, provincial and local interests.<sup>82</sup> Thus, failure to provide a written mandate as envisaged by the Constitution could be argued as rendering the NCOP process unconstitutional.<sup>83</sup>

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## 2.6 Conclusion

The veto power demands interplay of complicated legal concepts and practical solutions between the multi-level governments in safeguarding autonomous local government. Case law confirms that inappropriate implementation of section 139(1) interventions could negatively impact on attempts towards ensuring effective government. The veto power remains predominantly unregulated, which may inhibit the successes to be achieved from this mechanism. The Constitution is unambiguous in the role provincial parliament should play yet the provincial parliament appears insignificant in the operations of the veto power. According to CoGTA, the draft legislation was a result of intense research based on well documented implementation problems associated with past section 139 and 100 interventions. Yet, it fails to highlight the absent regulation of the veto power and the significance to be attached to the veto power. The Minister and NCOP are tasked by the Constitution to exercise a veto power when required to do so per section 139(2) and (3), and therefore operate within an open ended spectrum. The next chapter will focus on the veto powers invoked by the Minister and NCOP for the last five years, coupled with reasons, legal basis and the methods used by the Minister

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<sup>81</sup> S42(4) of the 1996 Constitution.

<sup>82</sup> Murray C & Hoffman-Wanderer Y (2007) 11-15.

<sup>83</sup> Murray C & Hoffman-Wanderer Y (2007) 23-24.

and NCOP in exercising the veto power in terms of sections 139 (2) (b) and 139(3)(b) of the Constitution.



## Chapter 3: The use of veto power in practice

### 3.1 Introduction

The discussion on the policy and legal framework for interventions in the previous chapter made clear the significance to be attached to the veto power for the Minister and the NCOP.<sup>84</sup> As a constitutional checks and balancing mechanism it is justifiably assumed that the veto power is an ideal mechanism to circumvent unnecessary tensions between various government spheres.<sup>85</sup> These tensions would normally manifest in protracted litigation and prolonged IGR battles.<sup>86</sup> Thus, the veto power is imperative to avoid undue interference from the provincial sphere into the autonomy of municipalities.<sup>87</sup>

The above-mentioned is especially critical, if one considers the concerns raised with respect to the utilisation of section 139(1) interventions by the *Select Committee on Cooperative Governance and Traditional Affairs on its activities undertaken during the 4th Parliament* (May 2009 – March 2014).<sup>88</sup> The Committee expressed its difficulty in determining ‘*why provincial governments would intervene in some municipalities with problems and not in others*’, thus implying that double standards might exist.<sup>89</sup>

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<sup>84</sup> Ss 139(1)(a);(b) and (c) and 139(2)(b)and 139(3)(b) of the 1996 Constitution.

<sup>85</sup> De Visser J & Steytler N (2012) 15:24 -25.

<sup>86</sup> Mkhwanazi S ‘Government counts the cost of court action by municipalities’ *The Newage* 08 August 2014.

<sup>86</sup> S40 of the 1996 Constitution.

<sup>87</sup> Parliament of the Republic of South Africa *Parliament of the Republic of South Africa Select Committee on Cooperative Governance and Traditional Affairs on its activities undertaken during the 4th Parliament (May 2009 – March 2014)* (2014)1;2 and 3 of 24. (hereinafter 4<sup>th</sup> Term Legacy Report).

<sup>88</sup> Parliament 4th Term Legacy Report (2014) 2 of 24.

<sup>89</sup> Parliament 4th Term Legacy Report (2014) 2 of 24.

This is problematic for many reasons. First interventions operate within an intergovernmental system of governance; therefore consistency in addressing problematic municipalities must be entrenched. In addition, enabling good local government demands all spheres to deliver on its mandate. As a result, the veto power must ensure accountability from all spheres of government to all citizens. This is the oversight role envisaged from the Constitution and promised by the WPLG.<sup>90</sup> Therefore, in instances where it is deemed that national and provincial governments have failed local government, the veto power should detect such failures. Yet, Powell argues the extent of such failure is often unknown and unaccounted for. With the result that provincial and national governments continue to be unchecked for providing inadequate support to municipalities.

Empirical data on section 139(1) interventions invoked during 2010 to 2014 is presented, which include an overview of all the interventions during this period. A detailed description of instances where interventions were terminated is also presented. Further to these, the role, nature and actions of all stakeholders, namely the municipality, provincial government, Minister and NCOP are also documented.

It should be underlined that at this stage of this study, only the facts of each case study are presented with no analysis being provided. Thus, this chapter only establishes the basis for the analysis to be conducted in the next chapter, i.e. chapter 4.

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<sup>90</sup> WPLG (1998) 38-46.

### 3.2 Overview of interventions during 2010 – 2014

According to the review as conducted by CoGTA on section 139 interventions, the nature of the problems experienced by municipalities relate to at least three broad categories as noted represented in table1 below.

**Table1: Broad Categories for Interventions Cited by CoGTA<sup>91</sup>**

<b>Governance</b>	<b>Challenges persist in the political/administrative interface: e.g. conflicts between top management and councillors and political in-fighting; there may be non-adherence to the Code of Conduct for Councillors and inability of a Council to perform as required by legislation. Often cited is poor or non-performance of top management, lack of proper organisational structures and vacant post in key management positions (e.g. technical, engineering, planning).</b>
<b>Financial</b>	Financial mismanagement: this includes a lack of adequate systems and capacity to effectively manage financial resources; e.g. insufficient revenue raising due to weak billing and tariff systems, and weak debt collection policies; poor budgeting; lack of internal controls related to revenue management allowing for fraud, and misuse of municipal funds; lack of controls through internal audit and risk management committees.
<b>Service Delivery</b>	Sections 152 and 153 of the Constitution clearly set out the service delivery obligations of municipalities, this is often highly uneven and may significantly lag demand; there may be high debt levels for bulk water and electricity purchases, and little or no spending on repairs and maintenance, resulting in distribution losses, breakdowns of systems, or services not rendered.

With reference to the table above, it is important to distinguish the financial category pertaining to section 139(1) intervention from section 139(5) intervention.<sup>92</sup> This is important since the veto power only applies to section 139(1) intervention. Also, these financial interventions are discretionary in nature since it falls under section 139(1) as read together with section 136 of the Municipal Finance Management Act (MFMA). In a nutshell, the latter permits different types of support that may be rendered in terms of a

<sup>91</sup> Department of Cooperative Governance and Traditional Affairs *Briefing to the Select Committee on Finance on the support provided by the department to municipalities under administration in terms of section 139 of the Constitution, and the need for legislation to regulate its implementation held 11 September 2013* (2013) 6 of 51. (hereinafter SC Finance Briefing (2013)).

<sup>92</sup> 139(5) of the 1996 Constitution.

139(1) discretionary intervention. However, section 139(5) interventions relate to mandatory financial interventions in terms of section 139(5) as read together with section 139 of the MFMA.



Interventions during 2010 – 2014 are represented in table 2 below:

**Table 2: Geographic Locations and Nature of Interventions<sup>93</sup>**

Prov	Type	Municipality	Nature	Duration
<b>KZN</b>	<b>Total number of interventions during period under review = 10</b>			
	S139(1)	Indaka	Grounds: Governance & Financial Administration S139(1)(b): Municipality placed under Administration	Duration: March 2010- Current (Extended on 31 July 2012)
	S139(1)	Okhahlamba	Grounds: Governance & Financial Administration	Duration: March 2010 - 30 June 2012
	S139(1)	Umsunduzi	Grounds: Governance & Financial Administration	Duration: May 2010 - 13 December 2011
	S139(1)	Mtubatuba	Grounds: Governance & Financial Administration S139(1)(b): Municipality placed under Administration	Duration: November 2012- Current
	S139(1)	Imbabazan	Grounds: Governance & Political party conflicts S139(1)(b): Municipality placed under Administration	Duration: January 2013- Current
	S139(1)	Abaqulusi	Grounds: Governance & Financial Administration S139(1)(b): Municipality placed under Administration	Duration: March 2013- Current
	S139(1) MFMA	Umvoti	Grounds: Governance & Financial Administration S139(1)(b): Municipality placed under Administration	Duration: July 2013- Current
	S136 MFMA	Umzinyathi District	Grounds: Financial Administration	Duration: April 2013- Current

<sup>93</sup> Parliament of the Republic of South Africa Website: available at [http://www.parliament.gov.za/live/content.php?Category\\_ID=326](http://www.parliament.gov.za/live/content.php?Category_ID=326) (accessed 1 July 2014).

	S136 MFMA	Uthukela District	Grounds: Governance & Financial Administration	Duration: May 2013- Current
	S136 MFMA	Ugu District	Grounds: Governance & Financial Administration	Duration: May 2013- Current
<b>NW</b>	<b>Total number of interventions during period under review = 8</b>			
	S139 (1)	Moses Kotane	Grounds: Governance & Financial Administrative	Duration: July 2010 – May 2011
	S139 (1)	Swaing	Grounds: Governance & Financial Administrative	Duration: July 2010 – May 2011
	S139 (1)	Madibeng	Grounds: Governance & Financial Administrative.	Duration: July 2010 – May 2011
	S139 (1)	Madibeng	Grounds Vetoed: By Minister	Duration February 2014 –
	S139 (1)	Mafikeng	Grounds: Governance & Financial Administrative	Duration: July 2010 – May 2011
	S139 (1)	Maquassi Hills	Grounds: Governance & Financial Administrative S139(1)(b): Municipality placed under Administration	Duration: April 2013- Current
	S139 (1)	Matlosana	Grounds: Governance & Financial Administrative Vetoed: By NCOP	Duration: April 2013 – Nov 2014
	S139 (1)	Ditsobotla	Grounds: Governance & Financial Administrative S139(1)(b): Municipality placed under Administration	Duration: April 2013
<b>MP</b>	<b>Total number of interventions during period under review = 4</b>			
	S139 (1)	Thembisile Hani	Grounds: Governance & Financial Administration	Duration: April 2010
	S139 (1)	Emalahleni	Grounds: Governance & Financial Administration	Duration: April 2013- Current
	S139 (1)	Bushbuckridge	Grounds: Governance & Financial Administration S139(1)(b): Municipality placed under Administration	Duration: April 2013- Current
	S139 (1)	Emalahleni	Grounds: Governance & Financial Administration	Duration: 17 April 2013- Current
<b>FS</b>	<b>Total number of interventions during period under review = 3</b>			
	S139 (1)	Nala Local	Grounds: Governance & Financial Administration	Duration: December 2010 - May 2011
	S139 (1)	Masilonyana	Grounds: Governance & Financial Administration	Duration: December 2010 - May 2011

	S139 (1)	Naledi	Grounds: Governance; Financial Administration & Council Dysfunctionality	Duration: May 2010 - May 2011
<b>WC</b>	<b>Total number of interventions during period under review = 4</b>			
	S139 (1)	Stellenbosch	Grounds: Governance	Duration: April 2010- April 2010
	S139 (1)	Swellendam	Grounds: Governance & Financial Administration Vetoed: By Minister	Duration: Sept 2012- Nov 2012
	S139 (4)	Oudtshoorn	Grounds: Budget & Revenue Raising Mechanism	Duration: Nov 2012- Feb 2013
	S139 (4)	Overberg District	Grounds: Budget & Revenue Raising Mechanism	Duration: July 2010- Oct 2010
<b>GP</b>	<b>Total number of interventions during period under review = 1</b>			
	S139 (1)	Nokeng Tsa Taemane	Grounds: Governance & Financial Administration	Duration: Oct 2010- May 2011
<b>EC</b>	<b>Total number of interventions during period under review = 2</b>			
	S139 (1)	Sunday's River Valley	Grounds: Governance & Financial Administration	Duration: Jan 2010- May 2011
	S139 (1)	Mnquma	Grounds: Governance	Duration: Mar 2013- Sept 2013
<b>LP</b>	<b>Total number of interventions during period under review = 1</b>			
		Mogalekwen a	Grounds: Governance Vetoed: By the High Court of Gauteng	Duration: Mar 2013- Sept 2013
<b>NC</b>	<b>Total number of interventions during period under review = 0</b>			

Following from the above table, it becomes clear that a total of 33 interventions have occurred across provincial boundaries from 2010 to 2014. However, of these only two cases were subject to the veto power. The first case relates to the intervention brought by the Western Cape Provincial Government into Swellendam Local Municipality in October 2012. The second case relates to the intervention brought by the North West Province into Madibeng Local Municipality in July 2014.

### 3.3 Case study : Western Cape Provincial Government intervention into the Swellendam Local Municipality in October 2012

#### 3.3.1 Context triggering intervention

Swellendam Local Municipality was governed by a coalition of the Democratic Alliance (DA) and African Christian Democratic Party (ACDP) since the African National Congress(ANC) and DA both held four seats while the ACDP held (one) seat. A stalemate arose when the ACDP member was removed by his Party. As a result, Council failed to quorate since March 2012, but the ACDP member was later reinstated by his Party in reaction to a Cape High Court order delivered on 17 April 2012.<sup>94</sup>

Community protests transpired due to the political instability. Protests were rather violent and involved vandalising private businesses and public properties.<sup>95</sup> Moreover, the protests involved not only local residents but also officials from the municipality.<sup>96</sup> These protests were not related to service delivery but rather related to the extension of the serving municipal manager's contract.<sup>97</sup> This was due to the fact that the municipal manager was perceived by the community and staff members to be favouring the DA council members.<sup>98</sup> Accordingly, during periods when a shift in political power occurred,

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<sup>94</sup> Western Cape Department of Local Government available at <http://www.westerncape.gov.za/text/2013/July/municipal-councils-june-2013.pdf> (accessed 1 March 2014).

<sup>95</sup> Western Cape Government Ministry of Local Government : Media Statement: Swellendam Municipality Update 27 February 2013 available at <http://www.westerncape.gov.za/news/swellendam-municipality-update-0> (accessed 1 March 2014). (hereinafter referred to as Media Statement).

<sup>96</sup> Western Cape Government (2013) Media Statement.

<sup>97</sup> Western Cape Government (2013) Media Statement.

<sup>98</sup> Western Cape Government Briefing notes submitted in terms of the Local Government Support Group (LGSG) during June to September 2013. (on file with author).

the municipal manager was replaced by an official, at a junior level within the administration, and widely regarded to be affiliated to the ANC caucus.<sup>99</sup> Ultimately, service delivery was compromised due to the malfunctioning administration. The situation reached alarming levels, prompting National Treasury [NT] to caution the municipality that it would subject it to a section 216(2) process of the Constitution, whereby its portion of funds allocated in terms of the Local Government Equitable Share would be withheld if the municipality failed to meet the MFMA prescriptions.<sup>100</sup>

Despite reinstatement of the ACDP councillor, who previously supported a coalition with the DA but subsequent to his reinstatement supported the ANC, the stalemate in Council continued.<sup>101</sup> Consequently, a proposed adjustment budget was not considered and the tabling of the 2012/13 Draft Annual budget and Integrated Development Plan (IDP) were not approved within the prescribed timeframes.<sup>102</sup> In addition, the senior management of the municipality was severely compromised. For instance, the contract of the municipal manager was soon to expire, coupled with the fact that three of five senior posts as provided for in the approved organogram were vacant, namely the Director: Technical Services; Director: Community Services and Director: Corporate

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<sup>99</sup> Western Cape Government Briefing notes submitted in terms of the Local Government Support Group (LGSG) during June to September 2013. (on file with author).

<sup>100</sup> National Treasury of the Republic of South Africa *Decision to invoke section 216(2) of the Constitution against municipalities in breach of section 126 of the MFMA (reference letter -M3/4/3/2 (3551/12) (2012)*.

<sup>101</sup> Western Cape Government Briefing notes submitted in terms of the Local Government Support Group (LGSG) during June to September 2013. (on file with author).

<sup>102</sup> Western Cape Government (2013) Media Statement.

Services. Moreover, the Chief Financial Officer (CFO) was placed on sick leave on more than one occasion, and for lengthy periods.<sup>103</sup>

Aggravating the state of affairs was the number of litigation instituted by councillors. A total breakdown of litigation costs for this period is not available. However, more than three High Court proceedings were instituted in the Western Cape High Court during 2012.<sup>104</sup> It became clear that the municipality was in desperate need of assistance. The provincial government, where an outright DA majority exists, cautioned the municipality that it needed to fill all vacant posts or service delivery would be seriously compromised.<sup>105</sup> The municipality responded that nothing had changed to create a reasonable expectation that the Council meeting could be successfully facilitated to extend the appointment of the acting municipal manager before it expired on 5 September 2012.<sup>106</sup> In response, the DA-led provincial government alerted the municipality that failure to fill senior posts would jeopardise the functioning of the administration. Moreover, that it would intervene to extend the acting arrangement of the municipal manager if the municipality fails to do so.<sup>107</sup>

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<sup>103</sup> Western Cape Government Department of Local Government *Regional Monitoring Teams Municipal Governance Reports for the period ended June 2012* available at <http://www.westerncape.gov.za/text/2012/11/swellendam-municipality-rmt.pdf> (accessed 1 March 2014).(hereinafter RMT Reports).

<sup>104</sup> Western Cape Government Department of Local Government (2012) RMT Report.

<sup>105</sup> Western Cape Government Minister of Local Government, Environmental Affairs and Development Planning *Letter to the Speaker of the Swellendam Local Municipality dated 21 August 2012 (Reference 3/11/2/27(2012/1825)* (2012). (on file with author).

<sup>106</sup> Swellendam Local Municipality *Letter to the Minister of Local Government, Environmental Affairs and Development Planning dated 27 August 2012 (No Reference)* (2012).(on file with author).

<sup>107</sup> Western Cape Government Minister of Local Government, Environmental Affairs and Development Planning *Letter to the Speaker of the Swellendam Local Municipality dated 21 August 2012 (Reference 3/11/2/27(2012/1825)* (2012).(on file with author).

### 3.3.2 Action by the provincial government

Despite being abreast of all political and administrative hurdles confronting the municipality, the provincial government failed to provide any concrete support. To add to an already bad situation, no genuine efforts were instituted by either the DA or ANC councillors to overcome the impasse in Council. The provincial government consulted both the DA and ANC councillors to reach an agreement on the appointment of the municipal manager and other senior positions, with the extension of the municipal manager's contract being the priority for the provincial government.<sup>108</sup>

Accordingly, the provincial executive invoked section 139(1)(b) to effect the extension of the municipal manager's appointment for a maximum period of three months per section 54A(2A)(b) of the Municipal Systems Act. A directive was issued to the Municipality and reference was made to section 54A of the above-mentioned Act. Also, the municipal council was requested to adhere to the requirements of section 60 of the MFMA. The latter provisions were the executive obligations, which the intervention was based on.<sup>109</sup>

The Mayor replied that the municipality could not meet the request, a response he attributed to continuous walk outs by councillors to consider the item on the agenda of council meetings. The Mayor requested the provincial government to extend the employment contract as proposed in the directive.<sup>110</sup>

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<sup>108</sup> Western Cape Government Minister of Local Government, Environmental Affairs and Development Planning *Cabinet Submission dated 29 August 2012 (Cabinet Minute No. 237/2012) (2012)*. (on file with author)(hereinafter Cabinet Submission).

<sup>109</sup> Western Cape Government Cabinet Submission (2012).

<sup>110</sup> Western Cape Government Cabinet Submission (2012).

### 3.3.3 Response from the Minister

The Minister disapproved the intervention on 4 October 2012 and instead suggested a cooperative government approach be adopted. The Minister made no outright recommendation as to the appointment of a new municipal manager. Once the Minister exercised the veto power, it basically created a situation where the municipality was without a municipal manager as of 4 October 2012.

No clear mandate was presented to the province or the municipality. However, engagements were arranged on a political and administrative level and clear roles and responsibilities were established emanating from the engagements between CoGTA and the provincial government.<sup>111</sup> The Minister also consulted the local municipality separately, whilst also attending a joint meeting with the community residents to discuss the municipal affairs that gave rise to the intervention in question.<sup>112</sup>

Political office holders for province and national government entered into negotiations on how they were to support Swellendam municipality during October.<sup>113</sup> At the time the Swellendam community was informed that a cooperative arrangement would be implemented to overcome the challenges confronting the municipality. Moreover, a comprehensive support plan was developed with clear roles and responsibilities for both provincial and national government to execute. This support included the secondment of

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<sup>111</sup> Western Cape Government (2013) Media Statement.

<sup>112</sup> Western Cape Government (2013) Media Statement.

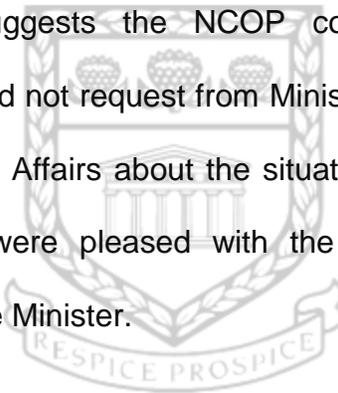
<sup>113</sup> Western Cape Government (2013) Media Statement.

an official of the provincial Department of Local Government as acting municipal manager for a period of six months from October 2012 to March 2013.<sup>114</sup> The Minister did not provide a report to the Select Committee on Governance and Traditional Affairs.<sup>115</sup>



### 3.3.4 Response by the NCOP

The NCOP did not take any measures after receiving the notice of intervention. It merely endorsed the plan by Minister, province and municipality.<sup>116</sup> There is no information available that suggests the NCOP consulted the province or the municipality. The NCOP also did not request from Minister to brief the select committee on Governance and Traditional Affairs about the situation in Swellendam, to ascertain whether the local residents were pleased with the outcomes of the cooperative arrangement coordinated by the Minister.



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<sup>114</sup> Western Cape Government (2013) Media Statement.

<sup>115</sup> Parliament of the Republic of South Africa Website: available at [http://www.parliament.gov.za/live/content.php?Category\\_ID=326](http://www.parliament.gov.za/live/content.php?Category_ID=326) (accessed 1 July 2014).

<sup>116</sup> Western Cape Government Department of Local Government *Letter directed to the NCOP dated September 2012 (2012)*.

### **3.4 Case study : North West Provincial Government into the Madibeng Local Municipality in July 2014**

#### **3.4.1 Context triggering intervention**

The provincial executive previously intervened in the municipality during 2010 for a period of six months, i.e. April to October 2010<sup>117</sup> The intervention was extended at the beginning of November 2010 and concluded in May 2011 since the next local government elections were to be held. It was envisaged that the new political leadership would bring to an end challenges faced by the municipality. Unfortunately, that was not the case with the municipality experiencing the same problems post the elections. In December 2012, a further intervention was brought by the province and set aside by the Minister in January 2013. According to the provincial government, the interventions were a consequence of the non-compliance by the municipality with regulatory and governance requirements.<sup>118</sup> As challenges remained unaddressed, the province then sought to bring a further intervention in February 2014.<sup>119</sup> The Minister set aside both the 2012 and 2014 interventions and instead implemented a support plan in terms of section 154 of the Constitution.<sup>120</sup> The actions of the Minister are detailed in section 3.4.3 below.

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<sup>117</sup> Matlawe E *Madibeng Local Municipality Close Out Report* (2010) 4 of 16. (on file with author).

<sup>118</sup> Matlawe E (2010) 4- 6 of 16.

<sup>119</sup> Matlawe E (2010) 4- 6 of 16.

<sup>120</sup> Matlawe E (2010) 4 -6 of 16.

The problems confronting the municipality relate to serious financial mismanagement and maladministration and corruption.<sup>121</sup> The extent of the problem was so serious that the municipality was listed in Proclamation No: R72 of 2009 for the Special Investigating Unit to probe.<sup>122</sup> In addition, countless litigation occurred between the municipality and its officials, covering a range of legal issues of matters of theft and corruption to unfair dismissal and disputed human resource practices.<sup>123</sup>

The dire administrative situation of the municipality negatively impacted service delivery. For instance, it was subjected to severe financial challenges (e.g. revenue shortages and cash flow problems) for ten consecutive years, which had a knock on effect on the financial sustainability and delivery of basic services. For example, provisioning of water; sanitation; electricity, and refuse removal was compromised.<sup>124</sup> As a result, many service delivery protests occurred, which were often violent in nature, and resulting in at least four deaths.<sup>125</sup> The community's dismay related to poor service provisions, coupled with scores of corruption and maladministration.<sup>126</sup> In an effort to curtail flagrant disregard of its local government mandate, the local residents established a Residents Rates Payers Association and withheld payment of services to the municipality. The monies were held in a separate trust account, which signified a high level of distrust towards the municipality.<sup>127</sup>

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<sup>121</sup> Matlawe E (2010) 4 -6 of 16.

<sup>122</sup> Matlawe E (2010) 4 -6 of 16.

<sup>123</sup> Matlawe E (2010) 4 -6 of 16.

<sup>124</sup> Matlawe E (2010) 2 -4 of 16.

<sup>125</sup> Sapa 'Madibeng municipality out under administration' *City Press* 11 February 2014.

<sup>126</sup> Sapa 'Madibeng municipality out under administration' *City Press* 11 February 2014.

<sup>127</sup> Sapa 'Madibeng municipality out under administration' *City Press* 11 February 2014.

The initial intervention in 2010 aimed to appoint an administrator to attain sound municipal communication, both internally and externally. Furthermore, it was to ensure alignment of the turnaround strategy and intervention plan for the development of a financial recovery plan.<sup>128</sup> Progress was made with outcomes related to service delivery issues; finances; local economic development, and public participation.<sup>129</sup> Remarkably, the financial recovery plan was prepared as a discretionary provincial intervention in terms of Section 136 of the MFMA as read together with section 139(1) of the Constitution.<sup>130</sup> The provincial government collaborated with CoGTA and requested National Treasury, with support from the Development Bank of Southern Africa (DBSA), to prepare a financial recovery plan to address the financial challenges of the Municipality.<sup>131</sup>

The administrator made a number of observations in the Close Out Report.<sup>132</sup> For example, it was noted that the deployment of an administrator to a municipality without a support team will fail to expedite support efforts.<sup>133</sup> In addition, it was observed that a lack of provincial support is a major factor impeding local governments development.<sup>134</sup> Specific attention was also drawn to the province's poor understanding of its support role in interventions, as captured below:<sup>135</sup>

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<sup>128</sup> Matlawe E (2010) 5 of 16.

<sup>129</sup> Matlawe E (2010) 9-12 of 16.

<sup>130</sup> Matlawe E (2010) (2010) 3 of 16.

<sup>131</sup> Matlawe E (2010) (2010) 12 of 16.

<sup>132</sup> Matlawe E (2010) 16 of 16.

<sup>133</sup> Matlawe E (2010) 16 of 16.

<sup>134</sup> Matlawe E (2010) 16 of 16.

<sup>135</sup> Matlawe E (2010) 16 of 16.

'Support by the Department of Human Settlement to secure land for housing development including unblocking some of the housing projects was lacking in many respects. The municipality was inundated with complaints about the state of the provincial roads, but the responsible department lacked the resources to address the situation, although there was willingness at all times to address the situation, although there was willingness at all times to address the situation, the department was financial constraint [sic]'.<sup>136</sup>

The Administrator strongly recommended both national and provincial governments to support, capacitate and monitor municipalities in such a manner that they do not reach a stage of desperation. Provinces ought to develop early warning mechanisms to intervene at the right time before problems escalate out of control.<sup>137</sup> The Administrator added that officials deployed by CoGTA to support the municipality were not well versed with municipal operations, and struggled to provide adequate support. For example, no funds were granted to support the municipality and it had to carry the intervention costs, thus defeating the purpose of the intervention.<sup>138</sup>

### **3.4.2 Action taken by the provincial government**

After the 2010 intervention problems persisted, the province invoked an intervention in December 2012 in terms of section 139(1)(b) of the Constitution. The intervention aimed to provide for the take-over of the executive obligations and divest Council's authority in the Administrator. No directive was issued to the municipality. When the municipality

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<sup>136</sup> Matlawe E (2010) 16 of 16.

<sup>137</sup> Matlawe E (2010) 16 of 16.

<sup>138</sup> Matlawe E (2010) 16 of 16.

became aware of the intervention, it sought legal action.<sup>139</sup> The municipality felt aggrieved by the intended intervention, arguing that it was unfair, premature and malicious, and attempted to stop the intervention by means of a court interdict. However, the Minister quickly vetoed the intervention.

In February 2014, the province again intervened in the municipality in terms of section 139(1)(b) of the Constitution to appoint an Administrator to implement the support plan that emanated from the Minister's veto in 2013.<sup>140</sup> The intervention was estimated to last for a minimum period of six months and a maximum period of 12 months. The basis for the intervention was the continued problems pertaining to governance, financial management and service delivery. Particular attention was drawn to the failure of the new political leadership's failure to implement the support plan. The new leadership replaced the former office bearers in January 2014.

### **3.4.3 Response from the Minister**

CoGTA received a representation from the North West Member of Executive Council (MEC) for Local Government and Traditional Affairs, which served as a notice of the December 2012 intervention.<sup>141</sup> As noted above, the intervention was to last for a minimum period of six months and a maximum period of 12 months. The intervention provided for the assumption of all executive duties from Council even though the

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<sup>139</sup> Department of Cooperative Governance and Traditional Affairs *Presentation to the National Council of Provinces Select Committee On Cooperative Governance And Traditional Affairs on Madibeng Local Municipality Interventions held July 2014* (2014) 2-3 of 11. (hereinafter CoGTA Madibeng Presentation).

<sup>140</sup> CoGTA Madibeng Presentation (2014) 2-3 of 11.

<sup>141</sup> CoGTA Madibeng Presentation (2014) 2-3 of 11.

problems were not caused by the current leadership.<sup>142</sup> No real attempt was made to offer support to the municipality. The intervention was invoked notwithstanding the recommendation by the 2010 Administrator cautioning that future interventions should be avoided at all costs.<sup>143</sup> Furthermore, no formal notification was sent to the municipality.



The Minister, together with a Task Team in the North West Provincial Government, conducted an analysis on the state of municipalities in the province. The outcome of the investigation was to inform the support efforts and disciplinary actions to be taken to address challenges.<sup>144</sup> In this way, the Minister engaged both parties prior to the determination to intervene in 2012. In fact, when the Minister became aware of the 2012 proposed intervention, he approached the provincial government to request the Task Team to investigate whether such an intervention was warranted. The Task Team had a clear mandate and submitted a report with recommendations in the first quarter of 2013. The investigation conceded that the intervention in terms of 139(1)(b) of the Constitution was premature and punitive. Therefore, the Minister exercised the veto power and terminated the intervention.<sup>145</sup>

With respect to the February 2014 intervention, the Minister also vetoed this intervention, and once again requested a support plan to be implemented. A Ministerial Support Team was established for this purpose and the scope of the support outlined in

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<sup>142</sup> CoGTA Madibeng Presentation (2014 )2-3 of 11.

<sup>143</sup> Matlawe E (2010) 16 of 16.

<sup>144</sup> CoGTA Madibeng Presentation (2014 )2-3 of 11.

<sup>145</sup> CoGTA Madibeng Presentation (2014 )5-7 of 11.

a Terms of Reference (TOR).The latter comprehensively dealt with all challenges confronting the municipality. One of the actions the Minister inculcated after vetoing the intervention was to ensure that an official from CoGTA is appointed to the position of acting municipal manager following the suspension of the municipal manager. The acting municipal manager was tasked with monitoring, supervising and implementing the recommendations of the Ministerial Support Team. Progress achieved was reported to the Select Committee on Governance and Traditional Affairs.<sup>146</sup>

#### **3.4.4 Response from the NCOP**

The NCOP assessed the feedback presented by CoGTA. In addition, the NCOP also conducted an oversight visit during April 2014. The NCOP requested an independent assessment of the state of affairs in the municipality.<sup>147</sup> Also, the NCOP approved of the support plan put in place.

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<sup>146</sup> CoGTA Madibeng Presentation (2014) 10 of 11.

<sup>147</sup> Parliament of the Republic of South Africa Committee Assess Water and Sanitation Challenges in Madibeng [http://www.parliament.gov.za/live/content.php?Item\\_ID=6523](http://www.parliament.gov.za/live/content.php?Item_ID=6523).(Accessed 1 March 2014).

### 3.5 Conclusion

A few observations could be drawn from the case studies as presented in this chapter. The Minister and NCOP displayed sound understanding of the legal regulatory framework. For instance, the Minister was quick to respond to both notifications of intervention by the Western Cape and North West province. Also, the Minister complied with the legal injunctions in that he checked whether the province provided support to the municipality prior to the decision to intervene. Outcomes for the interventions were also assessed. Whether the intervention would be curative in nature was evaluated on a factual basis. The actions of both provinces and municipalities were taken into account to determine the appropriate legal processes to be followed. Specifically, it was considered whether the intervention was appropriate and whether the correct intervention steps were followed. For example, when the provinces intervened, the Minister would check that a directive was issued. The Minister also checked whether the intervention step implemented by the province was the least intrusive. Therefore, the Minister supported the decision of deploying administrative officials to act in the capacity of municipal manager in terms of a section 154 support plan rather than utilising intervention for this purpose.

The Minister demonstrated commitment to the intergovernmental principles in that he scheduled consultations with the provinces, municipalities, and local residents. In doing so, the Minister entrenched the cooperative governance model amongst the spheres of government and jointly accounted to the local residents on the state of affairs in the

municipality. Not only does this provide accountability to the residents, it also manifestly holds all of government responsible for the recovery of the municipality.

A poor regulatory framework for interventions certainly compromises the processes to be followed when determining to terminate an intervention. Whether this is the main reason for not using the veto power more in practise is uncertain. It is established; however, that in the absence of a sound regulatory framework the methodology and protocols used for the veto power was developed by the institutions on an ad hoc basis.

The data documented the context triggering the intervention and the responses by all stakeholders. Concerns by the Minister and NCOP for the limited use of the veto power in practise failed to emerge. While there are definite efforts to improve oversight of interventions, there seems no impetus to concretise outcomes for the veto power.

While positive observations are raised above concerning the utilisation of the veto power, it cannot be denied that it is too infrequently utilised as a legal tool to assist municipalities, which is worrisome since it is provided for in the Constitution. Notably of concern in this regard is that 33 interventions occurred from 2010 to 2014, yet only two cases were vetoed. The overview on section 139 interventions signifies clear problems in its implementation but still only two cases were vetoed. It does not seem plausible that all 33 interventions were not eligible for the Minister or the NCOP to exercise their veto powers. The next chapter argues that there is inconsistency in the application of the veto power, coupled with presenting attributing factors for this inconsistency in practise.

## Chapter 4: Why the veto power is failing

### 4.1 Introduction

In chapter 3 the context and procedure in which the veto power is exercised was discussed. The veto power when exercised has shown to have positive outcomes for municipalities and local residents. Notwithstanding sound constitutional safeguards provided by the veto power its efficacy lies in its implementation in practise.<sup>148</sup> As mentioned in the previous chapter, the veto power was only applied to two of the 33 interventions. The latter signals a cog in the intergovernmental accountability chain. Although the Constitutional design establishes a place and role for the veto power, at a conceptual level there appears little evidence to concretise this in practise. Arguably, the failure to concretise the veto power in practice may be attributed to shortcomings in current operations of the Minister and the NCOP.

This chapter argues that a degree of inconsistency exists in the application of the veto power. To illustrate this inconsistency, two case studies concerning interventions where the Minister and NCOP failed to apply the veto power where such action was actually warranted, will be discussed. These case studies comprise the North West Provincial Government's intervention into the Matlosana Local Municipality in April 2013, and the Limpopo Provincial Government's intervention into the Mogalakwena Local Municipality in June 2014. These case studies highlight the extent of the inconsistent application of

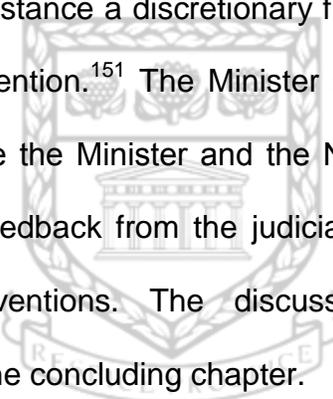
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<sup>148</sup> Department of Cooperative Governance *Intergovernmental Monitoring, Support and Intervention Bill Application of Sections 100 and 139 of the Constitution Practitioners' Roundtable dated 13 March 2014* (2014).

the veto power.<sup>149</sup> The attributing factors for this inconsistency are analysed, and which relate to three key factors, namely the poor regulatory framework; political contestation, and lack of accountability on the parts of the Minister and the NCOP.<sup>150</sup>



In brief, the discussion demonstrates how the Minister and NCOP inconsistently apply the veto power. With respect to the legal framework, despite no directive being issued and drastic intervention steps being implemented, the Minister and NCOP failed to institute corrective action against these interventions. Also, where the incorrect type of intervention was followed, for instance a discretionary financial intervention as opposed to a mandatory financial intervention.<sup>151</sup> The Minister and NCOP tacitly permitted the flawed process. Of concern are the Minister and the NCOP's inadequate response to constructive evidence-based feedback from the judiciary and the select committee of the NCOP on undue interventions. The discussion here is critical for the recommendations provided in the concluding chapter.



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<sup>149</sup> Department of Cooperative Governance *Intergovernmental Monitoring, Support and Intervention Bill Application of Sections 100 and 139 of the Constitution Practitioners' Roundtable dated 13 March 2014* (2014) Section B- Presentations on past interventions (hereinafter (IMSI Bill Roundtable).

<sup>150</sup> South African Local Government Association *Joint Workshop on the Application of Section 139 and the Need for Legislation* dated 2 November 2010 (2010 (hereinafter SALGA Joint Workshop).

<sup>151</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)15:-25 – 26.

## 4.2 Case study: North West Provincial Government intervention into the Matlosana Local Municipality in- April 2013

### 4.2.1 Context triggering intervention

Community unrest was prompted by political infighting within ANC factions.<sup>152</sup> Matters were exacerbated by the Council's inability to collect municipal debt and to enforce credit control policies. Also, the Municipality failed to honour its financial statutory obligations, including its non-payment of bulk electricity and bulk water accounts to Eskom and the Midvaal Water Board, respectively.<sup>153</sup>

The Provincial Government was aware of the poor financial management issues experienced by the Municipality prior to the political power change from the one ANC faction to the other.<sup>154</sup> The newly established ANC leadership expected the Provincial Government to provide the necessary support and assistance to the Municipality in terms of section 154 of the Constitution.<sup>155</sup> In this regard, the Municipality took initiative and communicated to the Provincial Government its willingness to meet in order to discuss its dire financial situation.<sup>156</sup> In doing so, the Municipality's new leadership most probably wanted to give effect to the recommendations as provided in the already

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<sup>152</sup> Maje O 'City of Matlosana lambasted by AG' *Taung Daily News* 9 October 2013.

<sup>153</sup> Department of Cooperative Governance and Traditional Affairs *Briefing to the Select Committee on Appropriations on the support provided by the department to municipalities under administration in terms of section 139 of the Constitution held 28 January 2014* (2014) 26. (hereinafter SC Appropriations Briefing).

<sup>154</sup> CoGTA SC Finance Briefing (2013) 22.

<sup>155</sup> CoGTA SC Finance Briefing (2013) 22.

<sup>156</sup> CoGTA SC Finance Briefing (2013) 22.

mentioned investigation in 2012.<sup>157</sup> Consequently, a meeting was scheduled for February 2013 between these two stakeholders.<sup>158</sup>

At the meeting of February 2013 the Provincial Government merely communicated to the Municipality that an Administrator must be appointed to assist, and that an intervention is required for the purpose of addressing problems within the municipal administration.<sup>159</sup> The appointment of the Administrator was premised on the Municipality's perceived incompetent financial team who lacked the necessary skills to address financial problems associated with the Municipality.<sup>160</sup>

The Provincial Government indicated its intention to intervene, a move that was immediately challenged by the Municipality. The latter argued that since the new leadership came into power it took measures to address shortcomings and while problems do persist, that the Municipality was acting in good faith. In amplification, the Municipality contended that the problems persisted prior to the new leadership, thus that it was not their (i.e. the new leadership) doing.

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<sup>157</sup> CoGTA SC Finance Briefing (2013) 22.

<sup>158</sup> CoGTA SC Finance Briefing (2013) 22.

<sup>159</sup> Parliament of the Republic of South Africa *Report of the Select Committee on Co-operative Governance and Traditional Affairs on the intervention in Matlosana Local Municipality dated 10 September 2013* (2013). (hereinafter Matlosana Report).

<sup>160</sup> Parliament Matlosana Report (2013) 4 of 8. .

#### 4.2.2 Action taken by the Provincial Government

On 19 March 2013, the provincial executive resolved to intervene in the Municipality in terms of section 139(1)(b) of the Constitution. The intervention was aimed at addressing administrative, governance and more specifically poor financial management in the Municipality.<sup>161</sup> The Provincial Government sought an Administrator and two financial experts to assume the functions of taking over the financial management of the municipality.

It should be highlighted that a directive was not issued by the provincial executive. In response, the Municipality felt aggrieved by the decision to intervene and took an executive committee (EXCO) decision refusing to accept the proposed intervention.<sup>162</sup>

The intervention outcomes were obscured since the intervention resulted in violent protest action and exorbitant costs for the appointment of an administrator and two financial experts with little to no benefit of the Municipality.<sup>163</sup> These officials were denied access to the municipal premises for the five month period applicable to the intervention. As a result, National Treasury performed the tasks these officials were supposed to perform.<sup>164</sup> Nevertheless, the Provincial Government still went ahead to recover the costs for these appointees from the Municipality.

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<sup>161</sup> Ss 41 and 139(1) of the 1996 Constitution.

<sup>162</sup> Parliament Matlosana Report (2013) 4 of 8. .

<sup>163</sup> Maje O 'City of Matlosana lambasted by AG' *Taung Daily News* 9 October 2013.

<sup>164</sup> Parliament Matlosana Report (2013) 5 of 8.

### 4.2.3 Response from the Minister

The Minister supported the Provincial Government's decision to intervene, noting that the intervention was necessary bearing in mind the serious financial mismanagement practices associated with the Municipality.<sup>165</sup> CoGTA's main focus was the outstanding debt owed by the Municipality to the amount of R980-million.<sup>166</sup> Despite serious procedural flaws on the part of the Provincial Government, the Minister proved to be unwilling to apply the veto power.<sup>167</sup>

There is no evidence to suggest that the Minister independently consulted the Municipality.<sup>168</sup> Also, there is no documentation requesting the Provincial Government to identify prior support initiatives to the Municipality. Alternatively, to consider cooperative governance arrangements that could be entered into to provide support through other means.<sup>169</sup> Furthermore, no evidence is available that confirms a CoGTA Ministerial Task Team was established, coupled with the fact that no mandate was established to ascertain the true state of affairs from the Municipality. It appears that the Minister did not feel empowered to set aside the intervention on the basis of the serious financial implications.<sup>170</sup> The distinction between section 139(1) and 139(5) is critical in this regard. If the Minister viewed this intervention to be a compulsory financial intervention, then the correct process the Provincial Government had to follow was in terms of section 139(5) of the Constitution. Therefore, if the incorrect type of

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<sup>165</sup> Parliament Matlosana Report (2013) 3 of 8.

<sup>166</sup> Parliament Matlosana Report (2013) 4 of 8.

<sup>167</sup> Parliament Matlosana Report (2013) 5 of 8.

<sup>168</sup> CoGTA SC Finance Briefing (2013) 22.

<sup>169</sup> CoGTA SC Appropriations Briefing (2014) 26.

<sup>170</sup> CoGTA SC Appropriations Briefing (2014) 26.

intervention was initiated, namely in terms of section 139(1), then the Minister should have vetoed the intervention for failing to comply with the applicable legal framework. However, a turn-around strategy was developed by NT to support the Municipality with its financial challenges. This strongly suggests that a section 139(5) intervention was required since NT leads in these interventions. The veto power does not apply and CoGTA must play a support role in overseeing the coordination of support efforts.<sup>171</sup>

#### **4.2.4 Response from the NCOP**

The NCOP took a decision to conduct an oversight visit on 21 August 2013 to establish whether the intervention must be approved or vetoed.<sup>172</sup> For this purposes, the NCOP sent a delegation to conduct an independent evaluation of the state of affairs at the Municipality.<sup>173</sup> More specifically, the main objectives of the oversight visit were to determine whether procedural requirements for the intervention were adhered to.

The NCOP's delegation had interactive engagements with internal and external stakeholders of the Municipality. Internal stakeholders included the Mayor; Speaker; Chief-Whip; Administrator, and representatives of Organised Labour. External stakeholders included representatives from the South African Local Government Association (SALGA); business; community forums, and non-governmental organisations NGOs). The main thrust of these discussions centred on procedures

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<sup>171</sup> CoGTA SC Appropriations Briefing (2014) 26.

<sup>172</sup> Parliament Matlosana Report 4 of 8.

<sup>173</sup> Parliament Matlosana Report 4-8 of 8.

followed by the Provincial Government.<sup>174</sup> Also, progress, if any, achieved by the Municipality was relayed to the NCOP delegation. The NCOP delegation was pleased with the progress made recommended in its Report to the NCOP to veto the intervention.<sup>175</sup> On 10 September 2013, the NCOP had to consider the recommendation from the delegation. The NCOP went ahead, stating that it will disregard the above-mentioned recommendation to veto the intervention. This response was based on two reasons; firstly, at the time the intervention period was close to expiring, thus not requiring the veto power to be exercised, and secondly, it was argued that the Report by the NCOP delegation was not appropriately tabled. No details were provided for this finding.



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<sup>174</sup> Parliament Matlosana Report 4 of 8.

<sup>175</sup> Parliament Matlosana Report 7 of 8.

### 4.3 Case study: Limpopo Provincial Government into the Mogalakwena Local Municipality disapproved by the Gauteng High Court in June 2014

#### 4.3.1 Context triggering the intervention

The Municipality was deemed politically unstable. The local government elections held in 2011 resulted in the ANC securing a majority of 52 seats, with the DA securing six; the COPE two, and the APC; AZAPO 1, and FF+ each one.<sup>176</sup> The state of affairs in the Municipality was problematic because violent protests broke out, which ultimately led to the former Mayor, i.e. Tlhalefi Mashamaite being shot.<sup>177</sup> Governance challenges in the Municipality related to two concerns. Irregular financial expenditure by the former Mayor created widespread unhappiness.<sup>178</sup> For instance, a KPMG investigation uncovered that from 1 July to 30 October 2013, the Mayoral Discretionary fund was depleted from an initial balance of R1 784 311 to a mere R192 352,20.<sup>179</sup> The money was used primarily for political events, not genuine mayoral outreach events.<sup>180</sup> The former Mayor organised these events to promote his personal agenda, and ultimately his own popularity.<sup>181</sup> Ironically, the previous audit findings for the Municipality had an excellent performance over the financial years 2009–2010, 2010–2011 and 2011–2012. In addition, a ratings agency rated the municipality as the best in Limpopo from 2007 to 2011.

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<sup>176</sup> See Mogalakwena Local Municipality Website: available at [http://en.wikipedia.org/wiki/Mogalakwena\\_Local\\_Municipality](http://en.wikipedia.org/wiki/Mogalakwena_Local_Municipality) (accessed 1 March 2014)

<sup>177</sup> See Democratic Alliance Website: available at <http://www.dampl.co.za/2014/09/anc-responsible-for-mogalakwenas-chaos/> (accessed 1 March 2014)

<sup>178</sup> *Mogalakwena Case* at para 6.

<sup>179</sup> See Democratic Alliance Website: available at <http://www.dampl.co.za/2014/09/anc-responsible-for-mogalakwenas-chaos/> (accessed 1 March 2014)

<sup>180</sup> See Democratic Alliance Website available at <http://www.dampl.co.za/2014/09/anc-responsible-for-mogalakwenas-chaos/> (accessed 1 March 2014)

<sup>181</sup> *Mogalakwena Case* at paras 5 and 6.

Secondly, political instability between the ANC factions led by the former Mayor on the one hand, and Mr William Mabuella on the other resulted in much contestation.<sup>182</sup> When the Mabuella-faction gained power in the Municipality, it sought to take action as recommended in the KPMG investigation. As a result, the Municipality resolved to take disciplinary action against council members implicated in the irregular expenditure.<sup>183</sup> The Municipality wrote to the Provincial Government on 28 February 2014, requesting the MEC to remove the former Mayor and implicated councillors.<sup>184</sup> On 10 March 2014, the MEC replied, advising the Municipality to apply the rules of natural justice and hear those in question in relation to the complaints against them.

By letter dated 17 March 2014, the Municipality confirmed to the MEC that it would follow the MEC's instruction.<sup>185</sup> Upon receipt of the Municipality's letter, the Provincial Government neglected to communicate to the Municipality its intention to intervene.<sup>186</sup> This decision was taken without providing any support efforts to the Municipality in terms of section 154 of the Constitution.<sup>187</sup> It appeared that the intervention was underscored by political tensions within the different ANC factions.<sup>188</sup>

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<sup>182</sup> *Mogalakwena Case* at paras 8 and 9.

<sup>183</sup> *Mogalakwena Case* at para 10.

<sup>184</sup> Parliament of the Republic of South Africa *Order Paper: National Council of Provinces No 17-2014 dated 16 September 2014* (2014) 91. (hereinafter ATC No17).

<sup>185</sup> *Mogalakwena Case* at para 13.

<sup>186</sup> *Mogalakwena Case* at para 13.

<sup>187</sup> Parliament ATC No 17 (2014) 91.

<sup>188</sup> *Mogalakwena Case* at paras 26 and 62.

### 4.3.2 Action taken by the Provincial Government

Keeping the above-mentioned in mind, tensions arose between the Provincial Government and the Municipality.<sup>189</sup> On 17 March 2014, the provincial executive resolved to intervene in the Municipality. The grounds for the intervention included non-fulfilment of executive obligations relating to (i) financial management; (ii) implementation and review of the IDP and Budget; (iii) development of policy and initiation of bylaws, and (v) coordination of the executive committee and municipal council. The Provincial Government appointed an Administrator to fulfil these duties.<sup>190</sup> However, the executive obligations were vague and there seemed to be no substantial basis for the intervention.<sup>191</sup>

In response, the Municipality argued that the failure to issue a directive in the present circumstances made the intervention legally unsound. On this basis it requested the High Court to stay the intervention by providing an interdict against the actions of the provincial executive.<sup>192</sup> The issue around the directive became the central question for determination in the court proceedings.<sup>193</sup> The Court, citing Steytler and De Visser, confirmed that a failure to issue a directive deprives the Municipality in question of the opportunity to remedy the shortcomings in order to avoid an intervention.<sup>194</sup>

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<sup>189</sup> *Mogalakwena Case* at para 15.

<sup>190</sup> *Mogalakwena Case* at para 31.

<sup>191</sup> *Mogalakwena Case* at para 33.

<sup>192</sup> *Mogalakwena Case* at para 2.

<sup>193</sup> *Mogalakwena Case* at paras 24 and 25.

<sup>194</sup> *Mogalakwena Case* at paras 24 and 25.

Moreover, the Court found the action by the Provincial Government in violation of the prescripts for intergovernmental principles. This finding was specifically linked to the MEC writing to the municipal manager to divest him of all his powers.<sup>195</sup> This action was rather punitive and against the cooperative governance principles.<sup>196</sup> Moreover, the Court found no justification for the intervention.<sup>197</sup> Based on this argument, the Court viewed the intervention as inappropriate, and rather as a tool to settle political scores.<sup>198</sup>

The province sent notification of the intervention to both the Minister and NCOP before the court case. Yet both stakeholders failed to act immediately upon receipt of the section 139(1)(b) notice.<sup>199</sup> In addition, the Minister and the NCOP were cited as third and fourth respondents in the urgent application brought by the Municipality on 27 May 2014 to the Gauteng High Court to prevent the Provincial Government from intruding into its affairs. However, no response or representation was forthcoming from either the Minister and/ or the NCOP.

#### **4.3.3 Response from the Minister**

Based on the literature reviewed for the purposes of this study, it could be argued that no engagements with relevant stakeholders occurred. However, a meeting was requested by the former Minister, i.e. Minister Baloyi on 09 April 2014.<sup>200</sup> The purpose

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<sup>195</sup> *Mogalakwena Case* at para 42.

<sup>196</sup> *Mogalakwena Case* at para 26.

<sup>197</sup> *Mogalakwena Case* at para 26.

<sup>198</sup> *Mogalakwena Case* at para 46.

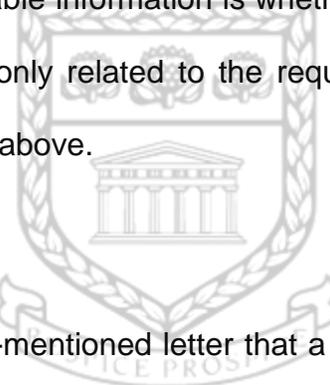
<sup>199</sup> *Mogalakwena Case* at paras 24 and 25.

<sup>200</sup> Ministry Cooperative Governance and Traditional Affairs Republic of South Africa *Letter to the MEC Human Settlements and Traditional Affairs Limpopo Provincial Government dated 09 April 2014 (Reference 3/6/6/5/5) (2014)*.

of the meeting was to discuss the following issues with the Provincial Government, namely:

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- (i) What section 154 support initiatives were provided;
  - (ii) The reasons for the decision to divest the municipal manager of his authority;
  - (iii) What specific executive obligations were not met, and;
  - (iv) The grounds on which the municipal manager could be held accountable for executive failures.<sup>201</sup>

What is not clear from the available information is whether the meeting did in fact occur. The correspondence available only related to the requesting for the meeting and the points for discussion articulated above.



It would appear from the above-mentioned letter that a clear mandate was established, yet no reconnaissance is documented. On 4 September 2014, a proposal was made to the Provincial Government to establish an Inter-Departmental Task Team comprising officials from CoGTA; National Treasury; the South African Police Service (SAPS); Limpopo Premier's Office, and the Limpopo provincial CoGTA.<sup>202</sup> The Task Team was expected to deal with all pertinent issues in an attempt to stabilise the Municipality.<sup>203</sup> A

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<sup>201</sup> Ministry Cooperative Governance and Traditional Affairs Republic of South Africa *Letter to the MEC Human Settlements and Traditional Affairs Limpopo Provincial Government dated 09 April 2014 (Reference 3/6/6/5/5) (2014).*

<sup>202</sup> Ministry Cooperative Governance and Traditional Affairs Republic of South Africa *Letter to the MEC Human Settlements and Traditional Affairs Limpopo Provincial Government dated March 2014 (No Reference).*

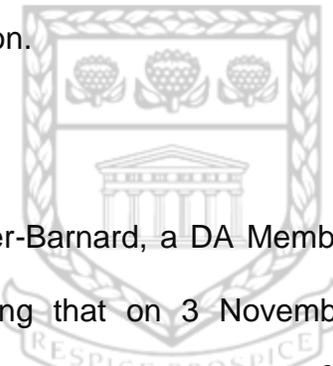
<sup>203</sup> Ministry Cooperative Governance and Traditional Affairs Republic of South Africa *Letter to the MEC Human Settlements and Traditional Affairs Limpopo Provincial Government dated March 2014 (No Reference).*

TOR was to be developed to guide this process. However, there is no information available that details and/ or confirms the outcomes of this process. For instance, no recovery plan is available and as at 16 September 2014, the Minister failed to veto the intervention.



#### 4.3.4 Response from the NCOP

There is no information available to suggest that the NCOP consulted the Government and/ or the Municipality, particularly since it was cited in the application to court. However, on 16 September 2014, the NCOP requested the Minister to brief it on the support that will be provided to the Municipality.<sup>204</sup> In similar vein to the Minister, the NCOP did not veto the intervention.



On 4 November 2014, Ms Kholer-Barnard, a DA Member of Parliament (MP), issued a statement in Parliament reporting that on 3 November 2014 police actions at the Mogalakwena Municipality amounted to a '*coup d'etat*'.<sup>205</sup> She noted that the SAPS not only seized physical control of the municipal building, without the necessary legal processes being followed, but also exerted violent action against 'security offices, staff and municipal councillors' in that police members reportedly attacked and pointed firearms at them.<sup>206</sup> Moreover, SAPS 'allegedly arrested the municipal manager, and forced the Council to swear in nine new Proportional Representative councillors'.<sup>207</sup>

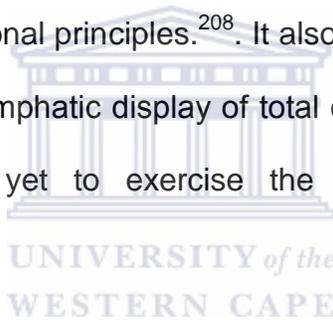
<sup>204</sup> Vecchiatto P 'DA claims police coup at Mogalakwena' *Business Day Live* 04 November 2014.

<sup>205</sup> Vecchiatto P 'DA claims police coup at Mogalakwena' *Business Day Live* 04 November 2014.

<sup>206</sup> Vecchiatto P 'DA claims police coup at Mogalakwena' *Business Day Live* 04 November 2014.

<sup>207</sup> Vecchiatto P 'DA claims police coup at Mogalakwena' *Business Day Live* 04 November 2014.

In response, the High Court pointed out that the intervention was not appropriate and was not in keeping with the constitutional principles.<sup>208</sup> It also alluded to the veto power being ineffective in practise.<sup>209</sup> In an emphatic display of total disregard for the Court's finding, the Minister and NCOP are yet to exercise the veto power to terminate the intervention.<sup>210</sup>



#### 4.4 Poor regulatory framework

Chapter 2 emphasised the legal and policy frameworks for interventions.<sup>211</sup> Amongst its shortcomings, as cited by key stakeholders is inconsistency in interpretation and application of the law; irregular procedural processes followed, and unclear outcomes achieved.<sup>212</sup> Now, since the veto power is inextricably linked to interventions, a rational conclusion could be drawn that shortcomings in the legal framework will impact the veto power. Accordingly, observations in this section is constructed around the legal uncertainty and contested terrain of the veto power; and undue weighting of the Minister and NCOP to condone interventions that meet substantive thresholds but fail to comply with legal and procedural requirements.

The Minister and NCOP have failed to veto several interventions that are undertaken by means of inappropriate and/ or irregular processes.<sup>213</sup> Important to bear in mind though,

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<sup>208</sup> *Mogalakwena Case* at para 26.

<sup>209</sup> *Mogalakwena Case* at para 26.

<sup>210</sup> Vecchiatto P 'DA claims police coup at Mogalakwena' *Business Day Live* 04 November 2014.

<sup>211</sup> CoGTA IMSI Bill Roundtable (2014). ) Section B-4.

<sup>212</sup> Powell D *et al* (2014) 3.

<sup>213</sup> Department: Provincial and Local Government (DPLG) 'Intervening in Provinces and Municipalities: Guidelines for the application of sections 100 and 139 of the constitution' (2010) 24. (hereinafter Guidelines for sections 100 and 139 interventions).

is that the Minister and NCOP have to operate in a milieu of legal uncertainty.<sup>214</sup> Throughout their interactions, fairness to both local and provincial governments must be maintained.<sup>215</sup> In doing so, they must continue to, at all times, operate within their constitutionally allocated powers.<sup>216</sup> This can be difficult at times.<sup>217</sup> On the one hand, CoGTA is challenged by provinces not to encroach on provincial powers of municipal monitoring and oversight.<sup>218</sup> On the other hand, the Department of Public Services and Administration (DPSA) has recently challenged CoGTA on oversight of provinces claiming it falls within the DPSA's mandate.<sup>219</sup> The latter became contentious and amounted to a 'turf battle' between the two departments.<sup>220</sup> In addition, DPSA developed a separate Bill to CoGTA's Intergovernmental, Monitoring, Support, and Interventions Bill.<sup>221</sup> This demonstrates high levels of legal complexity and the extent of the disputed terrain in which the Minister and its department operates.<sup>222</sup> It must be added that this muddled terrain is not new with respect to interventions.<sup>223</sup>

Compounding an already strained regulatory environment, as was discussed in chapter 2, no prescribed processes are available to execute the veto power.<sup>224</sup> Further to this, no sanctions are prescribed for non-compliance with reporting requirements.<sup>225</sup> This seriously compromises the Minister and NCOP and could possibly place them at a

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<sup>214</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24

<sup>215</sup> DPLG Guidelines for sections 100 and 139 interventions (2010) 24.

<sup>216</sup> De Visser J A (1999) 22-28.

<sup>217</sup> CoGTA IMSI Bill Roundtable (2014) Section B-2; 3 and 4.

<sup>218</sup> CoGTA Close Out Reports (2012).

<sup>219</sup> Department of Cooperative and Governance and Traditional Affairs *Presentation to Institute of Municipal Finance Officers (IMFO) Conference held on 30 September 2013* (2013). 11 of 23. (hereinafter IMFO Conference)

<sup>220</sup> CoGTA IMFO Conference (2013) 11 of 23.

<sup>221</sup> Provincial Monitoring, Support and Intervention Bill [B- 2013], (reference 090313ce).

<sup>222</sup> CoGTA IMSI Bill Roundtable (2014) Section B-2; 3 and 4.

<sup>223</sup> Steytler N (2004) Part 2: 5-12.

<sup>224</sup> DPLG Guidelines for sections 100 and 139 interventions (2010) 24.

<sup>225</sup> DPLG Guidelines for sections 100 and 139 interventions (2010) 24.

disadvantage in addressing multiple issues to be considered when they contemplate to exercise their veto power.<sup>226</sup> Although, an argument could be made that failure to comply with the reporting requirements, is of little consequence.<sup>227</sup> This could be true if one is cognisant of the fact that interventions are ‘malleable in nature’ and change rapidly over short periods.<sup>228</sup> However, this reasoning is flawed. The focus here is not so much about the value-add of receiving those reports and its relevance as opposed to how the Minister and NCOP must respond to specific interventions.<sup>229</sup> The significance here is to inculcate a culture of IGR that underscores provinces’ commitment to the co-operative governance arrangements.<sup>230</sup> Simply put, this process should not be viewed as a discretionary obligation.<sup>231</sup> The submission of reports indicates willingness by provinces to keep the Minister and NCOP abreast of developments within its jurisdiction and fosters greater transparency.<sup>232</sup> The Minister and NCOP can thus interrogate fully underlying root causes for each scenario at a municipality.<sup>233</sup>

Despite the above-mentioned challenges, reviews undertaken on the NCOP strongly confirm the institutional astuteness in executing its operations.<sup>234</sup> In contrast, no independent study was conducted on the performance of the Minister and his department, i.e. CoGTA. However, the available information shows sound legal

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<sup>226</sup> De Visser J (1999) 8- 13 and 23-28.

<sup>227</sup> Murray C & Hoffman –Wanderrerr (2007) 23.

<sup>228</sup> CoGTA Close Out Reports (2012).

<sup>229</sup> De Visser J (1999) 8- 13 and 23-28.

<sup>230</sup> D Powell ‘Intergovernmental Relations in South Africa’ in *A Global Dialogue on Federalism* (2010) (forthcoming, on file with the author).

<sup>231</sup> DPLG Guidelines for sections 100 and 139 interventions (2010) 24.24.

<sup>232</sup> N Steytler & J Mettler ‘Federal arrangements as a peacemaking device during South Africa’s Transition to democracy’ in *Publius: The Journal of Federalism* 31:4.

<sup>233</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>234</sup> Mugoya BC *Evaluation and impact of the National Council of Provinces* (2010).

understanding and appreciation of its constitutional duty towards interventions.<sup>235</sup> The latter is also demonstrated in the IMSI Bill.<sup>236</sup> The bottom line is that the methodology used by the Minister and NCOP meets legal scrutiny.<sup>237</sup> While the methodology was discussed in chapter 2 and its application presented in chapter 3, the question in this chapter is why interventions are not terminated for failing to meet procedural requirements? The answer seems to lie in the fact that in most cases the actual circumstances of the municipality warrants intervention.<sup>238</sup> Alternatively put, where the substantive grounds are met for an intervention, the Minister and NCOP are apprehensive to veto.<sup>239</sup> This is not a new phenomenon, especially if one keeps in mind that the NCOP has previously displayed lenience towards provinces failing to follow the correct legal process due to a lack of understanding of the legal framework.<sup>240</sup>

Also, provinces continue to bemoan the procedural conundrum for interventions.<sup>241</sup> For instance, the Minister and NCOP are slow to veto procedurally incorrect interventions because according to CoGTA, one third of the country's 283 municipalities are in a state of distress and require serious interventions.<sup>242</sup> The NCOP also found in certain

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<sup>235</sup> CoGTA SC Finance Briefing (2014).

<sup>236</sup> IMSI Bill (2013).

<sup>237</sup> Murray C & Hoffman –Wanderrerr Y '(2007) 29 -30.

<sup>238</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24 .

<sup>239</sup> Murray C & Hoffman –Wanderrerr Y '(2007) 22.

<sup>240</sup> Murray C & Hoffman –Wanderrerr Y '(2007) 22.

<sup>241</sup> CoGTA Close Out Reports (2012).

<sup>242</sup> President Zuma J Opening Address at The Presidential Local Government Summit held on 18 September 2014 available at

<http://www.polity.org.za/article/sa-jacob-zuma-address-by-president-of-the-republic-of-south-africa-on-the-occasion-of-the-presidential-local-government-summmit-gallagher-convention-centre-midrand-18092014-2014-09-18> (accessed 1 November 2014).

instances municipal functionality is so poor it actually requires intervention.<sup>243</sup> Yet this does not excuse or condone failure of the Minister and NCOP to utilise the veto power.<sup>244</sup> It is not for the Minister and NCOP to circumscribe powers conferred to it through the Constitution, albeit not expressly defined powers.<sup>245</sup> Rather, it is for the Minister and NCOP to progressively realise their powers and functions diligently as well as constitutionally.<sup>246</sup> The purpose of the veto power is not to correct interventions, but to serve as a safeguard against improper interventions.<sup>247</sup> Therefore, the veto power should serve to protect the institutional integrity of municipalities.<sup>248</sup> Against this background, it is important to consider that the extension of the veto power was advocated for during the Second Amendment drafting process to strengthen the powers of the Minister and NCOP to terminate improper interventions for all types of interventions.<sup>249</sup> The rationale for this was to make interventions an exception rather than the norm.<sup>250</sup> In contrast, the veto power has become the exception.<sup>251</sup>

The poor utilisation of the veto power also undervalues the central IGR role expected of the Minister and the NCOP.<sup>252</sup> Particularly so since SALGA<sup>253</sup>; CoGTA<sup>254</sup> and NCOP<sup>255</sup>

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<sup>243</sup> Parliament of the Republic of South Africa ATC131017: *Draft Report of the Portfolio Committee on Cooperative Governance and Traditional Affairs on the oversight visits to North West and Eastern Cape Provinces from 21 to 25 July and 28 July to 1 August 2013- Dated 17 September 2013* (2013).

<sup>244</sup> De Visser J (1999) 8- 13 and 23-28.

<sup>245</sup> De Visser J (1999) 25- 28.

<sup>246</sup> Steytler N (2004) Part 2: 5-12.

<sup>247</sup> De Visser J (1999) 25- 28.

<sup>248</sup> Steytler N (2004) Part 2: 5-12.

<sup>249</sup> Steytler N (2004) Part 2: 5-12.

<sup>250</sup> Steytler N (2004) Part 2: 5-12.

<sup>251</sup> See discussion in chapter three of this paper: *The use of veto power in practice* 28-49.

<sup>252</sup> Murray, C. and Simeon, R. 1999. "From Paper to Practice: The National Council of Provinces after its first year. *SA Public Law* 14, no. 1: 96 – 141 and C Murray 'The Constitutional context of Intergovernmental relations' in Calland & Nijzink 66

<sup>253</sup> SALGA Joint Workshop (2010).

<sup>254</sup> Department of Cooperative and Governance and Traditional Affairs *Back to Basics – Serving Our Communities Better*(2014) available at

confirm that intervention outcomes are often not curative in nature and seldom have sustainable outcomes.<sup>256</sup> Conspicuously, interventions are inconsistently applied and highly politicised.<sup>257</sup> Crucial to note is that where interventions were terminated, positive outcomes were achieved through identification of integrated support efforts by different stakeholders across all spheres of government.<sup>258</sup> If the veto power had perhaps been used frequently it may have benefited much more municipalities placed under improper interventions

#### 4.5 Political contestation

Interventions are known to involve 'settling of political scores', even when valid grounds are used, and for this reason, intervention is often underpinned by political contestation.<sup>259</sup> Likewise, the veto power is also embedded in a 'culture of impunity' where 'political allegiance' determines responses from provincial and national governments.<sup>260</sup> Therefore, the political and administrative interface becomes difficult to distinguish.<sup>261</sup> The Multi-Level Government Initiative Audit Barometer findings demonstrate and confirm cases of inconsistency by the national government in determining when to intervene<sup>262</sup>. For instance, '*when some municipalities obtain a disclaimer they immediately intervene yet other municipalities with repeated disclaimers*

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<http://www.cogta.gov.za/summit2014/>. (accessed 1 November 2014).(hereinafter Going Back to Basics).

<sup>255</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>256</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

<sup>257</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>258</sup> See discussion in chapter three of this paper: *The use of veto power in practice* 28-49.

<sup>259</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

<sup>260</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>261</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>262</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

are not intervened'.<sup>263</sup> No rational explanation makes sense for this disparate treatment<sup>264</sup> According to Lund T:

This fuels perceptions inside and outside the ANC about interventions not being as much about saving the municipality and its surrounding economy from financial ruin as they are about purging a politician who is not in a particular faction'.<sup>265</sup>

The Mogalakwene case study is testimony to the haphazard approach by the Minister and the NCOP. Here, punitive action was exerted on a municipality for maladministration and corruption caused by the former leadership of the municipality, which at the time of the intervention was in the process of being ousted.<sup>266</sup> One would assume that proper IGR require the Minister, for the very least, to give the newly established leadership time to effect changes deemed necessary by them.<sup>267</sup> Even more appropriately, the Minister should have opted for a cooperative approach to IGR to be followed by establishing a support plan in terms of section 154 of the Constitution.<sup>268</sup> Rather, the Minister was insistent on seeing the intervention through.<sup>269</sup>

The above-mentioned insistence gives rise to the question why the Minister supported the intervention?<sup>270</sup> More conspicuous is the ANC's failure to take action against Mashamaite despite recommendations for criminal charges to be laid against him' from the KPMG Report.<sup>271</sup>

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<sup>263</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>264</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>265</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>266</sup> CoGTA IMSI Bill Roundtable (2014) Section B-2; 3 and 4.

<sup>267</sup> CoGTA IMSI Bill Roundtable (2014) Section B-2; 3 and 4.

<sup>268</sup> CoGTA IMFO Conference (2013). 11 of 23.

<sup>269</sup> See discussion in chapter three of this paper: *The use of veto power in practice* 28-49.

<sup>270</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>271</sup> Tau P Mogalakwena councillors lock horns in battle for survival *City Press* 6 November 2014.

In fact, there were 'reports of an apparent plot by the ANC heavyweights in the province to reinstate Mashamaite as mayor.'<sup>272</sup> According to Mogalakwena, Mayor William Mabuela, who is one of the 22 councillors being expelled, 'The ANC teaches us that our number one enemy is corruption yet here we are being victimised for taking a strong stand on corruption while the corrupt are being protected.'<sup>273</sup> On this point it is useful to note [r]eluctance on the part of the ANC to deal with corruption in its ranks is indeed one of the factors helping to undermine the legitimacy of local government.<sup>274</sup> Also, there may be an element of politicking surfacing since dominant councillors within the ANC are often not dealt with.<sup>275</sup> The underlying reason for this approach appears to be the ability of these councillors to draw votes during elections, and more significantly, influence the appointment of members to provincial and national party structures.<sup>276</sup>

The High Court's views on this intervention are useful.<sup>277</sup> The Court demonstrated apprehension towards the veto power as a mechanism to really protect the Municipality from political stratagems exerted by the Provincial Government.<sup>278</sup> It diverted dealing with the relevance of the veto power by arguing that the limited timeframes available to the Minister and NCOP made it impracticable for the veto power to be applied given the

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<sup>272</sup> Tau P Mogalakwena councillors lock horns in battle for survival *City Press* 6 November 2014.

<sup>273</sup> Tau P Mogalakwena councillors lock horns in battle for survival *City Press* 6 November 2014.

<sup>274</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

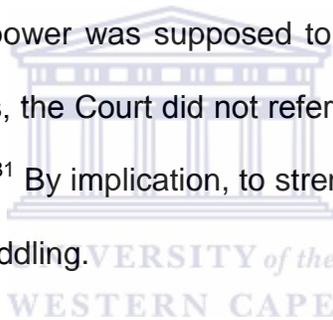
<sup>275</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>276</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>277</sup> See discussion in chapter three of this paper: *The use of veto power in practice* 28-49.

<sup>278</sup> *Mogalakwena Case at para 26.*

pending litigation.<sup>279</sup> Upon further scrutiny, it becomes apparent that the Court failed to identify what exactly the veto power was supposed to do, and how it should serve to protect the Municipality.<sup>280</sup> Thus, the Court did not refer to the Minister's IGR role that is expected from the veto power.<sup>281</sup> By implication, to strengthen the veto power it must be viewed as free from political meddling.



Directing the discussion now to the NCOP, positive strides made by the NCOP in dealing with interventions must be acknowledged.<sup>282</sup> Despite external political influences continuing to threaten its very existence and/ or diminishing its powers, the NCOP was efficient in executing its mandate. Yet, one cannot assume that the NCOP is near to achieving its full potential.<sup>283</sup> Also, the NCOP has not been decisive in its utilisation of the veto power, as discussed earlier in particularly the Molatsane case.<sup>284</sup> Despite the recommendation by the select committee not to support the intervention, the NCOP refused to endorse the recommendation. Another case in point is the disparate response to the Madibeng and Swellendam interventions. In the former case, the NCPO quickly conducted an independent evaluation of the municipal state of affairs, but failed to follow suit with respect to Swellendam. What seems most problematic is the serious threat to municipal autonomy in Mogalakwene, which has not received a rapid

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<sup>279</sup> *Mogalakwena Case at paras 24-26*

<sup>280</sup> *Mogalakwena Case at para 24.*

<sup>281</sup> *Mogalakwena Case at para 24.*

<sup>282</sup> Murray C & Simeon R 'From Paper to Practice: The National Council of Provinces after its first year' (1999) *SA Public Law* 14; Murray C & Hoffman –Wanderrerr Y 'The National Council of Provinces and Provincial Intervention in Local Government' (2007) *STELL LR*; and Murray, Bezruki & Ferrel et al *Interim Report- Speeding Transformation: Monitoring and Oversight in the NCOP in Report to the NCOP* (July 2004) 7 – 16.

<sup>283</sup> *Mugoya BC Evaluation and impact of the National Council of Provinces* (2010) 1 -2.

<sup>284</sup> See discussion in chapter three of this paper: *The use of veto power in practice* 28-49

response from the Minister, and the NCOP has failed to hold both the Provincial Government and the Minister accountable. No curative measures have been implemented to address serious challenges confronting the Municipality.

Mugoyo suggests that the NCOP's inconsistency could be attributed to what could be phrase partisan politics. In 2010, Mugoyo, conducted a study on the impact of the NCOP, and found it to be subjected to deeply rooted practices of partisan politics:<sup>285</sup>

[T]he political dominance of the ANC ensures that most important decisions are made through party structures and inter-sphere executive structures, thus undermining or bypassing the NCOP... . This current political environment is further reinforced by strict party discipline which ensures that party members in the NCOP adhere to party policies as opposed to any independent views which may be contrary to party positions on issues'.<sup>286</sup>

Observations made about the NCOP certainly points to centrality of political factors in shaping its decisions and actions.<sup>287</sup> Whether challenges confronting the veto power within the NCOP can be overcome remains difficult to answer. In addition, Murray and Simeon argue that the NCOP is not only strained by political influences, but rather and more significantly is confronted with systemic problems related to its functioning.<sup>288</sup> They attribute these problems to the ruling party's antagonism for federalist's principles, which the NCOP must fulfil keeping in mind the country's multi-level government design.<sup>289</sup> These authors posit certain thoughts as to what is required to overcome the systemic problems of the NCOP. This is significant in that it will ultimately add to the recommendations in the concluding chapter. Murray and Simeon argue that once a new

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<sup>285</sup> Mugoya BC (2010) 3.

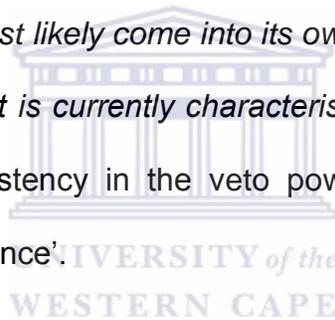
<sup>286</sup> Mugoya BC (2010) 3.

<sup>287</sup> Mugoya BC (2010) 1-4.

<sup>288</sup> Murray C & Simeon R Reforming multi-level government in South Africa (2008): 14-23.

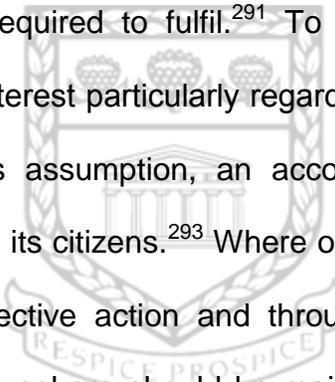
<sup>289</sup> Murray C & Simeon R (2008): 23-39.

political culture is embedded in the multi-level governance system, 'the effectiveness of the design of the NCOP will most likely come into its own right when competitive politics replaces the political space that is currently characterised by 'one party dominance'.<sup>290</sup> Arguably, the NCOP's inconsistency in the veto power remains to be linked to its adherence to 'one party dominance'.



#### 4.6 Lack of accountability

The veto power was designed within the context of the intergovernmental role that both the Minister and NCOP are required to fulfil.<sup>291</sup> To ensure from an executive and legislative arm, citizens' best interest particularly regarding service delivery is protected at all times.<sup>292</sup> Based on this assumption, an accountability chain is established, coherently linking all spheres to its citizens.<sup>293</sup> Where one sphere fails, the other should ideally step in to ensure corrective action and throughout this process institutional autonomy and integrity of each sphere should be maintained.<sup>294</sup> However, in practise multi-level governance is not working too well.<sup>295</sup> Despite federal principles contained in



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<sup>290</sup> Murray C & Simeon R (2008) :23-39.

<sup>291</sup> Murray C & Simeon R 'South Africa's financial constitution: Towards better delivery' (2000)15 *SA Public Law* 477.

<sup>292</sup> Murray C & Simeon R 'Promises Unmet- Multi-level Government in South Africa' in Saxena R (ed) *Varieties of Federal Governance* (2010) 232.

<sup>293</sup> Steytler N 'Republic of South Africa' in Kincaid J & Tarr G *A Constitutional Origins, Structure and Change in Federal Countries: A Global Dialogue on Federalism vol. 1* (2005) 317.

<sup>294</sup> See Simeon R & Murray C 'Multi-sphere Government in South Africa: An interim assessment' 31 *Publis: Journal for Federalism* (2001) 65.

<sup>295</sup> Powell D Imperfect transition – local government reform in South Africa 1994-2012.

the Constitution, key players (i.e. the Minister and the NCOP) are not capacitated within this system to adequately give effect to their roles.<sup>296</sup>

The veto power is modelled around federal concepts of institutional autonomy for multi-level governments where constituency play a central role.<sup>297</sup> Consequently, accountability to citizens demands that the Minister and NCOP not only terminate improper interventions, but also establish sustainable mechanisms for integrated support from all of government to address these shortcomings. Arguably the veto power is failing in this regard. Moreover, citizens are disgruntled about poor service delivery, which has led to 'social tensions' and a steady increase in violent protests.<sup>298</sup>

The Minister and NCOP are failing to practice their required oversight in holding government to account for improper interventions. Developmental local government requires that all spheres significantly contribute to attaining the ideal state presented in the WPLG.<sup>299</sup> Admittedly, the reality for local government is far from the developmental state.<sup>300</sup> Attributing factors include misguided policies; conflicting policy priorities; high levels of corruption and mismanagement; lack of capacity, and competency as well as increasingly violent protests.<sup>301</sup> Blaming this state of affairs on local government alone is

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<sup>296</sup> Kotze H 'Federalism: the state of the debate in South Africa' available at <http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=11628> (accessed 10 February 2014).

<sup>297</sup> Steytler N (2005) 317.

<sup>298</sup> Jain H *Community protests in South Africa: Trends, analysis and explanations* <http://www.ldphs.org.za>. (Accessed 8 March 2014).

<sup>299</sup> WPLG (1998):38-46.

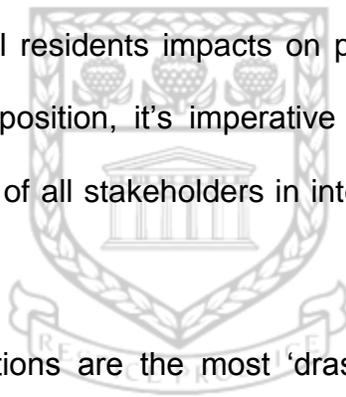
<sup>300</sup> The Harold Wolpe Memorial Trust *Colloquium on The State of Local Government in South Africa held on 3 -4 March 2011* (2011) 28.

<sup>301</sup> Powell D Imperfect transition – local government reform in South Africa 1994-2012.

inappropriate.<sup>302</sup> For the most part, factors mentioned above equally apply to other spheres.<sup>303</sup> Chief failures relate to support rendered, or not, by national and provincial governments, which is uncoordinated; inconsistent; fragmented, and predominantly lacking.<sup>304</sup>



Drawing on analysis from interventions, it becomes clear that the local government configuration is set to fail.<sup>305</sup> Apart from associated factors of poor legal regulatory framework and political dynamics, the veto power is not adequately protecting the autonomy and integrity of local government.<sup>306</sup> Importantly, the direct role local government plays with its local residents impacts on perceptions of government as a whole.<sup>307</sup> Considering this proposition, it's imperative for the Minister and NCOP to vigilantly expose shortcomings of all stakeholders in interventions and accordingly hold them to account.<sup>308</sup>



Bearing in mind that interventions are the most 'drastic step' in efforts to maintain service delivery standards, one would assume that dialogue with citizens must be prioritised.<sup>309</sup> While consultations do sporadically transpire with relevant stakeholders, and most importantly local communities, it is could be argued that current efforts by the Minister appear to fall short of the required standards.<sup>310</sup> The South African Constitution

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<sup>302</sup> Powell D *et al* (2014)3.

<sup>303</sup> CoGTA Going Back to Basics (2014) 1-8.

<sup>304</sup> Mathekga R 'Local government needs 'sufficient' support' *SABC* 14 January 2014.

<sup>305</sup> Powell D Imperfect transition – local government reform in South Africa 1994-2012.

<sup>306</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

<sup>307</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

<sup>308</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

<sup>309</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>310</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

stipulates in section 195 (1e), “the public must be encouraged to participate in policy-making” and the general principle is that this is facilitated through public hearings. Previously, structured engagement through the ‘imbizo system’ established dialogue with citizens. Ministers and senior officials from respective departments would visit a municipality for a week and ‘reconnect with local communities and collect data’.<sup>311</sup> Given the lack of consistent monitoring information available, this will also stand the Minister in good stead as to know what is happening at a regional, and most importantly, local level.<sup>312</sup>

In contrast, the NCOP is emerging as an entity that holds provincial governments to account and do question national government on support provided to municipalities.<sup>313</sup> In addition, the NCOP displays ardent aspiration when conducting oversight visits and consulting stakeholders and citizens.<sup>314</sup> However, the approach by the NCOP has been critiqued and found to be usurping the role of provincial legislatures.<sup>315</sup> Mugoya opines that ‘it amounts to management of the interventions in the same manner as the PL’<sup>316</sup> This argument as advanced by Mugoya is technically sound, but given the insipid role provincial legislatures have played, one can possibly understand how this practise came into realisation. Nevertheless, what is required of the NCOP is to establish accountability from provincial legislatures to its constituency by making them exercise

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<sup>311</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>312</sup> Lund T Municipalities in a fix *Financial Mail* 11 April 2013.

<sup>313</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>314</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>315</sup> Mugoya BC (2010) 12.

<sup>316</sup> Mugoya BC (2010) 12-13.

appropriate oversight over provincial executives on the one hand, and facilitating and encouraging engagement with constituents on the other.

In addition, when the Minister and NCOP fail to call out politically motivated interventions, it entrenches a paradigm where accountability by the municipal council and/ or provincial executive lies with party regional and national structures instead of the local residents.<sup>317</sup> This failure completely violates the accountability as conceptualised in the Constitution and the WPLG.

A different matter requiring attention is the general lack of integration between IGR; monitoring; support, and interventions, which is troublesome since this linkage forms part of the accountability chain between the different spheres of government.<sup>318</sup> Prior to interventions, CoGTA may not have been aware of the state of affairs at a municipality or alternatively failed to take decisive action against defaulting municipalities, which then results in an intervention.<sup>319</sup> In contrast, NT as the institution performing oversight over financial governance, appears to be aware of municipalities' non-compliance with legislated prescripts.<sup>320</sup> Where there is non-compliance, the NT will issue a notice of punitive action to be taken should the misdemeanour persist.<sup>321</sup> As a result, remedial efforts are instituted to avoid such threats.<sup>322</sup> Yet, this does not seem to be the case for interventions related to non-financial governance and/ or service delivery issues, mainly

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<sup>317</sup> Lund T Now for the really hard job *Financial Mail* 24 September 2014.

<sup>318</sup> CoGTA Going Back to Basics (2014)1-7.

<sup>319</sup> CoGTA Going Back to Basics (2014 1-7.

<sup>320</sup> Case Study: Western Cape Provincial Government intervention into the Swellendam Local Municipality 34-39.

<sup>321</sup> Case Study: Western Cape Provincial Government intervention into the Swellendam Local Municipality 34-39.

<sup>322</sup> Case Study: Western Cape Provincial Government intervention into the Swellendam Local Municipality 34-39.

because the state of affairs may have deteriorated so badly, rendering it virtually impossible to turnover in short periods.<sup>323</sup> The methodology followed by the Minister fails to ensure consistent oversight and accountability on interventions, and to date, no IGR structure is in place for this specific purpose.<sup>324</sup>

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Accordingly, the veto power fails to create an on-going mechanism that builds institutional knowledge on what works in practise and how best to limit unnecessary interventions in future.<sup>325</sup> The constitutional design envisages a reality where interventions are only brought as a matter of last resort. As a result, the veto power must be a consistent barometer to detect shortcomings in interventions and introduce measures to overcome identified shortcomings.

The barometer mentioned above requires real time monitoring of provinces and municipalities.<sup>326</sup> This would empower the Minister to act quickly to veto undue interventions and will prevent legal costs being accrued due to court action.<sup>327</sup> The point to be made here is that while the veto power is only triggered by an intervention, the mechanism to fully capacitate the Minister in exercising the veto power requires constant and thorough monitoring of municipalities.<sup>328</sup>

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<sup>323</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

<sup>324</sup> CoGTA Going Back to Basics (2014) 13-18.

<sup>325</sup> CoGTA Going Back to Basics (2014) 13-18.

<sup>326</sup> CoGTA Close Out Reports (2012).

<sup>327</sup> CoGTA Close Out Reports (2012).

<sup>328</sup> Lund T Municipalities in a *fix Financial Mail* 11 April 2013.

However, monitoring of municipalities as a constitutional function falls within the ambit of provincial governments and the Minister should check to ensure that his department empowers provinces to do this by establishing sound monitoring tools.<sup>329</sup> To date no standard format for reporting has been prescribed.<sup>330</sup> When information is submitted by provinces to CoGTA, there is seldom a response.<sup>331</sup> CoGTA should interrogate provinces' information on municipalities and identify bespoke approaches (e.g. integrated support plans) for the purposes of municipalities displaying signs of requiring intervention. If these shortcomings are addressed, then the veto power will be adhering to the Constitutional standard with respect to accountability promised to citizens.

#### **4.7 Conclusion**

The analysis in this chapter built on the discussions in chapters 2 and 3, and confirmed, based on an empirical study, why the veto power is failing in practise. Multiple reasons were proffered for these failings. The central argument was that inconsistent application of the veto power by the Minister and NCOP is related to the poor regulatory framework; political contestation, and lack of accountability.

The discussion highlighted many shortcomings concerning the implementation of the veto power. Bearing these shortcomings in mind, the veto power ought to foster greater support to municipalities by ensuring its autonomy is vigorously protected and that

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<sup>329</sup> CoGTA Close Out Reports (2012).

<sup>330</sup> CoGTA Going Back to Basics (2014) 8-13.

<sup>331</sup> CoGTA Going Back to Basics (2014) 8-13.

appropriate support was provided prior to an intervention. These protective measures could possibly address existing lack of municipal integrated support. A serious indictment on local government is the unfair distribution of responsibilities and/ or blame for service delivery failures. Even more alarming is the impunity towards inappropriate and piecemeal assistance by provincial and national government, undue financial expenses incurred from interventions, and lack of sustainable outcomes of interventions.<sup>332</sup>

Municipalities continue to perform their functions without clearly defined benchmarks, especially considering its broad constitutional mandate. A noticeable failure by the Minister and NCOP in this regard is to strengthen monitoring and supervision of local government and to create greater clarity for both local and provincial government as to what is expected from each of them, and what role national government must play.<sup>333</sup> Furthermore, provincial and national government ought 'to ensure that local government is not only stable, but also has capacity to deliver on its goals'<sup>334</sup> Thus far, interventions had predominantly negative implications for municipalities. The Select Committee on G&TA confirmed that in most cases interventions occur when municipalities are in a complete state of breakdown.<sup>335</sup> This means that both provincial and national government reneged on its responsibility towards service delivery. This failure is aggravated through the Minister and the NCOP's leniency in using the veto power and

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<sup>332</sup> Steytler N (2004) Part 2: 5-12.

<sup>333</sup> Mathekga R 'Local government needs 'sufficient' support' *SABC* 14 January 2014.

<sup>334</sup> Mathekga R 'Local government needs 'sufficient' support' *SABC* 14 January 2014.

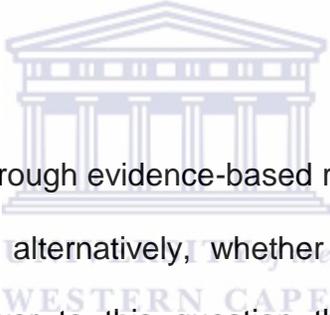
<sup>335</sup> Parliament 4<sup>th</sup> Term Legacy Report (2014)1-24.

more specifically not holding provincial and national government accountable within the framework of the veto power.

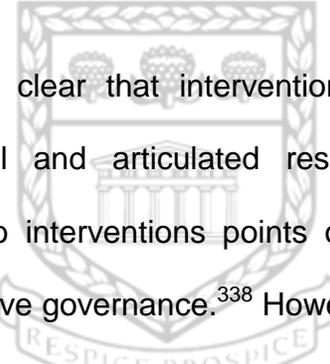


## Chapter 5: Conclusion

### 5.1 Introduction



The study set out to establish through evidence-based research whether the veto power continues to be relevant, and alternatively, whether the veto power is working in practise? In reaching an answer to this question the legal and policy framework regulating interventions were examined in chapter 2; the data on interventions from 2010 to 2014 were documented in chapter 3, and chapter 4 evaluated the shortcomings related to the veto power.



From the research it became clear that interventions are a contentious issue in practice.<sup>336</sup> It requires careful and articulated responses from all stakeholders involved.<sup>337</sup> Greater insight into interventions points out the importance of the veto power with respect to co-operative governance.<sup>338</sup> However, failure to conceptualise the veto power as a significant tool for this purpose has resulted in its failure in practise.

This chapter will provide an evaluative summary of the research findings. Recommendations and best practise will be presented to improve implementation of the veto power. Moreover, it will be argued that the current reality for intervention requires the veto power to be strengthened as it remains relevant as an IGR and oversight tool. A thorough evaluation of the astuteness of the institutions to achieve this goal goes

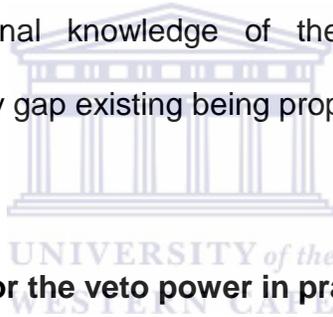
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<sup>336</sup> Lund T 'Now for the really hard job' *Financial Mail* 24 September 2014.

<sup>337</sup> Lund T 'Now for the really hard job' *Financial Mail* 24 September 2014.

<sup>338</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

beyond the scope of this study, but it will be argued that from a theoretical perspective the information and institutional knowledge of the institutions is already at a sophisticated level, with the only gap existing being proper implementation.



## 5.2 Overview on findings for the veto power in practise

- Constitutional protection against undue interventions is failing in practice since intergovernmental checks to safeguard municipal autonomy remains far and in between.<sup>339</sup> This is so despite institutions articulating concern that interventions are highly politicised and at times it is unclear why certain municipalities are subjected to intervention compared to others that are equally delinquent in its performance.<sup>340</sup>
- The veto power is modelled around federal concepts of institutional autonomy for multi-level governments where constituency play a central role. Consequently, accountability to citizens demands that the Minister and NCOP not only terminate improper interventions, but also establish sustainable mechanisms for integrated support from *all of government* to address these shortcomings. However, the veto power is failing in this regard. Moreover, citizens are disgruntled about poor service delivery which has led to 'social tensions' and steady increase in 'violent protests'

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<sup>339</sup> Lund T 'Now for the really hard job' *Financial Mail* 24 September 2014.

<sup>340</sup> Lund T 'Now for the really hard job' *Financial Mail* 24 September 2014.

- Legal uncertainty for intervention remains problematic and creates uneven application of rules and policy requirements.<sup>341</sup> The evaluations provided by SALGA, provinces, CoGTA and the NCOP are consistent and provide a coherent story as to why interventions are problematic.<sup>342</sup> Yet what does not transpire from the evaluations is a sense of acknowledgment from national and provincial government that failures in the local government environment must not be borne by municipalities alone.<sup>343</sup> The reality is that there exists a lack of accountability by national and provincial government.<sup>344</sup> This lack of accountability is aggravated since the MLGI Barometer on audit findings expressed concern that 'national and provincial support to municipalities is difficult to track'.<sup>345</sup>
- Problematic monitoring, support and intervention practices continue to occur.<sup>346</sup> To date no uniform reporting template is available that contain integrated information at a municipal level.<sup>347</sup> This situation is aggravated by inadequate capacity and resources available to effectively monitor municipal performance.<sup>348</sup> This could ultimately be blamed partially for the inconsistent application of the veto power.

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<sup>341</sup> CoGTA IMSI Bill Roundtable (2014) Section B-4.

<sup>342</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>343</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing.49-81.

<sup>344</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>345</sup> Powell D et al (2014) 3.

<sup>346</sup> CoGTA Going Back to Basics (2014) 13-18.

<sup>347</sup> CoGTA Close Out Reports (2012).

<sup>348</sup> CoGTA IMSI Bill Roundtable (2014) Section B-4.

- The Minister and CoGTA have no structured IGR platform with a specific focus on oversight and accountability for municipalities placed under administration.<sup>349</sup> Alternatively, existing structures are not maximised for this purpose where agenda items are tabled and resolutions documented and follow-up action monitored.<sup>350</sup> Regulating interventions in this structured manner will achieve credibility for the veto power.
- A different model is yet to be implemented with appropriate benchmarks to measure municipal performance.<sup>351</sup> This will enable the veto power to be implemented in terms of established standards, but taking into account that varying capacity levels of municipalities.<sup>352</sup> Obviously, using the veto power in this context will justify inconsistency based on those differentiated standards.<sup>353</sup>
- Sound policy on integrated approaches for services delivery is available such as the single window of coordination, and the recent call by the President to go Back to Basics. But churning out more and more policy documents is simply not enough.<sup>354</sup> What is required is actual implementation of basic principles espoused in the Constitution and the White Paper on Local Government.<sup>355</sup>

<sup>349</sup> Lund T 'Now for the really hard job' *Financial Mail* 24 September 2014.

<sup>350</sup> CoGTA Going Back to Basics (2014) 13-18.

<sup>351</sup> CoGTA Going Back to Basics (2014) 8-13.

<sup>352</sup> CoGTA Going Back to Basics (2014) 1-8.

<sup>353</sup> CoGTA Going Back to Basics (2014) 1-8.

<sup>354</sup> Department of Cooperative Governance and Traditional Affairs Service Delivery Agreement for Outcome 9 (2009) and Amended Service Delivery Agreement for Outcome: 9(2012).

<sup>355</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

- Interventions that were terminated illustrated how intervention outcomes could be achieved through different methods.<sup>356</sup> This makes it difficult to reconcile why the veto power is seldom invoked.
- Lack of political will to strengthen the veto power could possibly be associated with the poor state of affairs for approximately one third of the municipalities in the country.<sup>357</sup> There appears to be a relaxing of the veto power due to what is perceived to be necessary interventions even in instances where provinces institute processes that display flagrant disregard for democratic processes.<sup>358</sup>
- Interventions are known to involve ‘settling of political scores’, even when valid grounds used for intervention are underpinned by political contestation. Likewise, the veto power is also embedded in a ‘culture of impunity’ where ‘political allegiance’ determines responses from provincial and national governments. Therefore, the political and administrative interface requires constant monitoring for signs of political meddling.<sup>359</sup>

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<sup>356</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>357</sup> CoGTA Going Back to Basics (2014) 7.

<sup>358</sup> Vecchiatto P DA claims police ‘coup’ at Mogalakwena Business Day Live 04 November 2014.

<sup>359</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

### 5.3 Recommendations

As stated already, the veto power remains relevant, especially given the context of interventions.<sup>360</sup> This section will draw on methods to improve the veto power in practise.

- Fast-tracking adoption of the IMSI Bill is essential for the creation of normative standards and in turn uniformity will be established for both the implementation and regulation of interventions.<sup>361</sup> The Bill should be accompanied by regulations to add practical guidance to the legal provisions.<sup>362</sup> If the DPSA proceeds to separate national interventions into provinces from the IMSI Bill it needs to ensure that equal standards are benchmarked to ensure fairness and consistency in oversight of the different spheres.<sup>363</sup> However, it is submitted that to strengthen the veto power all interventions should be championed by one political and administrative champion.<sup>364</sup>
- To strengthen the veto power, the Minister and NCOP must be proactive in terminating intervention.<sup>365</sup> In order to achieve this, the Minister should require integrated municipal specific reporting across all spheres of government.<sup>366</sup> This

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<sup>360</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>361</sup> CoGTA IMSI Bill Roundtable (2014) Section B-4.

<sup>362</sup> CoGTA IMSI Bill Roundtable (2014) Section B-4.

<sup>363</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>364</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>365</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

<sup>366</sup> See analysis discussed in chapter four of this paper : Why the veto power is failing 49-81.

will empower the Minister to immediately direct where support is required when supporting the municipality in trouble.<sup>367</sup>

- CoGTA lacks a dedicated structure to deal with interventions. This structure should ideally be resourced by a multi-functional team comprising technical experts on IGR, support, monitoring, and interventions. Moreover, this structure should keep the Minister abreast on a weekly basis on problems at provinces and municipalities and identify appropriate action to be taken (i.e. consulting, monitoring and/ or provision of integrated support). This process of engagement will accommodate rapid responses from the Minister.<sup>368</sup>
- The veto power must be documented and reported on in the same way approved interventions are documented. In this way the veto power will gain more prominence. Furthermore, the Minister should strengthen the application of the veto power by revitalising the Imbizo system of engagement with local communities. The latter will strengthen accountability towards citizens and outwardly demonstrate the accountability chain of the cooperative governance system that coherently links all spheres to its citizens.<sup>369</sup> Where one sphere fails the other steps in to ensure corrective action and throughout this process institutional autonomy and integrity of each sphere is maintained, while citizens' best interests are prioritised.

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<sup>367</sup> See analysis discussed in chapter four of this paper: Why the veto power is failing 49-81.

<sup>368</sup> See analysis discussed in chapter four of this paper: Why the veto power is failing 49-81.

<sup>369</sup> Steytler N (2005) 317.

Over and above the proposed internal structure within CoGTA to ensure rapid responses when dealing with interventions and the veto power, and apart from the above-mentioned Imbizo system of engagement with local communities, it is recommended that the Minister contemplates a similar process as the WCPG's Municipal Review and Outlook (MGRO) as initiated in 2012.<sup>370</sup> Drawing from international best practices, this initiative is based on the Canadian Oversight Model and provides for structured engagement with municipalities on its governance and audit findings.<sup>371</sup> Further to this, it identifies integrated support action by province to adequately address both financial and non-financial challenges confronting municipalities.<sup>372</sup> The support does not only relate to resource capacity or expertise but also to financial support.<sup>373</sup> Since limited financial resources are available, a competitive process is followed through which municipalities are required to strongly motivate if they want to apply for additional funds.<sup>374</sup> This incentivises municipalities to improve their performances.<sup>375</sup> Within the context of the veto power, this initiative is forward looking and creates accountability from political and administrative heads. Moreover, support efforts are identifiable and a cooperative working relationship is forged. For these reasons, the Western Cape's MEC for Local Government attributes the

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<sup>370</sup> Western Cape Provincial Government Website : 22 January 2014: Western Cape Municipalities Receive Best Financial Governance Outcomes  
<http://www.westerncape.gov.za/news/western-cape-municipalities-receive-best-financial-governance-outcomes> (hereinafter Audit Outcomes).

<sup>371</sup> Western Cape Provincial Government (2013)\_Audit Outcomes.

<sup>372</sup> Western Cape Provincial Government Website  
[http://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/municipal\\_government\\_audit\\_report\\_card\\_201213.pdf](http://www.westerncape.gov.za/sites/www.westerncape.gov.za/files/municipal_government_audit_report_card_201213.pdf) (hereinafter Audit Report).

<sup>373</sup> Western Cape Provincial Government (2013) Audit Report.

<sup>374</sup> Western Cape Provincial Government (2013)\_Audit Outcomes.

<sup>375</sup> Western Cape Provincial Government (2013)\_Audit Outcomes

Provinces' performance in receiving the best audit outcomes for 2012/13 to the above-mentioned initiative.<sup>376</sup> Keeping all of this in mind, it should be ideal if the Minister of CoGTA also considers this, or similar initiative for all the provinces. Alternatively, the Minister can use the Canadian Model at a national level and facilitate engagements with provinces and municipalities by means of the Imbizo system.



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<sup>376</sup> Western Cape Provincial Government (2013) Audit Report.

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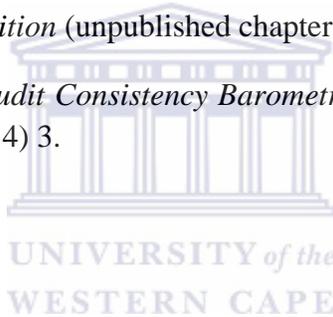
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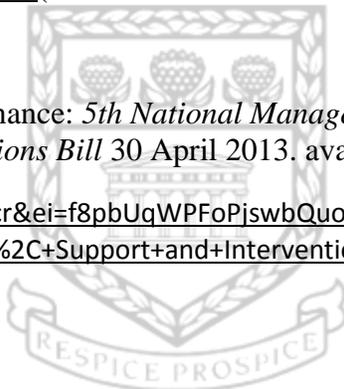
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