TITLE:

A LEGAL ANALYSIS OF PROVINCIAL INTERVENTION IN A MUNICIPALITY

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CHAPTER 1

INTRODUCTION

With the introduction of the 1996 Constitution,[1] local government was for the first time in South African history acknowledged as a fully fledged 'sphere' of government and its role and responsibilities as an equal partner of national and provincial government gained momentum. Local government no longer was an instrument at the hands of national government, used to implement its apartheid policies and practices.[2] Instead, it became one of the three "distinctive, interdependent and interrelated spheres"[3] of government and a new unexplored legal space for local government opened up.

But on 18 March 1998, a crack in the newly created sphere of local government appeared. The Eastern Cape Provincial Executive intervened in the Butterworth Transitional Local Council and assumed full responsibility for the administration of Butterworth. The province used as a legal basis section 139 of the very same Constitution that provided Butterworth with this new status as being part of an 'independent and autonomous sphere of government'.

This immediately raised numerous questions about section 139. What does this intervention mean? When, under which circumstances, can a province exercise this power? What does it mean when a province assumes responsibility? What powers does it have? How far can it go and what are the roles of the Minister and the National Council of Provinces?

Very soon, it became clear that the legislation, envisaged by section 139(3), aimed at regulating the process of the intervention is absolutely necessary in order to prevent

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[1] Act 108 of 1996.
[2] See N Ismail and C J J Mphaisha, 'The Final Constitution of South Africa: Local Government Provisions and their Implications', *Occasional Papers, Konrad Adenauer Stiftung* (1997) at pg. 3-9.
[3] Section 40(1) of the Constitution.

section 139 from becoming either a scene of 'wild west interventions' or a 'paper tiger'.

This paper aims to be an introduction to some of the legal issues and uncertainties, plaguing section 139. Chapter two deals with the *substantive* requirements for intervention: in other words, what circumstances, prevailing in a municipality, merit a section 139 intervention? In chapter three, the *procedural requirements* for intervention are discussed, subdivided in the procedures before, and after the intervention. Chapter four defines the powers of the province and the Municipal Council after a section 139(1)(b) intervention and chapter five presents a case-study on the intervention in Butterworth. Finally, chapter six compares section 139 with similar legislation in the Netherlands. Although, in principle, section 139 seems to enable the province to exercise an infinite variety of interventions,[4] the main focus of this paper will be the intervention, whereby the province assumes responsibility in terms of section 139(1)(b).

It would strain common sense to think that, at this point in time, all the legal questions, surrounding section 139 can be answered. But an attempt will be made to gather different opinions and possibilities and present answers to the questions that arise in the context of section 139. This will be done, bearing in mind that a balance has to be struck between the constitutional protection of the autonomous sphere of local government and the need for good and effective government at local level.

[4] See paragraph 2.8.

CHAPTER 2

WHEN TO INTERVENE?

In this chapter, the *substantial* requirements for a section 139 intervention will be discussed. In other words, under what circumstances can a province intervene in a failing municipality? The situation where an intervention is appropriate is described in section 139(1) as:

> "When a municipality cannot or does not fulfil an executive obligation in terms of legislation..."

2.1 "...a municipality..."

Section 139(1) speaks of "a municipality". What is meant by 'municipality'? *Who* has to fail in executing the obligation? Does the fact that a municipality has incapable municipal workers mean that the 'municipality' is incapable? Does section 139, by using the word 'municipality', refer to the 'top-management' of the municipality, namely the Municipal Council, which means that if they fail, the province can intervene? What about the Chief Executive Officer? Can a province intervene in a municipality where the Chief Executive Officer fails to perform, but the Municipal Council performs satisfactory?

Section 151(2) places the executive and legislative authority in the Municipal Council. It follows that the Municipal Council is the highest authority in the municipality. The term 'municipality' should be seen as a holistic term, embracing the entire municipality with all its organs, workers and offices. The Municipal Council, however, is the organ with the highest authority and, as a result, with the highest responsibility. Therefore, the Municipal Council is accountable to the province in the context of section 139. If the Chief Executive Officer fails to perform and as a result of that, the municipality fails to fulfil its obligations, the Municipal Council is accountable to the province in the

context of section 139. The province can then intervene in terms of that section and take over the role *of the Council*, if and to the extent necessary.[1]

2.2 "...cannot or does not..."

The term 'cannot' refers to a situation of incompetence or inability. The municipality is not capable of performing its functions. The intention of a municipality is irrelevant. Even if the municipality tries to do the best it can within its competence, a failure to meet the standard of 'fulfilling an executive obligation' will be decisive. However, not each and every incapability forms a reason for intervention. There are two exceptions:

a) There are circumstances where a Council does not have a choice, other than to cease performing its functions. An example is a labour conflict, where a legitimate strike of municipal workers results in the suspension of the delivery of services.
b) Extreme emergencies can occur. When a *vis mayor*, eg natural disaster causes failure on the part of the municipality to perform its normal functions, section 139 is not the appropriate way to intervene. There is no indication in the text or elsewhere that section 139 is meant to be an 'emergency power', which gives the province the right to intervene in a municipality in case of emergencies.

The term 'does not' seems to refer to a situation where a municipality is capable of performing its functions, but, for some reason, does not do so. It is hard to think of situations other than where there is 'unwillingness' on behalf of the Municipal Council.[2]

2.3 "...fulfil an executive obligation in terms of legislation..."

The Constitution speaks of an *executive* obligation. The dictionary meaning of the word *executive* is "administrative: distinguished from legislative and judicial".[3] When

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[1] To take that argument further: if the Council and the CEO perform well, but the administration or the municipal workers are the reason for the municipality failing to do its job, the Municipal Council is still the responsible organ.

[2] Here, one can find an indication that section 139 is 'addressed' to the Municipal Council. Where a CEO or a high official is 'unwilling', the duty is on Municipal Council to exercise its authority and there is no reason (yet) for the province to intervene. But if the Municipal Council is 'unwilling', then there clearly is scope for a 139 intervention.

[3] According to *Webster's New World Dictionary*, Third College edition, New York (1988). The *Shorter Oxford English Dictionary*, Oxford (1973) says: 'pertaining to execution: having the function

read together with section 151(2) of the Constitution, it appears that section 139 is not concerned with the municipality's *legislative* authority, namely its authority to make by-laws.[4]

An intervention in the case of failure to fulfil an obligation presupposes a *pre-existing* legal obligation. When read together with the phrase "in terms of legislation", it follows that it should be possible to trace the obligation back to a statute.[5] The Provincial Executive must indicate *which* statutory obligation is at hand. An important question in this regard is how narrowly described this executive obligation must be. Can the Provincial Executive intervene with reference to the objectives of local government, as laid down in the Constitution?[6] Or should there be a reference to a specific statutory obligation, in which the municipality is assigned a particular task? The latter seems to be the intention behind section 139. The objectives of local government, as laid down in the Constitution, are too broad and too vague. Section 152 stipulates that a municipality must strive, *within its financial and administrative capacity*, to achieve objects such as to ensure the provision of services to communities in a sustainable manner, the promotion of social and economic development and the promotion of a safe and healthy environment. It would be very difficult to measure a municipality's achievements in terms of these objectives. Indeed, it can be argued that there are few municipalities in South Africa that meet these requirements fully. Using the constitutional objectives of local government as yardstick in the context of section 139 renders the scope of section 139 too broad and opens the door for abuse.

Therefore, the intervening Provincial Executive should indicate with some precision which executive obligations were not fulfilled by referring to existing statutory law.

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of executing: esp. as concerned with carrying out the laws, decrees and judicial sentences: opp. to 'judicial' and 'legislative'.

[4] In paragraph 4.1, the distinction between 'executive' and 'legislative' powers is discussed in the context of the permissible extent of the intervention.

[5] See again the dictionary meaning in the 'Shorter English Dictionary' *supra* n3: "having the function of executing: esp. as concerned with *carrying out the laws, decrees and judicial sentences* (emph. added).

[6] The objectives of local government are entrenched in sections 152 and 153 of the Constitution.

2.4 Not all executive obligations can be assumed responsibility for

The second part of section 139(1)(b) circumscribes the substantial requirements further but only with regard to the assumption of responsibility.

> "assuming responsibility for the relevant obligation in that municipality to the extent necessary-
>
> (i) to maintain essential national standards or meet established minimum standards for the rendering of a service;
>
> (ii) to 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) to maintain economic unity."

When read together with the first part of section 139, which deals with the non fulfilment of the 'relevant' obligation that is being referred to here, this part of section 139 seems to limit the scope for assumption of responsibility to those executive obligations that are relevant to these three issues. In other words, assumption of responsibility is possible, only when the nonfulfilment of the executive obligation endangers essential national standards, minimum standards for service delivery or economic unity, or when the nonfulfilment of the executive obligation is prejudicial to another municipality or to the province. The terminology is amorphous. However, the same conditions also feature in section 44(2), although tailored to the context of legislative intervention by Parliament in Schedule 5 matters. The interpretation by the courts of section 44(2) will be relevant here, to the extent that the difference in nature of the intervention permits. In the context of section 44(2), Mettler submits that the interpretation of the necessity requirement will depend on a court's disposition towards a unitary dispensation or a federal one:

> "What may be necessary for a 'unitary' judge may be anathema to a 'federal' judge."[7]

Regarding the third condition, "to maintain economic unity", the question arises as to where this condition refers to. Can intervention be necessary for economic unity in the country as a whole or does it refer to economic unity in the province only? It is

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[7] J Mettler, 'Constitutional Powers of Local Government', unpublished paper, Community Law Centre, UWC, pg. 10.

submitted that it also refers to unity in the country as a whole. The aim of unity *in the province* is already captured in section 139(1)(b)(ii) where the municipality is prohibited from harming the interests of another municipality.

2.5 Proof of inability, incompetence or unwillingness

There must be inability or unwillingness on the part of the municipality, before an intervention in terms of section 139 can take place. How should this be proved?

There can be little doubt that a general utterance of discomfort or dissatisfaction by the residents of the municipality does not suffice. When defending the intervention, the province must point at objective factors. Examples are records of electricity or water supply, photographic material of, for instance, municipal roads, statements made (under oath) by high officials and any other evidence that can prove the existence of objective facts that made the province resort to intervention.

2.6 'Overall' state of chaos?

The question arises as to whether or not section 139 requires an "overall" state of chaos. Does failure in only one particular functional area also merit an intervention? For example, can a province intervene in a municipality where water supply is an absolute chaos, while all other municipal functions are performed well? An indication for a positive answer to that question can be found in the text of subsection 139(1)(b)(i), where the Constitution speaks about -

> "...assuming responsibility for the *relevant* obligation to meet established minimum standards for the rendering of *a* service.."[8]

It is submitted that the malfunctioning in only one particular area can merit a section 139 intervention.

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[8] Emphasis added.

2.7 Provincial support a precondition for intervention?

Another important question is whether or not provincial support is a precondition for intervention. In other words, can a municipality challenge an intervention by holding that the intervening province did not 'support and strengthen' the capacity of the municipality and therefore shares guilt in the problems?[9]

The duty on the province to support and strengthen the municipality is based on the principles of co-operative government.[10] De Villiers argues that section 154(1) may balance the right of a province to "assume" powers of a local authority due to the fact that the local authority could argue in defence that the province has neglected its obligation to assist the local government in developing its capacity.[11]

On the one hand, the province clearly has the duty to support on the basis of sections 154(1), 155(6) and 41(1)(h)(ii). One can argue that it would be unfair and subversive to the idea of co-operative governance if a province would fail to fulfil that constitutional duty of providing the necessary support and subsequently assume responsibility for that municipality. The result of this would be that a province could be in the position to promote the usurping of power of a municipality by withholding the necessary support which would result in the collapse of the municipality. This is an extreme position and requires 'bad faith' on the part of the province. But then again, disputes and arguments between provinces and municipalities are not uncommon. On the other hand, it does not seem to make sense to prohibit a province from intervening, and to allow the situation in the municipality to get worse, simply because of inaction by the province in the past. This would result in an untenable situation.

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[9] See 154(1) and 155(6) of the Constitution.

[10] See I M Rautenbach and E F J Malherbe, *Constitutional Law* (1996) at pg. 266 where they discuss section 154(1) as falling within the scope of co-operative government, together with the other principles such as mutual respect for constitutional status and the prohibition not to encroach on one another's geographical, functional and institutional integrity. See also R Mastenbroek and N Steytler, 'Local Government and Development: The New Constitutional Enterprise', *Law, Democracy and Development* (1997) November, at pg. 245: "The above injunction on national and provincial government to support local government needs to be read in conjunction with the principles of co-operative government as set out in chapter 3 of the Constitution."

[11] B de Villiers, 'Local-Provincial Intergovernmental Relations: A Comparative Analysis', *Occasional Papers, Konrad Adenauer Stiftung* (1997) at pg. 4.

The second argument is to be preferred. Section 139 does not seem to be the appropriate arena to play out a sanction on a failure of the province to support a municipality. To hold that, as a punishment for not providing enough support, a province forfeits its right to intervene when necessary would stifle the good administration of the country. Loss of the right to intervene should not be used as an enforcement of provisions that fall within the scope of co-operative government, which is in essence a *non-legalistic* institution.[12]

The flipside of the coin in the context of 'support and strengthen' is the duty on the municipality to foster constructive relations with the province.[13] The province must also be *enabled* by the municipality to perform its supporting role. This may include aspects such as the provision of access to relevant information, held by the municipality. The relation of support and strengthening "is not to be a one way traffic of which local government is the only beneficiary".[14] It may thus be too easy to 'punish' a province by taking away the power to intervene as a reaction to a failure in a 'support and strengthen relationship'. Moreover, it may be very difficult to apply the other approach in practice. Because is a province prevented from *ever* intervening after a lack of support? This is difficult to uphold, so the alternative means that a municipality would have to prove that there is a clear link between the lack of support and the problems in the municipality. Because the province would be prevented from intervening *to the extent of the failure that is a result of the lack of support from the province*. Especially in cases where there has been some support (but maybe not enough) this will be virtually impossible to prove.

It is therefore submitted that provincial support is not a precondition for intervention in terms of section 139.

2.8 The provincial executive's discretion

The second part of section 139(1) states:

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[12] See N Steytler, 'Decentralisation of Government and the Reform and Transformation of the Public Service in South Africa - A Constitutional Perspective', 1998 *Presidential Review Commission Report* (Anexure D) at pg. 14.

[13] See for example section 41(1)(h)(i).

[14] See Mastenbroek en Steytler *supra* n10 at pg. 245.

> "...the relevant Provincial Executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including - ..."

The Provincial Executive has a discretion with regard to two aspects.

a) Firstly, the phrase "may intervene" indicates that the Provincial Executive has a discretion in deciding *whether to intervene or not*. It makes clear that they do not have to intervene for every single failure to fulfil some statutory obligation on the part of the municipality. They can use their discretion to decide whether or not an intervention is necessary.
b) Secondly, the Provincial Executive "may intervene by taking *any appropriate steps*,...including -". This means that there is a discretion with regard to both the *form* of the intervention and to the *extent* to which the intervention takes place.

Should this discretion be curtailed? It is an understatement to say that section 139 does not provide the provinces with sufficient guidance as to when and how they should intervene. It is also clear that the provinces need discretion. Different circumstances require different interventions. However, there is a need to objectify the substantive requirements for interventions. The requirements of 'essential national standards' and 'established minimum standards' should be given attention in legislation to the extent that it becomes possible for provinces to ascertain when the shortcomings of local government merit intervention. It would also facilitate the solution of possible disputes, following the intervention.

2.9 Summary

This chapter dealt with the substantive requirements for intervention. When can a province intervene and to what extent is it allowed to intervene? One important conclusion was that intervention is possible, only in the event of a failure to fulfil a *pre-existing and specific* statutory obligation. A failure of the province to 'support and strengthen' in terms of sections 154(1), 155(6) and 41(1)(h)(ii) cannot be the basis for the loss of the province's right to intervene. It was further argued that there is a need to objectify the discretion of the Provincial Executive to decide when, how and to what extent intervention is necessary.

CHAPTER 3

PROCEDURAL REQUIREMENTS FOR INTERVENTION

Intervention in the form of assumption of responsibility in terms of section 139(1)(b) is the main focus of this chapter. Section 139 introduces a number of procedural requirements that can prove to be of great importance in the exercise of this instrument. One important question is whether or not there is a requirement of prior notice. This question is dealt with in Part I of this chapter. In Part II, the requirements of section 139(2), that come into play after the assumption of responsibility by the province, is discussed.

Part I

Procedural requirements before intervention

3.1 Section 139(1)(a) directive a requirement for assumption of responsibility?

In the event of a province assuming responsibility in terms of section 139(1)(b), the question arises whether the issuing of the directive ("describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations") in terms of section 139(1)(a) is a *procedural* precondition for a section 139(b) intervention.

The *text* of section 139 seems to imply that subsection 139(1)(a) is not a requirement for subsection 139(1)(b). Section 139 speaks of -

> "taking any appropriate steps...*including* -
> (a) issuing a directive...*and*
> (b) assuming responsibility..."[1]

Rautenbach and Malherbe also seem to adhere to the view that subsection 139(1)(a) is not a requirement for subsection 139(1)(b).[2] The White Paper on Local Government does the same, although implicitly, by speaking of interventions -

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[1] Emphasis added.

> "...ranging from support and advice *through issuing directives* for specific actions, to the assumption of executive authority for a municipal function by another sphere of government."[3]

It seems that, on the face of it, the section 139(1)(a) directive does not form a procedural precondition for the intervention in terms of section 139(1)(b). But one could very well argue that in the event of such a severe inroad into the municipality's independence and autonomy, fairness requires the province to first issue a directive before assuming responsibility. In the context of section 100, the equivalent of section 139 in the context of the relation between national government and provinces, the Constitutional Court resolved this matter by deciding that the assumption of responsibility in terms of 100(1)(b) is not possible without first issuing the section 100(1)(a) directive.[4] The Court came to that conclusion on the basis of an interpretation of section 100 that is logical and straightforward. According to the Court, the word "and" indicates that section 100 is a *process*, whereby the first step is the issuing of the directive. The second step, after the first step appears to be unsuccessful, is the assumption of responsibility. The same approach is applicable to section 139.

3.2 Prior notice requirement?

After concluding that the section 139(1)(a) directive is a precondition for assuming responsibility in terms of section 139(1)(b), the following question arises: does the province have to send a notification, prior to embarking on either the issuing of directive or the assumption of responsibility? There are three possible avenues for arriving at the approach that 'prior notice' is a formal requirement for any section 139 intervention:

a) a requirement of 'prior notice', based on section 33 of the Constitution, which entrenches the principle of just administrative action;

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[2] See I M Rautenbach and E F J Malherbe, *Constitutional Law* (1996) at pg. 268 where they say: "This may include a directive to fulfil the obligation, *or* the provincial government may itself assume responsibility for it to the extent that it is necessary to maintain or establish essential national standards..."(emphasis added).

[3] White Paper on Local Government, March 1998 at pg. 45.

[4] *In re Certification of Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC), paragraph 124, fn 116.

b) a requirement of 'prior notice', based on common law; or

c) a requirement of 'prior notice', based on the principles of co-operative government.

3.2.1 Prior notice requirement on the basis of section 33 - ' just administrative action'?

Section 33(1) reads -

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."[5]

An intervention in terms of section 139 can surely be categorised as 'administrative action'. The requirement of procedural fairness in terms of section 33 would then mean that prior notification is necessary before a province can intervene. However, the question is whether or not a municipality can be the bearer of this fundamental right to just administrative action and claim on the basis of section 33 that prior notice of the intervention is a precondition for the intervention. This would require a *horizontal* application of the provision of the bill of rights *between government structures*. Without venturing into the thorny issue of horizontal application, a few comments can be made.

Section 8 stipulates that juristic persons are entitled to the rights in the bill of rights to the extent required by the nature of the rights and the nature of that juristic person. It is clear that "there are rights which juristic persons are capable of acquiring, such as administrative justice".[6] A municipality is a juristic person. Is it entitled to the right to administrative justice in relation to the exercise of administrative power by the province? The preferred view is that it cannot. In general, the state is not the beneficiary of the rights, entrenched in the bill of rights. The bill of rights *binds* the state and is a restraint on the state in its relations to its citizens.

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[5] Section 23 of Schedule 6 entails another provision that applies until the legislation envisaged in 33(3) is enacted. For the sake of argument, section 33 is referred to.

[6] D Basson, *South Africa's Interim Constitution, Text and Notes* (1994) at pg. 20.

> "A bill of rights sets limits to government actions when *individual* interests are restricted for the protection of community interests."[7]

In the context of the issue of horizontal application, Devenish makes the following remark:

> "Traditionally a bill of rights was conceived and designed to protect individuals against abuse of state power."[8]

In this, the gist of the argument lies. The bill of rights governs relations between individuals and the government and (to the extent of the horizontal application) between individuals. Relations between different government structures are not governed by the bill of rights. These relations should be governed by the principles of co-operative government. Therefore, it is submitted that the right to just administrative action cannot be the basis for asserting that prior notice is a precondition for a section 139 intervention.

3.2.2 Prior notice requirement, based on common law?

In this paragraph, the second possible 'avenue' for arriving at a prior notice requirement will be explored. The question is whether or not it is possible to construe a requirement of prior notice on the basis of common law. A short description follows of the common law requirements relevant in this context.

Baxter explains that the notion of 'natural justice' has crystallised into two fundamental principles: *audi alteram partem* and *nemo iudex in propria causa*.[9] Only the first principle is relevant here. The principle of *audi alteram partem* requires a 'fair hearing'.[10] The two fundamental requirements based on the notion of a 'fair hearing', to which an affected party is entitled, are the 'notice of intended action' and a 'proper opportunity to be

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[7] Rautenbach and Malherbe, *supra* n2 at pg. 8 (emphasis added).
[8] G E Devenish, *A Commentary on the South African Bill of Rights*, Butterworths, Durban (1999) at pg. 24.
[9] L Baxter, *Administrative Law*, Juta, Cape Town (1984) at pg. 541.
[10] Baxter *supra* n9 at pg. 542.