

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

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

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



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

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

4.6 Conclusion

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

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

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



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

Chapter 5

Conclusion and recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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



Bibliography

Books

Bekink, B *Principles of South African local government law* (2006) Durban: LexisNexis Butterworth.

Chaskalson, M, *et al Constitutional law of South Africa* (1996) Kenwyn: Juta.

De Visser, J *Developmental local government: a case study of South Africa* (2005), Community Law Centre: University of the Western Cape.

De Ville, JR *Constitutional and Statutory Interpretation* (2000) Interdoc Consultants.

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

Murray, C *et al 'Provincial Executive Authority'* (1996) in Woolman, S *et al Constitutional Law of South Africa* Kenwyn: Juta & Co.

Steytler, N (ed) *The place and role of local government in federal systems* (2005) Konrad-Adenauer-Stiftung: Johannesburg.

Steytler, N and De Visser, J *Local Government Law of South Africa* (2007) LexisNexis: Durban.

Levy, N and Tapscott, C (Eds) *Intergovernmental Relations in South African: The Challenges of Cooperative Government* (2001) UWC School of Government and IDASA Political Information and Monitoring Service, Cape Town.

Stu Woolman & Yolandi Schutte 'Auditor-General' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2005) Kenwyn: Juta & Co.

Case Law

Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (2) SA 97.

CDA Boerdery v Nelson Mandela Metropolitan Municipality 2007 (4) SA 276 (SCA).

Chidi v Minister of Justice 1992 (4) SA 110 (A).

City of Cape Town v Premier of the Western Cape 2008 (6) SA 345 (C).

City of Johannesburg v Gauteng Development Tribunal 2010 (9) BCLR 859 (CC).

Democratic Alliance v Masondo NO and another 2003 (2) BCLR 128 (CC).

Democratic Alliance v Minister of Local Government 2005 JOL 13412 (C).

Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC).

Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council 1998 (6) BCLR 671 SCA.

Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC).

Minister of Local Government, Housing & Traditional Affairs (KwaZulu-Natal) v Umlambo Trading 29 CC [2007] SCA 130 RSA.

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

Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others Case No. 231/2009 (unreported) (17 February 2009).

Premier of the Western Cape v Overberg District Municipality 2011 JOL 27183 (SCA).

President of the Republic of South Africa v South African Rugby Football Union 2000 1 SA 1 (CC).

Selebi v S 2012 1 ALL SA 332 (SCA).

Uthukela Municipality v President of RSA 2002 (2) BCLR 1220 (CC).

Van Wyk v Uys 2002 (5) SA 92 (C).

Venter v R 1907 TS 910 at 913.

Journal Articles

Cameron, E *Nude Monarchy: the case of South Africa's judges* (1987) *SAJHR* 342.

De Visser, J *Political –administrative interference in local government: assessing the qualities of local democracies* *Local Government Bulletin* 11(5).

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

Klaaren J, Sibanda, S. *'Introducing the Gauteng Scrutiny of Subordinate Legislation Act: notes and comments'* (2009) *South African Journal on Human Rights* 25.

Makalima, O *'Interesting court cases and legal issues'* (2010) 10 *Institute of Municipal Finance Officers* 24.

Mettler, J *'Provincial-municipal relations: a few challenges'* (2001) *Law Democracy and Development* [available online at <http://www.saflii.org/za/journals/LDD/2003/11.pdf> accessed 3 September 2012].

Murray C, and Hoffman-Wederer, Y 'The national council of provinces and provincial intervention in local government' (2007) 1 *Stellenbosch Law Review* 7.

Ntliziywana, P Court rejects traditional method of intervention *Local Government Bulletin* 12(1) 17-19.

Nyalenga, D 'The revitalization of local government in South Africa' (2006) 1 *International NGO Journal*. [available online at <http://www.academicjournals.org/INGOJ> accessed on 3 September 2012]

O' Regan, K 'Checks and Balances reflections on the development of the doctrine of separations of powers under the South African Constitution' (2005) *PELJ* (8) 1.

Reddy, P 'Intergovernmental relations in South Africa' (2001) 20 *Politeia* 1 21-39.

Conference Papers

Madonsela, T 'Corruption and Governance Challenges: The South African Experience' presented at the *National Conference on Corruption and Governance Challenges*, (2010) Nigeria. Available at http://www.pprotect.org/media_gallery/2010/PP%20Speech%20Nigeria%20Corruption%20and%20Governance%20Challenges%20final.pdf (accessed 3 September 2012).

Legislation

➤ **National**

Auditor General Act 12 of 1995.

Commissions Act 8 of 1947.

Constitution of the Republic of South Africa, 1996.

Fire Brigade Services Act 99 of 1987.

Health Act 63 of 1997.

Local Government: Municipal Finance Management Act 56 of 2003.

Local Government: Municipal Structures Act 117 of 1998.

Local Government: Municipal Systems Act 32 of 2000.

South African Police Service Act 65 of 1995.

➤ **Provincial**

Commissions Ordinance 5 of 1954 (Free State)

Commissions Ordinance Amendment Act 4 of 1998 (Free State)

Constitution of the Western Cape.

KwaZulu-Natal Commissions Act 3 of 1999.

Mpumalanga Commissions of Enquiry Act 11 of 1998

Northern Cape Commissions of Inquiry Act 4 of 1996

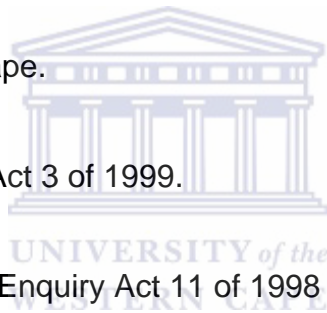
Northern Province Commissions of Inquiry Act 4 of 2001

North West Commissions Act 18 of 1994

Provincial Commissions Act 3 of 1994 (Eastern Cape)

Provincial Commissions Act 1 of 1997 (Gauteng)

Western Cape Provincial Commissions Act 10 of 1998.



Newspaper Articles

Evan, S 'A business associate of Northern Cape ANC chairman John Block is amongst those in the dock' *Mail & Guardian* 16 November 2012.

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

Reports

Auditor-General *Consolidated General Report on the local government audit outcomes 2009-10* available at www.agsa.co.za/Reports%20Documents/Consolidated.pdf (accessed on 2 June 2012).

Corder, S *et al Report on parliamentary Oversight and Accountability* (1999) Faculty of Law: UCT.

Department of Constitutional Development *Project Viability* available at <http://www.cogta.gov.za/subwebsites/projectviabilityjune98.htm> (accessed 14 September 2012).

Department of Provincial and Local Government *Project Consolidate* available at http://ftp.shf.org.za/lg_project_consolidate.pdf (accessed 14 September 2012).

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

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

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

Statistics South Africa *Highlights of key results* (2011) available at http://www.statssa.gov.za/Census2011/Products/Census_2011_Methodology_and_Highlights_of_key_results.pdf (accessed 20 November 2012).

De Visser J, Steytler N & Mettler J *Provincial Supervision: Manuel for the application of section 139 of the Constitution*, Community Law Centre: University of the Western Cape.

Department of Co-operative governance and Traditional Affairs *Local Government Turnaround Strategy* November 2009.

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

Van Stavel, P *The role of the National Council of Provinces in the legislative process: an examination of its effectiveness in achieving its constitutional mandate* (2002) University of the Western Cape.

Department of Co-operative Government and Traditional Affairs *State of Local Government in South Africa-Overview Report* (2009) available at: <<http://www:dplg.co.za> (accessed on 15 June 2010).

Papers

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