

# The Battle of Butterworth

## A section 139 intervention in the Eastern Cape

**B**utterworth, an industrial and business centre halfway between East London and the former Transkei capital of Umtata, made history as the first municipality to be subjected to an intervention by provincial government under the 1996 Constitution. The Eastern Cape provincial executive intervened in the Butterworth Transitional Local Council and assumed full responsibility for the administration of Butterworth. The legal basis was section 139 of the very same Constitution that provided Butterworth with its new status as being part of an 'independent and autonomous sphere of government'. How did the Eastern Cape intervene? What transpired after that? And what are the comments to be made from a legal angle? This article aims to report on the major issues and events surrounding this intervention and it attempts to answer the above questions.

### Background to the intervention

Butterworth had been beset with a host of problems. It suffered from administrative and financial problems, largely inherited from earlier lack of administrative competence in the homeland of Transkei. Basic services were not being provided in a sustainable manner, there were allegations of fraud, nepotism, corruption and misuse of municipal assets by councillors. The collection of arrear rates and taxes had been completely neglected. This left the municipality on the verge of complete financial collapse.

At the end of February 1998, Butterworth's financial predicament resulted in its failure to pay the municipal workers their wages. They embarked on a strike, leaving the municipality in a situation where, according to a Senior Superintendent of the SAPS stationed at Butterworth, 'all services came to a complete standstill'. Refuse was not being collected and the town was deprived of water for three full days, which posed a serious threat to the health of the residents. At the same time, there was a threat that electricity supply to the municipality would be severed. There were continuous protest actions, organised by local political parties, civic organisations and unions, resulting in a state of civil unrest in

Butterworth. The allegations of fraud, corruption and mismanagement gained momentum in a preliminary report of the Heath Commission. This report divulged the status of investigations by the commission and noted unauthorised payments, improper appointments, unauthorised use of municipal property and services, maladministration and huge outstanding amounts of taxes and rates.

The MEC for Housing and Local Government in the province reacted to these mounting problems in Butterworth by sending a letter, in which a meeting was requested within 24 hours. The MEC pointed at the council's failure to deliver services, to promote a safe and healthy environment and to promote the development of the municipality. In general, the MEC stated, the municipality failed to fulfil its obligations in terms of the Constitution. In the meeting that took place the following day (12 March 1998), assurances were given by the Butterworth TLC that the situation was actually improving and normalising.

However, on the 13 March it was discovered that there was no improvement at all, but rather a further deterioration: the hospital was now also under threat of closure, the strike continued and business and education institutions were closed. The MEC visited the town and met with relevant stakeholders, including business, municipal workers and political structures. They demanded the dissolution of the council. In a meeting with the council, the MEC requested the council to step aside and allow the province to take over the administration of the town.

The council acknowledged its inability to perform, and requested intervention by the province, but on its own terms. It sought to place the blame for the state of affairs in Butterworth on certain groups and factions outside the council. It also wanted to negotiate which powers were to be taken from the council and wanted the intervention to be limited to the restoration of basic services and to the duration of the emergency. These terms were unacceptable to the MEC, who subsequently obtained a mandate from the provincial

executive to send a directive in terms of section 139(1)(a) of the Constitution.

### The section 139(1)(a) - directive

In the directive, dated 16 March, the MEC listed the shortcomings of the council:

- administrative and financial chaos;
- failure to collect a substantial amount in arrear rates and taxes;
- the severance of water supply to residents of Butterworth;
- the threat to cut electricity;
- discontinued or irregular provision of other services, such as refuse and sewage removal;
- the health risk for the residents as a result of this;
- the closure of businesses;
- civil unrest;
- the hostility between the council and the community; and
- mismanagement, fraud, nepotism and unauthorised use of municipal property and services by councillors.

In general, the directive stated that the council had not been complying with the provisions and/or underlying values and principles of the Constitution. The directive explained why the MEC found the terms, under which the council would step aside, unacceptable or irrelevant. The appointment of blame for the deterioration of the town is irrelevant for the operation of section 139. And negotiating which functions and powers were to be taken from the council would be futile, since it would be impossible to separate the areas where performance was satisfactory from those where it was not. Limiting the intervention to lifting the emergency was not advisable, as the aim of the intervention should be the permanent and sustainable ability of Butterworth to fulfil its obligations.

### A comment on the directive

A few comments can be made here. First of all, the directive is right in stating that the only jurisdictional fact required by section 139 is the inability of the council to fulfil its executive obligations. Blame is, to a very large extent, irrelevant in the operation of section 139. In the light of the circumstances that prevailed in Butterworth during

February and March 1998, the province seemed to have good reason to find that it was impossible to draw a line between the functions of the council that were being performed satisfactorily and those that were not. But it must be noted that section 139(1)(b) clearly states that, if the intervention takes the form of the assumption of responsibility, it should be limited to 'the relevant obligation' and 'to the extent necessary'. This obliges the provincial executive to attempt to limit the assumption of responsibility to those functions and powers where the problem lies and not to use section 139(1)(b) in a sweeping way, relieving the relevant local authority of all its powers.

### Steps to be taken

The directive continues with the steps that the MEC was considering to take against Butterworth.

- The councillors and the town clerk would be relieved from their respective functions and duties with retention of full benefits, and would be replaced by administrators appointed by the MEC.
- The councillors and the town clerk should be available to render assistance or provide information to the administrators.
- This position would endure until -
  - the provincial executive was satisfied that economic and financial order and stability, as well as the ability to render sustainable and effective local government services, had been established; and
  - the investigation of the Heath Commission, as well as any legal proceedings, connected to it, had ended.

### Butterworth's response to the directive

The council was given until 17 March, 15h00, to make written or oral representations with regard to the directive. A response was received in which the council once again blamed political structures for the problems in Butterworth. It suggested that the history of poor administration in the area should be seen as extenuating circumstances. It further noted that the collection of arrears was being attended to and referred to the strike of municipal labourers as 'serious acts of sabotage' committed by 'criminal elements'. The water supply had been taken over by a private contractor and legal action had been taken to force the labourers back to work. In conclusion, the council refused to step down.

### Eastern Cape assumes responsibility for administration of Butterworth

This response did not convince the provincial executive not to intervene. On 18

March, the Eastern Cape provincial executive intervened as set out in the directive. The councillors were requested to comply with the provisions of the directive and to 'temporarily relinquish' their functions. Two administrators were appointed to administer the affairs of the municipality. On 11 May a third administrator was appointed.

### A comment on the terms of the intervention

From the terms of the intervention, as set out in the directive, it seemed that the province misinterpreted section 139. The provincial executive 'relieved' the councillors 'from their functions and duties' on the basis of section 139. However, section 139 does not authorise a province to do so. The Constitution speaks of the non-fulfilment of an *executive* obligation. Section 139 is not concerned with the municipality's *legislative* authority, that is its authority to make by-laws. The effective dissolution of the council meant that its legislative authority was being curtailed without a legal basis. In line with that, the councillors should not have been ordered to vacate their offices, but should have retained access to them, in order to be able to fulfil that legislative function. Another problem arises with regard to the duration of intervention. The province linked the duration to, among other things, the duration of the investigation by the Heath Commission as well as the duration of all legal proceedings in connection with its findings. These seem to be very uncertain criteria, considering that legal (appeal) proceedings can continue for a number of years and that the intervention must be limited to the extent necessary to maintain and meet minimum standards.

### Approval by the Minister

On 27 March the provincial executive requested the Minister for Provincial Affairs and Constitutional Development to approve the intervention. Five days later, the Minister approved unconditionally.

### Approval by the NCOP

Approval of the National Council of Provinces was sought on 30 March. The NCOP discussed the intervention in a special plenary on 20 April, in which the intervention was approved by the Council. However, the NCOP did give terms with which the intervention had to comply. It empowered the administrators to assume 'executive and functional responsibility' in the following areas:

#### 1. Provision of basic services -

- the restoration of services such as water and electricity supply, refuse removal etc; and
- ensuring that the social, economic, com-

mercial and industrial viability of Butterworth was no longer threatened.

#### 2. Financial management -

- collection of rates, fees, service charges and other moneys due and owing to it;
- ensuring that the municipality meets its financial obligations; and
- ensuring that the municipality is enabled to comply with the provisions relating to financial management in section 10(G) of the LGTA.

#### 3. Administrative procedures -

- ensuring compliance with policies and procedures for the use of assets of the municipality;
- ensuring use of those assets for their lawful purpose only; and
- ensuring that the municipality's affairs are conducted in an open, transparent, accountable and responsible manner.

With regard to the powers of the council, the NCOP stated: "The powers of the Council are limited to the extent that the Administrators have assumed the duties of the Municipality to maintain essential national standards or meet established minimum standards for the rendering of services." It was further decided that the Select Committee on Constitutional Affairs & Public Administration would concern itself with the procedures for the review of the intervention.

### A visit to Butterworth by the NCOP

The Select Committee undertook a study tour to Butterworth on 25 and 26 May 1998. The aim of the visit was to ascertain whether or not the NCOP's Terms of Intervention were being adhered to. It further aimed to find out whether the intervention should continue, what was being done to support and strengthen the capacity of the municipality in terms of section 154(1) of the Constitution and what was being done to address the root cause of the problems, namely the conflict between the community of Butterworth and the council. The representatives of the NCOP met with all the stakeholders; provincial legislature, community structures, unions, municipal administration, councillors, mayor, MEC and the administrators. Subsequently, it drafted a report and proposed recommendations, which were approved by the NCOP.

### The NCOP reviews

Firstly, the NCOP again made it clear that the administrators only had capacity to perform executive functions. They could not legislate. Any legislative acts, including the budget, had to be approved by the council. Councillors could not be prevented from using the facilities of the municipality that

they required to perform their responsibilities. Secondly, the report clarified the relationship between the council and the administrators by saying that the administrators were accountable to the MEC, but that they had to ensure regular reporting to the council. Thirdly, vacancies that occurred had to be filled and those members entitled to allowances had to be paid those allowances. The MEC was to investigate allegations that members were receiving allowances in excess of the amount they were entitled to. Fourthly, the town clerk, who had been suspended, had to be reinstated. He was to work together with the administrators to resolve the problems. However, if the town clerk was unwilling or unable to do so, the MEC was to require the council to take necessary steps to relieve him of his responsibilities. Fifthly, in dealing with the community, the administrators were encouraged to remain impartial at all times and to appear to act in an even-handed manner. In conclusion, the report stated that all stakeholders, including staff and the councillors, agreed that the intervention should continue.

#### **Comment on the report**

The report provided clarity on a few problematic elements of the intervention and corrected some mistakes on the part of the province. The notion, created by the directive and the actual intervention by the province, that the councillors were to lay down their functions altogether, was corrected by the NCOP. The councillors retained their capacity to legislate. They could therefore not be refused access to facilities they wanted to use for that purpose. The NCOP also reversed the suspension of the town clerk. This implied that the NCOP was of the opinion that the council, and not the administrators, remained the designated organ to take disciplinary action against the town clerk. However, the report did not deal with the question of whether or not the jurisdictional facts leading to the intervention, namely the deterioration of basic services and management, were still prevalent. The aims of the visit required an investigation into these objective facts, but the report details that most of the visit was spent on addressing the lack of clarity surrounding the intervention and the conflict between the community and the council.

#### **The finale: court action**

On 3 July, the town clerk was suspended from his position by the MEC. The MEC also investigated the allegations of excesses in the payment of allowances to the councillors, and reset their allowances to the legal amount. The councillors and the mayor of

Butterworth then embarked on legal action. On 14 August they approached the High Court in Umtata for an interdict. In their application, they asked for reinstatement of the town clerk, invalidation of the intervention (or continuation on the terms of the NCOP), re-instatement of the original payment of allowances to the councillors and the MEC and the administrators to be prevented from interfering with the council. After negotiations between the council, the provincial executive and the NCOP, the case was settled out of court. In terms of the agreement, the intervention was withdrawn and in its place the parties agreed to a new intervention, the terms of which were described in the agreement. The settlement contained the following terms:

- the town clerk had to be re-instated;
- any allegations of misconduct of the town clerk had to be dealt with by the council;
- the intervention had to be withdrawn and the administrators had to cease their activities in Butterworth;
- all expenditures incurred after the start of the intervention, which were not approved by the council, were acknowledged as being unauthorised;
- the council had to review and approve those expenditures retrospectively - all expenditure not approved by the council had to be repaid by the MEC;
- a new intervention had to be undertaken by the province, limited to -
  - directing and assisting the staff of the municipality to deliver services; and
  - providing resources and skills and build capacities in conjunction with municipal staff;
- the new intervention had to be approved by the NCOP and the province had to abide by and implement the terms of the approval, if granted;
- under the new intervention, the council had to convene in the usual manner to exercise its legislative functions;
- one or more persons, nominated by SALGA and appointed by the MEC, had to direct and control the intervention; and
- the MEC had to appoint an administrator to administer and implement the terms of the agreement.

#### **A comment on the agreement**

The most interesting aspects of this agreement are the reinstatement of the town

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clerk and the provision regarding the expenditures made without approval of the council. The reinstatement of the town clerk, after his suspension by the MEC, affirms the position taken by the NCOP in its report that, despite the intervention, the council, and not the MEC, was the designated organ to take disciplinary action against the town clerk. The provision regarding the expenditures made without approval of the council, makes clear that the approval of expenditures falls within the ambit of the legislative capacity of the council. This legislative capacity remains intact in the event of an intervention. In conclusion, the section 139 intervention does not affect the legislative capacity of the relevant municipality and

it does not go as far as assuming the council's authority to take disciplinary action against its employees. The agreement also refers to a new intervention, to take place after the withdrawal of the original intervention. This new intervention never materialised. Apparently, the need for provincial interference was no longer there.

#### **Assessment**

In the end, the intervention seems to have accomplished its aims. Relative normality has returned to Butterworth, the delivery of services is at an acceptable level and there are no serious complaints by business or communities about the municipality. From a legal point of view, two important notions emerge from this unprecedented section 139 intervention. Firstly, the assumption of responsibility for a municipality's obligations by a province cannot effect the legislative capacity of that municipality. The status of local government as an autonomous sphere of government prevents the province from assuming a municipality's legislative capacity. Secondly, the role of the NCOP should be emphasised. The NCOP took its obligation to review this intervention very seriously. The NCOP's constitutionally mandated supervision works in two ways; not only must the NCOP assist the province in creating workable terms for the intervention as well as clarifying its role, but it must also protect local authorities from interventions that reach beyond that which is constitutionally permitted.

*Jaap de Visser*

**Local Government Project  
Community Law Centre, UWC**