Provincial intervention

The principles and rules

Section 139 of the Constitution authorises the provincial executive to intervene in a municipality when it does not fulfil an executive obligation in terms of legislation. This article seeks to introduce the rules and principles that can be derived from the Constitution.

Context: provincial monitoring and support of local government

The basis of the power of the province to monitor local government is set out in section 155(6) of the Constitution where it provides that

"(e)ach provincial government ... by legislative or other measures, must provide for the monitoring and support of local government in the province."

Under the heading *Provincial supervision of local government*, section 139 provides for intervention. But section 139 covers more than just the provincial executive taking remedial action. It also includes a process, whereby the province reviews and monitors the actions of municipalities. Thus, section 139 has two components. The first one is the process of provincial review of the actions of local government in order to measure the fulfilment of its executive obligations. The second one is a process of correction should local government fall short of its obligations. In *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para. 120 the Constitutional Court identified five successive steps in the process of supervision:

(a) the review or monitoring of local government by the provincial executive;
(b) the identification of the non-fulfilment of executive obligations by the provincial executive;
(c) the intervention by the provincial executive;
(d) the review by the National Council of Provinces (NCOP) of the assumption of responsibility of an executive obligation by the provincial executive;
(e) the managing and termination of the assumption of responsibility by the provincial executive.

What does the power to review and monitor entail? At present, various Acts of Parliament set out measures that may be used to monitor performance. These measures are useful indicators of the content of the powers to review and monitor. They range from a mere request for information to an intrusive power to enter buildings and seize documents.

Request for information

A fairly evident measure in terms of monitoring is the request for information. In many cases, local authorities are compelled by legislation to supply information to different organs. For example, the Health Act 63 of 1997 obliges the Medical Officer for Health of a local authority to submit reports to the national-, provincial- and local authorities.

Right to access sources, places and persons

More intrusive is the right of the monitoring authority to have physical access to the records, books and other documentation of a local authority or to interrogate persons. For example, the Fire Brigade Services Act 99 of 1987 allows the Chief Fire Officer to enter any premises under his or her jurisdiction in order to determine whether the Act is complied with.

Right to assistance

The power to monitor and review also entails that the institution that is being monitored must render reasonable assistance to facilitate the supervising authority in exercising this power. In that vein, the Auditor-General Act 12 of 1995 requires that suitable office accommodation and other facilities be made available for the duration of the audit.

Interventions as a result of monitoring

These examples of monitoring measures also make provision for intervention by a competent authority when conditions are not complied with. The Health Act provides that the Minister may, in some cases, intervene by taking over powers of the local authority.

These examples of measures of monitoring can often be very intrusive and pose a threat to the autonomy of local government. Most of the current legislation still dates from the old order where local government was the lowest of the three tiers of government. The current system of municipal monitoring by a province is fragmented. Each piece of legislation concerning a municipal competence has its own monitoring mechanism. There is a need for a uniform and effective intervention scheme. The legislation in terms of section 139(3) currently forms part of the draft Municipal Systems Bill that will be published in bill form shortly. A set of principles that has guided the drafting of this legislation, and that should guide the implementation of it, can be identified. These principles relate to the requirements for intervention, the procedure before intervention, the procedure after intervention and the powers of the province after the assumption of responsibility.

Requirements for intervention

The requirements for intervention are as set out in the first part of section 139(1) of the Constitution that reads:

"When a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene..."

Failure in fulfilling what?

The basis of the obligation must be in legislation. This includes the Constitution, Acts of Parliament, provincial Acts and by-laws. Other subordinate legislation, such as national and provincial regulations also qualify as legislation. Directives and standing orders do not, however, qualify. In the case of Butterworth, the Eastern Cape provincial executive pointed at the general objectives of local government (s 152 of the Constitution) and invoked section 139 on the basis of failure of Butterworth to fulfil these objectives. However, section 152 contains merely objectives, not statutory obligations. Reference to failure in meeting these general objectives is not sufficient to invoke section 139. The Constitution particularises the type of obligation that must be fulfilled. It must be an *executive* obligation. Section 139 is not concerned with a municipality's legislative authority but rather with the *execution* of those and other decisions. The fact that section 139 refers to *an* obligation suggests that the

province must indicate precisely which executive obligation is not being fulfilled. There is no need for a total collapse of a municipality before a province may intervene. Non-fulfilment with respect to a single identifiable obligation is sufficient for intervention.

Who or what fails?

Section 139 stipulates that failure of *a municipality* may lead to intervention. In the Constitution, the council is regarded as having the highest authority and therefore the province must direct itself to the council to correct any wrongdoings. The council is the only body that is accountable to the province in the context of section 139. The focus of a section 139 enquiry is therefore conduct of the municipal council whether directly or through inaction by not giving proper direction to or exercising proper control over the CEO.

Failure to perform

When a municipality *cannot or does not* perform, it may lead to intervention. The inability to perform may even be a result of a lack of resources. But the only thing that is really important in this context is the failure to meet certain standards. What is the yardstick? Because clearly, all municipalities do not have the same resources and can consequently not all fulfill the same obligation to the same extent. Section 139(1)(b) mentions *essential national standards* and *established minimum standards for the rendering of a service*. Therefore, the failure to meet minimum standards may give rise to an intervention. A 100 % fulfilment is not required.

Province's duty to support

The lack of performance by a municipality could be the result of the failure of the province to fulfil its obligation to support. Can a municipality challenge the intervention by arguing that the intervening province did not 'support and strengthen' the capacity of the municipality and therefore shares guilt in the problem? It would be unfair if a province would fail in its constitutional duty to support a local authority and subsequently intervenes. On the other hand, and this is the preferred view, it does not make sense to prohibit a province from intervening, and allow the situation to get worse just because of the inaction of the province in the past.

Procedure before intervention

Section 139 enables the province to take *any appropriate steps* which include issuing directives and assuming executive responsibilities. In other words, the province has a discretion in deciding which measure to take. But its discretion is limited by the procedures and rules of section 139 and also by the principle of local autonomy entrenched in the Constitution. The assumption of authority is a method of last resort and other attempts of remedying the situation should first be sought. Before assuming authority in terms of section 139(1)(b), a province should, in the normal course of events, first have issued a directive in terms of section 139(1)(a).

Issuing directives

Before a province issues a directive compelling a municipality to perform certain acts, a notice should be sent to the municipality regarding the intended action. A municipality can then respond to the alleged failure to fulfil its obligations and to the appropriateness of the intended issuing of a directive.

Assuming responsibility

Before assuming responsibility, the province must notify the municipality in writing of its intention to do so. The province must provide reasons why it is considering to assume responsibility and offer the municipality the opportunity to respond. The municipality can make representations and try to convince the province that the directive has in fact been complied with.

Procedure after intervention

After the assumption of responsibility by a province, the national Minister responsible for local government must approve the intervention within 14 days. A notice of the intervention must be tabled in the NCOP and in the provincial legislature within 14 after their first sittings. Unless the NCOP approves the intervention within 30 days after its first sitting, the intervention comes to an end.

Approval by the Minister and the NCOP

The Minister can disapprove the intervention, upon which the intervention ends. The Minister can also approve the intervention under certain conditions or unconditionally. The Minister's approval is important because it may serve the function of 'filling the gap'. If the NCOP is in recess, it might take time before Parliament can approve the intervention. It can also serve as a 'filter'. Should vexatious and frivolous interventions by provinces occur, they can be filtered out, without having to set a whole parliamentary chamber in motion over it.

The NCOP can disapprove the intervention. The Minister's decision to approve is then overruled. The NCOP can also approve the intervention conditionally or unconditionally. It may occur that the NCOP approves under conditions that differ from the Minister's conditions. The NCOP's conditions then prevail and the Minster's conditions lapse.

Section 139(2)(d) instructs the NCOP to review the intervention on a regular basis and make recommendations to the provincial executive. The role of the NCOP is to assist the provincial executive in managing the intervention and protect the institutional integrity of local government against interventions that are too intrusive, not properly defined or not properly implemented.

Powers after assumption of responsibility

The intention of the assumption of responsibility should not be to totally take over the municipal powers, but only to deal with those aspects where the municipal council has failed. The intervention should be viewed as a corrective measure, not as a punitive one. During the intervention the council must continue exercising those powers that were not taken over by the province, and should be enabled to do so by the province.

The province appoints administrators, who are accountable to the provincial executive and act in a provincial capacity. The province is liable for actions performed by them and is responsible for their salaries. The provincial executive must manage the intervention and regularly report to the NCOP.

Termination of the intervention

The intervention must end when the reason for the intervention no longer exists. Therefore, the reason for the intervention should be clearly stated in the notice preceding the intervention. The objective of the intervention should be to restore the functioning of the municipality to an acceptable standard.

Conclusion

Three main principles should inform the forthcoming legislation on section 139 as well as its implementation. Firstly, the assumption of responsibility is a measure of last resort. Secondly, the integrity of local government as an independent sphere of government protects municipalities from provincial interference with its legislative functions. Thirdly, the aim of the intervention should be restorative rather than punitive.

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