

Interventions in municipalities

Amendment to Section 139 of the Constitution

The Second Constitutional Amendment Act of 2003 dramatically increases the powers of provincial governments to intervene in a municipality, through amendments to section 139.

These now provide the constitutional basis for the Municipal Finance Management Bill to empower provincial executives to intervene in a municipality in case of a financial crisis.

The Amendment Act also softens the review by the National Council of Provinces of an intervention in other circumstances.

Section 139 now provides for three types of interventions:

- a general intervention;
- an intervention relating to budget or revenue-raising measures; and
- a financial emergency intervention.

General intervention

Dissolution of a council

The Amendment Act explicitly provides that where a municipality cannot or does not fulfill an executive obligation in terms of either the Constitution or legislation, a provincial executive may intervene by dissolving the municipal council. This may happen only if 'exceptional circumstances warrant such a step'. An administrator is then appointed, whose function comes to an end when a new council has been elected.

An example of 'exceptional circumstances' is provided in section 34(3) of the Municipal Structures Act of 1998. This empowers an MEC for local government to dissolve a council if an assumption of responsibility in terms of section 139 has not resulted in the council being able to

key points

- Section 139 now provides the constitutional basis for the Municipal Finance Management Bill to empower provincial executives to intervene in cases of financial crisis in a municipality.
- In a financial crisis the provincial executive must impose a recovery plan.
- If the municipal council cannot or does not give effect to the plan, the provincial executive must dissolve the council.
- If a province does not comply with its duty to intervene, the national government may do so in its place.
- A municipal council may also be dissolved if it cannot or does not adopt a budget or revenue-raising measures to give effect to the budget.
- In other interventions, the NCOP must review the intervention within 180 days.

fulfill its obligations in terms of legislation. Whereas section 34(2) of the Structures Act was precariously based on the 1998 constitutional amendment, which merely mentioned the possibility of the dissolution of a council by an MEC in section 159, the present amendment gives this power a clear constitutional foundation.

Review of assumption of responsibility

The Amendment Act has softened the supervisory role of the national minister responsible for local government and the National Council of Provinces in cases where there is an assumption of responsibility by a provincial executive. After

written notice has been given to the national minister, the relevant provincial legislature and the National Council, the intervention must end if, first, the minister disapproves the intervention within 28 days or does not approve of it by the end of that period. The original period of 14 days has thus been doubled to 28 days.

It does require, however, that the Minister makes a decision one way or the other.

Second, despite the approval of the minister, the assumption must nevertheless end if the National Council disapproves it or if it is not approved within 180 days of the beginning of the intervention. This extends the original period of 30 days after notification to 180 days.

Review of dissolution of council

When a provincial executive dissolves a council, stricter review procedures are put in place. First, the provincial executive must immediately submit a written notice to this effect to the minister, the relevant provincial legislature and the National Council.

Second, the dissolution takes effect only 14 days after the minister and the National Council have received such notice. Within that period, the minister or the National Council may set the dissolution aside.

Interventions relating to budget or revenue-raising measures

Where a municipal council does not or cannot fulfill the specific obligation to approve a budget or any revenue-raising measure to give effect to the budget, a new duty is placed on the provincial executive. It has no option but to intervene by taking 'appropriate steps' to ensure that these financial obligations are fulfilled.

The steps include dissolving the council, appointing an administrator and approving a temporary budget or revenue-raising measure to provide for the continuing functioning of the municipality.

A municipality's failure to adopt a budget is thus an example of the 'exceptional circumstances' justifying the dissolution of a council.

When intervening on this ground, the provincial executive must notify the national minister, the relevant provincial legislature and the National Council of Provinces of the intervention within seven days of the intervention.

However, if the municipal council is dissolved, the protective measures concerning dissolution apply – the notification must be immediate and dissolution takes effect only after 14 days.

Financial crisis intervention

The main import of the Amendment Act is that it provides for interventions in what the Municipal Finance Management Bill calls 'financial emergencies'. If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or meet its financial commitments, the provincial executive must intervene. The same applies if a municipality admits that it is unable to meet these obligations or commitments.

Recovery plan

The first duty of the provincial executive is to impose a recovery plan that is aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments. The plan is prepared in accordance with national legislation (the Municipal Finance Management Bill).

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The plan binds the municipality in the exercise of its legislative and executive authority to the extent necessary to solve the financial crisis. This means that the provincial executive cannot over-prescribe what the municipality must do.

Enforcement mechanisms

The provincial executive has powerful tools to enforce implementation of the recovery plan.

First, if the municipal council cannot or does not approve legislative measures necessary to put the plan into practice (including a budget and revenue-raising measures), the provincial executive must dissolve the council. In that case, an administrator is appointed until a new council is elected and the province approves a temporary budget or revenue-raising measures so that the municipality can continue functioning.

Second, if the municipality cannot or does not take the necessary measures other than legislative ones to implement the recovery plan, the provincial executive must assume responsibility to do so itself.

Protective procedures

Within seven days of the intervention the provincial executive must notify the national minister, the relevant provincial legislature and the National Council of Provinces.

However, if the municipal council is dissolved, the protective measures applicable to dissolution apply – notification must be immediate and dissolution takes effect only after 14 days.

National government intervention

The national government will closely scrutinise how provinces intervene in municipal financial crises. If a provincial executive cannot or does not adequately exercise its powers or perform its functions relating to interventions concerning budgets or revenue-raising measures, or financial crises, the national government must intervene in place of the provincial executive.

Comment

Over the past two years a number of drafts of the amendment to section 139 have been before Parliament. The main objective has been to provide a constitutional basis for regulating financial emergencies in terms of the Municipal Finance Management Bill.

The Bill is long overdue and has been delayed by, among other things, the difficulty of striking the right balance between safeguarding the financial health of municipalities, and ensuring their integrity and distinctiveness as a sphere of government.

Determining the roles of the national and provincial governments with regard to their oversight of municipal finances has also proved difficult.

With the adoption of the new section 139 the Municipal Finance Management Bill can now be finalised.

In forthcoming editions of the *Local Government Bulletin* considerable attention will be given to this Bill, including examining how, in the chapter on financial emergencies, it gives effect to the provisions of section 139.

We have commented on earlier drafts seeking to amend section 139 (see *LGL Bulletin* 2002 4(3): 1–3).

These drafts were criticised as being unnecessary and unduly invasive of local government's institutional integrity (see *LGL Bulletin* 2002 4(3): 3–6). Those comments remain valid.

However, the amendments to section 139 are now part of our constitutional framework. Interventions are by their very nature an invasion of the institutional integrity of local government. They should therefore be used sparingly, placing the emphasis again on the need for adequate monitoring and support to avoid the need for interventions.

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