Provincial-municipal relations: A few challenges

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1 INTRODUCTION

The status of local government has changed radically compared to what was previously the case. Now, local government is an autonomous sphere of government; its powers are derived from the Constitution[1] and are no longer delegated from the national or provincial government. The by-laws of a municipal council are legislative acts and are therefore not open to review in terms of administrative law. The Constitution further refers to various obligations that will determine the relations between a province and a municipality. These obligations are the monitoring, support, regulation and supervision of municipalities by provinces. By and large, the obligations have been further defined in legislation such as the Municipal Structures Act 117 of 1998 (hereafter the Structures Act 1998),[2] the Municipal Systems Act 32 of 2000 (hereafter the Systems Act 2000) and other national legislation. The sum of these relationships may be clustered under the term 'intergovernmental relations', although the term itself captures much more.

Chapter 7 of the Constitution gives provincial government very specific obligations and powers in respect of municipalities. The provisions dealing with the issue of provincial oversight (monitoring and support) are found in sections 154(1) and 155(6) and (7). The power to supervise municipalities is found in section 139.

The coming into operation of a new constitutional and legislative regime for local government poses a few challenges to the relations between provincial government and municipalities within the same province. This paper highlights some of these challenges and suggests an appropriate approach to them.

2 MONITORING AND SUPERVISION

The constitutional basis of the monitoring power is set out in the Constitution, which provides that:

1 All references to the Constitution in this paper are to the Constitution of the Republic of South Africa Act 108 of 1996.

2 Local Government: Municipal Structures Act 117 of 1998.

(e) each provincial government . . . by legislative or other measures, must provide for the monitoring and support of local government in the province.[3]

The provincial supervision of local government is described in section 139(3) as a "process", consisting of, in the words of the Constitutional Court, a number of "successive steps".[4] The following steps can be identified:

(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 (the substantive requirements for intervention);

(c) the intervention by the provincial executive in the functional and institutional terrain of local government (the substantive and procedural requirements of intervention);

(d) the review by the NCOP of the assumption of responsibility by the provincial executive; and

(e) the management and termination of the assumption of responsibility by the provincial executive.

Section 139 entails more than the provincial executive taking remedial action; it includes also a process of review or monitoring. In the *First Certification Judgment*[5] the Constitutional Court said that provincial supervision of local government in terms of section 139 has two components: the first entails a process of provincial *review* of the actions of local government so as to measure the fulfilment by local government of executive obligations conferred by statute, and the second is a process of implementing *corrective measures* should local government fall short of its obligations. The Court added that a similar meaning is attributed to 'supervision' in section 100.

The review of local government (or monitoring) should thus be seen as an integral component of the power to intervene. Indeed, the act of review is a limited form of intervention, albeit without immediate or direct consequences. When dealing with the requirements of section 139, then, the implicit powers of review should also be recognised and articulated. The successful implementation of a review process may either prevent the use of the corrective measures or, if it is unavoidable, make only the least intrusive measures necessary.

2.1 Aspects of monitoring

Various Acts of Parliament set out in some detail the measures that may be used to effect a monitoring function.[6] These measures may be used by

3 S 155(6).

4 *In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) (referred to as the *Second Certification Judgment*) para 120.

5 *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 370.

6 See, for example, Auditor-General Act 12 of 1995 (AGA 1995), Fire Brigade Services Act 99 of 1987, Health Act 63 of 1977 and SA Police Service Act 68 of 1995 (SAPSA 1995). This list is by no means exhaustive.

functionaries either in local government itself or in other spheres of government, as the case may be, and may range from a request for information[7] to the unilateral entry into a building and the seizure of documents.[8]

2.1.1 *Requests for information*

It is a fairly basic monitoring requirement to be supplied with information and, in general, local authorities are legislatively compelled to either provide reports or to make specified documents readily available. In this regard, the Auditor-General Act 12 of 1995 (AGA 1995) makes provision for persons to be subpoenaed and to attend with certain documents under their control.[9] The Health Act 63 of 1997 is another example; the Medical Officer for Health of a local authority is obliged to compile a series of reports to the national, provincial and local authorities on certain specified topics.[10] In terms of the SA Police Service Act 68 of 1995 (hereafter SAPSA 1995) the National Commissioner may request and obtain information and documents under the control of the municipality under review.[11]

2.1.2 *Rights of access to sources, places and persons*

A more intrusive device to monitor local government is the right of a competent authority to have physical access to the records, books and other documentation under the control or in the possession of a local authority. In this case, the institutional integrity of a local authority is at stake as current legislation allows for the reviewing authority itself to have access to the local authority in order to obtain relevant information. The AGA 1995 makes provision for the right to make extracts from any source or document of an institution under audit.[13] It also provides for the right to interrogate any person for the due performance and exercise of the powers and duties of the Auditor-General.[12] In terms of the Fire Brigade Services Act 99 of 1987 (hereafter FBSA 1987), the chief fire officer may enter any premises under his or her jurisdiction in order to determine whether the safety provisions of the Act are being complied with.[14] Similarly, where a municipality has decided to establish a municipal police service, the SAPSA 1995 provides that the National Commissioner or the MEC may enter any building or premises under the control of the municipality or its police service in order to ensure that national standards are being maintained.[15]

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7 See AGA 1995.
8 See SAPSA 1995.
9 S 5(a).
10 Ss 23, 28 and 29.
11 S 64L.
12 S 5(b).
13 S 5(c).
14 S 18.
15 S 64L.

2.1.3 *Right to assistance*

Monitoring may, however, also entail reasonable assistance being rendered to the supervising authority by the institution being monitored. The rationale may be that effective monitoring is more likely to take place where the supervising authority has ready access to the institution. Also, monitoring tends to be a periodic event as opposed to an ongoing one, in which case cost effectiveness demands that such assistance be rendered for that limited time. In this vein, the AGA 1995 requires that suitable office accommodation, other facilities and logistical support be made available free of charge for the duration of the audit.[16] Also, the cost of the audit in this monitoring exercise is recoverable from the fund concerned.[17] Similarly, the SAPSA 1995 determines that the National Commissioner is entitled to all reasonable assistance by any member of the municipal police service or any employee of the municipality in question.[18]

2.1.4 *Interventions as result of monitoring*

As alluded to above, the review of local government should be seen as an integral component of the power to intervene. The various pieces of legislation referred to make provision, to varying degrees, for intervention by a competent authority in the event that certain conditions are not complied with. In that vein, the FBSA 1987 provides that the MEC may direct a municipality to comply with certain conditions, failing which the MEC may cause certain steps to be taken in compliance with the order, on behalf of the municipality and at its expense.[19] Similarly, the Health Act 63 of 1977 provides that the Minister may, if he or she is of the opinion that the health of the inhabitants are endangered by the failure or refusal of a local authority to provide a certain service, intervene by directing or assuming the powers of the local authority in order to effect compliance.[20] Similarly, the SAPSA 1995 provides that the MEC, at his or her own instance or on request by the Minister, may intervene in terms of section 139 of the Constitution in the event of non-compliance with national standards on the part of a municipality. In terms of this Act, the MEC may request the municipality to comply with the conditions or national standards, failing which an administrator may be appointed to exercise all the duties of the executive head of the municipal police service with the rider that all expenditure is for the account of the relevant municipality.[21]

The various aspects of monitoring referred to above clearly indicate that the level of monitoring ranges from the least intrusive submission of periodic reports to more intrusive investigations and interrogations and, finally, to the stage of compulsion where responsibilities are taken over by a competent authority.

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16 S 5(d).
17 S 8.
18 S 64L.
19 S 17.
20 S 18.
21 S 64M read with 64N.

2.2 Monitoring in terms of the Municipal Systems Act 2000

The monitoring regime envisaged by the Systems Act 2000 seems to indicate a shift away from the fragmented approach currently in operation.[22] The Systems Act 2000 seeks to compel the MEC for Local Government to establish mechanisms, systems and processes to monitor municipalities with regard to the management of their affairs, the performance of their functions and the exercise of their powers, as well as to monitor the development of local government capacity. Significantly, the object of the monitoring exercise is also to assess the support needed by municipalities to strengthen their capacity in all respects. The Systems Act 2000 further makes provision for the minister to issue uniform guidelines on the establishment of provincial monitoring mechanisms, systems and processes.

The question that then arises is whether such a uniform system is conducive to good governance in a province and, if so, what the implementation of such a system would mean for the current monitoring system as set out in various pieces of legislation. The Constitution places great emphasis on the notions of essential national standards, minimum standards, the maintenance of economic unity and the prevention of unreasonable action prejudicial to others.[23] The consistency that the Constitution seeks to establish and maintain will find effect in national, provincial and local legislation. Most of the current legislation on the statute books still dates, to a significant extent, from the old order and, although amended, still lack the values of the present Constitution, referred to above. Through the efflux of time those values will find their way into all pieces of legislation. However, in the pursuit of democratic, representative, sustainable and developmental local government time is of the essence. There is an overwhelming need to establish a coherent and effective system of governance in the shortest time possible and to that extent, the establishment of uniform mechanisms, systems and processes are indispensable for good governance.

As alluded to above, the current system of municipal monitoring by a province is fragmented in that each piece of legislation concerning a municipal competence contains its own monitoring mechanism. A more serious problem is that some legislation dates from before the advent of the 1996 Constitution, with the result that aspects of the monitoring mechanism, especially the intervention part, do not comply with the dictates of the Constitution as set out in section 139. Some Acts still refer to the Administrator as the competent authority to exercise jurisdiction over a local authority and those Acts, for obvious reasons, do not contain the section 139 procedure in respect of its contemplated intervention procedures. Furthermore, from the overview of the few pieces of legislation referred to above, it is clear that the monitoring power can be applied in a most intrusive manner. This, undoubtedly, is a relic from the past

22 Ss 105 and 107.
23 Ss 44, 100 and 139.

where local government was the lowest tier of government in a strict hierarchical setting. As a result of their subordinate role, local authorities had to bear the incidental cost implications of provincial monitoring; no provision was made for alleviating the financial burden by setting aside office space, telecommunication equipment and services, staff to assist in the compilation of reports, office space to store reports, etc.

The only principles that would guide the MEC in the establishment of mechanisms, systems and processes for the purposes of monitoring, are those contained in Chapter 3 of the Constitution. However, those are mere principles which, in order to be effective, should be embodied in the text of legislation. In the absence thereof, it becomes a matter of interpretation whether the principles of intergovernmental relations have been complied with. It is suggested that the principles of consultation, clarity and reasonable limits act as the built-in safeguards in the establishment of a provincial monitoring regime.

First, there should be provision that consultation must take place between the MEC, provincial organised local government and other possible stakeholders in the development of such a monitoring regime. In cases where the Minister exercises his or her prerogative to issue uniform guidelines, such consultation must take place at a national level.

Second, the manner of establishing the monitoring regime must be clearly spelled out by means of adequate notification to all interested parties.

Third, the Systems Act 2000 itself gives an indication of the reasonable limits within which monitoring may be effected. In this regard, the MEC must take into account the administrative burden on municipalities, the cost involved and existing performance monitoring mechanisms. This will ensure that the exercise of the monitoring power is effected in the least intrusive manner possible.

3 SUPPORT

The constitutional basis for support is set out in the Constitution, which states that:

> . . . each provincial government must provide for the . . . support of local government in the province; and must promote the development of local government capacity.[24]

In giving content to the concept of support, it is instructive to refer to the Constitutional Court's *First Certification Judgment*.[25] The Court held that the term 'support' derived much of its significance from section 154(1) where national and provincial government are compelled to "support and strengthen the capacity of municipalities".[26] The power of 'support' can be

24 S 155(6).

25 1996 (4) SA 744 (CC).

26 At par 371 where the Court dealt with the provincial government's legislative powers in respect of local government.

employed by provincial governments to strengthen existing local government structures, powers and functions and to prevent a decline or degeneration in such powers, structures and functions.[27] The power of support is further to be read in conjunction with the legislative and executive role of the province in terms of section 155(6)(b) and (7). In terms of this section, the province has the power to promote the development of local government capacity to perform its functions and may assert such powers by regulating municipal executive authority to see to the effective performance of municipal functions. This control is not purely administrative and could encompass control over municipal legislation, to the extent that such legislation impacts on the manner of administration of local government matters.[28]

3.1 Support in terms of the Systems Act 2000

In terms of the Systems Act 2000, an MEC must establish mechanisms, processes and procedures to assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions.[29] Although this appears to be a major step down from the constitutional obligation to support, it is more apparent than real. The constitutional obligation stands, while the Systems Act 2000 adds to the duty by requiring assessment by a province of a municipality's needs.

The Systems Act 2000 also empowers an MEC to issue standard draft by-laws in respect of matters for which a municipality may make by-laws, as a support measure.[30] These standard draft by-laws may be issued on own initiative or on request by organised local government. In addition, it is submitted that an MEC may publish model delegations, standing orders, guidelines and policy directives that a municipality may adopt if it so chooses.

4 REGULATION

Provincial government has the legislative and executive authority to see to the effective performance of a municipality's functions by regulating the exercise by a municipality of its executive authority.[31] The meaning of 'regulate', in terms of the *First Certification Judgment*, connotes a broad managing or controlling rather than a direct prescriptive function.[32] Textually, the word 'regulate' is used in the context of the exercise, by both

27 *Ibid.*
28 *Ibid.* The 1998 *White Paper on Local Government* further envisages that national government establishes an overall framework for municipal capacity-building and support. Ministry of Provincial Affairs and Constitutional Development 1998 *White Paper on Local Government* Pretoria: Department of Provincial and Local Government (hereafter the *White Paper*).
29 S 105(1)(c).
30 S 14.
31 S 155(7).
32 At par 377.

national and provincial governments, of a legislative and executive power in respect of municipal executive authority. This type of control could therefore encompass legislation that obliges municipalities to adhere to standards in the exercise of their executive authority. These regulatory powers of both the national and the provincial governments are, it is submitted, fairly extensive powers over local government matters. It is further submitted that these powers do not extend to the 'what' – the core of Schedule 4 Part B matters – but that they extend to the 'how' – the framework of those matters. For example, municipal councils will be legislatively competent to establish childcare facilities[33] and to provide for their powers, functions, budgets and general management. The regulatory power of the provincial or the national governments could determine issues such as essential national standards in respect of the establishment or closing down of such facilities, the minimum staff-child ratio, monitoring, oversight and other minimum requirements.[34]

The most recent example of the extent to which the power of regulation may be taken can be found in the judgment of the Constitutional Court in deciding on a range of constitutional challenges to the Structures Act 1998 brought in 1999 by the provincial executives of the Western Cape and KwaZulu-Natal. In short, the provisions in the Structures Act 1998 pertaining to executive committees, mayors, executive mayors, mayoral committees, metropolitan sub-councils, ward committees and municipal managers were challenged as being in conflict with section 160(6) of the Constitution. The Court held that the section must be interpreted narrowly to mean that it dealt with internal domestic matters only. The Structures Act 1998 dealt with institutional matters that were key to a municipality's democratic structure, such as the establishment and functioning of its executive, and the national government was therefore entitled to legislate on those matters.

Provincial government is granted substantial powers to regulate local government. It will always be subject to the protection of municipal autonomy in terms of section 151 of the Constitution but in the case of a municipality with very limited capacity, the provincial power to regulate would be great.

5 INTERGOVERNMENTAL RELATIONS

The practice of intergovernmental relations between spheres of government within the new constitutional dispensation can probably be described as being in its infancy.[35] The practice of intergovernmental relations

33 Child care facilities are listed in Schedule 4 Part B.

34 Although the *White Paper* envisages that provincial regulations and ordinances need to be reviewed and reformulated in order to be constitutional, it does not address the distinction between the core and the framework of matters. It needs to be ascertained whether the current ordinances go to the core of matters and whether they are, for that reason, unconstitutional. These ordinances would have to be reviewed, redrafted and passed in the form of municipal by-laws should they go to the core.

35 See in this regard, the "Audit on intergovernmental relations" prepared for the Department of Provincial and Local Government by the UWC School of Government and the Community Law Centre, UWC, 1999.

between provinces and local government can be described as being, at best, in a period prior to infancy. The reason is quite apparent in that the new local government system was formally established on 5 December 2000 and precious little could have been done between then and now. There is now a window of opportunity to shape the relations in such a way that it facilitates the execution of the constitutional obligations that have been placed at the door of provincial government in relation to local government. The obligations to monitor, support, regulate and supervise must find expression in the practice of provincial-local relations.

There may, conceivably, be two dimensions to the relations between province and local government.

The first may relate to the mechanisms, processes and procedures that will facilitate the relations between the province and local government as a whole within the province. In this regard, the establishment of a MEC/Mayors forum, along MinMec lines, may be a consideration. Equally, the establishment of a Speakers' forum may add value to the relations as it would function as a legislative coordinating tool with a view to promoting best practices and the attainment of provincial norms and standards. Further, the participation of provincial organised local government in the provincial legislature will become an imperative. This will serve to mediate any tension that may arise in the exercise of legislative authority by the two spheres and will also have a positive spin-off in increased capacity on the part of organised local government.

The second dimension relates to the relations between the province and individual municipalities. In this regard, the relations between the province and district and metropolitan municipalities may be critical. In terms of the current division of powers between categories of municipalities, these two will be the engines of delivery within the provinces. The purpose of the relations between the province and these municipalities, beside the monitoring, support, regulation and supervision functions, must be to coordinate and facilitate the alignment and implementation of provincial development plans and strategies within these municipalities.[36] Such plans and strategies would have been identified in the integrated development planning processes between the province and municipalities.

6 CONCLUSION

The new local government dispensation poses various challenges to provinces in the areas of monitoring, support, regulation, supervision and intergovernmental relations. The fact that this new dispensation has only very recently been established creates a window of opportunity for provinces to create mechanisms, processes and procedures that will facilitate smooth relations between the spheres. A timeous start to these processes is of the essence so that meaningful interventions can be made by provinces.

36 See Systems Act 2000, ss 31, 32.