The quest for financial discipline at local government level: The regulation of municipal borrowing and financial emergencies

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1 INTRODUCTION

> . . . at least 843 municipalities are facing financial difficulties and many of these are in danger of total collapse . . .[1]
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> Eight local authorities in South Africa owe the Department of Land Affairs about R205 million and most of this money is unlikely to be recovered.[2]
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> . . . many councils were also defaulting on payments to creditors.[3]

These quotes are from but a few of the numerous media reports over the last few years reflecting the sad state of local government finances in South Africa. In February 2000 the Bronkhorstspruit town council was reported as being unable to meet its financial commitments and as having made "insufficient provisions for looming bad debts".[4] In November 1999 the Johannesburg Metropolitan Council indicated that it would sell its metropolitan centre to an investment company and then rent it back in a desperate attempt to generate urgently needed cash. Despite this cash injection, the council still needed another R100 million loan and was hoping to 'roll over' an existing R200 million loan that was due at the end of that year.[5]

In the Government's *Policy Framework for Municipal Borrowing and Intervention* published in July 2000, the situation was summarised by the rather bland statement that "fiscal crisis in local government is not new in South Africa".[6]

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1 http://www.iafrica.com/business/sa/story01.htm/ accessed on 14 October 1999.

2 As stated by the Auditor-General in his report for the year ending March 1999, which concluded that there is a "strong possibility" that this money would have to be written off. See http://www.business.iafrica.com/news/sabusinessnews/14602.htm accessed on 29 March 2000. See also http://www.bday.co.za/00/0329/news/news5.htm accessed on 29 March 2000 and http://www.mg.co.za/mg/news/99Aug2/26aug-local.html accessed on 26 August 1999.

3 Statement by Daniel Manyindo, Senior Advisor in the Department of Provincial and Local Government, quoted by Wyndham Hartley in *Business Day*, 5 March 2003.

4 http://www.iafrica.com/business/sa/mon.content.htm accessed on 29 February 2000. At this time the council was reported to have loans of R142,8 million.

5 http://www.business.iafrica.com/news/sabusinessnews/ accessed on 1 November 1999.

6 *Government Gazette* No. 21423, 28 July 2000.

A number of reasons have been advanced for this crisis, ranging from inadequate revenue bases and a failure to collect revenue to financial mismanagement, all resulting in the non-payment of salaries, pension and medical aid benefits, creditors, etc.[7] Whenever such cash-flow problems are experienced, municipalities may be tempted to either borrow more money, or roll-over existing loans – a solution that will at most provide short-term relief, and will probably exacerbate their long-term financial woes. Furthermore, the availability of debt is decreasing in concurrence with creditor confidence.[8] The need for financial reform and effective financial management at local government level is therefore evident.

This article focuses on the regulation of municipal borrowing powers and financial emergency as part of effective local government financing.

2 HISTORICAL REGULATORY FRAMEWORK

Before 1993 and the enactment of the Interim Constitution of 1993, local authorities were regulated in the main by the respective ordinances of the former four provinces, Transvaal, Natal, the Orange Free State and the Cape Province. These provincial ordinances all granted local governments borrowing powers subject to different quantitative and procedural limitations. The limitations included stipulations on the purposes for which loans could be obtained, ceilings on the maximum amounts that could be borrowed and the approval of loans by the relevant Provincial Administrator. In general, these ordinances focused on pre-borrowing regulation and did not provide for default mechanisms other than the possible personal liability of councillors.[9] They remained in force for three years after 1993 as neither the Interim Constitution of 1993, nor the Local Government Transition Act 209 of the same year (LGTA 1993), provided in any detail for the financial regulation of local government or contained provisions dealing with borrowing powers.

This position only changed in November of 1996 with the enactment of the Local Government Transition Second Amendment Act 97 of 1996 (LGTSA 1996). This incorporated Part VIA into the principal Act, which included a section on financial matters.

3 CURRENT REGULATORY FRAMEWORK

Local government financial management is still governed by the LGTA until the new Municipal Finance Management Bill comes into operation in 2004. Section 10G in particular provides for local government borrowing powers.

In terms of section 10G(8)(a)(i), a municipality may raise loans for capital expenditure by way of a majority resolution of all members of the

7 See "Presentation by Portfolio Committee on Justice and Constitutional Development", 5 September 2002, http://www.pmg.org.za/docs/2002 and Hartley 2003.

8 http://iafrica.com/business/sa/story01.htm accessed on 14 October 1999.

9 For a full discussion of these regulations, see Wandrag 1997: 265–266.

council. This is subject to any reasonable conditions and criteria, including limitations on or the disallowance of such loans, which may be determined by the Minister of Finance by means of a notice in the *Government Gazette*. The only such determination until now restricts long-term borrowing to loans for capital expenditure that have been budgeted for and approved by council.[10]

Loans for bridging finance may be raised only in order to finance current expenditure in anticipation of the receipts of revenue in that particular financial year, and not as a continuous and unlimited revolving credit. The only clear restrictions placed on the municipality's power to raise loans are that no loans may be raised in a foreign currency and that no other liabilities or risks payable in foreign currency may be incurred without the prior approval of, and subject to conditions set by, the Minister of Finance.

Contrary to the Interim Constitution, the 1996 Constitution provides for local government borrowing powers in section 230. This is an enabling provision and it does not attempt to regulate municipal borrowing in any detail. Originally, local governments and provinces were given the power to raise loans for capital or current expenditure as long as it was done in accordance with "reasonable conditions" determined by national legislation, and with the added proviso that loans for current expenditure could only be raised when necessary for bridging purposes and had to be repaid within a year.

Section 230 was, however, amended in 2001 to separate the regulation of provincial and municipal borrowing powers. A new section 230A now regulates municipal borrowing powers, as follows:

> (1) A Municipal Council may, in accordance with national legislation:
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> (a) raise loans for capital or current expenditure for the municipality, but loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year; and
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> (b) bind itself and a future Council in the exercise of its legislative and executive authority to secure loans or investments for the municipality.
>
> (2) National legislation referred to in subsection (1) may be enacted only after any recommendations of the Financial and Fiscal Commission have been considered.[11]

The purpose of the amendment was to empower local government to make long-term loans at a cheaper rate. This amendment raised a number of questions, particularly regarding the enforceability of such 'bindings' against future councils.

In terms of section 230A, any further regulation of municipal borrowing powers is therefore placed in the hands of Parliament, which has to enact national legislation to that effect within a reasonable period[12] and after consideration of relevant recommendations of the Financial and Fiscal

10 Department of Finance Regulation No. 412.
11 Constitution of South Africa Amendment Act 34 of 2001.
12 Sch 6, clause 21(1) of Constitution of South Africa Act 108 of 1996.

Commission.[13] Until such time as this national legislation is enacted, local government borrowing is regulated by section 10G of the LGTA (as amended).[14]

Section 10G does little more than reiterate the basic empowering provisions of section 230A of the Constitution and it cannot be said to provide a system of coherent regulation of municipal borrowing. On the contrary, it fails to address important aspects such as default mechanisms or enforcement measures for municipal creditors, and it does not provide for any national or provincial government intervention in the event of local governments experiencing financial difficulties. The only form of intervention provided for is that the MEC, whenever he or she is of the opinion that the finances of a municipality are "unsound", may instruct the council to take steps to correct the situation and may him/herself take such steps as are deemed necessary to restore the finances of the council to a sound footing. Exceeding municipal borrowing powers does not qualify a municipality's finances as being "unsound", as the definition of this term does not include a failure to abide by the terms of subsection (8), which details the borrowing powers of a municipality.[15]

This unsatisfactory position is amplified by a lack of disclosure on municipal finances and bad credit ratings, which are causing banks to be more and more reluctant to provide any loans to municipalities.[16] Add to this a political unwillingness to place struggling municipalities under a form of 'judicial' management,[17] and a traditional belief that national government will 'bail out' such struggling entities,[18] and the result is that a large number of municipalities are experiencing financial difficulties.

4 POLICY FRAMEWORK FOR BORROWING AND INTERVENTION

The lack of coherent regulation of municipal borrowing powers, and particularly the lack of intervention and default mechanisms, gave rise to the government's "Policy Framework for Municipal Borrowing and Intervention" (the Policy), which in turn inspired the Municipal Finance Management Bill (the draft MFM Bill).[19]

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13 Ss 230(2) and 230A(2).

14 See *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 W 474–475.

15 S 10G(2)(m) LGTA 1996. S 10G(2)(m)(ii) states that "the term 'unsound' includes any failure to claim or to collect income or to control expenditure or to compile and approve an operating budget, or to comply with subss (1), (2), (3), (4), (6) and (7)".

16 http://iafrica.com/business/sa/story01.htm accessed on 14 October 1999.

17 City manager Kotso Gordhan said in 1999 "if the (Johannesburg Metropolitan) council was not a public institution, it would have been placed under curatorship several years ago". http://www.business.iafrica.com/news/sabusinessnews/ accessed on 1 November 1999.

18 As confirmed by statements such as that of Jackie Manche of the Department of Provincial and Local Government, who indicated at the end of 1999 that the government was likely to step in to avert a crisis in at least 250 local councils facing serious financial difficulties. http://www.business.iafrica.com/news/sabusinessnews/ accessed on 17 August 1999.

19 *Government Gazette* No. 21423, 28 July 2000.

The Policy mentions four key elements that drove this process, namely:

- the lack of coherent legislative regulation of municipal borrowing powers;
- the stagnation of the municipal debt market;
- a policy shift from national government guarantees to local responsibility for debt, resulting in a need for a legal and regulatory framework that clarifies the rights and obligations of creditors and borrowers; and
- the increasing financial difficulties experienced by local governments in recent years.[20]

The Policy emphasised the need for local government to have direct access to investment capital and loan finance, the need to improve the credit ratings of local government and the importance of improved disclosure of financial matters to potential investors, as interdependent ways of addressing the above problems.[21] Deputy Director-General Ismael Momoniat also emphasised that the ability of creditworthy municipalities to attract long-term private capital would allow national government to direct more resources to those municipalities that are incapable of doing so.[22]

These are not new concepts. A number of World Bank and International Monetary Fund (IMF) documents have proposed local government market access as the preferred method of decentralisation of government borrowing powers.[23] In relation to financial disclosure by local government, the Policy calls the "lack of clear and sufficient information about municipal finances" an "impediment to municipal lending".[24] Again, this is not a novel idea. In October 1999, Banking Council general manager Lincoln Mali stated that "a lack of information" was making it increasingly difficult for banks to assess the financial state of municipalities.[25] Various IMF and World Bank papers highlight the need for disclosure, transparency and better public information,[26] and this was stipulated clearly in the draft report leading to the Policy document.[27] Equally important is to keep in mind the *purpose* and *target* of such disclosure. The Policy states unequivocally: "The primary purpose of disclosing such information is to enable investors to make informed investment decisions and to allow the market to effectively allocate capital through pricing".[28]

Further emphasising the important role of creditors and investors, the Policy also stresses the importance of default mechanisms and redress procedures in this endeavour. It points out that typical common law

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20 *Ibid* 92.
21 *Ibid* 109–112.
22 http://www.bday.co.za/bday/content/direct/1,3523,920257-6099-0,00.html accessed on 3 September 2001. The President's Coordinating Council at its meeting of 14 December 2001 also emphasised the need for local government access to financial markets (see Steytler 2002: 4).
23 See Ter-Minassian 1996 and Ahmad 1998: 1. See also Cronje 1995 and Wandrag 1997.
24 *Government Gazette* No. 21423, 28 July 2000 p 108.
25 http://www.iafrica.com/business/sa/story01.htm accessed on 14 October 1999.
26 See Ahmad 1998, Ter-Minassian 1996 and Ter-Minassian 1997.
27 Glasser 1998: 28.
28 *Government Gazette* No. 21423, 28 July 2000 p 109. See also Glasser 1998: 31.

remedies that may be available to creditors in the private sector are, although available, not of much use to municipal creditors. Such redress mechanisms would include attachment of property, but municipal property is by nature not very 'attachable'. The Policy states that "municipalities cannot be liquidated",[29] although the basis for the statement is not very clear. At most it seems to be linked to political considerations, and the need to continue the delivery of essential services – what the Policy calls the "distinctive nature of municipalities, as opposed to corporate entities in the private sector".[30]

It is true that local government enjoys constitutional protection as a separate sphere of government that is "distinctive, interdependent and interrelated".[31] The Constitution itself does not, however, protect government from contractual or delictual liability. The State Liability Act 20 of 1957 (as amended) provides that although claims against the 'state' will be cognisable in any competent court, "No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State".[32] This Act does not define 'state' but in section 4 refers specifically to liabilities of the "State or the national government or a provincial government or any department thereof". The specific reference to national and provincial government was inserted by amendment in 1993,[33] but the Act does not contain any reference to local government. It appears, therefore, that though the State Liability Act may protect national and provincial government from attachment of property, it does not apply to municipalities and there may not be any legal prohibition on the liquidation of municipalities.[34]

This was also the conclusion reached by the Supreme Court of Appeal.[35] Political considerations may, however, render it "untenable in most cases for a central government to allow a sub-national government to go bankrupt".[36]

Whether for legal or political reasons, the Policy clearly prefers statutory intervention measures as default and redress mechanisms over the liquidation of municipalities, and recommends the creation of a Municipal Financial Emergencies Authority (MFEA) as a specialist and autonomous administrative instrument of state for this purpose. This type of mechanism can also be found in countries such as the United States (financial control boards) and New Zealand (court-appointed receiverships), where these mechanisms are used as a last resort.[37]

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29 *Ibid* 114 and at 120: "it is not legally or practically possible to liquidate a municipality".
30 *Ibid*. 113.
31 S 40 of the Constitution. See also Mettler 2002: 4.
32 S 3 of Act 20 of 1957.
33 Constitution Consequential Amendments Act 201 of 1993.
34 A view also expressed in discussion documents of the Departments of Provincial and Local Government and the Treasury. (http://www.parliament.org.za.)
35 *Mateis v Plaaslike Munisipaliteit van Ngwathe en Vrystaat Munisipale Pensioenfonds* case 254/2002. See Mettler 2003.
36 Black *et al* 1999: 317.
37 Ahmad 1998.

Lastly, the Policy chose not to impose municipal credit limits as these were found to be unnecessary, impractical to implement and in contrast with the decentralised nature of the Policy.

5 MUNICIPAL FINANCE MANAGEMENT BILL: VERSION 1 – 2000

The Policy recommendations were largely taken up in the draft MFM Bill published in July 2000.[38] The essential stipulations in the draft MFM Bill relating to borrowing powers and default mechanisms can be summarised as follows:

Chapter 5 limited short-term borrowing to bridging operating cash shortfalls and bridging capital requirements, on the basis of anticipated income streams, grants or long-term debt-in-waiting. It further provided that short-term debt should be paid off within a year and that no lender can extend credit to a municipality for the purpose of renewing or refinancing such debt. This was clearly an attempt to protect the municipality against itself, but it then continues that if a lender willfully extended credit to a municipality in contravention of this stipulation, the municipality would not be bound by the contract in terms of which the credit had been extended. This creates the impression that the creditor, on the other hand, could still be bound by such an agreement. The reason for this stipulation is not clear. Typically, if a transaction contravenes a statutory prohibition, such a contract would be void, neither party would be bound to it and restitution would take place.

Long-term borrowing was limited to funding of capital investment in property, plant or equipment to be used for the purpose of achieving the constitutional objectives of local government. Further conditions included that municipal debt had to be Rand denominated, approved by council resolution, the details of which had to be published in a newspaper beforehand, and the municipal manager had to submit information on the purpose of the loan, the total cost and repayment terms thereof to the council.[39]

The draft MFM Bill clearly provided that national or provincial government guarantees of municipal debt could only take place within the ambit of the Public Finance Management Act.[40] On the other hand, it allowed municipalities to provide security for loans, including undertakings to restrict future debt, cede categories of revenue rights, etc. Before a council could approve such security, it had to determine whether the asset or right with respect to which the security was to be given, was necessary for providing a minimum essential municipal service. If this was the case, it had to indicate the manner in which the service delivery would be protected. A determination that the asset or service was not linked to an essential service, would be binding upon the municipality until the secured debt had been paid in full.[41]

38 *Government Gazette* No. 21423, 28 July 2000.
39 Clause 23.
40 Clause 25.
41 Clause 24.

Although municipalities were allowed, in terms of Chapter 8 of the draft MFM Bill, to establish, or acquire corporate entities to provide municipal services, they could not establish or acquire such entities solely for the purpose of raising or borrowing money.[42] Municipalities were also allowed to guarantee any loan of a municipal entity under their ownership control, provided the loan was reflected in the municipal financial statements.[43]

In line with the Policy's aim of improving municipal credit ratings and disclosure requirements, the draft MFM Bill included some preventative and monitoring measures. Chapter 2 assigned the job of monitoring and supervising municipal budgets and expenditure and general compliance with the draft MFM Bill to the National Treasury. These functions could also be delegated to individual national departments or department heads or a provincial treasury. In addition to this, municipal councils would have to publish their intention to borrow money in a public newspaper and invite representations from the public thereon before the debt could be incurred.[44] Chapter 5 also required any person involved in borrowing or investments on behalf of municipalities to disclose all relevant information to the prospective creditor/investor during the lending process.[45]

Somewhat in contradiction with the Policy's stated intention of improved disclosure and transparency, Chapter 13 contained a blanket limitation of liability that simply said, "No person shall be liable in respect of anything done in good faith under this Act". As "person" was not defined, it is was not clear what the legislature intended, but it seemed to give *carte blanche* to anyone whose *bona fides* could not be disproved.

The draft MFM Bill was aimed at establishing the Municipal Finance Emergency Agency (MFEA) as its intervention mechanism, but the legislature realised that the provisions contained therein might be deemed unconstitutional and thus Chapter 11 was temporarily placed on hold.

6 CONSTITUTIONAL PROPOSALS 2001

In 2001, two constitutional Amendment Bills were tabled aimed at effecting the necessary constitutional changes to allow the implementation of some of the provisions in Chapter 5 of the draft MFM Bill, as well as the MFEA procedures.

The first Constitutional Amendment Bill 68 of 2001 (the first Amendment Bill) provided, *inter alia*, for amendments to sections 155 and 156 of the Constitution, while the second Constitutional Amendment Bill 78 of 2001 (the second Amendment Bill) proposed amendments to sections 100 and 139.

The proposed amendments to section 100 in the second Amendment Bill would have given the national executive the power to intervene in a

42 Clause 38.
43 Clause 47.
44 Clause 23.
45 Clause 26.

municipality that failed to fulfill an obligation in terms of national legislation or the Constitution. At the same time the provincial executive's intervention powers in terms of section 139 would have been brought in line with section 100.

The second Amendment Bill also intended to amend the wording of section 230 to remove the reference to "reasonable conditions" that national legislation were to place on the borrowing powers of municipalities and provinces, and to simply state that "the power of a province or a municipality to raise loans may be regulated by national legislation".

The amendments to sections 155 and 156 in the first Amendment Bill would have allowed the establishment of the MFEA as an administrative authority with extensive powers, including the power to appoint an administrator to temporarily exercise control over the executive and legislative authority of a municipality that is in a "municipal financial emergency". A court could declare such an emergency on application by any of a number of parties, including creditors, the municipal council, the Minister of Finance and organised labour, if one or more of the following conditions were found to exist:

- there had been a default on a municipality's financial obligations to suppliers, employees or creditors;
- there had been a default on a promise or agreement made in connection with borrowing;
- actual current expenditures had exceeded actual current revenues for three fiscal years or more; or
- a municipality had experienced an operating deficit in the prior fiscal year in excess of 10% of actual operating revenues.

The proposed introduction of the MFEA as an intervention mechanism was in line with the Policy's emphasis on the need for stronger default mechanisms for local government. The Policy found the existing intervention measures in section 139 of the Constitution to be lacking. Section 139 gives provincial government the power to intervene in the affairs of local government if the latter fails to fulfill an executive obligation. Although local government is recognised as a distinct sphere of government,[46] the basis for such interventions is to be found in section 155(6) of the Constitution that assigns the duty of monitoring and support of local government to the respective provincial governments.[47] According to the Policy, the section 139 mechanism is not enough as these interventions, where they have been initiated, have not resulted in municipalities being restored to financial health. A process overseen by the judiciary and managed by a more independent agency was seen as a better option.[48] Unfortunately, neither the basis upon which this independent agency would function nor the basis for the judicial oversight were particularly clear. Two of the four possible grounds for the declaration of a 'financial

46 S 40 Constitution.
47 See Steytler, Mettler & De Visser 1999: 11-12 for a discussion provincial interventions.
48 *Government Gazette* No. 21423, 28 July 2000 p 118 122.

emergency' referred to defaults on payments of amounts due or defaults on agreements providing for security for debts. However, the term 'default' was not defined, and no minimum default amounts were stipulated. Exactly how badly would a municipality have to 'default' before such an emergency could be declared?

The draft MFM Bill as well as the first and second Amendment Bills elicited vehement response from various organisations involved in local government affairs.

Cosatu characterised the proposed Amendment Bills as a "power grab". The Municipal Demarcation Board echoed these sentiments and both organisations expressed their concern at the level of consultations that preceded the Amendment Bills.[49] Concern was expressed at the fact that national government would be granted powers to intervene in an area that was assigned to provincial government in section 155 of the Constitution. Various organisations also expressed surprise at the fact that the Constitution was being changed in order to fit in with the draft MFM Bill – a case of the "tail wagging the dog".[50] In October 2001, Finance Minister Trevor Manuel suggested that the Amendment Bills should be put on hold for further consultation.[51]

On 21 November 2001 and 14 December 2001 respectively, the Constitution of South Africa Amendment Act 34 of 2001 and the Constitution of South Africa Second Amendment Act 61 of 2001 were enacted. As stated above, the proposed amendments to sections 155 and 156 were not enacted; instead, section 230 was amended to separate the regulation of provincial and municipal borrowing powers. Sections 100 and 139 were left unchanged.

7 MUNICIPAL FINANCE MANAGEMENT BILL: VERSION II – 2002

The Municipal Finance Management Bill was published again (with amendments) on 31 August 2001 and yet again (with amendments) as the Municipal Finance Management Bill 1 of 2002 (hereafter MFM Bill II).

Some of the most prominent amendments to the original draft MFM Bill included a change in the wording regarding the prohibition on refinancing short-term debt. A creditor who extended credit to a municipality in contravention of this clause would be protected if he/she acted in good faith and did not know that the loan was for the refinancing of short-term debt. Preferred creditors to whom security was given were not so fortunate, however. They would still not be allowed to act against the object of their security if it had been deemed necessary for providing a minimum essential municipal service.

A significant amendment to the original draft MFM Bill was the expansion of municipal long-term borrowing powers. It provided that long-term

49 http://www.bday.co.za/bday/content/direct/ accessed on 25 September 2001.
50 http://www.bday.co.za/bday/content/direct/ accessed on 20 September 2001. See also De Visser & Steytler 2001: 4.
51 http://wwwbdfm.co.za/cgi-bin/pp-print.pl accessed on 15 October 2001.

debt could be incurred not only for capital expenditure, but also for refinancing existing long-term debt. Capital expenditure was now defined to include financing costs, printing costs, costs for professional services and other costs.

The limitation of liability clause was amended by defining 'person' to include organs of state or persons performing a function or exercising a power in terms of the Act. This served to at least clarify the intention of the legislature and it may be less open to abuse than the first version, but it still seemed to contradict the need for disclosure and transparency.

The MFEA provisions were left out of the previous versions of the draft MFM Bill, pending the constitutional amendments of sections 155 and 156 as envisaged by the first Amendment Bill. Despite the fact that the proposed amendment to section 155 was not enacted, the MFEA provisions were included in the MFM Bill II. It provided for the establishment of an Emergency Authority to oversee the financial recovery of municipalities declared to be in a financial emergency. These provisions did not change much from those published on 20 July 2000; they still failed to define 'default' or stipulate minimum amounts for default that would justify the declaration of a 'financial emergency'.

Despite the amendments to the original version of the Bill, the 2002 MFM Bill II still elicited strong responses from various organisations involved in local government affairs. The Finance and Fiscal Commission declared that it would be inappropriate to apply the MFM Bill II uniformly to all municipalities, weak and strong.[52] The Municipal Demarcation Board rejected the MFM Bill II on the grounds that it did not take into account the independence of local government, calling for a Bill that would not "encroach on the institutional integrity of local government".[53] The City of Cape Town and the Western Cape Local Government Association objected and called for a rewrite of the MFM Bill II, which they claimed was unconstitutional and would give the National Treasury too much power to interfere in local government affairs.[54] The Community Law Centre at the University of the Western Cape raised a number of concerns about the MFM Bill II, including the fact that although sound financial administration is essential, it goes too far in allowing the National Treasury to intrude into local government affairs.[55]

8 AMENDING THE CONSTITUTIONAL FRAMEWORK

In response to the various submissions received, the Constitution of South Africa Amendment Bill 33 of 2002 (the Amendment Bill 33) was introduced, aiming at "easing the introduction" of the MFM Bill[56] – a task that proved much more difficult than anticipated.

52 http://www.bday.co.za/bday/content/direct/ accessed on 14 February 2002.
53 http://www.news24.com.News24/ accessed on 19 February 2002. See also http://www.bdfm.co.za/cgi-bin/pp-print.pl accessed on 2 May 2002.
54 http://www.bdfm.co.za/cgi-bin/pp-print.pl accessed on 14 March 2002. See also the Cosatu submission of 12 March 2002 at http://www.cosatu.org.za.
55 De Visser & Steytler 2002: 16.
56 See Ensor 2002a.

The aim was to amend section 139 of the Constitution to provide for discretionary provincial intervention where a municipality:

- cannot or does not fulfill an executive obligation in terms of legislation or the Constitution;
- fails to approve or give effect to a budget;
- does not fulfill any other obligation specified by legislation; or
- where the serious or persistent breach of such obligation threatens the health and safety of residents of the municipality.

If the provincial executive failed to fulfill this obligation, the national executive could intervene in accordance with section 100 of the Constitution. This differs drastically from the second Amendment Bill, which would have granted direct intervention powers to the national executive. It also differs drastically from the current position, which allows provincial intervention only if a municipality fails to fulfill an executive obligation.

This drastic change was explained as an attempt to "provide a missing piece in the Government's overall strategy in dealing with municipal financial problems".[57] According to the Policy, the Government intended to provide a comprehensive approach to resolving financial crises in municipalities, and as financial recovery usually requires the adoption or modification of municipal budgets, provincial interventions would have to include the power to adopt or modify budgets in order to be successful. Provincial interventions under the current constitutional framework lack that power, as budgetary decisions by municipal councils are regarded as *legislative* and not *executive* functions.[58]

The Amendment Bill 33 also provided for the compulsory intervention by provincial government where a municipality, as a result of "a crisis in its financial affairs is in serious or persistent breach of its obligations to provide basic services or to meet its financial commitments". Such compulsory intervention could include the adoption and implementation of a recovery plan to resolve the municipality's financial difficulties as well as the dissolution of the municipal council and the approval of a temporary budget.[59] In his presentation before the Security and Constitutional Affairs Select Committee, Deputy Director-General Ismael Momoniat emphasised that this clause represents the ultimate scenario or situation of last resort and that governmental monitoring and oversight functions should be used to prevent municipalities from reaching such financial crises.[60] As a reason for the clause was it was explained that municipalities could not be allowed to deliberately default on loans to creditors, for political or other

57 "Minutes of Justice and Finance Portfolio Committees Meeting on 19 February 2003", http://www.pmg.org.za/docs/2003/.

58 As decided in *Fedsure Life Assurance Ltd and others v Greater Johannesburg TMC and others* 1998 (12) BCLR 1458 (CC). See also "Minutes of Security and Constitutional Affairs Select Committee Meeting on 26 February 2003", http://www.pmg.org.za/docs/2003/ and Steytler & Smith 2002: 2.

59 *Ibid.* See also http://www.bdf.co.za/cgi-bin/pp-print.pl accessed on 10 July 2002.

60 "Minutes of Security and Constitutional Affairs Select Committee Meeting on 26 February 2003", http://www.pmg.org.za/docs/2003/.

reasons, as this would adversely affect every other municipality's chances of obtaining loans.[61] This sentiment certainly cannot be faulted and is in line with the stated objectives of the Policy. The same can unfortunately not be said of the wording of the clause, which raised a number of questions in the Justice and Constitutional Affairs Portfolio Committee dealing with constitutional amendments. The most obvious was the question of what is meant by "a crisis in its financial affairs"? The Committee, however, found the answer to be quite obvious – the financial crisis in section 139(1B) was limited to a "serious or persistent breach of an obligation to deliver basic services or to meet financial commitments".[62] Exactly what such a 'serious breach' would entail was unfortunately not made equally clear.

Lastly, the Amendment Bill 33 also provided that if provincial government failed to fulfill its obligations of intervention the national executive could, in accordance with section 100, intervene by directing the province to act, or by assuming responsibility itself if necessary.

During the hearings on the Amendment Bill 33, SALGA made a submission opposing the amendments on the grounds that they would undermine the constitutional integrity of local government. Instead, SALGA emphasised the monitoring and supporting role of provincial government in relation to local government as assigned by the Constitution, with intervention as a last resort. SALGA proposed a new amendment to section 139 that would require provinces, in case of intervention, to explain which monitoring and supporting measures they had taken prior to the intervention.[63]

Although it is true that the Constitution recognises local government as a separate sphere of government, with its executive and legislative authority vested in its municipal council, and that it has the right to govern, on its own initiative, the local government affairs of its community, this right is "subject to national and provincial legislation, as provided for in the Constitution".[64] The Constitution itself therefore provides for possible limitations to the autonomy of local government, subject again to the proviso that "national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."[65] Saving a financially inept local government which finds itself in a "financial crisis" from itself can hardly be called "compromising or impeding" its right or ability to govern itself – provided, of course, that such financial crisis is properly defined.

61 *Ibid.*

62 "Minutes of Justice Portfolio Committee Meeting on 5 September 2002", http://www.pmg.org.za/docs/2002/.

63 "Minutes of Justice Portfolio Committee Meeting on 6 September 2002", http://www.pmg.org.za/docs/2002/. See also Mettler 2002: 3–6 and Ensor 2002b.

64 S 151 Constitution.

65 S 151(4). See also the legal opinion of Trengove submitted to the Portfolio Committee on Finance on 30 May 2003, http://www.pmg.org.za/docs/2003/.

The debate on the intervention mechanisms proposed in the Amendment Bill 33 continued in September,[66] October,[67] and November 2002[68] before the Portfolio Committees on Justice and Constitutional Development, and Finance, but were not finalised before the Parliamentary recess. The debate continued into 2003.[69] Eventually the amendments were enacted as the Constitution of South Africa Second Amendment Act 3 of 2003.[70]

Section 139 of the Constitution now provides for three different types of provincial intervention in local government affairs.

The first type is a discretionary intervention mechanism in the event of a municipality failing, or being unable, to fulfil an executive obligation in terms of the Constitution or legislation. This is a general intervention that allows the provincial executive, *inter alia*, to issue a directive stating the steps required to meet its obligations, assuming responsibility for the relevant obligations in the municipality or dissolving the municipal council and appointing an administrator, if "exceptional circumstances" warrant such a step. There is no attempt to define 'exceptional circumstances' that would warrant the dissolution of the municipal council, but if it should happen, notice of such dissolution must be given to the relevant Cabinet member and NCOP. Steytler[71] submits that an example of such 'exceptional circumstances' can be found in section 34(3) of the Municipal Structures Act of 1998, which empowers an MEC to dissolve a municipal council if an assumption of responsibility in terms of section 139 does not result in the council being able to fulfill its obligations in terms of legislation.

Section 139 further provides for two instances of mandatory provincial intervention. In terms of section 139(4), the provincial executive *must* intervene if a municipality "cannot or does not fulfill an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures" relating to the budget. The provincial executive must take any steps necessary to ensure the approval of the budget or revenue-raising measures. Again, the provincial powers include the dissolution of the municipal council, the appointment of an administrator and the approval of a temporary budget.[72]

66 "Minutes of joint meeting of Justice and Constitutional Development and Finance Portfolio Committees, 16 September 2002", http://www.pmg.org.za/docs/2002/.

67 "Minutes of the Finance Portfolio Committee of 16 October 2002", http://www.pmg.org.za/docs/2002/.

68 "Minutes of joint meeting of Justice and Constitutional Development, Finance and Provincial and Local Government Portfolio Committees, 12 November 2002", http://www.pmg.org.za/docs/2002/ "Minutes of the Finance Portfolio Committee of 16 October 2002", http://www.pmg.org.za/docs/2002/.http://www.pmg.org.za/docs/2002/.

69 "Minutes of the Security and Constitutional Affairs Select Committee of 26 February 2003", http://www.pmg.org.za/docs/2003/.

70 *Government Gazette* No. 24744, Gov N516 11 April 2003.

71 Steytler 2003: 5.

72 Because of the power to dissolve the Municipal Council in terms of s 139(4), Steytler (2003: 6) also regards the municipality's failure to adopt a budget as an example of the "exceptional circumstances" referred to in s 139(1)(c). If this had been the case, however, why does the "exceptional circumstance" in s 139(4) justify a mandatory intervention, while the "exceptional circumstances" referred to in s 139(1)(c) merely gives a potential additional power to the provincial executive in terms of a discretionary intervention?

Section 139(5) retained the much-debated last-resort clause. It provides for a mandatory intervention 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 to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments". In the event of such financial crisis, the provincial executive *must* impose a recovery plan aimed at securing the municipality's ability to meet its service and financial commitments and must dissolve the municipal council if the municipality fails to approve legislative measures, including a budget. If the council is not dissolved, the provincial executive must take responsibility for the implementation of the recovery plan. This recovery plan must be prepared in accordance with national legislation and will bind the municipality in the exercise of its legislative and executive authority to the extent necessary to solve the crisis in its financial affairs.

Section 139 still does not attempt to define a "crisis in its financial affairs" or a "serious or persistent material breach" of obligations. Presumably, these aspects would be defined in the national legislation that is envisaged by section 139(8), which states that national legislation *may* regulate the implementation of, and the processes established by, the section.

Lastly, section 139(7) provides that if the provincial executive fails to, or does not *adequately* exercise the mandatory intervention mechanisms, the national government *must* intervene in terms of subsections (4) and (5) instead. Again a number of questions are left unanswered. What would constitute an "inadequate" intervention by the provincial executive, and who is to make this determination?

These amendments and the intervention mechanisms they provide for confirm the government's commitment to a "comprehensive" approach to financial discipline at local government level, its concerns regarding the bad credit ratings of municipalities and its desire to create a viable municipal debt market. The amendments have not yet entered into force, but when they do, they are expected to pave the way for the enactment of the Municipal Financial Management Bill, the long-awaited national legislation that will regulate the implementation of the mechanisms created by section 139.

9 MUNICIPAL FINANCIAL MANAGEMENT BILL: FINAL VERSION – 2003

The MFM Bill II of 2002 was also reworked in response to the various submissions and responses referred to in section 7 above. From October 2002 various redrafts of the MFM Bill II were deliberated in the Finance Portfolio Committee,[73] as well as in joint meetings of the Finance and

73 "Minutes of the Finance Portfolio Committee of 15 and 16 October 2002", http://www.pmg.org.za/docs/2002/ and of 30 May 2003, 3 June 2003, 12 August 2003 and 3 September 2003, http://www.pmg.org.za/docs/2003/.

Provincial and Local Government Portfolio Committees.[74] Much of the discussion focused on municipal entities, procurement and financial misconduct. Two legal opinions were obtained regarding the constitutionality of certain of the clauses in the MFM Bill II.[75]

After "three years of tortuous deliberations and redrafts",[76] the MFM Bill II was finally adopted by the National Assembly on 11 September 2003.[77]

It is aimed at securing "sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government". Among other things, it will regulate municipal borrowing and the handling of financial problems in municipalities in accordance with the intervention mechanisms created by the amendments to section 139 of the Constitution (still to come into effect).

9.1 Regulation of debt

The regulation of municipal borrowing powers in Chapter 6 is much more detailed than in the original drafts.

"Debt" is defined in section 1 as including not only monetary liabilities, obligations or the issuance of municipal debt instruments, but also contingent liabilities, such as that created by guaranteeing the monetary liabilities or obligations of others.

Short-term debt (debt repayable within one year) may only be incurred when necessary to bridge shortfalls within a financial year during which the debt is incurred, in expectation of specific and realistic anticipated income to be received in that financial year, or to bridge capital needs within a financial year, to be repaid from enforceable allocations or long-term debt commitments.[78]

Such short-term debt must further be approved by a municipal council resolution and the signature of the accounting officer must appear on the agreement. Short-term debt must be repaid within one financial year and may not be renewed or refinanced if the effect of the renewal or refinancing will extend the debt into a new financial year.

The rather controversial section dealing with the consequences of unauthorised renewal of short-term debt has been substantially improved. Section 45(5) still provides that no lender may willfully extend credit to a municipality to refinance or renew short-term debt and that if he/she does so willfully, the municipality is not bound to repay the loan or interest on the loan. This section still gives a somewhat one-sided protection to the municipality, but the addition of the word "willfully" does create an

74 See "Minutes of Joint Meetings of the Finance and Provincial and Local Government Portfolio Committees; Finance Select Committee on 11, 15 and 16 April 2003", http://www.pmg.org.za/docs/2003/.

75 See Trengove and Cockrell 2003a and 2003b: 1 and 2.

76 Ensor 2003.

77 See "Parliamentary Papers of 11 September 2003: Announcements, tablings and committee reports", at http://www.parliament.gov.za.

78 S 45.

impression of a lack of *bona fides* on the side of the lender. This impression is strengthened by subsection (6) which states that this protection in subsection (5) will not apply when the lender acted in good faith on written representations of the municipality as to the purpose of the borrowing and did not know, nor had reason to believe, that the borrowing was for the purpose of renewing short-term debt.

In terms of section 46, a municipality may only incur long-term debt (repayable over more than one financial year) for purposes of capital expenditure to be used for the purposes of achieving the objects of local government in section 152 of the Constitution, or for re-financing existing long-term debt, provided that the existing debt was incurred lawfully and that the debt will not outlast the usefulness of the capital items for which the money was used. Such long-term debt also requires a municipal council resolution, the signature of the accounting officer and the publication of the proposed debt 14 days prior to the council meeting.

Section 48 allows municipalities to provide security for any of its debt obligations or any debt obligations of a municipal entity under its sole control. These security provisions are quite wide and include agreeing to restrictions on debt that the municipality may incur in future until the secured debt is settled or the secured obligations are met.

Before such security can be granted, the council must determine whether the asset or right covered by the security is necessary for providing the minimum level of basic municipal services, and, if so, must indicate how the availability of the asset or right for the provision of that service will be protected. As in previous drafts of the Bill, the continued provision of basic municipal services is protected in that once a determination has been made that the asset or right is necessary for providing the minimum level of service, neither the secured lender nor any successor may, in the event of default by the municipality, deal with the asset in a manner that would preclude or impede the continuation of the minimum level of basic municipal services.

The MFM Bill as adopted also retains the basic disclosure requirements in section 49, which requires any person involved in municipal borrowing to disclose all relevant information that may influence the decision of the prospective lender or investor.

9.2 Financial emergencies

It is apparent that, contrary to the tenor of the first drafts of the MFM Bill, in the final version adopted the emphasis has shifted from the declaration of financial emergencies in municipalities to measures aimed at preventing such emergencies. Section 135 firmly places the primary responsibility for avoiding, identifying and solving municipal financial problems on the municipality itself and requires it to notify provincial government if it is unable to do so.

A mayor must report a serious financial problem or a failure to approve an annual budget by the first day of the financial year to the MEC in the province and has the discretion to recommend to the MEC a provincial

intervention in terms of section 139 of the Constitution.[79] Such provincial intervention based on the failure to approve a budget is also expressly provided for in section 26.

Although this paradigm shift is to be welcomed, it seems as though these principles should have been understood from the inception of local government as a separate sphere of government and that it should not have been necessary for parliament to propose legislation in order to remind local government that it "must meet its financial commitments".[80]

The MFM Bill, as adopted, details possible provincial interventions in local government, distinguishing between discretionary and mandatory interventions and referring directly to the corresponding provisions of the newly enacted section 139 of the Constitution.

Section 136 places the responsibility on the MEC for local government to assess the seriousness of the situation if he/she becomes aware that there is a serious financial problem in a municipality. The MEC further carries the responsibility of determining whether the situation justifies an intervention in terms of section 139 of the Constitution.

Three types of interventions are created, directly corresponding with the discretionary intervention in terms of section 139(1) and the mandatory interventions in section 139(4) and (5) of the Constitution. The implementations of the different intervention mechanisms are detailed respectively in sections 137, 26 and 139 of the MFM Bill as adopted.

Section 136(2), read together with sections 136(1) and 137(1) and (3), adds a new dimension to the discretionary intervention mechanism in section 139(1) of the Constitution by linking the failure to fulfill executive obligations and the discretionary intervention[81] to the existence of a "serious financial problem".[82] Section 137(3) states unequivocally that the discretionary intervention mechanism created by sections 136(2) and 137(1) of the MFM Bill, as adopted, does not apply to a provincial intervention which is unrelated to a financial problem in a municipality. This appears to be something of a departure from the discretionary intervention mechanism provided for by section 139(1) of the Constitution, which is not linked specifically to financial problems in the municipality.

The discretionary intervention mechanism provided for in section 137(1) includes a determination by the provincial executive whether the financial problem, singly or in combination with other problems, is sufficiently serious or sustained that the municipality would benefit from a financial recovery plan. If yes, the executive has the power to request "any suitably qualified person" to prepare an appropriate financial recovery plan for the municipality.

This section and its deviation from section 139(1) of the Constitution, was one of the aspects considered by the Trengove legal opinion submitted

79 S 55.
80 S 135(2).
81 S 139(1).
82 S 136(1).

to the Portfolio Committee.[83] The question Adv. Trengove had to answer was whether it is constitutionally permissible for the MFM Bill to allow a financial recovery plan to be imposed on a municipal council during a discretionary intervention. He concluded that it would be permissible, as section 139(1) of the Constitution permits the provincial executive to take "any appropriate steps" to address the municipality's failure to fulfill its executive obligation and that the imposition of a financial recovery plan would qualify as such an "appropriate step".

The criteria for determining the existence of such a "serious financial problem" for purposes of section 137, are set out in section 138. This section requires *all* relevant facts to be considered, and states that the factors stipulated may, singly or in combination, indicate a serious financial problem.

These factors include the municipality failing to make "payments as and when due"; defaulting on financial obligations for financial reasons; having its current expenditure exceeding current revenue plus available surpluses for at least two consecutive financial years; the existence of operating deficits in excess of 5% of revenue; the municipality being more than 60 days late in submitting annual financial statements to the Auditor-General; if any of these conditions exist in a municipal entity owned or controlled by the municipality; or any other material condition which indicated that the municipality, or its entity, is likely to be unable for financial reasons to meet its obligations.

Unfortunately, most of these criteria are vague and would not really assist in determining the existence of "a serious financial problem". With reference to the first criteria of failure to make payments, no indication is given as to what kind of payments this refers to and to whom such payments should be due. Would this include all payments, notwithstanding the amount, to short-term as well as long-term creditors, employees, service providers, etc? What does "as and when due" mean? Can a serious financial problem be found to exist if payment to a service provider is not made within 30 days as requested, or would payment within 60 days suffice to avert a serious financial problem? It seems as though guidelines that are more definite would be required for the MEC to make this determination. What does "default on financial obligations for financial reasons" mean? Which financial obligations should be taken into account? Would a default on an obligation of R100 be sufficient to trigger a "serious financial problem"?

The reference to defaults for "financial reasons" does not make much sense either. It seems to create the impression that municipalities could default on any financial obligations, as long as it is not done for financial reasons. This appears to be a direct contradiction to the statements made in February 2003 by Ismael Momoniat, the Deputy Director-General in the National Treasury, indicating that no municipality could be allowed to deliberately default, as it would adversely affect all other municipalities.[84]

83 Trengrove & Cockrell 2003a.

84 "Minutes of Security on Constitutional Affairs Select Committee of 26 February 2003", http://www.pmg.org.za/docs/2003.

It also appears to contradict section 135(2), which simply states, "a municipality must meet its financial commitments" – without adding any qualifications or political exceptions.

Secondly, it is not clear how an MEC will "become aware" of the existence of such serious financial problems as required by section 136(1). There is an obligation on the mayor to report financial problems in terms of section 54, and the municipality must report financial problems to the MEC in terms of section 135(3), but what if the mayor or municipality fail to do so? In terms of the MFEA provisions contained in the MFM Bill II of 2002, external parties such as creditors or organised labour could apply to the courts to make such a determination. Section 136 seems to rely totally on the integrity of the mayor and municipality to report the existence of serious financial problems, in so doing initiating potential discretionary provincial intervention. Lastly, section 137(1)(c) allows "any suitably qualified person" to prepare a financial recovery plan in terms of the discretionary intervention mechanism. Again, no guidelines are provided as to what would constitute "suitable qualifications". Yet, once this person has prepared the financial recovery plan the municipality must implement it in terms of section 145, and it binds the municipality in the exercise of its executive authority, to the extent necessary to resolve the financial problems of the municipality. If the municipality cannot or does not implement this financial recovery plan, section 145(3) provides that the provincial executive could take further appropriate steps in terms of section 139(1) or (4) of the Constitution to ensure its implementation.

Compulsory provincial intervention is regulated by section 26, or a failure to approve a budget, and by sections 139 and 140, where the municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of service obligations or financial commitments, or admits that it is unable to meet those obligations or commitments.

In terms of section 139, the provincial executive must, in these circumstances, promptly request the Municipal Financial Recovery Service to determine the reason for the financial crisis, assess the municipality's financial state and prepare an appropriate financial recovery plan, including recommendations for appropriate changes to the budget and revenue raising measures. The Municipal Financial Recovery Service is an institution within the public service that forms part of, and functions within, the National Treasury. Section 139(3) provides that any mandatory intervention in terms of section 139 supersedes any discretionary section 137 intervention, provided that any financial recovery plan, as prepared by the "suitably qualified person", must continue until replaced by the recovery plan from the Municipal Financial Recovery Service in terms of section 139.

In terms of section 140, a determination on whether the conditions for a mandatory section 139 intervention exists should take into account all factors, and any or all of these may indicate a serious material breach of financial commitments.

Such factors include a failure by the municipality to make any payment to a lender or investor as and when due; a failure to meet a contractual

obligation providing security in terms of section 48; a failure to make any other payments as and when due, which exceeds prescribed amounts, or exceeds 2% of the municipality's budgeted operating expenditure, or if the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities. In terms of section 140(3), any recurring or continuous failure by a municipality to meet its financial commitments, which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate persistent material breach of its financial commitments.

Again, this attempt at defining the grounds for mandatory provincial intervention lacks clarity. No minimum amounts are prescribed in relation to a failure to make payments to lenders or investors, and again "as and when due" is not defined. It seems that payments to service providers, employees, etc are not included in this section. Such payments should resort under "any other payment". At least as far as "other payments" are concerned, a minimum amount of more than 2% of budgeted operating expenditure is prescribed. Though provision is made for amounts to be prescribed, it is not clear by whom this should be done. It is equally unclear how a determination will be made on whether one municipality's failure to meet its financial commitments will impact upon the availability of credit to others.

Section 140(4) excludes the application of all these criteria to obligations explicitly waived by the creditor, or disputed obligations concerning which there are pending legal actions between the municipality and the creditor. Where legal action is pending, or a waiver has been obtained from a creditor, the requirements for mandatory provincial intervention will not be met.

Contrary to section 137, only the Municipal Financial Recovery Service may prepare a financial recovery plan in terms of a section 139 mandatory intervention. This effectively means that the National Treasury will be responsible for placing a municipality back on its feet in terms of a mandatory provincial intervention.

The municipality must implement the financial recovery plan in terms of a section 139 mandatory intervention, and it binds the municipality in the exercise of both its legislative and executive authority, including the approval of a budget, but only to the extent necessary to give effect to the recovery plan.[85]

Section 142 prescribes specific criteria for financial recovery plans which must ultimately be aimed at securing the municipality's ability to meet its service obligations and its financial commitments and which must, *inter alia*, provide for the liquidation of specific assets, excluding those needed for the provision of minimum levels of municipal services and which must provide for debt restructuring or debt relief.

85 S 146.

The MFM Bill, as adopted, also contains provisions of specific significance to the regulation of municipal borrowing powers.

Section 151 protects any common law or legislative rights of creditors and others who have claims against municipalities, to revert to ordinary legal processes or alternative dispute resolution mechanisms, except as otherwise provided in Chapter 13 itself. Although such a retention of rights for creditors, investors and others must be welcomed, the true value of this provision must also be questioned in view of the Policy's contention that such common law or legislative redress procedures are not of much use to creditors *vis-à-vis* municipalities.[86]

Section 152 appears to re-affirm the Policy's view, at least on a temporary basis, by allowing a municipality that is "unable to meet its financial commitments" to apply to the High Court for a stay of all legal proceedings against it or against entities under its sole ownership or control for a period not exceeding 90 days. Notice of such an application must be given to the province and creditors to whom the municipality (or entity) owes more than a prescribed amount, or more than R100 000. No indication is given of the grounds upon which the court should grant this application, neither is an "inability to meet financial commitments" defined. It is also not clear how this section relates to provincial intervention. Can, or should, a municipality apply for a stay of proceedings against it before it notifies the province of its financial problems? If it does, it may, in terms of section 152(3), be regarded as an admission of inability to meet its financial commitments in terms of section 139(5) of the Constitution, which could in turn lead to mandatory provincial intervention. Although it is clear that such a stay of proceedings can provide breathing space to a financially troubled municipality, it could be prejudicial to creditors, especially creditors to whom the municipality or entity owes less than R100 000. Since none of the other sections relating to defaults in payments mentions any amounts, it is not clear why only creditors of more than R100 000 need to be informed of a section 152 application.

A slightly more balanced provision is contained in section 153, which provides for applications for extraordinary relief. In this case, a municipality may apply to the High Court for a stay of all legal proceedings against it for a period not exceeding 90 days at a time, an order to suspend its financial obligations to creditors until it can meet those obligations, or an order to terminate its financial obligations to creditors and settle their claims in terms of a distribution scheme as referred to in section 155. Such a distribution scheme in terms of section 155 effectively amounts to an application for the municipal equivalent of voluntary sequestration, except that assets reasonably necessary to sustain effective administration or provide basic municipal services will not be affected. A trustee will be appointed to prepare a distribution scheme and settle claims against the municipality.[87]

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86 *Government Gazette* No. 21423 of 28 July 2000 p 113-114.

87 The proposed s 156 requires the National Treasury to provide for equitable processes for the recognition of claims against a municipality by way of regulation.

Section 153 applications for extraordinary relief may only be granted in conjunction with mandatory provincial intervention, if it is likely that the approved recovery plan will fail without such an order, and if all the municipal assets not reasonably required to sustain effective administration or a minimum level of municipal services have been liquidated in the case of an order for the suspension of obligations to creditors. Creditors may find this section more equitable as the implementation of the recovery plan implies the hope that the municipality may be able to pay its debts in future. Alternatively, creditors may share in the distribution scheme. Slightly worrying, however, is the fact that a stay of proceedings in terms of section 153 may be granted for periods of 90 days at a time, with no apparent limit on how many times this could be repeated. Presumably, applications can be made as long as a mandatory intervention in terms of section 139 is in place, and that could be for an indefinite period until "the municipality's ability to meet its financial commitments is secured".[88] As in section 152, creditors owed less than R100 000 need not be notified of section 153 applications, but at least organised labour must be notified. When measured against the Policy's stated intention of promoting municipal creditworthiness and attracting investments, these provisions may not inspire enough confidence among potential creditors.

Finally, section 150 of the MFM Bill, as adopted, stipulates that if the conditions for mandatory provincial intervention in terms of section 139(4) and (5) of the Constitution are met and the provincial executive fails to, or does not adequately, exercise these powers or functions, then the national executive must act or intervene instead of the provincial executive, assuming all the powers allocated to a provincial executive in Chapter 13.

10 CONCLUSION

The Constitution undeniably established local government as a separate and, to some extent, autonomous sphere of government embodied with executive and legislative powers – powers that should be used to establish responsible, effective and financially viable local government.

This has not always happened. The situation is aggravated by the lack of coherent legislative regulation of municipal borrowing powers that has persisted ever since the birth of local government as a separate sphere of government. The legislation to address the problem has been in the pipeline since 1997, but as evidenced by the 41 parliamentary committee meetings on the Bill,[89] it has been difficult to get the balance between local autonomy and national and provincial supervision right.

This legislative process was aimed at addressing four key issues identified in the Policy for municipal borrowing and financial emergencies, namely:

88 S 148.
89 Ensor 2003.

- the lack of coherent legislative regulation of municipal borrowing powers;
- the stagnation of the municipal debt market;
- a policy shift from national government guarantees to local responsibility for debt, resulting in a need for a legal and regulatory framework that clarifies the rights and obligations of creditors and borrowers; and
- the increasing financial difficulties experienced by local governments in recent years.[90]

Although the first published versions of the MFM Bill did not succeed in addressing these issues successfully, progress has been made. The final version of the MFM Bill, in particular Chapter 13, does address these issues more directly and more successfully. The emphasis is placed on the prevention of municipal financial crisis rather than curing it and the MFM Bill, as adopted, makes it clear that this is primarily the responsibility of the municipal council itself and that national or provincial government will not 'bail out' municipalities in crisis. Chapter 13 and the creation of the Municipal Financial Recovery Service also attempt to regulate and balance (rather precariously at times) the rights and needs of the municipality and its creditors during municipal financial crisis. Chapter 13 follows the amended provisions in section 139 of the Constitution closely, but there appears to be some anomalies between the Constitution and the 2003 MFM Bill, especially with regard to the discretionary provincial intervention.

A number of uncertainties remain, both within section 139 of the Constitution and Chapter 13 of the MFM Bill as adopted – particularly regarding the implementation of the provincial intervention mechanisms and the functions of the MFRS. The Policy pointed out that current common law and legislative redress procedures are not of much use to creditors *vis-à-vis* municipalities.[91] Until there is clarity on the present uncertainties in the MFM Bill and the Constitution regarding the grounds for provincial intervention, and regarding concepts such as "serious financial problem", "default", and "inability to meet financial commitments", "any other payment as and when due", "recurring or continuous failure to meet financial commitments", which are to justify such interventions,[92] the rights of creditors will not be properly safeguarded and the redress procedures will still not be of much use to them.

When initially introducing the MFM Bill to Parliament, Minister Trevor Manuel confirmed the government's commitment to the facilitation of a municipal borrowing market, and promised to take steps to ensure that all spheres of government act on their constitutional responsibilities, so that municipalities will be allowed to lower their costs of borrowing for capital expenditure and to attract investors.[93] Creditor confidence and municipal credit ratings are only likely to improve, however, once these default and intervention procedures in both the Constitution and the MFM Bill have

90 *Government Gazette* No. 21423 of 28 July 2000 p 92.
91 *Government Gazette* No. 21423 of 28 July 2000 p 113–114.
92 Ss 135–154 Bill.
93 As quoted in Ensor 2003.

not only been clarified, but also implemented successfully. At the earliest this will happen at the start of the 2004–2005 financial year.[94] Until then, financial discipline at local government level and the creation of a viable and sustainable municipal debt market remain a dream.

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94 *Local Government Law Bulletin*, 4(4), 2002 p 7.

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