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## **THE IMPLEMENTATION OF SUPPORT TO MUNICIPALITIES IN TERMS OF SECTIONS 154(1) AND 155(6) OF THE CONSTITUTION**

### **1. BACKGROUND**

The state of performance and compliance of municipalities in South Africa remains a cause for great concern for Government. Whereas the Constitution places the local sphere of government at the centre of service delivery in the country to complement the work of a developmental state, most municipalities continue to perform dismally. The Auditor-General's (AG's) annual audit reports continuously highlight concerns about the state of performance of and compliance by municipalities, citing a number of governance challenges and root causes.

Whilst national and provincial governments have broadly used a number of policy and legislative instruments to provide support to the respective municipalities in each province in the spirit of cooperative government, such support has not been consistent, as it varied from one municipality to another.

This paper provides an overview of the implementation of support provisions contained in sections 154(1) and 155(6) of the Constitution of the Republic of South Africa, 1996. Together, these provisions place an obligation on national and provincial governments (through legislation and other measures) to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions. In so doing, the paper provides an overview of the policy and legislative framework that regulates the duty of support on national and provincial governments in relation to municipalities. It then explores in some detail the implementation of the requirement of support to municipalities as it relates to current practices and shortcomings. The paper argues for a national and provincial programme of support to municipalities, whilst suggesting that horizontal support between metropolitan municipalities be strengthened, pursuant to the principles of co-operative government, as mandated by Chapter 3 of the Constitution. It also highlights the importance of improving local government accountability by strengthening oversight and monitoring of the implementation of municipal support. Finally, it emphasises the importance of strengthening oversight and intergovernmental relations (cooperation between national, provincial and local spheres of government) in ensuring sustainable development and service delivery.

### **2. POLICY AND LEGISLATIVE FRAMEWORK REGULATING SUPPORT TO MUNICIPALITIES**

Government has developed various initiatives, including legislation and programmes, towards coordinating capacity-building in local government. This section highlights such provisions contained in the Constitution and other legislation, as well as the Back to Basics (B2B) Programme.



## 2.1 The Constitution

Section 151(2) of the Constitution vests the executive and legislative authority of a municipality in its Municipal Council. It also empowers a municipality to govern, on its own initiative, the local government affairs of its community subject to national and provincial legislation<sup>1</sup> and prohibits national and provincial governments from compromising or impeding a municipality's ability and right to exercise its powers and perform its functions.<sup>2</sup> Further, section 152 of the Constitution mandates the local sphere of government to, amongst others, provide democratic and accountable local government to communities; ensure that services are provided to communities in a sustainable manner; and to promote a safe and healthy environment. The Constitution envisages a developmental role for local government. As such, it places an obligation on municipalities to structure their administration, budgeting and planning processes in a manner that prioritises the basic needs of the community, and to promote the social and economic development of the community.<sup>3</sup> The Constitution also places municipalities at the centre of the delivery of essential basic public services, such as water, electricity, refuse and sewerage disposal, public health facilities and public transport facilities.<sup>4</sup>

To ensure that municipalities are adequately capacitated to provide these essential basic services to communities, the Constitution contains a number of provisions that envisage a support and oversight role for national and provincial governments in relation to local government, in the spirit of cooperative government. These include:

- Section 154(1) - mandates national and provincial governments, through legislative and other measures, to support and strengthen the capacity of municipalities to manage their own affairs and to exercise their powers and functions.
- Section 155(6) - places an obligation on provinces to monitor and support municipalities through legislation and other measures and to promote the development of municipalities' capacity to enable them to perform their functions and manage their own affairs.
- Section 139(1) - Empowers a provincial executive to intervene in a municipality if a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation.

This presupposes that the national and provincial governments must have the necessary skills and capacity to provide targeted, hands-on support to municipalities. However, the question is whether national and provincial governments have in their establishments staff endowed with the necessary qualifications, skills, capacity and expertise to provide needed support that is sustainable.

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<sup>1</sup> Section 151(3).

<sup>2</sup> Section 151(4).

<sup>3</sup> Section 153.

<sup>4</sup> Schedule 4: Part B; Schedule 5: Part B.



## **2.2 The Municipal Finance Management Act**

Sections 34 to 37 of the Local Government Municipal Finance Management Act, No.56 of 2003, emphasise capacity building and the promotion of co-operative government by national and provincial institutions. It also entails support in the form of national and provincial resource allocations to the local sphere, as well as the promotion of co-operative government by every municipality horizontally and vertically.<sup>5</sup> This includes co-operation in fiscal and financial relations with the local sphere. It means promptly meeting the national and provincial financial commitments towards the local sphere. It further entails provision of timely information and assistance to municipalities to enable them to plan properly, develop and revise their Integrated Development Plans (IDPs), as well as prepare their budgets in compliance with the Public Finance Management Act, the annual Division of Revenue and the Inter-Governmental Fiscal Relations Act, No.97 of 1997.<sup>6</sup>

## **2.3 The Local Government Municipal Systems Act**

The Local Government Municipal Systems Act, No. 32 of 2000, provides the framework for support, monitoring and standard setting by the national and provincial spheres of government to progressively build local government into an efficient, frontline development agency capable of integrating the activities of all spheres of government for the general social and economic upliftment of communities. It provides an enabling legislative framework and environment for the core processes of planning, performance management, resource mobilisation and organisational change that underpins the notion of developmental local government.<sup>7</sup>

The Systems Act further enables the national and provincial governments to provide funding and capacity building support to the local sphere. The Act places a duty on the CoGTA Minister, the MEC for CoGTA or an organ of the state assigning a function or power to a municipality in terms of Section 9 and 10 of the Act, to take appropriate steps to ensure sufficient funding and capacity building initiatives necessary for the smooth execution of the assigned functional responsibility or powers by a municipality.<sup>8</sup>

## **2.4 Local Government Municipal Structures Act**

Section 88(1) and (2) of the Local Government Municipal Structures Act, No.117 of 1997, calls for co-operation between district and local municipalities.<sup>9</sup> This entails providing assistance and support to one another. It states that, “a district municipality, on request by a local

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<sup>5</sup>MFMA, (2003).

<sup>6</sup> IGFRA, (1997).

<sup>7</sup> Systems Act, (2000).

<sup>8</sup> MFMA, (2003).

<sup>9</sup> Structures Act, (1997).



municipality within its area of jurisdiction, may provide financial, technical and administrative support to a local municipality subject to its capacity to provide such needed support.<sup>10</sup>

During Local Government Week hosted by the National Council of Provinces in the term of the Fifth Democratic Parliament, a resolution was taken that the National Department responsible for local government should amend Section 88(2)(a & b) of the Structures Act. The main objective of the proposed amendment was to remove the prohibitive clause, which emphasises that a district may only play its support role upon request by a local municipality. This is yet to take place and district municipalities may use this as an excuse when failing to support local municipalities in their jurisdictional areas.

Section 19(1) of the Structures Act, which outlines the objectives of Municipal Councils, enjoins every municipality to strive within its capacity to achieve the objectives of local government set out in section 152 of the Constitution. Accordingly, a municipal council must annually review its overall performance in achieving the objectives set out in Section 19(1) of the Structures Act.<sup>11</sup> Because national and provincial governments are expected to comply with the requirements of municipal support as defined under Section 154(1), it behoves the national and provincial spheres of government to take the necessary initiative and provide needed support to the local sphere. This means doing so whenever inability to perform and execute its mandate and responsibilities is demonstrated through poor performance or lack thereof.

## **2.5 Back to Basics programme**

The Back to Basics (B2B) Programme aims to give all South Africans a basic set of tools by which they can hold their municipalities to account and measure whether they are living up to their promises. The Programme is built on five pillars, namely putting people first; delivering municipal services; good governance and administration; sound financial management; and building institutional capabilities. It sets clear performance benchmarks to ensure that municipalities perform their basic responsibilities. With regard to the fifth pillar, i.e. building institutional capabilities, the programme identifies five priorities. These are:

- Monitor and support the filling of vacancies with competent personnel, especially the top six posts (Municipal Manager, Finance, Corporate Services, Infrastructure, Community Development and Development Planning).
- In collaboration with the South African Local Government Association (SALGA), monitor the functionality of local government labour forums, identify weaknesses and intervene.
- National and provincial government must support municipalities to develop appropriate organograms.
- Develop and implement appropriate capacity building interventions.
- Develop guidelines on shared services and inter-municipal collaboration.

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<sup>10</sup>Ibid.

<sup>11</sup> Ibid.



### **3. REFLECTIONS ON THE IMPLEMENTATION OF SUPPORT AS MANDATED IN TERMS OF SECTION 154(1) and 155(6) OF THE CONSTITUTION**

The Constitution provides the necessary support instruments that broadly apply in local government whenever intervention is necessary in a municipality. As mentioned before, Section 154(1) of the Constitution compels the national and provincial governments to support and strengthen the capacity of municipalities to enable them to execute their mandate efficiently. It states that “The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Further, section 155(6) requires provincial governments to monitor and support municipalities and to develop their capacity to enable them to perform their functions and manage their affairs. These provisions give effect to the principle of cooperative relations between the three spheres of Government by facilitating the provision of support to local government to capacitate municipalities to perform their developmental mandate, as envisaged by the Constitution.

Notwithstanding the fact that national Government, under the leadership of the Department of Cooperative Governance and Traditional Affairs, has put in place a number of policies and other initiatives to guide and coordinate capacity building support to municipalities, as envisaged by the Constitution, there is a lack of uniformity in the manner in which provinces provide such support. This has resulted in varying degrees of success, with many municipalities still facing various skills and capacity challenges. Then Minister of Cooperative Governance and Traditional Affairs, Hon. Mr Z. Mkhize, confirmed this in a media statement in 2018 when he noted that the performance of the majority of municipalities is below expectation. In particular, the Minister reported that only 7% of the country’s municipalities are well functional; approximately 31% are reasonably functional; 31% are almost dysfunctional and 31% are dysfunctional.<sup>12</sup> This is also evident in the consistent adverse findings against municipal performance by the Auditor-General and the steady increase in notices of interventions into municipalities in terms of section 139 of the Constitution tabled in the National Council of Provinces (NCOP). Between the Fourth and Sixth Democratic Parliaments, the majority of these notices related to interventions pursuant to section 139(1)(b) of the Constitution, i.e. where the executive has to assume responsibility for the obligations of a municipality when such municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. This is of particular concern, as the Constitution envisages that local government, as the sphere closest to the people, will meet the basic service needs of the people (especially the poor and marginalised) and facilitate opportunities for economic development and growth in their areas.

The question that thus arises is: how effective is the national and provincial spheres of government in discharging their constitutionally mandated function of supporting and strengthening the capacity of municipalities to manage their own affairs and to exercise their powers and functions (section 154(1))? Moreover, if provinces routinely monitor the work of

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<sup>12</sup> South African Government (2018).



municipalities and provide support where shortcomings are identified, as required by section 155(6) of the Constitution, why have so many municipalities become either partly or fully dysfunctional? Peters and van Nieuwenhuyzen (2012)<sup>13</sup> suggest that the fact that municipalities struggle to develop the required capacity to give effect to their constitutional mandate can possibly be ascribed to the lack of a coordinated, guided approach by provincial governments in building municipalities' capacity. The authors submit that whilst Government has invested significantly in capacity-building, the absence of a formal evaluation mechanism in its capacity-building initiatives complicates a proper assessment of the efficacy of such initiatives, especially at local government level. The authors highlight a number of challenges that rendered past capacity-building initiatives unsuccessful, including:

- Uncertainty surrounding the roles and responsibilities of municipalities (changing powers and functions).
- The assumption that a lack of capacity is the root cause of all municipalities' failure to perform.
- The roles and responsibilities of national and provincial governments in local government are not clearly articulated.
- Provinces and district municipalities lack capacity to support local municipalities.
- Municipal needs are not sufficiently prioritised.
- The performance of municipalities is not adequately monitored.
- There is no mechanism to manage the transition between support and intervention.

The Department of Cooperative Governance and Traditional Affairs confirmed most of these challenges in a briefing to the Portfolio Committee on Cooperative Governance and Traditional Affairs<sup>14</sup> in which it noted that capacity-building initiatives have experienced shortcomings caused by:

- Inadequate assessments of performance constraints, leading to incomplete diagnosis resulting in interventions not addressing the root causes of problems.
- Mainstreaming hands-on support to improve municipal governance, performance and accountability has resulted in short-term appointments with no transfer of skills.
- The provision and management of support is fragmented, which results in limited impact and inefficient utilisation of scarce resources.
- Not enough has been done to build capacity of provinces and districts to enable them to support municipalities.

Arguably, one of the most significant challenges highlighted by Peters and van Nieuwenhuyzen is that there is no mechanism to manage the transition between support and intervention in the affairs of a municipality. This is indicative of the manner in which the intricacies of cooperative governance plays itself out in capacity building at municipal level. On the one hand, section 154(1) of the Constitution mandates national and provincial governments to support and

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<sup>13</sup> In Financial and Fiscal Commission Submission for the 2013/14 Division of Revenue, Chapter 9 at 97.

<sup>14</sup> Coordination of Capacity Building in Local Government Memo (n.d.).



strengthen the capacity of municipalities to enable them to manage their own affairs and to exercise their powers and functions. Further, section 155(6) of the Constitution places an obligation on provinces to monitor and support municipalities through legislation and other measures and to promote the development of municipalities' capacity to enable them to perform their functions and manage their own affairs. On the other hand, however, section 139(1) empowers provincial governments to intervene in a municipality's affairs by taking over such powers and functions where a municipality cannot or does not perform it. Based on the autonomy of the spheres of government, a province should only use intervention into the affairs of a municipality as a remedial measure of last resort. However, provinces generally use this as a first resort, without first taking steps to proactively provide hands-on support to municipalities, as envisaged by sections 154(1) and 155(6) of the Constitution. A further contributing factor is that some municipalities guard their autonomy zealously by resisting support provided by provinces in terms of the mentioned constitutional provisions. As a result, many municipalities across the country have been subject to, or are still under intervention, a number of them repeat interventions.

Examples of municipalities under repeat interventions in KwaZulu Natal are the Umzinyathi District and Mpofana Local Municipalities. The Mpofana Local Municipal Council was dissolved. The municipality resisted Section 154(1) support provided by the Provincial Department of Co-operative Governance and Traditional Affairs. In the Eastern Cape, the Inkwanca Local Municipality was dissolved during the period leading up to the 2016 local government elections. The Enoch Mgijima Local Municipality resisted both Section 154(1) support, as well as Section 139(1)(b) intervention. The Municipality was placed under intervention during the Fifth Democratic Parliament and already twice in the Sixth Democratic Parliament. Furthermore, the Makana Local Municipality was placed under section 139 intervention twice. The first intervention was nullified due to procedural flaws whilst the subsequent one failed to yield the desired results although procedurally correct. The Amahlathi Local Municipality is yet to recover from its total shut down, which led to the destruction of all its offices, as well as a local municipal clinic. In both municipalities, there is no convincing evidence of the success of either section 154(1) support or 139(1)(b) intervention by the provincial government. In the North West Province, a significant amount of municipalities have been under Section 139(1)(b) intervention. The North West Provincial Department of Co-operative Governance has not been able to provide demonstrable evidence of Section 154(1) support provided to its distressed municipalities. The Auditor-General, in his 2019/2020 Municipal Audit Outcomes for local government, sketched a gloomy picture of the current state of municipalities in the North West. Not a single municipality in this province has managed to obtain a clean audit outcome.<sup>15</sup> Instead, even those that have been under intervention have performed badly in the latest municipal audit outcomes released by the Auditor-General. Municipalities that experienced interventions in Gauteng include Emfuleni Local Municipality and the Tshwane Metropolitan Municipality. Neither intervention yielded the desired results due to political instability and infighting across party lines. This includes resistance to intervention and court action challenging intervention in the Tshwane Metro, whilst service

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<sup>15</sup> Makwetu, (2020).



delivery remains compromised. There is no conducive and stable local government environment to enable smooth implementation of section 154(1) support or section 139(1)(b) intervention, respectively.

All these municipalities experience widespread service delivery challenges, which have culminated in destructive service delivery protests. In others, there is continued infighting among councillors, predominantly members of the Council of the same party. This has contributed into internal political and administrative divisions. In most of such municipalities, the Auditor-General has reported lack of internal controls, which he deems to be deliberate and resulting in irregular, wasteful, fruitless and unauthorised expenditure amid acts of irregularities in supply chain management and corruption. Provinces, with the aid of National and Provincial Treasuries, have invested significant funds in these municipalities during the period of intervention without any positive results. This proves that merely channelling vast financial resources to municipalities where there are no internal controls, nor strict oversight, is not a solution to the challenges affecting local government.

## **4. ISSUES FOR CONSIDERATION**

### **4.1 General issues**

- Whilst the support provisions contained in sections 154(1) and 155(6) of the Constitution provide the broad framework within which national and provincial governments must support and strengthen local government capacity, legislation discussed in section 3 above was developed to specify the context within which such support must be rendered. These include the Municipal Finance Management Act, Local Government Municipal Structures Act and the Local Government Municipal Systems Act. The aim of these support provisions is to improve municipal performance and compliance to achieve good governance and accountability whilst enhancing sustainable service delivery and maintaining a stable and harmonious municipal environment.
- Together, the Constitution and these pieces of legislation require the development of an annual programme of support by national and provincial governments that can be implemented in municipalities. In the absence of a national or provincial programme of support it is difficult to provide proactive municipal support that is underpinned by the requisite human resources skills to execute defined support activities or functions. Consequently, support provided to municipalities is arguably ad hoc and reactive. It varies from province to province and from district to district, with varying degrees of success.
- In most cases, the organ of the state responsible for local government in a province provides generic and reactive support to identified municipalities when problems have erupted and culminated in service delivery protests. A case in point is the Amahlathi Local Municipality in the Eastern Cape where municipal buildings were destroyed during protest action, including a municipal clinic servicing local health needs.
- Instead of focusing on strengthening proactive support to municipalities as prescribed by sections 154(1) and 155(6) of the Constitution, provinces generally move directly to





invoking either Section 139(1)(b) or 139(1)(c) interventions, which was envisaged as a constitutional remedial measure of last resort when all efforts at proactive municipal support have failed. Unfortunately, such interventions have not always achieved the intended outcomes, resulting in municipalities being subject to repeat interventions.

- In some instances, municipal leadership at both administrative and political levels deliberately resist national and provincial support. This, coupled with the lack of internal controls, creates a fertile environment for a lack of accountability and corruption to flourish.
- Effective oversight of municipal performance by provincial governments can serve as an early warning system to detect indicators of incapacity, poor performance and dereliction of duty. This should inform national and provincial programmes of support, identifying all areas requiring support, not only to improve work performance but also to implement targeted training intervention aimed at re-skilling municipal employees. In this manner, national and provincial support to municipalities will become authentic, effective and sustainable, covering short, medium and long-term support objectives.
- The Auditor-General reports that broadly, local governments refuse to account for their performance.<sup>16</sup> To this end, some municipalities resist audits by creating an environment that may endanger the lives of the audit staff. This works against the principles of transparency and accountability and impedes the provision of effective support to municipalities.
- At the time of writing, the Department of Cooperative Governance and Traditional Affairs is yet to respond to a resolution taken during Local Government Week hosted by the NCOP and SALGA in 2018. The resolution called upon the Department of CoGTA to amend section 88(2)(a)&(b) of the Local Government Municipal Structures Act. The main objective of the proposed amendment was to remove the prohibitive clause, which emphasises that a district may only play its support role upon request by a local municipality, which may result in district municipalities evading their duty of support to municipalities.

## 4.2 Requirements for support

- Proactively invoking the support provisions contained in sections 154(1) and 155(6) of the Constitution based on national and provincial programmes of support entails:
  - Identifying areas in need of municipal hands-on support, based on key challenges affecting the functioning of a municipality.
  - Defining the skills required to provide targeted support in a municipality.
  - Deploying and employing suitably qualified staff across all municipal functional areas.
  - Deploying and employing suitably qualified and skilled staff in the provincial departments responsible for local government support to enable successful use and

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<sup>16</sup> Makwetu, (2020).



transfer of relevant skills and expertise in their support responsibilities and not generic support that fails to address the specific challenges of municipalities.

- Deploying appropriate financial, technical and administrative resources and tools to achieve national and provincial support objectives and to assist in minimising any dysfunctions.
- Developing proactive support measures to minimise all the concerns raised in the annual reports of the Auditor-General. This submission is based on the fact that For section 139 interventions have not necessarily improved municipal performance or audit outcomes in most municipalities where it has been applied, for example, in the North West.
- Putting in place pre-determined objectives and measures for the achievement of the goals set out in the Constitution regarding support to municipalities.
- Conducting effective and efficient supervision of municipal performance, using an approved system of performance management to avoid performance lapses, especially lapses during post-support implementation. For example, in cases where provincial staff is assigned to provide support, whether generic or contextually specific, such performance standards set must be upheld beyond the departure of provincial staff in a municipality. Currently, once such deployed support staff leaves, nothing happens to take performance and execution of the same tasks to another level, indicating a possible lack of transfer of skills. Consequently, most of the work is outsourced to consultants whilst staff employed continue to enjoy full salaries and benefits without corrective action. In some municipalities, almost the entire constitutional mandate of the municipality is outsourced to consultants, with no tangible improvement in performance. The Auditor-General reveals this challenge in his reports annually, yet there is no consequence management by municipal leadership.
- The duty of support envisaged in the Constitution is inherently broad and must be approached in a holistic manner. It is not limited to any single issue in a municipality to the exclusion of others. For example, with regard to local government finance management, a municipality might attain a clean audit or unqualified audit outcome but perform poorly in other functional areas. In this regard, it is important to acknowledge that a clean or unqualified municipal audit outcome may not necessarily translate into sustainable service delivery. Support to municipalities should therefore not be limited to financial management, but should include all functions of municipalities to enable sustainable delivery of services through effective and efficient use of resources.
- Whilst the support provided by national and provincial governments is vertical, supervisory and facilitative, setting performance standards and guidelines for local government, it is also educational and instructive, providing mentoring, monitoring and continuous evaluation of local government performance.
- Support invoked in terms of the Constitution should assist municipalities in the implementation of service delivery programmes. As a pre-requisite, hands-on support should entail an assessment of the state of service delivery performance in each municipality in order to establish how the utilisation of funds allocated for service delivery is managed. Local government reports provided by each provincial MEC



responsible for local government can also serve as a reference tool to inform the nature and kind of support required to improve a municipality's state of governance, performance and accountability.

- The duty of support envisaged by the Constitution includes targeted training intervention and capacity building across all functional units of a municipality. It does, however, not preclude different categories of municipalities from supporting one another by initiating horizontal sharing of knowledge and expertise.
  - Providing effective support to capacitate municipalities to give effect to their constitutional mandate requires a coordinated response, calling on all role-players to give effect to the principle of cooperative intergovernmental relations. It thus calls on:
    - The national and provincial governments to strengthen their support to local government to improve their state of performance and compliance, whilst monitoring and enhancing adherence to the principles of co-operative government.
    - Parliament and the Provincial Legislatures, Metropolitan, District and Local Municipality Oversight Structures to enhance and strengthen their oversight of the implementation of section 154(1) and 155(6) support.
    - Metropolitan, District and Local Municipalities to co-operate by fostering friendly, harmonious relations, as well as to assist and support one another in the delivery of services whilst sharing knowledge, skills and technical expertise.
    - National and provincial government to adduce demonstrable evidence of hands-on support to municipalities before invoking the provisions of Section 139 of the Constitution.
    - National and provincial government to ensure the appointment and utilisation of appropriately skilled staff to provide hands-on support to municipalities.
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