

NATIONAL COUNCIL OF PROVINCES



Celebrating
20 years
of the Constitution and
20 years since
the establishment of the NCOP

Induction programme: SALGA members
03 & 04 October 2017
Interventions
Advocate ME Phindela

Interventions

The Constitution

- ▶ Government in the Republic of South Africa is constituted by national, provincial and local spheres
- ▶ The spheres are distinctive, interrelated and interdependent.
- ▶ Other than the functional areas of concurrent national and provincial, each has its area of competence
- ▶ The Constitution enjoins the spheres to refrain from intruding into each other's terrain in the exercise of their powers and the performance of their functions
- ▶ Despite their being distinctive, the Constitution authorizes national and provincial executives to intervene in provincial administration and local government respectively within certain constitutional constraints.

The Constitution

- ▶ The interventions are authorized by sections 100 and 139
- ▶ Sections 100 and 139 prescribe preconditions for interventions
 - ▶ Firstly, the national or provincial executive may intervene in a manner and to the extent prescribed by the Constitution (procedural requirements)
 - ▶ Secondly, the national or provincial executive must give reasons why it intervenes in provincial or local government affairs (substantive requirements)
- ▶ Is failure to conjunctively satisfy procedural and substantive requirements fatal to the intervention?

Requirements for intervention s139(1)

- ▶ The provincial executive *may* intervene when a municipality cannot or does not fulfill *executive obligations*
- ▶ The obligations must be imposed by the Constitution or legislation
- ▶ The provincial executive may take *appropriate steps* to ensure the fulfillment of the obligation
- ▶ Appropriate steps may *include*
 - ▶ issuing of a directive to the Municipal Council describing the extent of the failure to fulfill its obligations and stating steps required to fulfill the obligations; (s139(1)(a))
 - ▶ assuming responsibility for the relevant obligation in the municipality to the extent required by the Constitution; (s139(1)(b)) *or*
 - ▶ dissolving the Municipal Council and appoint an administrator until the election of a new Council, if this is warranted by *exceptional circumstances* (s139(1)(c))

What constitutes executive obligation?

- ▶ The meaning must be found within the context of the Constitution
- ▶ Executive obligation must not be confused with statutory obligation
- ▶ Executive obligation may mean
 - ▶ the delivery of basic services and improvement of the lives of people
 - ▶ development of policy and initiation of by-law
 - ▶ implementation and administration of legislation related to local government

Requirements for intervention

S139(1)(a) & (b)

- ▶ The power to intervene is clearly discretionary
- ▶ Before the provincial executive intervenes the above facts must have existed
- ▶ Whether these facts exist is objectively determinable
- ▶ There must be a rational connection between the intervention and the reasons proffered to validate it - it must not be arbitrary
- ▶ The intervention must be limited to the purpose for which it has been invoked - it must not travel beyond constitutionally permissible borders
- ▶ An intervention that is irrational is bound to fail constitutional muster

Dissolution of a Municipal Council

S139(1)(C)

- ▶ The dissolution of a Municipal Council and the appointment of an administrator must be warranted by exceptional circumstances
- ▶ Whether these circumstances exist is objectively determinable
- ▶ The onus is on the provincial executive to show the existence of such circumstances
- ▶ In the absence of the existence of exceptional circumstances, it may not be appropriate for the provincial executive to dissolve the Municipal Council.

Requirements for intervention S139(4)

- ▶ The municipality must fail to fulfil a constitutional or legislative obligation
 - ▶ to approve a budget or
 - ▶ any revenue raising-measures
 - ▶ the measures must be necessary to give effect to the budget
- ▶ The provincial executive *must* intervene by taking
 - any appropriate steps to ensure the approval of the budget or revenue- raising measures*
- ▶ Appropriate steps may include the dissolution of the Municipal Council
- ▶ If it dissolves the Municipal Council
 - ▶ the provincial executive must appoint an administrator and
 - ▶ approve a temporary budget or revenue raising-measures necessary for the continued functioning of the municipality

Requirements for intervention S139(4)

- ▶ Intervention is compulsory
- ▶ Dissolution of the municipal Council is not the only consideration
- ▶ Dissolution must be considered as a last resort
- ▶ The questions whether the municipality has failed to approve a budget or revenue-raising measures and whether the dissolution is an appropriate step are objectively determinable

See Overberg District Municipality and Others v The Premier of the Western Cape and Others

Requirements for intervention S139(5)

- ▶ The municipality must be in serious or persistent material breach of its obligations to
 - ▶ provide basic services or
 - ▶ meet its financial commitments or
 - ▶ admit that it is unable to meet the above
- ▶ The provincial executive *must* intervene by
 - ▶ imposing a recovery plan aimed at assisting the municipality to meet its obligations and
 - ▶ dissolving the Municipal Council provided it fails to approve legislative measures, including the budget or any revenue-raising measures necessary to give effect to the recovery plan

Intervention in terms of section 139(7)

- ▶ Failure or inability by the provincial executive to intervene in terms of section 139(4) or (5) attracts intervention by the national executive

Timeframes

- ▶ If the provincial executive intervenes in terms of section 139(1)(b), it must submit a written notice of intervention to
 - ▶ the Cabinet member responsible for local government affairs;
 - ▶ the relevant provincial legislature; and
 - ▶ the NCOP within **14 days after the intervention began**;
- ▶ The intervention must end either if
 - ▶ the Cabinet member responsible for local government affairs disapproves or omits to approve the intervention within **28 days** after it has begun; or
 - ▶ the NCOP disapproves or omits to approve the intervention within **180 days** after it has begun

Timeframes

- ▶ If the provincial executive dissolves the Municipal Council in terms of section 139(1)(c) it must *immediately* submit the notice of dissolution to
 - ▶ the Cabinet member responsible for local government affairs,
 - ▶ the relevant provincial legislature and
 - ▶ the NCOP;
- ▶ The dissolution takes effect within **14 days** from the date of receipt of notice by the NCOP.
- ▶ It comes to an end if the Cabinet member or the NCOP disapproves it before the expiry of 14 days

Timeframes

- ▶ If the provincial executive intervenes in a municipality in terms of section 139(4) or (5) it must submit a notice of the intervention to
 - ▶ the Cabinet member responsible for local government affairs;
 - ▶ the relevant provincial legislature; and
 - ▶ the NCOP within *seven days* of the intervention.

Requirements for interventions 100(1)

- ▶ The national executive *may* intervene when a province cannot or does not fulfill *executive obligations*
- ▶ The obligations must be imposed by the Constitution or legislation
- ▶ The national executive may take *appropriate steps* to ensure the fulfillment of the obligation
- ▶ Appropriate steps may *include*
 - ▶ issuing of a directive to the provincial executive describing the extent of the failure to fulfill its obligations and stating steps required to fulfill the obligations; (s100(1)(a))
 - ▶ assuming responsibility for the relevant obligation in that province to the extent necessary to:

Requirements for interventions 100

- ▶ maintain essential national standards or meet established minimum standards for the rendering of the service;
- ▶ maintain economic unity;
- ▶ Maintain national security; or
- ▶ Prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole. (s100(1)(b) (i) - (iv))

Eastern Cape Department of Education

Requirements for interventions 100

- ▶ To the extent that section 100(2) does not require the notice of intervention to be submitted to the provincial legislature and any Cabinet member, the requirements of section 100(2), to the extent required by the context, mirror those of section 139(2)

Conclusion

- ▶ Intervention is remedial in nature
- ▶ It must be intended to assist the municipality to carry out its own obligations

THANK YOU

The background features a series of overlapping, semi-transparent geometric shapes in various shades of orange and brown, creating a modern, layered effect. The shapes are primarily triangular and polygonal, with some thin white lines intersecting them.