SUSPENSION AND DISSOLUTION OF MUNICIPAL COUNCILS UNDER SECTION 139 OF THE CONSTITUTION

1 *Introduction*

Section 139(1) of the constitution grants a provincial executive broad powers to intervene "[w]hen a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation". Until recently, provinces have been reticent in using their section 139 powers. Indeed, the problems of provincial government gave them little opportunity to take on those of the municipalities within their jurisdictions. But things have changed drastically since the 2004 elections. With the increasing emphasis on the importance of providing all citizens with basic services, the inadequacies of municipalities have become very evident and provinces have been unable to avoid their constitutional responsibility to support municipalities. Accordingly, section 139 has been used more than eight times since April 2004.

Inevitably, the section has raised difficult legal questions, many relating to what provincial action is authorised by it. One of these questions was whether a provincial executive can dissolve a municipal council. This question was finally answered by a constitutional amendment in 2003. Section 139(1)(c) now expressly permits the dissolution of a council, albeit under strictly constrained circumstances. Unanswered questions include whether a province has the power under section 139(1) to suspend a council or to legislate on its behalf. This note addresses these questions.

Section 139(1) provides a list of possible actions that the province may take when a municipality fails to fulfil its obligations, but the list is not closed. This is clear from the introductory wording of the subsection, which allows the provincial executive to take "any appropriate steps to ensure fulfilment of the obligation *including*" those listed in paras (a) to (c). Yet, as the constitutional court has said in connection with section 100 of the constitution, which corresponds, at national level, with section 139, the words "appropriate steps" must be construed to mean steps that are appropriate in the context of the constitution and, particularly, chapter 3 (*In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* 1997 2 SA 97 (CC) par 124). Not all steps will be "appropriate" within the framework of the constitution.

Besides requiring steps taken by the provincial executive to be "appropriate" within the constitutional framework, section 139(1) also limits the powers that a province may assume in the context of such an intervention in other ways. For example, under section 139(1)(c) a province may dissolve a council in exceptional circumstances only. In addition, the constitutional court has interpreted section 139(1) to mean that a province may not assume responsibility for an obligation as anticipated in para (b) unless it has first issued the directive referred to in para (a). This is because, in the constitutional court's view, section 139 sets out a "process" (*In re Certification of the Amended Text of the Constitution* par 120). This means that, once the provincial executive has decided to intervene under section 139(1), it must follow the steps set out in the section: issuance of a directive; assumption of responsibility; and, finally, in exceptional circumstances, dissolution of the council. With each step, the

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authority of the provincial executive increases while that of the municipal council decreases.

2 *The power to dissolve a council*

Section 139 of the constitution underwent drastic changes when it was amended in 2003. In considering the power of a province to suspend a council, the most significant amendments were the addition of paragraph (c) to section 139(1) and the addition of subsections (4) and (5). Each of these additions anticipates the dissolution of a council in certain circumstances.

Prior to the 2003 constitutional amendment, it was unclear whether the provincial executive had the authority, within the parameters of a section 139(1) intervention, to dissolve the council and/or to assume its legislative functions in order to "ensure fulfilment of that obligation" that the municipality had failed to fulfil. Lawyers argued that, as section 139(1) refers to a provincial *executive* taking over *executive* obligations, the reference to "any appropriate steps" should be read as limited to steps ensuring that laws were properly executed. It should not allow a province to interfere with the legislative powers of the council, and, in particular, should exclude the drastic step of dissolving the council.

As we note above, the constitutional amendment explicitly authorises dissolution of the council in subsection (1)(c). By separating this authority from the general power to assume responsibility for the relevant obligation under para (1)(b), by limiting its use to "exceptional circumstances", and by setting out different procedures in subsections (2) and (3) respectively for a province to follow when it undertakes para (b) and para (c) interventions, the constitution implies that the authority to dissolve a council does not exist under paragraph (1)(b). The provincial executive may not, therefore, dissolve the municipal council, within the context of an intervention under section 139(1)(b).

3 *When can a province assume the legislative functions of a council?*

Dissolution of the council seems to be a necessary condition of an assumption of its legislative functions. This we learn most clearly from subsection 139(5), which describes a municipality's serious and persistent failure to provide basic services or to meet financial commitments as a result of a financial crisis. Under such circumstances, the provincial executive must impose a recovery plan that "binds the municipality in the exercise of its legislative and executive authority" (constitution s 139(5)(a)(ii)). If the council then fulfils its legislative functions to the extent necessary to give effect to the recovery plan, the provincial executive may not assume those functions and may only assume responsibility for the plan's implementation to the extent necessary. If, however, the council does not fulfil its legislative functions — approval of a budget or other revenue raising measures necessary to give effect to the recovery plan — the provincial executive is obliged to dissolve the council, appoint an administrator and assume certain, limited legislative functions. In other words, the assumption of legislative functions is permitted only if the council is unable or unwilling to perform such functions itself and, this being the case, the council must first be dissolved.

This understanding is consistent with section 139(4), which specifically ap-

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plies to a situation in which a municipality cannot or does not fulfil certain legislative functions, namely to approve a budget or any revenue-raising measure necessary to give effect to the budget. (In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC) par 45, the constitutional court found that approval of a budget is a legislative function. This also appears obvious from the language of section 139(5)(b) of the constitution, which states "if the municipality cannot or does not approve legislative measures, including a budget or any revenue raising measures".) Under such circumstances, if the provincial executive cannot ensure through other appropriate means that the council performs these legislative functions, there is no alternative but to dissolve the council and appoint an administrator until a new council has been elected.

To argue that legislative powers can be assumed under subsection (1) without dissolution of the council but not under either subsection (4) or (5) would imply a substantial inconsistency in section 139.

In short, an analysis of subsection (1)(c) in the context of section 139 as a whole leads to the conclusion that —

i if an intervention takes place under subsection (1) of section 139, only para (c) allows a council to be dissolved; and
ii legislative powers can be assumed by a province only when a council has been dissolved.

This raises the question whether a council can be suspended under section 139(1)(b) despite the fact that suspension does not entitle the province to assume the council's legislative powers.

4 *What about suspension of the council?*

"Suspension" has become important because situations may arise in which dissolution of the council is not warranted, yet the council must be prevented, during the term of the intervention, from acting in ways that may impede provincial action. For example, the Select Committee's report on the Mamusa Local Municipality intervention notes in its discussion of financial management systems that "council decisions never took into account the financial position of the Municipality. Projects were approved and executed without the necessary funding being available" ("Report of the Select Committee on Local Government and Administration on Visit to Mamusa Local Municipality, dated 18 August 2004" Announcements, Tablings and Committee Reports No 53 — 2004, First Session Third Parliament (Wed 25 August 2004) 608). If such financial mismanagement were the only problem the province may consider it necessary to stop the council from approving additional spending while the municipality's finances are sorted out and new financial management practices are instituted. At the same time, although councillors may need to learn to ensure that appropriate funding exists before projects are approved, the council's actions may not warrant dissolution of the democratically elected body.

It is relatively clear what we mean when a council is dissolved: the council ceases to exist as a legal entity; councillors lose their authority, and their rights and obligations as members of the council; and a new council must be elected. However, the implications of suspension must be spelled out. In a basic sense, we understand suspension of a council to mean a temporary withdrawal of its

authority to exercise its rights and obligations, while maintaining its legal existence. A suspension implies that the elected councillors will resume their responsibilities in due course.

The constitution refers only to dissolution of a municipal council; nowhere does it expressly authorise the provincial executive to suspend the council or to suspend any of its specific powers. This does not mean that the provincial executive has no authority to suspend the council. Indeed, inherent in the right to assume executive powers is the right to suspend the council's right to exercise those (executive) powers. Certainly, in terms of section 139, it seems reasonable to assert that an assumption of responsibility for an executive obligation by the province must entail the possibility of a corresponding suspension of the council's executive authority regarding that obligation. Section 87 of the Municipal Structures Act 117 of 1998, which allows a province to allocate temporarily the powers of a district municipality to a local municipal within its jurisdiction or to allocate the powers of a local municipality to the district within which it falls, is an example of an intervention under section 139(1) that involves removing (or reducing) the powers of a council. If an assumption of responsibility did not imply the suspension of the powers of the municipality, the province would be unable to prevent the council from obstructing its work and the purpose of the intervention would be completely defeated. Of course, such suspension must be limited to the extent necessary to achieve the legitimate purposes of the intervention.

Whether the council's *legislative* powers may be suspended under section 139(1)(b) is a separate question. First of all, section 139 is quite adamant that the council be given the opportunity to fulfil its legislative obligations for purposes of implementing an intervention. So, for example, in an intervention under subsection (5), the province may approve legislative measures necessary to give effect to its recovery plan only if the municipality cannot or does not approve them itself. Second, we know that if the provincial executive wants to assume legislative powers, it must first dissolve the council, and that section 139(1)(b) does not authorise such dissolution. So the question here is whether the legislative powers of the council may be suspended even though the provincial executive cannot assume those powers.

Section 139(1) authorises the provincial executive to take "any appropriate steps" to ensure fulfilment of municipal executive obligations. As noted above, the constitutional court has said that the words "appropriate steps" must be construed to mean steps that are appropriate in the context of the constitution. Although suspension of the council's legislative powers is not expressly authorised by the constitution, there may be circumstances, as described above, in which it will be a necessary step both to ensure fulfilment of the municipality's executive obligations, within the context of a subsection (1)(b) intervention, and to avoid the more drastic step of dissolution when, in the long run, this might not be necessary.

5 *Conclusion*

It is up to the provincial executive to determine, on a case-by-case basis, when suspension, as opposed to dissolution, is warranted. In exercising this discretion, the provincial executive should consider whether the council would be capable of fulfilling its obligations after the intervention is over.

Section 139 clearly indicates that dissolution ought to be a last resort, appropriate only "if exceptional circumstances warrant such a step". Thus, if the

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province does not wish to legislate, but considers it necessary to prevent the council from doing so while the intervention takes place, section 139 would allow suspension of the council's legislative powers. Otherwise, the provincial executive would be forced to dissolve the council unnecessarily in order to implement its intervention effectively.

The thrust of section 139(1) is to enable a province to take whatever steps are necessary to get the municipality back on its feet and fulfilling its obligations. The section builds in both legal and political safeguards: objective tests for interventions are included in the section; a council may challenge any intervention that it believes is unwarranted under the constitution in court; and the relevant national minister or the NCOP may terminate provincial action in a municipality taken under subsection (1). In addition, the principles of co-operative government in chapter 3 of the constitution require provinces to be circumspect in the use of their intervention powers.

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