

# PROVINCIAL SUPERVISION

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## Manual for the application of section 139 of the Constitution

Prepared by

Jaap de Visser  
Prof Nico Steytler  
Johann Mettler

of

Local Government Project, Community Law Centre  
University of the Western Cape

on behalf of and in collaboration with

Department of Provincial and Local Government

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## **FOREWORD**

The 1996 Constitution entrenched a new constitutional dispensation for South Africa and introduced a system of governance that disperses legislative and executive authority between the national, provincial and local sphere.

This was the basis for a process of changing local government's status from one where its very existence depended solely on superior legislatures into one that is protected by the Constitution itself. Local government is no longer an administrative arm of provincial and national government but, in the words of the Constitutional Court, "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself".

The transformation of South African local government from an illegitimate institution with unprotected powers into a fully fledged sphere of government whose existence, as well as its legislative and executive acts are accepted and endorsed by its citizens is a mammoth task. Local authorities are faced with a legacy of painful disparities in wealth, infrastructure and provision of services.

Local government cannot fulfil that task on its own. National and provincial governments are obliged to take an active interest in local government's success.

The involvement of provincial government can, as a last resort, take the form of intervention into the affairs of a particular local authority. This instrument, given to provinces in section 139 of the Constitution cannot be exercised at the province's will and discretion, precisely because of this new constitutionally protected status of local government. The use of section 139 is circumscribed by rules and principles and must take place in the spirit of sound intergovernmental relations.

This manual provides an outline of the relevant rules for the application of section 139. Adherence to this manual by provinces when using the instrument of intervention will ensure the necessary uniformity and protection against legal challenges.



**Fholisani Sydney Mufamadi**  
**Minister for Provincial and Local Governemnt**



# INTRODUCTION

Provincial government has the duty to take an active interest in ensuring the development of strong local government, capable of fulfilling its constitutional mandate. Provincial government must not only monitor and support local government by legislative or other measures, it must also exercise provincial supervision in terms of section 139 when necessary.

In exercising its powers, provincial government must respect local government's institutional integrity as an independent sphere of government. This must be balanced against the need for minimum standards of service delivery and good governance by local authorities.

In terms of the Constitution, the responsibility of provincial government with regard to local government entails the following steps:

- the *monitoring* of local government's performance by the provincial executive, by means of different monitoring instruments, provided for in national and provincial legislation;
- the undertaking of measures of *support and strengthening*, aimed at developing the capacity of municipalities to perform their functions and manage their own affairs;
- *intervention* in terms of section 139 of the Constitution.

It is clear that *intervention* should be an instrument only to be resorted to by provincial governments when the instruments of monitoring and support did not result in a municipality being able to fulfil its constitutional functions.

This manual serves as a guideline, detailing the steps to be taken and the principles to be adhered to by the different stakeholders in the process of provincial intervention in a municipality. These stakeholders are:

- the Provincial Executive;
- the Municipal Council;
- the Minister for Provincial and Local Government; and
- the National Council of Provinces.

The aim of this manual is to promote a uniform mode of provincial intervention, which fulfils the purpose of ensuring delivery of services and good governance by local authorities and which, at the same time, respects the status of local government as an autonomous sphere of government.

- Chapter 1 of the manual deals with the *substantive* requirements for intervention, in other words with the question: when is intervention permissible? The emphasis in that Chapter 1 is on the identification of the relevant 'executive obligation' that the Constitution refers to in section 139.
- Chapter 2 deals with the *procedural* requirements that apply both before and after intervention.
- Chapter 3, finally, deals with the definition of powers after the assumption of responsibility by the Provincial Executive.

## **CHAPTER 1**

# **THE SUBSTANTIVE REQUIREMENTS FOR INTERVENTION**

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## **– WHEN IS INTERVENTION PERMISSIBLE?**

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Section 139 authorises a Provincial Executive to intervene if a municipality “cannot or does not fulfil an executive obligation in terms of legislation”.

### **The Council is accountable**

*Who* must fail in fulfilling the executive obligation? Does the fact that a municipality has an incapable Chief Executive Officer (CEO) mean that ‘the municipality’ is incapable? Is intervention permitted if the Council performs well, but the CEO fails to perform?

Section 139 speaks of “a municipality”. In that municipality, the Municipal Council has been afforded the highest authority by the Constitution. The Council is therefore accountable to the Provincial Executive in the context of section 139. A section 139 enquiry into the performance of the Council must include its performance in terms of exercising control and supervision over the municipality’s administration.

### **Relevance of the intentions of the Council**

The phrase ‘... cannot or does not ...’ indicates that section 139 applies to situations of *incompetence* as well as to situations of *unwillingness*. The intentions of the municipality are irrelevant: failure to fulfil an executive obligation is decisive, even if the municipality has made all the necessary effort.

### **Who intervenes?**

The Constitution stipulates that the “Provincial Executive” can intervene. Section 125 of the Constitution provides that the executive authority at provincial level is vested in the Premier, who exercises it together with the other members of the Executive Council. The reference in section 139 to the “Provincial Executive” thus empowers the Premier and the Executive Council to intervene. The Executive Council may, however, authorise the MEC responsible for local government (or the MEC in whose portfolio the unfulfilled obligation falls) to intervene.

### **Executive obligation in terms of legislation**

A crucial element in section 139 is the restriction of the scope of intervention to failure to fulfil an *executive* obligation. When read together with section 151(2), which speaks of the municipality’s *executive and legislative* authority, it appears that a section 139 intervention cannot affect a Council’s *legislative* powers, ie. its powers to make by-laws.

The executive obligation must exist “in terms of legislation”. The obligations can be found in:

- the Constitution;
- Acts of Parliament;
- provincial Acts;
- municipal by-laws; and

- any regulations, promulgated in terms of the above legislation.

Before the Provincial Executive can intervene, it must be able to identify a statutory obligation that places a duty on local government to fulfil a certain *executive* obligation. The Provincial Executive must indicate *which* obligation is not being fulfilled. In other words, the Provincial Executive, in its correspondence relating to the intervention, must identify *which* executive obligation is not being fulfilled and state its legislative origin. Chapter 1.1 lists examples of executive obligations in terms of national legislation that the Provincial Executive can invoke when it intervenes. Chapter 1.2 deals with the question how the Provincial Executive can ascertain the facts, that justify intervention. Chapter 1.3 discusses the Provincial Executive's discretion.

## **1.1 IDENTIFYING THE RELEVANT EXECUTIVE OBLIGATION**

When a section 139 intervention is not based on the failure of a municipality to fulfil one or more executive obligations, it is unlawful. The fact that the Constitution speaks of “the relevant obligation” makes clear that the obligation must be identified. A general reference to the municipality's failure to fulfil its executive obligations will not suffice.

What are the existing executive obligations that are relevant to the exercise of a section 139 intervention? What follows is a list with examples of executive obligations that can be invoked by the Provincial Executive when it intervenes in terms of section 139. Some of the most important and clear obligations on local authorities are listed by functional area. These obligations all exist in terms of national legislation. A similar exercise should be done by the relevant provincial governments with reference to provincial or municipal legislation.



## Water supply

### Situation:

Water supply in the municipal area has been interrupted. Residents are not provided with water, because municipal officials are not functioning or are on strike, suppliers have stopped providing water to the municipality because of non payment. Or the municipality is the water supplier and provides polluted water.

### Problem:

The municipality does not provide water to residents who are willing and able to pay.

### Executive obligation:

Section 11(1) Water Services Act, No. 108 of 1997:

*“Every water services authority has a duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.”*

**OR**

Item 4 (draft) Compulsory National Standards in terms of sections 9(1) and Measure to Conserve Water in terms of 73(1)(j) of the Water Services Act:

*“A water services institution must take reasonable measures to ensure that, where the water services usually provided by or on behalf of the water services authority are interrupted for a period of more than twenty four hours for reasons other than provided for in terms of section 4 of the Act, a consumer has access to alternative water services comprising at least –*

- (a) *water supply services of at least 10 liters per person per day; and*
- (b) *sanitation services sufficient to protect health.”*

Item 3 of the Compulsory National Standards provides that:

*“The minimum standard of basic water supply services provided to consumers or potential consumers must consist of –*

- (a) *the provision of appropriate education in respect of effective water use; and*
- (b) *a minimum quantity of potable water of 25 liters per person per day –*
  - (i) *at a minimum flow rate of not less than 10 liters per minute;*
  - (ii) *within 200 metres of a household; and*
  - (iii) *with an effectiveness of not more than 7 days interruption in supply to any consumer per year.*

(These regulations were not yet promulgated at the time of printing)

**OR**

Section 9(1)(a)(iii) Housing Act, No. 107 of 1997:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps, within the framework of national and provincial housing legislation and policy to ensure that services in respect of water are provided, sanitation, electricity, roads, stormwater drainage and transport are provided for in a manner which is economically efficient.”*

**Problem:**

The municipality does not purify water that is intended for the use of residents.

**Executive obligation:**

Section 20(1)(c) Health Act, No. 63 of 1977:

*“Every local authority shall take all lawful, necessary and reasonably practicable measures to prevent the pollution of any water intended for the use of the inhabitants of its district, irrespective of whether such water is obtained from sources within or outside its district, or to purify such water which has become so*

**Electricity supply**

**Situation:**

Electricity supply in the municipal area has been interrupted or is severely threatened because the municipality cannot or does not pay ESKOM for the bulk supply of electricity. ESKOM has severed electricity supply to the municipality or threatens to do so. This results in residents that are able and willing to pay not being provided with electricity or in a serious threat that they will not be provided electricity.

**Problem:**

The municipality fails to provide electricity to residents who are paying for electricity or who can make arrangements therefor.

**Executive obligation:**

Section 10(1) Electricity Act, No. 41 of 1987:

*“Every licensee shall up to the limit, if any, of electricity which he may generate or supply in terms of his licence, supply electricity within the area of supply mentioned in the licence to every applicant who is in a position to make arrangements for payments therefor.”*

**OR**

Section 9(1)(a)(iii) Housing Act, No 107 of 1997:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps, within the framework of national and provincial housing legislation and policy to ensure that services in respect of water are provided, sanitation, electricity, roads, stormwater drainage and transport are provided for in a manner which is economically*

## Refuse collection/cleansing

### Situation:

Garbage and refuse is piling up on the streets and the streets are not being cleaned. Refuse is not being collected by the municipality because officials are not working or on strike or the refuse service is being managed poorly. Not only is the town an eyesore, but this also poses a threat to the health of persons residing in it.

### Problem:

The municipality does not collect refuse and/or does not remove garbage and waste from the streets.

### Executive obligation:

Section 20(1)(a) Health Act, No. 63 of 1977:

*“Every local authority shall take all lawful, necessary and reasonably practicable measures to maintain its district at all times in a hygienic and clean condition.”*

OR

Section 20(1)(b) Health Act:

*“Every local authority shall take all lawful, necessary and reasonably practicable measures to prevent the occurrence within its district of any nuisance, unhygienic condition, offensive condition or any other condition which will or could be harmful or dangerous to the health of any person.”*

OR

Section 9(1)(a)(ii) Housing Act, No. 107 of 1997:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to ensure that conditions not conducive to the health and safety of the inhabitants of its area are prevented or removed.”*

OR

Item 6 (draft) Compulsory National Standards in terms of sections 9(1) and Measures to Conserve Water in terms of 73(1)(j) of the Water Services Act:

- (1) A water services institution must take reasonable measures to prevent any substance other than uncontaminated storm water to enter –
  - (a) any storm water drain; or
  - (b) any watercourse, except in accordance with the provisions of the National Water Act, Act 36 of 1998.
- (2) A water services institution must take reasonable measures to prevent storm water from entering its sewerage system.

OR

Item 12 (draft) Compulsory National Standards:

- (1) A water services institution must ensure that any major or visible leak in its water services system is repaired within 48 hours after the water services institution became aware thereof.
- (2) A water services institution must have a consumer service to which leaks can be reported.

## Sewerage

### Situation:

The sewerage system is not functioning. Damaged or leaking sewage pipes are not being repaired. The open sewer causes a stench and poses a threat to the health of persons residing in the municipality.

### Problem:

The municipality does not maintain its sewerage system.

### Executive obligation:

Section 9(1)(a)(iii) Housing Act, No. 107 of 1997:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to ensure that services in respect of sanitation and stormwater drainage are provided in a manner which is economically efficient.”*

OR

Section 20(1)(a) Health Act, No. 63 of 1977:

*“Every local authority shall take all lawful, necessary and reasonably practicable measures to maintain its district at all times in a hygienic and clean condition.”*

OR

Section 20(1)(b) Health Act:

*“Every local authority shall take all lawful, necessary and reasonably practicable measures to prevent the occurrence within its district of any nuisance, unhygienic condition, offensive condition or any other condition which will or could be harmful or dangerous to the health of any person.”*

OR

Section 9(1)(a)(ii) Housing Act:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to ensure that conditions not conducive to the health and safety of the inhabitants of its area are prevented or removed.”*

## Housing

### Situation:

There is no proper implementation of housing policy in the municipality. Waiting lists are astronomical. Money meant for housing schemes is being squandered. Nobody in the municipality is taking responsibility for assisting communities that need housing, which results in more informal settlements. Communities are protesting and demanding that the municipality addresses the problem of housing.

### Problem:

The municipality does not promote housing development at all.

### Executive obligation:

Section 9(1)(a)(i) Housing Act:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to ensure that the inhabitants of the area of jurisdiction have access to adequate housing on a progressive basis.”*

OR

Section 9(1)(d) Housing Act:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to create and maintain a public environment conducive to housing development which is financially and socially viable.”*

OR

Section 9(1)(f) Housing Act:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in the area of jurisdiction.”*

### Problem:

The municipality does not identify and designate land for housing development.

### Executive obligation:

Section 9(1)(c) Housing Act:

*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to identify and designate land for housing development.”*



**Problem:**

The municipality does not set housing delivery goals

**Executive obligation:**

Section 9(1)(b) Housing Act:  
*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to set housing delivery goals in respect of its area of jurisdiction.”*

**Town planning**

**Situation:**

There is no proper town planning in the municipality. There is no clarity with regard to zoning regulations. The Council does not enforce its zoning regulations. Building activities are taking place without prior approval or even consultation with the Council.

**Problem:**

The municipality does not plan land use and land development at all

**Executive obligation:**

Section 9(1)(h) Housing Act, No. 107 of 1997:  
*“Every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps to plan and manage land use and development.”*

**Health care**

**Situation:**

The municipality is not providing primary health care services. First line health care is non-existent in the area of jurisdiction or of a standard below what is reasonable. Clinics are completely run down, health care officials are not doing their job or are not able to do so.

**Problem:**

Primary health care services are non-existent in the municipality

**Executive obligation:**

Section 20(1)(c) Health Act, No. 63 of 1997:  
*“Every local authority shall take all lawful, necessary and reasonably practicable measures to render primary health care services in its district.”*

## Financial Management

### Situation:

The municipality's finances are far from being in order. There is no sound financial system in place. Rates and taxes are not being collected. Residents owe the municipality enormous amounts of money and the municipality can no longer pay service providers who threaten the municipality with severance. Public funds under the control of the council are being embezzled. Municipal property and services are being used for unauthorised purposes. No proper recording of financial transactions is taking place and tender procedures are not transparent.

### Problem:

There is no firm policy on debt collection. Municipal officials fail to collect arrear rates and taxes.

### Executive obligation:

Section 10G(1)(e) Local Government Transition Act, No. 209 of 1993:  
*"Every municipality shall manage its financial resources to meet and sustain its objectives."*

### Problem:

No disciplinary action is taken against officials who fail to collect money owing to the municipality.

### Executive obligation:

Section 10G(2)(f) Local Government Transition Act:  
*"If a person who is or was in the employ of a municipality causes or caused the municipality a loss or damage because he or she failed to collect money owing to the municipality for the collection of which he or she is or was responsible, the chief executive officer of that municipality, or, if the chief executive officer was responsible for such loss or damage, the council, shall determine the amount of such loss or damage and take disciplinary action where possible and in appropriate cases recover the loss or damage."*

### Problem:

Municipal officials and/or councillors use municipal property and/or services for unauthorised (private) purposes. Goods and services are being bought on the municipality's expense by councillors and/or officials for unauthorised use.

### Executive obligation:

Section 10G(11) Local Government Transition Act:  
*"A municipality shall ensure that the acquisition and disposal, the utilisation and control and the maintenance of its assets are carried out in an economic, efficient and effective manner."*

**Problem:**

There are no proper tender procedures or they are not being adhered to. Contracts are not awarded to the lowest and/or best bidder nor do they fall within an affirmative action programme.

**Executive obligation:**

Section 10G(5)(a) Local Government Transition Act:

*“A municipality shall award contracts for goods and services in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”*

**OR**

Section 217(1) Constitution of the Republic of South Africa, 1996, No. 108 of 1996:

*“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”*

**Problem:**

The Council does not recover unauthorised expenditure from the CEO who is unwilling to recover the amount from the beneficiary or the person responsible for the unauthorised expenditure.

**Executive obligation:**

Section 10G(2)(k) Local Government Transition Act:

*“Unauthorised expenditure referred to in paragraph (j) shall be disallowed and shall not form a charge against a fund or account concerned until it has been approved by the responsible authority, in accordance with the normal budgetary procedure applicable to the fund or the account concerned, and any unauthorised expenditure or part thereof as determined by the Minister, MEC or council, as the case may be, which has not been authorised, shall be recovered from the chief executive officer if he or she is unwilling to recover the amount concerned from the beneficiary or the person responsible for the unauthorised expenditure ...”*

**Problem:**

Councillors and/or officials (without being corrected by the Council), on behalf of the municipality, are making expenses, for which the budget makes no provision and which are therefore unauthorised.

**Executive obligation:**

Section 10G(4)(a) Local Government Transition Act:

*“A municipality shall only incur expenditure in accordance with its approved*

**Problem:**

The CEO is not keeping a proper accounting system: transactions are not being recorded and the financial state of affairs of the municipality is unclear. The council fails to direct the CEO or its directions do not result in improvement.

**Executive obligation:**

Section 10G(2)(a)(i) Local Government Transition Act:

*“The chief executive officer of a municipality shall, subject to this Act and the regulations made thereunder, cause such accounting records to be kept as are necessary to reflect the transactions and financial state of affairs of the municipality.”*

**OR**

Section 10G(2)(a)(ii) Local Government Transition Act:

*“The chief executive officer of a municipality shall cause to be kept in the accounting records contemplated in subparagraph (i) a revenue account which shall be credited with all money which accrues to and is received by the municipality and be debited with all expenses of the municipality.”*

**Problem:**

There is no proper system of internal control of the municipality’s finances. Expenses and commitments made by officials and/or councillors are not being subjected to regular control or internal auditing schemes.

**Executive obligation:**

Section 10G(2)(c) Local Government Transition Act:

*“Every municipality shall establish and maintain a system of internal control and, as far as practicable, institute internal audit, including audit committees, as an independent appraisal function.”*

**Problem:**

Properties within the municipal area are not being valued, resulting in the municipality not being able to tax the property or tax it adequately.

**Executive obligation:**

Section 10G(6) Local Government Transition Act:

*“A local council, metropolitan council and rural council shall, subject to any other law, ensure that -*

- (a) properties within its area of jurisdiction are valued or measured at intervals prescribed by law;*
- (b) a single valuation roll of all properties so valued or measured is compiled and is open for public inspection; and*
- (c) all procedures prescribed by law regarding the valuation or measurement of properties are complied with ... ”*

## 1.2 ASCERTAINING THE FACTS

How must a province ascertain the objective facts that justify intervention? It must be noted that the investigation, preceding the intervention, is of utmost importance.

- Firstly, the objective facts that come out of the investigation will have to form the basis on which the Provincial Executive exercises its discretion as to whether or not and how to intervene.
- Secondly, on the basis of the result of the investigations, the section 139(1)(a) directive will be drawn up. The content of the directive is crucial for the determination of the extent of follow-up to the directive, ie. the assumption of responsibility that is legally permissible. An incomplete investigation might result in the assumption of responsibility for an incomplete set of executive obligations. In that case the Provincial Executive's hands are tied because the permitted scope of intervention is too narrow. Therefore, a complete investigation, resulting in a picture of the municipality's failures that is as complete as possible, is imperative.

What are the instruments available to the Provincial Executive for this purpose? To ascertain the facts, the Provincial Executive can use its monitoring powers. Two types of monitoring powers can be identified in this respect, namely:

- those that are based on provinces' *general* constitutional duty to monitor; and
- those that are based on *specific* legislation.

### General duty to monitor in terms of the Constitution

A province has the constitutional power and duty to monitor local government (section 155(6)(a) of the Constitution). The monitoring of local government is a costly, but absolutely necessary exercise. Provinces therefore can and must develop, by legislative or other measures, their own scheme of monitoring local government in the province. This scheme can be used for ascertaining the facts, relevant to a section 139 intervention.

The duty of the provinces to monitor local government also means that provinces can, on an *ad hoc* basis, actively engage with the relevant municipality in order to ascertain facts and that the municipality will be bound to provide the necessary information, to the extent set out below.

### General monitoring measures

- The MEC responsible for Local Government in the province can, by notice addressed to the Council, require municipalities to submit to a specified provincial department or institution such information as may be required, either at regular intervals or within a period as specified.
- The MEC responsible for Local Government in the province may make reasonable requests to municipalities for additional information after taking into account the administrative burden and costs for the municipality to furnish the information and existing monitoring mechanisms.

### Monitoring measures aimed at ascertaining facts for intervention

When the MEC has reason to believe that a municipality fails to fulfil an executive obligation, the MEC can, in order to establish whether or not that is the case -

- by written notice to the municipality, request the Council or the CEO to provide the MEC with information required in the notice;
- designate a person to investigate the matter;
- organise a public hearing in the municipality and invite all the relevant stakeholders.

The aim of the use of these instruments should be to establish whether or not the facts justify intervention.

#### Organised local government

Good practice would be for the MEC to inform organised local government in the province when implementing any of the abovementioned measures.

#### Monitoring measures based on specific legislation

Some of the acts, referred to in Chapter 1.1, contain specific provisions that enable provinces to monitor the implementation of these acts.

The Water Services Act, for example, stipulates that municipalities must, as part of their Integrated Development Planning, have a water services development plan. Section 18(1) of the Act provides that municipalities must report on the implementation of the plan to the province. Item 10(3)(i) of the draft Compulsory National Standards (see page 9), in terms of the Act stipulates that municipalities must include their water services audit (introduced by those regulations) in this report. In section 62(1), the Act also compels provinces to monitor the performance of municipalities with regard to the national standards, prescribed under the Act. Lastly, the Province can authorise a person to enter property and inspect water services work in terms of section 80(1) of the Act.

## 1.3 THE PROVINCIAL EXECUTIVE'S DISCRETION

The Provincial Executive has a discretion to decide *whether or not* to intervene and a discretion in deciding *what steps* to take.

#### Discretion as to whether or not to intervene

In deciding whether or not to intervene, the Provincial Executive should act within the framework and spirit of the principles of co-operative government as laid down in Chapter 3 of the Constitution. The Executive should be guided by the principle that section 139, being a severe inroad in local government's institutional integrity, is a measure of last resort only. Only if other measures to support and strengthen the capacity of a municipality have failed, should section 139 come into play.

#### → Intervention in one particular area is possible

Section 139 does not require a total collapse of service delivery. This conclusion can be drawn on the basis of the text of section 139, where section 139(1)(b) speaks of assuming responsibility 'for the relevant obligation'. Failure in only one particular functional area can merit intervention.

#### → Intervention should be aimed at achieving minimum standards

The yardstick is a minimum standard of service delivery. The constitutional status of local government as an autonomous sphere of government militates against interventions that go beyond achieving a minimum standard of service delivery and good governance.

Minimum standards of service delivery can often be found in regulations, promulgated in terms of the Acts, that were mentioned in Chapter 1.1. Examples of minimum standards are the compulsory national standards that the Minister of Water Affairs and Forestry can prescribe in terms of section 9 of the Water Services Act, No. 108 of 1997.

### Discretion as to what steps to take

In principle, any “appropriate” measure can be taken. What is “appropriate”?

#### → Purpose

First and foremost, the steps taken must be for the purpose of ensuring the fulfilment of an executive obligation. Any steps taken for ulterior purposes are inconsistent with the Constitution and can be challenged in court.

#### → Aim

Second, the Constitutional Court has described the steps taken in terms of section 100 and section 139 as “a process of implementation of corrective measures”. The aim is not merely the fulfilment of an obligation which a municipality has failed to do, but to ensure that it will be fulfilled in the future. An intervention should thus be solution-oriented.

#### → “ ... appropriate steps ... ”

The Constitutional Court has defined “appropriate steps” in a formal way, that is, the “steps” must be authorised by the Constitution or by constitutionally compatible legislation. The Constitution mentions two steps in particular: the issuing of a directive and the assumption of responsibility. Other “appropriate steps” include steps taken in terms of Chapter 3 of the Constitution, dealing with co-operative government. While the steps detailed in section 139 entail carefully circumscribed powers and proceedings, the essence of Chapter 3 steps will be their informality and diversity. The Constitutional Court has held that court proceedings could constitute an appropriate step towards securing fulfilment of such obligations.



## **CHAPTER 2**

# **THE PROCEDURAL REQUIREMENTS**

## **FOR INTERVENTION**

### **Introduction: respecting the institutional integrity of local government**

The principles of co-operative government require from the Provincial Executive that it exercises its powers, including its power to intervene, in a manner that does not encroach on the institutional integrity of local government (section 41(1)(g) of the Constitution).

The fact that the Provincial Executive, in resorting to a far-reaching method such as section 139, must be guided by the principles of co-operative government has two clear consequences in terms of procedure:

- The principle of respect for the institutional status of local government induces the Provincial Executive to resort to assumption of responsibility, only after a directive has proved to be unsuccessful.

The relation between section 139(1)(a) and (b) needs to be clarified. These two provisions are part of one process. Dealing with section 100, the equivalent of section 139 for national intervention in provincial affairs, the Constitutional Court made it clear that section 100 represents 'a process which requires a directive to be issued before the intervention sanctioned by section 100(1)(b) takes place.'

The steps of section 139(1)(a) and 139(1)(b) follow each other. This means that only after the issuing of a directive did not have the desired effect, may assumption of responsibility take place. In other words, the directive is a precondition for the assumption of responsibility

- The same principle induces the Provincial Executive to inform a municipality of the intention to use section 139 and requires the Provincial Executive to allow the municipality to respond to the allegations.

The relevant municipality must be notified of an intention to intervene and must be afforded an opportunity to respond. The Provincial Executive can only intervene after having considered the representations, made by the municipality in this regard. This principle applies to both the issuing of a directive and to the assumption of responsibility.

In addition, the right to be given prior notice of an action which may infringe your rights, arises from the common law principle of a 'fair hearing', which incorporates the right to prior notice and the right to a proper opportunity to be heard.

Against the backdrop of these principles, the procedural requirements for intervention will be discussed in more detail in the following three parts:

- 2.1 The procedural steps, necessary when intervening by way of a directive (section 139(1)(a));
- 2.2 The procedure, necessary when intervening by way of the assumption of responsibility (section 139(1)(b)); and
- 2.3 The procedure after intervening by way of the assumption of responsibility.

## 2.1 PROCEDURAL REQUIREMENTS FOR INTERVENTION BY WAY OF A DIRECTIVE

- Step 1: The Provincial Executive (or the MEC) notifies the relevant Municipal Council in writing of the intention to issue a directive in terms of section 139(1)(a)
- Step 2: The Provincial Executive considers the representations, made by the Council and decides whether or not to proceed with the issuing of a directive.
- Step 3: The Provincial Executive issues a directive in terms of section 139(1)(a).

Step 1:

The Provincial Executive (or the MEC) notifies the relevant Municipal Council in writing of the intention to issue a directive in terms of section 139(1)(a).

Minimum content of the notification:  
(See Example A – page 34)

- identification of the executive obligations that are not being fulfilled and their legislative origin;
- description of the extent of non-fulfilment;
- identification of the steps that the Provincial Executive will direct the municipality to take;
- invitation to the Council to make written representations; and
- a reasonable time period for the making of representations.

Since Step 1 is not an intervention in itself but a notification of the intention to intervene, the MEC responsible for local government in the province (or the MEC in whose portfolio the unfulfilled obligation falls) can issue this notice on his or her own behalf without the explicit approval of the Provincial Executive.

Step 2:

The Provincial Executive considers the representations, made by the Council and decides whether or not to proceed with the issuing of a directive.

Before the Provincial Executive decides to intervene itself or before it decides to authorise an MEC to intervene, it must consider the representations, made by the Council.

Step 3:

The Provincial Executive issues a directive in terms of section 139(1)(a).

Minimum content of the section 139(1)(a) directive:  
(See Example B – page 36)

- a statement that the Provincial Executive is acting in terms of section 139(1)(a) of the Constitution;
- a consideration of any representations, made by the Council;
- identification of the executive obligations, that are not being fulfilled;
- identification of the legislative origin of those obligations;
- an outline of the steps to be taken by the Municipal Council to ensure the fulfilment of the obligations referred to;
- a reasonable time period for the Municipal Council to take the steps, mentioned in the directive
- instruction to the Municipal Council to report to the Provincial Executive on the implementation of the directive; and
- a statement that failure to implement the steps can be followed up by assumption of responsibility in terms of section 139(1)(b).

Since Step 3 is the actual intervention in terms of section 139(1)(a), the directive must be issued by the Provincial Executive (or the MEC, authorised by, and acting together with the Provincial Executive).

#### Importance of a directive

It must be noted that the content of the directive determines, to a large extent, the mandate for the assumption of responsibility. As outlined below under Chapter 3.1, assumption of responsibility can only take place with regard to those executive obligations, that were mentioned in the directive and those that are incidental to the fulfilment of those executive obligations. That implies that the directive should be inclusive and accurate, ie. contain all the relevant executive obligations and should not be phrased in a narrow wording. This also re-affirms the importance of a proper investigation before intervening (*See Chapter 1.2: page – 18*).

#### Organised local government

Good practice for Provincial Executive's would be to forward a copy of the directive to organised local government in the province.

#### Amending a directive

The Provincial Executive can amend a directive that has been issued to the Municipal Council. An amendment to a directive can -

- specify additional steps that the Council is directed to take;
- extend the period within which the Council must comply with the directive; or
- amend the directive in any other respect.

If the directive is amended in any material respect, the amendment cannot take place without following Step 1, 2 and 3. In particular, amendment 'in any material respect' will be the case if an executive obligation is added that was not mentioned in the notice of intention to issue a directive or in the directive itself.

#### Extreme circumstances

In a situation, where extreme circumstances require an instant assumption of responsibility, the Provincial Executive is not necessarily bound to first issue a directive or a notice that precedes a directive or assumption of responsibility. The Provincial Executive could then assume responsibility as a first step. However, this would only be appropriate under extreme circumstances.

## 2.2 PROCEDURAL REQUIREMENTS FOR THE INTERVENTION BY WAY OF ASSUMPTION OF RESPONSIBILITY

- Step 1: The Provincial Executive (or the MEC) notifies the Municipal Council in writing of its intention to assume responsibility in terms of section 139(1)(b) of the Constitution.
- Step 2: The Provincial Executive considers the representations, made by the Municipal Council and decides whether or not to proceed with the intervention.
- Step 3: The Provincial Executive notifies the Municipal Council in writing of its decision to assume responsibility for those executive obligations, where the directive has not been complied with.

Step 1:

The Provincial Executive (or the MEC) notifies the Municipal Council in writing of its intention to assume responsibility in terms of section 139(1)(b) of the Constitution.

Minimum content of the notification:  
(See Example C: page 38)

- identification of the failure to comply with one or more steps to be taken by the Municipal Council in terms of the directive;
- invitation to the Municipal Council to make written representations with regard to its efforts to comply with the directive; and
- a reasonable time period for the making of representations.

Step 2:

The Provincial Executive considers the representations, made by the Municipal Council and decides whether or not to proceed with the intervention.

Step 3:

The Provincial Executive notifies the Municipal Council in writing of its decision to assume responsibility for those executive obligations, where the directive has not been complied with.

Minimum content of the notification:  
(See Example D: page – 39)

- reference to section 139(1)(b) of the Constitution;
- identification of the steps in the directive that the Council did not comply with;
- announcement that the Provincial Executive assumes responsibility for those executive obligations, where the steps in the directives were not complied with;
- identification of the exact date, on which the assumption of responsibility takes effect;
- specification of the extent to which and the expected period for which the MEC is assuming responsibility;
- outline of the implementation of the assumption of responsibility (designation of persons, acting for the Provincial Executive in the assumption of responsibility) or reference to future communication with regard to that.

Since Step 3 is the actual intervention in terms of section 139(1)(b), the notice must be issued by the Provincial Executive (or the MEC, authorised by, and acting together with the Provincial Executive).

#### Organised local government

Good practice for Provincial Executives would be to forward a copy of the notice of assumption of responsibility to organised local government in the province.

#### Amending a notice of assumption of responsibility

The Provincial Executive can amend a notice of assumption of responsibility that has been issued to the Municipal Council. An amendment can -

- extend the expected period for which the Provincial Executive is assuming responsibility for;
- expand the extent to which the Provincial Executive is assuming responsibility for an executive obligation; and
- amend the directive in any other respect.

If the assumption of responsibility is amended in any material respect, the amendment cannot take place without following Step 1, 2 and 3 with the relevant changes as the context requires. In particular, amendment 'in any material respect' will be the case if an executive obligation is added that was not mentioned in any preceding notice.

## 2.3 PROCEDURAL REQUIREMENTS AFTER ASSUMPTION OF RESPONSIBILITY

- |          |  |
|----------|--|
| Step 1:  | The Provincial Executive must seek approval from the Minister for Provincial and Local Government.                                   |
| Step 2A: | The Provincial Executive must arrange for the tabling in the Provincial Legislature, of the notice of the intervention.              |
| Step 2B: | The Provincial Executive must arrange for the tabling in the National Council of Provinces (NCOP) of the notice of the intervention. |
| Step 3:  | The NCOP must approve the intervention within 30 days of its first sitting after the intervention began.                             |

With the issuing of the notice of assumption of responsibility (Chapter 2.2, Step 3) subsection 139(2) becomes applicable and the procedural requirements of that subsection have to be adhered to.

Any amendment to the assumption of responsibility is subject to the same requirements with the necessary changes as the context may require.

**Step 1:**

**The Provincial Executive must seek approval from the Minister for Provincial and Local Government.**

This must be done timeously, since the Minister must approve within 14 days of the issuing of the notice of assumption of responsibility. Otherwise the intervention will end automatically. The best practice may be to submit the request for approval simultaneously with the issuing of the notice of assumption of responsibility.

The aim of the Minister's review is to determine -

- whether the procedural requirements have been met;
- whether the substantive requirements have been met; and
- whether the Provincial Executive has used its discretion properly.

Considering the short time period (14 days) for review by the Minister and the fact that therefore the review will take place on the basis of written documentation only, the Minister's review will be limited to the prevention of abuse of power by the provinces and the occurrence of frivolous interventions.

What must be submitted to the Minister?

For the Minister to be able to exercise this review properly, the following documentation should accompany the letter, in which the Provincial Executive, with reference to section 139(2)(a) and 139(1)(b), requests approval for the assumption of responsibility for the relevant obligation(s);

**Information with regard to the procedural requirements**

- a copy of the notice of intention to issue a directive;
- copies of representations, made by the Council in response to that notice;
- a copy of the directive that was issued;
- a copy of the notice of intention to assume responsibility;
- copies of representations, made by the Council in response to that notice; and
- a copy of the notice of assumption of responsibility.



### Information with regard to the substantive requirements

- any relevant information, needed for the Minister to take a well-informed decision on the use by the Provincial Executive, of its discretion, for example:
- representations or reports submitted to the Provincial Executive by organised local government;
- reports on prior attempts, made by the province to support the municipality;
- any information, submitted by the Council on the request of the MEC or any relevant information, submitted in terms of specific legislation;
- reports of investigations, conducted by provincial officials;
- minutes of public hearings, held by the province; and
- copies of relevant complaints, letters and petitions that reached the Provincial Executive.

### Information with regard to the implementation of the assumption of responsibility

- copies of written instructions, given to persons, appointed by the Provincial Executive.

On the basis of that information, the Minister can:

→ disapprove the intervention – the intervention ends and the Municipal Council resumes full responsibility;

Actions taken by the Provincial Executive before the disapproval remain valid. Step 2A and 2B must still be taken.

→ approve the intervention.

There is a range of possibilities between approval and disapproval. It is not so that the Minister must either approve of the intervention in its entirety or disapprove. He or she can approve certain aspects of the implementation and disapprove others, provided that the Minister cannot add any measures or tasks, but only subtract. Therefore, the Minister can set terms to his or her approval. The Provincial Executive can then proceed with the intervention, subject to these terms.

Before deciding, the Minister can require further information from the Provincial Executive or the Municipal Council.

Step 2A:

**The Provincial Executive must arrange for the tabling in the Provincial Legislature, of the notice of the intervention.**

The notice must be tabled within 14 days after the Provincial Legislature's first sitting after the intervention began and must be accompanied by the same information as that was submitted to the Minister.

The purpose of the tabling is twofold:

- to inform the Provincial Legislature of the intervention and enable it to exercise its function of holding the Provincial Executive accountable when necessary and of overseeing the exercise of provincial executive authority (section 114(2)(b) of the Constitution). Approval by the Provincial Executive is not necessary; and
- to facilitate the Provincial Legislature's decision on a mandate for its delegates in the National Council of Provinces.

In order for the Provincial Legislature to properly arrange a parliamentary debate on the intervention as soon as possible and in order for its delegates to be able to give the NCOP an advanced warning of the intervention, it would be good practice to arrange for the tabling on the day the assumption of responsibility takes effect.

In the event of a disapproval by the Minister, the Provincial Legislature should still be notified of the terminated intervention. The initiation of the procedure alone is a serious motion of no confidence in a municipality, which is a serious matter of which the Provincial Legislature needs to be informed.

Step 2B:

**The Provincial Executive must arrange for the tabling in the National Council of Provinces (NCOP) of the notice of the intervention.**

The document must be tabled within 14 days after the NCOP's first sitting after the intervention began and must be accompanied by:

#### Information with regard to the procedural requirements

- a copy of the answer of the Minister to the request as soon as it is available;
- a copy of the notice of intention to issue a directive;
- copies of representations, made by the Council in response to that notice;
- a copy of the directive that was issued;
- a copy of the notice of intention to assume responsibility;
- copies of representations, made by the Council in response to that notice; and
- a copy of the notice of assumption of responsibility.

#### Information with regard to the substantive requirements

- any relevant information, needed for the NCOP to take a well-informed decision on the use by the Provincial Executive, of its discretion, for example:
- representations or reports submitted to the Provincial Executive by organised local government;
- reports on prior attempts, made by the province to support the municipality;
- any information, submitted by the Council on the request of the MEC or any relevant information, submitted in terms of specific legislation;
- reports of investigations, conducted by provincial officials;
- minutes of public hearings, held by the province; and
- copies of relevant complaints, letters and petitions that reached the Provincial Executive.

## Information with regard to the implementation of the assumption of responsibility

- a business plan, which will clearly be informed by the directive and which:
  - sets out how the Provincial Executive intends to restore the fulfilment of the relevant obligations and ensure fulfilment in the long term;
  - deals with the relationship between the Municipal Council and the Provincial Executive (or any person designated by the Provincial Executive), in particular with the division of powers and functions between them after assumption of responsibility; and
  - gives an indication as to what time frames the Provincial Executive has set itself for the intervention.

In the event of a disapproval by the Minister, the NCOP must still be notified of the terminated intervention. The initiation of the procedure alone indicates that there are serious problems with regard to a municipality in that particular province, which is a serious matter of which the NCOP needs to be informed. Although the NCOP cannot reverse the Minister's decision, it could nevertheless hold the Minister accountable through the normal parliamentary process.

### Step 3:

The NCOP must approve the intervention within 30 days of its first sitting after the intervention began.

In deciding whether or not to approve, the NCOP should consider the following aspects:

#### Did the Provincial Executive comply with the procedural requirements?

- Has the municipality been notified of the intention to issue a directive? (as in Chapter 2.1, Step 1)
- Were the representations, made by the Municipal Council in response to the notification, duly considered? (as in Chapter 2.1, Step 2)
- Has a section 139(1)(a) directive been issued? (as in Chapter 2.1, Step 3)
- Has the municipality been notified of the intention to assume responsibility? (as in Chapter 2.2, Step 1);
- Has the implementation of the directive been assessed by the Provincial Executive, with due consideration to the representations, made by the Municipal Council in response to the notification of the intention to assume responsibility? (as in Chapter 2.2, Step 2)
- Has responsibility for the relevant obligation been assumed? (as in Chapter 2.2, Step 3)

## Did the Provincial Executive comply with the substantive requirements?

- Was there the identification of one or more executive obligations, together with their origin in national, provincial or local legislation?
- Did the municipality fail in the exercise of that executive obligation to an extent that renders the assumption of responsibility necessary for one of the three reasons of section 139(1)(b)?
- Did the Provincial Executive exercise its discretion to intervene properly?

The NCOP can:

→ disapprove the intervention – the intervention ends and the Municipal Council resumes full responsibility;

In its decision to disapprove, the NCOP overrules the approval by the Minister.

→ approve the intervention and set new terms to it. With regard to the NCOP's power to set terms, the same as with regard to the Minister's terms applies. It is not so that the NCOP must either approve of the intervention in its entirety or disapprove. The NCOP can approve certain aspects of the implementation and disapprove others, provided that the NCOP cannot add any measures or tasks, but only subtract. The Provincial Executive can proceed with the intervention, subject to these terms;

On approval by the NCOP -

- the Minister's terms lapse and are replaced by those of the NCOP;
- the NCOP must establish a time frame for the review of the intervention; and
- the NCOP must appoint a committee that will concern itself with the procedures of the review.

Before deciding, the NCOP can require further information from the Provincial Executive or the Municipal Council or hold an on site inspection.



## **CHAPTER 3**

# **DEFINING THE POWERS AFTER ASSUMPTION OF RESPONSIBILITY**

### **3.1 THE PROVINCIAL EXECUTIVE AND THE MUNICIPAL COUNCIL**

The Provincial Executive is the organ that is responsible for managing the intervention. It has a discretion, to decide which form the intervention will take, ie a directive, whether or not followed by assumption of responsibility or any other form of intervention. It also has a discretion, with regard to the assumption of responsibility, to decide on the duration and extent of the intervention.

This discretion is circumscribed by:

- the substantial and procedural requirements of section 139;
- any terms, set by the Minister (only applicable until the NCOP approves); and
- the terms, set by the NCOP.

#### **Duration of assumption of responsibility**

In principle, the Provincial Executive decides when the intervention ends. It should establish a scheme of regular assessment whether or not the continuation of the intervention is necessary. The criteria used for this assessment must be related to those executive obligations, that were mentioned in the preceding directive and the non-fulfilment of which gave rise to the intervention. The intervention should end, when the purpose of the intervention, eg to maintain minimum standards of service delivery, no longer exists.

#### **Extent of the assumption of responsibility**

The extent of the assumption of responsibility must be linked to the purpose of the intervention. The Provincial Executive assumes responsibility only for those executive obligations, that were mentioned in the directive.

After assumption of responsibility, the Provincial Executive can only perform executive acts. It cannot perform legislative acts, such as the passing of by-laws, the approval of budgets or the imposition of rates, taxes or other levies. If the Provincial Executive needs the Municipal Council to perform a certain legislative act, eg. the approval of a budget, it must request the Municipal Council to do so.

The Municipal Council retains its power and duty to legislate. Councillors should be enabled to exercise this power: they have access to municipal buildings, are allowed to meet there and use venues and amenities.

The Provincial Executive assumes responsibility only for those executive obligations -

- that were mentioned in the directive and with regard to which the directive was not implemented properly; and
- those executive obligations, the performance of which is incidental to the fulfilment of the ones identified.

Therefore, unless the obligation is incidental to an identified executive obligation, the assumption of responsibility by the Provincial Executive cannot include:

- any executive obligation, not mentioned in the directive,
- any executive obligation, mentioned in the directive but not identified in the notice of assumption of responsibility in relation to the failure to implement the directive.

All other executive obligations remain the responsibility of the Municipal Council.

#### **Implementation of the assumption of responsibility**

In implementing the assumption of responsibility for the executive obligation, the Provincial Executive or the relevant MEC can designate any person and charge that person with certain duties, related to the Provincial Executive's responsibility to ensure that the executive obligation is fulfilled and that it will be fulfilled in the future. That person, who can be called, for instance, an 'administrator', can either be an official of one of the province's departments or someone, contracted from outside the department. In both cases, these persons are fully accountable and subordinate to the Provincial Executive and act in a provincial capacity. The Provincial Executive is responsible for their salaries and is liable for any actions performed by them. The provisions with regard to agency and delegation of section 238 of the Constitution apply.

## **3.2 STATUS OF THE DIRECTIVE**

What is the status of the directive after the Provincial Executive has assumed responsibility? Is the Provincial Executive bound by it in the sense that it can only execute those tasks that it had set out for the Council to do?

The text of the Constitution indicates otherwise. The Provincial Executive 'assumes responsibility *for the relevant obligation*'. That means that the Provincial Executive (or any person acting on behalf of the Provincial Executive) is mandated by the Constitution to charge itself with fulfilling that executive obligation, not with implementing the steps of the directive.

The question arises whether or not the Council is obliged to continue attempting to implement the steps, after the assumption of responsibility. The answer is that it is not. On the assumption of responsibility, the steps, detailed in the directive, lose their authority and the Provincial Executive becomes the source of authority for that executive obligation. That does not mean that the Provincial Executive cannot instruct the Council to perform certain steps that were also in the directive.

However, in the context of the powers of the Provincial Executive and the Council, the directive does retain its importance with regard to the identification of those executive obligations for which the Provincial Executive has assumed responsibility. The Provincial Executive only has powers related to the fulfilment of executive obligations that were identified in the directive.

## **3.3 THE NATIONAL COUNCIL OF PROVINCES**

### **Supervision**

In its decision to approve, the NCOP should set a date on which it will review the intervention. This will give proper effect to its reviewing power and enable both the Municipal Council and the Provincial Executive to prepare and put forward

representations with regard to the continuation of the intervention. The NCOP can appoint any person to examine and report on any matter relating to the intervention. The NCOP can end the intervention at such a review if:

- any of the substantial or procedural requirements of section 139 is not met; or
- the Provincial Executive does not comply with the terms for approval.

Either before or after its decision to approve, the NCOP must afford the municipality the opportunity to answer the allegations against it, and to state its case before a committee of the Council.

#### Recommendations

Further, the NCOP can make non-binding recommendations to the Provincial Executive regarding the implementation of the intervention.

The NCOP's power to set the terms of intervention (see Chapter 2.3, Step 3) is concerned with determining the outer boundaries of an intervention. In this sense, the NCOP acts as a constraint on the Provincial Executive; it tells the Provincial Executive what it may not do. However, the NCOP cannot tell the Provincial Executive what it should do. The nature of a review function is not to impose positive obligations, but to scrutinise the measures that are taken. In other words, the NCOP's task is not to manage the intervention or to prescribe to the Provincial Executive how best the intervention should be executed. However, by being closely involved in the process, the NCOP may usefully assist the Provincial Executive by making non-binding "recommendations" regarding matters of policy, training initiatives and other positive measures.

## 3.4 DISSOLUTION AFTER INTERVENTION

Section 34(3) of the Municipal Structures Act, No. 117 of 1998 provides for the dissolution of the Council by the MEC for Local Government in the province after –

*"... an intervention in terms of section 139 of the Constitution has not resulted in the council being able to fulfil its obligations in terms of legislation."*

The MEC can only dissolve the Council with the concurrence of the Minister and after the NCOP has approved the dissolution.

The principle of respect for the institutional integrity of local government and the principle of least interference lead to the conclusion that section 34(3) is only open after an unsuccessful assumption of responsibility. This section cannot be used after an unsuccessful directive, without first assuming responsibility.

→ This section of the Municipal Structures Act will apply to a municipality, only after it has been established in terms of section 12 of the Act, which will take place on the day of the local government elections of 2000. It can therefore not be used with regard to a municipality before it has been established.

## **EXAMPLE A:**

# **NOTIFICATION OF THE INTENDED ISSUING**

# **OF A DIRECTIVE**

To: Municipal Council  
Poortown

From: Member of the Executive Council for Local Government  
Provincial Executive  
Southern Province

Date: 1 October 1999

Notice of intention to issue a directive in terms of section 139(1)(a) of the Constitution

1. It has come to the attention of the Provincial Executive that the Council cannot or does not fulfil the following executive obligations:
  - (a) The Council is not complying with section 11 of the Water Services Act, No 108 of 1997, by not ensuring efficient and sustainable access to water services in the Council's area of jurisdiction in that the water supply to those residents in Poortown entitled to such service, has been stopped since 15 September 1999.
  - (b) The Council, as a licence holder to supply electricity, is not complying with section 10(1) of the Electricity Act, No 41 of 1987 by not supplying electricity within the area of supply mentioned in its licence to residents who are in a position to make arrangement for payments.
  - (c) The Council is not complying with section 20(1)(b) of the Health Act, No 73 of 1997 by not maintaining a hygienic and clean condition within the Council's area of jurisdiction, in that refuse collection has been discontinued or is being rendered on an irregular basis since July 1999.
  - (d) The Council is not complying with section 20(1)(a) of the Health Act, No 73 of 1997 by not maintaining a hygienic and clean condition within the Council's area of jurisdiction, in that sewage is not being removed and the waterborne sewage system has broken down.
  - (e) The Council is not complying with section 10G(2)(a)(ii) of the Local Government Transition Act, No 209 of 1993, by not keeping such accounting records as necessary to reflect transactions and the financial state of affairs in the municipality.
2. In order to ensure the fulfilment of the above mentioned executive obligations, the Provincial Executive is considering issuing a directive containing the following steps the Council must do:
  - (a) Restore the supply of water to residents in your area of jurisdiction who are entitled to such water supply, within two working days as from the receipt of the directive.

- (b) Present within in three weeks as from the receipt of the directive, a detailed plan of action to the MEC responsible for local government, for maintaining the supply of water in which -
- (i) the core problems, preventing the supply of water are being identified;
  - (ii) measures are proposed, which address these problems; and
  - (iii) attention is given, in particular, to a sound financial and economic scheme for future water supply.
- (c) Supply within two working days as from the receipt of the directive, electricity to all residents entitled to such service.
- (d) Restore within three working days as from the receipt of the directive the collection of refuse and waste to an acceptable level.
- (e) Restore within two working days as from the receipt of the directive the sewage system and drainage services to an acceptable level.
- (f) Present, within two weeks as from receipt of the directive, a business plan in which -
- (i) the core problems for the lack of proper financial management are being identified;
  - (ii) details of the current financial state of affairs, including details of cost recovery and debt repayment, in the municipality are included;
  - (iii) measures are proposed, which address the problems in the financial management of the municipality.
3. The Council is invited to make written representations regarding its failure to fulfil the above mentioned executive obligations and the steps it may be directed to take. In view of the urgency of the matter, representations must receive this office no later than by noon on 3 October 1999.

Yours faithfully,

Signed:

Member of Executive Council for Local Government and Housing,  
on behalf of the Provincial Executive Council,  
Southern Province

## **EXAMPLE B:**

### **SECTION 139(1)(A) DIRECTIVE**

To: Municipal Council  
Poortown  
From: Member of the Executive Council for Local Government  
Provincial Executive  
Southern Province  
Date: 4 October 1999

A directive issued by the Provincial Executive of the Southern Province to the Municipal Council of Poortown in terms of section 139(1)(a) of the Constitution

1. The Provincial Executive Council has received the Council's written representations dated 3 October 1999.
2. The Provincial Executive Council has considered the written representations regarding the extent of the failure to fulfil the listed executive obligations and has noted that electricity supply has been restored to residents of Poortown on 2 October 1999.
3. The Provincial Executive Council still has reason to hold that the Council has failed to fulfil the following executive obligations -
  - (a) The Council is not complying with section 11 of the Water Services Act, No 108 of 1997, by not ensuring efficient and sustainable access to water services in the Council's area of jurisdiction in that the water supply to those residents in Poortown entitled to such service, has been stopped since 15 September 1999.
  - (b) The Council is not complying with section 20(1)(b) of the Health Act, No 63 of 1997 by not maintaining a hygienic and clean condition within the Council's area of jurisdiction, in that refuse collection has been discontinued or is being rendered on an irregular basis since July 1999.
  - (c) The Council is not complying with section 20(1)(a) of the Health Act, no 63 of 1997 by not maintaining a hygienic and clean condition within the Council's area of jurisdiction, in that sewage has not being removed for the past two weeks and the waterborne sewage system has broken down or has been working intermittently for the past two months.
  - (d) The Council is not complying with section 10G(2)(a)(ii) of the Local Government Transition Act, No 209 of 1993, by not keeping such accounting records as necessary to reflect transactions and the financial state of affairs in the municipality, in that no annual financial statement has been produced for 1998.
4. The Provincial Executive Council is not convinced that the reasons that the Council advanced for the non-fulfilment of the identified executive obligations are legitimate. The plan of action proposed by the Council to restore essential services is too vague to attach much weight to it. The Council notes, however, the extensive damage caused by the recent floods to the water supply pipes and that the restoring of system will take at least five weeks. However, the Council notes that the municipality is

nevertheless obliged to provide alternative basic water services in terms of the 1999 Water Services Regulations.

5. The Provincial Executive Council therefore issues a directive in terms of s 139(1)(a) of the Constitution, whereby the Council is directed to take the following steps:
  - (a) Restore the supply of water to residents in your area of jurisdiction who are entitled to such water supply, within two working days as from the receipt of the directive.
  - (b) Present within three weeks as from the receipt of the directive, a detailed plan of action to the MEC responsible for local government, for maintaining the supply of water in which -
    - (i) the core problems, preventing the supply of water are being identified;
    - (ii) measures are proposed, which address these problems; and
    - (iii) attention is given, in particular, to a sound financial and economic scheme for future water supply.
  - (c) Restore within three working days as from the receipt of the directive the collection of refuse and waste to an acceptable level.
  - (d) Restore within two working days as from the receipt of the directive the sewage system and drainage services to an acceptable level.
  - (e) Present, within two weeks as from receipt of the directive, a business plan in which -
    - (i) the core problems for the lack of proper financial management are being identified;
    - (ii) details of the current financial state of affairs, including details of cost recovery and debt repayment, in the municipality are included;
    - (iii) measures are proposed, which address the problems in the financial management of the municipality.
5. The Municipal Council is further directed to inform the MEC whether the steps listed in paragraph 4 have been taken by the dates set out in that paragraph.
6. Take further notice that, should there be no substantial compliance with this directive, the Provincial Executive may intervene by assuming responsibility for the executive obligations mentioned in the directive and for those executive obligations, the performance of which is incidental to the fulfilment of the ones identified, should it be necessary to maintain essential national standards or to meet minimum standards for the rendering of services.

Yours faithfully,

Signed:

Member of Executive Council for Local Government and Housing,  
on behalf of the Provincial Executive Council,  
Southern Province

**EXAMPLE C:**  
**NOTIFICATION OF THE INTENDED**  
**ASSUMPTION OF RESPONSIBILITIES**

To: Municipal Council  
Poortown  
From: Member of the Executive Council for Local Government  
Provincial Executive  
Southern Province  
Date: 8 October 1999

Notice of intention of the Provincial Executive of the Southern Province to assume responsibility for some executive obligations of the Municipal Council of Poortown in terms of section 139(1)(b) of the Constitution

- A. The Provincial Executive Council issued a directive to the Council on 4 October 1999 directing the Council to take specific steps in order to comply with the executive obligations identified in the directive.
- B. The Provincial Executive has noted that refuse collection services have been restored. However, the Provincial Executive still has reason to believe that the Council failed in material respects to comply with the directive by not taking the following steps -
- (a) water supply to residents in your area of jurisdiction who are entitled to such water supply, has not yet been restored, in any event not within two working days as from the receipt of the directive.
- (b) The sewage system has not yet been restored, in any event not within two working days as from the receipt of the directive.
- C. The Provincial Executive is therefore of the opinion that it is necessary for the maintenance of essential national standards and the meeting of established minimum standards for the rendering of services that adequate water supply and a proper sewage system be maintained for the health and well-being of the residents of Poortown. The Provincial Executive therefore intends to assume responsibility for the rendering of those services.
- D. The Council is invited to make written representations why the Provincial Executive should not assume responsibility for the above mentioned executive obligations. In view of the urgency of the matter, representations must be received by this office no later than by noon on 9 October 1999.

Yours faithfully,

Signed:

Member of Executive Council for Local Government and Housing,  
on behalf of the Provincial Executive Council,  
Southern Province

**EXAMPLE D:**  
**SECTION 139(1)(B) ASSUMPTION**  
**OF RESPONSIBILITIES**

To: Municipal Council  
Poortown  
From: Member of the Executive Council for Local Government  
Provincial Executive  
Southern Province  
Date: 10 October 1999

Notice that the Provincial Executive of the Southern Province is assuming responsibility for some executive obligations of the Municipal Council of Poortown in terms of section 139(1)(b) of the Constitution

1. The Provincial Executive Council has received the Council's written representations dated 9 October 1999.
2. The Provincial Executive Council has noted that the Council concedes that it is unable to give effect to the steps indicated in the directive dated 4 October 1999.
3. The Provincial Executive has reason to believe that the Council failed in material respects to comply with the directive by not taking the following steps -
  - (a) Water supply to residents in your area of jurisdiction who are entitled to such water supply, has not yet been restored, in any event not within two working days as from the receipt of the directive.
  - (b) The sewage system has not yet been restored, in any event not within two working days as from the receipt of the directive.
4. The Provincial Executive is thus of the opinion that it is necessary for the maintenance of essential national standards and the meeting of established minimum standards for the rendering of services that adequate water supply and a proper sewage system be maintained for the health and well-being of the residents of Poortown.
5. The Provincial Executive is therefore intervening in terms of section 139(1)(b) of the Constitution by assuming responsibility for the executive obligations listed in paragraph 3 above as of noon 11 October 1999.
6. The Provincial Executive assumes responsibility for the executive obligations listed in paragraph 3 and for those executive obligations, the performance of which is incidental to the fulfilment of those mentioned in paragraph 3 until such time as the Municipal Council can resume responsibility for those obligations in a sustainable manner.

7. With regard to financial management, the Provincial Executive will be assuming responsibility for the relevant executive obligations if the steps in paragraph 5 (e) of the directive, issued to your Council on 4 October 1999, have not been substantially complied with by 18 October 1999.
8. In due course, the Provincial Executive will designate a person to act on its behalf with regard to the further implementation of the assumption of responsibility, and the Municipal Council will be informed thereof.
9. The Municipal Council must give its full cooperation to that person in the execution of his or her tasks to ensure that the Municipal Council can resume responsibility for those obligations in a sustainable manner.
9. The Municipal Council should take note that this intervention will be reviewed by the Minister for Provincial and Local Government within 14 days and the National Council of Provinces within 30 days of its first sitting after the intervention began.

Yours faithfully,

Signed:

Member of Executive Council for Local Government and Housing  
on behalf of the Provincial Executive Council  
Southern Province





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# PROVINCIAL SUPERVISION

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of Section 139 of the  
Constitution