Judicial Enforcement of Mandatory Provincial Interventions in Municipalities in South Africa*

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Abstract: This article evaluates the judicial enforcement of provincial interventions in municipalities as a viable response to the collapse of local government in South Africa. We argue that when relations between municipalities and their communities have deteriorated to a level of deep mistrust and collapse, and when there is dismal service delivery, there is a case for the courts to order unresponsive provincial authorities to intervene in municipalities as provided for in law. Such interventions are necessary in the name of intergovernmental support and co-responsibility. They protect the rights of communities. However, reality shows that judicially ordered interventions are simplistic solutions that do not do justice to the legal and political complexities around such interventions. Party politics and the need for sustained good local governance often clash when the judiciary orders provincial executives to intervene in failing municipalities. Consideration of the aftermath of judicially ordered interventions in selected cases in this article confirms that whereas litigation may enforce the law around provincial interventions and municipal duties, it is a short-term fix that does not bring sustainable solutions to the collapse of local government. Instead, it often exacerbates the situation.

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A. Introduction

Many municipalities in South Africa are in a state of paralysis.[1] They are unable to afford and sustainably deliver basics such as water, electricity and waste removal.[2] In 2020, the Auditor-General painted a bleak picture of municipal service delivery and questioned

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1 *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29, para. 195.

2 *Auditor-General of South Africa*, Consolidated General Report on the Local Government Audit Outcomes MFMA 2018-19, https://www.agsa.co.za/Portals/0/Reports/MFMA/201819/GR/MFMA%20GR%202018-19%20Final%20View.pdf (last accessed on 30 June 2020), p. 9.

the financial viability and overall functionality of municipalities.[3] The Auditor-General's report of 2021 conveys the same concern.[4] In an analysis of the financial position of municipalities in the third quarter of 2020, the National Treasury indicated that 80,5% of municipalities faced serious financial problems and that 49% were in financial crisis.[5] Without derogating from the reality that some municipalities are performing well, the extent of the financial and service delivery problems facing most municipalities manifests a collapse of local governance in South Africa.[6]

The poor performance of municipalities, their service delivery failures, and the financial crises they face often serve before the courts, which continue to set precedents regarding the obligations of municipalities.[7] The judicial decisions spell out the rights of local communities who are deprived of services by poor governance in municipalities.[8] They also clarify important questions of constitutional law on the obligation of provincial authorities to intervene in failing municipalities and how they should provide support to get these municipalities back on track. In recent times, provincial interventions in municipalities, sometimes in the form of the dissolution of Municipal Councils, have emerged as some of the illustrations of the crisis facing local government. These interventions not only limit democracy but also affect the lives of residents, particularly when they fail to resolve issues plaguing the municipalities.[9]

This article relies on legal doctrinal research. The literature used revolves around primary and secondary South African local government law sources, which included national legislation such as the *Local Government: Municipal Financial Management Act* 56 of 2003 and the *Local Government: Municipal Systems Act* 32 of 2000. In addition, a thorough and critical review of key judicial decisions on provincial interventions were undertaken. These are all referred to in the discussion.

We examine judicial enforcement of mandatory provincial interventions in municipalities. We lay the context by first considering the issues that lead to the collapse of municipalities to the level of requiring provincial interventions and the effects of such

3 Ibid., p. 8.

4 Ibid., p. 7.

5 *National Treasury*, Municipalities Meeting Criteria for Determining Serious Financial Problems in terms of Section 138 & 140 of the MFMA, http://mfma.treasury.gov.za/Media_Releases/s71/1819/3rd_1819/Pages/pdf.aspx (last accessed on 16 February 2021).

6 See, for instance, *Ciaran Ryan*, Municipal Sector Faces Collapse - Ratings Afrika, https://www.moneyweb.co.za/news/south-africa/municipal-sector-faces-collapse-ratings-afrika/ (last accessed on 16 February 2021).

7 See, for instance, *Premier, Gauteng v Democratic Alliance; All Tshwane Councillors Who are Members of the Economic Freedom Fighters v Democratic Alliance; African National Congress v Democratic Alliance* [2021] ZACC 34 and *Unemployed Peoples Movement v Eastern Cape Premier* 2020 3 SA 562 (ECG).

8 See, for instance, *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipalities* [2020] ZANWHC 9.

9 *Premier, Gauteng v Democratic Alliance*, note 7, para. 49.

factors on citizens. We proceed to analyse the constitutional framework for mandatory provincial interventions in the semi-federal government design of South Africa and discuss why provincial governments often fail to resolve issues affecting municipalities. Given that court-ordered provincial interventions impinge on the demarcation of state authority between the three branches of government, we discuss the desirability, sustainability, and potential risks of judicial orders compelling provincial governments to intervene in failing municipalities. We argue that when municipalities collapse, there is a case for the courts to order unresponsive provincial authorities to intervene in such municipalities. We caution that such interventions should be done in the name of judicial oversight for the enforcement of legislation, intergovernmental support, co-responsibility, and for the protection of communities, not for expedient political ends. Our analysis builds on earlier research in this field by scholars such as De Visser and November,[10] Ledger and Rampedi,[11] Makoti and Odeku,[12] Murray and Hoffman-Wanderer[13] and Van der Waldt.[14] Recently, Chamberlain and Masiangoako questioned whether the South African system of provincial intervention is working and explored the key challenges.[15]

B. Why do municipalities collapse?

Problems affecting municipalities are complicated. They involve an intricate web of stakeholders, public and private relationships, and a historically forged social transformation project that relies heavily on municipalities. The problems can also be traced to obstructed financial pathways, social, economic and environmental pressures that accompany urbanisation, the strain caused by poverty, and natural disasters such as droughts, fires and floods. The impacts of climate change and global health risks such as COVID-19 exacerbate

10 *Jaap De Visser* / *Jerome November*, Overseeing the Overseers: Assessing Compliance with Municipal Intervention Rules in South Africa, Hague Journal on the Rule of Law 9 (2017), p. 109.

11 *Tracy Ledger* / *Mahlatse Rampedi*, Mind the Gap: Section 139 Interventions in Theory and Practise, https://pari.org.za/mind-the-gap-section-139-interventions-in-theory-and-practice/ (last accessed on 22 August 2020).

12 *M.Z. Makoti* / *O.K. Odeku*, Intervention into Municipal Affairs in South Africa and its Impact on Municipal Basic Services, African Journal of Public Affairs 10 (2018), p. 68.

13 *Christina Murray* / *Yonina Hoffman-Wanderer*, The National Council of Provinces and Provincial Intervention in Loal Gvernment, Stellenbosch Law Review 18 (2007), p. 7.

14 *Gerrit Van der Waldt*, Government Interventionism and Sustainable Development: The Case of South Africa, African Journal of Public Affairs 8 (2015), p. 35; and *Gerrit Van der Waldt* / *Wynand Greffrath*, Towards a Typology of Government Interventionism in Municipalities, African Journal of Public Affairs, 9 (2016), p. 152. The author considers issues such as the challenges with the implementation of s. 139 of the Constitution of the Republic of South Africa, 1996, the level of compliance with municipal intervention rules, the impact of intervention on the delivery of basic municipal services, intervention statistics, the need for the promulgation of national legislation to assist provinces in implementing the constitutional provisions on interventions etc.

15 *Lisa Chamberlain* / *Thato Masiangoako*, Third Time Lucky? Provincial Intervention in the Makana Local Municipality, South African Law Journal 138 (2021), p. 423.

these challenges. The heavily regulated institutional environment in which municipalities function further hampers their ability to provide essential services to communities.[16] The complexity of the foregoing factors accentuates the importance of critically exploring options and opportunities to help avert the further deterioration of municipalities and to restore the relationships between municipalities and their communities.

The foregoing causes for the collapse of municipalities can be illustrated with several examples, one of which is the Makana Local Municipality. The Makana Municipality governs the town of Makhanda, formerly Grahamstown, and surrounding areas in the Eastern Cape Province.[17] The height of the collapse of governance in Makana must be juxtaposed against its success in 2005 when it received the National Vuna Award for service delivery excellence.[18] At the time, it had reserves of about R50 million and operated with 350 employees.[19] By the end of 2014, Makana was bankrupt and had incurred a debt of R150 million. The number of its employees had ballooned to 1 500.[20] After 2014, the position of Makana deteriorated to the extent that the Municipality became a suitable case study, if not a classic illustration, of the collapse of good local governance.

In 2019, Makana faced a multitude of financial problems which negatively affected its ability to provide basic services.[21] The failure of the Municipality to deliver services, particularly water and sanitation, was serious.[22] These problems were compounded by one of the worst droughts to affect the Eastern Cape Province. Water shortages worsened due to leaks which the Municipality failed to repair, further exacerbating the situation.[23] Makana also failed to address sewerage spillages and resorted to sporadic refuse collection. The road infrastructure crumbled, and electricity supply became erratic.[24] Absent the sustained delivery of basic services like sewage disposal, refuse removal, water and electricity, the immediate environment of the community suffered.[25]

16 The complex web of factors and fault-lines contributing to the "crisis in local government" is systematically explained by *Marius Pieterse*, Anatomy of a Crisis: Structural Factors Contributing to the Collapse of Urban Municipal Governance in Emfuleni, South Africa, Urban Forum 32 (2021), p. 1.

17 For more on the Municipality, see *Socio-Economic Rights Institute*, Case Study 3: Makana Local Municipality - Provincial Intervention in a Municipal Crisis, https://www.seri-sa.org/images/SERI_Makana_case_study_FINAL_WEB.pdf (last accessed on 16 June 2021), pp. 9-10.

18 *Unemployed Peoples Movement v Eastern Cape Premier* 2020 3 SA 562 (ECG) (hereafter refered to as *Makana*) para. 9, explained in footnote 11 of the judgment.

19 Ibid, para. 23.

20 Ibid., para. 23.

21 Ibid., para. 28.

22 Ibid., paras. 42, 28 and 31.

23 Ibid., paras. 42.

24 Ibid., paras. 42, 44 and 46.

25 Ibid., paras. 28.

One of the underlying causes of the deterioration of governance in Makana was the failure of the Municipality's administration to uphold ethical and legal obligations. The Municipality was mired in numerous allegations of corruption, nepotism and financial mismanagement.[26] The Auditor-General reported that fruitless and wasteful expenditure in Makana amounted to ZAR 9,9 million, while unauthorised expenditure racked up to ZAR 253,7 million in the 2016 financial year.[27] Financial mismanagement manifested in an unfunded (and therefore unlawful) budget of ZAR 32 million for the 2017/18 financial year. The Municipality had poor revenue collection and was owed irrecoverable debts amounting to ZAR 145 million.[28] Violations of the municipal financial management law contributed to Makana's failure to meet its obligations.[29] The Municipality became unable, and at times unwilling, to utilise resources in the best interests of the community.[30] When Eskom (the national power utility) began threatening to cut off power, the Municipality diverted its budget and ringfenced some funds for Eskom, leaving gaps in the provision of other services.[31] The Municipality breached every object of developmental local government as stipulated in section 152 of the Constitution.[32] Its paralysis infringed on several constitutional rights, including the rights to human dignity, housing and an environment that is not detrimental to well-being. These rights were affected due to erratic refuse collection, unavailability of water and constrained electricity supply. The Makana situation prompted the need for a mandatory provincial intervention into its affairs.

C. Mandatory provincial interventions

Globally, sub-national authorities often suffer from insufficient capacity to adequately exercise their authority and execute their functions.[33] At least two factors illustrate the constraints faced by South African municipalities in this regard. The first is that whereas municipalities have law-making powers, they do not often actively exercise such powers but implicitly rely on the national government for the exercise of law-making authority.[34] The second is the failure of many municipalities to fulfil their constitutional and statutory obligations to provide basic municipal services, with the result that provincial governments

26 Ibid., paras. 28 and 42.

27 Ibid., para. 45.

28 Ibid., para. 45.

29 Ibid., para. 52.

30 Ibid., para. 52.

31 Ibid., para. 69.

32 Ibid., para. 52.

33 See *Warren Freedman*, Constitutional Law: Structures of Government, in: W.A. Faris et al. (eds.), The Law of South Africa (3rd ed.), Durban 2019, vol. 7(2) § 311.

34 See *Jaap De Visser*, Concurrent Powers in South Africa, in: Nico Steytler (ed.), Concurrent Powers in Federal Systems: Meaning, Making, Managing, Leiden 2017, p. 237.

have to intervene.[35] As such, provincial interventions in municipalities should be understood in terms of the duty to support local government. This duty is explicitly captured in the Constitution.[36] It is one of the backbones of the post-apartheid system of cooperative governance that has its grounding in chapter 3 of the Constitution.[37]

However, it must be noted that "the right to intervene is not absolute".[38] Provincial interventions were never designed to infringe on the constitutional autonomy of municipalities or to become the go-to form of local government support. As such, interventions should, in principle, not interfere with a municipality's autonomy to regulate the affairs of its community in the context of local circumstances, subject to the Constitution and applicable legislation.[39] Notwithstanding that the Constitution grants municipalities protection from unnecessary provincial and national interference, there is a tacit acknowledgement that at times the problems which plague municipalities may be beyond their competence and capacity.[40] This renders it necessary for provincial and national authorities to intervene.[41]

The supervisory powers of provincial governments are divided into four categories: monitoring, support, regulation and intervention.[42] This contribution focuses on the fourth category – intervention – which is divided into two sub-categories, namely discretionary interventions and mandatory interventions. Section 139(1) of the Constitution and section 137 of the *Municipal Finance Management Act* 56 of 2003 (MFMA) regulate discretionary provincial interventions in local government.[43] They prescribe the circumstances in which

35 According to *SALGA*, A SALGA Reflection on Section 139 Interventions, Pretoria 2020, 46 municipalities were subjected to intervention in the 2019/2020 financial year. In July 2020, 36 municipalities were subjeted to intervention, two municipal councils of which were indefinitely dissolved. In the same report SALGA reported that 16 interventions had been invoked more than once. See *Department of Cooperative Governance*, Summary of Municipalities Placed Under Intervention for 2019/20 Financial Year, Pretoria 2020, for a summary of the municipalities placed under intervention for the 2019/20 financial year, and *Themba Fosi*, Status of Interventions in Terms of Section 139 of the Constitution: A CoGTA Presentation to the Portfolio Committee Meeting of 28 July 2020, https://pmg.org.za/committee-meeting/30804/ (last accessed on 16 June 2021), p. 6.

36 Section 154 of the Constitution.

37 For a discusion of Chapter 3 of the Constitution in the context of interventions in municipalities, see *Premier, Gauteng v Democratic Alliance*, note 7, paras. 161 and 179.

38 Ibid., para. 60.

39 See s. 151(3) of the Constitution on the autonomy of municipalities.

40 The inclusion of s. 139 in the Constitution suggests this.

41 See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC), para. 373.

42 *Freedman*, note 33, § 311; *Nico Steytler* / *Jaap De Visser*, Local Government, in: Stu Woolman / Michael Bishop (eds.), Constitutional Law of South Africa (2nd ed.), Cape Town 2014, pp. 115-118.

43 For an explanatory diagram of provincial intervention in terms of s. 139 of the Constitution and the associated provisions in the MFMA, see *SERI*, note 17, pp. 9-40.

such interventions could occur and the procedure for such interventions. The provisions stipulate that when a municipality fails or is incapable of fulfilling its constitutional or legislative obligations, the provincial executive under which the Municipality is located may take any appropriate action to ensure that such constitutional or legislative obligations are fulfilled.[44] A provincial executive may intervene in municipal affairs and assume responsibility for a municipal obligation which the Municipality is unable to fulfil. This is a preemptive step to prevent more radical forms of provincial intervention, such as the dissolution of the Municipal Council.[45] Mandatory interventions, which form the subject of this article, are divided into two types: budget and revenue, and financial crisis interventions. They are regulated by section 139(4)-(5) of the Constitution.

I. Budget and revenue mandatory interventions

A provincial executive must intervene under section 139(4) of the Constitution when a municipality is unable or fails to approve a budget or other measure for raising revenue that is necessary for the implementation of that budget. In such circumstances, the intervention of the provincial executive through appropriate action is meant to ensure the approval of the budget or the measure for raising revenue. The wording of section 139(4) suggests that the provincial executive may intervene when a municipality is unable to constitute a quorum to pass a budget. The latter is not a strange phenomenon in South Africa. It tends to arise because of political instability, which results from political infighting and the collapse of political coalitions.[46]

44 Section 39(1) lists the options and is reproduced below:

"139. (1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including –

issuing a directive to the Municipal Council, discribing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

assuming responsibility for the relevant obligation in that manucipality to the extent necessary to –

maintain essential national standards or meet established minimum standards for the rendering of a service;

prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

maintain economic unit; or

dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step."

45 Section 139(1)(b) of the Constitution.

46 *Fosi*, note 35, p. 5. One of the recent cases in which the collapse of coalitions hamstrung a municipality is *Democratic Alliance v Premier for the Province of Gauteng* [2020] ZAGPPHC 330. For an account of the implications of political coalitions on service delivery and how their fragility affects municipalities, see *Michael Beaumont*, The Accidental Mayor: Herman Mashaba and the Battle of Johannesburg, Cape Town 2020, ch. 9.

Section 139(4) contains a discretionary element in that although the provincial executive must intervene, it has discretion as to *how* to intervene. One of the discretionary tools available during a mandatory intervention is the dissolution of the Municipal Council to pave the way for the provincial executive to appoint an administrator to run the affairs of the Municipality until a newly elected Municipal Council is declared.[47] When the provincial executive dissolves the Municipal Council, it must also approve a temporary budget or other measures for raising revenue so that the Municipality can continue to function and provide basic services.[48]

II. Financial crisis mandatory interventions

Financial crisis mandatory interventions differ from budget and revenue interventions in that the provincial executive *must* intervene when a municipality is in a financial crisis (as opposed to failing to approve a budget or a revenue-raising measure):

> *If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments.*[49]

When a municipality has a serious financial crisis, persistently fails to fulfil its obligations to render basic services, and fails to satisfy its financial obligations as they become due, the provincial executive does not have any discretion. It must intervene by imposing a financial recovery plan.[50] Sections 138 and 140 of the MFMA provide guidance on how to determine whether a municipality has financial problems and is in a serious or persistent material breach of its financial commitments.[51] The recovery plan must enable the municipality to rebound from its crisis. It must be prepared in accordance with the MFMA.[52] The municipality is bound by the adopted recovery plan when it exercises its legislative and executive authority, but only to the extent that the recovery plan is necessary for the resolution of the financial crisis facing the municipality.[53]

47 Section 139(4)(a) of the Constitution.

48 Ibid., s. 139(4)(b).

49 Ibid., s. 139(4).

50 Ibid., s. 139(5).

51 This article will not venture into the details on how to determine the presence of a financial crisis. For a detailed discussion on this topic see *Matthew D. Glasser* / *Johandri Wright*, South African Municipalities in Financial Distress: What Can Be Done?, Law, Democracy & Development 24 (2020), pp. 413, 421.

52 Sections 142-145 of the Local Government: Municipal Finance Management Act 56 of 2003.

53 Section 139(5)(a)(ii) of the Constitution.

Where the municipality does not take the required legislative measures in accordance with that financial recovery plan, the Municipal Council must be dissolved.[54] When the provincial executive dissolves the Municipal Council in terms of section 139(5)(b), it must take two steps. First, it must appoint an administrator to run the affairs of the municipality until a new Municipal Council is elected. Second, it must approve a temporary budget or measures for raising revenue which the Municipal Council has failed to pass so that the recovery plan can be implemented. When the provincial executive does not dissolve a Municipal Council in terms of section 139(5)(b) when the Municipal Council is unable or fails to implement the recovery plan, the provincial executive must assume responsibility for the implementation of the recovery plan.[55]

III. Procedure for mandatory interventions

The above suggests that mandatory interventions give provincial authorities powers to intrude into municipal authority and to exercise the powers of local government – something which they ordinarily cannot do.[56] Such intrusion is subject to substantive constitutional and adjectival requirements and controls stipulated in section 139(6)-(7) of the Constitution.[57] Whereas the circumstances under which the provincial executive may intervene in a municipality differ under sections 139(4) and 139(5), the procedures for such interventions are similar. The Constitution requires the provincial executive to issue and submit a written notice of intervention to the Minister of Cooperative Governance and Traditional Affairs.[58] Within seven days of the intervention, the provincial executive must submit the intervention notice to the provincial legislature and the National Council of Provinces (NCOP).[59] The notice to the provincial legislature is required because the executive must inform the legislature of its actions. The NCOP must be notified because Parliament is responsible for the protection of the interests of provinces.[60]

The Constitution further envisages a situation in which the provincial executive refuses or is unable to adequately exercise its powers to intervene in terms of section 139(4)-(5). It stipulates that in such circumstances, the national executive must intervene in a municipal-

54 Ibid., s. 139(5).

55 Ibid., s. 139(5)(c).

56 *In re Certification of the* Constitution, note 41, para. 373.

57 A failure to meet these requirements renders a provincial intervention invalid – see *Mnquma Local Municipality v Premier of the Eastern Cape* [2009] ZAECBHC 14. See also *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C); *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] 4 All SA 67 (GP) (affirmed in *Democratic Alliance v Premier for the Province of Gauteng* [2020] 2 All SA 793 (GP)). For a discussion on the procedural requirements before and after interventions, see *De Visser* / *November*, note 10, pp. 119-130.

58 The Minister of Cooperative Governance and Traditional Affairs is the Cabinet member responsible for local government affairs, as envisaged in s. 139(6) of the Constitution.

59 Section 139(6)(b) of the Constitution.

60 Ibid., s. 42(4).

ity when the jurisdictional requirements are met.[61] However, the question arises whether, when the provincial executive fails (or refuses) to intervene when the jurisdictional requirements are met, a court of law should order such intervention? The following section considers this question.

D. Judicial involvement in the enforcement of mandatory provincial interventions

South Africa is fast becoming a so-called lawfare state in which everything and anything can be litigated and decided by the courts.[62] Judges increasingly find themselves in situations in which they have to decide contentious matters,[63] including politically clouded matters such as provincial interventions in failing municipalities.[64] Whereas provincial interventions are provided in the Constitution, and whereas they are constitutional matters and raise arguable points of law that engage the jurisdiction of the courts, including the Constitutional Court, they often arise because of political factors.[65] An example is the Gauteng executive's intervention in the City of Tshwane Metropolitan Council, which came as a result of a combination of political factors, including the collapse of a coalition and subsequent walkouts by councillors belonging to the African National Congress and the Economic Freedom Fighters.[66] The walkouts were politically motivated to make it impossible for the Council to reach a quorum to decide on matters, effectively paralysing it.[67]

The Gauteng provincial executive moved in when it thought the conditions for intervention were satisfied. Its counterparts were not equally eager to intervene in municipalities falling under them. For instance, it took the orders of the High Court for the Mpumalanga and Eastern Cape provincial governments to intervene in eMalahleni Local Municipality and the Makana Local Municipality, respectively. The first case in which the court ordered a mandatory provincial intervention was *Coetzee v Premier, Mpumalanga Province*.[68] This case was the first of its kind to be decided in the affirmative on the question of whether the courts could order a province to institute a section 139(5) mandatory intervention. The applicants had filed a notice of motion in the High Court for an order compelling and

61 Ibid., s. 139(7).

62 For a full discussion of lawfare in South Africa, see in general, *Michelle Le Roux* / *Dennis Davis*, Lawfare: Judging Politics in South Africa, Cape Town 2019.

63 See *Mazibuko v Sisulu* 2013 11 BCLR 1297 (CC), para. 83. Political matters are defined as matters which have "a political bite" – see *Economic Freedom Fighters v Gordan; Public Protector v Gordhan* [2020] ZACC 10, para 97.

64 *Premier, Gauteng v Democratic Alliance*, note 7, is an example of a provincial intervention matter stemming from political contentions – see paras. 107, 123, 134 and 135.

65 See ibid., para. 49.

66 Ibid., para. 1.

67 Ibid., para. 5.

68 *Coetzee v Premier, Mpumalanga Province* Case No. 2799/2017 (unreported).

directing the Premier of the Mpumalanga Province to impose a mandatory intervention in the eMalahleni Local Municipality and to submit a request to the Municipal Financial Recovery Services to undertake the required steps under section 139(1)(a) of the MFMA. In the notice of motion, the applicants contended that the Municipality was in dire financial straits, as evidenced *inter alia* by the fact that its budget was unfunded; it would not be able to fund its annual operations (which stood at ZAR 686 million for the 2020/21 year); it had no payment plan for its ZAR 2,1 billion debt to Eskom (which constituted 80% of its debt); and it had a collection rate which fell too low below the benchmark set by the National Treasury.[69] The Municipality did not dispute these contentions.

It was evident from the papers before the court that the power utility had resorted to cutting off electricity from the Municipality and that this had serious repercussions on the livelihoods of residents, as it impacted, *inter alia*, on the provision of water services and sewage disposal. The respondents opposed the application but consented to judgment at the last minute, paving the way for the court to make the applicant's draft order final. However, the consent to judgment deprived the court of an opportunity to write a judgment canvassing the issues. Hence, there was a need for another test case on the question of whether a court of law could compel a provincial government to intervene in a municipality facing a financial crisis. That opportunity arose in *Makana*, the second case to confirm the court's powers to order a mandatory provincial intervention.

The factors leading to the collapse of the Makana Local Municipality have been described above. When the problems mounted in the Municipality and service delivery collapsed, the Makana community attempted several times to restore the position of the Municipality.[70] However, in April 2014, the crisis in Makana had escalated. The Provincial Treasury Department deemed it necessary to deploy an acting chief financial officer to the Municipality.[71] Between April 2014 and February 2019, when the Unemployed Peoples Movement (a social movement with branches in three of South Africa's provinces) launched its application in the High Court, the people of Makana had sent several letters voicing their concerns to the Municipal Council, the mayor and the Member of the Executive Council of Cooperative Governance and Traditional Affairs (MEC of CoGTA).[72] The community also resorted to protests, with the most memorable in November 2018.[73]

The situation in Makana led to two provincial interventions. The first occurred in October 2014, followed by another in February 2015.[74] Chamberlain and Masiangoako[75]

69 For the complete list of the factors which showed that the eMalahleni Local Municipality was in a serious financial crisis, see the applicant's supplementary affidavit in *Coetzee v Premier*, note 68, para. 24.

70 *Makana*, para. 52.

71 Ibid., para. 23.

72 Ibid., paras. 23, 24, 38, and 41.

73 Ibid., para. 41.

74 Ibid., paras. 23 and 24.

75 *Chamberlain* / *Masiangoako*, note 15, p. 438.

explain that in 2015, with the provincial government's first intervention, an administrator was appointed. A recovery plan was developed for the Municipality:

> *The Recovery Plan identified a number of key strategies to reduce expenditure, increase revenue and ensure that proper administrative and governance arrangements were in place to address the key financial and service delivery challenges. It estimated that R800 million was required to upgrade services. Importantly, the Plan specified that should Makana Municipality fail to implement the Recovery Plan, provincial government must consider alternative measures, including the dissolution of the municipal council.*[76]

By the end of the first intervention, there had been little improvement in the Municipality. The recovery plan had not been implemented.[77] A second intervention was instituted.[78] Both interventions did not yield results. On 8 September 2015, the High Court issued a structural interdict directing Makana to develop and operate the municipal waste disposal site, for example.[79] A report detailed the findings of a forensic investigation into the affairs of the Municipality.[80] The report highlighted concerns regarding, *inter alia*, habitual financial management transgressions, an inability to address unlawful financial conduct, and a failure to implement remedial recommendations as prescribed in the financial recovery plan.[81] In 2018, the Unemployed Peoples Movement directed a letter of demand to the national department responsible for local government affairs that also elaborated on the state of collapse in Makana.[82]

In 2019, after five years of exploring alternative remedies unsuccessfully, the Unemployed Peoples Movement lodged an application in the High Court seeking a declaratory order that, *inter alia*, Makana was in breach of sections 152 and 153 of the Constitution and that the conditions of sections 139, 139(1)(c) and 140 of the MFMA were present. The applicant further argued that a provincial intervention in Makana was justified, that an administrator had to be appointed, and that the Municipal Council had to be dissolved.[83] In *Makana,* the applicants sought an order declaring that the Makana Local Municipality had breached the following constitutional provisions:

(i) section 152 - failure to ensure a sustainable provision of services to the community;
(ii) section 24 – failure to promote a safe and healthy environment; and

76 Ibid.

77 Ibid.

78 Ibid.

79 *Makana*, para 40.

80 *KABUSO*, Forensic Investigation Draft Report: Makana Local Municipality, http://www.makana.gov.za/wp-content/uploads/2013/06/KABUSO-REPORT-DOCUMENT.pdf (last accessed on 16 June 2021).

81 *Makana*, para 24.

82 *Chamberlain* / *Masiangoako*, note 15, p. 438.

83 *Makana*, para 3.

(iii) section 153(a) - failure to prioritise the provision of basic services and the promotion of the social and economic development of the community when it structured and managed its administration, budget and planning.

The applicants also alleged that the financial crisis in Makana satisfied the provisions of section 139 of the Constitution and section 140 of the MFMA, both of which stipulate the jurisdictional requirements for the province to intervene in the Municipality. The court declared that the Municipality had failed to fulfil the above constitutional provisions and that its conduct was invalid.[84] The court agreed that it could not order a provincial executive to intervene under section 139(1)(c) of the Constitution because of the discretionary powers granted by that section. It held that the correct recourse for the applicants was section 139(5) of the Constitution, which empowers the court to order the provincial executive to institute a mandatory intervention.

The court further observed that although the provincial executive had previously intervened in the Makana Local Municipality, and whereas it had instituted a financial recovery plan, the Municipal Council had failed to implement the plan. Accordingly, it was necessary to order the dissolution of the Municipal Council to enable the provincial executive to implement the financial recovery plan.[85] The court expressed the opinion that such an order would not be in conflict with the doctrine of the separation of powers. The basis of the court's opinion was that the jurisdictional factors in terms of section 139(5) of the Constitution had been met.[86] The respondents were not satisfied with the order and sought leave to appeal, which the court denied.[87] The respondents escalated the matter to the Supreme Court of Appeal, which granted them leave to appeal. At the time of writing, reports indicate that the situation in Makana Local Municipality has deteriorated further and that the applicants are in the process of applying for enforcement of the court order granted in January 2020.[88]

E. Should the courts order mandatory interventions?

When determining whether the courts *should* order mandatory interventions, it is important to bear in mind that the courts *can* order such interventions, since the power to make remedies in matters that serve before them is given by the Constitution.[89] Whether they *should*, given the political contestations, grant such orders is a question that should be

84 *Coetzee v Premier*, note 68, paras. 15 and 55.

85 Ibi.d, para. 92.

86 Ibid., paras. 92, 93 and 97.

87 *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* [2020] ZA-ECGHC 47, para 1.

88 *Sue MacLennah*, Province Welcomes Green Light to Appeal UPM Judgment, https://www.grocotts.co.za/2020/10/23/province-gets-green-light-to-appeal-upm-judgment/ (last accessed on 20 June 2021).

89 See *Premier, Gauteng v Democratic Alliance*, note 7, para. 49.

answered considering whether such orders and their implementation bring favourable outcomes. Although the primary responsibility to identify and resolve financial problems in municipalities rests with the municipalities,[90] the failure of local government is a failure of "government" as a whole, not just the specific municipality. This is evident from an inclusive reading of sections 7 and 8 of the Constitution in combination with the rest of the Bill of Rights. It is echoed in the words of Moseneke DCJ (as he was):

> *The branches of government are not in competition with one another. Rather they are symbiotic. They are part of a beautiful mosaic which will work only if we bring all our public goodness to the fore.*[91]

Cooperative government, intergovernmental support and collective responsibility are not too difficult to comprehend from the perspective of the three *spheres* of government. Much in the Constitution and in national legislation drives home and explains this notion. Less clear is the expectation of cooperation among the legislature, the executive and the judiciary as the three distinct branches of government and how supervision and support are supposed to work in the light of the doctrine of the separation of powers.[92] While the courts are classified as one of the three branches of government, there is room for the possibility that the legitimacy and efficacy of their role in matters of government (such as mandatory interventions) may be curtailed by the reality that the role of the courts is not to govern.[93] They serve the people of South Africa differently from Parliament and the executive.[94] Part of the challenge is the absence of law that governs the implementation and monitoring of intervention in municipalities.[95] Instead, the issue is regulated in terms of a patchwork of national legislation.[96] *Makana* paved the way for a critical assessment of

90 *SERI*, note 17, p. 16; s. 135 of the MFMA.

91 *Dikgang Moseneke*, Separation of Powers: Have the Courts Crossed the Line?, https://www.groundup.org.za/article/separation-powers-have-courts-crossed-line_3152/ (last accessed on 20 June 2020).

92 The doctrine of the separation of powers denotes the division of government responsibilities into distinct branches to prevent any one branch from exercising or usurping the core functions of another. It serves to prevent the concentration of governing power in one branch and provides checks and balances. See *Prenisha Sewpersadh* / *John C. Mubangizi*, Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism?, Law, Democracy & Development 21 (2017), pp. 201, 202.

93 See *Felix Dube*, Separation of Powers and the Institutional Supremacy of the Constitutional Court over Parliament and the Executive, South African Journal on Human Rights 36 (2022), pp. 293, 306.

94 *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC), para. 4.

95 At the time of writing, the legislative process for the regulation of the implementation of s. 139 was still underway. See *SALGA*, Municipal Support and Intervention Framework, http://www.salga.org.za/event/nma20/documents/LG%20Publications/SALGA%20%20Framework%20for%20Municipal%20Support%20and%20Intervention.pdf (last accessed on 18 November 2020), p. 5.

96 *Research Unit of the Parliament of the Republic of South Africa*, Overview of Municipalities Under Section 139 Intervention as It Relates to Service Delivery, https://www.parliament.gov.za/st

the desirability and sustainability of judicially ordered mandatory provincial intervention in local government as opposed to the potential risks. These are discussed below.

I. The desirability of judicially ordered interventions

When a province refuses or fails to intervene in a municipality that is grappling with a financial crisis, people continue to suffer from a lack of service delivery. The situation which transpired in Makana is a classic example. Such suffering puts the constitutional vision of a transformed society and human well-being at serious immediate and long-term risk. However, an intervention by the provincial government temporarily impacts the autonomy of local government and on representative democracy. *Makana* shows that it is possible for a court of law to order provincial authorities to intervene in a municipality in terms of section 139(5) of the Constitution. This provision compels provinces to intervene when municipalities face financial crises and when they are in serious or persistent material breach of their service delivery obligations. Provinces may also intervene when municipalities fail to meet their financial commitments.

Scholars question the appropriateness of mandatory and discretionary interventions in local government.[97] It is not the objective of this article to further explore the fundamental and relevant concerns in this regard. However, we ask how desirable it is for the judiciary to force the executive in one sphere of government to step in when another sphere of government fails to execute its constitutional and legislative duties. Makoti and Odeku submit that the aim of limiting municipal autonomy through section 139 is to ensure that municipalities effectively and efficiently render basic municipal services to communities located in their areas of jurisdiction.[98] As earlier explained, the Constitution sets out specific substantive and procedural requirements with which a provincial executive must comply when intervening in a municipality. This includes oversight by the Minister of Cooperative Governance and Traditional Affairs and the NCOP, as well as a requirement for the consideration and approval or disapproval of interventions by the NCOP.[99] An intrusion on local government autonomy, therefore, does not go unchecked.

As it stands, a section 139(5) mandatory intervention is a constitutional obligation that a provincial authority is not at liberty to ignore. Section 2 of the Constitution provides that the obligations imposed by the Constitution must be fulfilled. Section 237 of the Constitution provides that "[a]ll constitutional obligations must be performed diligently and without delay". Hence, when a province fails to intervene timeously when the conditions of section 139(5) are present, it effectively breaches its constitutional duty and could be directed to do

orage/app/media/Pages/2020/september/02-09-2020_National_Council_of_Provinces_Local_Government_Week/docs/municipalities_under_Section_139_intervention_as_it_relates_to_service_delivery.pdf (last accessed on 30 November 2020); *De Visser* / *November*, note 10, pp. 114-115.

97 See, for example, *Chamberlain* / *Masiangoako*, note 15, pp. 444-455.

98 *Makoti* / *Odeku*, note 12.

99 *Research Unit of Parliament*, note 96.

so by the courts, which are empowered to decide constitutional violations. The desirability of court interventions in the decision of a provincial government to intervene is a matter of upholding the Constitution in terms of the rights of people and the attendant duties of the state. The courts have been doing this for many years, as explained by Moseneke DCJ (as he was):

> *Courts have required the executive to give effect to socio-economic claims of the poor and vulnerable. We have required government to provide appropriate access to health care. We have reminded the executive of its duty to provide access to housing. We have required Parliament to bring certain laws in line with the Constitution. We have mediated differences around eviction of homeless, urban and rural occupiers who are said to be unlawful. We have insisted that land owners must display patience as homeless occupiers find other refuge. We have ordered government to find alternative accommodation should evictions ensue. Courts have insisted that drinkable water be made available to vulnerable members of society.*[100]

The severity of the socio-economic, financial and environmental impacts when a municipality is in a financial crisis and cannot provide basic services or meet its financial commitments is well-documented.[101] It is prudent that such crises and impacts be avoided whenever possible.[102] When they occur, the Constitution must be followed. Provincial authorities must intervene according to the constitutionally prescribed process and in a manner that will bring meaningful positive change. When a province refrains or refuses, for a political or any other reason, to institute a mandatory section 139(5) intervention, a court would have no choice but to decide the matter and order the intervention.

II. Sustainability of judicially ordered interventions

Are judicial orders that force provinces to intervene in municipalities in terms of section 139(5) of the Constitution sustainable? It is useful to look at this question against the backdrop of a recent pronouncement of the Research Unit of Parliament:

> *A number of municipalities have undergone multiple interventions. This could be an indication that interventions are not effective in yielding the expected outcomes. Consideration should be given to identifying some of the root causes for interventions failing and mechanisms to respond to such failures. This should include a focus on mechanisms in place to set clear objectives for interventions and to monitor and manage the implementation of these interventions. Comprehensive and integrated*

100 *Moseneke*, note 91.

101 See, for example, *Ledger* / *Rampedi*, note 11, pp. 1-2; *De Visser* / *November*, note 10, p. 113.

102 This should ideally be done through municipal self-monitoring as well as provincial and national monitoring and the support of local government. District municipalities also have a role to play in supporting local municipalities. This system is explained by *SALGA*, note 95, pp. 12-20.

> *mitigation: It is important to note that intervention in a municipality, as defined in the Constitution, has to be holistic in order to be sustainable during its implementation. It requires collective effort, involving various role-players with appropriate skills and expertise. Moreover, it should focus strategically on a wide range of issues over the short, medium and long term. Every intervention should have regard to the requirements of co-operative government, inter-governmental relations and Integrated Development Planning (IDP) to achieve synergy, functional co-ordination and collaboration.*[103]

The above suggests that interventions in local government according to the strict letter of the law cannot yield lasting positive results.[104] There is a need for more. The recently decided *Kannaland* case shows how a mandatory intervention and placement under "full administration" by the Western Cape Provincial government yielded positive structural and financial results for a short time.[105] The intervention did not please local politicians for long.[106] This underscores the need for an inclusive and holistic approach to local government support. At this point, the question is whether it is sustainable for desperate communities to litigate for intervention when the constitutional requirements for a mandatory provincial intervention are met.

Litigation is costly, time-consuming and inevitably damages relationships. It would be naïve to support a remedial system for failing local government that depends on court orders. In addition, municipalities enjoy exclusive powers on matters listed in chapter 7 of the Constitution. As such, the legislative powers of local government are protected from both national and provincial intrusion through constraints on what Parliament and provincial legislatures can do on functional areas reserved for local government. While this preserves the autonomy of municipalities, it potentially makes it impossible for provincial and national governments to avert deterioration in the provision of basic municipal services until such time as the situation becomes so bad that the only available avenue is the mandatory provincial intervention in terms of section 139(5) of the Constitution. Arguably, intervention at this point may never reverse the damage.

Timely intervention is necessary to prevent permanent harm to communities when local governance collapses because of a financial crisis.[107] In the event of the politically driven or other unwillingness of provincial and national governments to intervene in a municipality,

103 *Research Unit of Parliament*, note 96.

104 *Chamberlain* / *Masiangoako*, note 15, p. 457 state in this regard that "provincial interventions are not working as intended".

105 *Executive Council of the Western Cape Province v Kannaland Local Municipality* [2021] ZA-WCHC 51, paras. 6-7.

106 In 2020 the Executive Mayor of the Municipality fell seriously ill and took a leave of absence, whereafter an Acting Executive Mayor stepped in who has taken steps to terminate the provincial intervention. See *Kannaland*, note 105, para. 8.

107 Also see *Chamberlain* / *Masiangoako*, note 15, p. 453.

the communities affected have few viable options to safeguard their interests. Probably, the best option under the circumstances would be to seek an order of the High Court, which could compel provincial and national governments to intervene. While this is an available and viable remedy, it should be a matter of last resort and cannot be deemed sustainable. Instead, consideration should be given to how best national and provincial governments can provide preventative support, oversee and build capacity at a much earlier stage to avoid a deterioration of municipalities to such a state of dysfunction that intervention must be invoked and "judicial intervention" becomes necessary. In this vein, Chamberlain and Masiangoako suggest that the application of the mechanism of provincial intervention should be revisited in that it "should no longer be seen as a means of last resort once a municipality has collapsed, but as a framework to prevent such collapse".[108]

III. Potential risks of judicial involvement in interventions

A distinction should be drawn between the potential risks of provincial interventions in local government (e.g. political bias, prejudice and the disruption of local governance) and the risks that go with judicially ordered mandatory intervention. This article concerns the latter. When a court of law makes a ruling that triggers concerns about the separation of powers, there is a chance that the court could act beyond its jurisdiction and interfere in areas that fall within the mandate and governing domain of the executive or the legislature.[109] Thus, the need for judicial restraint is always present.[110] Another potential risk is the lack of democratic legitimacy and capacity deficits when judges rule in cases with potentially far-reaching consequences. This is part and parcel of the conflicting demands placed by the Constitution and its democratic commands on the courts. When faced with such situations, courts may defer to the executive or operate as a corrective to policy (or decisions or the lack of decisions) that do not accord with peoples' rights.

Judicial hesitation to order an intervention on the pretext of possible harm that could be suffered by a municipality or the municipal councillors runs the risk of deepening the harm done to the community by the failures of the Municipality. On this point, albeit, in a slightly different context, the Court stated that:

> *It needs to be stressed that the potential prejudice and urgency lie not in the harm suffered by the Municipality or the municipal councillors, but in the continued disruption of basic essential services to the people and communities the Municipality is supposed to serve.*[111]

108 Ibid., p. 453.

109 *Sewpersadh* / *Mubangizi*, note 92, p. 203.

110 *Patrick Lenta*, Judicial Restraint and Overreach, South African Journal on Human Rights 20 (2004), p. 544.

111 *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 1 BCLR 72 (CC), para 9. This case concerned the autonomy of different spheres

And further that:

> *It is clear that where access to water, sanitation, electricity and fire and emergency services once existed but is then taken away due to a dispute within or relating to the management of a municipality, there may be a violation of fundamental rights of inhabitants.*[112]

The real risk related to the courts' ordering of mandatory provincial interventions lies in what it suggests about the legal framework pertaining to municipal support, mandatory interventions in local government, and the responsibility and accountability of municipal, provincial and national authorities. There is a risk that section 139(5) itself is too vaguely construed for provincial authorities to have confidence in a timely decision to undertake a mandatory and highly intrusive intervention in a municipality.[113] There is also a further risk that provincial authorities may either not sufficiently care, or that they may also be struggling with their own financial affairs. They may also lack the human resource capacity to execute such interventions. These risks must be managed in the context and spirit of a constitutionally entrenched system of cooperative government.[114]

F. Conclusion

Local government in South Africa is in a worrying state due to governance instability and financial mismanagement, both of which affect service delivery and the maintenance of critical infrastructure. This invites scholars, policymakers and government to critically engage with, first, the causes of the deterioration, and second, the remedies available to local communities that continue to suffer because of poor local governance. South African law provides several options for recourse in the event of the failure of local government. These options range from authorised service delivery protests, civil court action for damages, the recouping of wasted funds, the laying of criminal charges against recalcitrant individuals, voluntary and mandatory intergovernmental interventions, the taking over by civic organisations of municipal services (as was done in *Kgetlengrivier*)[115] and public-private partnerships to assist with resource deficits in local government. National

of government and provincial intervention in local government. The court refused to entertain the matter as the needs of the community were met by the administrator appointed during the intervention.

112 Ibid., para. 14.

113 *SERI*, note 17, p. 30 finds that "the longer the period of time during which a municipality operates in a state of crisis before an intervention is initiated, the less likely it is that the intervention that have a meaningful impact". Notably, ss. 138 and 140 of the MFMA provides somewhat detailed indications for when provincial government would be justified to intervene into the affairs of municipalities.

114 See ch. 3 of the Constitution.

115 *Kgetlengrivier Concerned Citizens*, note 8.

and provincial governments also dedicate substantial resources to support municipalities in the form of advice, training, financial injections such as grants, and the deployment of human resources.[116]

Interventions by provincial authorities into the affairs of local government happen only under exceptional, specified circumstances and should be instituted and implemented in line with the Constitution. The reservations of the Auditor-General on the overall functionality of municipalities and their ability to provide basic services,[117] points to a crisis in municipalities generally. This situation does not bode well in terms of good local governance and the protection of the rights and interests of millions of people living in South African towns and cities. The demands of providing a healthy democracy and an accountable government require the judiciary to step in when intergovernmental support between the three spheres of government is absent or inadequate to bring change and stability. Should the courts fail to order provincial governments to intervene in failing municipalities, that would be a tragic setback for good local governance.

Von Danwitz's anecdotal quote from the walls of the historic Supreme Court of New York building that "The true administration of justice is the firmest pillar of good government"[118] comes to mind when analysing judicially ordered provincial interventions into municipalities. In the case of Makana, the judiciary's careful consideration of the circumstances and the pleas of affected local communities were mostly welcome – even if it meant that the judiciary crossed the lines of government autonomy. Sustainable change in South African local government with a lasting positive impact requires the close involvement and commitment of all three spheres and all three branches of government. It would seem that the time is also ripe for in-depth analyses of the suite of established and more novel remedies available to claimants and the courts when a municipality collapses. Some of these remedies are less drastic than judicially mandated provincial interventions. For instance, a High Court judge recently handed over the sewage and water works of a failing municipality to a residents' association, which repaired the water works within three days.[119] The order, while contentious and probably not the end of the story, affirms that judicially ordered interventions are not the only avenues to restore service delivery in failing municipalities. The law invites adjudicators and courts alike to be creative in their interpretation of South African constitutional, local government and development law that

116 *De Visser* / *November*, note 10, p. 113.

117 *Auditor-General*, note 2, p. 9.

118 *Thomas von Danwitz*, Good Governance in the Hand of the Judiciary: Lessons from the European Example, Potchefstroom Electronic Law Journal 13 (2010), pp. 1, 3 and 16.

119 See the order in *Kgetlengrivier Concerned Citizens*, note 8. For a synopsis of the contentions against the court's order and the risks which the novel remedy posed, see *Marius Pieterse*, Local Government in South Africa is Broken: But Giving the Job to Residents Carries Risks, https://theconversation.com/local-government-in-south-africa-is-broken-but-giving-the-job-to-residents-carries-risks-155970 (last accessed on 2 June 2021).

has ultimately been designed to protect and secure human life, well-being and prosperity for all living in the country.