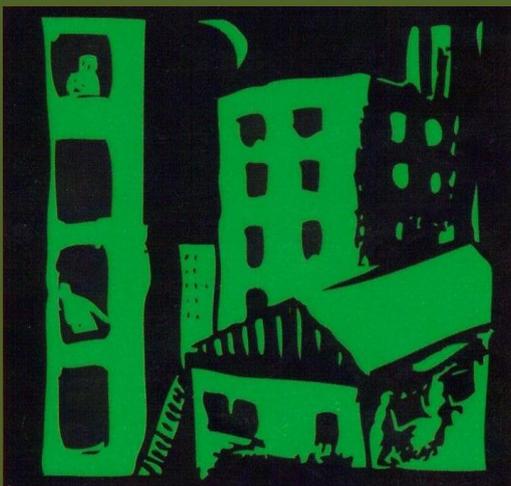


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Contemporary trends in provincial government supervision of local government in South Africa

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1 INTRODUCTION

Since the onset of the current system of local government in South Africa, it has become possible to determine certain trends in respect of the supervision of local government. These trends demonstrate current thinking and approaches concerning the proper relationship between the three spheres of government. Government in the Republic “is constituted as national, provincial and local spheres of government.”¹ The structure of government, where powers are distributed among and simultaneously shared by different spheres of government, may pose challenges to the functioning of government. Accordingly, a mechanism is necessary to ensure that

¹ See s 40 (1) of the Constitution of the Republic of South Africa, 1996 (Constitution).

all the spheres of government exercise their powers properly for the good of governance in the Republic. Thus, intergovernmental supervision is a necessary but potentially intrusive component of the constitutional relationship between the spheres of government. The purpose of this article is to establish whether the practice of provincial government supervision of local government corresponds to the legal position and whether, perhaps, adjustments are required to bring the practice of supervision in line with the established legal position. The article is based on law as well as empirical studies based on interviews with officials in municipalities in various provinces.

This article discusses the practice of supervision of local government in South Africa. The constitutional principle of co-operative government which informs intergovernmental supervision is briefly explained in the first instance. In setting the context for a discussion of the practice of the supervision of local government, the legal framework for the supervision of local government is subsequently discussed, and a conclusion is reached on the trends of supervision of local government in South Africa. For purposes of this article, the cases which deal with both the monitoring and intervention components of supervision of local government are discussed and assessed together. This is so because both the monitoring and intervention in local government reflect the trends of supervision in local government. In KwaZulu-Natal, supervision is examined in the Utrecht Local Municipality, IMbabazane Local Municipality, Abaqulusi Local Municipality, UMvoti Local Municipality and UMGungundlovu District Municipality. In the Western Cape, the trends are discussed regarding the supervision of the Overberg District Municipality and the Langeberg Local Municipality by the provincial government of the Western Cape. In the Eastern Cape, the supervision of Mquma Local Municipality by the provincial government of the Eastern Cape is examined. These case studies assist in explaining the trends in provincial supervision of local government in South Africa.

2 THE PRINCIPLES OF CO-OPERATIVE GOVERNMENT

In order to achieve coherent government in the Republic, the Constitution makes provision for principles of co-operative government. The said principles of co-operative government instruct all spheres of government and organs of State to commit themselves to the Republic of South Africa, first, by securing the well-being of the people of the Republic, and by providing “effective, transparent, accountable and coherent government for the Republic as a whole.”² Thus, the spheres of government are required to commit themselves to the course of government in the Republic.³ The commitment of the spheres of government to the Republic and the provision of coherent government entails that the upper spheres should supervise the lower spheres

² See s 41 (1) (b) and (c) of the Constitution.

³ Ss 41 (1) (a) and (d) of the Constitution indicate that the Constitution demands commitment from the spheres of government to the Republic. This they do by preserving national unity, the indivisibility of the Republic, securing the well-being of the people of the Republic, providing coherent government for the Republic as a whole, and by being loyal to the Constitution, the Republic and its people.

in order to prevent the decline of government in the Republic. Accordingly, provincial government as the sphere of government closest to local government supervises local government to ensure harmony in the functioning of government in the Republic. Secondly, all spheres are instructed to respect the autonomy of one another.⁴ Accordingly, the principles of co-operative government create boundaries between the spheres of government which require each sphere of government to respect the autonomy of the other sphere. Thus, in exercising its supervisory powers over local government provincial government may not erode the autonomy of local government. Thirdly, all spheres and organs of State should embody mutual trust and good faith when co-operating with one another by fostering friendly relations and supporting one another.⁵ Accordingly, the power of provincial government to supervise local government does not entitle provincial government to compete with local government for the exercise of such power; instead, it requires a provincial government to co-ordinate its activities with local government in addressing any and all deficiencies that may exist in the functioning of local government.

Thus, the principles of co-operative government require intergovernmental supervision for the proper functioning of government, and further place restraints on the exercise of the supervisory powers for purposes of protecting the autonomy of spheres from being eroded by other spheres. Consequently, if provincial government exercises its supervisory powers in a manner that impinges on the autonomy of local government, that would offend the Constitution.

3 THE LEGAL FRAMEWORK FOR SUPERVISION OF LOCAL GOVERNMENT

This article hinges on terms such as “supervision of”, “monitoring of” and “intervention in” local government affairs. Before the amendment of section 139 of the 1996 Constitution, the heading “Provincial Intervention in Local Government” read “Provincial Supervision of Local Government.”⁶ Thus, when *in re: Certification of the Constitution of the Republic of South Africa 1996*⁷ was decided the heading to section 139 of the Constitution was “Provincial Supervision of Local Government”. The Court defined the word “supervision” in the context of intervention in local government. This is evident from the following statement of the Court: “Supervision is utilised alongside ‘intervene’ to designate the power of one level of government to intrude on the

⁴ In this regard ss 41 (1) (e) – (g) of the Constitution direct the spheres of government to: “respect the constitutional status, institutions, powers and functions of government in the other spheres”; to “not assume any power or function except those conferred on them in terms of the Constitution”; and to “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.”

⁵ See ss 41(1) (h) (i)-(iii) of the Constitution.

⁶ The Constitution Eleventh Amendment Act of 2003.

⁷ *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC) (*First Certification of the Constitution*).

functional terrain of another”.⁸ De Visser supports this view when he states that the word “supervision” was used to reflect the provincial government power to intervene in the affairs of a municipality.⁹ It may be concluded that the meaning ascribed to the word “supervision” in section 139 of the Constitution in the *First Certification of the Constitution* case is not necessarily the same after the word “supervision” was substituted by the word “intervention” in April 2003. Given the fact that the word “supervision” does not feature in the heading of section 139 of the Constitution any longer, the contextual meanings of the word is no longer helpful. Therefore the dictionary meaning of the word supervision should be considered. The *Oxford South African Concise Dictionary* defines the word “supervise” as meaning to “observe and direct the execution of (a task or activity) or the work of (a person)”.¹⁰ According to De Visser the principle of supervision in the amended section 139 of the Constitution comprises four aspects, namely regulation, evaluation, intervention and redistribution.¹¹ The *Oxford South African Concise English Dictionary* defines the word “regulate” as meaning “to control or maintain the rate or speed of a machine or process. Control or supervise by means of rules or regulation”.¹² On the other hand, the word “evaluate” is defined as meaning “to form an idea of the amount, number, or value of; assess ...”¹³ and “redistribute” is defined as meaning to “distribute again or distribute differently”.¹⁴ De Visser defines “regulation” as referring to “national and provincial governments setting the framework within which local government must exercise its autonomy”.¹⁵ In setting the framework for local government the national and provincial governments can pass legislation and issue directives regulating the exercise of local government powers.

In this regard the scope of supervision of local government is broader than intervention in local government in the amended section 139 of the Constitution. It includes the monitoring of, intervention in, and support of local government. The monitoring of local government informs local government on the proper action for remedying any deficiency in the functioning of local government. The remedial action may take the form of intervention by assuming certain powers of local government or by rendering support by redistributing resources to local government, if it needs such support.

3.1 Monitoring of local government

In defining the word “monitoring” the Constitutional Court explains that the power to monitor local government is limited to the power to observe or keep under review local

⁸ See *First Certification of the Constitution* at para 370.

⁹ De Visser J *Developmental local government: a case study of South Africa* (Intersentia Antiwerpen-Oxford 2005) at 169.

¹⁰ *Oxford South African Concise Dictionary* (2010) at 1192.

¹¹ See De Visser (2005) at 170.

¹² At 904.

¹³ At 404.

¹⁴ At 988.

¹⁵ See De Visser (2005) at 170.

government, but does not include the control of local government affairs.¹⁶ The monitoring of local government by the other spheres of government was further construed as the power that is limited to measure or test at intervals local government compliance with the Constitution, and with national and provincial directives.¹⁷

The monitoring of local government may be regarded as a watered down form of the supervision of local government in that the monitoring of local government is carried out within the framework of intergovernmental relations.¹⁸ The Constitution provides specifically for two instances when provincial government is required to monitor local government. First, provincial government is required to make provision for the monitoring of local government by legislative and other measures.¹⁹ Secondly, provincial government is required to oversee the effective performance by municipalities of their powers in respect of the matters listed in Schedules 4 and 5 of the Constitution by regulating the exercise by municipalities of their executive authority as referred to in section 156(1) of the Constitution.²⁰ Accordingly, the monitoring of local government is authorised by the Constitution. The other source of the power of provincial government to monitor local government is national legislation which may then be referred to as the secondary source of local government power.

In the event of a municipality failing to perform or committing maladministration the Municipal Systems Act empowers the MEC to act, when it provides as follows:²¹

If a MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must –

- (a) by written notice to the municipality, request the municipal council or municipal manager to provide the MEC with information required in the notice; or
- (b) if the MEC considers it necessary, designate a person or persons to investigate the matter.

Interestingly, section 106 of the Municipal Systems Act does not give the MEC unlimited powers to demand information from municipalities. Rather, this provision requires the MEC to act if the MEC has reason to believe that a municipality is failing to fulfil a statutory obligation which is binding on that municipality, or that other wrongs had occurred or are occurring in that municipality. Another piece of national legislation

¹⁶ See *First Certification of the Constitution* at para 372.

¹⁷ See *First Certification of the Constitution* at para 373.

¹⁸Parliament adopted the Intergovernmental Relations Framework Act 13 of 2005 which seeks to promote relations among the spheres of government by creating structures that enforce intergovernmental relations among them. S 40 (1) of the Act prescribes the means for the settlement of intergovernmental disputes.

¹⁹ See s 155 (6) (a) of the Constitution.

²⁰ See s 155(7) of the Constitution.

²¹ See s 106(1) of the Local Government: Municipal Systems Act 32 of 2000.

which is a source of provincial government powers to monitor local government is the Municipal Finance Management Act (MFMA).²² In terms of the MFMA, the provincial treasury is required to monitor a municipality's compliance with the Act. Thus, in exercising its monitoring powers the provincial government is required to adhere to the principles of co-operative government and the prescripts as laid down by the Constitution and legislation.

3.2 Intervention in local government

Intervention comprises the most powerful form of supervision of local government.²³ In explaining the powers of intervention in local government, De Visser argues that while the power of intervention goes to the core of local government autonomy, it is necessary for effective oversight by other spheres of government.²⁴ Intervention in another sphere of government is authorised by the Constitution and is not confined to a single sphere of government either. The national government may intervene in a provincial administration when the province is either unable to, or does not, fulfil an executive obligation in terms of either the Constitution or legislation.²⁵ Moreover, both national and provincial governments may intervene in local government.²⁶

In terms of the Constitution, there are three instances in which a provincial government may intervene in a local government: First, when a municipality is either not able to, or does not, fulfil an executive obligation in terms of either the Constitution or legislation.²⁷ This provision creates jurisdictional facts that have to exist for a provincial government to intervene in local government. These facts would arise only if a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation. Secondly, the provincial government must intervene in a municipality if the municipality either is not able to, or does not, fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue raising measures necessary to give effect to the budget.²⁸ The jurisdictional facts that should exist before a provincial government may intervene in a municipality under this provision are the failure by a municipality to adopt either a budget or any revenue raising measures deemed necessary to give effect to the budget by the first day of the new budget year. Thirdly, provincial government must intervene in a municipality "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."²⁹ The jurisdictional facts that should exist before provincial government

²² Local Government: Municipal Finance Management Act 56 of 2003.

²³ See Steytler N & De Visser J *Local government law of South Africa* (LexisNexis Durban 2008) in ch 22:118.

²⁴ See De Visser (2005) at 185.

²⁵ See s 100(1) of the Constitution.

²⁶ See s 139 of the Constitution.

²⁷ See s 139(1) of the Constitution.

²⁸ See s 139(4) of the Constitution.

²⁹ See s 139(5) of the Constitution.

can intervene in a municipality are that there must be a crisis in the financial affairs of the municipality, and the said crisis must result in the municipality's serious or persistent breach of its obligation to provide basic services, further resulting in a breach that is material to the municipality's ability to meet its obligation to provide basic services.

The MFMA elaborates on the grounds for intervention in local government. In addition to the three grounds of intervention in local government in terms of section 139(1), (4) and (5) of the Constitution the MFMA elaborates on the intervention relating to a situation in which a municipality is experiencing serious financial problems.³⁰ The MFMA provides only for a situation where the failure to fulfil an executive obligation has resulted in serious financial problems or when such serious financial problems are the cause of a failure to fulfil an obligation.

4 THE PRACTICE OF THE SUPERVISION OF LOCAL GOVERNMENT

4.1 Supervision of the Langeberg Municipality

The Langeberg Municipality is situated in the Western Cape. The municipality was led by the DA, whereas the Western Cape provincial government was led by the ANC in 2004. The supervision of the Langeberg Municipality by the provincial government is reported in *Democratic Alliance Western Cape v Minister of Local Government Western Cape*.³¹ This case concerned a dispute between the DA and the provincial government about the position of Mr Carelse, a councillor representing the DA in the Langeberg Municipality. Mr Carelse defected from the DA to the ANC during the 2004 floor crossing window period while a time for floor crossing was still permissible in terms of the then amended Schedule 6B of the Constitution.³²

The DA, possibly suspecting that some of its councillors would cross the floor during the approaching floor crossing window period, requested its councillors, including Mr Carelse, to resign before the commencement of the floor crossing window period. Mr Carelse refused to resign and the DA summoned him to appear before its internal disciplinary committee in terms of its internal rules. Mr Carelse eventually crossed the floor to the ANC during the floor crossing window period, but on the eve of the floor crossing Mr Carelse made a statement under oath to the Minister for Local Government in the Western Cape requesting the Minister to investigate his claim that he had been intimidated by the DA into not crossing the floor to the ANC. On receipt of Mr Carelse's affidavit the Minister, acting in terms of section 106(1) (b) of the Municipal Systems Act, appointed a commission of inquiry into the Langeberg Municipality.

³⁰ S 136 (2) of the MFMA provides: "[i]f the financial problem has been caused by or resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for an intervention in terms of s 139(1) of the Constitution are met, the provincial executive must promptly decide whether or not to intervene in the municipality..."

³¹ 2005 (3) SA 576 (C) (Democratic Alliance Western Cape case).

³² Floor crossing was subsequently abolished.

Consequent to this action by the Minister the DA launched an application for a court order reviewing and setting aside the decision of the Minister to investigate the affairs of the Langeberg Municipality.

4.2 Supervision of the Overberg District Municipality

The Overberg District Municipality, situated in the Western Cape, was led by the ANC coalition, whereas the Western Cape provincial government was led by the DA in 2010. The intervention by the provincial government in the Overberg District Municipality is reported in the Supreme Court judgment of *Premier of the Western Cape v Overberg District Municipality*.³³ The case arose from the fact that the Cabinet of the Western Cape (as the provincial executive council is termed in that province), took a decision in terms of section 139(4) of the Constitution on 14 July 2010 to dissolve the Overberg District Municipality, based on its failure to approve a budget before the start of the new financial year. The decision of the provincial Cabinet was challenged in court by both the municipality and the councillors, who constituted a coalition government in the municipality, seeking an order setting aside the decision.

4.3 Supervision of the Mquma Local Municipality

The Mquma Local Municipality, formerly known as the Butterworth Municipality, is situated in the Eastern Cape, a province led by the ANC. The supervision of the Mquma Municipality by the provincial government is reported in *Mquma Local Municipality v Premier of the Eastern Cape*.³⁴ In December 2008 the MEC for Local Government in the Eastern Cape gave written instructions to the municipality to suspend all activities with financial implications until further notice, because the MEC had received reports of possible maladministration in the municipality.³⁵ In the same letter the MEC informed the municipality of his decision to launch an investigation into the affairs of the municipality in terms of section 106(1) (b) of the Municipal Systems Act. On receipt of the letter from the MEC the municipality replied to the MEC, requesting clarity on the alleged possible maladministration. Without responding to the municipality's request for clarity the MEC caused a notice to be published in the *Provincial Gazette*, dissolving the Municipal Council in January 2009. It has been pointed out above that the principles of co-operative government require all the spheres of government to embody mutual trust by fostering friendly relations and supporting one another when co-operating with one another.³⁶ Accordingly, in terms of the principles of co-operative governance, it would seem imperative to provide such information on the alleged maladministration. The municipality reacted to the notice of dissolution by launching a court application for an order interdicting the Executive Council of the Eastern Cape from interfering in and dissolving the Municipal Council. The order was granted by consent between the municipality and the provincial executive. However, on the same date as the court

³³ *Premier of the Western Cape v Overberg District Municipality* 2011 (4) SA 44 (SCA).

³⁴ [2009] ZAECBHC 14, 5 August 2009.

³⁵ See *Mquma Local Municipality* at para1.

³⁶ See text at footnote 5 above.

order, the Provincial Executive sent a letter to the mayor advising him that the Municipal Council was not fulfilling its executive obligations by failing to comply with certain provisions of the MFMA and that, for this reason, the Municipal Council was dissolved with effect from 12 February 2009.

In reaction to the second notice of dissolution the Municipal Council launched a second court application for an order interdicting the Provincial Executive from interfering in and dissolving the Municipal Council. Once again the order was granted, unopposed, in favour of the municipality after the Provincial Executive had withdrawn its opposition to the application. Later in February 2009 the MEC wrote a letter advising the mayor that the Provincial Executive was considering whether to issue a notice dissolving the Municipal Council, based on a number of complaints. However, this time the provincial executive solicited a response from the municipality. After the Provincial Executive had considered the representation made by the municipality it took a decision to dissolve the Municipal Council and appointed an administrator in terms of section 139(1)(c) of the Constitution, which decision was communicated to the municipality on 16 April 2009. In reaction to the decision to dissolve the Municipal Council the municipality launched a court application for an order reviewing and setting aside the attempt of the Provincial Executive to dissolve the Municipal Council. This application was also granted.

4.4 Intervention in the Abaqulusi Municipality

The Abaqulusi Municipality is in KwaZulu-Natal, with its offices in Vryheid. On 25 May 2005, the MEC for Local Government, Housing and Traditional Affairs in KwaZulu-Natal wrote a letter to the Abaqulusi Municipality, notifying the municipality that, on 18 May 2005, the Executive Council of KwaZulu-Natal had resolved to intervene in the Abaqulusi Municipality. The letter was entitled "Notification in terms of section 139 of the Constitution and section 106 of the Local Government: Municipal Systems Act". The intervention was based on reports that the municipality was unable to fulfil its executive obligations. The purpose of the letter to the municipality was to give the Municipal Council written notice of the intervention in terms of section 139(2) of the Constitution, and to give further notice that the MEC also would be appointing an attorney and an advocate, Mr E Ngubane and Mr RE Griffiths, respectively, in terms of section 106 of the Municipal Systems Act to conduct an investigation and determine whether there had been non-performance and maladministration, as defined in section 106 of the Municipal Systems Act.

Eventually, the commission of enquiry appointed by the MEC to investigate the affairs of the municipality held an enquiry, and compiled a report which contained its findings on the allegations against the municipality.³⁷ The commission of inquiry found that some of the councillors had been guilty of failing to attend three consecutive Municipal Council meetings and recommended that these councillors should be

³⁷ See *KwaZulu-Natal (South Africa) Provincial Department of Local Government and Traditional Affairs Report of the Commission of Enquiry into the Abaqulusi Municipality in terms of s 139 of the Constitution and section 106 of the Local Government: Municipal Systems Act* (September 2005).

removed from office. It was further found that, even if these councillors were to be removed from the Council, this would not be regarded as sufficient reason for the appointment of an administrator since the Council would still have a quorum.

On receipt of the report from the commission of inquiry the MEC addressed a letter, dated 2 November 2009, to the municipal manager of the Abaqulusi Municipality. In this letter, titled “Notice in terms of section 139(3) of the Constitution – Abaqulusi Municipality”, the MEC advised the municipal manager that he had determined that 15 councillors should be removed from office. The MEC advised the municipal manager further that, notwithstanding the investigation by the commission of inquiry, the Executive Council continues to receive reports that the affairs of the municipality were still in disarray and that the situation, in terms of which the Municipal Council was operating in a state of chaos, was impacting negatively on the Municipal Council’s ability to perform its legislative and executive functions. Accordingly, the Executive Council had resolved to dissolve the Municipal Council as provided for in section 139(1) (c) of the Constitution, and to appoint an administrator to administer the municipality until a newly elected Municipal Council had taken office.

4.5 Supervision of the Utrecht Municipality

The Utrecht Municipality is in KwaZulu-Natal. In September 2006 a councillor sent a letter to the MEC for Local Government alleging acts of maladministration and corruption at the Utrecht Municipality, and requesting the MEC to investigate the allegations.³⁸ Based on the letter, the MEC appointed a firm of consultants to investigate the allegations of irregularities and maladministration at the Utrecht Municipality.

The Head of the Department of Local Government, Housing and Traditional Affairs in KwaZulu-Natal wrote a letter, dated 11 September 2006, to the municipal manager of the Utrecht Municipality informing him that the MEC, in terms of section 106(1) (b) of the Municipal Systems Act, had designated ESP Consultants,³⁹ a firm of forensic auditors, to carry out an investigation on his behalf. The MEC informed the municipal manager in writing on the next day that, following the appointment of the team of forensic auditors, the municipality was directed to suspend, with full pay, all those councillors who were implicated in the allegations before the investigation commenced in order not to compromise the integrity of the investigation. On 15 September 2006 the municipal manager of Utrecht Municipality wrote back to the Head of Department informing her that it may not be necessary to suspend the councillors because the investigation had, in fact, already commenced. The MEC responded to the municipal manager’s letter on same day, advising that it remained his considered view that all the affected councillors should be suspended with immediate effect until the investigation had been concluded, failing which the MEC would have no option but to exercise the powers vested in him by the Constitution and the Municipal Systems Act.

³⁸ The facts of the supervision of Utrecht Municipality are reported in the High Court case of *MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council* 2007 (3) SA 436 (N) (*Utrecht Municipal Council*).

³⁹ “ESP” is not an acronym, but the registered name of a firm of accountants in Pietermaritzburg.

On 11 October 2006 the MEC wrote letters to the implicated councillors, suspending them with full pay.

When the mayor, councillor Khoza, who was also implicated in the allegations, refused to accept his suspension by the MEC, pending the outcome of the investigation, the MEC launched a court application seeking an order declaring that the councillors involved be suspended. In the subsequent case, *MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council*,⁴⁰ the Court had to determine whether the MEC had the power to suspend the councillors, pending the outcome of an investigation. Avoiding a finding on the facts as to whether the suspension of the mayor was legal, Moleko J held that the Court was not required to review the suspension of the councillor: "I have been asked to determine whether the applicant has the power to suspend a councillor or councillors; I am not required to review the applicant's action in suspending the councillor – this may be a matter, if need be, to be pursued later".⁴¹ The Court nevertheless found that the councillor was legally suspended.

4.6 Supervision of the IMbabazane Municipality

The IMbabazane Municipality is in KwaZulu-Natal. One faction of councillors, led by the mayor, believed that a candidate for the position of municipal manager should be interviewed by members of the Executive Committee of the Municipal Council, who would then recommend the candidate for appointment to the Council. The other group of councillors, led by the speaker, believed that the candidate should be interviewed by all the councillors comprising the Municipal Council and then appointed by the same councillors at a Municipal Council meeting.

On 26 June 2008, one group of councillors, led by the speaker, interviewed a candidate and appointed her to the position of municipal manager while, on the same date, the other group of councillors, comprising members of the Executive Committee only, and led by the mayor, interviewed another candidate and recommended that candidate to the Municipal Council for appointment. Accordingly, there were two municipal managers for the IMbabazane Municipality, appointed by different groups of councillors on the same date. On 9 July 2008 the MEC for Local Government wrote a letter ratifying the appointment of one of the candidates to the position of municipal manager. This candidate was Ms Mnikati, who had been interviewed by the councillors led by the speaker, and appointed by the Municipal Council. In the meantime, the mayor of the IMbabazane Municipality had obtained an interim judgment, nullifying the appointment of Ms Mnikati as the municipal manager of the IMbabazane Municipality.⁴² In responding to the Court's decree which called upon the MEC to show cause why the nullification of his ratification of the appointment of Ms Mnikati should not be discharged, the MEC filed an affidavit dated 17 July 2008 wherein he withdrew his ratification of the appointment of Ms Mnikati as the municipal manager. He stated that

⁴⁰ *Utrecht Municipal Council*.

⁴¹ At para 25.

⁴² *Elvis Dlamini v Imbabazane Local Council* (unreported case 9196/08) [24 November 2008] (*Elvis Dlamini*).

his ratification of the appointment of Ms Mnikati as the municipal manager was based on a report he received about a group of protesters who had unlawfully invaded the municipal offices, disrupted activities and ejected the municipal manager (Ms Mnikati). He had not been in the office but had directed an official in his ministry to write a letter to the speaker, demanding the reinstatement of Ms Mnikati as the municipal manager of the Imbabazane Municipality.

4.7 Supervision of the UMvoti Local Municipality and the UMgungundlovu District Municipality

The reason behind comparing the supervision of UMvoti Local Municipality and UMgungundlovu District Municipality is to demonstrate the double standards applied by some provincial governments when supervising municipalities led by different political parties. The UMvoti Local Municipality was led by the IFP whereas both the UMgungundlovu District Municipality and the provincial government of KwaZulu-Natal were led by the ANC. The issues in these cases relate to the employment of municipal managers at the UMvoti Local Municipality and the UMgungundlovu District Municipality.

The matter regarding the employment of the municipal manager at the UMvoti Municipality was heard in *MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa*.⁴³ UMvoti Municipality advertised a post for a municipal manager. The advertisement stipulated that the job requirement was a bachelor degree in either public administration or a relevant field. Mr Yengwa (the applicant), with a three year teacher's diploma and a one year certificate in municipal leadership, applied for the position. He was shortlisted, interviewed and recommended to the Municipal Council for appointment.

At the Council meeting at which the applicant's appointment was considered, an official of the provincial Department of Local Government arrived with a letter from the MEC's office, informing the Municipal Council that the UMvoti Municipal Council could not employ the applicant as municipal manager, because he did not have the relevant qualifications as required by the Local Government Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to the Municipal Managers.⁴⁴ Despite the instructions from the provincial government not to employ the applicant, the Municipal Council by majority decision appointed the applicant as the municipal manager of the UMvoti Local Municipality.

The municipal manager of the UMgungundlovu District Municipality was appointed by the majority party, the ANC, despite strong opposition from the opposition parties, mainly the DA and the IFP. The opposition parties argued that the appointment of Ms Mngadi as the municipal manager was illegal because she did not appear to have any qualifications beyond a matriculation exemption as she had failed to attach a copy

⁴³ 2010 (5) SA 494 (SCA) (*Yengwa*).

⁴⁴ See Department of Provincial and Local Government "Municipal performance regulations for municipal managers and managers directly accountable to municipal managers" Government Notice 805 in *Government Gazette* 29089 of 1 August 2006.

of any degree certificate in her application, but instead attached a one day MBA attendance certificate.⁴⁵ The MEC for Local Government was aware of this issue since it had been widely publicised in the newspapers, but he did not interfere with the appointment of Ms Mngadi. Subsequent to the decision of the UMvoti Municipal Council to employ the applicant, the MEC launched an application in the High Court for an order declaring void *ab initio* and setting aside the resolution taken by the UMvoti Municipality to appoint the applicant as its municipal manager.

5 ASSESSMENT OF THE PRACTICE OF SUPERVISION OF LOCAL GOVERNMENT

5.1 Assessment of the supervision of the Langeberg Municipality

In the *Democratic Alliance Western Cape* case the disciplinary action against Mr Carelse had not been instituted by the municipality, but by the DA, Mr Carelse's political party. For this reason, the Court found in favour of the DA and set aside the investigation launched by the provincial government into the affairs of the municipality. In setting aside the appointment of the commission of enquiry, the Court held:⁴⁶

Invoking the provisions of section 106(1) (b) in the light of the information before him was improper and an overreaction on the part of the first respondent. In effect he used section 106(1) (b) to launch an investigation into the internal conduct of an opposition political party at the local level, an unwarranted and, indeed, inappropriate intervention into the sphere of local government by a provincial Minister, for whom the section was not intended.

The conduct of the Minister raises questions regarding the scope within which section 106(1) (b) of the Municipal Systems Act can be invoked and whether the powers conferred on the MEC to investigate the affairs of municipalities could be invoked against political parties purely on the basis of internal political party disputes. In finding that the scope of the Municipal Systems Act was limited to the performance of functions within the municipality which, in turn, excludes irregularities in the internal affairs of political parties, the Court held:⁴⁷

As to the meaning to be ascribed to the phrase 'other serious malpractices' the Concise Oxford English Dictionary defines malpractice as improper, illegal or negligent professional activity or treatment. It is a wrongdoing committed in a professional capacity in the performance of a professional activity. The definition in the context of section 106 is suggestive of a doing pertaining to the performance of the functions in the municipality to which he or she is appointed.

Accordingly, the alleged intimidation by the DA of its party member had not been committed in the course of the performance of a professional activity and it did not involve the performance of functions within the municipality. For these reasons, the supervision of the Langeberg Municipality reflects a total disregard of the Constitution by the provincial government when dealing with another sphere of government. The

⁴⁵ Saville S "Mngadi honoured herself: controversial district manager awarded her own honorary doctorate" 19 October 2007, *Natal Witness*, 1.

⁴⁶ At para 40.

⁴⁷ At para 37.

provincial government failed to respect the constitutional status of the Langeberg Municipality,⁴⁸ and encroached on the institutional integrity of the municipality.⁴⁹ The spheres of government may not assume powers other than those conferred on them by the Constitution.⁵⁰ The provincial government assumed powers not conferred on it by the Constitution or the applicable legislation, by investigating the internal issues of a political party.⁵¹

5.2 Assessment of the supervision of the Overberg District Municipality

Regarding the appropriateness of the step to dissolve the municipality the Court found that the Cabinet erred in assuming that it had no alternative but to dissolve the Municipal Council if it had failed to approve a budget before the start of the new financial year.⁵² It was also found that, by deciding to dissolve the Municipal Council without considering a more appropriate remedy, the Cabinet of the Western Cape offended against section 41(1) (e)-(f) of the Constitution which requires all spheres of government to respect the constitutional status, powers and functions of government in another sphere and not to assume any power or function except those conferred on them in terms of the Constitution.⁵³ The Court further found that, by assuming that there were no alternative steps other than the dissolution of the Municipal Council when it failed to approve a budget before the start of the new financial year, the Cabinet of the Western Cape had misconstrued its powers and had contravened the constitutional principle of legality, which requires the holder of executive power not to misconstrue that power.⁵⁴

5.3 Assessment of the supervision of the Mquma Municipality

In the *Mquma Local Municipality* judgment the Court did not consider the legality of either the first or the second interventions in the municipality, which had already been determined by the Court before the third intervention. However, for the purposes of analysing the legality of the supervision of the municipality both the first and second interventions in the municipality are discussed. In considering the legality of the first intervention it should be recognised that the letter written by the MEC in December 2008 directed the municipality to suspend all activities with financial implications. It should be noted that a directive is a means of intervening in a Municipal Council and it can only be issued once the provincial government has decided to intervene in that municipality.⁵⁵ Accordingly, the claim of possible maladministration did not justify the

⁴⁸ See s 41(1) (e) of the Constitution.

⁴⁹ See s 41(1) (g) of the Constitution.

⁵⁰ See s 41 (1) (f) of the Constitution.

⁵¹ See s 41(1) (f) of the Constitution.

⁵² See *Overberg District Municipality* at para 36.

⁵³ See *Overberg District Municipality* at para 38.

⁵⁴ See *Overberg District Municipality* at para 38.

⁵⁵ S 139 (1) (a) of the Constitution provides: "(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- (a) issuing a

MEC's interference in the affairs of the municipality. The same criticism may be levelled against the provincial executive regarding the second intervention in the municipality. The fact that on the same date when the first intervention was resolved out of court the provincial government notified the municipality of the second intervention is evidence of the violation of the constitutional duty imposed on the spheres of government to cooperate in mutual trust and good faith, and by fostering friendly relations.⁵⁶

In respect of the third intervention the Court found that there were no jurisdictional facts justifying the provincial executive's intervention in the municipality as the failure by the mayor either to table a budget process plan or to include an annual performance report in the annual report did not constitute a failure to fulfil an executive obligation.⁵⁷ The Court further found that the existence of exceptional circumstances is a prerequisite for the exercise of the power to dissolve a Municipal Council, which circumstances did not exist in this case.⁵⁸ In discussing the approach regarding the assessment of the existence of jurisdictional facts justifying provincial government intervention in a municipality, the Court held that the issue was not whether the existence of such facts was accepted unless the municipality provided sufficient and convincing evidence to the contrary, but whether there was sufficient evidence to conclude that the jurisdictional facts do exist.⁵⁹ In rejecting the relevancy of the information considered by the provincial executive, because this information related to previous failures, the Court held that the evidence relied upon in this regard should justify the conclusion that had been drawn.⁶⁰

The Court's judgment in the *Mnquma Local Municipality* case demonstrates the challenges relating to an acrimonious relationship between a provincial government and a municipality, and its effect on the supervision of local government. It appeared that the purpose of the provincial government was the dissolution of the Municipal Council at all costs, despite the provincial government invoking the intervention contrary to the purposes of the intervention clause in the Constitution. This heavy handed and inappropriate approach is not a commendable example of the supervision of local government.

5.4 Assessment of the supervision of the Abaqulusi Municipality

There are two notices of intervention in the case of the Abaqulusi Municipality which warrant assessment to ascertain whether they conform with the Constitution and the relevant legislation. The first notice of intervention is contained in the letter of 25 May 2005 advising the municipality of the intervention and the second notice of intervention

directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations..."

⁵⁶ See s 41(1) (h) (i) of the Constitution.

⁵⁷ At para 65.

⁵⁸ At para 76.

⁵⁹ At para 93.

⁶⁰ At para 95.

is contained in the letter of 25 November 2005 which informed the municipality of the dissolution of its Municipal Council.

The first notification of intervention to the Municipal Council was titled “Notification in terms of section 139 of the Constitution and section 106 of the Local Government: Municipal Systems Act”. However, the provisions of the Constitution and the Municipal Systems Act quoted in the notice regulate different situations under different circumstances. Section 139 of the Constitution regulates provincial government intervention in a Municipal Council, whereas section 106 of the Municipal Systems Act regulates the monitoring of a municipality. There are also substantive and procedural differences between sections 139 and 106. The notice of intervention combined these two sections without clarifying any of them. As pointed out above, section 139 of the Constitution, which deals with intervention in local government, contains three subsections which regulate intervention under different circumstances, namely, when a municipality fails to fulfil an executive obligation in terms of either the Constitution or legislation, when a municipality fails to adopt a budget or the revenue raising measures necessary to give effect to the budget, and when a municipality fails to provide basic services as a result of a crisis in its financial affairs. In other words, section 139 prescribes the jurisdictional facts that must exist before a provincial government may intervene in a municipality under this provision. Section 106 of the Municipal Systems Act empowers the MEC to request information from a municipality or to designate a person or persons to investigate the affairs of a municipality if the MEC believes that the municipality is failing to fulfil its obligations or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in that municipality.⁶¹

The scope of intervention in local government under section 139 is broader than this and if a provincial government invokes this section without specifying under which subsection of section 139 it is intervening in a municipality, the municipality would not be enlightened as regards what it had done wrong. The substantive and procedural requirements prescribed by each subsection of section 139 of the Constitution confine and define the ambit of provincial government intervention in local government under a particular subsection.⁶² For this reason the notice of intervention in the Abaqulusi Municipal Council leaves room for speculation as to the specific subsection of the Constitution under which such intervention was carried out.

It should be determined whether the steps taken by the provincial government when intervening in Abaqulusi Municipality conform with the Constitution and the applicable legislation. The Constitution provides for three modes when intervening in a municipality, namely, the issuing of a directive, the assuming of responsibility for the relevant obligation of the municipality, or dissolving the Municipal Council.⁶³ The question arises whether a provincial government has discretion to choose any particular one of the three steps, when intervening in a municipality. The

⁶¹ See s 106(1) of the Municipal Systems Act.

⁶² See s 139 of the Constitution.

⁶³ See s 139 (1) of the Constitution.

wording of section 139(1) is not helpful as it provides that the provincial government may intervene by taking any appropriate steps, including the three steps mentioned in the provision. In *In re: Certification of the Amended Text of the Constitution of the Republic of South Africa 1996*,⁶⁴ the Constitutional Court considered the question with regard to a section 100 of the Constitution intervention by national government in provincial government. It was held that the issuing of a directive in terms of section 100(1) (a) and the assumption of responsibility for the relevant obligation of the provincial government in terms of section 100(1) (b) involved one process, and that a directive had to be issued before the assumption of responsibility for the relevant obligation of the provincial government would be sanctioned.⁶⁵ The question of whether the Court's interpretation of the section 100 intervention in provincial government is equally applicable to provincial government intervention in local government in terms of section 139(1) is debatable. This issue also arose in the *Mnquma Local Municipality* case, where the Court dismissed a submission that the issuing of a directive, the assumption of responsibility for the relevant obligation, and the dissolution of a Municipal Council under section 139(1) of the Constitution was a process. The Court held that:⁶⁶

With regard to the first submission it is in my view an incorrect approach to the interpretation of this part of sub-section (1) to simply attribute to it a meaning similar to that given to its counterpart in section 100 at a time when paragraph (c) did not exist.

In interpreting the meaning of sections 139(1) and 100 of the Constitution regard should be had to the intention of inserting these provisions in the Constitution, namely, the prevention of decline and collapse of government structures.⁶⁷ There was a common purpose for inserting the intervention clauses in respect of both provincial and local governments even before the Constitution was amended to introduce the modes of dissolution in respect of local government. For this reason, the Court erred in holding that the principle of the *Second Certification of the Constitution* case on the application of the modes of intervention should not be attributed to a section 139 (1) intervention simply because the modes of dissolution of a Municipal Council did not exist at the time when the Court pronounced its verdict. Although the dissolution of a Municipal Council was later introduced in the Constitution, the provisions of section 139 (1) (a) and (b) are to a large extent identical to those of section 100 (1) (a) and (b). They both make provision for issuing a directive and assuming responsibility. It seems then the purpose of introducing the dissolution of a Municipal Council as an appropriate step was aimed at removing any uncertainty that had existed with regard to the dissolution of a Municipal Council. The logical conclusion is that the decision in the *Second Certification of the Constitution* case on the successive steps to be taken when intervening in provincial government equally applies to intervention in local government, with the exception that intervention in local government under section 139(1) includes the

⁶⁴ 1997 (1) BCLR 1 (CC) (*Second Certification of the Constitution*).

⁶⁵ See *Second Certification of the Constitution* at para 120.

⁶⁶ At para 72.

⁶⁷ Murray C "Municipal Integrity and effective government: the Butterworth intervention" (1999) 14 *SAPL* 332 at 335.

dissolution of a Municipal Council as an appropriate step, whereas a section 100 intervention does not include the dissolution of a provincial government

Intervention in a Municipal Council under section 139(1) should be a process which requires a provincial government to commence by issuing a directive, then to assume the relevant obligations of the municipality, and finally, to resort to dissolving the Municipal Council when exceptional circumstances exist. It is evident that the steps taken by the provincial government when intervening in the municipality had not included any of the less intrusive steps mentioned in section 139(1). Apart from the fact that the provincial government did not intervene by means of the least intrusive step of issuing a directive, it also failed to inform the municipality of the intended intervention before it commenced with the intervention. The notice of the intended intervention is necessary in complying with the constitutional instruction for the spheres of government to foster friendly relations and to act in mutual trust and good faith.⁶⁸

In respect of the second intervention in the Abaqulusi Municipality, the investigators found that, although there were irregularities in the municipality, it was possible for the Municipal Council to continue to function and there was no need for the appointment of an administrator.⁶⁹ Accordingly, the second intervention came as a surprise to the municipality. It is assumed that the dissolution of the Municipal Council did not result from the report of the commission of inquiry into the affairs of the municipality because the report had recommended against the appointment of an administrator, and therefore also against the dissolution of the Municipal Council. The provincial government had, thus, acted against the recommendations of its own investigation and report. The MEC's appointment of the investigators, and his disregard for the findings and recommendations of his own investigation, may be an indication of bad faith on the part of the MEC. The appointment of the investigators seems then to have been a mere smoke-screen hiding the true intention to dissolve the Municipal Council at all costs.

It may be argued that the state of disarray and chaos in the municipality, as alleged by the MEC when dissolving the Municipal Council in his second notice of intervention, constituted a new ground for intervention. However, this state of affairs in the municipality had never before been raised, nor verified, with the municipality. Even if it were to be accepted that the provincial government had received reports that the Abaqulusi Municipality was in a state of chaos and disarray, the provincial government was still obliged to consider the facts and decide whether it justified the dissolution of the Municipal Council. Thus, the fact that the provincial government had received multiple complaints against a municipality does not entitle the provincial government to intervene and dissolve the Municipal Council without establishing the existence of the substantive requirements for intervention. In considering whether multiple

⁶⁸ See s 41(1) (h) (i) of the Constitution.

⁶⁹ See *KwaZulu-Natal Department of Local Government and Traditional Affairs Report of the Commission of Enquiry into the Abaqulusi Municipality in terms of section 139 of the Constitution and section 106 of the Local Government Municipal Systems Act* (September 2005) 102.

complaints against the municipality justified the dissolution of the Municipal Council, the Court held in the *Mnquma Local Municipality* case:⁷⁰

The approach appears to have been that the 'issues analysed above are multiple and, in their cumulative effect serious'. The finding is effectively that there were so many failures that the only appropriate form of intervention was the dissolution of the council. The danger with this approach is that a large number of what may constitute failures that are not serious and could easily have been resolved in another manner, are thrown together to justify the dissolution of a Municipal Council.

This judgment explains that each complaint received against a municipality should be investigated and a finding made as to whether it justified dissolution of the Municipal Council. The multiplicity of complaints, even if taken together, in itself does not make the matter, so serious as to warrant the dissolution of a Municipal Council. For this reason the provincial government erred in assuming that merely because there were several reports of irregularities this justified the dissolution of the Municipal Council. It is possible that these allegations could have been addressed in a different manner other than by dissolving the Municipal Council. In other words, the appropriateness of the steps taken by a provincial government should be considered even though the jurisdictional facts for the provincial government to intervene in a Municipal Council do exist.

5.5 Assessment of the supervision of the Utrecht Municipality

In assessing whether the supervision of the Utrecht Municipality conformed to the spirit of the Constitution and relevant legislation, it should be recognised that the first step taken by the MEC after receiving the allegations of maladministration and corruption was to appoint forensic auditors to investigate the allegations. This investigation was carried out in terms of section 106(1) (b) of the Municipal Systems Act which empowers the MEC to investigate the affairs of a municipality. Section 106(1) empowers the MEC to request information from a municipality if he or she "has reason to believe that a municipality...cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality." Sections 106(1)(a) and (b) of the Municipal Systems Act indicate that the MEC must commence the investigation under those provisions by requesting information, which request should precede the launching of an investigation into the affairs of the municipality.⁷¹ This approach conforms to the constitutional principle of co-operative government which requires all spheres of government to respect the constitutional status, institutions, powers and functions of government in the other spheres.⁷² For this reason, the MEC acted prematurely in appointing investigators before requesting and considering information

⁷⁰ At para 97.

⁷¹ See Steytler N & De Visser J *Local Government Law of South Africa* (LexisNexis Durban 2007) in chap 15:13 who argue that the fact that s 106(1)(b) refers back to "the matter" on which information was requested in terms of s 106(1)(a), suggests that the investigation must be preceded by such a request for information.

⁷² See s 41(1) (e) of the Constitution.

provided by the municipality. As the MEC's actions were contrary to section 106 of the Municipal Systems Act upon which the MEC had relied in initiating the investigation, the investigation into the Utrecht Municipality was unlawful.

The MEC also relied on section 155(7) of the Constitution as the source of his authority to investigate the affairs of the Utrecht Municipality. As stated by Steytler and De Visser, section 155(7) of the Constitution authorises national and provincial governments to regulate the exercise of municipal powers.⁷³ Accordingly, section 155(7) is used for monitoring local government in general and not for the monitoring of individual municipalities. Thus, in failing to inform and consult the Utrecht Municipality as regards the allegations of maladministration and corruption against it, the provincial government disrespected the constitutional status of the Utrecht Municipality.

5.6 Assessment of the supervision of the IMbabazane Municipality

A MEC has no power to appoint an acting municipal manager under the repealed provisions of the Municipal Structures Act.⁷⁴ However, the Municipal Structures Act was amended in 2011,⁷⁵ and the new amendment empowers the MEC either to extend the period in office of an acting municipal manager or to second an acting municipal manager to the municipality concerned.⁷⁶ Whereas the MEC has been empowered through an amendment to second an acting municipal manager and to extend the contract of an acting municipal manager,⁷⁷ the power of employing municipal personnel was not extended to the MEC. In addition, the MEC did not consider the relevant legislation regulating the employment of municipal managers. The Municipal Structures Act provides that the municipal manager is employed by the Municipal Council,⁷⁸ and regulates the procedure for employing a municipal manager by providing that the municipal manager is employed by the Municipal Council on the recommendation of the Executive Committee of the Municipal Council.⁷⁹ Thus, the Municipal Structures Act excludes the possibility of all members of a Municipal Council interviewing a candidate for the position of municipal manager.

The Municipal Structures Act makes provision for two stages in the appointment of a municipal manager. The first stage is when the municipal manager is interviewed by the Executive Committee of the Municipal Council, which then recommends the candidate, if suitable, to the Municipal Council for consideration. The second stage of the employment of the municipal manager is the consideration by the Municipal Council of

⁷³ Steytler & De Visser (2008) in chap 22:115 explain that as section 155(7) authorises only regulatory measures, it provides a basis for a general system of monitoring in that it imposes routine duties of reporting, rather than allowing for individualised monitoring actions.

⁷⁴ The repealed s 82 of Municipal Structures Act 117 Of 1998 empowered a Municipal Council to appoint a municipal manager or acting municipal manager.

⁷⁵ See s 15 of Local Government: Municipal Systems Amendment Act 7 of 2011, (hereafter the Municipal Systems Amendment Act).

⁷⁶ See s 54A (2) (b) and (6) (a) of the Municipal Systems Act.

⁷⁷ See s 54A (2A) (b) and (6) (a) of the Municipal Systems Act.

⁷⁸ See s 82 of the Municipal Structures Act.

⁷⁹ See s 30(5) (c) of the Municipal Structures Act.

the candidate who is recommended by the Executive Committee for appointment. In this regard the Municipal Council has the authority to consider only those candidates recommended for employment by the Executive Committee. Accordingly, it is the Municipal Council which has the authority to decide whether a candidate is suitable for appointment as municipal manager. None of the two candidates who had been interviewed by the two groups of councillors could be legally appointed as municipal manager. First, the candidate who had been interviewed by the councillors attending the meeting of the Municipal Council and had then been appointed by the Municipal Council had, in fact, not been appointed by the Municipal Council on the recommendation of the Executive Committee. On the other hand, the candidate who had been interviewed by the Executive Committee had, in fact, never been appointed by the Municipal Council. The appointment of this candidate was contrary to the Municipal Structures Act which requires a candidate to be appointed by the Municipal Council. Accordingly, if the MEC had applied the law correctly, he should have advised the Municipal Council of the IMbabazane Municipality that the procedure followed by both groups of councillors when appointing their preferred candidates had been irregular, and that the process ought to have started afresh. For these reasons, when dealing with the issue of the employment of the municipal manager at the IMbabazane Municipality, the MEC had compromised the municipality's ability to exercise its powers or perform its functions, which conduct is contrary to the Constitution.⁸⁰ In dealing with the crisis at the IMbabazane Municipality the MEC had acted like a court of law with jurisdiction to review, set aside or confirm the appointment of an employee. When a public functionary misconstrues their powers it offends the principle of legality, and the conduct of the MEC was at odds with the principle of legality.⁸¹

5.7 Assessment of the supervision of the UMvoti and UMgungundlovu municipalities

In assessing whether the supervision of the UMvoti and UMgungundlovu municipalities conformed to the spirit of the Constitution and relevant legislation, it should be recognised that, before the Municipal Systems Amendment Act had come into effect in 2011, the employment of municipal managers had been regulated by the Municipal Structures Act which provides that a Municipal Council must appoint a municipal manager, who is the head of administration, and also the accounting officer for the municipality, and that "a person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with the post".⁸²

In dismissing the MEC's claim and upholding the argument of the UMvoti Municipality about the power of the Minister to make regulations about the qualifications of the municipal managers under the Municipal Systems Act, the court *a*

⁸⁰ S 154 (1) and s 151(4) of the Constitution.

⁸¹ Mathenjwa M "A critique of the law regarding employment of municipal managers and the managers accountable to the municipal manager" (2013) 28 *S A Public Law* 265 at 270 states that the principle of legality demands that the bearer of public powers must not misconstrue the powers conferred.

⁸² See s 82(1) (a) and (2) of the Municipal Structures Act.

qua found that regulation 38 (1) of the Municipal Performance Regulations was not concerned with matters either listed or prescribed in sections of the Municipal Systems Act. In explaining why regulation 38 (1) was invalid, Van Heerden AJ stated:⁸³

In my view regulations promulgated under the Systems Act cannot lawfully restrict the ambit of section 82 of the Structures Act and to the extent that they purport to do so, as regulation 38 (1) does, they are infringing the principle of legality and as such are invalid.

The judgment of Van Heerden AJ was subsequently overturned by the Supreme Court of Appeal on a different ground. The Court found that since the applicant had indicated that he was no longer taking up the position of municipal manager there was no longer a *lis* between the parties.⁸⁴

The approach of the MEC in supervising the UMvoti Municipality is complicated by the different standards he applied in his supervision of the UMgungundlovu District Municipality, where similar circumstances applied. It is difficult to accept the explanation of the MEC regarding the employment of the manager at the UMgungundlovu District Municipality when his spokesperson stated that the MEC was not able to enquire about the appointment of the applicant by the UMgungundlovu District Municipality, because he did not have the applicant's CV. The statement by the MEC's spokesperson to the effect that the MEC was unable to act until such time as someone had brought forward concrete evidence further indicates a serious dereliction of duty on the part of the MEC. Nothing prevented the MEC to request the information regarding the CV of the applicant from the UMgungundlovu District Municipality.⁸⁵ The MEC also did not need the services of a whistle-blower to obtain the CV of the applicant who had been employed by the municipality contrary to the regulations applicable to the appointment of municipal managers. This view is based on the powers conferred on the MEC to enquire by requesting information from a municipality when there are allegations of serious malpractices in that municipality. However, the fact that the MEC acted swiftly, against the UMvoti Municipality (led by the opposition party) when he received allegations that it had transgressed the law, but dragged his feet in respect of similar allegations against the UMgungundlovu District Municipality (led by his own political party) may demonstrate that the supervision of these municipalities was conducted on a partisan and ill-considered basis

6 CONCLUSION

This article has clearly shown that the exercise of the power of supervision of municipalities by some provinces points to an encroachment on the affairs of municipalities by provincial governments under the pretext of regulating the exercise of municipal powers. The supervision of specific municipalities by provincial governments

⁸³ See *MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa* (unreported case no. 4462/2007) [26 November 2008] at para 12.

⁸⁴ See *Yengwa* at para 8.

⁸⁵ S 106(1) of the Municipal Systems Act empowers the MEC to request information from the municipality as there were allegations of serious malpractices regarding the employment of the applicant by the municipality.

also demonstrates a misinterpretation of their supervisory powers over local government and a degree of disrespect for the institutional and functional integrity of municipalities. This is evident from the case study on the dissolution of the Abaqulusi Municipality by the provincial government of KwaZulu-Natal – a dissolution which took place even against the recommendations of the commission of enquiry into the affairs of the municipality.⁸⁶ These trends in the supervision of local government further demonstrate that the intervention in municipalities is often marred by party-political considerations when municipalities are supervised by a provincial government led by a different political party than the party leading the municipality. This emerged from the cases in which investigations into municipalities were conducted for crude and partisan reasons.⁸⁷

The challenge inherent in the failure of some provincial governments to conceptualise and understand the legal prescripts regulating the supervision of local government requires first and foremost the attention of the national government which has the responsibility to intervene in a provincial government when it is failing to fulfil its executive obligations in terms of the Constitution or legislation.⁸⁸ There is a prima facie obligation on the national Department of Co-operative Governance and Traditional Affairs to ensure that provincial departments of Co-operative Governance receive instruction and guidance on the implementation of their monitoring and intervention functions. If a provincial government continues to misconstrue or abuse its powers of supervising municipalities, it will not be able to properly fulfil its constitutional obligations of monitoring and supporting municipalities. This misconstruing by some provincial governments of their powers to supervise municipalities has exacerbated the vulnerability of municipalities at the mercy of provincial government.

Of course, the national government is not the only responsible role player in this issue. All spheres of government, as well as the public at large, are responsible to realise the goals and objectives of the Constitution. However, in respect of the supervision of local government, meticulous adherence to the legal prescripts as set out in the Constitution and legislation is an indispensable point of departure. Observing the applicable legal requirements will go a long way to building mutual trust and goodwill. The purpose of this article is to raise the awareness of all concerned regarding the challenges faced by all three spheres of government in this regard. The hope is expressed that the article will result in much more interaction and debate on the issue of the supervision of local government by the other spheres of government. It is imperative that the shortcomings of the practice of supervision be acknowledged and addressed effectively. Ignoring them will inevitably lead to a breakdown in intergovernmental relations and a general inability to provide effective government at the local level. Resolving the issues will strengthen the local sphere and assist in

⁸⁶ See Kwazulu-Natal (South Africa) Provincial Department of Local Government and Traditional Affairs, *Report of the Commission of Enquiry in to the Abaqulusi Municipality in terms of section 139 of the Constitution and section 106 of the Local Government: Municipal Systems Act* (September 2005) at 102.

⁸⁷ See the judgment in *Democratic Alliance Western Cape*.

⁸⁸ See s 100(1) of the Constitution.

providing the kind of governance and services the people of South Africa need and desire.