

Supervision or oversight? How best to avoid a section 139 intervention?

Executive Summary

The Constitution of the Republic of South Africa obligates national and provincial government to monitor local government performance and provide support where capacity to perform is lacking. As a last resort, the Constitution also provides a framework for provincial intervention in local government matters where there is gross mismanagement at the municipal level that compromises services to communities. Essentially, the oversight and support role intends to prevent an intervention, which is an indicator of gross failure at a local government level. Notwithstanding the monitoring and support role and its anticipated role of preventing a section 139 intervention, local government has been characterised by numerous interventions that bring into question the effectiveness of the oversight and support provided. Research by the Financial and Fiscal Commission critically analysed the oversight and support framework applied by national and provincial government to municipalities, using a combination of qualitative and quantitative methods. While the full analysis identified various fundamental challenges with the oversight framework and the approach to its implementation, one of the key findings is that a paternalistic view to undertaking monitoring and support by national and provincial government is not conducive to an effective oversight framework. Furthermore, in order to improve the effectiveness of the monitoring and support function, which is critical to entrenching an early warning system at the local government level, it is important that a cooperative approach be embraced by all stakeholders.

Background

The South African Constitution obligates national and provincial government to regulate, monitor and support local government in fulfilling its constitutional obligations. As part of this framework, when such channels fail, provincial government can directly intervene in the affairs of local government to remedy such performance failures via a section 139 intervention.



THE FINANCIAL AND FISCAL COMMISSION

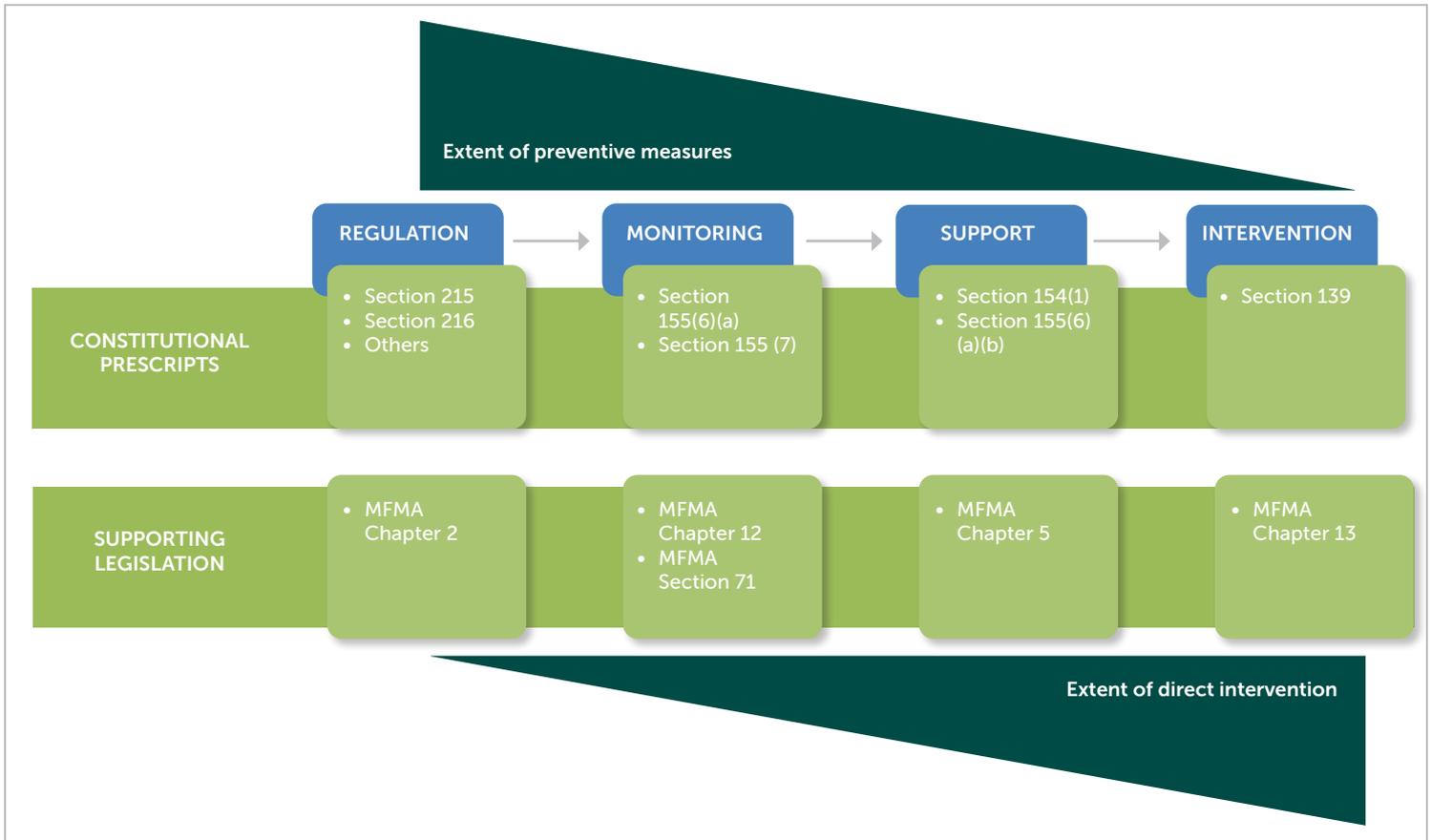
The Financial and Fiscal Commission is a body that makes recommendations and gives advice to organs of state on financial and fiscal matters. As an institution created in the Constitution of the Republic of South Africa, it is an independent juristic person subject only to the Constitution itself, the Financial and Fiscal Commission Act, 1997 (Act No. 99 of 1997) (as amended) and relevant legislative prescripts. It may perform its functions on its own initiative or at the request of an organ of state.

The vision of the Commission is to provide influential advice for equitable, efficient and sustainable intergovernmental fiscal relations between national, provincial and local spheres of government. This relates to the equitable division of government revenue among three spheres of government and to the related service delivery of public services to South Africans.

Through focused research, the Commission aims to provide proactive, expert and independent advice on promoting the intergovernmental fiscal relations system using evidence-based policy analysis to ensure the realisation of constitutional values. The Commission reports directly to both Parliament and the provincial legislatures, who hold government institutions to account. Government must respond to the Commission's recommendations and the extent to which they will be implemented at the tabling of the annual national budget in February each year.

The Commission consists of commissioners appointed by the President: the Chairperson and Deputy Chairperson, three representatives of provinces, two representatives of organised local government and two other persons. The Commission pledges its commitment to the betterment of South Africa and South Africans in the execution of its duties.

This process of regulation, monitoring, support and intervention is outlined in Figure 1, along with the prescripts of the Constitution and supporting legislation that give effect to this framework.



Source: Financial and Fiscal Commission

Figure 1: The process of the oversight and support framework

Monitoring has two primary goals: Firstly, to ensure that local government adheres to legislation and regulations; and secondly, for monitoring and the findings of such monitoring to act as an early warning system that identifies existing and potential challenges and failures. Following on from monitoring, support should provide remedial measures to address identified challenges and potential failures with the goal of mitigating the need for a provincial intervention in local government affairs. However, since 1998, there have been 140 section 139 interventions in local government¹, thus bringing into question the integrity and effectiveness of the monitoring and support provided by national and provincial government.

Research findings

The Commission’s analysis of the oversight and support framework and its implementation identified various challenges that serve to dilute the effectiveness and value that can be derived from this key responsibility allocated to national and provincial governments. This policy brief hones in on one of the issues: whether the monitoring and support provided by national and provincial governments should be viewed and implemented in a hierarchical or a cooperative manner. This remains an area of debate in the legal analysis and interpretation of the Constitution with regard to the spirit of intergovernmental support and oversight.

Section 40(1) of the Constitution establishes three spheres of government as “distinctive, interdependent and interrelated”. Many researchers view this clause as highlighting the autonomy of the spheres of government, particularly with reference to the word “distinctive”².

¹ Ledger and Rampedi (2019)

² Moeti & Khalo (2007); Schwella (2016)

Furthermore, the explicit emphasis on cooperative governance in the Constitution is an indication of respect afforded the “distinctive” nature and integrity of local government, which is further entrenched by the clear division of powers and functions across spheres and the exercising of local government’s “legislative and executive authority in its area”, in accordance with section 155 of the Constitution. Consequently, the White Paper on Local Government describes local government as “a sphere of government in its own right, and is no longer a function of national and provincial government” (RSA, 1998).

Alongside the above clauses relating to the autonomy of local government, section 139 of the Constitution provides insight into specific instances where local government’s authority and autonomy can be limited (Moeti & Khalo, 2007). Given this, it can be argued that the prescripts of the Constitution intend to balance a degree of subnational autonomy with intervention features through a system of cooperative governance. It is therefore important to place the monitoring and support functions of national and provincial government over local government within the nature of the South African state implicitly captured in the Constitution.

It should also be noted that, during the Certification³ of the Constitution of South Africa, the constitutional vision for local government was captured as “a structure for (local government). On the one hand, this reveals a concern for the autonomy and integrity of (local government) and prescribes a hands-off relationship between (local government) and other levels of government. On the other, it acknowledges the requirement that higher levels of government monitor (local government) functioning and intervene where such functioning is deficient or defective in a manner that compromises this autonomy”.⁴ The monitoring and support of local government by national and provincial government is thus contextualised as necessary to ensure that poor performance does not compromise local government expressing its autonomy within its constitutional duty towards its citizens. Therefore, it places an obligation on national and provincial government to ensure support to municipalities and build capacity where necessary.

The final Constitution placed monitoring and support within the context of cooperative governance, where the Constitution promotes “an integrated system of government in which both national and (local) governments are deeply implicated in each other’s functioning” (Schwella, 2016:77). However, some authors consider this oversight as “intergovernmental supervision” with national and provincial government acting as a “superior authority” over local government that is distinctive from cooperative governance (Reynecke, 2012).

It is the position of the Financial and Fiscal Commission that, in terms of the regulatory, monitoring and support responsibilities of national and provincial government over local government, the Constitution promotes an ideal of cooperation between spheres to ensure autonomy and effective service delivery, and subsequently mandates the national and provincial spheres to support and intervene when this vision fails, within the ambit of cooperative governance. The notion behind the obligation that national and provincial governments have to support local government is driven by the concept of decentralisation, where higher levels of government are better placed to identify and remedy common and exogenous challenges that may impact on subnational governments.

Conclusion and recommendations

Given the above arguments, one of the key findings of the research is that the monitoring and support provided by provincial government to local government is most effective when approached in the spirit of cooperative governance, as opposed to a patriarchal or “big brother” approach by national and some provincial governments. Further, it is important that the spirit of cooperative governance be emphasised during the process of monitoring and support and that the framework applied be best viewed as an “oversight” framework as opposed to a “supervisory” framework, the latter which assumes and applies an inefficient and ineffective hierarchical relationship between local government and higher spheres of government.

³ The Certification of the Constitution was a process that attempted to confirm whether the proposed (draft) Constitution adheres to the constitutional principles established in schedule 4 of the Interim Constitution of the country. This process formed an integral part of the processes towards the adoption of the new Constitution of South Africa.

⁴ Ex parte Chairperson of the Constitutional Assembly, in: re – Certification of the Constitution of the Republic of South Africa 1996(4) SA 744 (CC) para 373.

The Commission makes the following recommendations:

1. As part of National Treasury's review of capacity-building grants, financial support to build capacity and institutional systems (such as the Finance Management Grant and the Municipal Systems Improvement Grant) should:
 - i. be disproportionately directed at lesser-resourced, poorer and more rural municipalities;
 - ii. make every effort to ensure that capacity-building efforts are comprehensively consulted with and agreed to with a municipality;
 - iii. either link capacity-building efforts to a municipality-specific diagnosis of capacity challenges or deficits, or be specifically aimed at addressing challenges picked up through intergovernmental monitoring; and
 - iv. consider the consolidation of all capacity-building grants into one financial flow that is specifically linked to overall intergovernmental "support" of municipalities. This will assist in the administrative and reporting burden placed on both grant administering departments and receiving municipalities, and will further assist in streamlining the overall conditional grant framework.
2. The Minister of Cooperative Governance and Traditional Affairs, in enacting the provisions of section 105(3) of the Municipal Systems Act, should implement mechanisms to undertake a critical evaluation of the impact of the regulations, monitoring and support provided to local government, with an emphasis on the explicit cost-benefit analyses when new legislation, regulations, monitoring and/or support initiatives are introduced across the supervisory framework. The cost-benefit analysis should do the following:
 - i. Assess not only the outcomes/performance related to the oversight and support framework (e.g. whether there are more funded budgets), but also whether monitoring and support is provided in the most efficient and effective manner (i.e. minimising the burden placed on municipalities).
 - ii. Consider the Department of Performance Management and Evaluation, which is based at The Presidency, for this role. Such evaluations should be undertaken periodically with larger reviews every five years.
3. Given that the current monitoring and support framework is applied uniformly across local government, government should reconsider its current approach to explore the principle of a differentiated method to municipalities when it comes to financial and non-financial reporting requirements, overall monitoring and support.
4. The Minister of Finance should ensure that provincial treasuries are effectively capacitated to undertake their oversight and support role of local government in terms of financial management. In addition, government should consider developing a common framework to guide provinces in their oversight and support role towards the delivery of basic services.
5. Government should review specific legislation that results in a duplication of the supervisory and regulatory roles of national and provincial government departments.

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