

WHY EFFECTIVE INTERGOVERNMENTAL GOVERNANCE MECHANISMS ARE IMPORTANT BEYOND 2024

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Abstract: The relevance of local governments is frequently defended based on municipalities' novel contribution towards the promotion of democratisation and also the intensification of community participation in decision-making due to its close proximity to its citizens. However, the departing premise hereto is also that the realisation of a democratic and accountable government likewise depends on the degree of functionality of every municipal council. Volatility in governance structures like councils can therefore adversely compromise democratic and accountable governance, for example in cases of hung councils. In recent years, local coalition governments have been seen more frequently, partly due to the number of hang councils in South Africa. This can indirectly be attributed to the decline of support of the current ruling party in the Republic and, equally, the inability of other parties to obtain a clear majority during local government elections (Netswera & Khumalo 2022:1). This article investigates the effectiveness of national and provincial mechanisms strengthening an accountable and democratic local government Premier, Gauteng and Others v Democratic Alliance and Others matter. Through the doctrinal legal research, the authors used an analysis of primary sources on South African local government legislation and the impact the Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021) case have on hung councils. The research benefitted from secondary sources such as research reports, publications, journal articles and books. It follows that successful coalition councils are founded on the principles of cooperation and trust. Therefore, interventions as solitary intergovernmental mechanisms cannot remedy accountability and governance failures in municipalities, caused by coalition fallouts. Still, when a break between coalition partners ensues, accountable governance suffers because of the resulting volatility caused by the political standoff. The intergovernmental governance mechanisms, in isolation, are ineffective in sustaining and ensuring an accountable and democratic local government. Whereas, coalitions governments are the primary cause of volatility and dysfunctionality in municipalities, it remains the responsibility of coalitions to step up and execute their constitutional obligations as responsible executive actors in the local government area, to ensure accountable governance. In the absence thereof, coalitions must be held liable for the failure to execute their constitutional responsibilities.

Keywords: Accountability, Constitution, Council, democratic, dysfunctional intergovernmental governance, municipalities, national government, provincial government.

Introduction

Municipalities in South Africa are the government sphere that is responsible for the basic provision of services to its community members. Considering that the municipality should

provide these essential services to the community members, the municipality plays an important role in the community's quality of life (Madumo & Koma 2019: 581). Chapter 7 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) regulates local governments' status, powers and functions in South Africa. Section 151(1) of the Constitution states that the local government sphere is divided into different municipalities, which, according to section 151(3), provides that these municipalities have a right to govern the affairs of their community. However, it is subject to national and provincial legislation. Section 164 of the Constitution stipulates that if a municipality does not fulfil its constitutional obligations, the national and provincial legislation may prescribe the framework for compiling within the national legislation perspective. Realizing a democratic and accountable local government structure depends on the functionality of its municipal council. However, just as democratic and responsible local government is dependent on a municipal council, the unpredictability of the council, caused by coalitions, may also influence the objectives of a democratic and accountable government. Coalition governments are seen more frequently in South Africa due to the number of hung councils.

It should be noted that the Constitution does not contain specific provisions that regulate the formation and the functioning of coalition governments in the spheres of government. Dodd (2015:4) states that the Constitution creates a hybrid version of parliamentary government systems that apply to the spheres of government. In this hybrid version of the parliamentary government system, the executive power resides in the executive and can usually be removed by the municipal council. This power is regulated by ordinary legislation as opposed to the national and provincial government regulated by the Constitution. When standoffs are created, a coalition government can undermine the aim of an accountable and democratic government when there is no formal intervention in terms of section 139 of the Constitution by either the national or provincial sphere of government. This article intends to interpret the judgment of Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021) where intergovernmental governance mechanisms are cited as possible less intrusive remedies, in relation to stricter section 139 interventions. These accountability mechanisms stand to remedy the accountability deficit caused by failed or hung councils.

Through doctrinal legal research, the intergovernmental governance mechanisms are assessed to determine the influence thereof, to support coalition governments in realising their constitutional mandates. First, the discussion will highlight municipalities' constitutional mandate; the second will explore case law and the situations in which municipalities find themselves. Thirdly, the lessons learned through the application of intergovernmental governance mechanisms and a discussion on the dysfunctionality of municipalities will be initiated. Ultimately, a conclusion will be drawn.

Constitutional and legislative mandate of municipalities

Since municipalities form part of the three spheres of government in South Africa, it is essential to understand what the term 'municipality' means. This will avoid any ambiguity that may be created in this article. Roux (2005:64) describes a municipality as a public

organisation authorised to manage and govern its affairs in its area of jurisdiction. Roux (2005:64) states that it is essential to note that a municipality does not refer to an individual municipality but rather to the sphere of government. The individual municipalities make up the collective sphere known as local government. Madumo (2017:55) states that a municipality is a basic unit of government with responsibilities that facilitate the interaction between the government and its people while ensuring that services are delivered within its jurisdiction. These responsibilities are provided for in the Constitution. According to section 40(1) of the Constitution, the three spheres of government are distinctive, interdependent and interrelated. However, even though there is this division of powers between the three spheres of government, there is a direct relation and responsibility between the national government and provinces and between the national government and local government, which creates a sub-national government in South Africa (Monkam 2014: 276).

With the dawn of the new democracy in South Africa in 1994, Chapter 7 of the Constitution recognised local governments as one of the spheres of government that consist of municipalities that are responsible for the provision of executive and legislative authority through municipal councils, the right to government its initiatives, local government matters of the community and fulfils the jurisdiction to govern legislation that was passed by national and provincial spheres of government and the right to apply its powers or ability to execute its functions without the national or provincial spheres of government intervening (Madumo & Koma 2019: 582). Section 152 of the Constitution further establishes the importance of the local sphere of government in consideration that services must be delivered sustainably within its objectives. Their objectives include that the local government sphere is democratic and accountable, the delivery of services to communities in a sustainable way promotes socio-economic development, the establishment of an environment that supports the community's health and safety, and encourages participation of the community in the local government affairs (South African Government, 1996, s152(1) of the Constitution). The Constitution states that municipalities should attempt to achieve these objectives by considering their financial and administrative capacity (South African Government, 1996, s152(2) of the Constitution). To achieve these objectives, the municipality must structure and manage its administration, budgeting and planning processes to prioritise the community's basic needs. Therefore, the community must involve the community in the decision-making processes. This is seen, for example, in the councils of municipalities, where it is a prerequisite for the council to consider the views of the community before adopting the planning framework and approving the budget (Madumo & Koma 2019: 582).

The Constitution and the Municipal Systems Act stipulate the governance framework of municipalities. Municipalities' governance mechanism follows the governing body's constitutional, legal and administrative mandate to manage its powers. This includes checks and balances that must be incorporated to ensure that municipalities adhere to the objectives stipulated in the Constitution and that the municipality is accountable, the rule of law is followed, and transparency and public participation are evident. The political office-bearers and officials do this in the municipality (Madumo & Koma 2019: 584). For this article, it is important to understand the council established in the municipality. The municipal council is the governing body with executive and legislative authority in its area of jurisdiction (South African Government, 1996, s151(2) of the Constitution). The council

is an elected body of public representatives with the final decision-making authority (Madumo 2017:31).

Section 160(1)(b) and (c) of the Constitution allows the municipal council to elect a chairperson and executive and other committees subject to national legislation to regulate the affairs of the municipality. This is regulated in the Local Government: Municipal Structures Amendment Act 3 of 2021 (hereafter the Municipal Structures Act). Coalition governments form part of the mayoral executive system of government, similar to the national and provincial levels of government. The mayoral executive system is where the executive authority is exercised through the executive mayor, and the mayor is assisted by the mayoral committee (De Vos 2021). There are specific requirements after the municipal elections, such as the election of a speaker, appointment of a mayor and elections of the different committees. The stability of a coalition government may also be impacted in section 139(1)(c) of the Constitution. Section 139(1)(c) of the Constitution allows a provincial executive to dissolve a municipal council within the province and appoint an administrator. Section 139(1)(c) of the Constitution provides as follows:

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 the fulfilment of that obligation, including (c) Dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared, if exceptional circumstances warrant such a step.

However, with the intervention of section 139(1)(c) of the Constitution, problems may arise when a specific political party governs the related province and another political party governs the municipality or a coalition of parties hold the executive reins in the municipality. This is especially seen when a party that wishes to unseat the coalition government acts irrationally in a way that triggers the application of section 139 of the Constitution (De Vos 2021), without showing self-restraint by resorting to less invasive or better fitted mechanisms to support the municipality, before mechanically usurping the powers of a municipality. In this context, it is essential to revise the efficiency of intergovernmental mechanisms *vis-a-vis* the degree of dysfunctionality of municipalities and its determinants in South Africa through reviewing the Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021) (hence the Premier, Gauteng and Others v Democratic Alliance and Others). The results of the exercise will contribute to understanding intergovernmental governance mechanisms that influence the effectiveness and capability of municipalities and will help inform future decisions aimed at intervention by the provincial government.

Dysfunctional Municipalities: The Case Of Premier, Gauteng And Others V Democratic Alliance And Others

In context of the Municipal Council, it has been unable to convene since September 2018 and retain the necessary quorum due to walkouts by the African National Congress (ANC) and the Economic Freedom Fighters (EFF) councillors. During December 2019, the Gauteng Executive Council resolved to invoke section 139(1), read with section 154 of the Constitution on this municipality. This decision was invoked due to problems associated

with the financial management of the institution, service delivery issues, alleged maladministration, alleged corruption and institutional capacity (paragraphs 8 and 9 of Premier, Gauteng and Others v Democratic Alliance and Others). The Speaker of the Municipal Council responded to the letter of the MEC stating that no identification was given on which executive obligations were not met and that no engagement took place with the Municipal Council before invoking section 139(1). The MEC responded to the letter disputing the competence of the response and indicated that a directive was set out due to the Municipal Council's failure to render services to the communities not addressing water and electricity losses, inadequate revenue collection, poor debtor management, weaknesses in governance and related accountability deficit of the institution. (paragraph 13 of Premier, Gauteng and Others v Democratic Alliance and Others). In return, the Speaker responded to the directives with detailed action plans and programmes to be undertaken by the Municipal Council (paragraphs 9 and 10 of Premier, Gauteng and Others v Democratic Alliance and Others).

Hereto, the MEC enquired on whether the directives had served before the Municipal Council and correspondingly required an answer within three days. Consequently, the Gauteng Executive Council resolved to dissolve the Council in March 2020. This decision was attributed to the Municipal council that reached a deadlock with the councillors by walking out of the meeting and leaving the meeting to inquorate. The Municipal Council was immediately dissolved, and an administrator was appointed. The new elections were to be held within 90 days. The Democratic Alliance (DA) and the Municipal Council were presented, for the first time, with a Dissolution Notice that set out nine critical observations for the dissolution: "(1) a leadership crisis that has left the Council barely able to function; (2) due to this instability the City is without a Mayor, Mayoral Committee or Municipal Manager; (3) there has been widespread corruption; (4) there is a water crisis in Hammanskraal; (5) the City "has not been fulfilling its obligations in respect of grant spending"; (6) there is a "grave concern" of returning grants allocated for service delivery due to poor performance; (7) the suspension of the heads of the departments of human settlement and roads and transport; (8) there is a "widely reported crisis at the Wonderboom National Airport that include[s] issues of corruption and maladministration"; and (9) irregular expenditure to the tune of R5 000 000 000." (paragraph 101 of Premier, Gauteng and Others v Democratic Alliance and Others).

The DA launched an urgent application seeking review and setting aside the dissolution decision. The application also seeks to compel the ANC and EFF councillors to attend the council meeting. The Premier of Gauteng and the ANC opposed the application, while the EFF did not oppose the mandamus (paragraph 42 of Premier, Gauteng and Others v Democratic Alliance and Others). The High Court considered the validation of the necessary involvement of section 139(1)(c) of the Constitution. The High Court indicated that provincial intervention should have been used, and it did not justify the council's dissolution. The High Court stated that the provincial government had to apply less intrusive means in resolving the dysfunctionality and that there is no guarantee that an administrator and new council will resolve the staged walkouts by the ANC and EFF. The dissolution decision was set aside.

The decision of the High Court brought separate applications before the Constitutional Court, aggrieved the Premier, EFF and the ANC. The DA opposed the applications of the Premier and EFF. The Premier and EFF argued that the High Court did not correctly apply

the rationality test. They further indicated the true nature of the dysfunctionality of the Municipal Council was the breakdown in the coalition agreement between the DA and the EFF. The DA argued that the wording of sections 139(1) and 139(1)(c) of the Constitution must also consider the test of lawfulness due to the wording used, such as "appropriate step". The DA also argued that the Court should use less drastic steps that could be undertaken in exceptional circumstances. The DA further argued that the Court make an order that is just and equitable, and, to that end that the Court should order the ANC and EFF councillors to attend the Council meeting. The DA thought that even if the ANC and EFF councillors refused to vote, the Municipal Council would ensure the day-to-day running of the municipality. The ANC did not make representations and therefore elected to abide by the decision of the Court (paragraph 37 of *Premier, Gauteng and Others v Democratic Alliance and Others*).

The majority judgment held by the Constitutional Court identified four jurisdictional facts to be interpreted in terms of section 139(1)(c) of the Constitution. The first was the establishment of a failure to fulfil an executive obligation, the second was taking an 'appropriate step', the third was the existence of exceptional circumstances, and the last was that the extraordinary circumstance warranted the dissolution. The majority decision was that three of the facts had been established. Still, the dissolution was unjustified (paragraph 69 of *Premier, Gauteng and Others v Democratic Alliance and Others*). Therefore, the dissolution decision was unlawful (paragraph 208 of *Premier, Gauteng and Others v Democratic Alliance and Others*). It ordered the MEC to invoke the MEC's powers in terms of item 14(4) of Schedule 1 of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) to appoint a person or a committee to investigate the cause of the deadlock of the Municipal Council. Based, on the court's assessment of the unsuitability of a section 139 intervention and the deadlock in the Municipal Council cited in the judgment, consideration will now be afforded, whether other intergovernmental mechanisms are deemed more suitable to remedy the governance failures caused by the volatility and uncertainty of coalitions in municipalities.

Intergovernmental Governance Mechanisms

Based on their constitutional obligations in terms of constitutional and cooperative governance as intergovernmental actors, national and provincial governments hold constitutional responsibilities to monitor and support municipalities (Du Plessis 2010: 272). In light of the constitutional inference that these different spheres of government are interrelated, the national government performs a supervisory role in the other provinces, and the provincial governments must exercise a supervisory role over municipalities (SALGA 2020 and Du Plessis 2015: 43-55). In terms of the supervisory role performed, the provincial governments provide monitoring and support functions to municipalities (South African Government 1996, s 155 (6)(a) of the Constitution) and promote the development of local government capacity to allow municipalities to develop their capacity to perform their functions and manage their affairs (South African Government 1996, s 155(6)(b) of the Constitution). Set in lieu of these principles, various governance mechanisms are available to advance good governance in municipalities and restore functionality in dysfunctional municipalities. Typical examples of the associated supervisory role offered to municipalities include monitoring, support, regulation, and intervention (Wright, Dube & Du Plessis 2022:110).

Chapter 9 of the Medium-Term Strategic Framework (2019-2024) emphasises the critical role of other spheres of government to support local government. Hereto, the responsibility of both national and provincial governments is highlighted in that they have a responsibility to ensure that municipalities receive the best possible support to obtain their objectives. In this instance, support and monitoring mechanisms have also been developed in terms of both national and provincial legislation as intergovernmental mechanisms to support municipalities (Department of Planning, Monitoring and Evaluation 2019). Intergovernmental monitoring mechanisms allow other spheres of government to appraise the support required by municipalities. Understanding the needs of municipalities helps provincial and national governments discharge their constitutional obligations to strengthen the capacity of municipalities. This further allows municipalities to improve their capacity to manage their affairs (South African Government 1996, s 154(1) of the Constitution). In terms of Chapter 10 of the Systems Act, provincial and national governments are responsible for monitoring and standard setting. Importantly, in terms of provincial governments, the MECs for local government in the different provinces assume the responsibility to establish mechanisms, processes, and procedures to monitor municipalities exercising their powers and functions in the discharging and managing their affairs (South African Government 2000, Chapter 10 of the Systems Act). In context hereto, both national and provincial functionaries as monitoring and support actors to municipalities will now be discussed.

National functionaries as monitoring and support actors

From a national government perspective, intergovernmental monitoring and support will include important actors like the National Treasury, which is responsible for the management and expenditure of national revenue; this will, amongst others, include the monitoring and proper implementation of the Municipal Finance Management Act 56 of 2003 (hereafter MFMA) by municipalities. As part of national strategy documents like the National Development Plan (NDP), Chapter 13 calls on the other spheres of government to support and oversee local government (SALGA 2020). An emphasis accompanies this call on the need to improve measures to improve accountability. Typical intergovernmental mechanisms in this regard will include national and provincial treasury circulars like municipal budget circulars (National Treasury Circular 58: 2012, National Treasury Circular 59: 2012, National Treasury Circular 67: 2013), consequence management frameworks (National Treasury Circular 121: 2022), supply chain management enhancement and accountability circulars (National Treasury Circular 62: 2012) and revenue management frameworks (National Treasury Circular 64: 2012).

These circulars, together with mandatory reporting, like section 71 of the Systems Act reports to both provincial and national treasury, can actively monitor municipal standards and practices, which will likewise monitor functionality in coalition municipalities and serve as early warning systems when the financial well-being of a municipality suffers under the instability associated with coalition governments in municipalities. Notwithstanding the monitoring of core financial aspects like over and underspending of related budgets, the section 71 report guarantees transparency in reporting, improved oversight of the financial performance of municipalities by intergovernmental structures, early warning mechanisms for provincial and national legislatures, and municipal management to monitor and enhance municipal performance timeously. These

mechanisms empower intergovernmental actors to be preventative, rather than remedial by nature in their monitoring of coalition governments and prevent dysfunctionality (Division of Revenue Act 5 of 2023 provides a detailed discussion of the provision of conditional grants to municipalities that regulate proper expenditure using conditions about grant expenditure, related timeframes to it and the recovery of grant funding in the event of non-compliance. Also see Municipal SCOA Circular No. 13 Municipal Finance Management Act No. 56 of 2003, Guidance on recording of conditional grants).

Supplementary national government monitoring and support mechanisms are incorporated in the draft Intergovernmental Monitoring, Support and Interventions Bill, 2023 (South African Government 2023, Gen N 1915 in GG NO. 48932 of 10 July 2023). Although not promulgated at the time of publication of this research, the Intergovernmental Monitoring, Support and Interventions Bill of 2023 is likely to regulate monitoring, support and intervention projects between the three spheres of government. The purpose of the concept legislation is, in part, to monitor municipalities in terms of their adherence to their constitutional and statutory obligations, also, to provide targeted support to municipalities to enable them to fulfil these constitutional and statutory obligations, and lastly, to formally legislate any implementation of section 139 in terms of municipalities (Post facto the judgment in the Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC 34, the regulation of how related spheres of government co-operatively and in good faith exercise their powers and perform their functions in terms of section 100 and 139 of the Constitution is critical to prevent overreaching by other spheres of government, of which their actions must be executed in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.). Some of the more critical aspects regulated by the Bill in its current format include both monitoring and support of municipalities (South African Government 2023, Chapter 4 of Intergovernmental Monitoring, Support and Interventions Bill), and augmented with regulated interventions in municipalities only when deemed adequate in terms of the proposed statutory thresholds established by the proposed Bill (South African Government 2023, Chapter 5 of Intergovernmental Monitoring, Support and Interventions Bill). These mechanisms inter alia include the provision of professional, technical or administrative guidance and advice (South African Government 2023, s44(a) of the Intergovernmental Monitoring, Support and Interventions Bill); the temporary secondment of critical professionals, technical or administrative personnel (South African Government 2023, s44(b) of the Intergovernmental Monitoring, Support and Interventions Bill); assistance in managing, operating or maintaining different operative systems (administrative, personnel or financial systems; municipal service and other technical systems; operational systems, supply chain processes, performance monitoring and reporting processes; infrastructure, equipment or other assets;) (South African Government 2023, s44(c) of the Intergovernmental Monitoring, Support and Interventions Bill); the access to technical equipment and facilities (South African Government 2023, s44(d) of the Intergovernmental Monitoring, Support and Interventions Bill); the training of, and transfer of skills to, Councillors or staff (South African Government 2023, s44(e) of the Intergovernmental Monitoring, Support and Interventions Bill); the assistance in guiding decision-making (South African Government 2023, s44(f) of the Intergovernmental Monitoring, Support

and Interventions Bill); the sharing of information (South African Government 2023, s44(g) of the Intergovernmental Monitoring, Support and Interventions Bill); and financial support (South African Government 2023, s44(h) of the Intergovernmental Monitoring, Support and Interventions Bill).

Another essential attribute of the Bill relates to the addition of dispute resolution as an alternative step to induce compliance by a municipality with its executive obligations (South African Government 2023, s44(1) of the Intergovernmental Monitoring, Support and Interventions Bill). Hereto, the provincial executive may, if the conditions for an intervention in terms of section 139(1) of the Constitution in a municipality are met, now, instead of intervening in terms of section 139(1) of the Constitution, opt to utilise different forums, mechanisms and procedures established by the Intergovernmental Relations Framework Act 13 of 2005 (hereafter the IRFA) to induce a municipality to comply with an executive obligation (South African Government 2023, s48(1)(a) of the Intergovernmental Monitoring, Support and Interventions Bill). The new proposed “dispute resolution as an alternative step” does, however, not obligate the province to use the dispute resolution forums before a section 139 intervention and retains the use of the intergovernmental mechanisms in the same context as contained in the Intergovernmental Relations Framework Act, 13 of 2005 (South African Government 2005, s39(1)(b) of the IRFA whereby the framework regulating settlement of intergovernmental disputes as contained in Chapter 4 of the IGR Act does not apply to a dispute concerning intervention in terms of section 100 or 139 of the 30 Constitution).

Other examples of typical remedial national intergovernmental mechanisms that can be utilised without formal assumption or usurping of the complete corpus of localised executive powers and functions include section 63 interventions by either the provincial executive or the Minister in instances where the water services authority has failed to perform specific duties in terms of the Water Services Act (Karsten 2022). This type of intervention allows the "intervening power to step into the shoes of the failing municipality and perform the responsibility of the water services authority" (Karsten 2022). Therefore, the focus should be solely on the related water and sanitation functions without upsetting a municipality's principal governance functions and stability, as with the associated assumption of powers when a section 139 intervention occurs. For purposes of our scenario, this mechanism could likewise have remedied the "water crisis in Hammanskraal" governance failure without invoking the section 139 intervention instituted in the case of Premier, Gauteng and Others v Democratic Alliance and Others (African National Congress v Democratic Alliance and Others (CCT 82/20; CCT 91/20) [2021] ZACC 34; 2021 (12) BCLR 1406 (CC); 2022 (1) SA 16 (CC) (4 October 2021). Likewise the new Water Services Amendment Bill is also likely to strengthen monitoring and enforcement by allowing the issue of directives to municipalities that fail to meet minimum standards as per the current obligations seen in the current Act. Hereto the proposed amendments seem draconian to the extent that it will allow the water minister to appoint any water services institution to take over all the duties of the current water services provider, including operations, refurbishment, expansion, procurement billing and revenue to mention a few. This also include enforcement of non-compliance in the form of criminal prosecution and through the issuing of fines to both the municipality and the accounting officer in the event of continued transgressions.

Like the section 63 intergovernmental governance mechanism that provides remedial action about water and sanitation problems in delinquent municipalities, the Electricity Regulation Act 4 of 2006 regulates the conduct of “licensees” (SALGA 2022). All municipalities are service authorities, which includes the role of service authority for electricity as per the Constitution) related to the distribution of electricity by municipalities. Hereto, the National Energy Regulator established in terms of section 3 of the National Energy Regulator Act 40 of 2004 enforces the regulatory framework of the Electricity Regulation Act that inter alia includes the enforcement of compliance and taking of the required steps in terms of non-compliance and conduct investigations into the behaviour of the licensees (South African Government 2006, s4(1)(vi) of the Electricity Regulation Act). This typically opens the door to having municipalities’ distribution licences revoked if conditions in terms of the licence are not met (South African Government 2006, s18(1)(d) of the Electricity Regulation Act). These potentially include situations where municipalities, due to ongoing service delivery dysfunctionality problems, struggle to provide electricity to their constituents (South African Government 2006, s15(1)(m) of the Electricity Regulation Act) and likewise don’t comply to conditions relating to the termination of electricity supply to customers and end users under related circumstances (South African Government 2006, s25(1)(n) of the Electricity Regulation Act). Similar to the Hammanskraal water crisis problem, utility-orientated issues like electricity service delivery problems can be resolved without resorting to a formal section 139 intervention. Another remedial intergovernmental governance mechanism that can address dysfunctionality in municipalities includes the oversight work done by the Auditor General of South Africa. This work, inter alia, contains external auditing of municipalities and provides valuable insight regarding dysfunctional governance and the enforcement of “consequence management” from a recovery perspective (Karsten 2022). Hereto, remedial action about material irregularities, including fraud and other serious breaches, found in municipalities can now be addressed through these extraordinary powers of the Auditor General (South African Government 2018, s5(1A) and (1B) of the Public Audit Amendment Act). The enforcement of any material findings can be directly recovered from any person responsible for the loss incurred (South African Government 2018, s5(1A) of the Public Audit Amendment Act). This expanded mandate effectively deals with irregularities ranging from non-compliance, fraud, theft and breaches of fiduciary duties (National Treasury Circular 2020-2021: 2021). Examples of the related consequence management used by the Auditor General include where an accounting officer in the North West failed to make progress and implement recommendations of the Auditor General on a contract irregularly extended, whereby the Auditor General issued a directive for the financial loss to be quantified and recovered from the responsible parties and take the necessary disciplinary action (National Treasury Circular 2020-2021: 2021).

Provincial functionaries as monitoring and support actors

Additionally, provincial governments are similar to national governments responsible for the creation of mechanisms to also monitor local government capacity in managing their affairs in the related province (South African Government 2000, s105(1)(a) of the Systems Act) monitor development of municipal capacity to ensure proper development (South African Government 2000, s105(1)(b) of the Systems Act); and review the necessary support required by municipalities to strengthen their capacity to manage their affairs

(South African Government 2000, s105(1)(c) of the Systems Act). Provincial governments can also use current internal regulated performance monitoring mechanisms like annual reports (South African Government 2000, s105(3)(a) of the Systems Act) to monitor municipalities and request municipalities to provide additional information that will assist in the monitoring activities (South African Government 2000, s105(3)(b) of the Systems Act).

The mechanisms developed by provinces must typically include structured support assessments, diagnostic processes facilitated to monitor and understand municipal performance, the drafting of section 154 support plans and issuing of practice notes, circulars and directives to municipalities. The basis for provincial support in terms of underperformance can be found in the performance reports as required specific to section 46 and 47 of the Municipal Systems Act. Hereto, the MEC is responsible for the initiation of an investigation into the reasons why the related municipalities are identified in terms of underperformance. The use of section 46 quarterly reports is central to any assessment and related diagnostic report developed thereto. Post facto the diagnostic assessment, the related province must ensure that the approved section 154 support plan is implemented as to ensure that support is rendered where required (SALGA 2020).

The related plan is therefore drafted and implemented in compliance with the requirement of support to be provided in in terms of section 154 of the Constitution. Consequently any solution identified in terms of the diagnostic assessment and section 154 support plan must be implemented in partnership with the municipality, irrespective whether this relates to advice, technical support or other related resources. The Municipal Support Plan must indicate the support provided to a municipality to improve areas of underperformance. (SALGA 2020). Regulated provincial monitoring and support mechanisms include provincial acts like the Western Cape Monitoring and Support of Municipalities Act 4 of 2014. The Western Cape Provincial Government promulgated this Provincial Act to give effect to sections 154(1) and 155(6) of the Constitution, to make provision for measures to support municipalities in the Western Cape and further to develop and strengthen the capacity of municipalities (Western Cape Provincial Government, 2014, preamble of the Western Cape Monitoring and Support of Municipalities Act). The mechanism makes statutory provisions for the sharing of information and knowledge about municipal powers and functions, facilitating requests by municipalities for assistance (Western Cape Provincial Government, 2014, s2 of the Western Cape Monitoring and Support of Municipalities Act) and provision for practices notes (Western Cape Provincial Government, 2014, s4 of the Western Cape Monitoring and Support of Municipalities Act). These intergovernmental mechanisms are deemed “less invasive” from a self-governing perspective, whereby the intergovernmental involvement is restricted to support through the provision of information, technical support and direct requests for assistance by municipalities whereby the municipality maintains its responsibility to manage its affairs (SALGA 2020).

Resorting to dissolution is inappropriate in circumstances where there was another step that could have been taken which was reasonably capable of resolving the issue and would have been less invasive of local government autonomy (All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC para 34.). This was confirmed in the matter of the Premier, Gauteng and Others v Democratic

Alliance and Others (All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC para 34) in that “Where dissolution is resorted to, appropriateness must be determined in light of the fact that it results in the takeover of a democratically elected municipal council by an administrator appointed by the provincial executive. It involves, as counsel for the first respondent put it, the dissolution of one sphere of government by another and this impacts on separation of powers.” (Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC 34 para 88).

While writing this article, another draft amendment bill (Draft Western Cape Monitoring and Support of Municipalities Amendment Bill of 2023) was published for comment regarding the current Western Cape Monitoring and Support of Municipalities Act 4 of 2014. Part of the bill's objectives is to strengthen these monitoring and support mechanisms of the Western Cape Government to improve the ability of the province to support municipalities. Some of these proposed amendments include improved access to information (Western Cape Provincial Government, 2023, s2A and 2B of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill), the Provincial Minister to designate a provincial support officer to determine compliance by a municipality in terms of its statutory obligations (Western Cape Provincial Government, 2023, s3A(1) of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill), which inter alia include the determination of the scope and terms of reference of the monitoring and support to be provided (Western Cape Provincial Government, 2023, s3A(2) of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill), the provision of a report on the findings of the monitoring and support (Western Cape Provincial Government, 2023, s3A(3) of the Draft Western Cape Monitoring and Support of Municipalities Amendment Bill).

Other important provincial mechanisms, as part of monitoring and support, include section 106(1) assessments (Western Cape Provincial Government, 2014, s5 of the Western Cape Monitoring and Support of Municipalities Act) and investigation mechanisms (Western Cape Provincial Government, 2014, s7 of the Western Cape Monitoring and Support of Municipalities Act). It is anticipated that these assessments and investigations, as corrective measures, can also mitigate a failure to adhere to a statutory obligation or that an act of maladministration escalates into more severe dysfunctionality in the municipality. This includes where a municipality fails to perform a statutory obligation, hence the aforesaid will incorporate the non-performance of a statutory function. An example of a failure of a statutory obligation would include the non-performance of statutory duties of municipalities as referenced in the Municipal Systems Act and the Local Government: Municipal Structures Act 3 of 2021.

In general, a municipality performs its functions, in its area, in accordance with its “political, statutory and other relationships between its political structures, political office bearers and administration and its community” (South African Government 2000, s2(c) of the Systems Act). Equally hereto, if the MEC has reason to believe that that maladministration (Special Investigating Unit v MEC for health for the Province of the Western Cape and Others (2021) JOL 51786 (ECM) (unreported) at para 32-33, for related

interpretation of “maladministration), fraud (MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022) para 18 on how the Supreme Court of Appeal confirmed that the meaning of fraud and corruption does not only extend to the actual crime but extend to other crimes for instance theft of money), corruption (South African Government, 2004, s3 Prevention and Combating of Corrupt Activities Act for a detailed explanation of the general offence of fraud) or any other serious malpractice (Democratic Alliance Western Cape and others v Western Cape Minister of Local Government and Another [2006] 1 All SA 384 (C) at para 38-40, for related interpretation of “serious malpractice”) has occurred or is occurring in municipality in the province, the MEC must request information in terms of a notice issued based on the related transgression and even proceed to appoint investigations if he/she deems it necessary.

In the matter of the MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022)) the court cautioned on the restricted interpretation of the purpose of section 106 and confirmed that it is a “purpose-built mechanism not only for monitoring and strengthening of local government but also for accountability,” hence any restricted interpretation *inter alia* that the mechanism cannot be used to investigate other forms of criminal conduct will not provide a sensible meaning to give to the section (MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022) para 21.). Hereto the court also explained that the “exclusion of all criminal conduct apart from fraud and corruption from investigation” is likely to render the effect of any section 106 investigation “a dead letter” because it would create a plethora of unregulated offences in the local government domain (MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022) para 22).

Some of the offences that according to the court could prevail unchecked by this mechanism include an extended range of criminal offences related to maladministration of municipal finances in terms of section 173 of the Local Government: Municipal Finances Management Act 56 of 2003 ((MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022) para 22). Other related criminal investigations, for instance of how our municipalities are administrated, could be potentially blocked if only the restrictive approaches in terms of section 106 of the Municipal Systems Act mechanisms are applied, hence the restricted interpretation is not conducive to good and ethical governance (MEC Responsible for Local Government, Western Cape v Matzikama Local Municipality and Others (747/2021) [2022] ZASCA 167 (30 November 2022) para 22).

Mitigating dysfunctionalities in municipalities with intergovernmental mechanisms

The importance of intergovernmental governance mechanisms is therefore clearly displayed in the previously discussed sections. Evident from the above analysis, initial indications conclude that various intergovernmental mechanisms in the local government domain, may have the potential to remedy governance deficits in municipalities and related governance deficits caused by failed coalitions. This can be done, without the harsh constitutional interventions by another sphere of government.

The undermentioned table presented by the authors, provide confirmation of the ability of the researched mechanisms to provide support in terms of the specific dysfunctionality cited in the matter of the Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others [2021] ZACC 34. Hereto certainty must be obtained on whether the different individual dysfunctions cited in the Premier case, can be addressed by means of the plethora of mechanisms discussed in the above sections.

Dysfunctionality/ abandonment of function by coalition government	Type of governance mechanism	Governance Mechanism to resolve/mitigate dysfunctionality
<i>(a) leadership crisis that has left the Council barely able to function;</i>	Intergovernmental mechanism.	Municipal support through diagnostic assessment and 154 support plan (focus on action required and related timeframes thereto, provide clear guidance in terms of functionality of council and election of office bearers where required.
<i>(b) due to this instability the City is without a Mayor, Mayoral Committee or Municipal Manager;</i>	Intergovernmental mechanism.	Municipal support through diagnostic assessment and 154 support plan (focus on action required and related timeframes thereto, provide clear guidance in terms of functionality of council and the appointment of a municipal manager.
<i>(c) there have been widespread corruption;</i>	Intergovernmental mechanism.	Municipal support through diagnostic assessment and 154 support plan (focus on action required and related timeframes thereto e.g. functionality and findings of Internal Audit Function, Audit Committee, Disciplinary Board, performance management IDP, SDBIPS, section 32 investigations.) Also facilitate procedure to conduct a section 106 investigation.
<i>(e) the City “has not been fulfilling its obligations in respect of grant spending”;</i>	Intergovernmental mechanism	Division of Revenue Act (DoRA) requires the unspent conditional grants against the financial year under review must be returned to the National Revenue Fund (NRF), Municipal support through 154 support plan e.g. monitoring procurement plan, assessment of performance management in terms of IDP and SDBIPS.
<i>(f) there is a “grave concern” of returning grants allocated for service delivery due to poor performance;</i>	Intergovernmental mechanism	Municipal support through 154 support plan e.g. tracking and monitoring performance management, (tracking of expenditure) MFMA quarterly budget reports, SDBIPS, Enforcement of the unspent conditional grants against the financial year under review to be returned to the National Revenue Fund (NRF).
<i>(i) there is a “widely reported crisis at the Wonderboom National Airport that include[s] issues of corruption and maladministration”; and</i>	Intergovernmental mechanism	Special Investigation Unit (consider possible recovery), report to Auditor General, MEC section 106 investigation.
<i>(j) irregular expenditure to the tune of R5 000 000 000.</i>	Intergovernmental mechanism	Undertake section 32 investigation, consider section 172 and section 173 offences. Role-players to execute responsibilities: Special Investigation Unit (consider possible recovery),

		report to Auditor General, MEC section 106 investigation.
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Conclusion

South Africa uses a hybrid version of the parliamentary system of government in the different spheres of government. As seen above, this parliamentary system of government generates more opportunities to form coalitions, which is likely to happen when there are differences between the dominant party and some of the other parties. As seen above in the case of *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* [2021] ZACC 34 when no party obtains an absolute majority, the other parties will be forced to work together.

This paper has assessed the intergovernmental measures in terms of strengthening accountability in municipalities with a focus on the *Premier, Gauteng and Others v Democratic Alliance and Others; All Tshwane Councillors who are Members of the Economic Freedom Fighters and Another v Democratic Alliance and Others; African National Congress v Democratic Alliance and Others* [2021] ZACC 34 case. This qualitative research aimed to analyse whether governance improved in hung municipalities where section 139 interventions were applied as an isolated intervention method (as narrated in the judgement), and second the impact that other intergovernmental mechanisms associated with the national and provincial spheres of government will have in dysfunctional municipalities. As presented in the abovementioned table, evidence is recorded that the researched mechanisms are likely to temporarily provide support in terms of the specific governance and service delivery failures cited in the matter of the *Premier, Gauteng and Others v Democratic Alliance and Others*.

The intergovernmental mechanisms are however only likely to provide interim relief as interim support mechanisms to reset dysfunctional local government structures. These intergovernmental governance mechanisms, used in isolation, will therefore not be conducive to ensure long-term viability and stability in democratic local government structures. Therefore, in conclusion, in the aftermath of the assessment of these intergovernmental governance mechanisms, the mechanisms in isolation, are ineffective to ensure an accountable and democratic local government, whereas coalitions need to execute their constitutional obligations as responsible executive actors in the local government area. In the absence thereof, coalitions must be held liable for the failure to execute their constitutional responsibilities.

Important to the study is understanding that other spheres of government can aid municipalities with the necessary monitoring and support, as envisaged in terms of the Constitution, but municipal councils must execute their executive and legislative authority to govern, on its own initiative, the local government affairs of its community and when councils fail, they must hold liable for their own executive failures. Equally, more must be done to hold coalitions liable for their executive failure to execute their constitutional responsibilities.

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