

## **LOCAL GOVERNMENT PROJECT**

Adv Johnny de Lange

Bellville, 11 August 2001

Dear Adv de Lange,

**RE: PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO LOCAL GOVERNMENT AS PER AMENDMENT BILLS 3 AND 4 OF 2001**

The above matter refers.

The Community Law Centre (UWC) hereby submits the following comments:

### **1. REMOVAL OF THE ADJECTIVE 'EXECUTIVE' IN SECTIONS 100 AND 139 IN AMENDMENT BILL 4**

#### **1.1 Introduction**

Local government's status in the institutional framework finds its most critical expression in the authority of a democratically elected municipal council to express the wishes of its constituency in a by-law. Therefore, the removal of the adjective 'executive' in sections 100 and 139 goes straight to the core of local government's status as one of the distinctive, interdependent and interrelated spheres of government. Therefore, it cannot be, as the explanatory memorandum states, merely a 'technical' change.

The rationale behind this proposal appears to be to enable the intervening provincial or national government to pass critical municipal legislation, such as a municipal budget. The failure to pass a budget has been the problem in a number of municipalities that were previously subjected to section 139 interventions. The administrator(s) appointed to restore the situation in the municipality were dependent on the councillors when attempting to pass a budget for the municipality in order to prevent unauthorised expenditure.

#### **1.2 Objection**

The objection against this proposal is twofold:

Firstly, extending the intervention power to legislative acts significantly reduces local government status in the Constitution. This mode of intervention goes to the

core of democratic local government – its ability to make law. This right to govern itself is, of course, attenuated with the possibility that an elected Council may be dissolved. This may be a necessary and an acceptable compromise because the aim of the dissolution is to ensure that a new council is elected within 90 days.

The system of co-operative government, laid down in the Constitution recognises three *spheres* of government and entrenches the principle their positions are not determined by hierarchy. By recognising the autonomy of provincial legislation in section 100 and at the same time allowing national and provincial governments to pass municipal legislation, local government is again being reduced to being the stepchild of the other spheres of government. Because local self-government is a key approach to successful developmental government and establishing a culture of democratic responsibility, it is worth preserving the bedrock of democratic governance of local government, namely the authority to make laws.

Secondly, the problem that the amendment seeks to address has already been dealt with adequately in draft municipal finance legislation. Sections 16 and 17 of the draft Municipal Finance Management Bill authorise a municipality that failed to pass its budget to withdraw funds from its Revenue Fund. These funds may be used only to defray current expenditure in connection with matters for which funds were appropriated in the previous annual budget. This enables the administrator to take over the municipality and run its affairs without being hamstrung by its failure to pass a budget. A *new* budget would have to be passed by the council (or a new council, if the existing council is dissolved), thereby leaving intact the council's democratic mandate to prioritise its municipality's needs and appropriate funds to meet those needs.

### **1.3 Proposal**

It is submitted that the adjective 'executive' be retained in section 100(1). The insertion 'excluding an obligation to pass legislation in the case of a province' thereby becomes superfluous and can also be removed.

It is submitted that the adjective 'executive' be retained in section 139(1).

## **2 INSERTION OF 155(8) IN AMENDMENT BILL 3**

### **2.1 Unprincipled constitutional authorization**

The approach to constitutional amendments as evidenced in these amendments is one of unprincipled constitutional authorization. The first example of this approach was the 1998 Constitutional Amendment (Act 65 of 1998) that simply stated in section 159(2): “If a Municipal Council is dissolved in terms of national legislation ...”. No guiding principles are given for this very intrusive step in democratic local governance. There was no explicit reference that the checks and balances of section 139 applied. The normative framework for dissolution was thus left to the Municipal Structure Act of 1998. This style of constitutional amendment abdicates the very purpose of the Constitution, namely, to provide a broad normative framework for national legislation.

Section 155(8) is the same mould. The explanatory memorandum is quite explicit: “Both amendments [which includes s 155(8)] give effect to ... the Municipal Finance Management Bill”. The point is that the national legislation should give effect to the Constitution, and not the other way around. This approach to constitutional amendments is in effect seeking to write into the Constitution blank cheques that are then completed by national legislation. The proper approach, we submit, is for the normative framework to be clearly spelled out in the Constitution and not be relegated to national or provincial legislation that may undermine the spirit of our system of intergovernmental relations.

### **2.2 Section 155(8) disturbs the balance of intergovernmental relations**

Section 139 provides for the ‘assumption of responsibility’ for municipal affairs and contains a system of checks and balances that apply to the exercise of this far-reaching executive act.

Section 155(8) authorizes that either the national or a provincial government may exercise executive and legislative authority *on behalf of* a municipality (the difference between ‘exercising authority on behalf of’ and ‘assuming responsibility for’ is confusing and will give rise to endless problems around literal interpretations) when either the municipal council cannot function or there is a serious and persistent financial emergency. This section is not directly linked to section 139. If section 139 is not applicable, then none of the safeguards of section 139 apply even though the scope of intervention is even more intrusive than that an assumption of a particular executive obligation under section 139(1)(b). The result will be that the national legislation enabling an intervention as envisaged by section 155(8) need not comply with the safeguards of s 139. This will, in effect, render section 139 a dead letter, much to the prejudice of local self-government.

Section 155(8) endows Parliament with the power to legislate for an intervention mechanism that is more intrusive than section 139. The proposed section 155(8) makes no provision for any checks and balances, any oversight over or review of the exercise of authority on behalf of a municipal council. Even

though the national legislation can provide for this it is an anomaly that checks and balances are provided for in sections 100 and 139 and that the Constitution does not call for them in section 155(8). In sum, the Constitution would give Parliament greater powers than the Constitution itself has.

### **2.3 Fragmentation of intervention powers**

The proposed inclusion of section 155(8) appears to be part of a trend to increase the number and power of oversight and supervision instruments:

- section 34(3) of the Municipal Structures Act provides for the dissolution of a council after an unsuccessful 139 intervention;
- the amendment of section 159 of the Constitution appears to sanction dissolution as an appropriate intervention without giving it an explicit constitutional basis;
- this proposed amendment introduces powers for national government to intervene in local government;
- the Municipal Finance Management Bill introduces financial emergencies as circumstances warranting the assumption of authority by provincial government; and
- section 155(8) provides for the exercise of authority on behalf of the council when it, for any reason, cannot function as well as for the financial emergency.

The need for most of these measures cannot be contested. However, the fragmentation of intervention powers will harm the system of intergovernmental relations. Local government will be made subject to two possible 'interveners' and a myriad of intervention powers, some which are entrenched in various parts of the Constitution and some of which are entrenched in ordinary statutes and more or less implicitly 'sanctioned' by the Constitution. Ultimately the institutional integrity of local government will become victim to this 'diaspora' of intervention powers.

### **2.4 Proposal**

In order to preserve the integrity of our system of intergovernmental relations, a uniform approach to interventions should be adopted. This entails that the same principles and checks and balances should be applied when one sphere intervenes in the "geographical, functional or institutional integrity of government" of another sphere. It is thus submitted that any intervention, be it dissolution of a council or a financial rescue mission, should resort under section 139 or section 100.

New sections 100 and section 139 should therefore, in addition to their current provisions, deal with:

- national intervention powers in local government;
- financial emergency as a situation under which intervention in local government is permitted (in addition to the 'failure to fulfil and executive obligation'; and

- dissolution of a council as an appropriate step, following the directive and the assumption of responsibility.

The Community Law Centre has made concrete proposals with proposed formulations for a new section 139 and a new section 100A that meet the requirements of efficient local government without harming our constitutionally entrenched system of intergovernmental relations.

### **3 PROPOSED FORMULATION OF NEW SECTIONS 139 AND 100**

#### **3.1 Objectives**

The objectives of the proposed formulations are:

- To preserve the bedrock of democratic governance of local government, namely the authority to make laws by the retention of the qualifier 'executive' in section 139 and the new section 100;
- To provide for national intervention in local government by including a separate section 100A, dealing with national supervision;
- To spell out the normative framework for intervention in the event of a financial emergency in the Constitution by placing it within the context of national supervision (s 100A);
- To enable provincial government to deal with circumstances where a municipal council for any reason cannot function by providing for the dissolution of that council in that case;
- To spell out the normative framework for the dissolution of a municipal council in the Constitution by placing it within the context of provincial supervision (s 139); and
- To retain the system of checks and balances within the constitutional framework by preserving the role of the National Council of Provinces as per the original text.

## 3.2 Formulation

### “National supervision of local government

#### 100A

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

- (a) issuing a directive to the municipality, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to –
  - (i) maintain essential national standards;
  - (ii) meet established minimum standards for the rendering of a service;
  - (iii) maintain economic unity;
  - (iv) maintain national security; or
  - (v) prevent that municipality from taking unreasonable action that is prejudicial to the interests of another municipality, the province or to the country as a whole; and
- (c) assuming executive authority on behalf of a Municipal Council to the extent necessary to resolve a serious and persistent financial emergency in the municipality as determined by a court of law

(2) If the national executive intervenes in municipality in terms of subsection (1) (b) –

- (a) notice of the intervention must be tabled in the National Council of Provinces within 14 days after the intervention began;
- (b) the intervention must end unless it is approved by the Council within 30 days of its first sitting after the intervention began; and
- (c) the Council must review the intervention regularly and make any appropriate recommendations to the national executive.

(3) National legislation may regulate any of the processes established by this section.”

## **“Provincial supervision of local government**

139

(1) When a municipality –

- (a) cannot or does not fulfil an executive obligation in terms of legislation or the Constitution; or
- (b) is unable to govern, on its own initiative, the local government affairs of its community;

the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation or to rectify the situation.

(2) Appropriate steps include –

- (a) issuing a directive to the municipality, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
- (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to –
  - (i) maintain essential national standards
  - (ii) meet established minimum standards for the rendering of a service;
  - (iii) prevent that municipality from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
  - (iv) maintain economic unity; or
- (c) dissolving the Municipal Council when –
  - (i) an intervention in terms of subsection (2)(b) has not resulted in the Council being able to fulfil its obligations in terms of legislation; or
  - (ii) the Municipal Council for any reason is unable to govern.

(3) If a provincial executive intervenes in a municipality in terms of section (2)(b) –

- (a) notice of the intervention must be tabled in the provincial legislature and in the National Council of Provinces within 14 days after the intervention began;
- (b) the intervention must end unless it is approved by the Council within 30 days of its first sitting after the intervention began; and

(c) the Council must review the intervention regularly and make any appropriate recommendations to the provincial executive.

(4) The provincial executive may dissolve a municipal council in terms of subsection (2)(c) only-

(a) with the concurrence of the Cabinet member responsible for local government; and

(b) after notice of that dissolution has been tabled in the National Council of Provinces and that Council has approved the dissolution.

(5) National legislation may regulate any of the processes established by this section.”

Yours truly,

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