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COURTING AN INTERVENTION: CONCEPTUALISING THE JUDICIAL ROLE IN MATTERS RELATING TO SECTION 139 OF THE SOUTH AFRICAN CONSTITUTION

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A thesis submitted to the Wits School of Law, Faculty of Law, Commerce and Management, University of the Witwatersrand in fulfilment of the requirements for the degree of Doctor of Philosophy

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ABSTRACT

COURTING AN INTERVENTION:
CONCEPTUALISING THE JUDICIAL ROLE IN MATTERS RELATING TO SECTION 139 OF THE SOUTH AFRICAN CONSTITUTION

PhD Thesis

Claire Franklyn
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This Thesis conceptualises the developing judicial role in matters relating to section 139 of the South African Constitution, being the constitutional intervention mechanism in terms of which a provincial executive (or, in certain circumstances, the national executive) intervenes, temporarily and in a circumscribed manner, in a dysfunctional municipality. The burgeoning judicial role has developed within the context of systemic local government collapse, persistent service delivery failures, and failing and dysfunctional constitutional accountability and intergovernmental monitoring and support mechanisms.

Three broad categories of section 139 intervention matters are identified in this Thesis: first, the judicial review of a decision to initiate a section 139 intervention, second, the judicial review of a failure to take such a decision, and third, a catch-all category relating to matters which trigger, or at least, this Thesis argues, *should* trigger, a consideration of section 139 of the Constitution, where such intervention does not form part of the requested relief.

Chapter 1 sets out the policy, constitutional and legal framework and practice of the section 139 intervention mechanism. Chapter 2 draws on case law and academic literature relating to the South African court's adjudication of different subject matters (or 'streams'), each of which have elements pertaining to the section 139 intervention mechanism, to develop a conceptual, analytical and evaluative framework for constructing a judicial role conception in matters relating to section 139 of the Constitution. Chapters 3, 4 and 5 apply this framework to systematically analyse the case law falling within the three identified categories of section 139 intervention matters, tracing doctrinal developments and building a conception of the judicial role with a focus on justiciability, judicial scrutiny and remedial prescriptiveness.

The conclusion to the Thesis in Chapter 6 consolidates insights from the three categories, ultimately arguing that the South African environment is generally conducive to litigation relating to section 139 of the Constitution, with the court adopting a catalytic judicial role, shifting its levels of judicial scrutiny and remedial prescriptiveness in each category based on an intersection of its understanding of its own role under the doctrine of separation of powers, the role of governmental action and responsiveness, the integrity and healthy functioning of the applicable democratic institutions, structures and processes, and the seriousness of any underlying socio-economic rights violations.

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LIST OF ABBREVIATIONS AND SHORT FORMS

AGSA	Auditor-General of South Africa
AJLS	African Journal of Legal Studies
AJPA	African Journal of Public Affairs
ANC	African National Congress
CCR	Constitutional Court Review
CLoSA	Constitutional Law of South Africa
CoGTA	Cooperative Governance and Traditional Affairs
CILSA	Comparative and International Law Journal of Southern Africa
CUP	Cambridge University Press
DA	Democratic Alliance
DCoGTA	Department of Cooperative Governance and Traditional Affairs
EFF	Economic Freedom Fighters
Eskom	Eskom Holdings SOC Limited
HJRL	Hague Journal on the Rule of Law
HSF	Helen Suzman Foundation
IRFA	Intergovernmental Relations Framework Act 13 of 2005
JSAS	Journal of Southern African Studies
KZN	KwaZulu-Natal
LDD	Law, Democracy and Development Law Journal
MEC	Member of the Executive Council

MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MFRS	Municipal Finance Recovery Service
NA	National Assembly
NCOP	National Council of Provinces
OUTA	Opposition to Urban Tolling Alliance
PAJA	Promotion of Administrative Justice Act 3 of 2000
PARI	Public Affairs Research Institute
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SALGA	South African Local Government Association
SALJ	South African Law Journal
SAJHR	South African Journal of Human Rights
SAPL	South African Public Law
SCA	Supreme Court of Appeal
SERI	Socio-Economic Rights Institute of South Africa
SLR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UDM	United Democratic Movement
VRÜ	Verfassung und Recht in Übersee
YLJ	Yale Law Journal

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Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Structures Act 117 of 1998

Local Government: Municipal Systems Act 32 of 2000

South African Human Rights Commission Act 40 of 2013

CHAPTER 1: LOCAL GOVERNMENT, THE SECTION 139 INTERVENTION MECHANISM AND THE INVOLVEMENT OF THE COURTS

1.1 Introduction and the current state of local government

The South African constitutional and legislative framework assumes that local government (a critical sphere of government within the South African constitutional scheme) will function effectively and competently, fulfilling its role with limited monitoring and support from national and provincial government, and with intervention by the provincial (or, where applicable, national) executive only in the event of a crisis.

News reports, however, regularly detail local government dysfunction and collapse, as well as the particular challenges faced by local government, such as limited financial and human resources, weak institutional capacity, ongoing service delivery and governance failures, and financial mismanagement, often attributed to corruption, criminality, general mismanagement and insufficient managerial qualifications or capacity.[1]

These challenges have not only been identified in news reports. Submissions made to the Moseneke Inquiry on Free and Fair Local Government Elections during COVID, for example, 'drew attention to the governance devastation' at 'most municipalities' in South Africa, citing 'dysfunctional and totally inept municipal councils' with 'bouts of unaccountable government, inept and dishonest financial accounting and downright failure to observe the law that governs

[1] See, for example, Jan-Jan Joubert 'Report: Municipalities unviable' *Moneyweb* (19 March 2021) available at https://www.moneyweb.co.za/news/south-africa/report-municipalities-unviable/, accessed 6 March 2023; Jason Felix 'Experts warn of instability if dysfunctional municipalities continue "spending money it does not have"' *News24* (3 March 2022) available at https://www.news24.com/news24/southafrica/news/experts-warn-of-instability-if-dysfunctional-municipalities-continue-spending-money-it-does-not-have-20220303 accessed 7 February 2023. Also see Marius Pieterse 'Anatomy of a crisis: structural factors contributing to the collapse of urban municipal governance in Emfuleni, South Africa' (2021) 32(2) *Urban Forum* 1 at 1-2; and, generally, Crispian Olver *How To Steal a City: The Battle for Nelson Mandela Bay* (2017).

municipalities'.[2] The South African courts are also increasingly recognising and commenting on the 'current malaise which besets local government' and the 'high level of municipal dysfunction'.[3]

In August 2021, the Department of Cooperative Governance and Traditional Affairs ('DCoGTA') reported that 64 municipalities (up to 66 municipalities by November 2022[4]) were 'dysfunctional' based on factors such as: the political situation, the state of governance, the administration, financial management and service delivery levels.[5] It was further reported that 163 municipalities were under 'financial distress' and that 108 municipalities had unfunded budgets (meaning that these municipalities would spend more than the revenue collected, with the possibility of being unable to meet financial obligations).

On 21 September 2022, National Treasury reported that: 85% of municipalities (approximately 219 municipalities) met the 'criteria [in the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA')] for financial problems and crises',[6] 59% of municipalities (approximately 151 municipalities) were bankrupt, insolvent and unable to pay creditors and third parties, 68% of municipalities (approximately 175 municipalities) were in financial distress and on the brink of a financial crisis, 17% of municipalities (approximately

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[2] Justice Moseneke *A Report to the Electoral Commission of South Africa in Terms of Section 14(4) read with section 5(2)(a) of the Electoral Commission Act* (2021) para 297. Also see *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* 2022 (5) BCLR 571 (CC) para 195.

[3] *Electoral Commission* supra note 2 para 194; *Eskom Holdings v Resilient Properties* 2021 (3) SA 47 (SCA) paras 2, 93 in which the Supreme Court of Appeal ('SCA') observed that the factual scenario 'graphically illustrate[d] the distressing state of municipal governance' in South Africa, depicting a 'picture of the dysfunctional state of affairs bedevilling local government', which is facing a 'colossal crisis'; *Unemployed Peoples Movement v Premier, Province of the Eastern Cape* 2020 (3) SA 562 (ECG) ('*UPM')* paras 5-7.

[4] CoGTA Portfolio Committee 'Final State of Local Government report: engagement with [DCoGTA]; Progress on tabling of the Monitoring, Support and Interventions Management Bill; with Deputy Minister' (30 November 2022) available at https://pmg.org.za/committee-meeting/36191/ , accessed 15 February 2023; DCoGTA *State of Local Government Report – Presentation to Portfolio Committee* (30 November 2022) at 26.

[5] DCoGTA *State of Local Government Report – Local government support and interventions package* (24 August 2021) at 5-6.

[6] The MFMA criteria are discussed in paragraphs 1.2.1 and 1.3.2 below; see section 138 of the MFMA (detailing financial problems) and section 140 of the MFMA (detailing a financial crisis).

43 municipalities) were in 'crisis' (although this term was not defined), and 44% of municipalities (approximately 98 municipalities) had adopted an unfunded budget for the 2021/22 financial year. National Treasury reported further that, by September 2022, municipal debt owed to Eskom Holdings SOC Ltd ('Eskom') was estimated at R39.8 billion, municipal debt owed to the water boards was estimated at R15.1 billion, while consumers owed municipalities approximately R255.5 billion.[7]

The report by the Auditor-General of South Africa ('AGSA') on the local government audit outcomes for 2021/22 observed that local government is 'characterised by deteriorating standards of living, service delivery failures, dysfunctional municipalities, councils and administrative instability, financial mismanagement, service delivery protests and crumbling municipal infrastructure'.[8] In this report, the AGSA found that the financial position of 29% of the municipalities assessed (approximately 70 municipalities) was 'so dire' that there was 'significant doubt about their ability to fully operate in future', while 56% of the municipalities assessed (approximately 121 municipalities) had indicators of 'financial strain'. Without available funds, and the ability to manage these funds, many municipalities fail to deliver

[7] National Treasury 'Briefing by NT on underspending on municipal revenue management improvement programme (MRMIP) as at the end of the 2021/22 financial year' (21 September 2022) available at https://static.pmg.org.za/220921Underspending_on_MRMIP.pdf, accessed 29 September 2022.

[8] AGSA *Consolidated General Report on the local government audit outcomes: MFMA 2021-22* (2023) at 2, 39-40; AGSA *Consolidated General Report on the local government audit outcomes: MFMA 2020-21* (2022) at 3. The AGSA is an institution established under Chapter 9 of the Constitution which is involved in the audit of local government and is responsible for issue audit opinions which may be 'adverse' (where the municipality's financial statements include so many material misstatements that the auditor cannot confirm most of the amounts and disclosures) or 'disclaimed' (where the auditor cannot find enough paperwork to come to any conclusion about the accuracy of the financial statements) or 'qualified' (where the financial statements contain material misstatements in specific amounts). The AGSA's reports have consistently recorded 'the decline in the affairs of local government' which, as noted in the Moseneke Report op cit note 2 at para 298, have borne 'little evidence' of having been 'taken to heart'. Also see *Electoral Commission* supra note 2 para 195.

services or realise the socio-economic rights of those resident within their jurisdiction, with academic commentators arguing that this exacerbates existing inequalities in South Africa.[9]

Over the years, the South African government has proposed and implemented various measures to stabilise local government, with limited success, including: the Local Government Turnaround Strategy (2009-2013),[10] the Back-to-Basics Campaign (2014-2018),[11] and the Integrated Urban Development Framework (launched in 2016).[12] The most recent iteration of these measures is the District Development Model (2019 to present) which seeks to ensure that local government 'is capacitated and transformed to play a developmental role' and which involves joint and collaborative planning between all spheres of government to achieve an 'integrated district-based approach to addressing… service delivery challenges'.[13]

National Treasury, however, has conceded that municipalities in 'crisis' require a 'corrective mode of intervention', rather than merely support,[14] seemingly recognising the underlying

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[9] Lisa Chamberlain & Thato Masiangoako 'Third time lucky? Provincial intervention in the Makana Local Municipality' (2021) 136(2) *SALJ* 423 at 424; Jaap de Visser & Jerome November 'Overseeing the overseers: assessing the compliance with municipal intervention rules in South Africa' (2017) 9 *HJRL* 109 at 112-3

[10] This strategy was aimed at counteracting systemic and political forces, capacity and skills constraints, and weak intergovernmental support and oversight, undermining the local government system.

[11] This programme was devised to build and strengthen the capability and accountability of municipalities and improve service delivery and institutional performance.

[12] This strategic framework was aimed at promoting sustainable and inclusive urban development. See, generally, DCoGTA *Local Government Support Programmes: An Overview* (2020) 35-45.

[13] DCoGTA 'What is the District Development Model?' (28 March 2022) available at https://www.cogta.gov.za/index.php/2022/03/28/what-is-the-district-development-model/#:~:text=The%20objectives%20of%20the%20District%20Development%20Model%20are%20to%3A&text=Ensure%20inclusivity%20by%20gender%20budgeting,the%20District%20and%20City%20levels, accessed 23 February 2023.

[14] Standing Committee on Appropriations 'Municipal revenue management improvement programme underspending; Integrated financial management system implementation' (21 September 2022) available at https://pmg.org.za/committee-meeting/35605/, accessed 24 February 2023.

dysfunction in some of the constitutional accountability and intergovernmental monitoring and support mechanisms[15] and in the legal and structural features of local government.[16]

Section 139 of the Constitution[17] is such a 'corrective' and constitutionally-mandated intervention remedy, in terms of which a provincial (or, where applicable, national) executive is either permitted or mandated to intervene, temporarily and in a circumscribed manner, in a municipality.

Unfortunately, this section 139 intervention mechanism is often poorly (if at all) implemented[18] resulting in a growing number of requests for assistance being channelled directly to the courts or the institutions created under Chapter 9 of the Constitution to support constitutional democracy.[19] The result has been a noticeable change in the judicial role, with the judiciary finding itself squarely within the fray of local government dysfunction and increasingly being called upon to consider matters relating to section 139 of the Constitution.

Substantial research has been conducted on the constitutional and legal framework for, and practice of, the section 139 intervention mechanism and related constitutional safeguards. A growing area which is yet to receive substantial research attention, and which forms the basis for this Thesis, is the increasing role played by the South African courts in considering matters relating to section 139 of the Constitution, where a municipality is experiencing challenges or a 'crisis' and the provincial (or, where applicable, national) executive has been unable or unwilling to intervene or has done so inadequately or unlawfully.

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[15] DCoGTA op cit note 4 at 26 recognising that '[i]nadequate implementation of [section] 154 of the Constitution resulted in the need for many [section] 139 interventions'.

[16] Pieterse op cit note 1; Ian Palmer, Nishendra Moodley & Susan Parnell *Building a Capable State: Service Delivery in Post-Apartheid South Africa* (2017) at 49.

[17] Section 139 of the Constitution of the Republic of South Africa, Act 108 of 1996 is quoted in full in paragraph 1.2.2 below.

[18] See the discussion in paragraph 1.3.3 and 1.3.4 below.

[19] See the discussion in paragraph 1.3.6 below. Also see David Everatt & Marius Pieterse 'Outsourcing governance: Local government and the future of democracy in South Africa' (2022) 48(5) *JSAS* 787 at 795; SAHRC *National Conference on Local Government Accountability, Service Delivery and Human Rights* (2022).

With the current and prospective involvement of the courts, this Thesis asks: what is the South African courts' understanding of their role in matters relating to section 139 of the Constitution? Can this judicial role be categorised and, if so, are there similarities and differences in the conception of the judicial role within each category? What are the underlying factors applicable to the courts' assessments of justiciability, the level of judicial scrutiny and the remedial prescriptiveness in each category? What does this mean for the courts' ongoing role in these matters? These questions are intricately intertwined with conceptual, analytical, and normative tensions.

This Thesis, and the role played by the courts in matters relating to section 139 of the Constitution, should also be understood within a particular South African context including: a local government in crisis, a slow realisation of socio-economic rights, a 'crisis of legitimacy' in relation to political institutions governing South Africa, high levels of corruption, and a failure of the constitutional accountability and intergovernmental monitoring and support mechanisms.[20]

Against this background, Chapter 1 sets out the applicable constitutional and statutory framework for local government, including relevant constitutionally-mandated co-operative government mechanisms, with a focus on the increasingly-favoured section 139 intervention mechanism. The Chapter also considers the growing trend of litigation in matters relating to section 139 of the Constitution and proposes a broad categorisation of this litigation. Finally, this Chapter sets out the key research questions, the methodology and the research methods for this Thesis.

1.2 Local government: The applicable constitutional and legislative framework

The Constitution establishes three distinctive, interdependent and interrelated spheres of government in South Africa: the national, provincial and local spheres.[21] This constitutional

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[20] See, for example, South African Parliament *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) at 379, 381-4, 431; Everatt & Pieterse op cit note 19.

[21] Section 40*(1)* of the Constitution. See, generally, Pierre de Vos & Warren Freedman (eds) *South African Constitutional Law in Context* 2 ed (2022); Iain Currie & Johan de Waal *The New Constitutional and Administrative Law Vol 1* (2002); Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014).

structure takes shape through a single national government, nine provincial governments and a local government consisting of 278 municipalities (divided into metropolitan, district and local municipalities[22]) established on 'a wall-to-wall' basis for the whole country.[23] There are currently eight metropolitan municipalities (primarily for the centres of economic activity), with the remainder of the country being divided into 44 district municipalities, which are then further divided into a number of local municipalities. A district municipality comprises a few local municipalities.[24]

The Constitution does not embody a 'hierarchical division of governmental power';[25] rather, each sphere of government has autonomy to exercise its powers and perform its functions 'within the parameters of its defined space'[26] and in the 'spirit of consultation and co-ordination with the other spheres'.[27]

The principles of co-operative government and intergovernmental relations are set out in very broad language in Chapter 3 of the Constitution, read with the Intergovernmental Relations Framework Act 13 of 2005 (hereinafter 'IRFA') which aims to 'ensure the conduct of intergovernmental relations in the spirit of the Constitution'.[28] These principles require the multi-sphere government structure to work together harmoniously and as a single coherent

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[22] Section 155 of the Constitution read with sections 2-4 of the Local Government: Municipal Structures Act 117 of 1998 ('Structures Act'). Sections 24-29 of the Intergovernmental Relations Framework Act 13 of 2005 ('IRFA') provide for intermunicipal coordination and collaboration (although these fora reportedly often either do not exist or are inefficient); see Palmer et al op cit note at 16.

[23] Section 151*(1)* of the Constitution; Nico Steytler & Jaap de Visser 'Local government' in Woolman et al op cit note 21 at 22-16.

[24] Councillors from local municipalities represent their municipalities in the district municipal council; Nico Steytler 'District municipalities: Giving effect to shared authority in local government' (2003) 7 *LDD* 227.

[25] *City of Cape Town v Robertson* 2005 (2) SA 323 (CC) paras 54-60. Also see *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 26, 38; *CDA Boerdery v Nelson Mandela Metropolitan Municipality* 2007 (4) SA 276 (SCA) paras 37-40.

[26] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 42; Johann Mettler 'Provincial-municipal relations: A few challenges' (2003) 7(2) *LDD* 217-25.

[27] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) para 82, with reference to section 41*(1)* of the Constitution.

[28] See Chapter 3 of the Constitution and the preamble to the IRFA.

system of government. For example, all spheres of government are required to observe and follow the principles set out in Chapter 3 of the Constitution, co-operate with one another in mutual trust and good faith by informing and consulting each other on matters of common interest, and avoid legal proceedings against one another.[29]

There is a substantial body of academic literature providing a specific focus on South African local government law.[30] The Constitutional Court has repeatedly emphasised local government autonomy subject to the requirements of co-operative government and the limits imposed by the Constitution and national and provincial legislation.[31] This is buttressed by the provisions of Chapter 3 of the Constitution which provide, amongst other things, for the establishment and safeguarding of the geographical, functional and institutional integrity of local government and for the national and provincial spheres of government to respect the status, powers and functions of local government.[32] Further, the national and provincial spheres of government are expressly prohibited under the Constitution from impeding or compromising a municipality's ability or right to exercise its powers or perform its functions.[33]

Against this background, a municipality is recognised as interdependent and 'inviolable', with 'latitude to define and express its unique character', operating under a comprehensive suite of legislation including, for example, the Structures Act, the Local Government: Municipal Systems Act 32 of 2000 ('Systems Act') and the MFMA.[34]

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[29] See sections 40*(2)*, 41*(1)(h)(iii)* and *(vi)* of the Constitution.

[30] See, for example, Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2019); Steytler & de Visser op cit note 23; Bernard Bekink *Principles of South African Local Government Law* (2006).

[31] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*'First Certification*') paras 373-4, 462; *Fedsure* supra note 25 para 35-8, 126; *Robertson* supra note 25 paras 59-60; *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC) para 60. This emphasis is relevant as, prior to the development of the intergovernmental framework under the final Constitution, provinces had substantial authority over local municipalities; see Tracy Ledger & Mahlatse Rampedi *Mind the Gap: Section 139 Interventions in Theory and in Practice* (2019) at 2.

[32] Sections 41*(1)(e)-(g)* of the Constitution; *Gauteng Development Tribunal* supra note 26 para 58; *Robertson* supra note 25 para 59.

[33] Section 151*(4)* of the Constitution; *Robertson* supra note 25 para 59.

[34] *CDA Boerdery* supra note 25 para 38; Steytler & de Visser op cit note 23 at 22-15.

A municipality has the right to govern local government affairs.[35] Both the executive and legislative authority of a municipality is vested in its municipal council (a type of 'hybrid system'[36]) with the municipal council's term being no more than five years.[37] A municipality has executive authority over the local government matters listed in Part B of Schedules 4 and 5 of the Constitution (including certain important service-delivery activities).[38] A municipal council's executive decisions are considered to have a 'direct effect on the lives and opportunities of those living in the area',[39] with municipalities being seen as the 'face of government to the communities they are supposed to serve'.[40]

The Constitutional Court has afforded specific recognition to this 'special cluster of relationships' that exist between a municipality and citizens.[41] These relationships are founded in local government's constitutional obligation to provide democratic, accountable, developmental and participatory government and to ensure sustainable essential service delivery, which a municipality must 'strive, within its financial and administrative capacity, to achieve'.[42] A municipality's constitutional duty to provide basic municipal services[43] is often considered to be its 'cardinal function' and 'central mandate'.[44] Municipal services includes

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[35] Section 151*(3)* of the Constitution.

[36] Section 151*(2)* of the Constitution; *Masondo* supra note 31 para 21. This system of overlapping municipal legislative and executive authority has been criticised for effectively (but unintentionally) 'centralising executive power while diminishing accountability, participatory governance and oversight'; see Pieterse op cit note 1 at 7.

[37] Sections 152*(1)* and 159*(1)* of the Constitution.

[38] Section 156*(1)(a)* of the Constitution.

[39] *Masondo* supra note 31 para 60.

[40] *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC) para 1. Also see Steytler & de Visser op cit note 23 at 22-63-4.

[41] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 24, 34.

[42] See sections 152*(1)(a)-(e)*, read with section 152*(2)* of the Constitution, which sets out the 'objects' of local government.

[43] The Systems Act defines the concept of 'basic municipal services' as a service that is 'necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment'.

[44] *Joseph* supra note 41 paras 24, 34. In *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) paras 38, 52, 105: O'Regan J held that '[l]ocal government thus bears the important responsibility of providing services in a sustainable manner to their communities' while Yacoob J held that municipalities are

the provision of electricity reticulation, potable water supply systems, domestic wastewater and sewerage disposal systems and refuse removal as well the building and maintenance of roads and stormwater systems, fences, street lighting, municipal public transport and municipal health services.[45]

The developmental duties of a municipality also receive particular attention in the Constitution: a municipality is under a constitutional obligation to structure and manage 'its administration and budgeting planning processes' to 'give priority to the basic needs of the community' and to 'promote the social and economic development of the community'.[46] In other words, underlying the developmental duties of a municipality and the provision of basic municipal services must be a functioning and financially viable local government[47] operating as a 'good constitutional citizen' in an accountable, responsive and open manner, as a distinct sphere of government.[48]

The financial viability of a municipality is dependent on its revenue. A municipality's revenue is sourced from service fees, rates on property, surcharges on service fees, other taxes and duties and transfers,[49] as well as from local government's equitable share of revenue raised nationally (to enable it to provide basic services and perform the functions allocated to it)[50] and

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obliged to provide water and electricity to the residents in their areas 'as a matter of public duty'. Also see *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) para 16.

[45] Section 156*(1)*, read with Part B of Schedules 4 and 5, of the Constitution. Also see the *White Paper on Local Government* (Government Notice 423 in *Government Gazette* 18739 of 1998) at 23.

[46] Section 153*(a)* of the Constitution, read with section 73*(1)* of the Systems Act; Steytler & de Visser op cit note 23 at 22-67.

[47] *Mkontwana* supra note 44 para 105: '[t]he ability of local government to carry out its constitutional mandate [of providing services sustainably] depends on its financial stability'.

[48] *Merafong City Local Municipality v AngloGold Ashanti* 2017 (2) SA 211 (CC) paras 60, 61, 95: the Constitutional Court, quoting from *Khumalo v Member of the Executive Council of Education: KwaZulu Natal* 2014 (5) SA 579 (CC) para 29. Also see *Lesapo v North West Agricultural Bank* 1999 (12) BCLR 1420 (CC) para 17; *MEC for Health, Eastern Cape v Kirland Investments* 2014 (3) SA 481 (CC).

[49] Section 229 of the Constitution.

[50] Sections 214 and 227*(1)* of the Constitution.

from conditional grants from national government.[51] The Constitutional Court has emphasised that it is 'imperative for municipalities to do everything reasonable to reduce amounts owing', otherwise 'the sustainability of the delivery of municipal services is likely to be in real jeopardy'.[52]

1.2.1 Monitoring and support[53]

Local government does not operate in isolation: in accordance with the principles of co-operative government, it forms part of a network of intragovernmental support, co-operation and oversight.

There are accordingly various protective, and pre-emptive, constitutional and statutory mechanisms that have been developed in an attempt to ensure that challenges in a municipality's financial and governance affairs, and in the delivery of services, do not progress to the extent that they overwhelm the municipality. These are essentially 'co-operative government' mechanisms that trigger the national and provincial government's capacity and ability to provide monitoring and support.[54]

This framework means that provinces, for example, are not permitted to 'stand supinely by'[55] when a municipality is in 'crisis' or is encountering a serious financial problem. Provincial government is under a specific constitutional duty to provide monitoring and support to municipalities in their provinces and to promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.[56] While no

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[51] Section 227*(1)(b)* of the Constitution. Also see Steytler & de Visser op cit note 23 at 22-82.

[52] *Mkontwana* supra note 44 paras 47-9, 62, 124.

[53] See, generally, Steytler & de Visser op cit note 23 at 22-115-8.

[54] There are also various 'bottom-up accountability' mechanisms for local government, such as the facilitation of community involvement in governance processes (municipal budgeting, service delivery and integrated development planning). These mechanisms do not form part of the focus for this Thesis and are not discussed in any further detail here.

[55] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] 4 All SA 67 (GP) para 30.

[56] Section 155*(6)(a)* and *(b)* of the Constitution. The MEC for local government is required to establish mechanisms, processes and procedures to monitor municipalities for their ability to manage their own affairs (section 105*(1)(a)* of the Systems Act), municipal capacity (section 105*(1)(b)* of the Systems Act) and assessing

similar constitutional duty is placed on national government, the National Treasury is responsible for enforcing financial measures that ensure both transparency and expenditure control in all spheres of government, which implies a degree of monitoring and support.[57] (It is within this context that the National Treasury has adopted an approach of withholding intergovernmental transfers, often as a way of disciplining errant municipalities, although an analysis and assessment of this 'intervention-like' phenomenon falls outside the ambit of this Thesis.) The MFMA also provides that both national and provincial government must assist municipalities in building their capacity for efficient, effective and transparent financial management.[58]

Further, both provincial and national government are under a constitutional obligation to 'support and strengthen the capacity of municipalities' to enable them to manage their own affairs, perform their functions and exercise their powers.[59] This is a duty of support that seeks to 'prevent a decline or degeneration' of local government structures, powers and functions.[60] Steytler and de Visser argue that this constitutional obligation to provide support may be justiciable and that the courts may review the reasonableness of steps that the national or provincial government has taken in executing the duty of support (although the courts' potential role in this review falls outside the scope of this Thesis).[61]

National and provincial government are also required to 'see to the effective performance by municipalities of their functions' in respect of Schedule 4 and 5 matters, by 'regulating the exercise by municipalities of their executive authority'.[62] While no general power is conferred

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the support requirements of municipalities (section 105*(1)(c)* of the Systems Act). Also see *First Certification* supra note 31 paras 371-2; Steytler & de Visser op cit note 23 at 22-114; Mettler op cit note 26 at 223-4.

[57] Steytler & de Visser op cit note 23 at 22-115, with reference to section 216*(2)* of the Constitution.

[58] Section 34*(1)* of the MFMA.

[59] Section 154*(1)* read with section 155*(6)(b)* of the Constitution; *Mogalakwena* supra note 55 paras 27, 30. Also see the general discussion in Mbuzeni Mathenjwa *Supervision of Local Government* (2017).

[60] *First Certification* supra note 31 para 371.

[61] Steytler & de Visser op cit note 23 at 22-117; *Independent Municipal and Allied Trade Union v MEC Local Government, Mpumalanga* 2002 (1) SA 76 (SCA).

[62] See section 155*(7)* of the Constitution. Also see Jaap de Visser *Developmental Local Government: A Case Study of South Africa* (2005) at 180; *Mogalakwena* supra note 55 para 30; *Mnquma Local Municipality v Premier of the Eastern Cape* [2009] ZAECBHC 14 (5 August 2009) paras 40-8.

on the CoGTA Minister to monitor individual municipalities, the Systems Act provides that the CoGTA Minister may require municipalities to submit information concerning their affairs, at certain intervals or within a specified period, to a specified national organ of state, by notice in the *Government Gazette*.[63] Further, section 106 of the Systems Act provides that a provincial MEC is permitted to launch an investigation into the affairs of a municipality if she 'has reason to believe' that 'maladministration, fraud, corruption or any other serious malpractice' is occurring in the municipality or that the municipality has failed or will fail to fulfil a statutory obligation.[64]

Despite the general monitoring and support obligations set out in the Constitution, as supported by the statutory framework, it remains possible for a municipality to encounter a 'serious financial problem'. The seriousness of a financial problem can be assessed against a list of factors or criteria, individually or cumulatively, as set out in the MFMA.[65] The factors include the municipality failing to make payments as and when due; defaulting on financial obligations for financial reasons; spending more than the sum of its current revenue plus available surpluses for at least two consecutive financial years; having an operating deficit over 5% of revenue in the most recent financial year; being more than 60 days late in submitting its annual financial statements to the AGSA; or having the AGSA withhold an opinion or issue a disclaimer due to inadequacies in the financial statements or records of the municipality or having the AGSA issue an opinion which identifies a serious financial problem in the municipality.[66]

A municipality has a duty to meet its financial commitments and bears primary responsibility for identifying and resolving internal financial problems.[67] Further, if a municipality encounters a 'serious financial problem', it is responsible for notifying the MEC for local government and

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[63] Section 107 of the Systems Act.

[64] Also see *Premier, Gauteng v Democratic Alliance* 2022 (1) SA 16 (CC) (*'Tshwane'*) para 123, in which the majority of the Constitutional Court suggested that a provincial executive should consider utilizing 'less restrictive' steps, such as a section 106 enquiry, to address local government challenges prior to initiating a section 139 intervention; Victoria Bronstein & Daryl Glaser 'Intervention in South African municipalities: Dangers and remedies' (2023) 140(1) *SALJ* 95 at 101.

[65] Section 138 of the MFMA.

[66] See sections 138*(a)-(f)* of the MFMA.

[67] See sections 135*(1)-(2)* read with section 34*(2)* of the MFMA.

finance in the province, as well as the South African Local Government Association ('SALGA').[68] This self-monitoring mechanism champions local government autonomy while simultaneously enabling early detection and managing of serious financial problems within a municipality by the relevant provincial executive.

Responsibility, however, does not rest solely with the municipality: there is also a legislative obligation imposed on the MEC for local government if she becomes aware that a municipality is experiencing a serious financial problem. The MEC for local government is required to consult relevant parties, make an assessment of the severity of the situation and the municipality's response, and make a (prompt) determination as to whether a section 139 intervention is required.[69] The MEC's 'awareness' of the serious financial problem can arise as a result of the municipality's notification to the MEC or on an independent basis, including as part of the constitutional duty that is imposed on national and provincial governments to support and strengthen the capacity of municipalities to perform their functions and exercise their powers.[70]

1.2.2 Intervention

An intervention in local government is guided primarily by section 139 of the Constitution, read with the relevant provisions in the MFMA (as discussed further in paragraph 1.3 below). Section 139 of the Constitution details the possibility of and, where applicable, the requirement for provincial or national intervention in local government as a type of pre-emptive mechanism designed to correct challenges experienced by a municipality. The section 139 intervention mechanism is considered to be 'drastic',[71] 'most intrusive',[72] and a remedy of 'last resort, where the problem cannot be resolved through ordinary intergovernmental processes'.[73]

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[68] Section 135*(1)* read with sections 135*(3)(b)-(c)* of the MFMA.

[69] Section 136 of the MFMA read with section 139 of the Constitution.

[70] See, for example, sections 154*(1)*, 155*(6)* and *(7)* of the MFMA; *Mogalakwena* supra note 55 para 28.

[71] *Executive Council of the Western Cape Province v Kannaland Local Municipality* [2021] ZAWCHC 208 (7 October 2021).

[72] *Mogalakwena* supra note 55 para 24.

[73] Ledger & Rampedi op cit note 31 at 16; Chamberlain & Masiangoako op cit note 9 at 425; *Tshwane* supra note 64 para 58; *White Paper on Local Government* op cit note 45 at Section C, para 1.3.2. Also see Mbuzeni Mathenjwa 'The constitutional obligations imposed on a provincial government in instances where a municipality

However, the section 139 intervention mechanism 'is not absolute':[74] it is highly circumscribed, with neither the national nor provincial government permitted to usurp the functions of local government other than temporarily and in compliance with strict procedures, following the establishment of the jurisdictional facts.[75]

Given the central role played by section 139 of the Constitution in this Thesis, it is quoted in full:

> *'139. Provincial intervention in local government*
>
> *(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 directive to the Municipal Council, 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 or meet established minimum standards for the rendering of a service;*
>
> *(ii) prevent the Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or*
>
> *(iii) maintain economic unity; or*
>
> *(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.*
>
> *(2) If a provincial executive intervenes in a municipality in terms of subsection (1)(b) –*

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cannot provide basic services as a result of a crisis in financial affairs' (2015) 1 *TSAR* 59 at 64, arguing that although intervention is an intrusion into local government autonomy, this can be outweighed by a prevention in the decline of service delivery.

[74] See *Tshwane* supra note 64 para 60: the Constitutional Court held that section 139 of the Constitution is also subject to, for example, sections 154*(1)* and 41*(1)(h)* of the Constitution; *First Certification* supra note 31 paras 264-5, 363.

[75] *Tshwane* supra note 64 para 62; *Gauteng Development Tribunal* supra note 26 paras 43-4; Nico Steytler 'Establishing a regulatory framework for provincial intervention in terms of section 139 of the Constitution' available at https://pmg.org.za/docs/2004/appendices/041020draft1.htm, accessed 6 March 2023.

(a) it must submit a written notice of the intervention to –

(i) the [CoGTA Minister]; and

(ii) the relevant provincial legislature and the [NCOP], within 14 days after the intervention began;

(b) the intervention must end if –

(i) the [CoGTA Minister] disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention; or

(ii) the [NCOP] disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention; and

(c) the [NCOP] must, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the provincial executive.

(3) If a Municipal Council is dissolved in terms of subsection (1)(c) –

(a) the provincial executive must immediately submit a written notice of the dissolution to –

(i) the [CoGTA Minister]; and

(ii) the relevant provincial legislation and the [NCOP]; and

(b) the dissolution takes effect 14 days from the date of receipt of the notice by the NCOP] unless set aside by [the CoGTA Minister] or the [NCOP] before the expiry of those 14 days.

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and –

(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as 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, the relevant provincial executive must –

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which –

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and –

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

(6) If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to –

(a) the [CoGTA Minister]; and

(b) the relevant provincial legislature and the [NCOP], within seven days after the intervention began.

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.

(8) National legislation may regulate the implementation of this section, including the processes established by this section.'

Section 139 of the Constitution should be distinguished from section 100 of the Constitution, which regulates an intervention by the national executive in a provincial administration where a province 'cannot or does not fulfil an executive obligation in terms of the Constitution or legislation'.[76] While the section 100 intervention mechanism falls outside the scope of this

[76] The initiation of section 100 interventions has not been as prolific as the section 139 intervention mechanism. A recent example is the section 100*(1)(a)* and *(b)* intervention initiated by the national executive in ten provincial

Thesis, the judicial role in matters relating to section 100 of the Constitution could form the basis for future research.

To understand the judicial role in matters relating to section 139 of the Constitution, it is first necessary to understand the constitutional and statutory framework for interventions under section 139 of the Constitution.

1.3 The section 139 intervention mechanism: The applicable constitutional and statutory framework

1.3.1 Background to the section 139 intervention mechanism[77]

In its original form, section 139 of the Constitution (which was framed as a 'provincial supervisory function') was almost identical to the limited powers of national government to intervene in a province in terms of section 100 of the Constitution: a provincial executive was only permitted to intervene in a municipality, at its discretion, when that municipality failed 'to fulfil an executive obligation', so as to initiate a process of implementing corrective measures if local government '[fell] short of its obligations'.[78]

This initial version of the section 139 intervention mechanism did not include any specific intervention or remedy for financial problems in a municipality (which was considered to rather require a systematic response,[79] particularly to ensure the delivery of essential services) and did not contemplate the dissolution of a municipal council as a consequence of an intervention. This version of the section 139 intervention mechanism also made no provision for the national executive to intervene in a municipality, as an additional backstop measure.

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departments in the North-West province on 23 May 2018, reportedly due to governance challenges and violent protests.

[77] See, generally, de Visser op cit note 62 at 192-4; Steytler & de Visser op cit note 23 at 22-111-4, 118-26; Ledger & Rampedi op cit note 31 at 4; de Visser & November op cit note 9 at 113.

[78] *First Certification* supra note 31 para 370.

[79] See, generally, Department of Finance *Policy Framework for Municipal Borrowing and Financial Emergencies* (2000).

In 2003, section 139 of the Constitution was substantially amended (and was reframed as a 'provincial intervention power').[80] Amongst other things, these amendments made it mandatory, under section 139*(5)* read with section 139*(7)* of the Constitution, for both provincial government and national government (where applicable) to intervene in a municipality that, 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 such obligations or financial commitments.[81] Section 139*(1)* of the Constitution (which enabled an intervention by the provincial executive, at its discretion, when a municipality failed 'to fulfil an executive obligation') was also amended to include dissolution of the municipal council as a possible consequence.[82]

1.3.2 The mechanics of the section 139 intervention mechanism

There is a substantial body of academic literature which discusses, analyses and critiques the legal framework for a section 139 intervention.[83]

The mechanics of the section 139 intervention mechanism have also been discussed in two guidelines published by the national government: one prior to the 2003 amendments to section 139 of the Constitution and one after these constitutional amendments.[84] In 2020, SALGA published a 'Municipal Support and Intervention Framework' for local government which sets

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[80] Constitution of the Republic of South Africa Amendment Act 3 of 2003.

[81] Also see Chapter 13 of the MFMA, which complements these constitutional provisions and which came into effect on 13 February 2004.

[82] Other amendments included additional supervisory powers for the CoGTA Minister under a section 139*(1)* intervention and a framework for supervisory powers in the event of the dissolution of a municipal council, as well as the inclusion of section 139*(4)* of the Constitution.

[83] See, for example, Steytler & de Visser op cit note 30 at Chapter 15; Yvonne Hoffman-Wanderer & Christina Murray 'The National Council of Provinces and provincial intervention' (2007) 18 *SLR* 7; Christina Murray 'Municipal integrity and effective government: the Butterworth intervention' (1999) 14(2) *SAPL* 332; Yvonne Hoffman-Wanderer & Christina Murray 'Suspension and dissolution of municipal councils under s 139 of the Constitution' (2007) 1 *TSAR* 141; Ledger & Rampedi op cit note 31; de Visser & November op cit note 9; Bronstein & Glaser op cit note 64.

[84] Department of Provincial and Local Government *Provincial Supervision: Manual for the application of section 139 of the Constitution* (2000); Department of Provincial and Local Government *Intervening in provinces and municipalities: guidelines for the application of sections 100 and 139 of the Constitution* (2007).

out how monitoring, support and intervention 'could ideally work in the local government sector' by proposing a standard approach to be followed for any section 139 intervention undertaken by provincial government. [85]

The current version of section 139 of the Constitution contemplates both a 'discretionary' intervention (under section 139*(1)*) and a 'mandatory' intervention (under sections 139*(4)*, *(5)* and *(7)*), depending on the applicable circumstances. The 'correct diagnosis' of the underlying issues in a municipality is fundamental for determining which intervention mechanism should be adopted, particularly given that specific 'steps' or remedies have been stipulated in the Constitution to address specific problems.[86]

In other words, certain types of municipal crises may trigger either a discretionary or a mandatory intervention. Nico Steytler and Jaap de Visser, for example, have argued that because the existence of a functioning and transparent financial system is also an executive obligation, a financial crisis could be dealt with as a discretionary intervention (albeit that a financial crisis would ordinarily trigger a mandatory intervention, as discussed further below).[87]

1.3.2.1 A 'discretionary' intervention

The purpose of the section 139*(1)* intervention, a so-called 'discretionary' intervention, is for the provincial executive at its own election[88] to take 'any appropriate steps' (of varying

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[85] SALGA *Municipal Support and Intervention Framework* (2020) at 6.

[86] Ledger & Rampedi op cit note 31 at 17; Chamberlain & Masiangoako op cit note 9 at 444. Also see Mokgethwa Makoti & Kolawole Odeku 'Intervention into municipal affairs in South Africa and its impact on municipal basic services' (2018) 10(4) *AJPA* 68-85.

[87] Steytler & de Visser op cit note 30 at 15-46-47. Chamberlain & Masiangoako op cit note 9 at 445 note that a similar argument could be constructed in relation to service delivery: while service delivery failures are specifically identified in the mandatory intervention mechanism, service delivery is also a municipal executive obligation meaning that it could also trigger a discretionary intervention.

[88] The use of the word 'may' in section 139*(1)* of the Constitution is a 'power coupled with a duty' with the provincial executive 'fully entitled, if not obliged, to do what is necessary to ensure' the fulfilment of the municipality's executive obligations. See *Tshwane* supra note 64 para 59; *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 118.

severity) to ensure the fulfilment of an 'executive obligation'[89] which a municipality either cannot or does not fulfil.[90] The determination of the executive obligation is key as it will determine the scope of the provincial executive's assumption of responsibility, while powers falling outside this particular executive obligation will remain the prerogative of the municipal council.[91] This type of discretionary intervention focuses on an ongoing municipal failure, rather than a past failure,[92] and does not require the total collapse of the municipality prior to intervention.[93]

The 'appropriate steps' which may be taken by the provincial executive, which should promote co-operative governance and intergovernmental relations and be 'reasonably capable' of resolving the non-fulfilment of the executive obligation,[94] may include, but are not necessarily limited to, three stipulated steps.[95]

First, the provincial executive may issue a directive to the municipal council describing the failure to fulfil the executive obligation and setting out any steps that the municipality must take to meet its obligations.[96]

Second, the provincial executive may assume responsibility for the relevant executive obligation which is not being fulfilled 'to the extent necessary' to, for example, maintain or meet essential national standards for the provision of a service, prevent the municipal council

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[89] The scope of an 'executive obligation', which is not defined in the Constitution, has been the subject of much debate. Steytler & de Visser op cit note 30 at 15-19 suggest that it should include anything that does not fall within the legislative function of a municipality, including the implementation and administration of legislation, the provision of services, the development of policy and the initiation of by-laws; see *Mnquma* supra note 62 paras 58, 64, 91; *Tshwane* supra note 64 paras 71-5; de Visser & November op cit note 9 at 124-5.

[90] See section 139*(1)* of the Constitution. Also see, generally, Murray op cit note 83.

[91] de Visser & November op cit note 9 at 122-3.

[92] *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) para 79.

[93] *Tshwane* supra note 64 para 75.

[94] Ibid paras 79-81.

[95] Ibid paras 76-89; *Mogalakwena* supra note 55 para 22.

[96] Section 139*(1)(a)* of the Constitution. This is essentially a 'legal instruction to perform' and 'creates an immediate legal obligation on the municipality to take the steps mentioned in the directive'; *Tshwane* supra note 64 para 76; Steytler & de Visser op cit note 30 at 15-26.

from taking unreasonable action that may prejudice the interests of another municipality or the province itself, or to maintain economic unity.[97]

Third, the provincial executive may dissolve the municipal council[98] and appoint an administrator, until a newly elected municipal council has been declared (which must be within 90 days)[99] if 'exceptional circumstances' (circumstances which are 'markedly unusual or specially different) warrant such a step.[100] This is considered to be the most 'drastic' of the three steps, as an administrator will assume the role of the municipal council until the by-elections, thereby effectively operating as a mechanism by which a democratically-elected legislature and executive may be ousted.[101]

Section 137, read with section 136*(2)*, of the MFMA, also sets out some additional steps which could be followed, but *only* for a section 139*(1)* intervention which is related to a financial problem in the municipality (and specifically where such financial problem has been caused by or resulted in a failure by the municipality to comply with an executive obligation).

Importantly, the provincial executive is not required to take the most appropriate step; rather, it may intervene by taking any appropriate step.[102] There has been some debate as to whether the three specified 'appropriate steps' amount to a process, can be considered to be alternative

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[97] Section 139*(1)(b)* of the Constitution. Also see Johandri Wright, Felix Dube, Anel du Plessis 'Judicial enforcement of mandatory provincial interventions in municipalities in South Africa' (2022) 55(1) *VRÜ* 105 at 111, describing the steps set out in sections 139*(1)(a)* and *(b)* of the Constitution as 'pre-emptive step[s] to prevent more radical forms of provincial intervention'.

[98] See Hoffman-Wanderer & Murray op cit note 83 at 141-5 which considers whether a province has the power under section 139*(1)* of the Constitution to suspend a municipal council or to legislate on its behalf (concluding that it is within the powers of the provincial executive to determine, on a case-by-case basis, whether to suspend a municipal council and that there may be circumstances in which it may be a necessary step to assume the legislative powers).

[99] Section 159*(2)* of the Constitution; *Premier for the Province of Gauteng v Democratic Alliance* [2021] 1 All SA 60 (SCA) paras 31-2, 39, 41.

[100] Section 139*(1)(c)* of the Constitution; *Mnquma* supra note 62 para 76

[101] *Tshwane* supra note 64 paras 78, 97, 116, 126; Bronstein & Glaser op cit note 64 at 114-6, 122.

[102] Ibid para 83.

steps, or should be determined primarily with reference to the 'appropriateness' of the step.[103] In *Tshwane*, however, the majority in the Constitutional Court held that the requirement of appropriateness 'plainly calls for a contextual assessment of what is fitting and suitable in the circumstances', rather than the steps amounting to a process.[104]

In broad terms, section 139*(1)* of the Constitution thus has two fundamental components: first, the provincial review of local government actions to assess local government's fulfilment of its executive obligations (which informs the decision to intervene); and second, the implementation of corrective measures through 'appropriate steps' if local government is found not to fulfil its obligations.[105]

Other than this high-level framework, there are 'no prescribed administrative practises' for these discretionary interventions.[106] In other words, other than the limited application of the MFMA, there is no supporting national legislation which sets out the practicalities of implementing section 139*(1)* of the Constitution and its processes, or which clears up any uncertainties in the application (such as the meaning of 'executive obligations').

1.3.2.2 A 'mandatory' intervention

Section 139*(4)* and section 139*(5)* of the Constitution cater for a mandatory intervention by the provincial executive in a municipality in two distinct situations, both related to financial challenges.

First, intervention is required under section 139*(4)* of the Constitution if a municipality cannot or does not fulfil a constitutional or statutory obligation to approve a budget or any revenue-raising measures to give effect to the budget.[107] As the approval and adoption of a budget is

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[103] See Steytler & de Visser op cit note 30 at 15-25; de Visser & November op cit note 9 at 120-1; Mathenjwa op cit note 59 at 195; Chamberlain & Masiangoako op cit note 9 at 447-9; *Mnquma* supra note 62 paras 69, 72; *Mogalakwena* supra note 55 paras 18-20; *Tshwane* supra note 64 para 170

[104] *Tshwane* supra note 64 paras 83-9.

[105] *First Certification* supra note 31 para 363; Mettler op cit note 26 at 219.

[106] Ledger & Rampedi op cit note 31 at 8.

[107] This should be read with sections 16*(1)* and 24*(2)(a)* of the MFMA.

crucial to the proper functioning of a municipality,[108] a provincial executive must intervene in these circumstances, with 'appropriate steps' which could include the dissolution of the municipal council, the appointment of an administrator or the approval of a temporary budget or revenue-raising measure, to provide for the continuing functioning of the municipality.[109]

Second, intervention is required under section 139*(5)* of the Constitution 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 it admits that it is unable to meet these obligations or financial commitments. Steytler and de Visser argue that a single breach may be sufficient, provided that it is particularly egregious.[110]

The MFMA sets out a non-exhaustive list of factors which may, individually or cumulatively, indicate that a municipality is in serious material breach of its obligations to meet its financial commitments including, for example, that the municipality has failed to make a payment to a lender or investor when due or to meet a contractual obligation which provides security.[111] Any recurring or continuous failure by a municipality to meet its financial commitments which 'substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms' may also indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.[112] No similar guidance is provided in the MFMA for the factors which may indicate when a municipality is in serious or persistent material breach of the obligation to provide basic services.

Section 139*(5)* of the Constitution sets out a two-step process after it has been ascertained that the jurisdictional facts for a mandatory intervention under that section are present.[113] As a first step, section 139*(5)(a)* of the Constitution requires the provincial executive to request the

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[108] Steytler & de Visser op cit note 23 at 22-124.

[109] Section 139*(4)(a)-(b)* of the Constitution; *Premier, Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA) paras 13-17, 19, 23, 36-7.

[110] Steytler & de Visser op cit note 30 at 15-50, 17-8.

[111] Section 140*(2)* of the MFMA.

[112] Section 140*(3)* of the MFMA.

[113] Steytler & de Visser op cit note 23 at 22-125.

Municipal Finance Recovery Service (MFRS)[114] to prepare a recovery plan[115] aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments. An overview of the preparation of a financial recovery plan, the criteria for a financial recovery plan, and the approval and amendment of financial recovery plans is set out in the MFMA.[116] In turn, the municipality is required to implement an approved financial recovery plan, reporting to the MEC for finance on the implementation of the plan on a monthly basis.[117]

The second step arises if the municipality cannot or does not approve legislative measures (including a budget or revenue-raising measures) necessary to give effect to the recovery plan. If these measures are not approved, the provincial executive must dissolve the municipal council, which would include appointing an administrator to run the affairs of the municipality until a new municipal council is elected, and approving a temporary budget.[118] If, however, the municipal council is not dissolved, the provincial executive must assume responsibility for the implementation of the recovery plan if the municipality cannot or does not otherwise implement it.[119]

Finally, if the provincial executive 'cannot or does not or does not adequately exercise the powers or perform the functions' in relation to an intervention referred to in section 139*(4)* or *(5)* of the Constitution, and the conditions for such intervention are present, then the national executive is required to consult the relevant provincial executive and intervene in the stead of the provincial executive.[120] In so doing, the national executive assumes the functions and powers of the provincial executive for the purposes of the intervention.[121] There is no similar provision

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[114] The MFRS was established in 2007 as a Directorate in National Treasury.

[115] The provincial executive must request the MFRS to determine the reasons for the crisis in the municipality's financial affairs, assess the municipality's financial state and prepare an appropriate recovery plan for the municipality; see section 139*(5)* of the Constitution read with sections 139*(1)(a)-(b)*, 141 and 142 of the MFMA.

[116] Sections 141-4 of the MFMA.

[117] See, generally, section 146 of the MFMA.

[118] Section 139*(5)(b)* of the Constitution.

[119] Section 139*(5)(c)* of the Constitution.

[120] Section 139*(7)* of the Constitution read with section 150 of the MFMA.

[121] Section 150*(2)(a)* of the MFMA.

regarding the national executive's role in the event that the provincial executive cannot or does not exercise its powers and functions under section 139*(1)* of the Constitution, presumably owing to the discretionary nature of that provision.

1.3.2.3 In-built non-curial mechanisms in section 139

In recognition of the encroachment on the functional and institutional integrity of the local sphere of government that is implicit within section 139 of the Constitution, various component parts of that provision actively incorporate the principles of co-operative governance, ensure the promotion of intergovernmental relations, and safeguard against the abuse of power by provincial government.[122] In particular, the powers set out under section 139 of the Constitution are circumscribed by various in-built non-curial mechanisms for dispute resolution, such as the oversight role to be played, to varying degrees depending on the nature of the intervention, by the CoGTA Minister, the relevant provincial legislature and the NCOP.

For example, if a provincial executive intervenes in a municipality in terms of section 139*(1)(b)* of the Constitution by assuming responsibility for an executive obligation, it is required to submit a written notice of the intervention, within 14 days after its commencement, to three key role players: the CoGTA Minister, the relevant provincial legislature and the NCOP.[123]

The timeframes for the notification are slightly different if the 'appropriate step' selected was the dissolution of the municipal council in terms of section 139*(1)(c)* of the Constitution: then the provincial executive must 'immediately' submit a written notice of the dissolution to the CoGTA Minister, the relevant provincial legislature and the NCOP.[124] The dissolution will take effect 14-days after the receipt of notice by the NCOP (unless it is set aside, as discussed below).[125]

In both section 139*(1)(b)* and *(c)* interventions, the CoGTA Minister and the NCOP are granted particular powers in performing their oversight function: they are required to consider the

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[122] Mathenjwa op cit note 73 at 70; Bronstein & Glaser op cit note 64 111-2; *Tshwane* supra note 64 para 82.

[123] Section 139*(2)(a)* of the Constitution. See, generally, Hoffman-Wanderer & Murray op cit note 83.

[124] Section 139*(3)(a)* of the Constitution.

[125] Section 139*(3)(b)* of the Constitution.

intervention and may disapprove the intervention within a prescribed time period.[126] A section 139*(1)(b)* intervention must end if the CoGTA Minister disapproves (or fails to approve) the intervention within 28 days,[127] or the NCOP disapproves (or fails to approve) the intervention within 180 days after the intervention began. On the other hand, a section 139*(1)(c)* intervention must end if set aside by the CoGTA Minister or the NCOP within 14 days of receipt of the notice of dissolution by the NCOP.[128]

The NCOP also plays an additional oversight role in the context of a section 139*(1)(b)* intervention (a provincial executive's assumption of responsibility for a particular unfulfilled executive obligation). While the intervention continues, the NCOP is required to review the intervention regularly and may make appropriate recommendations to the provincial executive.[129] This additional oversight role is not applicable in the event of the dissolution of the municipal council in terms of section 139*(1)(c)* of the Constitution.

By comparison, if a provincial executive intervenes in a municipality in terms of sections 139*(4)* or *(5)* of the Constitution, it is required to submit a written notice of the intervention, within 7 days after the commencement of the intervention, to the CoGTA Minister, the relevant provincial legislature and the NCOP.[130] Notably, the Constitution does not provide for any of these parties to disapprove or set aside the intervention and there are no specific continuing constitutional oversight powers in relation to interventions under sections 139*(4)* and *(5)* of the Constitution, albeit that the national legislature will continue to perform its general oversight function.

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[126] No similar powers are granted to the provincial legislatures; see section 139*(2)(b)* of the Constitution. Also see Shehaam Johnstone *The veto power to terminate provincial interventions in terms of section 139(2)(b) and 139(3)(b) of the Constitution* (LLM thesis, University of the Western Cape, 2014).

[127] Ledger & Rampedi op cit note 31 at 9: criticises this 28-day period, noting that it does not appear to be sufficient to 'make an informed judgment as to the merits of the intervention, or to make an assessment of whether the correct part of section 139 has been selected, or to evaluate the structure of the proposed intervention'.

[128] Ibid at 12. In practice, an intervention is often terminated following scheduled national local government elections.

[129] Ibid: the practice is for the NCOP to rely 'on provinces to voluntarily report on progress' with 'provincial reporting [being] highly variable'; section 139*(2)(c)* of the Constitution.

[130] Section 139*(6)(a)* and *(b)* of the Constitution.

The MFMA, however, does include some additional provisions for the review of mandatory provincial interventions. The CoGTA MEC and finance MEC in a province are required to review any section 139*(5)* intervention every three months, including in relation to progress with resolving the municipality's financial problems and the effectiveness of any financial recovery plan. These MECs are further required to submit progress reports, and a final report, on the intervention to the municipality, the CoGTA and Finance Ministers, the provincial legislature and organised local government in the province.[131]

A mandatory section 139*(5)* intervention must end when the crisis in the municipality's affairs has been resolved and the municipality's ability to meet its obligations to provide basic services or its financial commitments is secured.[132] Steytler submits that, in the absence of any clarity as to when an intervention should end, the administrator, the CoGTA Minister, the provincial legislature and the NCOP should decide on the termination of an intervention.[133]

There has been some criticism of the 'watchdog' role assumed by the NCOP in the section 139 intervention mechanism.[134] For example, it has been argued that the NCOP's supervisory role is 'obscured'[135] and that the NCOP's intervention-approving process does not properly involve the provincial legislatures.[136] There has also been substantial criticism of the effectiveness of the NCOP's role in practice.[137]

Notably, section 139 of the Constitution makes no provision for community participation in the process leading up to the intervention or following the intervention.[138] However, some commentators have observed that it is fundamentally important to engage and involve

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[131] Section 147*(1)(a)-(b)* of the MFMA.

[132] Section 148*(2)* of the MFMA.

[133] Steytler op cit note 75.

[134] Also see, generally, Thobela Mdledle *Evaluating the role of the NCOP in reviewing national government interventions in provincial governments: a case study of the 2011 interventions in the Eastern Cape and Limpopo provinces* (LLM thesis, University of the Western Cape, 2013) which focuses on the role of the NCOP in national interventions in terms of section 100 of the Constitution.

[135] Steytler op cit note 75.

[136] Murray & Hoffman-Wanderer op cit note 83.

[137] See paragraph 1.3.4 below.

[138] Steytler op cit note 75.

communities in such provincial interventions, particularly as a means for ensuring the success of the intervention.[139]

Finally, while the IRFA expressly excludes from its ambit any disputes that may arise under section 139 of the Constitution,[140] Makoti and Odeku have argued that the provisions under the IRFA should nevertheless be followed prior to the implementation of a section 139 intervention for the purposes of avoiding litigation, and that there should be robust consultation before the initiation of a section 139 intervention for the purposes of ensuring respect for the principles of co-operative government.[141]

1.3.3 The current state of the section 139 intervention mechanism

The number of initiated section 139 interventions has been steadily climbing: 140 section 139 interventions, involving 143 municipalities, were initiated between 1998 and 2019, with 15 being set aside (during the oversight process, by mutual agreement or by court order) and 125 proceeding.[142]

There has also been a notable year-on-year increase in section 139 interventions: only 8 municipalities were under provincial intervention in June 2017, compared with 33

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[139] Lisa Chamberlain, Kelebogile Khunou, Thato Masiangoako & Alana Potter *Makana Local Municipality – Provincial Intervention in a Municipal Crisis* (SERI report, 2020) at 34-5; Chamberlain & Masiangoako op cit note 9 at 455-6.

[140] See section 39*(1)(b)* of the IRFA; *Posthumous v Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs* [2020] ZANCHC 78 (9 November 2020) paras 16-18.

[141] Mokgethwa Makoti & Kolawole Odeku 'Critical perspective on the complexity and functionality of intergovernmental relations between provincial and local governments in South Africa' (2018) 10(1) *AJPA* 98 at 110.

[142] Ledger & Rampedi op cit note 31 at 4, Annexures B and C, conducted a detailed review of the manner in which section 139 interventions were conducted (initiated, implemented, overseen and terminated) for the period July 2004 to June 2017, based on research undertaken for National Treasury in 2018 to examine the efficacy of the section 139 intervention framework, updated with interventions for the period July 2017 to the date of publication (September 2019). Also see the estimation by de Visser and November (op cit note 9 at 115-6) of 72 interventions between January 1998 and March 2014, with 42 of those interventions taking place between January 2009 and March 2014.

municipalities in January 2023 (although some of these interventions are ongoing).[143] In May 2022, the Minister of Finance advised Parliament during the budget vote that 43 dysfunctional municipalities would be placed under a mandatory provincial section 139*(5)* intervention (although interventions were not subsequently initiated in all of these municipalities).[144]

This is in addition to the national government's section 139 interventions in Lekwa Local Municipality (September 2021) and in Enoch Mgijima Local Municipality and Mangaung Local Municipality (April 2022). These interventions are particularly important as they are the first instances in which the national government has utilised its powers under section 139*(7)* of the Constitution, after years of resisting such action. This action thus appears to highlight and confirm the state of crisis in both local government and in the various constitutional accountability and intergovernmental monitoring and support mechanisms, including the provincial intervention mechanism.

Interestingly, there does appear to have been a shift in the type of intervention being initiated. Ledger and Rampedi, in September 2019, had found that in 129 interventions (out of 140 interventions), section 139*(1)* of the Constitution (a failure to fulfil an 'executive obligation') as opposed to 139*(5)* of the Constitution (concerning 'serious financial problems') was utilised as an almost 'blanket approach'.[145] Similarly, after assessing 39 interventions that took place between 2008 and 2014, Jaap de Visser and Jerome November concluded that the section 139*(1)* intervention mechanism was most commonly used.[146] However, by January 2023, out

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[143] DCoGTA 'Provincial Intervention in Local Government in terms of Section 139 of the Constitution and the Municipal Finance Management Act' (January 2023) available at https://www.cogta.gov.za/index.php/2023/01/27/provincial-intervention-in-local-government-in-terms-of-section-139-of-the-constitution-and-the-municipal-finance-management-act-as-of-january-2023/, accessed 10 February 2024.

[144] Minister Enoch Gondongwana 'National Treasury Department Budget Vote 2022/23' available at https://www.gov.za/speeches/minister-enoch-gondongwana-finance-202223-dept-budget-vote%C2%A0-18-may-2022-0000, accessed 29 September 2022. This figure correlates with the 17% of municipalities which the National Treasury indicated are in 'crisis' when presenting to Parliament's Standing Committee on Appropriations on 21 September 2022.

[145] Ledger & Rampedi op cit note 31 at 17-9.

[146] de Visser & November op cit note 9 at 128-31.

of 33 interventions, 3 had been initiated under section 139*(7)*, 9 under section 139*(1)*, and 21 under section 139*(5)*.[147]

1.3.4 The practice of the section 139 intervention mechanism

The White Paper on Local Government highlighted, amongst other things, the need for the 'fair and even' and predictable exercise of intervention powers and anticipated that the national and provincial government support role would be sufficient 'in most instances', with intervention being 'a rare occurrence' only where the problem could not be resolved through ordinary intergovernmental processes.[148]

However, the recent practice (and proliferation) of section 139 interventions, together with the accompanying intervention case law, has illustrated that these hopes have not materialised. Rather, the failure of the constitutional accountability and intergovernmental monitoring and support mechanisms described above appears to have led to an increase in section 139 interventions in local government and, as a corollary, suggest an enhanced role for the courts.

de Visser and November submitted in 2017 that 'little ha[d] been written about the practice of these [section 139] interventions', other than on a normative basis.[149] In recent times, however, the practice of the section 139 intervention mechanism has received particular attention within the national legislature (being one of the main themes of the NCOP's Local Government Week in 2020)[150] and within SALGA.[151]

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[147] DCoGTA 'Provincial Intervention in Local Government in terms of Section 139 of the Constitution and the Municipal Finance Management Act as of January 2023' (27 January 2023) available at https://www.cogta.gov.za/index.php/2023/01/27/provincial-intervention-in-local-government-in-terms-of-section-139-of-the-constitution-and-the-municipal-finance-management-act-as-of-january-2023/, accessed 6 March 2023.

[148] *White Paper on Local Government* op cit note 45; Ledger & Rampedi op cit note 31 at 41-2.

[149] de Visser & November op cit note 9 at 113.

[150] See the various resource documents made available for the NCOP's Local Government Week (September 2020) available at https://www.parliament.gov.za/project-event-details/892, accessed 6 March 2023.

[151] See, for example, Parliament of the Republic of South Africa 'SALGA concerned about high number of section 139 interventions in municipalities' (21 August 2019) available at https://www.parliament.gov.za/news/salga-concerned-about-high-number-section-139-interventions-municipalities, accessed 6 March 2023.

A growing body of research has also been developing, which specifically considers the practice of the section 139 intervention mechanism and the general adherence with the constitutional safeguards during the initiation of interventions.[152] This research is mainly conducted on a wholesale basis, although some specific case studies are also being developed (such as in the case of the Makana Local Municipality and the City of Tshwane Metropolitan Municipality).[153] Numerous fault-lines have been identified in this research on the practice of section 139 interventions.

Ledger and Rampedi, for example, have observed that the majority of interventions between 1998 and 2019 could not be considered to be long-term successes, based on the financial position of the municipality and audit outcome (before and after the interventions) as well as the number of repeat interventions.[154] Ledger and Rampedi concluded that few interventions actually 'had a meaningful and sustained impact on municipal operations or financial health'.[155] This has been supported by other researchers, who have noted that municipalities under intervention are not always effective and efficient after the intervention has been completed.[156]

This can also be linked with a further criticism of the practice relating to section 139 interventions: that an intervention tends to be initiated when municipalities have reached a nearly unsalvageable state of collapse (whereas interventions actually need to occur as a preventative framework prior to collapse).[157] In this regard, Chamberlain and Masiangoako

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[152] See, generally, Research Unit of the Parliament of the Republic of South Africa *Overview of Municipalities Under Section 139 Intervention as It Relates to Service Delivery* (September 2020); Ledger & Rampedi op cit note 31; Chamberlain & Masiangoako op cit note 9 at 457 (who submit that 'provincial interventions are not working as intended'); de Visser & November op cit note 9.

[153] See, for example, Chamberlain & Masiangoako op cit note 9; Bronstein & Glaser op cit note 64.

[154] Ledger & Rampedi op cit note 31 at 4, 13: who found that many interventions failed to demonstrate more than 'only marginal improvements in the selected indicators' while other municipalities actually 'deteriorated during and after the intervention'.

[155] Ibid at 10.

[156] Teyisi Zolani & Ogochukwu Iruoma Nzewi 'Provincial intervention outcomes in Makana Local Municipality in the Eastern Cape Province' (2018) 18 *Journal of Public Affairs* 2.

[157] See de Visser & November op cit note 9; Ledger & Rampedi op cit note 31 at 20-1, 26. Chamberlain et al op cit note 139 at 28-31 have also proposed additional solutions in an attempt to stem the tide of municipal collapse,

have argued that the application of the provincial intervention mechanism should be reconsidered so that it is 'no longer seen as a means of last resort once a municipality has collapsed, but as a framework to prevent such collapse'.[158]

Ledger and Rampedi have also identified wide variations in the administrative practices surrounding the initiation of section 139 interventions, often linked to provincial government discretion, provincial and national political leadership, and the relationship between such leadership and a municipality.[159] This is supported by Greffrath and van der Waldt who, after analysing the nature and frequency of section 139 interventions between the period of 1994 to 2015, suggest that 'electoral, factionalist and political motives' constituted key motivating factors behind the interventions, possibly even more so than issues of dysfunction, poor service delivery and governance.[160]

In a separate article, Greffrath and van der Waldt have highlighted the importance of increased research in relation to municipal interventions as an 'emergent strategy in South African governance' rather than as 'loose-standing and isolated occurrences'.[161]

Bronstein and Glaser have also expressed concern that the section 139 intervention mechanism may be susceptible to political abuse, particularly in the context of unstable local coalition governments, and have urged that the grounds for intervention (particularly more drastic interventions) should be restricted, with decisions to dissolve municipal councils, for example, rather being left to voters.[162]

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such as stable local government, the mitigation of political influence and the importance of timely and proactive intervention.

[158] Chamberlain & Masiangoako op cit note 9 at 453. Also see Wright et al op cit note 97 at 122.

[159] See Ledger & Rampedi op cit note 31 at 8-12, noting that most interventions were initiated following a specific trigger for intervention (such as one or a series of violent protests, or a threat by Eskom to disconnect the electricity supply). Also see Chamberlain & Masiangoako op cit note 9 at 451; Mbuzeni Mathenjwa 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 8 *LDD* 179, 189.

[160] Wynand Greffrath & Gerrit van der Waldt 'Section 139 interventions in South African local government, 1994-2015' (2016) 75 *New Contree* 135 at 145-9.

[161] Gerrit van der Waldt & Wynand Greffrath 'Towards a typology of government interventionism in municipalities' (2016) 9(2) *AJPA* 152 at 164.

[162] Bronstein & Glaser op cit note 64.

Further fault-lines have been connected to the procedural and substantive elements of section 139 of the Constitution. For example, de Visser and November's assessment of 39 interventions that took place between 2008 and 2014 concluded that few interventions complied with the constitutional requirements for the CoGTA Minister and NCOP to be informed of the intervention, and for their approval to be obtained.[163] In other words, there appears to be an underlying lack of accountability associated with the section 139 intervention mechanism. Additional fault-lines highlighted have included uncertainty around the role of an administrator[164] and a tension in the relationship between, and the roles of, National Treasury and the DCoGTA in relation to the implementation of the section 139 intervention mechanism.[165]

Ledger and Rampedi have also submitted that the majority of initiated section 139 interventions over the time period of 1998 to 2019 applied the incorrect statutory provision,[166] often paired with the provincial executive's poor or non-existent understanding and/or expression of the 'executive obligation' that the municipality had failed to fulfil.[167]

Finally, Mathenjwa has argued that the exercise of power in certain provinces indicates a fundamental misunderstanding by provincial governments of their role and powers in relation

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[163] de Visser & November op cit note 9 at 129-131; Jerome November *The role of provinces in the use of interventions in terms of section 139(1)(a)-(c) of the Constitution* (LLM thesis, University of the Western Cape, 2015). A similar finding was reached by Ledger & Rampedi op cit note 31 at 9.

[164] Ledger & Rampedi op cit note 31 at 11-2, 14, 21. See also Chamberlain et al op cit note 139 at 28-31, 34-5; Chamberlain & Masiangoako op cit note 9 at 454-5. National Treasury has identified the deployment of administrators without the dissolution of the municipal council as a key factor in the ineffectiveness of provincial interventions; see Presentation by National Treasury 'Strategy to address municipal performance failures: The approach going forward' (NCOP Provincial Week, September 2020) available at https://www.parliament.gov.za/storage/app/media/Pages/2019/september/11-09-2019_Preparatory_Workshop_for_the_Provincial_Week/presentations/Presentation_by_National_Treasury_Strategy_to_address_municipal_sustainability.pdf, accessed 6 March 2023.

[165] Ledger & Rampedi op cit note 31 at 21-3.

[166] Namely, the reliance on section 139*(1)* rather than section 139*(5)* of the Constitution, given the underlying crisis in financial affairs in the relevant municipalities.

[167] Ledger & Rampedi op cit note 31 at 4, 9, 17-9, 22-3.

to local government.[168] This has been exacerbated by provinces not having budgets to adequately fulfil their intervention obligations and lacking capacity in terms of personnel, funds, institutional knowledge and expertise.[169]

1.3.5 Pending developments in section 139 interventions

The Constitution specifically contemplates the development of national legislation to regulate the implementation of, and various processes set out in, section 139 of the Constitution.[170] While Chapter 13 of the MFMA does set out some detail on parts of the intervention process, with a focus on an underlying 'serious financial problem',[171] no standalone national legislation has yet been finalised.

National legislation developed under section 139*(8)* of the Constitution is often cited as being crucial to improving the section 139 intervention process. For example, Ledger and Rampedi suggest that one of the key solutions to the various fault-lines identified within the intervention mechanism is to introduce one piece of clear guiding legislation which can apply to the entire intervention framework and which includes the adoption of clear definitions and detailed thresholds for intervention.[172] de Visser and November propose that, to ensure usefulness, the legislation should clarify the trigger for intervention, the use of prior notices, the use of the section 139*(1)(a)* directive and the nature of the information that is to be submitted to the CoGTA Minister and NCOP.[173]

On the other hand, Chamberlain et al submit that, 'rather than develop another new law', guidance, preferably in the form of regulations, is required on the operation and

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[168] Mathenjwa op cit note 59 at 242. This was based on a consideration of a number of provincial interventions (including in Utrecht, Imbabazane, AbaQulusi, uMhlabuyalinganato, Langeberg, Overberg and Mnquma).

[169] Steytler op cit note 75. This has also been identified as a challenge by DCoGTA; see DCoGTA 'Application of section 139 of the Constitution' (23 July 2019) available at https://static.pmg.org.za/190723application.pdf, accessed 6 March 2023.

[170] Section 139*(8)* of the Constitution.

[171] See sections 136-150 of the MFMA.

[172] Ledger & Rampedi op cit note 31 at 25-8.

[173] de Visser & November op cit note 9 at 131-2; Steytler op cit note 75.

implementation of the existing provisions, including when a municipal council may be dissolved.[174]

Various draft iterations of the legislation under section 139*(8)* of the Constitution have been in the legislative pipeline since 2013. The current version of the draft Intergovernmental Monitoring, Support and Intervention Bill served before Cabinet on 29 November 2022 and was published for public comment in July 2023, with the expectation that it would be enacted in the 2023/24 financial year.[175]

1.3.6 Litigation and the section 139 intervention mechanism

As set out in above, section 139 of the Constitution incorporates certain co-operative government mechanisms, including the mandated roles for the CoGTA Minister, provincial legislatures and the NCOP in different types of interventions. However, section 139 does not expressly contemplate a role for the courts in an assessment of a section 139 intervention unlike, for example, section 38 of the Constitution which specifically recognises the justiciability of the rights set out in Chapter 2 of the Constitution (the Bill of Rights).[176]

By 2017 'very few cases of interventions into local government [had] made it to the courts'.[177] This was confirmed by Ledger and Rampedi in 2019, who noted that, in the time period under consideration (from 1998 to 2019), a 'small number of interventions (two) ha[d] been put aside following a court decision, after the municipality in question had challenged the basis for the intervention'.[178]

These two early High Court decisions, in *Mnquma*[179] *and Mogalakwena*,[180] have received substantial attention and have been referred to extensively in the seminal texts dealing with

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[174] Chamberlain et al op cit note 139 at 27, 31-4.

[175] DCoGTA op cite note 4.

[176] Section 38 of the Constitution provides that a court may be approached if a right in the Bills of Rights has been infringed or threatened and may grant 'appropriate relief', including a declaration of rights.

[177] de Visser & November op cit note 9 at 113.

[178] Ledger & Rampedi op cit note 31 at 10.

[179] *Mnquma* supra note 62.

[180] *Mogalakwena* supra note 55.

section 139 interventions.[181] The focus has generally been on how these decisions affect the interpretation of section 139 interventions[182] rather than specifically focusing on an understanding of the role of the courts in section 139 interventions.

The High Court in *Mogalakwena* was also critical of the use of section 139 intervention litigation to settle political disputes, particularly when this meant that public money was utilised for litigation rather than improving infrastructure and services in the community.[183] This approach has motivated some commentators to suggest that disputes relating to section 139 interventions should rather be resolved by way of arbitration.[184]

However, a local government in crisis, paired with dysfunctional channels of state accountability (including the co-operative governance mechanisms) and a poorly implemented (if even implemented) constitutionally-mandated remedy of 'last resorts', has led to requests for assistance increasingly being directed to the courts or Chapter 9 institutions.[185] The result has been a noticeable change in the judicial role, with the judiciary finding itself squarely within the fray of local government dysfunction and increasingly being called upon to consider matters relating to section 139 of the Constitution.

This growing role played by the courts in considering matters relating to section 139 of the Constitution has received limited attention from a research perspective. For example, while the academic texts have referenced case law, where applicable, to support the appropriate legal

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[181] See, for example, Steytler & de Visser op cit note 30; Steytler & de Visser op cit note 23; Ledger & Rampedi op cit note 31; de Visser & November op cit note 9; Chamberlain & Masiangoako op cit note 9; Bronstein & Glaser op cit note 64.

[182] For example, it has been argued that the objectives of local government are too broad and vague to constitute an executive obligation for the purposes of section 139*(1)* of the Constitution, and that the decision in *Mnquma* supra note 62 effectively created the precedent that provincial government is able to implement more drastic steps without first utilising less intrusive steps; see Phindile Ntliziywana 'Court rejects "traditional" method of intervention in municipalities' *Dullah Omar Institute* (March 2010) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-12-issue-1-march-2010/lgb-iss-12-1-court-rejects-the-traditional-method-of-intervention.pdf/view, accessed 6 March 2023.

[183] *Mogalakwena* supra note 55 paras 79-80.

[184] See, for example, Makoti & Odeku op cit note 86 at 84.

[185] Everatt & Pieterse op cit note 19 at 795.

interpretations for section 139, these texts generally do not engage extensively with the judicial role in section 139 interventions and, obviously from a timing perspective, have not comprehensively canvased the various arguments raised in the latest wave of section 139 intervention case law.

However, some researchers have started to consider these issues. For example, in a brief for the Helen Suzman Foundation, Ramsden discussed *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality*[186] (in which the court granted the community group temporary control of the water and sewage works), and the report of the South African Human Rights Commission ('SAHRC') on the Emfuleni Local Municipality[187] (in which a section 139 intervention was recommended), and noted the development of various possible courses of action (legal and otherwise) opening up to aggrieved residents in the face of continuing service delivery failures.[188]

There have also been a number of briefs prepared for the Dullah Omar Institute which, in part, consider the role of the court.[189] For example, Stevens briefly considered the role of the courts in compelling provinces to initiate a mandatory intervention in dysfunctional municipalities, based on the decision in *UPM* (a community-led court challenge on the failure to initiate a section 139 intervention). Stevens identified a jurisprudential trend that local communities can hold provinces 'accountable for failing to supervise municipalities' through mandatory

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[186] *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* [2020] ZANWHC 95 (18 December 2020).

[187] SAHRC *Final Report of the Gauteng Provincial Inquiry Into the Sewage Problem of the Vaal River* (17 February 2021).

[188] Chelsea Ramden 'Service delivery in South Africa at a glance' *HSF* (17 March 2021) available at https://hsf.org.za/publications/hsf-briefs/service-delivery-in-south-africa-at-a-glance, accessed 6 March 2023.

[189] See Gaopalelwe Mathiba 'Can a provincial government under national intervention intervene in a municipality?' *Dullah Omar Institute* (December 2019) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-14-issue-2-december-2019/can-a-provincial-government-under-national-intervention-ntervene-in-a-municipality, accessed 6 March 2023, which considers whether a High Court decision that the North West provincial government, which is under national intervention, does not have the requisite competence to intervene in local government (Kagisano Molopo Local Municipality), was a 'misdirection of law'. This decision has now been overturned; see *Premier of the North West Province v Kagisano Molopo Local Municipality* [2022] ZANWHC 7 (10 March 2022).

interventions and raised, without considering, the question of '[w]hether or not this amounts to judicial overreach'.[190] Stevens has also previously identified and welcomed the use of court orders as a means to enforce mandatory interventions, with reference to *Coetzee v Premier, Mpumalanga Province*.[191]

Chigwata, on the other hand, briefly considered the increased role of the courts as a check on provincial interventions with a focus on two decisions: *UPM*[192] and *Tshwane* (a political party-led court challenge on the lawfulness of an initiated section 139*(1)(c)* intervention).[193] Chigwata recognised that the willingness of the courts to consider national government intervention in certain circumstances highlighted the potential role of the courts in discretionary interventions.

Other academic commentators have focused on specific section 139 intervention matters. For example, in a dedicated consideration of the court-ordered intervention in the Makana Local Municipality, Chamberlain et al highlighted some of the key issues that arose in that matter in relation to the role of the courts. This included the appropriateness of a discretionary or mandatory intervention and whether courts can make such orders, the application of the separation of powers doctrine (with the High Court finding that when the Constitution requires

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[190] *UPM* supra note 3; Curtly Stevens 'Courts forcing provinces to intervene in dysfunctional municipalities: case study of Makana Local Municipality' *Dullah Omar Institute* (March 2020) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-15-issue-1-march-2020/courts-forcing-provinces-to-intervene-in-dysfunctional-municipalities-case-study-of-makana-local-municipality, accessed 6 March 2023.

[191] *Coetzee v Premier, Mpumalanga Province* (2799/2017) [2018] ZAGPPHC (9 October 2018); Curtly Stevens 'Provincial governments are not intervening when they are supposed to: The case study of Emalahleni Local Municipality' *Dullah Omar Institute* (September 2019) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-14-lgb/the-intersection-of-the-role-of-municipalities-under-the-spatial-planning-and-land-use-management-act-16-of-2013-and-the-role-of-traditional-leaders-in-the-process-of-allocating-land, accessed 6 March 2023.

[192] *UPM* supra note 3.

[193] Tinashe Carlton Chigwata 'Courts as a check on provincial interventions: the Makana and Tshwane interventions' *Dullah Omar Institute* (June 2020) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/vol-15-issue-2-june-2020/courts-as-a-check-on-provincial-interventions-the-makana-and-tshwane-interventions, accessed 6 March 2023.

the judiciary to decide an issue, it can 'never amount to overreaching'), and the ability of the courts to order the dissolution of a municipal council (with the High Court finding that it has the power to dissolve a municipal council if the legislative preconditions are met).[194]

In considering the judicial enforcement of mandatory provincial interventions in municipalities, Wright, Dube and du Plessis have argued that, in situations where the relationships between municipalities and their communities have collapsed and there is poor service delivery, there is a 'case' for the courts to order unresponsive provincial authorities to intervene in municipalities (albeit that the 'role of the courts is not to govern').[195]

However, Wright et al submit that, in practice, court-ordered interventions inadequately deal with the legal and political complexities of interventions and are 'simplistic' solutions which are not sustainable, while the required litigation is costly and time-consuming.[196] Wright et al raise three main risks with a judicially mandated intervention: first, the concern that courts may act beyond their jurisdiction and interfere in areas that fall within the mandate of the executive or legislature (therefore necessitating judicial restraint); second, that the lack of democratic legitimacy and capacity deficits of courts may lead to deference resulting in further harm to the community; and third, that it raises significant concerns in relation to the legal framework for support, monitoring and intervention and the lack of capacity by the provinces.[197]

Finally, Everatt and Pieterse have observed that courts are playing an 'increasingly interventionist' role, demonstrated through decreasing deference shown to the democratic legitimacy of local government and reduced belief in the ability of constitutional accountability mechanisms to avoid and address governance collapses, despite previously affording municipalities a 'significant margin of discretion' in dealing with local government affairs.[198]

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[194] Chamberlain et al op cit note 139 at 21-3; Chamberlain & Masiangoako op cit note 9 at 444-6; *UPM* supra note 3 paras 6-35, 94.

[195] Wright et al op cit note 97 at 105, 110, 118, 120-2. Also see Felix Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2022) 36 *SAJHR* 293 at 306.

[196] Ibid 120-2.

[197] Ibid 123.

[198] Everatt & Pieterse op cit note 19 at 787, 798-803.

1.4 A categorisation of section 139 intervention matters

The matters relating to section 139 of the Constitution that have been considered by the South African courts tend to have certain distinguishing characteristics which merit a preliminary, broad categorisation for the purposes of further analysis. This Thesis identifies three broad categories of section 139 intervention matters.

1.4.1 Category 1: Judicial review of an initiated section 139 intervention[199]

The first category or 'type' of decisions involving section 139 of the Constitution concerns the judicial role when a decision has been taken by a provincial executive[200] to initiate an intervention in a particular municipality in terms of section 139 read, where applicable, with the relevant provisions of the MFMA. The interventions contemplated in this first category may be based on any of sections 139*(1)*, *(4)*, *(5)* or *(7)* of the Constitution.

The litigation in this first category is generally initiated by one (or more) of the following parties: a municipality, a municipal councillor(s), a range of municipal officials (mayors, municipal managers, speakers) and/or a political party. The common thread amongst the applicants is that they are all actors within the local government sphere.[201]

Respondents to the Category 1 litigation include the intervention decision-makers (such as the provincial executive council, the premier, the MEC for local government and, where applicable, the MEC for finance) as well as the intervention 'watch-dogs' (represented by the CoGTA Minister, chairperson of the NCOP and speaker of the provincial legislature). If the provincial executive has taken a decision to dissolve a municipal council, then the administrator will also often be cited as a respondent in the litigation. In general terms, however, the

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[199] The Category 1 matters that have been considered in this Thesis are set out in the Table of Cases.

[200] At this stage, a mandatory national intervention under section 139*(7)* of the Constitution has been initiated on only three occasions and a review of such decision is yet to be considered by the courts.

[201] At this stage, interested community groups and fora have not been involved in Category 1 matters; rather the key applicants are discontented local government actors challenging a provincial government's decision to intervene in a particular municipality.

respondents will fall within two broad categories: actors within the provincial government sphere and actors within the national government sphere.

Applicants tend to structure a challenge in Category 1 in two parts. First, applicants will seek temporary relief in the form of an interdict to prevent a provincial executive or appointed administrator from 'interfering' in the municipality's affairs and for a suspension of the decision to intervene in its affairs. Second, as part of the main application, applicants will generally seek final relief in the form of the review and setting aside of the decision to intervene in the municipality.

Applicants tend to base their challenge on the absence of the jurisdictional facts which should act as pre-conditions to an intervention decision being taken. Applicants may argue that party-political influences (or ulterior motives) have motivated the provincial executive to initiate an intervention, rather than the existence of any such jurisdictional facts. Applicants may also raise arguments relating to the steps and processes that should have been followed prior to initiating a section 139 intervention including, but not limited to, allowing for representations, the application of the *audi alteram partem* rule, the application of the intergovernmental dispute resolution mechanisms, and the detail that is required in notices to be provided under section 139 of the Constitution. These arguments rely heavily on the underlying principles of co-operative government and intergovernmental relations which should find application in the relationships between different spheres of government.

The High Courts are increasingly being drawn into Category 1 matters and, with an increasing number of initiated interventions by both provincial and national government, it appears unlikely that this tide will turn. However, despite the relatively prolific nature of the Category 1 litigation, the Supreme Court of Appeal and the Constitutional Court have considered the substantive and procedural requirements of section 139 of the Constitution on very few occasions.

1.4.2 Category 2: Judicial review of a failure to initiate a section 139 intervention[202]

The second category or 'type' of decisions involving section 139 of the Constitution concerns the judicial role when the provincial and/or national executive has failed to take a decision to initiate an intervention in a particular municipality in terms of section 139 read, where applicable, with the relevant provisions of the MFMA. The interventions contemplated in this second category may be based on any of sections 139*(4)*, *(5)* or *(7)* of the Constitution (the mandatory intervention mechanisms).

The litigation in this second category is generally initiated by one (or more) of the following parties: concerned citizens, residents, ratepayers, organised community associations, businesses, business fora and/or civil society or public interest organisations acting on the community's behalf. These applicants are usually[203] actors independent of any particular sphere of government.

Respondents to the Category 2 litigation include a broad range of parties across all three spheres of government. First, court papers may cite the provincial decision-makers, including the provincial executive council, the premier, and the MECs for local government and for finance, who (it is alleged) have failed to take the relevant intervention decision under section 139 of the Constitution. These actors, all falling within the provincial government sphere, are usually referred to collectively as the 'provincial government respondents'.

Second, the court papers may cite the relevant local government actors, including the municipality as well as its council, mayor, municipal manager and, if relevant, administrator. These role-players are included given that the Category 2 matters relate, at their core, to allegations of service delivery failure and financial mismanagement within local government. On occasion, the relevant district municipality will also be included as a respondent. These actors, all falling within the local government sphere, are usually referred to collectively as the 'municipal' or 'local government' respondents.

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[202] The Category 2 matters that have been considered in this Thesis are set out in the Table of Cases.

[203] The DA, a political party, has indicated its intention of continuing to initiate such intervention litigation, although it is not clear whether such matters would be brought in its capacity as a political party, or by a DA councillor serving as part of a dysfunctional and/or failing municipal council.

Third, the court papers may cite the national government actors, such as the CoGTA Minister, the Minister of Finance and the President. In addition, various oversight bodies are usually cited as respondents including the NCOP, in its capacity as the intervention mechanism 'watch-dog', and SALGA, in its role to represent, promote and protect the interests of local government. On occasion, public utility providers, such as Eskom or the relevant water board, will also be included as respondents.

Applicants tend to structure a challenge in Category 2 in various parts. First, applicants will generally seek various declaratory orders, including that a municipality is in breach of its constitutional obligations and that the jurisdictional facts for a mandatory (or, possibly, discretionary) intervention are satisfied.

Second, applicants will generally seek an order from the court directing and compelling the provincial executive (or the national executive) to intervene in the municipality in terms of sections 139*(4)* or *(5)* of the Constitution (or in terms of section 139*(7)* of the Constitution), read with sections 139 and 140 of the MFMA, and to start the process of preparing a financial recovery plan. An order from the court directing and compelling the dissolution of the municipal council may also be sought.

Third, applicants may seek a structural or supervisory order requiring regular reporting by the various government actors to the court (and to the applicants) on the progress of the court-ordered section 139 intervention and the achievement of various implementation targets.

Following recent litigation success in Category 2 (in the case of both the Makana Local Municipality[204] and the Mafube Local Municipality[205]), it is likely that the role of the courts in this category will become increasingly important. At this stage, Category 2 matters have been considered by the High Courts and have not yet been comprehensively considered by the Supreme Court of Appeal or the Constitutional Court.

[204] *UPM* supra note 3.

[205] *Mafube Business Forum v Mafube Local Municipality* [2022] ZAFSHC 86 (28 April 2022).

1.4.3 Category 3: The judicial role in matters that (*should*) trigger section 139 of the Constitution[206]

While a mandatory section 139 intervention in a failing or dysfunctional municipality may specifically be sought by litigants as relief (as in Category 2), the initiation of such intervention (or the fortification of an existing intervention) is not always sought as relief, even when the jurisdictional facts could likely be established.

The third category or 'type' of decisions is thus a catch-all category considering the judicial role in matters which trigger, or at least, this Thesis argues, *should* trigger, a consideration of the mandatory section 139 intervention mechanism in a dysfunctional municipality. In these matters, the affected municipality is (often admittedly) experiencing a financial crisis which has led to a serious or persistent failure to meet its financial commitments (often to Eskom) or to provide basic services such as electricity, water and sanitation services, or both.

Litigation in response to systemic municipal dysfunction may be initiated by disgruntled local businesses or community-led litigants, municipalities or Chapter 9 institutions (such as the SAHRC), proposing either adherence to traditional constitutional accountability and intergovernmental monitoring, support and dispute resolution mechanisms, or a bypassing of such mechanisms in favour of 'innovative' alternatives, such as a court-sanctioned assumption of control by a community over the affected municipal service/s and/or the ring-fencing of funds. However, the initiation (or fortification) of a section 139 intervention is generally not sought as relief.

Against this background, Category 3 is divided into two sub-categories: first, matters where litigants (a municipality, community-led litigants, local businesses, chambers of commerce, and/or non-governmental organisations) are seeking to 'keep the lights on' in litigation involving both Eskom and the relevant municipality; and second, matters where litigants (community-led litigants or local businesses) are seeking to jettison constitutional intervention or intergovernmental dispute resolution mechanisms.

Category 3 matters have been considered by the High Courts, SCA and Constitutional Court.

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[206] The Category 3 matters that have been considered in this Thesis are set out in the Table of Cases.

1.5 Hypothesis and research questions

My hypothesis is as follows: the South African courts are currently involved in, and will continue to be involved in, considering decisions to initiate a section 139 intervention, failures to take decisions to initiate a section 139 intervention, as well matters which would appear to trigger a section 139 intervention (although no such section 139 intervention has been initiated or requested).

My main research question to be answered in this Thesis is 'based on a review and analysis of the existing case law, what is the developing and appropriate judicial role in matters relating to section 139 of the Constitution and what are the reasons for this judicial role conception?'

This question has a number of subsidiary questions:

- Can the role adopted by the judiciary in the existing case law be categorised and, if so, are there similarities and differences in the judicial role conception adopted by the courts within each category?

- What is the judicial role conception in the assessment of the justiciability of the matters related to section 139 of the Constitution?

- What are the factors that guide the intensity of the judicial scrutiny afforded to matters relating to section 139 of the Constitution, and are there similarities and differences in the judicial role conception adopted by the courts within each category?

- What are the factors that guide the remedial prescriptiveness adopted by the courts in matters relating to section 139 of the Constitution, and are there similarities and differences in the judicial role conception adopted by the courts within each category?

- How do separation of powers considerations, first, between the courts and the provincial and national executive and, secondly, between the courts and the municipal council, overlap or differ between the categories? How do these separation of powers considerations interact with the constitutional structuring of intergovernmental relations and municipal autonomy within each category?

- How do the courts deal with the socio-economic rights violations underlying local government dysfunction, failure or collapse in each category?

- How do the courts deal with failing democratic institutions, structures and processes, including accountability channels, in each category? How do the courts deal with governmental action and responsiveness in each category?

- What are the principles that guide the conception of the judicial role in matters related to section 139 of the Constitution?

The contribution of this Thesis to the literature is thus to distinguish between the different types of section 139 intervention matters considered by the courts and to analyse and conceptualise the judicial role across these types or categories.

1.6 Methodology and chapter outline

This Thesis is theoretical and doctrinal, with a focus on the case law relating (directly and indirectly) to section 139 of the Constitution, as grouped into the three broad categories identified above.

The understanding of theoretical research is that it 'fosters a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures' that influence a particular area of law[207] – in this case the judicial role conception in matters relating to section 139 of the Constitution.

Chapter 2 advances a theoretical understanding of the courts' conception of the judicial role across various streams of litigation in South Africa. The streams of litigation selected focus on different subject matter areas in which the South African courts play a significant role, including: the adjudication of disputes relating to intergovernmental relationships, the adjudication of a 'constitutional duty', the adjudication of 'pure' executive action, the adjudication of administrative action, and the adjudication of socio-economic rights violations. These streams were selected based on their underlying connections with key factors influencing matters relating to section 139 of the Constitution, which in turn informs the courts' own role conception. Drawing together these different streams, Chapter 2 develops a conceptual and

[207] See Terry Hutchinson & Nigel Duncan 'Defining and describing what we do: Doctrinal legal research' (2012) 17 *DLR* 83 at 101 with reference to Dennis Pearce, Enid Campbell & Don Harding *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

analytical theoretical framework for the construction of a judicial role conception to be applied to the categories of matters relating to section 139 of the Constitution, as discussed in Chapters 3, 4 and 5 of this Thesis.

The methodology in this Thesis is also doctrinal, with the judicial role conception and explanations for the development of the courts' understanding of its role being situated within the South African legal system. The doctrinal method is generally considered to be so embedded within legal research that it is often not even identified or developed as a methodology.[208] Doctrinal legal research includes the description and interpretation of laws, 'theory-building' through systematisation, and a problem-solving method often utilised by students and legal practitioners.[209] In this way, doctrinal legal research provides a 'systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments'.[210] Doctrinal research is further guided by the understanding that there may be a number of legal options for resolving an issue, but that one option may be 'preferable to the others for reasons of technical fit, social consequence and normative attractiveness'.[211]

This Thesis is further doctrinal in its methodology as it entails a systematic, conceptual and qualitative analysis of legal materials (both legislation and case law) and, where applicable, supporting materials, for the purposes of ascertaining similarities and connections across the identified categories of matters relating to section 139 of the Constitution, developing distinctions, establishing a theoretical framework and predicting future developments.[212]

In this regard: Chapter 1 systematically analyses the constitutional and legislative framework for: first, local government (including in relation to accountability, monitoring and support)

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[208] Hutchinson & Duncan op cit note 207 at 98-101; Theunis Roux 'Judging the quality of legal research: A qualified response to the demand for greater methodological rigour' (2014) 24 *Legal Education Review* 173 at 177, 180-1.

[209] Hutchinson & Duncan op cit note 207 at 106, 113; Terry Hutchinson *Researching and Writing in Law* 3 ed (2010) at 37; Roux op cit note 208 at 174, 182.

[210] Hutchinson & Duncan op cit note 207 at 101; Roux op cit note 208 at 174-5, 182, 198.

[211] Roux op cit note 208 at 184.

[212] Hutchinson & Duncan op cit note 207 at 83-4, 118; Richard Posner 'The present situation in legal scholarship' (1981) 90 *YLJ* 1113.

and second, for the section 139 intervention mechanism in South Africa. It also analyses the state of local government and the state of the section 139 intervention mechanism. Chapter 2 draws on the Constitution, case law and academic literature in developing an analytic and normative framework for judicial role conception in the South African legal system. The case law considered in Chapters 3, 4 and 5 trace doctrinal developments within each of the relevant categories to assess the courts' understanding of its own role. Chapter 6 then sets out some of the main findings, assesses the theoretical framework against the categories of matters relating to section 139 of the Constitution, develops and explains distinctions and predicts future developments in relation to the judicial role conception in section 139 intervention matters.

There is a concern that doctrinal research is too formalistic and may lead to oversimplifying legal doctrine, in terms of which 'the legal system itself is not only the subject of inquiry, but its categories and concepts form the framework' and tools for the research.[213] In recognition of this concern, this Thesis, in Chapter 6, sets out some areas for additional research and other questions that need to be answered to reach a clearer understanding of this area of law.

A further criticism of the doctrinal method is that the interpretation and analysis of legal material is generally neutral, objective and value-free.[214] In addressing this criticism, when engaging in normative analysis in the Thesis it is expressly recognised and acknowledged that this proceeds on the basis of certain ideological assumptions (as set out in Chapters 1 and 2). Given the noticeable gap in legal research in this area, this Thesis only purports to act as a 'first step' with the intention for extra-legal methods being used to advance the analysis of doctrine in future research.[215]

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[213] Pauline Westerman 'Open or autonomous: The debate on legal methodology as a reflection of the debate on law' in M Van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (2011) 87; Roux op cit note 208 at 174, 198.

[214] See, for example, Anthony Bradney 'Law as a parasitic discipline' (1998) 25 *Journal of Law and Society* 71-84.

[215] Roux op cit note 208 at 175-80. For example, to address a weak version of the critique that doctrinal research frequently relies on empirical claims that should be established by appropriate social science research methods, Roux proposes that doctrinal researchers can safely 'restrict themselves to the sort of armchair observations about the social effects of legal norms', as are also utilised by judges to support decisions.

The primary method of research of the Thesis is textual, analytic and desk-based focussing on a consideration of the growing body of case law relating to section 139 of the Constitution and, in particular, the judicial role in such matters. The research method is primarily grounded in juridical science but, where appropriate, relies on non-juridical materials. The materials considered include relevant legislation, local literature and research reports, policy documents and other publicly available documents relating to section 139 interventions including documents that are submitted to the NCOP, the CoGTA Minister and the relevant provincial legislature, annual reports of the various provincial and/or national CoGTA departments, minutes of relevant parliamentary committee meetings, official statements in respect of section 139 interventions, including those made by SALGA, as well as other news reports.

Some other methods adopted in the Thesis include inductive reasoning (a process of arguing from several specific cases, 'to find a major premise which underlies them all',[216] to a more general rule) and analogy (which involves identifying similar cases and then submitting that the same principles should guide these similar cases, resulting in similar outcomes).[217]

The case law within the three categories seeks to investigate the judicial role conception in varying matters relating to section 139 of the Constitution and explore why the judicial role conception differs, if at all, across the categories (as set out in Chapters 3, 4 and 5), including when compared with, and as influenced by, the streams considered in Chapter 2. The case law is thus considered for exploratory, illustrative and explanatory purposes.[218]

The case law within each of the three categories allows for the consideration of multiple individual court decisions, allowing for conclusions to be drawn across multiple matters in a systematic and analytical manner.[219] The categories group together various distinct cases that have been brought by different parties in different courts but relate to the same substantive issues and reflect some strategic alignment and connectedness. The categories have been

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[216] John H Farrar *Legal Reasoning* (2010) at 91-2 quoting Lord Diplock in *Dorset Yacht v The Home Office* [1970] AC 1004.

[217] Ibid at 102: analogy 'proceeds on the basis of a number of points of resemblance of attributes or relations between cases'.

[218] Robert Yin *Case Study Research: Design and Methods* 5th ed (2014) at 8.

[219] Ibid at 18.

established with due recognition of their similarities and differences, which enables useful comparisons and contrasts and a meaningful contribution to the debate about the judicial role in matters relating to section 139 of the Constitution.

The core similarity between the categories is the increasing role of the courts in considering matters related to section 139 of the Constitution, particularly where the underlying jurisdictional facts for a section 139 intervention have been established (or are alleged to have been established or could arguably be alleged to have been established). Other similarities across the three categories include concerns around the failures of applicable democratic institutions, structures and processes (including accountability channels), the responsiveness and action of government actors, and the reality, or possibility, of the violation of socio-economic rights.

One difference between the categories is the litigants, including: actors in the government sphere (primarily in Category 1), concerned citizens, residents, ratepayers, organised community associations, businesses, business fora and/or civil society or public interest organisations acting on the community's behalf (primarily in Category 2), or a mixture of these litigants (primarily in Category 3).

Another difference is the forum: while Category 1 culminated in a Constitutional Court decision, Category 2 includes mainly High Court decisions (which were not appealed or were settled before reaching the SCA or Constitutional Court), while Category 3 includes a mix of High Court, SCA and Constitutional Court decisions. Further, while Categories 2 and 3 are often based on (multiple) underlying socio-economic rights violation within the context of executive action, Category 1 is mainly based on the rule of law and the constitutional principle of legality (although underlying rights violations may also be present). This has the potential to affect both the level of judicial scrutiny and the remedial prescriptiveness afforded to each category. Differences such as these enable the testing of the theoretical framework for a judicial role conception against different categories of matters.

1.7 Contribution to knowledge

At the broadest level, this Thesis contributes to ongoing debates regarding constitutionalism, co-operative government and intergovernmental relationships, separation of powers, lawfare, judicial review and the role of the courts. More specifically, it focuses on the judicial role, and

the courts' understanding of this role, in matters relating to section 139 of the Constitution, particularly when the courts, unlike the provincial or national executive, are not subject to the co-operative government obligations set out in the Constitution.

The Thesis illustrates the contextual nature of the role of the courts and begins to build a theory of judicial role conception in matters relating to section 139 of the Constitution including whether a matter is justiciable and the level of judicial scrutiny and remedial prescriptiveness that is possible and legitimate based on underlying factors such as the courts' understanding of the application of the doctrine of separation of powers; the courts' understanding of the functionality of the democratic institutions, structures and processes, including accountability channels; the courts' understanding of governmental action and responsiveness; and the courts' understanding of the seriousness of any rights violation.

This Thesis thus advances the literature on section 139 of the Constitution and, in particular, the judicial role in such matters, and sets out factors to explain the judicial role conception at the level of theory, in Chapters 1 and 2, and qualitatively through an analysis of the categories of matters relating to section 139, in Chapters 3 to 5. While the literature has started to touch on the role of the courts, this Thesis fills the gap by focusing exclusively on this aspect and categorising and systematically analysing the matters relating to section 139 of the Constitution, particularly given the burgeoning litigation in this area.

CHAPTER 2: A THEORETICAL FRAMEWORK FOR THE DEVELOPMENT OF A JUDICIAL ROLE CONCEPTION

'... the more dysfunctional or deadlocked the political system and its decision-making institutions are in a given rule-of-law polity, the greater the likelihood of expansive judicial power in that polity'.[1]

2.1 Introduction

Chapter 1 provided a snapshot of the systemic and unrelenting collapse of local government and of seemingly dysfunctional constitutional accountability and intergovernmental monitoring and support mechanisms, including the section 139 intervention mechanism. Against this background, the South African courts are increasingly being drawn into considering matters relating to section 139 of the Constitution, inevitably triggering contestation and tension around the judicial role.

These tensions are not new. The courts are often required to navigate a 'delicate balance', with consideration of the doctrine of separation of powers, taking due care not to engage in judicial overreach or a 'jurisprudence of exasperation', while simultaneously not succumbing to undue judicial caution or timidity.[2]

The purpose of this Chapter is to develop a conceptual, analytical and evaluative framework for constructing a judicial role conception[3] (with a focus on justiciability, judicial scrutiny and

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[1] Ran Hirschl 'The new constitutionalism and the judicialisation of pure politics worldwide' (2006) 75(2) *Fordham Law Review* 721 at 744.

[2] See, in general, Jonathan Klaaren (ed) *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (2006). Also see Patrick Lenta 'Judicial restraint and overreach' (2004) 20 *SAJHR* 544 at 544; Lauren Kohn 'The burgeoning constitutional requirement of rationality & the separation of powers: Has rationality review gone too far?' (2013) 130(4) *SALJ* 810 at 823; Chelsea Ramden 'Judicial overreach' *HSF* (8 June 2017) available at https://hsf.org.za/publications/hsf-briefs/judicial-overreach, accessed 6 March 2023; Carol Steinberg 'Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence' (2006) 123(2) *SALJ* 264 at 274.

[3] The idea of the 'role conception' of a court, and the link with the adopted standard of judicial review and remedy, is borrowed from Katharine Young *Constituting Economic and Social Rights* (2012) at 152, 192. Young's view

remedial prescriptiveness) to determine 'the parameters of when and where courts [do and] *should* themselves intervene'[4] in matters relating to section 139 of the Constitution.

The Chapter starts by identifying and briefly discussing some of the constitutional concepts, values, principles and provisions ('lawfare', transformative constitutionalism, the doctrine of separation of powers, judicial review – the so-called 'theoretical yardsticks') that tend to influence the South African courts' role-conceptualisation more broadly and that infuse the academic literature on the judicial role. It then discusses the South African courts' adjudication in five broadly-identified subject matters or 'streams', each of which have elements pertaining to the adjudication of matters relating to section 139 of the Constitution. The streams include: the adjudication of disputes relating to intergovernmental relationships (Stream 1), the adjudication of a 'constitutional duty' (Stream 2), the adjudication of 'pure' executive action (Stream 3), the adjudication of administrative action (Stream 4), and the adjudication of socio-economic rights violations (the Stream 5).

The Chapter explores the understanding that the South African courts' have of their own role, as evidenced in their decisions within these streams, with a more in-depth discussion of certain judgments that illuminate particular aspects of the courts' self-conceptualised judicial role (a descriptive dimension). The Chapter also considers the (predominantly South African) academic literature relating to the judicial role in these streams, thereby layering the understanding of a judicial role conception with an analytical dimension. (The purpose, however, is not to conduct a critical analysis of the various judicial role conceptions within the five identified streams; this falls outside the scope of this Thesis.)

The Chapter concludes by weaving the various strands extracted from the case law and academic literature across the five streams into a conceptual, analytical and evaluative framework for constructing a judicial role conception applicable to matters relating to section 139 of the Constitution.

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on role conceptions demonstrates how the Constitutional Court's adjudication of socio-economic rights is related to the Court's view of itself as an 'institution of governance'.

[4] See Sanele Sibanda 'Introduction to special issue: separation of powers, the judiciary and the politics of constitutional adjudication' (2020) 36(4) *SAJHR* 287 at 288.

2.2 Theoretical yardsticks

2.2.1 Lawfare

> *'As long as political efforts remain insufficient, excessive recourse to the courts is likely to continue and the tensions caused by it will remain. The courts may then be tempted either to exceed the bounds of their proper authority or to make a strategic withdrawal, the more effectively to fight future battles*'.[5]

The surge of litigation in matters relating to dysfunctional local government and section 139 of the Constitution, despite the existence of non-curial constitutional safeguards, has the potential to trigger concerns of 'lawfare'.

The concept of 'lawfare', while recognised as vague and normatively intensive, has experienced traction and criticism in an emerging body of South African academic literature.[6] The intention is not to set out an in-depth analysis of the concept here; rather, it is to recognise the usage and associated high-level criticisms of 'lawfare' for the purposes of better conceptualising the courts' understanding of the judicial role when navigating matters relating to section 139 of the Constitution.

The term 'lawfare' was first used by anthropologists to refer to 'the effort to conquer and control indigenous peoples by the coercive use of legal means', especially within the context of colonial and apartheid-era abuses of law.[7] More recently, le Roux and Davis adopted the term 'lawfare' to comment on aspects of South African constitutionalism, arguing that 'lawfare' has 'a duality to it; it can be a good or a bad thing'.[8]

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[5] Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *AJLS* 105 at 126.

[6] See, generally, Corder & Hoexter op cit note 5 at 105-126; Michelle le Roux & Dennis Davis *Lawfare: Judging Politics in South Africa* (2019); Theunis Roux 'The Constitutional Court's 2018 term: Lawfare or window on the struggle for democratic social transformation?' (2020) 10(1) *CCR* 1.

[7] Roux op cit note 6 at 7; John Comaroff 'Symposium: Colonialism, culture and the law: A forward' (2001) 26 *LSI* 305, 306; John Comaroff & Jean Comaroff (eds) *Law and Disorder in the Postcolony* (2006) at 26.

[8] le Roux and Davis op cit note 6 at 5. This approach has been criticised for failing to 'offer us a normative theoretical framework for distinguishing between "good" and "bad" instances of the phenomenon'; see Roux op cit note 6 at 11.

Corder and Hoexter have proposed that the concept of 'lawfare' can be understood as incorporating three meanings: first, as the use or abuse of law by the state to achieve strategic political or military ends (mainly adopted in the pre-democratic era); second, as the use of litigation as 'a weapon of the weak' (mainly adopted between 1910 and 1933); and third, as the use of litigation, often by politicians and civil society, to 'resolve contentious political disputes' despite 'the existence of many non-curial constitutional safeguards' which are meant to prevent governance failures (mainly adopted in the constitutional democracy era).[9]

Roux, however, has argued that 'lawfare' has acquired a largely negative meaning: it is often used where the law is 'improperly used in pursuit of political ends'.[10] With reference to certain decisions from the Constitutional Court's 2018 term, Roux has identified three (in his view, often over-stated) concerns that are generally associated with the concept.[11]

The first concern is the debilitation of democratic politics through litigation of issues that should be resolved politically, with an excessive dependence on the courts to address 'core moral predicaments, public policy questions and political controversy' (sometimes referred to as the judicialisation of politics).[12] This dependence may arise when non-curial mechanisms and democratic institutions, processes and procedures (such as the intervention mechanisms in sections 100 and 139 of the Constitution, the general duty on all organs of state to provide accountable government, the duty on the National Assembly to oversee executive action, and the Chapter 9 institutions created in support of constitutional democracy) fail or are inadequately or insufficiently utilised.[13] This is a claim that may also be associated with certain section 139 intervention matters.

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[9] Corder & Hoexter op cit note 5 at 106-7. Also see Dennis Davis & Michelle le Roux *Precedent and Possibility: The (Ab)use of Law in South Africa* (2009) at 185; le Roux & Davis op cit note 6.

[10] Roux op cit note 6 at 3.

[11] Ibid at 11-2.

[12] Ibid. Also see Ran Hirschl *The Judicialisation of Politics* (2011) at 254; Hoolo Nyane 'The judicialization of politics in South Africa: A critique of the emerging trend' (2020) 36(4) *SAJHR* 319.

[13] See sections 41(1) and 42(3) of the Constitution; Dikgang Moseneke '20 years of democracy in South Africa: Where to now?' *University of South Africa* (12 November 2014) available at https://constitutionallyspeaking.co.za/dcj-moseneke-reflections-on-south-african-constitutional-democracy-

Roux agreed that the courts are being increasingly utilised but submitted that constitutional systems that provide for judicial review (including subjecting the exercise of public power to constitutional standards) '*require* courts to decide politically controversial matters' (emphasis added).[14] In any event, when considering the Constitutional Court's 2018 term, Roux observed a clear judicial focus on 'upholding the integrity of the democratic system', with the Constitutional Court consistently '*bolstering* democratic politics, *resisting* politicisation, and *sanctioning* attempts to abuse its processes'.[15]

The second concern is that judicial independence is endangered through the actual, or perceived, loss of the courts' independence, when politically contentious cases are litigated; this is often referred to as the 'politicisation of the judicial process'.[16] Again, this is a claim that may be associated with certain section 139 intervention matters. However, Roux has argued that the courts hold legitimate authority within both law and politics and that the Constitutional Court has consistently utilised legalist reasoning techniques to convert political questions into legal questions.[17]

The third concern is that litigants will abuse the law to delay cases or avoid accountability, which may manifest in a judicial review of the exercise, or failure to exercise, executive power. However, Roux has argued that an effective range of remedial orders have been adopted to sanction litigants who have lied or attempted to delay justice, which demonstrates the courts' appreciation and management of this inherent risk.[18]

2.2.2 Transformative constitutionalism

The idea of the South African Constitution as 'entailing a project of "transformative constitutionalism"' was formulated by Klare and involves 'constitutional enactment, interpretation and enforcement committed… to transforming [South Africa's] political and

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transition-and-transformation/, accessed 21 February 2024; Dennis Davis 'Separation of powers: Juristocracy or democracy?' (2016) 133(2) *SALJ* 258 at 269-70.

[14] Roux op cit note 6 at 11-12.

[15] Ibid at 6, 29.

[16] Ibid at 16-7.

[17] Ibid at 36-8.

[18] Ibid at 17-8.

social institutions and power relationships in a democratic, participatory, and egalitarian direction inducing large-scale social change through processes grounded in law'.[19]

Transformative constitutionalism has been associated with various aims such as the achievement of social justice, the eradication of inequality and the advancement of a culture of justification, particularly in the context of exercises of public power.[20]

The scope and meaning of 'transformative constitutionalism' is the subject of extensive academic debate, some of which is critical.[21] While the term 'transformative constitutionalism' is not expressly included in the text of the Constitution, it is generally agreed that transformative constitutionalism is 'a recognised feature of the Constitution… sourced in a range of [its] provisions'[22] and has become 'the pre-eminent conceptual framing typifying post-1994 South African constitutionalism'.[23] The term has also been incorporated within the jurisprudence of the Constitutional Court, with Nkabinde J noting in a unanimous judgment that it 'has over the past decade found considerable resonance in our jurisprudence'.[24]

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[19] Karl Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146 at 150.

[20] Pius Langa 'Transformative constitutionalism?' (2006) 17 *SLR* 351; Marius Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SAPL* 155 at 156, 161; Jason Brickhill & Yana Van Leeve 'Transformative constitutionalism – Guiding light or empty slogan' (2015) *Acta Juridica* 141-71; Cora Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) *SAJHR* 281 at 286-7.

[21] See, for example, Tshepo Madlingozi 'Social justice in a time of neo-Apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *SLR* 123; Sanele Sibanda 'Not purpose-made! Transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *SLR* 482.

[22] Such as the founding values, the duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights, and the inclusion of socio-economic rights that must be progressively realised. See Brickhill & Van Leeve op cit note 20 at 146-7; Cora Hoexter 'A rainbow of one colour? Judicial review on substantive grounds in South African law' in Hanna Wilberg & Mark Elliot (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (2015) 178 at 188; Hoexter op cit note 20 at 286-7.

[23] Sanele Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *LDD* 384 at 386-7, 406.

[24] *Hassam v Jacobs* 2009 (5) SA 572 (CC) paras 28, 35. Also see *Mwelase v Director-General: Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) para 47, fn 89; *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC) para 127; *Beadica 231 CC v Trustees for the time being, Oregon Trust* 2020 (5) SA 247

Regarding the judiciary's role in the realisation of the Constitution's transformative vision, Klare submitted as follows:

> '[t]he Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods.' [25]

These 'classical legalist methods' that were referred to by Klare incorporate the separation of law and politics: judges are to 'check their politics at the courthouse door', enforce laws neutrally, and 'not… make politics'.[26] Under classical legalist methods, the judiciary's duty is to ensure justice as permitted by law.[27]

Transformative constitutionalism, however, requires judges to interpret the law and apply the Constitution's provisions in a manner that furthers the Constitution's transformative purpose and 'accomplish[es] political projects', with reference to external factors such as the '[promotion of] equality, a culture of democracy and transparent governance'.[28] Judges are further required to intervene when there is an impermissible exercise of power.[29]

In undertaking transformative adjudication, judges are required to engage in substantive legal reasoning, interpreting legal provisions as 'human rights-creating or -enhancing provisions, as far as their language and structure will reasonably allow' and considering the values contained

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(CC) paras 74, 100, 206-31; *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) paras 55, 79, 114, 195; *King v De Jager* 2021 (4) SA 1 (CC) paras 47, 77, 165-8, 195-236.

[25] Klare op cit note 19 at 156.

[26] Ibid at 157.

[27] Dikgang Moseneke 'The fourth Bram Fischer Memorial Lecture: Transformative adjudication' (2002) 18 *SAJHR* 309 at 316.

[28] Ibid. Also see Pieterse op cit note 20 at 164; Klare op cit note 19 at 156-7.

[29] Moseneke op cit note 27 at 318.

in the Constitution, the applicable context (including the material context of litigants) and the social implications when interpreting rights and duties.[30] This judicial role means that the courts have legitimate constitutional authority to consider political matters, without being constrained by the doctrine of separation of powers.[31]

Some commentators have highlighted concerns with this expansive judicial role associated with transformative constitutionalism, including the possibility of a disconnect between the 'transformative aspirations' of the Constitution and an inherently 'conservative legal culture' (embedded with traditions of legal analysis, in particular literalist, technicist, rule-bound approaches, alongside a 'reverence for law').[32] The underlying concern is whether judges are able to transition from a classically liberal separation of powers to address the challenges of transformative adjudication by adopting a fundamental change in legal culture and engaging in a more political style of adjudication.[33] On the other hand, it has been argued that the clear statement and detail of the Constitution, particularly within the Bill of Rights, effectively limits the influence that legal culture and different interpretive approaches may have in South Africa.[34]

The judicial role in the context of transformative constitutionalism is thus still open to debate. Some commentators express a preference for more judicial involvement, with an argument that the courts are not doing enough to advance transformation and that the failure by the Constitutional Court 'to pursue a rights-based analysis of the content of social rights and the

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[30] Sandra Liebenberg *Socio-economic Rights: Adjudication Under a Transformative Constitution* (2010) Preface, xxi: a failure to take context into account perpetuates legal doctrines which are 'blind to the experiences and consequences of poverty and inequality'. Also see Moseneke op cit note 27 at 316-8; Cora Hoexter 'The enforcement of an official promise: form, substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 214; Hoexter op cit note 20 at 281, 287; Pieterse op cit note 20 at 164.

[31] See, generally, Felix Dube 'Separation of powers and the institutional supremacy of the Constitutional Court over Parliament and the executive' (2021) 36(4) *SAJHR* 293.

[32] Klare op cit note 19 at 151, 166-8; Sibanda op cit note 21 at 489, 490-4; Moseneke op cit note 27 at 315-6; Pieterse op cit note 20 at 164.

[33] Ibid. Also see Gretchen Carpenter 'Constitutional interpretation by the existing judiciary in South Africa – can new wine be successfully decanted into old bottles?' (1995) 28(3) *CILSA* 322-37.

[34] See Theunis Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference?' (2009) 20 *SLR* 258.

nature of the state's obligations',[35] and a preference for an 'arms-length' stance or reluctance for involvement, even when considering a grossly unequal background of deprivation, is harmful to transformative constitutionalism.[36]

On the other hand, some commentators are concerned with the extensive reliance on the use of transformative adjudication for transformation, arguing for less involvement by the courts. Sibanda, for example, has argued that the reliance on legal and judicial interpretation (which requires a 'sustained and purposeful legal and judicial interpretation demanding a shared consciousness' and is difficult to attain) threatens the very idea of transformative constitutionalism and the attainment of true transformation.[37]

2.2.3 The separation of powers

> '*For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred [where the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery], the courts have had little choice in their duty to provide effective relief.*' [38]

While not expressly mentioned in the Constitution, it has been widely accepted that the doctrine of separation of powers, considered a 'vital tenet of our constitutional democracy', is implicitly

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[35] Jackie Dugard & Theunis Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in Gargarella R et al (eds) *Courts and Social Transformation in New Democracies – An Institutional Voice for the Poor?* (2006) 107, 110, 115-6, 118-9; Stuart Wilson & Jackie Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 22 *SLR* 664 at 664-5, 670-2; Dennis Davis 'Transformation: The constitutional promise and reality" (2010) 26 *SAJHR* 85 at 99-101; Iain Currie 'Judicious avoidance' (1999) 15 *SAJHR* 138.

[36] See Theunis Roux 'Principle and pragmatism on the Constitutional Court of South Africa' (2009) 7(1) *International Journal of Constitutional Law* 106-38. Also see Corder & Hoexter op cit note 5 at 120; Lenta op cit note 2 at 544; Davis op cit note 13 at 2.

[37] Sibanda op cit note 21 at 493.

[38] *Mwelase* supra note 24 paras 48-9; *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) ('*Black Sash1*').

entrenched within the text of the Constitution.[39] As a result, separation of powers has emerged as a constitutional doctrine, foundational value and stand-alone justiciable legal principle, which has the potential to play a role whenever the courts conduct exercises of constitutional interpretation or consider relationships between constitutional structures and the manner in which other branches of government exercise their powers.

In the simplest terms, the doctrine of separation of powers incorporates two essential parts: first, a recognition of the functional independence and the distinct and separate exercise of power by the three branches of government (the legislature, executive and judiciary) and second, in recognition of any necessary or unavoidable intrusion of one branch into the terrain of another branch, a system of checks and balances that prevents the branches of government from usurping each other's power.[40]

The courts do not adopt their own self-appointed role within the doctrine of separation of powers. Rather, the separation of powers doctrine requires the courts, as the custodians of the Constitution and as the final and independent arbiter of legal issues, to ensure that all branches of government 'act within the law' while also abstaining from entering the exclusive terrain of the other branches of government unless 'the intrusion is mandated by the Constitution itself'.[41] This means that the courts must be aware of the duty not to assume superior wisdom and must

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[39] *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) ('*OUTA'*) paras 44, 63-5; *South African Association of Personal Injury Lawyers v Heath* 2001 (1) SA 883 (CC) paras 19, 46; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 66; *De Lange v Smuts* 1998 (3) SA 785 (CC) para 60.

[40] See, for example, Kate O'Regan 'Checks and balances: Reflections on the development of the doctrine of separation of powers under the South African Constitution' (2005) 8(1) *PELJ* 120-50; *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*'First Certification*') para 109; *International Trade Administration Commission v SCAW South Africa* 2012 (4) SA 618 (CC) para 95.

[41] See, generally, Lenta op cit note 2 at 544-76; Prenisha Sewpersadh & John Mubangizi 'Judicial review of administrative and executive decisions: Overreach, activism or pragmatism?' (2017) 21 *LDD* 201. This has been repeated by the Constitutional Court on numerous occasions including in: *OUTA* supra note 39 para 44; *Electronic Media Network Limited v e.tv* 2017 (9) BCLR 1108 (CC) paras 1-5; *EFF v Speaker of the National Assembly* 2018 (2) SA 571 (CC) ('*EFF2*') paras 92-3; *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) paras 37-8.

intrude 'only in the clearest of cases', especially 'when the executive decision making process is still [incomplete]'.[42]

Any allegation that the doctrine of separation of powers has been (or may be) infringed must be considered by the courts, although any such allegation should not be used to 'stigmatise' the courts' orders[43] or permit the courts to 'shirk' from their constitutional duty to protect the Constitution.[44]

The Constitutional Court's jurisprudence, however, consistently asserts that there is 'no universal model of separation of powers'.[45] This is generally paired with an expectation (or hope) that South Africa will, in time, develop a 'distinctively South African model of separation of powers' to 'fit' the Constitution and reflect the 'delicate balancing' between the different branches of government and the need to ensure that the government is still able to take 'timely measures in the public interest'.[46] This means that the Constitutional Court's jurisprudence on the doctrine of the separation of powers has tended to demonstrate 'judicial modesty', with limited guidance on the judicial navigation of the boundaries between impermissible activism and permissible review.[47]

There is an argument in the literature for a model of separation of powers that sets out a 'categorical understanding' of the doctrine,[48] while another argument supports the need for a

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[42] *SCAW* supra note 40 para 101.

[43] *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC) para 72.

[44] *Doctors for Life* supra note 41 paras 38, 200; *Minister of Health v New Clicks* 2006 (2) SA 311 (CC) para 313; *SCAW* supra note 40 paras 92-3. This is echoed by O'Regan J's dissent on remedy in *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) para 170.

[45] *First Certification* supra note 40 para 108; *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC) paras 28-30.

[46] *De Lange* supra note 39 para 60; *First Certification* supra note 40 paras 106-8; Lenta op cit note 2.

[47] Davis op cit note 13 at 258, 260.

[48] Heinz Klug 'Institutional integrity and the promise of constitutionalism: Justice Moseneke, judicial authority and the separation of powers' (2017) 3 *Acta Juridica* 3 at 7-8, 11; Mtendeweka Mhango 'Is it time for a coherent political question doctrine in South Africa: Lessons from the United States' (2014) 7 *AJLS* 457.

model of separation of powers that is 'agile, responsive, and provisional, rather than a matter of static relations'.[49]

Cachalia, for example, has argued that a 'free-standing' separation of powers framework (and the determination of the limits of judicial intervention) should be one that incorporates 'democratic process restraint' and the utilisation of democratic process to resolve issues, structured around the principles of legality and accountability and the prevention of abuses of power.[50]

On the other hand, Davis, for example, has expressed some concern with a model of separation of powers that is intertwined with democratic accountability, particularly when such accountability is not present in practice (including where 'non-litigious sites for mediation of conflict appear no longer to be present').[51]

In practice, despite the latent hope in the academic literature for conceptual guidance, the Constitutional Court has generally opted not to engage in a detailed explanation of the content of the doctrine of separation of powers or of how and why it applies. Instead, the Constitutional Court generally limits itself to explanations of the doctrine of separation of powers as being neither fixed nor rigid, being able to be expressed in many different forms and being subject to checks and balances of many types, while pairing this with the recognition that the Constitution does not provide for a total separation of powers between the branches of government.[52] This flexible separation of powers doctrine (generally) enables the Constitutional Court to avoid direct confrontation with the political branches.

Arguably this excessive judicial modesty has resulted in the separation of powers doctrine 'appear[ing], disappear[ing], reappear[ing] and evolv[ing] at the [Constitutional] Court's convenience and whim'[53] with the result that '[n]o clear doctrine of separation of powers

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[49] Aziz Huq 'A tactical separation of powers doctrine' (2019) 9 *CCR* 19 at 43-4.

[50] See, generally, Firoz Cachalia 'Separation of powers, active liberty and the allocation of public resources: the e-tolling case' (2015) 132 *SALJ* 285 at 298-303.

[51] Davis op cit note 13 at 269-70.

[52] See, for example, *NSPCA v Minister of Agricultural, Forestry and Fisheries* 2013 (5) SA 571 (CC) para 13.

[53] Timothy Fish Hodgson 'The mysteriously appearing and disappearing doctrine of separation of powers: toward a distinctly South Africa doctrine for a more radically transformative Constitution' (2018) 34(1) *SAJHR* 57 at 59.

exists'.[54] It would certainly appear that this conceptual vagueness, paired with an emphasis on flexibility and context, is strategic by the courts: it permits and enables significant judicial manoeuvrability, free from the constraints of an explicitly-demarcated and previously-articulated doctrine.

Nevertheless, elements of a 'uniquely South African' conception of the doctrine of separation of powers are starting to crystallise, as discussed broadly in the paragraphs below and as apparently manifesting in the matters relating to section 139 of the Constitution discussed in this Thesis.

2.2.4 Judicial review

> *'To legitimise the exercise of state power in a democracy, constitutionalism must not only demarcate the extent of state power, but also establish mechanisms aimed at ensuring the wielders of power are held accountable'.*[55]

Any model of judicial review, and the courts' corresponding choice of standard of review and remedy, is undergirded by multiple background structural forces, including various 'institutional concerns' which have been extensively discussed in, amongst others, the academic literature relating to the adjudication of socio-economic rights.[56]

First, there is the courts' understanding of their own democratically legitimate role in a constitutional democracy, closely linked with respect for separation of powers, considered together with counter-majoritarian arguments (also known as constitutional competence).[57]

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[54] Mia Swart & Thomas Coggin 'The road not taken: Separation of powers, interim interdicts, rationality review and e-tolling in *National Treasury v Opposition to Urban Tolling*' (2014) 5 *CCR* 346 at 365.

[55] Molly Beutz 'Functional democracy: responding to failures of accountability' (2003) 44 *Harvard International Law Journal* 387 at 388 quoted in Marius Pieterse 'Coming to terms with judicial enforcement of socio-economic rights' (2004) 20(3) *SAJHR* 383 at 385. Also see, in general, Jeremy Waldron 'The core of the case against judicial review' (2005) 115(6) *YLJ* 1346; Theunis Roux *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (2018).

[56] Danie Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *SLR* 614 at 615; Pieterse op cit note 55 at 383-417; Kirsty McLean *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (2009) at 89-115; Liebenberg op cit note 30 at 71-5.

[57] Danie Brand 'Socio-economic rights and courts in South Africa: Justiciability on a sliding scale' in Fons Coomans (ed) *Justiciability of Economic and Social Rights* (2006) at 207, 225-6; Liebenberg op cit note 30 at 63-

The broad argument is that judges are not democratically accountable for their decisions and that certain decisions are more appropriately made by people who are accountable to the public. On the other hand, there is an argument that courts specialise in interpretation and the evaluation of rights in a non-partisan and public manner, including judicial reason-giving in judgments, which necessarily makes the courts both accountable and ultimately the 'most appropriate forum' for deciding such matters.[58]

Second, there is the courts' views on the appropriate judicial role, given the institutional limitations and capacity of the courts, both in relation to the expertise of the courts and the information placed before the courts.[59]

Third, there is the courts' views on institutional competence and the appropriateness of judicial consideration of complex polycentric disputes, involving a 'myriad of interlinked, competing interests', which would ordinarily fall within the 'heartland' of executive or legislative power.[60] This discussion relates to the 'perceived appropriateness' of the courts to adjudicate matters, rather than an inherent inability to do so.

While there are polycentric elements in almost every dispute before the courts, this is fundamentally based on the argument that judges lack the experience, knowledge or resources to make these types of decisions and to assess, or respond to, the impact of their decisions.[61] There is also the possibility of judicial ignorance of the circumstances on the ground.[62]

71; McLean op cit note 56 at 86, 108, 111-4; Pieterse op cit note 55 at 390-2; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) ('*Mazibuko*') paras 60-2.

[58] McLean op cit note 56 at 89, 111-3; Pieterse op cit note 55 at 389 onwards; Liebenberg op cit note 30 at 71-5.

[59] McLean op cit note 56 at 72, Brand op cit note 56 at 616; Liebenberg op cit note 30 at 71-5; *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) ('*Soobramoney*') para 58; *Mazibuko* supra note 57 paras 61-2.

[60] See Lon L. Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 353 which is often cited as authority for the view that courts are not appropriate forums to decide polycentric matters. Also see Liebenberg op cit note 30 at 71-5; McLean op cit note 56 at 114-5; Pieterse op cit note 55 at 390-9; Brand op cit note 56 at 625; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) ('*TAC2*') para 38; *Doctors for Life* supra note 41 para 37; *SCAW* supra note 40 paras 94-5; *EFF v Speaker of National Assembly* 2016 (3) SA 580 (CC) ('*EFF1*') paras 92-3.

[61] McLean op cit note 56 at 72; Fuller op cit note 60 at 398; Pieterse op cit note 55 at 394-5.

[62] Wilson & Dugard op cit note 35.

However, the opposing view, as articulated by Pieterse, is that the judiciary is well-suited to consider matters (including socio-economic rights disputes) due to the courts' ability to provide individualised remedies fairly quickly, expertise in the interpretation of legislation, and rationality in the decision-making process, particularly in the context of proper argument and sufficient, accurate evidence.[63]

Fourth, there is the courts' views on the dangers associated with the judiciary analysing, evaluating and deciding complex and controversial questions (including social and economic questions) without any ability, other than reliance on judicial credibility, to ensure the enforcement and implementation of decisions.[64] To preserve the courts' institutional integrity and security, and embrace 'appropriate constitutional modesty', courts are required to carefully consider the judicial role in relation to the nature or content of the dispute and take due care not to overreach constitutionally or politically.[65] As a result, the courts may tend towards deference to the executive or legislature where a matter involves greater political discretion.

When adjudicating matters, the courts act within the context of, and are influenced by, these background structural forces, resulting in a structuring of judicial intervention in three key stages: first, an initial (often latent) justiciability-inquiry stage in which the courts consider and justify their involvement and the extent of that involvement; second, a 'review' stage in which the courts adopt a particular level of scrutiny, often with a degree of in-built deference; and third, a 'remedial' stage in which the courts decide on the prescriptiveness of a remedy, linked to considerations of what is just, equitable and appropriate in the circumstances.

2.2.4.1 Justiciability

Corder and Hoexter have observed that the Constitution is aimed at 'not only facilitat[ing] but actually encourag[ing] litigation'.[66] In other words, the provisions of the Constitution provide a direct constitutional legitimisation for judicial review: courts are required to declare invalid

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[63] Pieterse op cit note 55 at 395.

[64] Ismail Mahomed 'The independence of the judiciary' (1998) 115 *SALJ* 658 at 661; Brand op cit note 57 at 225; Brand op cit note 56 at 616; Liebenberg op cit note 30 at 72; *Soobramoney* supra note 59 para 58.

[65] McLean op cit note 56 at 61; Geoff Budlender 'A delicate balance: Remedying breaches of the Constitution' in Klaaren op cit note 2 at 83, 91; *Soobramoney* supra note 59 para 58.

[66] Corder & Hoexter op cit note 5 at 117.

any law or conduct that is inconsistent with the Constitution,[67] there are various justiciable rights in the Bill of Rights and broad standing provisions[68] and the courts are afforded broad remedial powers.[69]

The South African courts have adopted a 'liberal approach' to the justiciability of exercises of public power[70] with no indication that a political question doctrine will be developed.[71] However, the courts have cautioned that justiciability must not be assumed and must be assessed on a case-by-case basis.[72]

As such, while the exercise of public power may be susceptible to judicial review, the exact scope of justiciability will depend on a range of factors, including the nature of the power being exercised. Justiciability will further be informed by the Constitution and its values, the rule of law (a system of governance based on legality, accountability and a 'culture of justification'), the impact of transformative constitutionalism (requiring courts to exercise their powers in the

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[67] Section 172*(1)(a)* of the Constitution; *TAC2* supra note 60 para 99; *Doctors for Life* supra note 41 para 199.

[68] Section 38 of the Constitution, in terms of which anyone whose rights are affected or threatened may approach a court for relief; Corder & Hoexter op cit note 5 at 117; Patrick Lenta 'Democracy, rights disagreements and judicial review' (2004) 20(1) *SAJHR* 1.

[69] Section 172*(1)(b)* of the Constitution. Also see *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 18; *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) para 181.

[70] Corder & Hoexter op cit note 5 at 117; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56-8; *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) paras 19, 24; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC); *UDM v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 55; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 78, 244-5.

[71] For a discussion of this, see Mhango op cit note 48; Mtendeweka Mhango 'Executive accountability and the separation of powers: Introducing the political accountability doctrine in South Africa' (2021) 35(1) *Speculum Juris* 33; Mtendeweka Mhango & Ntombizozuko Dyani-Mhango 'Deputy Chief Justice Moseneke's approach to the separation of powers in South Africa' (2017) *Acta Juridica* 75-98.

[72] *SARFU* supra note 70 para 143; *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 48; *Kaunda* supra note 70 para 245.

achievement of social transformation),[73] the doctrine of separation of powers, the system of checks and balances,[74] the principles of co-operative governance and intergovernmental relations, and the influence of 'lawfare'.

2.2.4.2 Judicial scrutiny

When engaging in judicial review under the Constitution, the South African courts tend to adopt a standard of judicial review with a shifting intensity of scrutiny and often with a degree of in-built deference, depending on various factors.

Judicial scrutiny is, in part, determined by jurisdictional concepts and the categorization of government action, such as the differences between administrative and executive action.[75] The level of judicial scrutiny adopted may also vary based on the subject matter: for example, where a matter affects rights, it may be subject to more intense review; while matters relating to a 'particularly sensitive subject matter or policy matters', should be shown greater deference by courts through the adoption of less intense scrutiny.[76]

Further, the intensity of judicial scrutiny may be linked to constitutional competence, in terms of which a structural understanding of the Constitution could result in less judicial scrutiny being utilised where the Constitution assigns competence, in the first instance, to another body, such as a democratically elected legislature or a specific sphere of government.[77]

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[73] Stuart Wilson 'Litigating housing rights in Johannesburg's Inner City: 2004-2008' (2011) 27 *SAJHR* 127 at 131.

[74] Corder & Hoexter op cit note 5 at 117; Dikgang Moseneke 'Striking a balance between the will of the people and the supremacy of the Constitution' (2012) 129 *SALJ* 9 at 17; Dikgang Moseneke 'Oliver Schreiner Memorial Lecture: Separation of powers, democratic ethos and judicial function' (2008) 24 *SAJHR* 341 at 349.

[75] Jonathan Klaaren 'Five models of intensity of review' in Klaaren op cit note 2 at 79-82.

[76] Ibid at 82; *Bel Porto* supra note 69 para 127 quoting *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 (HL) at para 28. Also see *Minister of Defence and Military Veterans v Motau* 2014 (5) SA 69 (CC) para 43; PJH Maree and Geo Quinot 'A decade and a half of deference' 2016 *Journal of South African Law* 268-80 (part 1) and 447-66 (part 2).

[77] Klaaren op cit note 75 at 82. Also see Sachs J's judgments in *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC); *Democratic Alliance v Masondo* 2003 (2) SA 413 (CC); *New Clicks* supra note 44.

The level of judicial scrutiny is also closely intertwined with the concept of deference, restraint or 'respect' required to be shown to other branches of government,[78] which is in turn linked with the doctrine of separation of powers (albeit that there are shifting notions of this doctrine)[79] and to the various structural background forces set out above.[80]

A two-pronged test for determining the degree of deference required was formulated by the Constitutional Court in *Bato Star*. This test requires the recognition of, first, the proper role of the executive and legislature within the Constitution (the 'democratic principle')[81] and, second, polycentricity concerns and the courts taking due care not to assume 'superior wisdom in relation to matters entrusted to other branches of government' (institutional competence).[82] These elements affect the variability or 'spectrum-like' nature of the intensity of the review, the applicable review standards that are adopted, and the prescriptiveness of the remedies implemented.[83]

The incremental adoption of a doctrine of deference by the South African courts has been recognised in the adjudication of socio-economic rights claims[84] and in the judicial review of exercises of public power.[85] For example, the adoption of deference in socio-economic rights disputes has been described by Brand as the courts' approach of 'leav[ing] decisions of

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[78] Corder & Hoexter op cit note 5 at 117-8; Maree & Quinot op cit note 76; Cora Hoexter 'The future of judicial review in South African administrative law' (2000) *SALJ* 484 at 485-94, 501-2; Brand op cit note 56; Lenta op cit note 2 at 564; *Logbro Properties v Bedderson* [2003] 1 All SA 424 (SCA) paras 20-1.

[79] *Bato Star* supra note 72 para 46 (discussing Hoexter supra note 78); Klaaren op cit note 75 at 81.

[80] Brand op cit note 56 at 617; Pieterse op cit note 55 at 383-417; *Soobramoney* supra note 59 para 58; *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) para 41; *Mazibuko* supra note 57 para 65.

[81] *Bato Star* supra note 72 para 46; Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt'* (2010) 127 *SALJ* 580 at 588.

[82] *Bato Star* supra note 72 para 46; *TAC2* supra note 60 paras 8, 22, 38, 99.

[83] Hoexter op cit note 78 at 502-3; Maree & Quinot op cit note 76 at 270, 279.

[84] *TAC2* supra note 60 paras 8, 22, 38, 99; *Mazibuko* supra note 57 paras 63-5; McLean op cit note 56 at 127, 168; Brand op cit note 56 at 624-30; Liebenberg op cit note 30 at 173, 176-7.

[85] *Doctors for Life* supra note 41 paras 37-8, 199; *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 64; *Bato Star* supra note 72 para 46; *OUTA* supra note 39 para 65.

[complex technical or social] issues, in different ways and to varying degrees, to the other branches of government'.[86]

However, the judicial adoption of deference has been criticised, particularly to the extent that it can lead to 'over cautious timidity'.[87] McLean has argued further that '[w]holesale deference is neither warranted, nor desirable' in socio-economic rights disputes and that the adoption of deference should always be 'transparent'.[88] Budlender has suggested that deference must always be context-specific including, for example, a consideration of the nature of the respondent and its competence.[89]

Further, Maree and Quinot have argued that deference is 'a formal and conceptual approach', often assumed to have a 'self-evident meaning and role to play in adjudication', but with little clarity or consistency in its application or in the reasoning adopted by the courts, with the result that deference 'as applied is largely empty'.[90] These authors accordingly propose that deference should be infused with considerations of constitutional supremacy, a culture of justification, a human rights culture, and transformative constitutionalism.

On the other end of the spectrum of judicial scrutiny, lies a 'jurisprudence of exasperation', judicial activism and possible judicial overreach. O'Regan J has cautioned that the courts must remain vigilant, ensure that reasoned, principled decisions are prepared, and not be tempted to apply a higher standard of review when dealing with government actors as a result of 'exasperation' with the state of affairs.[91] Ideally, the courts must consistently aspire towards finding 'an appropriate balance between vigilance and deference' in each matter.[92]

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[86] McLean op cit note 56 at 3-4, 25-6.

[87] *Mwelase* supra note 24 para 50. Also see Jackie Dugard & Malcolm Langford 'Art or science? Synthesising lessons from public interest litigation and the dangers of legal determination' (2011) 27 *SAJHR* 39; Brian Ray 'Evictions, aspirations and avoidance' (2015) 5 *CCR* 173.

[88] McLean op cit note 56 at 211.

[89] Budlender op cit note 65 at 92.

[90] Maree & Quinot op cit note 76 at 280, 460.

[91] Kate O'Regan 'Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court' (2012) 28 *SAJHR* 116 at 128.

[92] Pieterse op cit note 55 at 417.

2.2.4.3 Remedies

The South African courts' remedial prescriptiveness is shaped by the background structural forces (discussed above), considerations of transformative constitutionalism and the doctrine of separation of powers, and the incremental adoption by the courts of a doctrine of deference.

Section 172 of the Constitution sets out a broad remedial paradigm for the courts when deciding constitutional matters. The courts must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency, while they are further afforded a generous discretionary power to make any order that is 'just and equitable' in fulfilling this mandate. This is a corrective principle, aligned with the doctrine of separation of powers, that specifically 'allows correction to the extent of the constitutional inconsistency'.[93]

When deciding an infringement of a constitutional right, the courts are further permitted, under section 38 of the Constitution, to grant 'appropriate' relief, including a declaration of rights, an interdict, a mandamus or any other relief required to protect and enforce the rights.[94] The Constitutional Court has clarified that appropriate relief 'must mean an effective remedy', where an infringement of a right is 'effectively vindicated' as guided by the applicable government failure, particularly given that 'so few have the means to enforce their legal rights through the courts' in South Africa.[95] The Constitutional Court has held that, to achieve this goal, the courts are obliged to 'forge new tools and shape innovative remedies, if needs be'.[96]

Bollyky has argued that such remedies should not interfere extensively in policy and budgetary considerations if the constitutional violation is not proportionally extensive.[97] However,

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[93] *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) ('*AllPay2*') para 45.

[94] *Fose* supra note 69 paras 18-9, 42, 69; *Bel Porto* supra note 69 para 181; Kent Roach & Geoff Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 351.

[95] *Fose* supra note 69 paras 19, 69; *Mwelase* supra note 24; *AllPay2* supra note 93 para 42.

[96] *Fose* supra note 69 para 69. This obligation to 'forge new tools' is borrowed from the judgment of the Supreme Court of India in *Nilabati Behera v State of Orissa* [1993] AIR 1960 (SC) 1969.

[97] Thomas J. Bollyky 'R if C > P + B: A paradigm for judicial remedies of socio-economic rights violations' (2002) 18 *SAJHR* 161 at 164-5.

Bollyky does accept that when government's failure to act is unconstitutional, a 'deferential approach to socio-economic rights runs the risk of reducing courts to Greek choruses – a lamenting, vocal band of observers, unable to alter the tragedy unfolding before their eyes'.[98] As such, for Bollyky, effective relief must be mandatory and structural when rights have been violated, addressing the underlying conditions triggering the rights violation as well as the acts creating and perpetuating those conditions. Bollyky posits that the courts consistently and intuitively weigh their 'positive' mandate created by a constitutional violation (and its severity) against the 'illegitimacy' of effective relief (measured against interference in both policy and budgetary decisions).[99]

Overall, a determination of remedial prescriptiveness is inherently a balancing exercise, informed by a degree of deference: the courts are required to balance the need for remedial flexibility with certainty, and the need to act as guardians of the Constitution by awarding effective relief to vindicate rights (in line with transformative constitutionalism) with the limitations of the judicial function under the doctrine of separation of powers.[100]

Roach and Budlender have developed a set of broad guidelines, linked with the reasons for governmental non-compliance with constitutional standards, for determining an 'appropriate' judicial response and remedial prescriptiveness which addresses what has happened, why it has happened and what is necessary to fix it. The reasons, each of which require a different 'responsive technique', may include: the government being inattentive to the relevant constitutional right (generally meaning a failing to appreciate or understand the nature of government's constitutional obligations), the government being incompetent (which may include a lack of capacity), or the government being intransigent (which may include making a deliberate decision to defy the courts). [101]

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[98] Ibid at 163.

[99] Ibid at 164, 199.

[100] Ibid at 177.

[101] Roach & Budlender op cit note 94 at 327, 345-50, with reference to Chris Hansen 'Making it work: Implementation of court orders requiring restructuring of State executive branch agencies' in SR Humm (ed) *Child, Parent and State* (1994) at 232. They also draw parallels to the principles of escalating regulatory responses in John Braithwaite *Restorative Justice and Responsive Regulation* (2002).

Where government is merely inattentive, Roach and Budlender argue that the appropriate remedy will usually be a declaratory order, or a mandatory order coupled with a declaratory order, occasionally with a requirement to report to the parties or to the public to ensure compliance with the Constitution. This responsive technique is based on an understanding that the government will take steps to ensure compliance, meaning that continued judicial supervision and intervention will not be necessary. Roach and Budlender argue that this approach is not undemocratic or an infringement on the doctrine of separation of powers given that government is required to be transparent and accountable.[102]

When government is incompetent (and/or lacks capacity to ensure compliance with the Constitution), Roach and Budlender argue that the appropriate remedy should be mandatory relief and a requirement to report to the courts at regular intervals or, if severe incompetence or lack of capacity is demonstrated, the courts may consider supervisory jurisdiction (such as a requirement for government to submit a plan and progress reports for the courts' approval). Roach and Budlender argue that this approach does not infringe the doctrine of separation of powers; rather it ensures effective compliance with the Constitution.[103]

When government is intransigent, Roach and Budlender argue that the appropriate remedy may be a detailed and specific mandatory interdict (including supervisory jurisdiction such as the submission of compliance and progress reports to the courts) which is reinforced by a contempt order (if required due to governmental non-compliance).[104] This provides the parties with the ability to effectively enforce the order.

Recognising that supervisory orders or structural interdicts implicate the separation of powers and appropriateness of the judicial role, the Constitutional Court has held that such orders should be granted where 'it is necessary to secure compliance with a court order'.[105] Roach and Budlender have further suggested four instances in which a structural interdict may be considered to be 'necessary': where there is a failure to take notice of the relief granted by the courts, where the process of complying with the Constitution has taken so long that it is not

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[102] Ibid at 346-8.

[103] Ibid at 348-9

[104] Ibid at 349-51.

[105] *TAC2* supra note 60 para 129; Roach & Budlender op cit note 94 at 333.

clear that the order will be carried out promptly,[106] where the consequences of a failure to comply with a court order are extremely serious,[107] and where the mandatory order is so general that it is not clear what the government is required to do.[108]

2.3 A judicial role conception

In addition to these theoretical yardsticks, there are various theoretical frameworks for the court in the context of judicial review including, for example, judicial deference, judicial minimalism[109] and a representation-reinforcing approach.[110] Unpacking each of these theoretical frameworks in detail falls outside the ambit of this Thesis.

Rather, in developing an understanding of the courts' conception of the judicial role in matters relating to section 139 of the Constitution, this Thesis focuses on a consideration of the courts' responses in various 'streams' of litigation in South Africa, in which a judicial role conception is 'held and upheld by the court itself' with an emphasis on the way in which the courts see themselves interacting with others.[111] These streams have been selected given their inherent interconnection with key factors influencing matters relating to section 139 of the Constitution, which in turn informs the courts' understanding of the judicial role in these matters.

2.3.1 Stream 1: Judicial role conception in intergovernmental disputes

The adjudication by the South African courts of matters relating to section 139 of the Constitution, which contemplates an intervention by a national or provincial executive in local

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[106] *Sibaya v Director of Public Prosecutions (Johannesburg High Court)* 2007 (1) SACR 347 (CC).

[107] *TAC2* supra note 60.

[108] Roach & Budlender op cit note 94 at 328-35; Budlender op cit note 60 at 85-7.

[109] See, for example, Cass R. Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Currie op cit note 35.

[110] See, for example, John Hart Ely *Democracy and Distrust: A Theory of Judicial Review* (1980).

[111] Young op cit note 3 at 190-1. See also, for example, James Fowkes *Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa* (2016) at 14. Fowkes suggests that the Constitutional Court has adopted a 'constitution-building approach' in which the influence of politics on legal decision-making is extensive, with the courts actively developing doctrine and remedies for the purposes of promoting the healthy functioning of constitutional institutions, including justifying judicial interventions if this is necessary to ensure that institutions function effectively.

government, is intricately intertwined with considerations of co-operative government and intergovernmental relations. While the Intergovernmental Relations Framework Act 13 of 2005 ('IRFA') expressly excludes from its ambit any disputes that may arise under sections 100 and 139 of the Constitution,[112] the general constitutional provisions remain applicable.

In this regard, the navigation of an intergovernmental dispute is similarly intertwined with considerations of co-operative government and intergovernmental relations. Chapter 3 of the Constitution, read with the IRFA, imposes a 'two-fold obligation' on organs of state involved in intergovernmental disputes, which effectively limits the justiciability of intergovernmental disputes (that is, whether such a matter ought to be resolved by the judiciary).[113]

First, every reasonable effort must be made by the parties to settle the dispute using the applicable mechanisms and procedures (including, where relevant, the detailed steps set out in the IRFA) and ensure that all underlying constitutional obligations have been met. Second, the parties must exhaust all other remedies before the courts are approached to resolve the intergovernmental dispute.

The Constitutional Court has held that the judicial role in intergovernmental disputes is to ensure the performance of the duty of organs of state to avoid legal proceedings against each other; if the court is not satisfied that this duty has been performed, it is '*required*' to refer the dispute back to the organs of state.[114] This means that all 'extra-judicial avenues' for resolving a dispute (including any intergovernmental dispute resolution mechanisms outlined in the IRFA) must be exhausted, or reasonably pursued, before the dispute can be considered justiciable.[115]

Further, if the parties to an intergovernmental dispute have failed to pursue intergovernmental dispute resolution mechanisms, or have pursued such mechanisms which have failed and, in

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[112] See section 39*(1)(b)* of the IRFA.

[113] Chapter 3, and section 41*(3)* in particular, of the Constitution, as well as section 45*(1)* of the IRFA; *Uthukela District Municipality v President of the Republic of South Africa* 2003 (1) SA 678 (CC) para 19. Also see paragraph 1.2 of Chapter 1 of this Thesis.

[114] *Uthukela* supra note 113 paras 12-3; *National Gambling Board v Premier of KwaZulu-Natal* 2002 (2) SA 715 (CC) paras 18-24.

[115] *Uthukela* supra note 113 paras 12-13, 18-23.

the process, have also failed to comply with their obligations under Chapter 3 of the Constitution, the courts would consider this to be a 'sufficient ground' for refusing to consider the matter and would refer the dispute back to the parties for resolution.[116]

The courts are, however, required to 'be astute' and to hold organs of state accountable for steps 'actually taken' to fulfil their co-operative governance obligations before resorting to litigation, irrespective of any 'lip-service' paid to the fulfilment of the parties' intergovernmental dispute resolution obligations. In this assessment, the courts will generally consider the following factors: first, the seriousness of each party's commitment to the extra-judicial resolution of the dispute; second, the extent to which the dispute turns on a question of legal interpretation which might have been resolved amicably; and third, the preparedness of the parties to strike compromises which would require that they fundamentally re-evaluate their positions in a meaningful way.[117]

While intergovernmental disputes will be referred to organs of state for resolution where the intergovernmental dispute resolution mechanisms have not been reasonably pursued or internal remedies have not been exhausted, the courts still retain a discretion to consider these matters. This means that, despite the justiciability assessment, the courts' jurisdiction will never be completely ousted.[118]

The result is that, in certain circumstances, the courts may agree to condone non-compliance with the provisions of the IRFA, or a failure to exhaust internal remedies before approaching the courts, while remaining mindful of the peremptory language of the Constitution and the IRFA and the duty of organs of state to comply with their constitutional obligations.[119] For example, the courts have held that a relevant factor to be considered is whether 'good cause'

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[116] *National Gambling Board* supra note 114 para 37.

[117] *Minister of Police v Premier of the Western Cape* 2014 (1) SA 1 (CC) paras 63-4; *National Gambling Board* supra note 114 paras 35-6 (in which the Constitutional Court held that this duty entails more than an effort to settle a pending court case).

[118] Sections 41*(1)(h)(vi)*, 41*(3)-(4)* of the Constitution. Also see *National Gambling Board* supra note 114 para 33; *First Certification* supra note 40 para 291, *Uthukela* supra note 113 para 13-14, 19, 22, 33; *Minister of Police* supra note 117 para 58.

[119] *City of Cape Town v National Energy Regulator of South Africa* [2020] ZAGPPHC 800 (11 August 2020) para 35.

has been shown to enable the courts to condone non-compliance with the intergovernmental dispute resolution mechanisms. Arguments that the intergovernmental dispute would be prolonged or that the organ of state's opinion was that the use of intergovernmental dispute mechanisms would be unsuccessful in resolving the dispute, may not, depending on the factual matrix, constitute 'good cause'.[120]

Further, where 'bad faith' is clearly present, the courts have held that there can be no reasonable expectation for the parties to take the steps set out in the IRFA before initiating litigation.[121]

If, however, the parties to an intergovernmental dispute attempt to circumvent the applicable intergovernmental dispute resolution mechanisms, or the possibility of judicial intervention, the courts may refer the matter to the parties for resolution. For example, Eskom's decision to interrupt the electricity supply to certain municipalities (which were in financial crises and unable to pay for the electricity supply) so as to coerce the municipalities into the payment of their outstanding debt, without approaching a court, was considered by the Supreme Court of Appeal ('SCA') to be a circumvention of the provisions in the Constitution and the IRFA. The SCA held that, despite Eskom taking some steps to follow intergovernmental dispute resolution mechanisms, such as meeting with certain municipalities, premiers and ministers, '[n]othing less than a "reasonable effort, in good faith" to resolve the dispute would suffice'.[122]

Ultimately, in these matters the courts have tended not to focus on any possible socio-economic rights violations (irrespective of whether these exist) and have rather focused on the justiciability of the dispute, based on the parties' compliance with the 'two-fold obligations' set out in Chapter 3 of the Constitution and the IRFA. Further, when ensuring compliance with Chapter 3 of the Constitution, the judicial role in intergovernmental disputes has focused on an assessment of whether every reasonable effort has been made by the parties, in good faith, to resolve the dispute 'at a political level rather than through adversarial litigation',[123] with some

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[120] Ibid paras 17, 20, 23, 31; *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) para 10; *MEC for Education, KwaZulu-Natal v Shange* 2012 (5) SA 315 (SCA).

[121] *City of Cape Town v Premier, Western Cape* 2008 (6) SA 345 (C) para 24. This matter concerned a dispute regarding the conduct of the City of Cape Town in investigating a councillor of the municipal council, which arose in the context of a political contest between two political parties for control.

[122] *Eskom Holdings v Resilient Properties* 2021 (3) SA 47 (SCA) paras 81-2.

[123] *First Certification* supra note 40 para 291.

faith being placed in the integrity and healthy functioning of applicable democratic institutions, structures and processes.

2.3.2 Stream 2: Judicial role conception in the adjudication of a 'constitutional duty'

The adjudication of matters relating to section 139 of the Constitution, particularly a failure by the provincial or national executive to intervene in local government when the jurisdictional facts have been established, is intertwined with considerations of the judicial role in the adjudication of a 'constitutional duty' or 'constitutional obligation'.

The judicial role conception that is developing within the adjudication of a 'constitutional duty' triggers considerations of the 'judicialisation of politics' and the role of separation of powers. While numerous decisions could be argued to fall within the ambit of this second stream, especially within the context of the adjudication of the internal processes and functioning of the legislature,[124] the discussion here is limited to two key decisions: *EFF1* and *EFF2.* For present purposes, these are emblematic of the judicial role conception in the adjudication of a 'constitutional duty'.

The genesis of these two decisions can be found in the Public Protector's investigation into the expenditure on upgrades to former President Jacob Zuma's private Nkandla residence. The Public Protector's report concluded that the President had breached various constitutional provisions as a result of the state paying for the non-security upgrades to the residence.[125] The Public Protector decided to take remedial action and directed the President (with the assistance of National Treasury) to pay a reasonable percentage of the reasonable cost of the non-security upgrades, and to reprimand the various Ministers that had been involved. The former President, however, submitted a report to the National Assembly ('NA') refusing to comply and the NA voted to absolve the President of the Public Protector's findings. In response, certain opposition

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[124] See, for example, the courts' involvement in compliance with the obligation of the national legislature to hold the President accountable (*EFF1* supra note 60), the need for rules regulating a President's impeachment (*EFF2* supra note 41), a constitutional obligation to facilitate public participation in the legislative processes (*Doctors for Life* supra note 41**)**, the scheduling of motions of no confidence (*Mazibuko v Sisulu* 2013 (6) SA 249 (CC)), and the powers of the Speaker to require a secret ballot (*UDM* supra note 70).

[125] Public Protector *Secure in Comfort* (2013/4); *EFF1* supra note 60 at para 7.

parties approached the courts to compel the President to comply with the remedial action set out in the Public Protector's report.[126]

In *EFF1*, the Constitutional Court held, unanimously, that the NA had violated its constitutional obligations to scrutinise and oversee executive action, in terms of section 43*(2)* of the Constitution, by failing to hold the President accountable, particularly given the evidence of abuse of power and misappropriation of public resources.[127] The Constitutional Court held further that the NA's resolution absolving the President was inconsistent with the Constitution (albeit that it was procedurally proper).

However, cognisant of the risk of 'border[ing] on second-guessing' the NA's constitutional power or discretion, the Constitutional Court only considered whether the NA had acted in 'substance and reality' in a manner consistent with the Constitution.[128] In particular, the Constitutional Court held that it fell 'outside of the parameters of judicial authority' to prescribe to the NA how to scrutinise executive action, what mechanisms to establish and the mandate of those mechanisms for the purpose of holding the executive accountable.[129] The Constitutional Court thus appeared to accept that the scope for judicial intervention to correct dysfunction within the democratic process is not unlimited and 'remains the exception, not the rule'.[130]

The Constitutional Court handed down its judgment in *EFF1* on 31 March 2016. On 5 April 2016, a political party brought an impeachment motion against the President in terms of section 89 of the Constitution (based on the President having committed a serious violation of the Constitution in failing to implement the Public Protector's remedial action). This motion was deliberated and voted on in the NA but was not successful.[131] The Speaker of the NA

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[126] *EFF1* supra note 60 paras 11-3.

[127] Ibid paras 94, 97-8, 104-5 and para 10 of the Constitutional Court's order.

[128] Ibid para 43.

[129] Ibid para 93.

[130] Ibid para 92; Firoz Cachalia 'Precautionary constitutionalism, representative democracy and political corruption' (2019) 9 *CCR* 45 at 72.

[131] *EFF2* supra note 41 paras 8-9.

subsequently refused a request by another political party for a fact-finding enquiry into whether the President should be impeached.

Various political parties applied directly to the Constitutional Court challenging this decision of the Speaker and the conduct of the NA in its failure to put in place the necessary mechanisms and processes to hold the President accountable (in terms of section 89 of the Constitution) and in its failure to scrutinise the President's constitutional violations identified in *EFF1*.

The Constitutional Court was divided in *EFF2.* Four separate judgments were handed down, illustrating a divergence in the Constitutional Court's views, particularly on the application of the doctrine of separation of powers.

Jafta J, for the majority, held that section 89*(1)* of the Constitution, while not setting out any specific rules, procedures or mechanisms, did not allow individual members to determine the conditions or grounds for impeachment (including what constitutes a 'serious violation of the law or the Constitution' or 'serious misconduct').[132] The majority held this determination requires an 'institutional predetermination', meaning that any impeachment process must be preceded by a preliminary inquiry based on rules formulated by the NA.[133] While the majority did not specify any content for the impeachment rules, it did set out the requirements for a 'specific mechanism' with which impeachment rules must comply, including the establishment, composition and mode of decision-making in the form of a standing committee (which had to be controlled by minority members of the NA in order to be constitutionally compliant).[134]

Against this background, the majority declared that the NA's failure to make impeachment rules was unconstitutional (combined with a direction to make such rules), and that the failure to determine whether the President had met the grounds for impeachment was unconstitutional (with a direction to fulfil that obligation).[135]

In its judgment, the majority was alive to separation of powers concerns, but held that its proposed order did 'not usurp' the NA's powers; rather, its order directed the NA to exercise

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[132] Ibid paras 137, 178.

[133] Ibid paras 178, 180-2.

[134] Ibid paras 170 and 232.

[135] Ibid Orders 2-3 and Orders 4-5, respectively.

its powers without delay given the 'special circumstances of [the] case'.[136] The majority held further that an order issued to achieve the fulfilment of constitutional obligations 'cannot be described as trenching upon the separation of powers' and refuted any allegations that the order amounted to judicial overreach.[137]

Froneman J, in a short concurring judgment, held that the majority's order was within the bounds of the doctrine of separation of powers as it provided 'guidance' to the NA as to how it should discharge its constitutional obligations and hold the President accountable 'in the direst of situations', rather than 'tell[ing]' the NA how to fulfil its constitutional duty, with 'history' determining whether the majority's order 'achieve[d] its aims'.[138]

Zondo DCJ, in the minority judgment, was concerned that the majority's order 'bypasse[d] the democratic process' envisaged by the Constitution.[139] In particular, Zondo DCJ was concerned that the majority had ignored that the NA had, to some extent, held the President accountable and that all of the NA's decisions for the establishment and composition of committees had to be initiated by majority vote.[140] Zondo DCJ held that respect should be shown for parliamentary processes by discouraging 'litigants from approaching [the courts] in regard to an issue which is capable of being resolved without going to court'.[141] Zondo DCJ held further that it was not the role of the courts to prescribe to the NA which model should be adopted for a section 89 procedure, and questioned the nature of the constitutional basis to compel the NA to initiate impeachment proceedings against a President who had retained the necessary political support to remain in office.[142]

Mogoeng CJ, in a dissenting judgment, relied on *EFF1* to argue that the majority had committed an 'unprecedented' and 'constitutionally impermissible intrusion' into the terrain

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[136] Ibid paras 215-6, 218-20.

[137] Ibid paras 217, 219-20.

[138] Ibid paras 284-6.

[139] Ibid para 62-5, 73.

[140] Ibid paras 89, 93-5, 99.

[141] Ibid para 60.

[142] Ibid paras 68, 73, 75, 104-5. Also see Cachalia op cit note 130 at 64.

of the legislature, with its order amounting to a 'textbook case of judicial overreach'.[143] Mogoeng CJ's concerns revolved around the majority's decision to prescribe to the NA what the 'key and inherent features of the impeachment process should be', without regard for the majority representation in the NA and the NA's functional independence guaranteed under the Constitution, which 'reache[d] over the bold and sharp bright line of separation of powers'.[144]

Implicit within Mogoeng CJ's judgment were considerations of the appropriate judicial role, the importance of institutional credibility and the need for the court's impartiality 'never [to] be open to reasonable doubt'.[145] Mogoeng CJ was particularly dismissive of an approach by the applicants which demonstrated 'a disregard for existing mechanisms and self-dislodgement from structures established to address concerns, instead seeking "urgent" help from courts'. He accordingly held that when the Constitutional Court is approached to intervene, but the 'solution has already been provided' and it is possible for the applicants to deal with their own problem, then it 'is duty-bound to let them do it themselves'.[146]

Academic commentators have relied on *EFF1* and *EFF2* to conceptualise the judicial role when adjudicating a 'constitutional duty', intertwined with considerations of the separation of powers.

For Huq, the Constitutional Court has adopted a 'tactical' and flexible approach to the doctrine of separation of powers, through its 'methodological pluralism and doctrinal flexibility' (rather than through a 'single, fixed theoretical framework'), focusing on protecting and preserving democracy (including in *EFF1*).[147]

For Cachalia, focusing on *EFF1* and *EFF2*, the failure of the democratic process to ensure accountability, combined with systemic corruption, explains and operates as the background to the approach that has been adopted by the Constitutional Court in reaching decisions that

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[143] Ibid paras 223, 252-4.

[144] Ibid paras 224, 240-7, 255, 270.

[145] Ibid para 235, 274-5.

[146] Ibid para 236.

[147] Huq op cit note 49 at 26. Also see Theunis Roux *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (2013)

are not justifiable from a 'traditional' separation of powers perspective.[148] In these limited and exceptional circumstances, where the Constitutional Court is required to engage in political process failures, Cachalia argues that 'democratic process dysfunction' provides a rationale for judicial intervention: a type of 'democracy protective rationale'.[149] Cachalia identifies this approach as 'precautionary constitutionalism' in terms of which the Constitution acts as a precautionary device, with judicially enforceable standards to manage the risks associated with democratic government (including 'political dysfunction'), thereby reinforcing a type of 'principal/agent accountability' between elections.[150]

As such, Cachalia argues for a democracy-reinforcing type of judicial review based on a contextual understanding which includes a consideration of the 'internal functioning' of institutions (usually considered to be non-reviewable under traditional separation of powers), and depends on the existence of working democratic institutions, structures and processes. This judicial review would focus on the harm caused to the democratic process and the harm to individuals arising from the democratic process dysfunction. However, Cachalia cautions that it should always be assumed that majoritarian parliamentary processes are 'functioning well', necessitating judicial restraint where there is no underlying rights violation or infringement of the rule of law.[151]

2.3.3 Stream 3: Judicial role conception in the adjudication of 'pure' executive action

The adjudication of matters relating to section 139 of the Constitution, particularly a decision taken by the provincial or national executive to intervene in local government in terms of section 139, constitutes 'executive action'.

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[148] Cachalia op cit note 130 at 73, 78. Cachalia does, however, argue that 'precautionary constitutionalism and democratic process reinforcement considerations' would have suggested a more limited intervention in *EFF2* supra note 41 than that proposed by the majority judgment.

[149] Ibid at 56, 72, 78.

[150] Ibid at 48, 50, 52, 66. Also see Samuel Issacharoff 'The democratic risk to democratic transitions' (2016) 8 *CCR* 97, arguing that the Constitutional Court will need to 'articulate a theory of proper democratic politics in order to discharge a principled role in engaging political process failures'.

[151] Ibid at 52, 56-7, 66, fn 104.

The judicial role conception in the adjudication of executive action includes matters where political decisions or executive exercises of power are challenged on the basis of legality, rationality or rights compliance. As discussed above, the South African courts have adopted a fairly liberal approach to the justiciability of exercises of public power, finding that executive action is justiciable under the Constitution and susceptible to judicial review, depending on the nature of the power being exercised and the applicable factual matrix.

Exercises of public power are constrained by the rule of law, one of the founding values of the Constitution, which is central to South Africa's constitutional order.[152] There is no settled conception of the 'rule of law' in South Africa, although it is considered to inform 'the interpretation of many, possibly all,… rights'.[153] The constitutional framing of the rule of law generally emphasises the legality of state action, principles of accountability,[154] and a 'culture of justification'.[155]

The principle of legality, which is said to '[lie] at the structural heart of our constitutional democracy',[156] is considered to be a justiciable principle in its own right, imposing standards for the exercise of all public power. [157] It is the ground for the judicial review of exercises of public power that do not amount to administrative action; in other words, it acts as 'a backstop or safety net… when the PAJA [is] not of application'.[158] Hoexter, however, has recognised

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[152] Section 1*(c)* of the Constitution provides, amongst other things, that South Africa is a democratic state founded on 'the supremacy of the Constitution and the rule of law'. See, generally, Frank Michelman 'The rule of law, legality and the supremacy of the Constitution' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2014) at Chapter 11-14; Alistair Price 'The evolution of the rule of law' (2013) 130 *SALJ* 649.

[153] *Fedsure* supra note 70 para 58; *Dawood* supra note 85 para 35.

[154] Section 1*(d)* of the Constitution sets out another founding value, that of the constitutional commitment to 'accountability, responsiveness and openness'.

[155] See Etienne Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31.

[156] *New Clicks* supra note 44 para 613.

[157] *Fedsure* supra note 70 paras 56-8; *Pharmaceutical Manufacturers* supra note 70 para 85; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 49; Michelman op cit note 152.

[158] Cora Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *SALJ* 207 at 219; *New Clicks* supra note 44 para 97; *Fedsure* supra note 70 para 59; Corder & Hoexter op cit note 5 at 117.

the possibility of the principle of legality, over time, 'replicat[ing] every one of the grounds of review in [the PAJA]'[159] (thereby involving a much more rigorous standard of review).

At its core, legality requires that holders of public power act lawfully and within their powers (in other words, that they 'exercise no power and perform no function beyond that conferred on them by law').[160] Legality also requires that public power must be exercised in good faith, not with an ulterior motive[161] or for an improper purpose, and must not be misconstrued.[162]

The principle of legality further requires that holders of public power must not act arbitrarily or for no purpose and must not ignore relevant considerations or consider irrelevant factors, which has been linked with the principle of rationality.[163]

The Constitutional Court has established rationality review as the low-threshold review for all exercises of public power,[164] to determine whether there is a rational connection between the exercise of the public power and the purpose sought to be achieved. This is an objective assessment of the structure of the decision-making process rather than the decision itself and involves two parts: first, an assessment of whether the conduct or decision is for a legitimate government purpose (purpose requirement) and second, an assessment of whether the means chosen to achieve this purpose are rationally connected to it or are objectively capable of

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[159] Hoexter op cit note 22 at 178.

[160] *Fedsure* supra note 70 paras 56-8.

[161] *Gauteng Gambling Board v MEC for Economic Development, Gauteng Provincial Government* 2012 (5) SA 24 (SCA) para 47.

[162] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 49-50; *SARFU* supra note 70 para 148; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 81; *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC) para 48.

[163] *Pharmaceutical Manufacturers* supra note 70 para 85, 89-90; *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) ('*Simelane*') paras 38-40; *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 (4) SA 125 (SCA).

[164] *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 67; Kohn op cit note 2.

furthering it based on the information before the decision-maker and reasons given (effect requirement).[165]

At its simplest construction, this low-threshold rationality test does not attempt to assess the correctness of the decision or the justification for the action.[166] It also does not attempt to make an assessment of whether the means chosen by the executive, which has a wide discretion, are the 'best means' to achieve the purpose.[167] Nor does it permit the substitution of the courts' opinions on the appropriateness of government's decisions.[168] Further, rationality review does not involve a consideration of the political merits or demerits of a decision[169] or the making of policy choices.[170]

The low-threshold rationality test has accordingly been associated with a deferent judicial role in terms of which judicial intervention is permissible 'only where it is necessary and unavoidable to do so', guided by the general duty of the courts to respect the competence and political autonomy of the other branches of the state (the 'principle of comity') and justified by considerations of institutional competence and democratic principle.[171] Further, the

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[165] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC); *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) paras 65-6; Kohn op cit note 2 at 826.

[166] *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC) para 55.

[167] *Albutt* supra note 157 para 51.

[168] *Pharmaceutical Manufacturers* supra note 70 para 90; *Bel Porto* supra note 69 para 45; *Kaunda* supra note 70 para 79; *Merafong* supra note 165 para 63; O'Regan op cit note 91 at 127.

[169] *Merafong* supra note 165 para 63.

[170] *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC) para 17.

[171] Alistair Price 'The content and justification of rationality review' in Stuart Woolman & David Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) at 37; *Doctors for Life* supra note 41 paras 37-8; *Glenister* supra note 45 para 19; *EFF1* supra note 60 paras 92-3; *Albutt* supra note 157 para 51; *Affordable Medicines* supra note 162 paras 73, 83, 86; *Simelane* supra note 163 paras 41-4; *Masetlha* supra note 162 para 77.

Constitutional Court has held, unanimously, that the application of rationality review 'should be guided by the principle of separation of powers'.[172]

However, the South African courts have on occasion been required to consider the potential variation of the minimum-threshold rationality test.[173] For example, the SCA has embraced an expansion of the rationality test through acceptance of the need for reasons in the context of an exercise of public power (based on, amongst other things, a constitutional right to rational decision-making).[174]

A further example of the courts' engagement with the variation of the rationality test is linked with the question as to whether procedural fairness forms a part of the principle of legality.[175] For example, in *Masetlha*, which concerned then-President Mbeki's decision to dismiss Mr Masetlha from his position as head of the National Intelligence Agency, the majority of the Constitutional Court held that the power to dismiss had to be exercised 'lawfully, rationally and in a manner consistent with the Constitution' but that procedural fairness was not required because it 'would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action' (not executive action).[176] The minority, however, used the principles of natural justice to conclude that *audi alteram partem* (that no one should be condemned unheard) 'is essential to rationality, the sworn enemy of arbitrariness', and is triggered 'whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing rights of

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[172] *Poverty Alleviation Network* supra note 165 para 74. However, see *Simelane* supra note 163 para 42, in which Yacoob J finds that separation of powers does not affect rationality review, as the rationality standard by its very nature prescribes the lowest possible threshold for the validity of executive decisions.

[173] For an overview of the various rationality standards used by the Constitutional Court, see Ignatius Michael Rautenbach 'Rationality standards of constitutional judicial review and the risk of judicial overreach' (2018) 1 *TSAR* 1.

[174] *Cape Bar Council v Judicial Service Commission* 2013 (1) SA 170 (SCA) para 44 with reference to *Bel Porto* supra note 69 and *Transnet Limited v Goodman Brothers* 2001 (1) SA 853 (SCA).

[175] Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) at 157-61; Clive Plasket 'Procedural fairness, executive decision-making and the rule of law' (2020) 137 *SALJ* 698 at 701.

[176] *Masetlha* supra note 162 paras 77-8; Melanie Murcott 'Procedural fairness as a component of legality: Is a reconciliation between *Albutt* and *Masetlha* possible?' (2013) 130 *SALJ* 260 at 271.

an individual'.[177] In effect, this reflects the view that the low-threshold rationality test should become more stringent as individual rights are threatened.

Subsequently in *Albutt*, a matter which concerned a special dispensation for pardoning politically motivated offenders, the Constitutional Court expressly expanded rationality review to include a procedural duty to hear the parties, where necessary to serve the legitimate purpose of the power (procedural rationality).[178] This expansion of the rationality test was based on certain context-specific facts together with the constitutional values of accountability, responsiveness and openness, meaning that the right to a hearing is an exception rather than the default position.[179]

Linking the process and substance of rationality to 'accountability, responsiveness and openness' was reiterated by Cameron J and Froneman J in another dissenting judgment in the Constitutional Court.[180] However, Tsele has cautioned against considering such references to accountability as permitting the courts to engage in a more rigorous scrutiny of a decision under review for rationality.[181]

Further, the Constitutional Court has emphasised that rationality is not a 'master key that opens any and every door, any time, anyhow' and is not a principle that is 'uncontrollable' and 'respects or knows no constitutional bounds'. Rather, it is subject to constitutional constraints and 'must fit seamlessly into our constitutional order, with due regard to the imperatives of separation of powers'.[182]

Commentators have engaged extensively with this variable rationality review. Price has argued that a degree of 'variability' or 'malleability' of rationality review is inevitable, particularly

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[177] Ibid para 187.

[178] *Albutt* supra note 157 para 70-2; Price op cit note 81; *Law Society* supra note 162 para 68.

[179] *Albutt* supra note 157 para 71; *Scalabrini* supra note 163 para 72; *Motau* supra note 76 paras 81-3; *Simelane* supra note 163 para 34.

[180] *e.tv* supra note 41 para 97; Hoexter op cit note 158 at 224; *Wessels v Minister for Justice and Constitutional Development* 2010 (1) SA 128 (GNP) at 141I-J in which the High Court held that legality 'includes rationality and accountability'.

[181] Michael Tsele 'Rationalising judicial review: Towards refining the "rational basis" review test(s)' (2019) 136 *SALJ* 328 at 329, 349.

[182] *e.tv* supra note 41 paras 6, 85.

given the varied circumstances in which the rationality test applies, the inherent discretion involved within the test, and its application within the context of the separation of powers. Price submitted that this variability can give rise to a continuum of review standards, from a reasonableness review on one side with courts taking into account all relevant considerations (likely appropriate when a rights violation would weigh more heavily against separation of powers) to a minimum-threshold (deferential) rationality review on the other side, with the courts only requiring a single legitimate rational connection.[183] On this continuum, more weight should afforded to considerations of democratic principle and institutional competence when assessing the rationality of decisions lying close to the heart of executive power thereby allowing for considerable deference, while any imposition of a higher level judicial scrutiny would require the courts to engage in an open and transparent discussion and decision 'guided by the principle of separation of powers'.[184]

However, commentators have also raised concerns with the variability of rationality review. Price has argued that this variability makes it difficult to predict the appropriate degree of scrutiny to be adopted by the courts, resulting in the courts being 'tempted' to violate the principle of comity by interfering beyond 'appropriate constitutional roles'.[185] Bishop has argued further that variability creates a disconnect and lack of transparency between the courts' 'mechanical' rationality review standard and the level of scrutiny that is actually adopted by the courts in the adjudication of exercises of executive power.[186] Tsele has argued that the rationality test must be deferential and not particularly stringent, so as to ensure 'proper respect of the separation-of-powers doctrine', and has expressed concern that the inconsistency of the

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[183] Price op cit note 171 at 54-7; Michael Bishop 'Rationality is dead! Long live rationality! Saving rational basis review' (2010) 25 *SAPL* 312 at 30.

[184] Ibid. Price op cit note 81 at 590; *Poverty Alleviation* supra note 165 para 74. Also see the dissenting judgment of O'Regan J in *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 122.

[185] Price op cit note 152 at 657.

[186] Bishop op cit note 183 at 33-7.

courts' variable approach has the potential to cause 'legal uncertainty' and produce 'sharply divergent judicial outcomes'.[187]

Kohn has argued that, in adopting this expanded and variable rationality review standard, the courts have consistently failed to ensure meaningful engagement with the doctrine of separation of powers, such as concerns with democratic legitimacy and institutional competence, which has resulted in an approach which is 'insufficiently nuanced', unable to engage with the theory of deference, and may be perceived as an impermissible expansion of judicial power.[188]

Pretorius, on the other hand, has submitted that 'deliberative democracy', rather than separation of powers, should guide our conception of the rationality standard, particularly given that rationality is 'too deferential' to 'facilitate the degree of justification required of governmental action which impacts on fundamental rights'.[189] Tsele, however, has argued that this approach is misplaced given that rationality-review is to be a 'minimum standard of review' which does not evaluate the desirability of government decisions.[190] O'Regan J has also cautioned against the test of rationality requiring a closer connection between government purpose and the action in question.[191]

Further, while it is generally accepted that a variable rationality review forms the basis for judicial scrutiny in the adjudication of executive action, Sachs J (in a minority judgment) has suggested that the principle of legality may, on occasion, require a proportionality analysis in yet-to-be-identified classes of cases and that a 'generalised, principled and flexible standard of review embodied in the notion of reasonableness' should replace any technical adherence with

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[187] Tsele op cit note 181 at 329. A similar argument has been developed in relation to the principle of legality; see Cora Hoexter 'The rule of law and the principle of legality' in Pieter Carnelley & Shannon Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2013) 55 at 65-68.

[188] Kohn op cit note 2 at 812, 828, 833-5.

[189] JL Pretorius 'Deliberate democracy and constitutionalism: the limits of rationality review' (2014) 29(2) *SAPL* 408 at 427; *Law Society of South Africa v Minister for Transport* 2011 (2) BCLR 150 (CC) para 36.

[190] Tsele op cit note 181 at 337.

[191] O'Regan op cit note 91 at 128.

categories and classifications as the basis for judicial review.[192] This view has not yet found traction, although Kohn has argued that Ngcobo CJ effectively adopted 'a type of proportionality assessment' in his judgment in *Albutt* by examining both the 'means' and the 'ends' in question.[193]

2.3.4 Stream 4: Judicial role conception in the adjudication of administrative action

The executive powers or functions of the provincial executive, as set out in section 139 of the Constitution, are expressly excluded from the ambit of 'administrative action' as defined in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').[194] However, the triggering of section 139 of the Constitution implicates the relationship between a municipality and those falling within its jurisdiction, even in the absence of a direct contractual relationship, particularly in relation to service delivery and the developmental obligations of local government.

The Constitutional Court considered this relationship in *Joseph*[195] after the City of Johannesburg decided to terminate the electricity supply to vulnerable (but paying) tenants in an apartment block following the landlord's failure to pay arrears to the City's electricity service provider, City Power.[196] As there was no direct contractual relationship between the municipality and the tenants, the City of Johannesburg argued that the tenants were not entitled to procedural rights (and, as such, there was no notice period and no opportunity to make representations). The tenants, on the other hand, sought the reconnection of the electricity supply, as well as an order declaring that they were entitled to procedural rights before the electricity supply was terminated.

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[192] *New Clicks* supra note 44 paras 579, 612, 633-7. In *Minister of Home Affairs v Public Protector of the Republic of South Africa* 2018 (3) SA 380 (SCA) para 38, fn25, the SCA acknowledged that 'disproportionality (as an aspect of unreasonableness) has not yet been recognised as a ground of [legality] review' except in Sachs J's minority judgment.

[193] Kohn op cit note 2 at 830-1.

[194] See section 1*(bb)* of the PAJA.

[195] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC)

[196] Ibid paras 7-10.

The Constitutional Court held that the provision of basic municipal services, including the provision of electricity, is a 'cardinal function, if not the most important function, of every municipal government' and has 'become virtually indispensable, particularly in urban society'.[197] It held further that the relationship between a public service provider and consumers with whom it had no contractual relationship form part of a 'special cluster of relationships' that exist between a municipality and persons living in its jurisdiction, entrenched by the public responsibilities of a municipality under the Constitution and legislation.[198] For the Constitutional Court, these relationships are founded in local government's constitutional obligation to provide democratic, accountable, developmental and participatory governance and to ensure sustainable essential service delivery, and includes a requirement for local government to act in a manner that is 'responsive, respectful and fair'.[199]

The Constitutional Court was thus satisfied that the principles of administrative and constitutional law, including those of procedural fairness, were applicable to this special cluster of relationships, especially where the tenants' rights had been materially and adversely affected by the termination of a municipal service.[200] As a result, the Constitutional Court held that the tenants were entitled to receive electricity, based on the public-law relationship between them and the City, and that local government was required to comply with procedural fairness obligations under administrative law.

Within the context of this 'special cluster of relationships', this fourth stream (which considers the judicial role in the adjudication of administrative action) merits consideration, effectively

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[197] Ibid paras 31-4. Also see *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 38: 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty'.

[198] Ibid paras 23-25, 32-33, 36-39, 46. Also see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 343.

[199] Ibid paras 34-40, 39, 42-44, 46. Also see sections 152*(1)(a)-(e)* of the Constitution which sets out the 'objects' of local government, read with section 152*(2)* of the Constitution which provides that a municipality must 'strive, within its financial and administrative capacity, to achieve [these] objects'.

[200] Ibid paras 17-18, 24, 52, 60, 62-63, 70. Also see David Bilchitz 'Citizenship and community: Exploring the right to receive basic municipal services in Joseph' (2010) 3 *CCR* at 56-59, 62, 67, 77-78; Dugard & Langford op cit note 87; Stuart Wilson & Jackie Dugard 'Constitutional jurisprudence: The first and second waves' in Malcolm Langford et al (eds) *Socio-economic Rights in South Africa: Symbols or Substance?* (2014) at 53.

operating as a category between the third stream (dealing with 'pure' exercises of executive power) and the fifth stream (dealing with socio-economic rights).

The courts' authority to engage in judicial review of administrative action is grounded in a constitutionally-entrenched right to just administrative action read with PAJA[201] which defines the scope of 'administrative action'[202] and provides guidelines for the judicial review of administrative action (albeit that legality reviews, a less stringent pathway than PAJA-based reviews, are becoming increasingly prolific).[203]

PAJA expressly recognises rationality as a ground of review for administrative action[204] which, it is argued, may be more stringent[205] or no different[206] from rationality review under the principle of legality.

PAJA also incorporates a reasonableness test, which asks whether the decision is one that a reasonable decision-maker could reach.[207] Reasonableness has been recognised as being inherently variable, linked primarily with both the normative context (any other constitutional provisions implicated) and the factual context of the decision.[208]

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[201] Section 33*(1)* of the Constitution provides that everyone has the right to 'administrative action' that is lawful, reasonable and procedurally fair, while section 33*(2)* provides for the right to written reasons where administrative action affects rights. Also see *Bato Star* supra note 72 para 25; *New Clicks* supra note 44 paras 92-6.

[202] Administrative action' refers to a decision of an administrative nature involving the exercise of public power by the state or a private entity that has an 'adverse effect' on 'rights' or 'legitimate expectations' and is final in effect.

[203] *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 101; *New Clicks* supra note 44 para 97; Hoexter & Penfold op cit note 175 at 171: 'PAJA must be applied where it is applicable'.

[204] Section 6(2)(f)(ii) of PAJA; *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) para 21.

[205] *SAAB Grintek Defence v South African Police Service* [2016] 3 All SA 669 (SCA) para 22. Also see Tsele op cit note 181 at 332; Hoexter op cit note 22 at 178; Hoexter & Penfold op cit note 175 at 465-6.

[206] *JDJ Properties v Umngeni Local Municipality* 2013 (2) SA 395 (SCA) para 23; *Simelane* supra note 163 para 44.

[207] Section 6*(2)(h)* of PAJA; *Bato Star* supra note 72 para 44; Hoexter & Penfold op cit note 175 at 476.

[208] Hoexter & Penfold op cit note 175 at 477; *New Clicks* supra note 44 paras 108, 145; *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College* 2001 (1) SA 257 (CC) paras 19, 22.

The Constitutional Court has thus held that reasonableness will depend on the circumstances, as guided by a list of factors relevant to deciding whether a decision is reasonable: 'the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected'.[209] This list of factors assists the courts in establishing the level of scrutiny to be applied in a matter, based on this variable standard of reasonableness, incorporating considerations of both rationality and proportionality.[210]

Quinot and Liebenberg have argued that this variability enables a flexible approach to reasonableness which 'allows for the band [of options available to the administrator] to be [expanded or] narrowed where the context demands'.[211] As a result, any administrative action that is predominantly policy-driven will trigger a review based on rationality, resulting in a wide band of options (with only some substantive basis required), while any action that impacts on fundamental rights will trigger a 'tightened (or narrowed)' review standard with heightened scrutiny and a 'much stricter proportionality inquiry' within a smaller 'band of options'.[212] As Hoexter has observed in a separate context, these shifting review standards would align with

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[209] *Bato Star* supra note 72 paras 45, 49-54.

[210] Geo Quinot & Sandra Liebenberg 'Narrowing the band: reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa' (2001) 22(3) *SLR* 639 at 646; Hoexter & Penfold op cit note 175 at 463-79 (and 476-7, in particular) which sets out the *Bato Star* factors giving 'scope to the element of proportionality'; *Medirite v South African Pharmacy Council* [2015] ZASCA 27 (20 March 2015) paras 20-3*; Esau v Minister of Co-operative Governance and Traditional Affairs* 2021 (3) SA 593 (SCA) paras 147, 152.

[211] Quinot & Liebenberg op cit note 210 at 647. The 'sliding scale of reasonableness' in judicial review in English law was recognised by Laws LJ in *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at para 19: 'There is… what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required.'

[212] Ibid at 647-52. Also see *Rail Commuters Action Group v Transnet t/a Metrorail* 2005 (2) SA 359 (CC) para 88 in which O'Regan J held that 'the more grave is the threat to fundamental rights, the greater is the responsibility on the duty bearer'.

Taggart's 'preference for higher-intensity review in cases implicating rights and lower-intensity review in other cases'.[213]

In the process of determining whether a decision would fall within a band of reasonable decisions, the courts may be required to assess the substantive content of a socio-economic right, the extent of the impact on the relevant right, whether there are less restrictive measures which could have been taken and whether the means chosen are reasonably likely to achieve a goal (within the band of reasonable options).[214]

Implicit within this variable reasonableness standard is the concept of 'deference', which has generally been adopted as the courts' 'main descriptor' of the judicial role in the adjudication of administrative action.[215] Some commentators, however, have expressed concern that this doctrine of deference has not been taken beyond explaining the courts' reluctance to interfere with a complex decision taken by an administrator with some expertise in the matter, and submitted that firm principles governing judicial intervention and non-intervention should be developed.[216] Commentators have also expressed a hope for the debate to shift beyond considerations of expertise and the separation of powers towards a fuller consideration of the role of the courts in a constitutional democracy, particularly in a 'rights culture'.[217]

2.3.5 Stream 5: judicial role conception in the adjudication of socio-economic rights

There is a close connection between socio-economic rights, the developmental obligations of local government and systemic local government dysfunction in matters relating to section 139 of the Constitution. An understanding of the judicial role conception in the adjudication of socio-economic rights violations thus has the potential to inform the judicial role conception in matters relating to section 139 of the Constitution.

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[213] Hoexter op cit note 22 at 178 with reference to Micahel Taggart 'Proportionality, deference, *Wednesbury*' (2008) *New Zealand Law Review* 423-81.

[214] Quinot & Liebenberg op cit note 210 at 647-52; *Bato Star* supra note 72 para 45.

[215] Maree & Quinot op cit note 76 at 459-60; *Logbro* supra note 78 paras 20-1; *Minister of Environmental Affairs and Tourism v Phambili Fisheries* [2003] 2 All SA 616 (SCA) para 50; *Bato Star* supra note 72 para 48.

[216] Hoexter op cit note 22 at 192-3.

[217] See Dennis Davis 'To defer and when? Administrative law and constitutional democracy' (2006) 1 *Acta Juridica* 23 at 23, 34.

The Constitutional Court has repeatedly and expressly confirmed the justiciability of socio-economic rights.[218] A broad 'reasonableness test', which is influenced by and incorporates the 'set of institutional concerns', has been developed by the Constitutional Court in the adjudication of socio-economic rights.[219] This 'reasonableness test' is based on the constitutional provisions requiring the government to take 'reasonable' legislative and other measures to ensure the progressive realisation of the rights of access to housing, health care services, food, water and social security, based on the government's available resources.[220] The severity of a socio-economic rights violation and its consequences tends to determine the response that will be considered reasonable by the courts.[221]

The Constitutional Court's decision in *Mazibuko*, which found that the City of Johannesburg's policy for the supply of free basic water satisfied the minimum requirements of constitutional reasonableness under the right of access to water, clearly outlines the parameters of the role of the court in the adjudication of socio-economic rights cases.[222] If government takes no steps to realise the rights, the courts will require the government to take steps. If government's adopted measures are unreasonable, the courts will require that they be reviewed so as to meet the constitutional standard of reasonableness. Three situations would indicate unreasonableness: where no provision is made for those most desperately in need;[223] where government has adopted a policy with unreasonable limitations or exclusions (which the court may order

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[218] See, for example, *Grootboom* supra note 80; *TAC2* supra note 60; *Mazibuko* supra note 57.

[219] Brand op cit note 56 at 617; Pieterse op cit note 55 at 383-417; *Soobramoney* supra note 59 para 58; *Grootboom* supra note 80 para 41; *Mazibuko* supra note 57 para 65.

[220] *Soobramoney* supra note 59 para 11; *TAC2* supra note 60 paras 30-9; *Mazibuko* supra note 57 para 66.

[221] Quinot & Liebenberg op cit note 210 at 656.

[222] *Mazibuko* supra note 57 paras 11-2, 67, 83-9, 98-102, 166. The Court was also satisfied that the City's decision to introduce pre-paid water meters in pursuance of its legislative and executive functions (to determine how services should be implemented) involved the exercise of executive powers (rather than administrative action); see paras 127, 130-1.

[223] See *Grootboom* supra note 80 paras 43-4.

removed);[224] and where the government has failed continually to 'review its policies to ensure the progressive realisation of the achievement of the right'.[225]

The Constitutional Court has emphasised that the purpose of the reasonableness test is only to determine whether a measure falls within the bounds of reasonableness (and not to determine what would be the best or most appropriate measure to address a particular social problem, or to develop an appropriate socio-economic policy): this is 'deference in operation'.[226]

The reasonableness test has been praised as a 'good doctrinal basis for a transformative interpretation' of socio-economic rights,[227] but has also been criticised for being overly formalistic and deferent based on a restrictive understanding of judicial institutional competence in socio-economic rights matters.[228]

Importantly, in *Mazibuko*, the Constitutional Court expressed support for the role of litigation in socio-economic rights disputes, despite its expense and requirement for expertise, finding that such litigation is supplementary to participative democracy, ensures that government is held accountable (particularly between elections), and may result in a responsive government, acting in good faith, choosing to itself take steps to ensure that its policies and actions are constitutionally-compliant.[229] There is also a suggestion that the courts will, in turn, be willing to protect interests more directly when such good faith and responsiveness are absent.[230]

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[224] See *TAC2* supra note 60.

[225] See, generally, *Mazibuko* supra note 57 para 67.

[226] *Grootboom* supra note 80 para 41; *TAC2* supra note 60 paras 37-8; *Mazibuko* supra note 57 para 65; Brand op cit note 56 at 617, 624-30; McLean op cit note 56 at 127, 168.

[227] Steinberg op cit note 3 at 284.

[228] Brand op cit note 56 at 619-20; Thomas Coggin & Marius Pieterse 'Rights and the city: An exploration of the interaction between socio-economic rights and the city' (2012) 23(3) *Urban Forum* 275; Liebenberg op cit note 30 at 173, 176-7, 467-71, 478-80; Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 1 *VRÜ* 25 at 33.

[229] *Mazibuko* supra note 57 paras 8, 59, 160-5; section 1 of the Constitution (requiring government to be 'responsive, accountable and open').

[230] Pieterse op cit note 228 at 25.

In general, three broad approaches to the adjudication of socio-economic rights can be identified in the jurisprudence. The first approach is one of deference to the government's preference in the progressive realisation of socio-economic rights where policies and processes have been developed and implemented in good faith, with meaningful input from citizens, even where it negatively affects the short-term interests of some citizens, such as in *Mazibuko*.[231]

The second approach, which is highlighted in the socio-economic rights decisions on urban local governments, housing, service delivery and education, involves an approach of deferring the resolution of disputes to alternative participatory, dialogic and democratic channels (both existing and newly created) to ensure meaningful engagement between the parties and the achievement of mutually acceptable solutions.[232] Where there are no existing processes or mechanisms, the Constitutional Court has required their development and utilisation, emphasising the need for the parties to engage in good faith, with a willingness to compromise, while also warning against a dismissive attitude by government.[233] Where existing processes were not responsive, the Constitutional Court has required that these processes become responsive.[234]

In practice, commentators have argued that the Constitutional Court has effectively elevated compliance with 'meaningful engagement' to a prerequisite of constitutionally permissible action, a central consideration in the courts' reasonableness assessment of any policy, and a fundamental component of the remedy in the dispute.[235] This expansion of meaningful

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[231] Pieterse op cit note 228 at 32.

[232] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 39, 41-3; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) paras 16-7, 20; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) paras 246, 379. Also see Liebenberg op cit note 30 at 422-3; Sandra Liebenberg 'Social rights and transformation in South Africa: Three frames' (2015) 31(3) *SAJHR* 446 at 468-9.

[233] *Olivia Road* supra note 232 paras 14-5, 20, 24-30; Pieterse op cit note 228 at 25.

[234] *Joseph* supra note 195.

[235] Pieterse op cit note 228; *Olivia Road* supra note 232 paras 10-3, 15-20, 22.

engagement (and a need for constitutional dialogue) should be understood within the context of the separation of powers.[236]

It has been argued that the requirement for meaningful engagement and the judicial preference for more accessible 'outside' dispute resolution processes to settle conflicts, rather than constitutional litigation, encourages participatory democracy while also protecting and energising deliberative spaces for democratic governance.[237] As a result, in the adjudication of socio-economic rights disputes, governance and dispute resolution institutions and mechanisms are supported and strengthened, with judicial intervention only when socio-economic rights are infringed or threatened and the courts are not satisfied with the integrity or effectiveness of institutional participatory processes.[238]

However, the courts' decision to create, or defer to, an outside dispute resolution mechanism, rather than to itself decide the issues, has been questioned, particularly in the presence of inherent power imbalances between parties to a dispute.[239] Further, some commentators have argued that the focus on 'meaningful engagement' is not effective when democratic structures have been unresponsive (as claimants will be abandoned to the failed democratic channels that led to the litigation in the first place); instead, these commentators argue that the courts should adopt a method that engages more directly with the claimants' needs.[240]

The third approach to the adjudication of socio-economic rights involves the Constitutional Court's intervention to stop measures which disregard socio-economic rights or in which a dysfunctional government triggers a potentially catastrophic socio-economic rights violation.

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[236] Fish Hodgson op cite note 53 at 84-5; Sandra Liebenberg 'Remedial principles and meaningful engagement in education rights disputes' (2016) 19 *PELJ* 1; Pieterse op cit note 228 at 25, 31-3; Brand op cit note 56 at 625-36.

[237] Pieterse op cit note 228 at 25, 31-3; Brand op cit note 56 at 625-36; McLean op cit note 56 at 150; Brian Ray *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016) 187-90; 212-4, 281, 297; Ray op cit note 87 at 187.

[238] Pieterse op cit note 228 at 12-4, 24, 32-4.

[239] Lilian Chenwi 'A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others*' (2009) 2 *CCR* 384-91; McLean op cit note 56 at 150-1; Liebenberg op cit note 232 at 468-70.

[240] Wilson & Dugard op cit note 35 at 664-5, 670-2.

This is well-illustrated in a trilogy of cases: *AllPay1*,[241] *AllPay2* and *Black Sash* in which the judicial role was fundamentally influenced by the role of endemic government incompetence and intransigence, the systemicity of these cases,[242] and their importance to the public. These decisions have their genesis in a contract awarded by the South African Social Security Agency ('SASSA'), which administers the payment of social grants on behalf of the Department of Social Development, to a private company, after a tender process, for the payment of social grants.

In *AllPay1*, the Constitutional Court declared the contract for the payment of social grants (to approximately 15 million beneficiaries) invalid but suspended this order pending the determination of a just and equitable remedy.[243] In *AllPay2,* which dealt with the remedy, the Constitutional Court relied on the doctrine of separation of powers to confirm the declaration of invalidity of the contract and to order that a new tender process be run (as 'effective relief' for infringements of constitutional rights).[244] While the Constitutional Court suspended the declaration of invalidity to allow SASSA an opportunity to run a new tender process and take a decision on whether to award a new tender,[245] it held that it was not prevented from regulating and supervising both the content and performance of the contract.[246] Further, to ensure effective monitoring and accountability, the Constitutional Court imposed a structural order requiring SASSA to report back to it at various stages of the new tender process.[247]

In reaching this decision, the Constitutional Court was particularly critical of SASSA's conduct, given the important role it plays as 'guardian of the right to social security and as

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[241] *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) ('*AllPay1'*).

[242] Gaurav Makherjee & Juha Tuovinen 'Designing remedies for a recalcitrant administration' (2020) 36(4) *SAJHR* 386 at 394: a term used to refer to 'the characteristics of an individual case to be representative of the underlying systemic problem of governmental incompetence, inattentiveness, intransigence, or persistent non-compliance with a judicial order, which has a knock-on effect on the realisation of a socio-economic right'.

[243] *AllPay1* supra note 241 Orders 3 and 4.

[244] *AllPay2* supra note 93 Orders 1 and 3, para 42.

[245] Ibid Order 2.

[246] Ibid paras 40, 52-60, 63-6.

[247] Ibid Orders 3.3 and 4.

controller of beneficiaries access to social assistance', and its adoption of an 'unhelpful and almost obstructionist stance' and failure to provide important information at relevant times.[248]

After SASSA missed the deadline stipulated in *AllPay2*, a non-governmental organisation successfully applied on an urgent basis to have this deadline extended in *Black Sash*. In its decision, the Constitutional Court noted the executive's admission that it was unable to fulfil its constitutional and statutory obligations relating to social assistance, even after extensive litigation.[249] The Constitutional Court further expressed its concern with the conduct and 'continued recalcitrance' of the executive and SASSA, which effectively 'negat[ed]' its order in *AllPay2*.[250]

The Constitutional Court held that the particular circumstances 'triggered' its just and equitable remedial powers (under section 172 of the Constitution) and the 'need to intervene'. These circumstances included the 'very real' threatened infringement of the right to social assistance and the disregard for the previous remedial order.[251] As a result, the majority of the Constitutional Court declared the continued suspension of the invalid contract and extended both the declaration of invalidity and the suspension of that declaration. It also imposed a structural order requiring SASSA and the Minister of Social Development to file reports to the court every three months, setting out certain information relating to the payment of social grants.[252] Further, none of the parties opposed the appointment of independent monitors (an independent panel of experts appointed to oversee remedy implementation).[253]

The Constitutional Court acknowledged that the just and equitable remedial power is not 'limitless', that the order in *Black Sash* 'pushes at its limits' and that its role was 'not one of the [Constitutional] Court's choosing'.[254] It stressed that the remedy was to be used cautiously

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[248] Ibid paras 73-5.

[249] *Black Sash* supra note 38 para 8.

[250] Ibid paras 36, 57-8.

[251] Ibid paras 10, 43-5, 47-9.

[252] Ibid Orders 7-9.

[253] Ibid paras 55-71; Orders 11 and 12. Also see *Grootboom* supra note 80 para 97.

[254] Ibid paras 14, 22, 51.

and in exceptional circumstances only (although it reiterated that these were exceptional circumstances given the likelihood of a 'national crisis').[255]

While the courts in socio-economic rights disputes ordinarily prefer declaratory relief,[256] based on this trilogy of cases, it appears that more invasive remedies (including supervisory orders) are more likely to be granted in situations where there is a likelihood of non-compliance with the court order [257] or a likelihood of serious harm.[258]

In considering the judicial role conception in socio-economic rights disputes, Young argues that the Constitutional Court has developed its own catalytic role to ensure rights-conducive political solutions.[259] This catalytic role, argues Young, entails the Constitutional Court shifting strategically between different modes of review (and the level of scrutiny and remedial prescriptiveness which it adopts in each case) depending on what it regards as necessary to resolve a socio-economic rights dispute in a rights-conducive manner, in line with transformative constitutionalism, and with due consideration of the responsiveness of organs of states and any communication failures.[260]

Young identifies five major modes of review:[261] deferential review (with the courts adopting an approach of deference to the decisions of the elected branches of government, based on democratic and epistemic authority), conversational review (with the courts adopting an

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[255] Ibid. Also see *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 137 in which Mogoeng CJ held that an 'exceptional case' requires 'an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy.'

[256] Brand op cit note 56 at 623-4, 663-4; Liebenberg op cit note 30 at 66-70.

[257] *Black Sash* supra note 38*; TAC2* supra note 60 paras 116-8; *Mwelase* supra note 24 para 69: with Cameron J observing the existence of 'failing institutional functionality of an extensive and sustained degree' that 'cried out for remedy'.

[258] *AllPay1* supra note 241**;** *AllPay2* supra note 93; *Black Sash* supra note 38**;** Makherjee & Tuovinen op cit note 242 at 391-2; Roach & Budlender op cit note 94 at 333.

[259] Young op cit note 3 at 125, 153-4, 188-212.

[260] Ibid at 172-5, 188-90, 197; Katharine Young 'A typology of economic and social rights adjudication: Exploring the catalytic function of judicial review' (2010) *International Journal of Constitutional Law* 387-412, 416-7. Also see Roach & Budlender op cit note 94 at 327, 333, 346-51.

[261] For a discussion of the five major modes of review see, generally, Young op cit note 3 at 163-87.

intergovernmental dialogue to resolve the dispute), experimentalist review (with the courts involving the stakeholders in solving the problem), managerial review (with the courts assuming a heightened review of governmental action and a structured and/or mandatory form of relief), and peremptory review (with the courts adopting rigorous scrutiny of government action). For Young, these modes of judicial review can be considered separately or can blend into one another.[262]

Young, relying on Roach and Budlender, argues further that the Constitutional Court's choice of a standard of review (and evaluation of government conduct) is primarily guided by government action, whether intransigent, inattentive or incompetent, rather than by the content of the right itself.[263] On this argument, inattentiveness is best addressed by focusing attention on the elected branches and adopting a conversational review, incompetence is best addressed through adopting the problem-solving capacity of experimentalist review or deferential review, and intransigence is best addressed with higher scrutiny under a experimentalist review or by managerial review.

2.4 Conclusions and reflections

The judicial role conception for matters relating to section 139 of the Constitution ought to be understood within a broader jurisprudential and political context.

This Chapter explored this context by considering various theoretical yardsticks (including lawfare, transformative constitutionalism, the doctrine of separation of powers, and judicial review) as well as the judicial role in five streams of litigation, namely adjudication of intergovernmental disputes, a 'constitutional duty', executive action, administrative action (in the context of the special cluster of relationships between a municipality and those falling within its jurisdiction), and socio-economic rights violations.

So, what are the factors that undergird the judicial roles adopted within the selected streams of litigation, as informed by the theoretical yardsticks? What theoretical framework, if any, best explains the courts' understanding and structuring of their own intervention and non-

[262] Ibid at 187-8.

[263] Ibid at 209-12.

intervention across the five streams, particularly in their assessment of justiciability and their adopted level of scrutiny and remedial prescriptiveness?

The initial (often latent) justiciability assessment, in terms of which the courts consider whether, and when, they are willing to get involved in matters, is considered settled in most of the streams, with the courts generally adopting a liberal approach to justiciability. It is only in the first stream (adjudication of intergovernmental disputes) that the courts still engage in a mild-type of justiciability assessment, based on the parties' compliance with the obligations set out in Chapter 3 of the Constitution and the IRFA.

Once involved, the courts tend to assume a shifting[264] or catalyst[265] judicial role conception across the streams in their assessment of whether to apply a more or less exacting level or degree of scrutiny to the other branches of government (illustrated through variable standards of review), and whether to order more or less interventionist or prescriptive remedies (illustrated through the variable severity of remedies). Implicitly woven through this shifting judicial role conception are concerns with the possibility of 'lawfare' (particularly in politically-charged issues), an appreciation for the role of transformative constitutionalism and the limitations imposed under the doctrine of separation of powers, and an inherent understanding of the role of judicial review.

Based on the discussion in this Chapter there are four key factors which, together with the traditional background structural forces and the selected theoretical yardsticks, seem to predict the justiciability of a matter, the level of scrutiny adopted by the courts and the remedial prescriptiveness imposed by the courts.

First, the courts' understanding of their own role in terms of the doctrine of separation of powers. Across the streams, the courts tend to apply 'separation of powers' in a flexible and tactical manner when appropriate to 'justify' a particular stance, but often without any detailed explanation of the content of the doctrine or of how and why it applies in a specific manner in particular circumstances. For example, as argued by Huq and Cachalia, democratic process

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[264] See, for example, Price op cit note 171 at 54-6; Quinot & Liebenberg op cit note 210 at 647; Roach & Budlender op cit note 94 at 327, 345-50.

[265] Young op cit note 3 at 125, 153-4, 188-212.

dysfunction may provide a rationale for judicial intervention for the purposes of protecting democracy.

The second factor is the courts' understanding of the reason for the dispute which is linked to governmental action and responsiveness (inattentiveness, incompetence or intransigence), and transformative constitutionalism. Along the lines of Roach and Budlender's judicial role conception, it appears that the courts tend to adopt a more interventionist approach to justiciability, the level of scrutiny applied and the remedy imposed, where the government is intransigent in relation to its actions, communications, responsiveness and openness with the courts. On the other hand, where the government is merely inattentive or lacking in capacity, but is responsive and engaged, the courts will impose a lower level of scrutiny and a less prescriptive remedy.

Third, the courts' understanding of the integrity and healthy functioning of the applicable democratic institutions, structures and processes appears to be determinative. Along the lines of the judicial role Pieterse has observed in the second-wave socio-economic rights disputes (building on Young): when the courts are satisfied that the democratic institutions are functioning, they will be more willing to engage with these institutions in a type of dialogic and deferential review; on the other hand, where such institutions are dysfunctional or inactive, the courts will be more willing to intervene, apply a higher level of scrutiny and impose a more prescriptive remedy along the lines of a managerial or peremptory type of review.

Fourth, the judicial role is influenced by the courts' understanding of whether and how gravely rights are being threatened or infringed (in other words, the severity of the rights violation). Across the streams, there is a common thread that, where the impact of the government's acts or omissions on socio-economic rights is severe or has the potential to be severe, the discretion in relation to justiciability is lower, the review standard is correspondingly tightened or narrowed, and the remedy becomes increasingly prescriptive.

CHAPTER 3: CATEGORY 1 – THE JUDICIAL ROLE IN INITIATED SECTION 139 INTERVENTIONS

'*What the [Constitution] seeks hereby to realise is a structure for [local government] that, on the one hand, 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 and, on the other, 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. This is the necessary hands-on component of the relationship.*'[1]

3.1. Introduction

The proliferation of initiated section 139 interventions has become a developing and observable trend in South Africa. While this trend is driven by multiple factors, as discussed in Chapter 1 it appears to be partly attributable to a failure in the utilisation and efficacy of the applicable constitutional accountability and intergovernmental monitoring and support mechanisms.

In turn, the failures inherent within the practice of interventions, the debate and contestation around the scope and ambit of section 139 of the Constitution, the absence of supporting legislation contemplated in section 139*(8)* of the Constitution, and the rising tide of local government actors resisting initiated section 139 interventions has, by way of corollary, led to an enhanced role for the courts: the Category 1 matters.

The courts' role in Category 1 is triggered with the judicial review of a decision taken by a provincial executive to initiate an intervention in a particular municipality in terms of section 139 of the Constitution read, where applicable, with the relevant provisions of the MFMA. The initiated section 139 intervention may be discretionary (based on section 139*(1)* of the Constitution) or mandatory (based on sections 139*(4)*, *(5)* or even *(7)* of the Constitution).

[1] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) (*'First Certification*') para 373.

Reliance on the discretionary intervention mechanism was dominant in the period up until 2019, although it does appear that this reliance is starting to shift.[2]

In Category 1, the provincial executive may exercise a discretion at two key stages: first, when it decides to initiate a (discretionary) section 139*(1)* intervention[3] and second, when it decides on the 'appropriate steps' to be taken under either a mandatory section 139*(4)* intervention or a discretionary section 139*(1)* intervention.[4] These decisions, which may be justiciable, require the provincial executive to assess the permissible degree of constitutionally-mandated encroachment on local government autonomy against and the need for effective local government, all within the constitutional framework for section 139 interventions.[5] As discussed in Chapter 1, this includes a consideration of Chapter 3 of the Constitution (which sets out the principles of co-operative government in South Africa) and Chapter 7 of the Constitution (particularly sections 151*(4)* and 154*(1)* of the Constitution which incorporate respect for and support of municipal autonomy).

The first litigation in Category 1 arose in response to the Eastern Cape provincial executive's decision in August 1998 to initiate a section 139 intervention in the Butterworth Transitional Local Council, following allegations of administrative and financial challenges in the municipality. More specifically, the provincial executive issued a directive under section 139(1)(a) of the Constitution requiring the municipality's councillors to 'temporarily

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[2] Tracy Ledger & Mahlatse Rampedi *Mind the Gap: Section 139 Interventions in Theory and in Practice* (2019) at 4, Annexures B-C; Jaap de Visser & Jerome November 'Overseeing the overseers: assessing the compliance with municipal intervention rules in South Africa' (2017) 9 *HJRL* 109 at 129-31.

[3] A provincial executive will not exercise a discretion under the mandatory intervention provisions: assuming the fulfilment of the jurisdictional facts, the provincial executive 'must' intervene (in other words, the intervention will be mandatory).

[4] A mandatory section 139*(5)* intervention does not contemplate the adoption of 'any appropriate steps' to ensure the municipality's ability to satisfy its obligations to provide basic services or meet its financial commitments; instead, it sets out certain specified steps, such as imposing a recovery plan or dissolution of the municipal council, which 'must' be adopted if the jurisdictional facts are satisfied.

[5] *First Certification* supra note 1 para 373; Yvonne Hoffman-Wanderer and Christina Murray 'The National Council of Provinces and provincial intervention' (2007) 18 *SLR* 7 at 7-8.

relinquish' their functions, and appointing administrators to assume those functions.[6] Although the municipality approached the High Court for relief (including the invalidation of the section 139 intervention and an order preventing the administrators from interfering with the municipal council), the matter did not proceed as the parties negotiated the terms of a new intervention.

The first High Court decisions in Category 1 were in: *Mnquma*[7] (in 2009) and *Mogalakwena*[8] (in 2014). However, while the High Courts have experienced a rising tide of litigation requesting review of an initiated section 139 intervention in recent years, the SCA and Constitutional Court have considered Category 1 matters on only three occasions:[9] the SCA in *Overberg*,[10] and the Constitutional Court in *Ngaka Modiri Molema*[11] and *Tshwane*.[12] These decisions of the SCA and Constitutional Court provide the foundation for the discussion in this Chapter, while references to various High Court decisions are incorporated where applicable. A comprehensive list of the courts' decisions (at January 2024) is included under Category 1 of the Table of Cases.

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[6] Jaap de Visser 'The Battle of Butterworth: A section 139 intervention in the Eastern Cape' *Dullah Omar Institute* (1999) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/title-1/10353.pdf, accessed 20 June 2023. The alleged challenges included: a failure to provide basic services in a sustainable manner; fraud, nepotism, corruption and misuse of municipal assets by councillors; and a failure to pay municipal workers' wages due to a financial crisis, which resulted in a strike which stopped all service delivery.

[7] *Mnquma Local Municipality v Premier of the Eastern Cape* [2009] ZAECBHC 14 (5 August 2009).

[8] *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo* [2014] 4 All SA 67 (GP).

[9] As at January 2024. The SCA has also considered the meaning of section 159 of the Constitution read with section 139*(1)(c)* of the Constitution (which requires elections to be held within 90 days of the dissolution of a municipal council) in *Premier for the Province of Gauteng v Democratic Alliance* [2021] 1 All SA 60 (SCA).

[10] *Premier, Western Cape v Overberg District Municipality* 2011 (4) SA 441 (SCA).

[11] *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC).

[12] *Premier, Gauteng v Democratic Alliance* 2022 (1) SA 16 (CC).

3.2. Overberg District Municipality

The Overberg District Municipality is a municipality in the Western Cape province, comprising the Theewaterskloof, Swellendam, Overstrand and Cape Agulhas local municipalities.[13] Towns within the jurisdiction of the municipality include Grabouw, Bredasdorp, Caledon, Hermanus and Swellendam.

The municipality has received predominantly clean audit opinions (since the 2014/15 financial year) and financially unqualified audit opinions (in the 2018/19 financial year and prior to the 2014/15 financial year), with the notable exception of a qualified audit opinion with findings in the 2010/11 financial year.[14]

During the 2010/11 financial year the Overberg District Municipality was run by an ANC-led coalition of approximately eleven councillors,[15] while the Western Cape provincial executive[16] was led by the DA. Various political disagreements within the municipal council at the time resulted in a resolution to remove the speaker from office, the election and subsequent resignation of a new speaker, a continuing failure to appoint a new speaker (beyond the chairing of a single meeting), a failure to convene an urgent special meeting despite requests to the municipal manager from the ANC-coalition councillors (in the absence of a speaker), an unsuccessful request by the ANC-coalition councillors to the DA-led provincial government in an attempt to compel the municipal manager to convene a council meeting for the purposes of

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[13] See Municipalities of South Africa 'Overberg District Municipality (DC3)' available at https://municipalities.co.za/overview/146/overberg-district-municipality, accessed 22 March 2023.

[14] See AGSA *Consolidated General Report on the local government audit outcomes: MFMA 2015-16* (2017) Annexure 3 and AGSA *Consolidated General Report on the local government audit outcomes: 2021-22* (2023) Annexure 3.

[15] See *Overberg* supra note 10 para 5. The municipal council consisted of twenty councillors: eleven ANC-led coalition councillors (nine councillors from the ANC and two councillors from the National Peoples' Party) and nine remaining councillors (eight councillors from the DA and one councillor from the Independent Democrats). Also see Mbuzeni Mathenjwa 'Contemporary trends in provincial government supervision of local government in South Africa' (2014) 8 *LDD* 179 at 185.

[16] Known as the provincial 'cabinet' in terms of section 35 of the Constitution of the Western Cape Act 1 of 1998.

approving a municipal budget and, ultimately, the municipality's failure to approve an annual budget.[17]

The ANC-coalition councillors did eventually meet, without the other councillors, and 'approved' the 2010/11 budget on 9 July 2010. However, this was not in accordance with the relevant provisions of the MFMA which requires that a municipal budget, which is the sole competency of a municipal council, 'must' be approved by the municipal council at a council meeting before the start of each financial year (being 1 July).[18]

As a result of this failure to approve the municipal budget, the Western Cape provincial executive dissolved the municipal council on 14 July 2010, approved a temporary budget for the municipality and appointed an administrator, pending the election of a new municipal council.[19] These decisions were taken in terms of section 139*(4)* of the Constitution read with section 26*(1)* of the MFMA, purportedly based on the provincial executive's understanding (derived from legal advice that it had received) that the intervention *and* dissolution decisions were mandatory, due to the *de facto* failure to approve a budget before the start of the municipal financial year and the peremptory wording used in section 139*(4)* of the Constitution.

The Overberg District Municipality, together with the eleven ANC-coalition councillors, applied to the High Court to set aside both the provincial executive's intervention and dissolution decisions. While the municipality's failure to approve the budget appeared to originate from various political disagreements (illustrating political tensions both between the councillors in the municipal council and with the provincial executive), the applicants did not argue (and the High Court did not consider) the political motivation for the intervention.

Instead, the High Court emphasised the need to interpret an 'ambiguous' section 139*(4)* of the Constitution within its appropriate constitutional context (with express recognition of local government autonomy), finding that the provincial executive was required to exercise its 'wide

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[17] *Overberg* supra note 10 paras 7-11; Jaap de Visser and Douglas Singiza 'Consequences of failing to adopt a budget by 30 June' *Dullah Omar Institute* (December 2010) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-12-issue-4-december-2010/lgb-iss-12-4-consequences-of-falling-to-adopt-a-budget-by-30-june.pdf, accessed 8 May 2023.

[18] See section 160 of the Constitution; sections 16*(1)* and 15-33 of the MFMA.

[19] *Overberg* supra note 10 para 2.

discretion' in taking appropriate steps (not only the dissolution of the municipal council) to achieve the end sought (the resolution of the municipal council's failure to approve a budget).[20] The court thus indicated a preference for avoiding any interpretation which would restrict and bind the provincial executive to the 'most drastic interference' in local government, such as a compulsory dissolution, suggesting respect for local government autonomy.

The High Court held further that, in the circumstances, it appeared that the provincial executive had failed to consider the underlying reasons for the municipality's failure to approve a budget (such as the absence of the speaker and the uncooperative behaviour of the municipal manager). Against this background, the court declared the intervention invalid and set aside both the provincial executive's intervention and dissolution decisions.

The decision was appealed by the provincial executive, premier and relevant MEC[21] of the Western Cape (collectively referred to here as the '*Overberg* appellants'). The *Overberg* appellants, in support of their understanding of the peremptory nature of a dissolution decision, argued that dissolution of a 'recalcitrant council' which is unable to approve a budget (without which service delivery is impossible) would have the effect of deterring, or at least imposing limits, on the use of 'local politicking at the expense of residents'.[22] The *Overberg* appellants further emphasised that a dissolution decision has the effect of 'restor[ing] democratic government', protecting residents' rights and ensuring the appointment of an administrator and the election of a new municipal council which can approve a budget.[23]

3.2.1. Was the SCA willing to consider the matter?

The SCA handed down its decision on 18 March 2011. The majority (in a judgment penned by Brand JA) and the concurring minority (in a judgment by Streicher JA) both appeared to accept the in-principle reviewability of section 139 intervention decisions.

The majority limited its scrutiny of whether the SCA was able to consider the intervention decision to a fairly cursory discussion of the 'settled law', namely that an exercise of public

[20] *Overberg* supra note 10 para 35; de Visser and Singiza op cit note 17.

[21] Known as the 'Provincial Minister' in terms of section 35 of the Western Cape Constitution.

[22] *Overberg* supra note 10 para 22.

[23] Ibid para 27.

power (implicitly including section 139 intervention decisions) amounts to executive action (rather than administrative action) which can be reviewed by the courts in terms of the constitutional principle of legality.[24]

The majority further held that the courts' role was to focus on the interpretation of the relevant provisions; in this case section 139*(4)* of the Constitution. For the majority, this included an assessment as to whether, assuming the fulfilment of the jurisdictional facts, the step that the provincial executive decided to take (in this case the dissolution of the municipal council) was discretionary or compulsory. This assessment was at the crux of the majority's determination of whether the provincial executive had misconstrued its powers under section 139*(4)* of the Constitution, thereby 'offending' the principle of legality.[25]

3.2.2. What was the extent of the SCA's involvement?

The majority held that the meaning of section 139*(4)* of the Constitution is 'quite plain' in that it requires intervention by the provincial executive.[26] This conclusion was based on the phrase: 'the provincial executive *must* intervene' (emphasis added) in section 139*(4)*, which means that an intervention is mandatory if the jurisdictional facts have been established.

For the majority, however, the steps chosen to deal with the underlying problems in the municipality remained within the 'wide discretion' of the provincial executive, which had to be exercised 'properly' and was limited by only two requirements.[27] The first requirement is that the steps must be 'appropriate', based on the express wording of section 139*(4)* of the Constitution, which the majority held could also be understood to mean 'suitable'. The second requirement is that the steps must be suitable 'for a particular purpose' (such as to ensure the approval of the annual budget) as informed by the facts and circumstances of each case. This creates a causal connection between the chosen steps and the purpose to be achieved.

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[24] Ibid paras 37-8.

[25] Ibid paras 1, 13-7.

[26] Ibid para 19.

[27] Ibid paras 19-20, 23, 36. The minority agreed that section 139*(4)* of the Constitution confers a wide discretion on the provincial executive to determine the appropriate step to ensure the approval of a budget; see para 45.

The majority thus held that the express reference to dissolution in section 139*(4)* of the Constitution did not make it a required step in every instance; rather its inclusion is attributable to its nature as the 'most drastic step'.[28] The necessary corollary for the majority was that the provincial executive is required to consider 'less drastic means' to ensure the approval of a budget.[29] The majority also sought to provide some guidance on the possible 'less drastic' steps that could have been considered. One possible step (which the majority noted would not always be appropriate)[30] was for the provincial executive to issue a directive enabling the municipal council to approve the annual budget in a stipulated time, despite such approval falling outside of the deadline imposed under the MFMA.[31] Another possible step was for the provincial executive to grant validity in respect of a belated approval of a municipal budget, falling outside of the MFMA-approval deadline, by a municipal council, that would otherwise have been invalid.[32]

The minority adopted a slightly different approach on the appropriate steps to be taken, preferring to support the High Court's position that a municipal council has the authority to approve an annual budget after the start of the relevant financial year.[33] The minority also recognised that attempts to persuade the municipal council to adopt a budget or to dissolve the municipal council and appoint an administrator, will always be appropriate for the provincial executive to take when exercising its wide discretion, 'for as long as' the municipal council fails to adopt such budget.

In any event, the majority held that the provincial executive had offended the principles of legality by misconstruing its powers under section 139*(4)* of the Constitution and that the appellant's interpretation that dissolution was a mandatory step was 'untenable'.[34] The majority

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[28] Ibid para 20.

[29] Ibid paras 19, 37-8. Also see Mathenjwa op cit note 15 at 191.

[30] Ibid para 32. Although the majority recognized that this would not always be the case, in this instance the budget was 'ready and awaiting approval' which meant that the proposed step would ensure the approval of the budget.

[31] Ibid paras 30-2. The majority held that such a step could not be limited by the provisions of the MFMA, as that would fetter the discretion of the provincial executive.

[32] Ibid para 34.

[33] Ibid paras 45, 53.

[34] Ibid para 35.

thus dismissed the appeal, agreeing with the High Court that the dissolution decision must be set aside on the grounds of illegality.[35]

The majority acknowledged that its conclusion 'stated slightly differently' was that the provincial executive had 'offended' the provisions of section 41*(1)* of the Constitution[36] by deciding to dissolve the municipal council without considering a 'more appropriate remedy'.[37] This was the only express reference to the principles of co-operative government in the majority judgment.

The majority's requirement for the provincial executive to consider 'less drastic means' or a 'more appropriate remedy' demonstrates intrinsic judicial support for the adoption of a more proportional step to correct the harm (in this case, the failure to approve a budget prior to the MFMA-deadline).[38] The result is the adoption of a standard of review centred around a type of proportionality analysis, despite the majority's broader stated approach of positioning the review within the principle of legality and, by implication, rationality.

This preference for a proportionality-infused approach can be linked, at least implicitly, with four factors. The first factor is the majority's underlying respect for local government autonomy, which translates into its support for a less drastic step with less intrusion into local government autonomy.

The second factor is the majority's preference for incorporating the intergovernmental monitoring and support measures implicit in Chapter 7 of the Constitution within the step to be adopted under section 139*(4)* of the Constitution. This is embodied in the majority's support for alternative measures requiring intergovernmental cooperation which would assist and support the municipality in achieving the belated approval of the budget. This approach, which leans towards intergovernmental and dialogic engagement between provincial and local government for the purpose of ensuring the approval of a budget, bears some resemblance to

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[35] Ibid para 38.

[36] This included provisions setting out respect for local government autonomy such as sections 41*(1)(e)-(f)* of the Constitution.

[37] *Overberg* supra note 10 paras 36, 38.

[38] Ibid para 37.

the approach of 'meaningful engagement' adopted by the Constitutional Court in the second wave of socio-economic rights disputes, as discussed in Chapter 2 of this Thesis.[39]

The third factor is the majority's support for adopting an interpretation of section 139 within the broader constitutional context, including the principles of co-operative government. This is embodied in the 'less drastic' steps proposed by the majority and in the alternative stating of the majority's conclusion (that the provincial executive had specifically 'offended' the provisions of section 41*(1)* of the Constitution).

The final factor is the majority's acknowledgement that the municipal council was both responsive and engaged, but only temporarily lacking in capacity. The majority held that the facts demonstrated that the municipal council was 'both willing and able' to approve the budget timeously, but that factors beyond its control prevented it from doing so. [40] The majority thus held that it was not only inappropriate but 'downright absurd' not to allow the council to approve the budget, which had already passed through all the preliminary procedures and to rather dissolve the municipal council instead as a purely punitive measure.[41] This illustrates judicial recognition of the integrity and efficacy of the municipal council which, although temporarily incapacitated, could (in the majority's view) be effectively supported by the provincial government to achieve, in this case, the approval of the budget.

Each of these factors effectively pulled the majority towards a preference for a proportionality-infused approach. As a result, the majority's approach suggests that the exercise of the provincial executive's discretion in favour of dissolution in the context of section 139*(4)* of the Constitution, should be a 'last resort' measure adopted only when the measures respecting and

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[39] Also see Katharine Young *Constituting Economic and Social Rights* (2012); Marius Pieterse 'Socio-economic Rights Adjudication and Democratic Urban Governance: Reassessing the "Second Wave" Jurisprudence of the South African Constitutional Court' (2018) 1 *VRÜ* 25; Katharine Young 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) *International Journal of Constitutional Law* 387.

[40] Ibid para 23. For the majority, the appellant's support for mandatory dissolution was inextricably linked with the assumption that a municipal council's failure to approve a budget is 'invariably attributable to incompetence or recalcitrance'.

[41] Ibid para 24.

supporting local government autonomy and any feasible intergovernmental monitoring and support, have failed.

While a failure to approve a budget may have implications for service delivery, and may lead to a rights violation, this was not an issue presented to or considered by the SCA. It seems possible, however, that an underlying rights violation, which is presented to the courts on the facts, could influence the courts towards a consideration that a provincial executive's adoption of dissolution as a step, is appropriate and suitable.

Finally, both the majority and minority judgments expressly acknowledged that the provincial executive has a 'wide discretion' which should not be unnecessarily limited or negated through a restrictive interpretation of section 139*(4)* of the Constitution.[42] Neither the majority nor the minority judgments made express reference to the doctrine of separation of powers to justify this approach. It seems likely that this could be attributable to a tactical decision on the part of the SCA, based on the municipality's willingness to adopt a budget and the provincial government's admission that its decision to invoke a mandatory dissolution was based on its understanding of the peremptory nature of section 139*(4)* of the Constitution,[43] as well as the absence of a fundamental democratic process dysfunction.[44] The result was thus a judicial preference for exploring existing mechanisms to resolve the challenges faced by the municipality.

3.3. Ngaka Modiri Molema District Municipality

The Ngaka Modiri Molema District Municipality is a municipality in the North West province, comprising the Mahikeng, Ratlou, Ramotshere Moiloa, Ditsobotla and Tswaing local

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[42] Ibid paras 19, 20, 23-4, 35, 45.

[43] See paragraph 2.2.4.3 of Chapter 2; Kent Roach & Geoff Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325 at 327, 345-50.

[44] See paragraph 2.3.2 of Chapter 2; Aziz Huq 'A tactical separation of powers doctrine' (2019) 9 *CCR* 19 at 43-4; Firoz Cachalia 'Precautionary constitutionalism, representative democracy and political corruption' (2019) 9 *CCR* 45.

municipalities.[45] Towns within the jurisdiction of the municipality include Mahikeng, Mmabatho and Lichtenburg.

The municipality has been the subject of multiple section 139 interventions: it was under a section 139*(1)(b)* intervention from July 2009 to July 2010, a section 139*(1)(b)* intervention in July 2014 (which was withdrawn by the provincial executive), a section 139*(1)(c)* intervention from September 2014 to December 2014 (which was the subject of a judicial review application), a section 139*(1)(b)* intervention from March 2015 to August 2016, and an ongoing section 139*(1)(b)* intervention since September 2018.[46]

For every financial year since the 2010/11 financial year, the municipality has received either an adverse audit finding, a disclaimed audit with findings or a qualified audit with findings.[47] In the 2014/15 financial year, when the section 139*(1)(c)* intervention was initiated, the Ngaka Modiri Molema District Municipality received a disclaimed audit opinion with findings.

Prior to the decision to initiate the section 139*(1)(c)* intervention in September 2014, the ANC-led North West provincial executive had reportedly, from 2012, attempted extensive engagements with the municipality at administrative and political levels, for the purposes of identifying the municipality's challenges and providing solutions and support. The municipality reportedly failed to attend most of these engagements. In July 2014 the provincial executive took a decision to initiate a section 139*(1)(b)* intervention, although this was subsequently withdrawn when the municipality objected to the manner in which the resolution was taken. In subsequent engagements with the provincial executive, the municipality

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[45] See Municipalities of South Africa 'Ngaka Modiri District Municipality (DC38)' available at https://municipalities.co.za/overview/142/ngaka-modiri-molema-district-municipality, accessed 3 April 2023.

[46] See MS Bole *Sustaining Section 139(1) interventions in local government: The case of selected municipalities in North West Province* (PhD thesis, North West University, 2022). The SAHRC also issued a final investigative report in relation to the breach by the municipality of its obligations to provide services to residents in a sustainable manner, to promote a safe and healthy environment, and to prevent contamination of the environment while allowing raw sewage to spill; see SAHRC *Final Investigative Report in the matter between Tumelo Phinda Kebaneile and Ngaka Modiri Molema District Municipality and Tswaing Local Municipality* (25 April 2023).

[47] AGSA op cit note 14 at Annexure 3.

reportedly 'denied and disputed' all concerns raised.[48] As a result, on 3 September 2014 the provincial executive took a decision to initiate a section 139*(1)(c)* intervention and to dissolve the municipal council (which, at the time, was comprised of 45 councillors and was majority-led by the ANC) and to appoint an administrator.

At the time, there were allegations of 'infighting' between the provincial government and the municipality, with news articles suggesting that attempts by the ANC-led provincial government to make changes in the municipality had been 'thwarted by the dissident ANC councillors'.[49] However, the provincial executive based its dissolution decision on three core issues: governance (including the municipality's dysfunctional intergovernmental relations forum), administration (including issues with meeting competency requirements, chronic failures as reflected in the AGSA reports, and non-compliance with supply chain management processes) and service delivery (such as poor management of water provision programmes, an absence of service level agreements for water provision, and a failure to spend the grants for water and sanitation projects).[50] The provincial executive also submitted that there was 'no political will' on the part of the municipality, particularly in relation to its challenges and the effect on its communities who were experiencing poor and non-existent service delivery.

The municipality approached the High Court for relief in two parts: first, temporary relief to prevent the administrator from 'interfering' in the municipality's affairs and for a suspension of the decision to dissolve it ('the temporary interdict application'); and second, the review and setting aside of the decision to dissolve the municipality ('the review application').[51]

In the temporary interdict application, the municipality stressed the importance of support and respect for local government autonomy and representative democracy, requesting the

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[48] NCOP Committee on CoGTA 'Section 139 Intervention: Ngaka Modiri Molema District Municipality and Mpofana Local Municipality' (15 September 2014) available at https://pmg.org.za/committee-meeting/17577/, accessed 5 May 2023.

[49] See, for example, Setumo Stone 'ANC sacks 22 defiant Limpopo councillors' *BusinessDay* (9 July 2014) available at https://www.businesslive.co.za/bd/politics/2014-07-09-anc-sacks-22-defiant-limpopo-councillors/, accessed 5 May 2023.

[50] See CoGTA MEC *Report to Select Committee on Cooperative Governance and Traditional Affairs* (15 September 2014) available at https://static.pmg.org.za/140915sccoopreport1.htm, accessed 5 May 2023.

[51] *Ngaka Modiri Molema* supra note 11 para 2.

restoration of the status of the municipal councillors to the position from which they had been unjustly removed.[52] The municipality argued that municipal officials had been 'infuriated' by the dissolution decision and had, as a result, caused 'turmoil and instability' within the municipality.[53] If the interim relief was granted, the municipality argued, the opposition to the intervention decision would be addressed and the municipality could continue to perform its functions.

On 25 September 2014, the High Court dismissed the application for interim relief on the basis that the municipality had not shown a *prima facie* right justifying the involvement of the High Court, given that it had suffered no harm, irreparable or otherwise.[54] The High Court drew a distinction between a municipality and individual councillors, which it identified as separate entities, and noted that it was insufficient to state that councillors would suffer because of a loss of earnings in salaries.[55] The High Court held further that the balance of convenience did not favour the granting of the interim interdictory relief.

The municipality sought leave to appeal directly to the Constitutional Court, including direct access for the review application (which was still pending in the High Court) on the ground of urgency. In its leave application, the municipality made further allegations that rights had 'been infringed or threatened' as a result of the 'extremely prejudicial impact' of the intervention, which resulted in water and sanitation services not being provided to certain communities.[56] In the process, the municipality alleged that the section 139 intervention itself (rather than any prior conduct by the municipality) had resulted in a service delivery failure and socio-economic rights violation, thereby necessitating the Constitutional Court's involvement.

The Constitutional Court handed down a unanimous decision on 18 November 2014.

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[52] Ibid paras 4-5. Also see *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* (M390/2014) [2014] ZANWHC 46 (25 September 2014) para 8.

[53] Ibid paras 5, 22.

[54] *Ngaka Modiri Molema* supra note 11 paras 8, 10.

[55] Ibid para 12.

[56] *Ngaka Modiri Molema* supra note 11 paras 6-7.

3.3.1. Was the Constitutional Court willing to consider the matter?

The Constitutional Court refused to grant leave to appeal against the High Court's decision on the temporary interdict application, based on its assessment of the potential prejudice and urgency, the interests of justice and a balance of convenience (incorporating a proportionality exercise and a consideration of the constitutional rights at stake).[57]

The Constitutional Court was clear that the potential prejudice and harm was not suffered by the municipality or the municipal councillors, as alleged by the applicants, which it considered to be a 'fundamental flaw' in the municipality's application for leave to appeal. Rather, it was located within the continued disruption of basic essential services, such as basic sanitation and water, to 'the people and communities the [m]unicipality is supposed to serve' (even though they were not party to the proceedings).[58] The Constitutional Court observed further that the municipality was dissolved because it failed in fulfilling its executive obligation (although this failure was not explored further, as it was the subject of the review application).

The Constitutional Court held further that it would not be in the interests of justice to grant the application for leave to appeal: the municipality and municipal councillors would not suffer irreparable harm (especially as they could be reinstated to their positions in the event of a successful review application), their interests were not affected by urgency and the balance of convenience did not support the continuation of a 'dire situation' given that it was alleged that it was the municipality itself that had failed to ensure the provision of services.[59]

The Constitutional Court appeared to place minimal weight on arguments for local government autonomy and the will of the people in the process of electing a municipal council in circumstances in which the municipality had alleged harm to the councillors, rather than to those residing within the municipality. It also appeared to place little express reliance on the doctrine of separation of powers, although this may have been based on its finding in a previous

[57] Ibid paras 1, 9-10.

[58] Ibid paras 4, 9.

[59] Ibid para 10.

matter that separation of powers must be considered whenever applying the balance of convenience test.[60]

For similar reasons, the Constitutional Court also refused to grant direct access for the review application holding that 'the determination of the section 139 constitutional dispute is one that ordinarily would not call for immediate intervention' and that the merits of the challenge would be decided in the review proceedings before the High Court.[61] While this decision does not affect the inherent justiciability of section 139 intervention decisions, it is illustrative of the Constitutional Court's reluctance to be prematurely drawn into a section 139 intervention dispute, especially as a court of first instance.

3.3.2. What was the extent of the Constitutional Court's involvement?

Despite its refusal to grant the direct access or leave to appeal applications, the Constitutional Court emphasised the judicial role in nevertheless coming to the aid of people and communities whose rights may be adversely affected following a 'dispute within or relating to the management of the municipality'.[62] For the Constitutional Court, this judicial assistance is applicable irrespective of whether there has been a finding of constitutional impropriety[63] and despite those community members, the 'people who may suffer the real harm' and 'whose interests lie at the heart of the matter', not being a party to the application.[64]

In this regard, the Constitutional Court issued directions to each party requesting information on the state of delivery of basic services to the communities served by the municipality, including specific information on the cessation or interruption in the provision of basic municipal services as well as the cause, extent, geographic reach, duration and period of such

[60] See Ngwako Raboshakga 'Separation of powers in interim interdicts applications' (2013) 5 *CCR* 366.

[61] *Ngaka Modiri Molema* supra note 11 para 11.

[62] Ibid paras 12-4.

[63] The Constitutional Court grounded this finding in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 35-40, where it found that a municipality has an obligation to provide basic services to its inhabitants irrespective of the existence of a direct contractual relationship.

[64] *Ngaka Modiri Molema* supra note 11 paras 4, 9-10, 12, 14. In support of this finding, the Constitutional Court also set out the obligations of local government to provide basic municipal services and the requirement set out in section 7*(2)* of the Constitution that the state must refrain from interfering with existing rights.

cessation or interruption.[65] It also requested submissions on why it should not order the individuals or responsible officials to provide basic municipal services, if these were not being provided. This illustrates a willingness by the Constitutional Court to involve the stakeholders in solving the problem (in a similar manner to that observed in the context of the second wave of socio-economic rights disputes),[66] to ensure the deliberate sharing of information between the courts and provincial and local government, and to assume an activist role in inquiring about specific details of a possible socio-economic rights violation, outside of the information placed before it.

The administrator (whose account was confirmed by the CoGTA Minister) explained that some communities had not had water for years (despite the municipality receiving funding for water and sanitation) and that the quality of the water was so problematic that the national government had issued a warning about drinking that water.[67] The administrator submitted that, following a section 139 intervention, an emergency plan had been put in place to restore services and that most areas had already been reconnected. The administrator accepted the possibility of an order compelling the provision of services but requested that consideration be given to the facts on the ground, the steps already taken to address the breakdown in the services, and the emergency plan.[68]

The municipality, on the other hand, submitted that it was the 'unlawful' section 139 intervention and the 'direct result of the unlawful usurping of the powers and functions of the municipal administration' that led to the breakdown in service provision.[69] As such, it submitted that an order specifically directing the administrator not to usurp and exercise the powers and functions of the municipal council was required.

The Constitutional Court found these responses 'instructive' and illustrative of a consensus between the parties that there had been 'widespread and continuing disruption of basic services

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[65] Ibid para 15.

[66] See paragraph 2.3.5 of Chapter 2.

[67] *Ngaka Modiri Molema* supra note 11 paras 17, 19-20. The CoGTA Minister also emphasised the administrator's authority to act in restoring basic services.

[68] Ibid para 18.

[69] Ibid para 21.

to people and communities'.[70] Relying on the submitted information, the Constitutional Court was satisfied that a return to 'normality' within the municipality was underway due to the section 139 intervention itself (and the implemented emergency plan for the provision of municipal services) and that no further judicial involvement was required.[71] The Constitutional Court was thus not swayed by the municipality's submissions and accepted that the democratic institutions were functioning effectively: the duly-appointed administrator was ensuring service delivery and new elections would be held within the requisite time period. It accordingly held that it would not make any unnecessary order for the provision of services, given that the dismissal of the leave to appeal application meant that the lawfulness of the section 139 intervention in restoring services was 'beyond question'.[72] In the event that the municipality or municipal officials interfered with the intervention, the administrator would be required to approach the High Court for relief. However, the Constitutional Court also undertook not to impose an adverse costs order on the municipality, finding that it would ultimately place an additional financial burden on residents.

While the Constitutional Court's engaged approach, focusing on a dialogue and sharing of information between the parties, did not change the outcome, it does highlight a willingness to take an active and interventionist role in the face of a potential socio-economic rights violation. This suggests that, in a proportionality assessment (including within a balance of convenience test), the presence and extent of an underlying rights violation would weigh more heavily for a court, thereby permitting a section 139 intervention which may, in the circumstances, be more restrictive of local government autonomy.

3.4. City of Tshwane Metropolitan Municipality

The City of Tshwane Metropolitan Municipality is a Category A municipality[73] in the Gauteng province and is the largest metropolitan municipality in South Africa.[74] The municipality has

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[70] Ibid para 16.

[71] Ibid paras 23-4.

[72] Ibid.

[73] Section 155*(1)(a)* of the Constitution read with section 2 of the Structures Act.

[74] See Municipalities of South Africa 'City of Tshwane Metropolitan Municipality (TSH)' available at https://municipalities.co.za/overview/3/city-of-tshwane-metropolitan-municipality, accessed 18 April 2023.

received financially unqualified audits with findings since the 2016/17 financial year.[75] In the 2016 local government elections, control of the municipality shifted from an ANC-majority to a coalition led by the DA and supported by another political party, the EFF. In practical terms, this meant that the DA-led coalition held 99 seats of the total 214 seats on the municipal council (compared to the ANC's 89 seats), with an agreement of support from the EFF's 25 seats in the form of a 'soft' coalition.

Following the 2019 provincial government elections, however, the EFF withdrew its support from the DA in all minority councils, including in the City of Tshwane.[76] While the DA-led coalition still held 99 seats on the municipal council, 108 seats were required to ensure that council meetings would be quorate.[77] With the ANC and EFF councillors either failing to attend meetings or leaving meetings once commenced, the requisite quorum for conducting council meetings, transacting and making decisions, including the election of a mayor and the appointment of a municipal manager, was often absent from December 2019 (or even from September 2018).[78]

In December 2019, the ANC-led Gauteng executive council took a decision to 'invoke section 139*(1)*' of the Constitution, without specifying the type of intervention, in the City of Tshwane

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[75] AGSA op cit note 14.

[76] Luyolo Mkentane 'EFF will no longer vote with DA and ANC in municipalities' *BusinessDay* (2 July 2019) available at https://www.businesslive.co.za/bd/national/2019-07-02-eff-will-no-longer-vote-with-da-and-anc-in-municipalities/, accessed 15 May 2023.

[77] Jordan Griffiths 'The short-term gain of dissolving Tshwane's council may turn into long-term pain for David Makhura' *Daily Maverick* (8 March 2020) available at https://www.dailymaverick.co.za/opinionista/2020-03-08-the-short-term-gain-of-dissolving-tshwanes-council-may-turn-into-long-term-pain-for-david-makhura/, accessed 5 May 2023.

[78] *Tshwane* supra note 12 paras 5-7, 15, 19, 23, 27, 100, 142, 147, 151, 225, 245, 249. These decisions were required following a municipal council meeting on 28 November 2019 when the ANC and EFF councillors collapsed a meeting following the speaker's decision to disallow a motion of no confidence in the mayor and a subsequent vote of no confidence removing the DA-mayor from his position on 5 December 2019 (although this decision was subsequently revoked by the High Court). Also see Tinashe Chigwata 'Constitutional Court invalidates the dissolution of the Municipal Council of Tshwane' *Dullah Omar Institute* (November/December 2021) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-16-issue-5-november-december-2021/constitutional-court-invalidates-the-dissolution-of-the-municipal-council-of-tshwane, accessed 15 May 2023.

Metropolitan Municipality, purportedly due to issues in finance management, service delivery, governance (such as maladministration and corruption) and institutional capacity.[79] In January 2020, the CoGTA MEC clarified that the intervention would be proceeding in terms of section 139*(1)(a)* of the Constitution and issued directives (setting out the failings of the municipal council as well as deadlines for the formulation, implementation and reporting on action plans or remedial action) with which the municipality was required to comply.[80]

The speaker of the municipality responded to the various directives, including action plans and programmes undertaken by the municipal council to address the directives, in early February 2020.[81] However, further disagreements led to the provincial executive taking the decision, in early March 2020, to dissolve the municipal council and to appoint an administrator in terms of section 139*(1)(c)* of the Constitution, read with the constitutional obligation under section 154*(1)* of the Constitution requiring national and provincial governments to support and strengthen the capacity of municipalities.

The Gauteng provincial executive noted that the municipal council had 'reached a deadlock' in that it was 'unable to conduct its business and could not serve its residents', which necessitated the intervention.[82] The decision to dissolve the municipal council was further linked with other unfulfilled executive obligations including service delivery failures, such as the provision of mobile drinking water tankers, sanitation services and water quality in Hammanskraal.[83]

The DA, and three DA councillors, challenged this section 139 intervention decision in the High Court on three grounds: first, that the provincial executive had acted unfairly and irrationally in dissolving the municipal council; second that the dissolution decision did not comply with section 139 of the Constitution and was therefore unlawful; and third, that the

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[79] Ibid paras 9-10, 99, 145.

[80] Ibid paras 12, 146.

[81] Ibid paras 21-2, 121, 149-50.

[82] Ibid paras 5-6, 27.

[83] *Democratic Alliance v Premier for the Province of Gauteng* [2020] 2 All SA 793 (GP) ('*Tshwane* (High Court)') at paras 15, 26, 29, 63-71.

dissolution decision was taken for an ulterior purpose, motivated by party political agendas to subvert democratic processes.[84]

The respondents included the municipality, the Gauteng premier, provincial executive and CoGTA MEC, the speaker of the provincial legislature, the CoGTA Minister, and the chairperson of the NCOP, while various political parties and their councillors forming part of the municipal council were also joined to the application.[85]

The High Court set aside the intervention decision after considering only the second ground of the applicants' challenge: the unlawfulness of the section 139 intervention.[86] It held that the decision was reviewable under the principle of legality which required the provincial executive to show, in addition to the other jurisdictional facts, that there is a direct correlation between the exercise of the power (in this case the decision to dissolve the municipal council) and the fulfilment of the identified executive obligations.[87]

The High Court held further that an assessment must be made as to whether the dissolution of a municipal council (in terms of section 139*(1)(c)* of the Constitution) should be preceded by other less intrusive means, such as a directive in terms of section 139*(1)(a)* of the Constitution, the assumption of responsibility in terms of section 139*(1)(b)* of the Constitution, or even other statutory options such as disciplining errant councillors.[88] On balance, the High Court held that the decision to dissolve the municipal council was not illegal; rather, it was 'inappropriate' as there were less intrusive measures which the provincial executive could have taken 'to address the root cause of the [c]ouncil's inability to fulfil its core responsibilities', namely the continued disruption of council meetings by the ANC and EFF councillors.[89] The court thus declared the dissolution of the municipal council invalid and directed the ANC and EFF councillors 'to

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[84] See *Tshwane* note 12 paras 152-4 for a summary of the grounds of review and the finding of the High Court; *Tshwane* (High Court) supra note 83 para 105.

[85] The other political parties included the Congress of the People, the African Christian Democratic Party, the Pan Africanist Congress of Azania and the Freedom Front Plus.

[86] *Tshwane* (High Court) supra note 83 para 104.

[87] Ibid para 35.

[88] Ibid paras 81-8.

[89] Ibid paras 71, 81, 94, 104-5; *Tshwane* supra note 12 paras 26-9.

attend and remain in attendance' at all municipal council meetings in accordance with the Code of Good Conduct of Councillors.[90]

Leave to appeal directly to the Constitutional Court against the High Court's decision was sought under three applications: first, by the Gauteng premier, provincial executive council and CoGTA MEC (referred to collectively as the 'provincial government applicants'); second, by the EFF and all municipal councillors who were members of the EFF (referred to collectively as the 'EFF applicants'); and third, by the ANC.[91] In all three applications, the respondents included the DA and various municipal councillors who were members of the DA.

The provincial government applicants submitted that the intervention decision was both lawful and rational (which aligned with what is 'appropriate') and that a proportionality analysis, as introduced by the High Court through the requirement for less intrusive steps, had no basis in the text of section 139*(1)(c)* of the Constitution.[92] The provincial government applicants argued further that the High Court's order 'superimposed a judicial regime' which 'encroaches on the separation of powers' and constituted 'impermissible judicial overreach'.[93] The EFF applicants, on the other hand, argued that the standard set by the High Court created a reasonableness test, which is a higher standard than rationality review (which does not require a proportionality test or the adoption of less restrictive means).[94]

The Constitutional Court handed down a split decision on 4 October 2021: Mathopo AJ (with Khampepe J, Majiedt J, Theron J and Victor AJ concurring) penned the majority judgment upholding the High Court's decision to invalidate the decision of the provincial executive to dissolve the municipal council, while Jafta J (with Mhlantla J and Tshiqi J concurring) and Mogoeng CJ (with Madlanga J concurring) penned separate dissenting minority judgments upholding the appeal of the provincial executive.

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[90] Ibid para 109; *Tshwane* supra note 12 paras 29-30.

[91] *Tshwane* supra note 12 para 53. However, the ANC opted not to argue this appeal before the Constitutional Court, effectively choosing to abide by the Court's decision.

[92] Ibid paras 32-4.

[93] Ibid para 36.

[94] Ibid paras 37-8.

3.4.1. Was the majority willing to consider the matter?

The majority grounded the Constitutional Court's role within the interpretation and application of section 139 of the Constitution, with a finding that it requires a 'narrow rather than a wide interpretation',[95] and held that a constitutional matter arises both with the exercise of a public power under the Constitution and with the judicial review of the control of public power.[96] The majority found further validation for the direct appeal to the Constitutional Court in the need for a speedy resolution, reduced costs and clarity over the proper interpretation of the constitutional provision, as well as the broader importance of the matter, with an express recognition of the potential impact of the judicial role on intergovernmental relationships between local and provincial government throughout South Africa.[97]

The majority further held that a section 139 intervention decision constituted executive action which is reviewable under the principle of legality, requiring a judicial assessment of both the lawfulness of an intervention decision and the appropriateness of the remedy (such as dissolution of a municipal council).[98] While the majority judgment did not engage with the doctrine of separation of powers,[99] it found that section 139 of the Constitution incorporates the provincial executive's discretion and a 'power coupled with a duty', while also recognising that the 'right to intervene is not absolute'.[100] This approach can be contrasted with the approach adopted by the two dissenting minority judgments, which placed particular emphasis on the role of the doctrine of separation of powers in a section 139 intervention decision.[101]

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[95] Ibid paras 55-6, quoting with approval from *Mnquma* supra note 7 para 76.

[96] Ibid para 49.

[97] Ibid paras 1, 51-2.

[98] Ibid para 1 (quoting Sachs J in *Minister of Health v New Clicks South Africa* 2006 (2) SA 311 (CC) para 613), 48-9.

[99] The only references in the majority judgment are in relation to the dissolution of 'one sphere of government by another' which 'impacts on separation of powers' (para 88) and to the order of the High Court as being 'far-reaching and encroaches on the separation of powers' (para 130).

[100] *Tshwane* supra note 12 para 59. Also see *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) ('*Second Certification*') para 118.

[101] Ibid paras 175-7, 181.

Finally, the majority appeared to harbour some concerns with the impact of a decision to dissolve the municipal council on the 'quality of life' of a municipality's residents, specifically referencing the Constitutional Court's approach in *Ngaka Modiri Molema*.[102] However, unlike in *Ngaka Modiri Molema*, the majority did not ask for further evidence from the parties on the extent to which socio-economic rights were being threatened, apparently satisfied that any such underlying rights violations were being adequately addressed by the steps already being taken by local government.

3.4.2. What was the extent of the Constitutional Court's involvement for the majority?

The majority positioned the interpretation of section 139 of the Constitution within the context of the Constitution as a whole and within various 'constitutional imperatives'.[103] These 'constitutional imperatives' included the rule of law (and the principle of legality)[104] and the principles of co-operative governance and intergovernmental relations (and constitutional coherence),[105] including the obligation imposed on both national and provincial government to support and strengthen the capacity of municipalities,[106] and the autonomy of local government (together with considerations of representative and participatory democracy).[107] The majority also held that a judicial assessment of a section 139 intervention decision, and the interaction between provincial and local government, must be undertaken within the context of the broad statutory powers available to a provincial executive, including under the Systems Act, such as the possibility of an MEC initiating an enquiry into local government or deploying the Code of Conduct for Councillors to assist the municipality.[108]

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[102] Ibid para 49, quoting with approval from *Ngaka Modiri Molema* supra note 11 para 9.

[103] Ibid paras 49, 55, 60-4, 81, 89, 91, 95, 116.

[104] Ibid paras 1, 48, 65-7.

[105] Ibid paras 55, 60-4, 82, 118, 122. Also see *First Certification* supra note 1 paras 124 and 264-5; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) paras 43-4; Victoria Bronstein & Daryl Glaser 'Intervention in South African municipalities: Dangers and remedies' (2023) 140(1) *SALJ* 95 at 111.

[106] Ibid paras 60, 114, 120. Also see section 154*(1)* of the Constitution.

[107] Ibid paras 51, 56, 88-9, 126. Also see *Mnquma* supra note 7 para 76; Bronstein & Glaser op cit note 105 at 96.

[108] Ibid paras 63, 108, 123; Bronstein & Glaser op cit note 105 at 100-1. In contrast, Mogoeng CJ (in a dissenting judgment) was clear that such steps would amount to no more than an attempt to 'ritualistically tick some inconsequential box'; see para 249.

In assessing the lawfulness of the intervention decision, the majority considered the establishment of the jurisdictional facts (or pre-conditions) for section 139*(1)(c)* of the Constitution: a failure to fulfil an executive obligation; the taking of 'appropriate steps'; and, in the event of a dissolution, the existence of 'exceptional circumstances' which 'warrant' the dissolution of the municipal council.[109]

For the majority, 'appropriate steps' must be steps which: 'promote' co-operative governance and intergovernmental relations,[110] are 'suitable in the sense that they fit the situation',[111] are 'solutions-orientated' (and 'reasonably capable' of fulfilling the executive obligation)[112] and are lawful (i.e. not for ulterior purposes or inconsistent with the Constitution). This cannot be determined in the abstract: the relevant context includes the nature and extent of the failure to fulfil the executive obligations, the interests of those affected by such failure, the interests of the municipality and the applicable factual matrix (including the conduct of the municipality and the provincial executive's previous attempts to address the failings by other means).[113]

However, the majority agreed with the first dissenting judgment that courts may not set aside a section 139 intervention decision if another more fitting, effective and appropriate step existed and could have been taken.[114] Instead, an appropriate step must be understood as a 'baseline' to measure the provincial government's involvement so that 'there is less intrusion' into local government autonomy.[115] The existence of a less restrictive measure was thus relevant for the majority's determination of appropriateness, with the dissolution of a municipal council being viewed as a 'drastic' and 'far-reaching' step which should be 'invoked sparingly'.[116]

Based on its understanding of the constitutional scheme, the majority found that the provincial executive had not satisfied the peremptory requirements of section 139*(1)(c)* of the

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[109] Ibid paras 67-9, 76-89, 91-8.

[110] Ibid paras 79, 82, 126.

[111] Ibid paras 80-1, 86, 88.

[112] Ibid paras 58, 70-5.

[113] Ibid paras 81, 84; *Mnquma* supra note 7 para 75.

[114] Ibid para 83-4.

[115] Ibid paras 79-81; *Second Certification* supra note 100 para 124; *Mnquma* supra note 7 para 75.

[116] Ibid paras 78, 87-8, 126.

Constitution, with the facts not supporting the dissolution decision as an appropriate step warranted by exceptional circumstances. In particular, the majority appeared to perceive the presence of a section 139 intervention as more intrusive of municipal autonomy and as posing a larger socio-economic rights threat to the municipality (given that the municipality was already undertaking steps to address the underlying socio-economic rights concerns), than the absence of a section 139 intervention.[117]

This understanding of an 'appropriate step' effectively side-stepped the minimum-threshold rationality standard of review ordinarily associated with exercises of public power, and created a proportionality-infused standard of review for intervention decisions, under the broader principles of 'lawfulness'.[118] Based on the language used in the majority judgment, the reasoning for this fettering of the provincial executive's discretion appears to have been fundamentally grounded in Chapter 7 of the Constitution, intertwined with respect for local government autonomy, a municipality's ability to fulfil its functions, and the role of applicable intergovernmental monitoring and support obligations. The result, however, is that the majority does not expressly discuss or justify this shift to a more stringent proportionality-infused review standard.[119]

In addition, the majority was critical of the provincial government's failure to engage meaningfully with the municipality during the intervention process, resulting in the decision to dissolve the municipal council being akin to a 'foregone conclusion'.[120] The majority held that section 41*(1)(h)* of the Constitution and the principles of co-operative governance require that local government be afforded a reasonable opportunity to be informed, consulted and heard, and for meaningful engagement to take place, before a decision relating to its governance is taken by the provincial government.[121] This created an additional procedural dimension to the section 139 discretion, aligned with a finding of procedural unfairness or procedural irrationality, which incorporates principles of co-operative government and mutual support set

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[117] Ibid paras 49, 51, 58, 100, 126.

[118] Ibid paras 120, 125.

[119] This approach can be compared with the more transparent approach adopted by O'Regan J in *New National Party v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) paras 122-3.

[120] *Tshwane* supra note 12 para 119.

[121] Ibid paras 119-22, 126, fn 76.

out in Chapter 3 of the Constitution. The adoption of a meaningful engagement and a procedurally fair or procedurally rational process was based in the principles of co-operative government (rather than in the public-law relationship between the state and its citizens as discussed in *Joseph*).[122] As a result, and in the absence of meaningful engagement or any prior notice of dissolution, the majority held that the provincial government had misconstrued its powers, that it had failed to act in accordance with its constitutional obligations, and that it was impossible to evaluate appropriateness or lawfulness at the time of the decision.

Together with the majority's finding that the decision to dissolve the municipal council should be set aside on the basis of 'offending the principles of lawfulness', it was clear that the order of the High Court (requiring the councillors to remain and stay in the meetings absent lawful excuse) was not permissible as it was 'far-reaching', 'encroaches on the separation of powers' and 'takes the mandamus too far'.[123]

In this context, the majority appeared to understand the judicial role as being 'tasked' to find a remedy that would strengthen and stabilise the municipal council to enable it to function and fulfil its executive obligations so as to 'serve the residents of Tshwane' and ensure that the 'People of Tshwane come first', ideally in line with the steps that the provincial executive should have taken in the first place based on the intergovernmental monitoring and support obligations.[124]

As such, the majority's approach to remedy was determined by apportioning the blame for the incapacitated municipal council on the 'recalcitrant councillors' (the ANC and EFF councillors who were walking out of council meetings) rather than on the municipal council (or at least the councillors who were remaining after the walkouts) which was 'willing and, in certain circumstances, able to fulfil its obligations'.[125] In other words, the majority appeared to accept *the absence* of the councillors as the identifiable reason for the incapacitation of the municipal council, which the provincial executive had consistently failed to address or had overlooked. The majority thus set aside the High Court's mandamus and substituted it with an order

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[122] See *Joseph* supra note 63 paras 17-8, 24, 52, 60, 62-63, 70.

[123] *Tshwane* supra note 12 para 130.

[124] Ibid paras 127, 129-30.

[125] Ibid para 127.

compelling the relevant MEC to appoint a person or a committee to investigate the cause of the deadlock of the municipal council and to make a recommendation as to an appropriate sanction.[126]

This remedy, which was categorised by Jafta J in a dissenting judgment as requiring meaningful engagement with all councillors to resolve the issues,[127] is consistent with the Constitutional Court's approach in the second wave of socio-economic rights matters, in which resolution of a dispute is referred to a democratic or statutorily-established body best-placed to deal with the dispute.[128] The majority thus recognised the applicable democratic institutions (the MEC and his or her powers to appoint a commission of inquiry) as functional and efficient with the ability to facilitate a meaningful engagement, outside a court room, so as to find a remedy to stabilise the municipal council and enable it to normalise its operations.

Given that both dissenting judgments were influenced by the doctrine of separation of powers, the democratic principle, the principle of comity and judicial deference, the majority appeared to forgo a valuable opportunity to justify its approach more clearly by developing its own conception of the doctrine of separation of powers engaged with support for local government autonomy and considerations of democratic principle. In particular, the majority could have taken additional steps to, tactically, justify its approach under the democratic principle (by arguing more clearly that respect for local government autonomy underlies the substantive dimension of the section 139 discretion), given that section 139 of the Constitution already places strain on the democratic principle (by permitting the dissolution of a duly elected municipal council).

3.4.3. Was the minority willing to consider the matter?

Both dissenting minority judgments agreed that leave to appeal should have been granted but disagreed with the reasoning and order of the majority judgment.

Jafta J, in the first dissenting minority judgment, identified the underlying dispute as a 'quintessential political dispute' involving 'the exercise of political power' by members of a

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[126] Ibid paras 126, 128-9, 131-2. Also see item 14*(4)* of Schedule 1 of the Systems Act.

[127] Ibid para 228.

[128] See the discussion in paragraph 2.3.5 of Chapter 2.

municipal council, with the dysfunction and incapacitation of the municipal council arising from an inability to address political issues which required a 'political solution'.[129] While it was not suggested that such a political crisis would preclude the involvement of the courts, Jafta J specified that an approach of deference to 'political choices' made by the 'right political role players' was required.[130]

Jafta J located the decision to dissolve a municipal council, and the accompanying judicial role, within the text of section 139 of the Constitution, expressly noting that specifically-mandated democratic institutions within the national sphere of government (the CoGTA Minister and the NCOP) were responsible for determining whether a dissolution decision was properly made, rather than the courts. However, he acknowledged the limitations of these internal mechanisms, holding that if the dissolution decision is not set aside where there is, in fact, a 'constitutional breach', then the 'courts *must* intervene to uphold the Constitution' (emphasis added).[131] This shows an implicit appreciation for the judicial role in reviewing intervention decisions, despite the existence of non-curial mechanisms, in the event of a failure to satisfy a jurisdictional fact or to follow the procedures set out in section 139 of the Constitution. Jafta J, however, did not confirm whether such 'constitutional breach' would extend to an underlying failure of national or provincial government to support and strengthen local government, or to an underlying rights violation.

Finally, Jafta J held that the grounds of review not considered by the High Court in the first instance (such as whether the provincial executive's decision to dissolve the municipal council was procedurally unfair and irrational or was actuated by an ulterior motive) should have been remitted to the High Court for consideration.[132]

In contrast to the first dissenting minority judgment, Mogoeng CJ was satisfied that all issues, including those relating to rationality, legality and procedural fairness, were 'fully ventilated'

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[129] *Tshwane* supra note 12 paras 134-9, 151, 198, 200, 203-5.

[130] Ibid paras 176-7.

[131] Ibid para 180. Also see *Mere v Chairperson of the North West Provincial Executive Council* [2017] ZANWHC 26 (15 June 2017) paras 21-6.

[132] Ibid para 236.

in the Constitutional Court, which meant that it could be 'definitive'.[133] Mogoeng CJ's willingness to consider the dispute was intertwined with a concern for the underlying rights violation and poor service delivery for the residents in the affected municipality. It was also firmly grounded in considerations of institutional competence and the doctrine of separation of powers, together with respect for participatory and representative democracy.[134]

Mogoeng CJ was particularly concerned that both the High Court's order and the order proposed by the majority judgment amounted to a 'constitutionally impermissible encroachment into the terrain exclusively reserved for the [e]xecutive'.[135] However, while Mogoeng CJ held that courts must 'leave executive challenges, which could euphemistically be referred to as a political chess game, to the [e]xecutive or the politicians',[136] this would not preclude the courts from considering section 139 intervention disputes.

3.4.4. What was the minority's understanding of the extent of the Constitutional Court's involvement?

In the first dissenting judgment, Jafta J held that the extent of the Constitutional Court's involvement should be limited to the sole issue of whether the decision to dissolve the municipal council was 'inappropriate' (rather than unlawful) because of the High Court's finding that the provincial executive could have taken 'less intrusive measures' to address the 'root cause' of the municipal council's inability to fulfil its executive obligations.[137]

In comparison with the contextual approach of the majority, Jafta J held that the interpretative exercise should adhere to the language and requirements of section 139 of the Constitution in

[133] Ibid para 251.

[134] Ibid para 254. See, for example, the references to *United Democratic Movement v Speaker of the National Assembly* 2017 (5) SA 300 (CC) paras 77-8 and *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 308.

[135] Ibid para 247.

[136] Ibid para 255.

[137] Ibid paras 154-6: Jafta J held that the lawfulness of the provincial executive's decision did not 'strictly speaking, arise because the [High Court] did not, throughout its judgment, hold that the decision itself was unlawful'.

isolation, recognising that it permits limited intervention in the affairs of local government.[138] Jafta J also placed the doctrine of separation of powers 'at the heart of [the] constitutional structure',[139] and carefully delineated the judicial role when reviewing the exercise of executive power, focusing on the principle of rationality[140] and the roles of deference[141] and of constitutional competence[142] in the judicial review process.[143]

Against this background, Jafta J held that the provincial executive has a 'wide' discretion in determining the applicable step under section 139 of the Constitution, which is qualified only by the in-built requirement of appropriateness which is, in turn, dependent on the 'nature of the unfulfilled obligation and the circumstances that gave rise to the unfulfilment'.[144] Jafta J held that if the step chosen by the provincial executive is dissolution, then this must be warranted or justified by 'exceptional circumstances' which serve to protect municipal autonomy.[145]

On consideration of the factual matrix, Jafta J was satisfied that the provincial executive had established a failure to fulfil an executive obligation, the supply of water to Hammanskraal, which had been exacerbated by the incapacitation of the municipal council.[146] He was further satisfied that the municipal council was dysfunctional, which stemmed from the 'deep-rooted political differences among the political parties represented in the [municipal council]', and

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[138] Ibid paras 158, 161-3, 169-71, 174, 190, 194, 196-7, 206-9, 212; Bronstein & Glaser op cit note 105 at 116.

[139] Ibid paras 164, 169, 172, 175-6.

[140] Ibid para 172 citing with approval from *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) para 51.

[141] Ibid paras 175-6 with reference to *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 46-7.

[142] Ibid para 177 with reference to *Bato Star* supra note 141 para 48.

[143] This echoes the approach adopted by the Constitutional Court on several previous occasions: see, for example, *Albutt* supra note 140 para 51; *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 73, 83, 86; *Bato Star* supra note 141 para 48; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 90; *Democratic Alliance v President of South Africa* 2013 (1) SA 248 (CC) paras 41-4.

[144] *Tshwane* supra note 12 paras 162, 164, 169 and 173.

[145] Ibid paras 167, 197, 202.

[146] Ibid paras 195, 223.

noted that the 'impasse itself was extraordinary' and 'exceptional'.[147] He thus held that the dissolution was warranted by these unusual circumstances, considered in their proper context (including the democratic process and a participatory, multi-party system of government) as they '[justified] the taking of such a step'.[148] In other words, for Jafta J, the failure to uphold the section 139 intervention would effectively bypass the recognised democratic process that was required in the circumstances.

Jafta J further held that the decision as to the appropriate step must be 'left to' the provincial executive, meaning that the provincial executive is not 'obliged' to take any particular step, including a 'more' or 'the most' appropriate or 'a less intrusive' or 'less drastic' step or a step as set out in the Systems Act.[149] For Jafta J, the reading in of these terms would amount to the unwarranted inclusion of an additional condition in section 139 of the Constitution and the application of the 'wrong standard' (being a proportionality analysis rather than the required minimum-threshold rationality standard).[150] Jafta J was further clear that other steps, such as a directive or the provincial executive assuming responsibility for an executive obligation, would not be suitable in a situation where the municipal council was incapable of fulfilling any obligations.[151] As such, he was satisfied that the jurisdictional facts contained in the text of section 139 of the Constitution had been established, with the dissolution decision being 'self-evidently' appropriate with 'no sound basis' for the Constitutional Court to find that it was unlawful or inappropriate.[152]

Jafta J was further critical of the remedy set out by the majority which required councillors to attend and remain in all municipal council meetings in the absence of lawful excuse, particularly as this remedy had not been requested and the various jurisdictional facts had not

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[147] Ibid para 198-201.

[148] Ibid paras 134, 202-6.

[149] Ibid paras 162-3, 169, 172-3, 175-6, 189, 194, 207-8, 212. In reaching this finding, Jafta J also considered that the listed steps in section 139 of the Constitution are neither exhaustive nor sequential.

[150] Ibid paras 172, 190, 207-9.

[151] Ibid paras 165-6, 210-1, 224-7.

[152] Ibid paras 192, 196-7, 202-6, 209-10.

been proved by evidence.[153] In addition to this issue of legality, Jafta J held that the majority's remedy was not suited to addressing the problem (the municipality's inability to discharge obligations) and was merely a mechanism to discipline councillors (resulting only in an investigation and the recommendation of a sanction), rather than an appropriate step envisioned under section 139*(1)* of the Constitution.[154]

Mogoeng CJ agreed with Jafta J's judgment, except for the remittal and the costs order.[155] In a similar manner to the majority, Mogoeng CJ outlined the contextual importance of section 139 of the Constitution and the link with the 'all-essential imperative of co-operative governance' contained in section 41 of the Constitution, which requires the provincial government 'to do everything reasonably practicable' to help a municipality fulfil its executive obligations.[156] In this context, Mogoeng CJ held that a provincial executive is required to assess and determine which of the available section 139(1) intervention options would 'realistically result' in service delivery and the fulfilment of executive obligations.[157]

However, for Mogoeng CJ this depended on the functionality and effectiveness of a municipal council: if a municipality is dysfunctional, some steps (including those set out in sections 139*(1)(a)* and *(b)* of the Constitution and in the Systems Act) will not ensure fulfilment of an executive obligation.[158] Instead, Mogoeng CJ held that such steps were 'not helpful at all', would merely amount to ritualistic box-ticking exercises and thus cannot be considered to be 'preconditions' to section 139 of the Constitution.[159] This demonstrates a recognition of the appropriate scoping of the judicial role when a solution has already been provided by a democratically-secured majority, which should leave courts duty-bound to let parties deal with their own problems.

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[153] Ibid paras 228-9. The DA had requested only a mandamus obliging the ANC and EFF councillors to attend and remain in attendance of council meetings, at risk of contempt of court.

[154] Ibid paras 230-4.

[155] Ibid para 237, 260.

[156] Ibid para 239.

[157] Ibid para 243.

[158] Ibid paras 239-43, 247-50, 258-9.

[159] Ibid paras 243, 247-9.

Mogoeng CJ was unequivocal about the need for courts to be decisive in the face of 'scarce judicial resources' and the 'necessity to be more deliberate and intentional about addressing the burning service delivery related issues on the ground', for which the public has experienced a long wait.[160] In particular, for Mogoeng CJ, the absence of a section 139 intervention appeared to pose a larger socio-economic rights threat to the municipality and a larger threat to democratic processes, when compared with the initiated section 139*(1)(c)* intervention (in terms of which an administrator would effectively exercise the authority of the dysfunctional municipal council, and new elections would enable participatory democracy).[161]

Against this background, Mogoeng CJ agreed with the 'reasonable and pragmatic' approach adopted by the provincial executive: that all the requirements for dissolution had been met and that dissolution, while extraordinary, was the only appropriate and effective remedial step that was also rationally connected to its constitutional purpose.[162] Mogoeng CJ's approach, which has distinct similarities with his judgment in *Economic Freedom Fighters v Speaker of the National Assembly*,[163] demonstrates intrinsic respect for judicial deference and a traditional doctrine of separation of powers paired with an express concern for any judicial intrusion into the exclusive domain of the executive and politicians.

Mogoeng CJ also agreed with Jafta J that strong caution should be exercised in undertaking constitutional interpretation, particularly to ensure that new and 'needless' constitutional requirements (such as 'less restrictive means' or 'less intrusive measures') are not 'imported' into the Constitution.[164] This suggests a concern of judicial overreach and the implication for such overreach to the court's institutional credibility. Mogoeng CJ thus rejected any proportionality-type assessment (which had infused the majority's approach to the substantive dimension of the provincial executive's discretion in terms of section 139 of the Constitution)

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[160] Ibid para 251.

[161] Ibid paras 253-5. Mogoeng CJ also quoted with approval from *United Democratic Movement* supra note 134 paras 77-8 that 'the most effective extra-parliamentary mechanism for holding the people's elected representatives accountable, is a general election'.

[162] Ibid paras 247, 252-3.

[163] See the discussion of Mogeong CJ's approach in paragraph 2.3.2 Chapter 2.

[164] *Tshwane* supra note 12 paras 247, 255- 6.

arguing that it is better associated with section 36 of the Constitution (the limitations analysis under the Bill of Rights).

Further, while recognising that the criticism against the engagements of the provincial executive were fair, based on the evidence, Mogoeng CJ was 'unable to say' that the provincial executive was 'actuated by bad faith'; rather it acted in a 'half-hearted' manner.[165] Unlike the first dissenting minority judgment which remitted consideration of this issue to the High Court, Mogoeng CJ was thus satisfied, at a high level, that there was no bad faith and that the intervention decision itself was not unfair or irrational (the remaining grounds of review not considered by the High Court).

3.5. Reflections: A judicial role conception in Category 1

The judicial role conception in Category 1 is shaped by three core questions: first, assuming the fulfilment of the jurisdictional facts, whether the courts should question the provincial executive's discretion in initiating a section 139 intervention in a municipality and implementing an 'appropriate' step (a type of justiciability assessment); second, whether the courts should adopt a high level of scrutiny over the discretion exercised by the provincial executive in an initiated section 139 intervention (an assessment of the extent of the courts' involvement); and third, whether the courts should be prescriptive in their oversight role (an assessment of remedial prescriptiveness).

3.5.1. The justiciability of the section 139 discretion

As set out in Chapter 1, while section 139 of the Constitution incorporates various non-curial constitutional safeguards, it does not expressly envisage a judicial role in the management, oversight or approval of an initiated section 139 intervention.

In broad terms, the courts have confirmed that every exercise of public power is, to some extent, justiciable for constitutional compliance and may be susceptible to judicial review.[166] The

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[165] Ibid para 257.

[166] Hugh Corder & Cora Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *AJLS* 10 at 117; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 56-8; *New National Party* supra note 119 para 19, 24; *President of the Republic of South Africa v South*

Constitutional Court has further specifically recognized (in the context of an intervention under section 100 of the Constitution) that provincial government is 'entitled to the protection of judicial review' if there were to be 'any unlawful interference by the national executive with the autonomy of the province'.[167]

The courts have not made a similar statement in respect of an intervention under section 139 of the Constitution, although the 'in principle' justiciability of the provincial executive's discretion in initiating a section 139 intervention and in choosing an 'appropriate step' has been implicitly recognised. The courts have also expressly confirmed that these decisions constitute executive action rather than administrative action,[168] and that the powers of the CoGTA Minister and the NCOP to terminate a section 139 intervention would constitute executive action.[169] However, the High Court has held that the factual finding leading up to a section 139 intervention decision should be an 'administratively justifiable decision' (and would not amount to the exercise of an executive power).[170]

Despite the courts adopting a liberal approach to the justiciability of the section 139 discretion, there are certain factors and arguments which have the potential to limit the courts' consideration of Category 1 matters. This includes the standing of the parties, the application of the in-built non-curial mechanisms contained in section 139 of the Constitution, the application of intergovernmental dispute mechanisms (in general), and the party-political influences (or ulterior motives) that may have motivated the provincial executive to initiate a section 139 intervention.[171] For the purposes of this Thesis, these are termed the 'mild justiciability' factors applicable to Category 1.

African Rugby Football Union 2000 (1) SA 1 (CC); *United Democratic Movement v President of the Republic of South Africa* 2003 (1) SA 495 (CC) para 55; *Pharmaceutical Manufacturers* supra note 143; *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) paras 78, 244-5.

[167] *First Certification* supra note 1 para 402.

[168] *Tshwane* supra note 12 para 48; *Overberg* supra note 10 paras 37-8; *Tshwane* (High Court) supra note 83 para 35; *Mogalakwena* supra note 8 paras 31-3; *Mnquma* supra note 7 paras 28-30, 67; *Abaqulusi Local Municipality v Premier of the Province of KwaZulu-Natal* [2023] ZAKZPHC 100 (15 September 2023) para 7.

[169] *Mogalakwena* supra note 8.

[170] *Mtongana v Premier of the Eastern Cape* [2009] ZAECHC 16 (26 February 2009).

[171] See, generally, Mathenjwa op cit note 15 at 199-200.

3.1.1.1. *Standing*

Standing, which is to be established by an applicant,[172] requires a direct and substantial interest in the subject matter and in its outcome.[173] While standing was not considered by the SCA or by the Constitutional Court in Category 1, the High Courts have adopted a broader or permissive approach to standing, in the absence of a specific standing provision in matters falling outside the ambit of section 38 of the Constitution.

For example, the High Court has recognised the standing of a mayor (and municipal councillor) who opted to bring an application in a personal capacity as a 'ratepayer' and 'registered voter who resides within the [relevant] municipal area'.[174] Further, the High Court has accepted that a political party with substantial representation in a municipal council, as well as its members who are councillors, have standing.[175] The High Court has also held that a notice to intervene under section 139 of the Constitution does not 'take away' the power of the municipality or the municipal officials to initiate proceedings.[176]

Nevertheless, the High Court has held that the mere assertion of capacity (such as 'deputy executive mayor and/or the acting executive mayor') does not automatically discharge the onus of proof for demonstrating a direct and substantial interest in the subject matter of the proceedings.[177]

The affected community tends not to be represented in proceedings in Category 1, possibly as it would be impractical to join a municipal community or attempt to decide who should be

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[172] *Mars Incorporated v Candy World* 1991 (1) SA 567 (A) 575H-I.

[173] For example, see *Nelson Mandela Bay Metropolitan Municipality v Premier of the Eastern Cape* (1715/2020) [2020] ZAECGHC 111 (22 September 2020) para 23 (citing *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board* (490/2016) [2017] ZASCA 44 (30 March 2017) para 18).

[174] *Mnquma* supra note 7 para 27. While the respondents opted not to pursue this argument, the court was receptive to the idea that a mayor and councillor are members of an affected community, and that community participation in local government affairs gives 'expression… to the democratic principles and values of [the] Constitution'.

[175] *Tshwane* (High Court) supra note 83 para 6. The opposing argument, rejected by the High Court, was that only a municipal council or individual councillors, if they form a quorum, have a direct and substantial interest in the matter and therefore have standing to challenge an intervention decision.

[176] *Abaqulusi* supra note 168 para 34.

[177] *Nelson Mandela Bay* supra note 173 paras 20-5.

joined. While the absence of the affected community as a party to proceedings does not act as a bar to the judicial consideration of the matter, the impact of a section 139 intervention on the affected community constitutes a factor which may influence the courts' assessment (such as in *Ngaka Modiri Molema*).

3.1.1.2. *In-built non-curial mechanisms in section 139 of the Constitution*

Category 1 courts have not yet been required to consider whether a failure to exhaust the 'internal checks and balances' (or so-called 'political safeguard'[178]) in section 139 of the Constitution such as, for example, by launching litigation prior to the exhaustion of the time-period within which the NCOP is permitted to disapprove an intervention,[179] would preclude judicial involvement. On the other hand, the Constitutional Court has held that where a section 139 intervention decision is not set aside by these in-built non-curial mechanisms where there is, in fact, a constitutional breach, the 'courts *must* intervene to uphold the Constitution' (emphasis added).[180]

The High Court has, however, recognised that the section 139 non-curial mechanisms are limited: for example, while the CoGTA Minister has the power to either allow or terminate a section 139 intervention, the Minister has no judicial power to suspend the implementation of an intervention decision pending a full hearing on the matter.[181] The High Court has further hinted at its concerns with the efficacy of the non-curial mechanisms, suggesting that it provides 'scant safeguard' in the event of an intra-party factional dispute or political manoeuvring within a municipality.[182] This implies support for an enhanced judicial role despite the existence of in-built non-curial mechanisms in section 139.

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[178] *Mnquma* supra note 7 para 82.

[179] See sections 139*(2)*, *(3)* and *(6)* of the Constitution; *Tshwane* supra note 12 paras 94, 178-80.

[180] *Tshwane* supra note 12 paras 178-80.

[181] *Mogalakwena* supra note 8 para 77.

[182] Ibid para 75. Also see de Visser & November op cit note 2 at 113; Ledger & Rampedi op cit note 2.

3.1.1.3. *Intergovernmental dispute resolution mechanisms*

The IRFA expressly excludes from its ambit any disputes that may arise under section 139 of the Constitution.[183] The High Court has accordingly rejected submissions that it may be precluded from considering a section 139 intervention decision, on the basis that the peremptory dispute resolution mechanisms set out in the IRFA have not been followed.[184]

There is a further argument that the IRFA's dispute resolution mechanisms should be used as a 'guide' by the provincial executive to ensure 'robust consultation' and resolve the issues between the parties before imposing an extreme measure, such as a decision to dissolve a municipal council.[185] While this approach has not gained any significant traction in the High Court[186] and has not been considered by the Constitutional Court or the SCA, there are similarities with the concept of 'meaningful engagement' and the type of Chapter 3-infused procedural fairness approach adopted by the majority in *Tshwane*.[187] While this does not suggest that the courts would be ousted from considering the matter, it may have implications for the extent of judicial involvement.

Intergovernmental dispute resolution mechanisms may also be incorporated in other legislative instruments. For example, the majority of the Constitutional Court in *Tshwane* noted that the provincial executive had not 'pursued any other means of addressing the political crisis', even though the Systems Act contains various mechanisms which could have been utilised for this purpose. However, there was no accompanying suggestion by the majority that this would preclude the Constitutional Court from considering the section 139 intervention decision.[188]

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[183] Section 39*(1)(b)* of the IRFA.

[184] *Posthumous v Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs* [2020] ZANCHC 78 (9 November 2020) paras 16-8.

[185] Ibid para 18. Also see Mokgethwa Makoti & Kolawole Odeku 'Critical perspective on the complexity and functionality of intergovernmental relations between provincial and local governments in South Africa' (2018) 10(1) *AJPA* 98.

[186] Ibid paras 19-27. The court noted that the argument for the appropriateness of a less stringent measure, such as using the IRFA as a guide, was not raised on the papers and was not supported by the facts.

[187] See paragraph 4.2 above.

[188] *Tshwane* supra note 12 paras 63, 108, 123. The majority judgment referred to sections 105-106 and Schedule 1, item 14*(4)* and 14*(6)* of the Systems Act.

Similarly, the dissenting judgments in *Tshwane* noted that section 139 does not require compliance with the Systems Act when an intervention decision is made, finding that such compliance would amount to no more than an attempt to 'ritualistically tick some inconsequential box'.[189]

The High Courts have also refused to consider whether there should be compliance with the provisions of the Systems Act prior to a section 139 intervention, rather leaving this issue to be decided by the review court.[190] As such, compliance with these legislative measures appears to contribute to an assessment of the judicial role, rather than as a bar to justiciability.

3.1.1.4. *The inherently political nature of a section 139 intervention decision*

A section 139 intervention decision is inherently political in two respects. First, there may be a disagreement or conflict between political parties at the municipal council level which results in the incapacitation of the municipal council itself.[191] Second, there may be a suggestion of bad faith or ulterior motives at the provincial government level when a section 139 intervention decision is taken, particularly where different political parties, or different factions within the same political party, exercise control over a provincial executive and a municipal council.

For example, in *Ngaka Modiri Molema* the applicants had stressed that political reshuffling at provincial government level led to the advancing of 'different political views' and 'political score settling' which resulted in the intervention.[192] In *Tshwane* the 'political crisis' within the municipal council and the role it played in the dissolution decision was emphasised by all parties, with the applicants further arguing, in the High Court, that the intervention decision was politically motivated (or actuated by bad faith or ulterior motives). In *Mogalakwena* a consistent theme of the judgment was that the section 139 mechanism was not being used for its proper purpose, but was instead being utilised in an attempt to resolve a political dispute in

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[189] Ibid paras 159, 189, 249.

[190] See, for example, *Ngaka Modiri Molema* supra note 11 para 14. From a different perspective, in *City of Cape Town v Premier of the Western Cape* 2008 (6) SA 345 (C) para 94, the High Court held that the subject matter of an investigation under the Systems Act must be such that intervention by the province could rationally result from the report.

[191] *Overberg* supra note 10; *Tshwane* supra note 12 para 107; *Tshwane* (High Court) supra note 83 para 88.

[192] See paras 12.1 and 20.2.6 of the applicant's founding affidavit in *Ngaka Modiri Molema* supra note 11.

favour of faction within the party in power in the municipality.[193] Finally, in *Kannaland* the municipality (together with various political office-bearers and municipal council members) argued that it had been 'singled out on political grounds', being an ANC-led municipality within a DA-led province, despite many other municipalities also experiencing problems.[194]

In general, however, the courts have not considered the inherently political nature of a section 139 intervention decision to preclude judicial involvement, rather factoring this into an assessment of the judicial role.

3.5.2. The level of judicial scrutiny

The courts in Category 1 have consistently accepted that a section 139 intervention decision is an exercise of public power which, by its nature, is executive action rather than administrative action.[195] The courts have also accepted the principle of legality as the applicable ground for judicial review[196] with a concomitant acceptance that the judicial role does not permit the substitution of the provincial executive's intervention decision with a step which the judiciary may consider to be more appropriate.[197]

This would appear to position Category 1 squarely within judicial role conception in the adjudication of executive action. This positioning seems to imply adoption of a low-level threshold rationality review as the applicable standard of review, paired with a deferent judicial role and justified by considerations of institutional competence and the democratic principle. A traditional low-level threshold rationality review would limit the judicial role to a determination as to whether there is a rational connection between the exercise of the public power (the section 139 intervention decision) and the legitimate government purpose sought to be achieved (such as the fulfilment of an executive obligation or the approval of a budget).

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[193] *Mogalakwena* supra note 8 paras 26, 55, 80.

[194] *Executive Council of the Western Cape Province v Kannaland Local Municipality* [2021] ZAWCHC 51 (19 March 2021) para 75.

[195] *Tshwane* supra note 12 para 48; *Overberg* supra note 10 paras 37-8; *Tshwane* (High Court) supra note 83 para 35; *Mogalakwena* supra note 8 paras 31-3; *Mnquma* supra note 7 paras 28-30, 67; *Mtongana* supra note 170.

[196] *Tshwane* supra note 12 paras 1, 48, 65-7; *Overberg* supra note 10 paras 37-8; *Mnquma* supra note 7 at paras 30-4, 67, 93-100; *Mogalakwena* supra note 8 paras 24, 33.

[197] *Tshwane* supra note 12 paras 83, 172-7.

However, the Constitutional Court has held that section 139 of the Constitution must be interpreted within the context of the Constitution as a whole and within various 'constitutional imperatives'.[198] This implies the potential for a variable standard of review, with a determination of the applicable standard of review to be conducted on a case-by-case basis, rather than strict adherence to a 'one size fits all' approach.[199]

Based on this contextual approach to constitutional interpretation, the Constitutional Court has determined that the discretion exercised by the provincial executive in terms of section 139 of the Constitution is fettered on two grounds. The first ground is a substantive dimension to the section 139 discretion which requires the provincial executive to take an 'appropriate step' when ensuring the fulfilment of an executive obligation (in terms of section 139*(1)* of the Constitution) or the approval of a budget (in terms of section 139*(4)* of the Constitution). The second ground is a procedural dimension to the discretion, associated with the process to be followed by a provincial executive before and during an intervention.

3.1.1.5. *The substantive dimension of the section 139 discretion*

For the majority in *Tshwane*, the test for the appropriateness of a step adopted by a provincial executive (the substantive dimension of the discretion), broadly incorporates three questions: first, whether the steps adopted are 'suitable' or 'fitting and reasonably capable' of resolving the issue(s) facing the municipality.[200] Second, whether the steps adopted limit local government autonomy in the least restrictive or intrusive way (with cognisance of the applicable normative context and in a manner aligned with intergovernmental monitoring and support measures under Chapter 7 of the Constitution).[201] Third, whether the steps are supported by the factual context, including the nature and extent of the failure to fulfil the executive obligations, the interests of those affected by such failure and of the municipality, and the conduct of both the provincial executive and the municipality.[202]

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[198] *Tshwane* supra note 12 paras 49, 55, 60-4, 81, 89, 91, 95, 116.

[199] Nico Steytler & Jaap de Visser *Local Government Law of South Africa* (2019) at 15:19-23.

[200] *Tshwane* supra note 12 paras 80-1. Also see *Overberg* supra note 10 para 19.

[201] Ibid paras 51, 56, 87-8, 92, 126. Also see *Overberg* supra note 10 paras 35, 38.

[202] Ibid paras 84-87, 89, 91, 116.

This test is strongly suggestive of a judicial preference for a proportionality-infused standard of review, with the court exercising care not to restrict the autonomy or integrity of local government, or to subvert formal democratic processes. It is also inherently variable and flexible, dependent on both the normative and factual context. However, the *Tshwane* majority in the Constitutional Court did not expressly identify this proportionality-infused approach as a deviation from the usual rationality standard of review applicable to exercises of public power. Instead, it chose to situate its approach within the broader principle of legality, finding that the provincial executive had either misconstrued its powers or offended the principles of lawfulness or legality.[203]

This preference for incorporating elements of a proportionality analysis into the assessment of the provincial executive's discretion under section 139 of the Constitution also finds resonance in certain High Court decisions.[204] For example, the court in *Mnquma* situated its decision firmly within an approach to an appropriate step that was the least restrictive of local government autonomy, with dissolution being considered 'appropriate' only if the fulfilment of an executive obligation cannot be achieved in another way.[205] Further, a failure to follow other steps prior to a section 139 intervention created the impression for the High Court in *Mogalakwena* that there was either a 'dereliction of… statutory duties' or a lack of a belief that a certain state of affairs existed which required action.[206]

However, both dissenting minority judgments in *Tshwane* disagreed with the proportionality-infused approach. Jafta J, relying on the principle of rationality as well as the roles of the doctrine of separation of powers, constitutional competence and judicial deference, held that

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[203] Ibid paras 125; *Overberg* supra note 10 para 38. The alternative finding of the SCA in *Overberg* was that the dissolution decision offended the provisions of section 41*(1)* of the Constitution, given that a more appropriate remedy was not considered.

[204] See *Mogalakwena* supra note 8 paras 21-5*; Mnquma* supra note 7 para 81; *Tshwane* (High Court) supra note 83 paras 81, 94.

[205] *Mnquma* supra note 7 paras 42, 46-7, 64, 77-9, 81-2. The court held that exceptional circumstances must justify any inroads into the autonomy of another sphere of government, thus making dissolution a 'last resort'. However, this approach has been criticized to the extent that it permits a dissolution decision too late, for example, after a municipality has already completely collapsed; see de Visser & November op cit note 2 at 24.

[206] *Mogalakwena* supra note 8 para 37.

an approach requiring the 'most appropriate step' or 'less drastic means' (as proposed by the majority) amounted to an impermissible inclusion of an additional condition in section 139 of the Constitution.[207] For Mogoeng CJ, the judicial role was guided by the doctrine of separation of powers and judicial deference, with greater weight being afforded to considerations of democratic principle and institutional competence. This similarly demonstrates implicit support for a low-threshold rationality review, without consideration of 'less restrictive measures' which, for Mogoeng CJ, should not form part of the constitutional requirements.[208] Mogoeng CJ's underlying concern with the approach adopted by the majority in *Tshwane* encapsulates a fear of the perception that courts are seeking to expand their supervisory review jurisdiction in an affront to the doctrine of separation of powers.

As demonstrated by the split decision in *Tshwane*, an approach which incorporates proportionality elements into a judicial review of a section 139 intervention decision, without specifically addressing the applicable standard of review, has the potential of attracting some criticism. As such, when the courts are considering the imposition of a higher level of scrutiny in the review of an exercise of public power, as was the case in the majority judgment in *Tshwane*, there should be a discussion and decision, undertaken in a transparent manner, regarding whether such a shift to a more rigorous standard of review is justified in the circumstances.[209]

Without discussion of the applicable level of scrutiny, and of factors which may operate to influence the intensity of such scrutiny, the courts may be vulnerable to violating the principle of comity by interfering beyond their appropriate constitutional role, something that is of particular concern for the dissenting minority judgments in *Tshwane*. This lack of transparency, with the courts purporting not to tell the executive what the best approach is, but then adopting

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[207] *Tshwane* supra note 12 paras 162-3, 169, 172-6, 189-90, 194, 207-9, 212.

[208] Ibid paras 247, 253, 256.

[209] See, for example, the dissenting judgment of O'Regan J in *New National Party* supra note 119 para 122; Alistair Price 'The content and justification of rationality review' in Stuart Woolman and David Bilchitz (eds) *Is this Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 37 at 57; Alistair Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network and Albutt'* (2010) 127 *SALJ* 580 at 590.

a higher level of scrutiny, can create legal uncertainty and sharply divergent judicial outcomes (as demonstrated through the three different judgments handed down in *Tshwane*).

3.1.1.6. *The procedural dimension of the section 139 discretion*

The procedural dimension of the section 139 discretion (aligned with the *Tshwane* majority's finding of procedural unfairness or procedural irrationality) incorporates principles of co-operative government and mutual support, as set out in Chapters 3 and 7 of the Constitution. For the *Tshwane* majority, this procedural dimension appeared to have been triggered based on a necessity to hear the parties so as to assess the appropriateness and lawfulness of any chosen step.[210] It seems feasible that this procedural dimension could also be triggered where a section 139 intervention decision prejudicially affects the rights of individuals.[211]

In terms of this procedural dimension, the majority in the Constitutional Court have elevated compliance with 'meaningful engagement', which includes a requirement to afford local government a reasonable opportunity to be informed, consulted and heard before a decision is taken against it, in respect of its governance, by the provincial government, to a prerequisite for a constitutionally permissible section 139 intervention.[212] In other words, both 'meaningful engagement' and a clear identification of the specific executive obligations are central considerations in an assessment of the 'appropriateness' of any intervention step (as well as being fundamental to the remedy in the dispute). This approach appears to bear some similarity with that adopted by the courts in the second wave of socio-economic rights decisions (deferring the resolution of disputes to alternative participatory, dialogic and democratic channels, both existing and newly created, to ensure meaningful engagement between the parties and the achievement of mutually acceptable solution).[213]

In pursuing 'meaningful engagement' in Category 1, the majority in the Constitutional Court appears to be attempting to invigorate the deliberative spaces for democratic governance, particularly in circumstances where local government may be dysfunctional or incapacitated,

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[210] *Tshwane* supra note 12 paras 118-22; *Albutt* supra note 140 paras 70-2.

[211] Ibid paras 127, 129; *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC) para 187.

[212] Ibid paras 74, 115-25; Bronstein & Glaser op cit note 105 at 113.

[213] See Pieterse op cit note 39; Sandra Liebenberg 'Social rights and transformation in South Africa: Three frames' (2015) 31(3) *SAJHR* 446 at 468-9; Young op cit note 39 at 163-87.

thereby requiring provincial and local government to cooperate and engage in good faith to ensure an effective local government. This approach incorporates the principles contained in Chapter 3 and 7 of the Constitution and shows respect for representative government by safeguarding local government autonomy and upholding outcomes of democratic decision-making processes.

This procedural dimension to a section 139 intervention decision has also found support in the High Courts.[214] In *Mnquma*, for example, the court held that provincial government's failure to engage with local government (for example, by not letting local government know that an intervention is being contemplated) was inconsistent with both the constitutional co-operative governance regime and the provisions contained in the Systems Act and the MFMA. The court accordingly held that there may be merit in including a requirement for procedural fairness, and receiving evidence from the municipal council, prior to a section 139*(1)* intervention decision (although no decision on this ground was taken by the court).[215]

3.5.3. The remedial prescriptiveness of the courts

In Category 1, the courts are required to determine the level of remedial prescriptiveness where a fault is located in the process or substance of an existing section 139 intervention. This requires judicial consideration of the applicable relief: when the jurisdictional facts are not present, when there are underlying socio-economic rights violations, when intruding on municipal autonomy other than through the section 139 intervention process, and when attempting to strengthen and maintain democratic institutions, structures and processes despite political dysfunction.

3.1.1.7. *Main remedy: Setting aside a faulty section 139 intervention decision*

The main remedy sought in Category 1 has been the setting aside of the provincial executive's decision to intervene in a municipality in terms of section 139 of the Constitution, most often

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[214] See *Mnquma* supra note 7. However, in *Abaqulusi Local Municipality v Premier of the Province of KwaZulu-Natal* (3357/2020P) [2020] ZAKZPHC 30 (30 July 2020) paras 41-5, the High Court held that, on a proper construction of section 139, an obligation of prior notice and having to hear the other side should not be inferred, with the High Court expressing concern that the purpose of section 139 may be thwarted in the process.

[215] *Mnquma* supra note 7 paras 32-4.

in the form of a dissolution decision.[216] Temporary relief may also be sought, pending such final relief, in which case the remedy sought is a suspension of the section 139 intervention decision pending a review.[217]

In Category 1, it appears that the courts would set aside section 139 intervention decisions if the courts view the interventions as intruding impermissibly into local government autonomy, particularly where the municipal council is responsive and engaged, albeit temporarily incapacitated. Intervention decisions would also be set aside where they were taken without consideration or prior application of various intergovernmental monitoring and support measures or where intervention would be more harmful to the fulfilment of service delivery and underlying socio-economic rights of residents than non-intervention.

On the other hand, it appears that the courts will uphold a section 139 intervention decision if the courts perceive that setting it aside would amount to judicial overreach in terms of the doctrine of separation of powers (contrary to the more accepted principle of judicial deference), would result in the complete incapacitation of the municipality, would undermine the integrity and functioning of democratic institutions, structures and processes at local government level, or would be more harmful for service delivery and underlying socio-economic rights than the intervention itself.

3.1.1.8. *Other remedies: Attempting to solve the underlying challenges facing a municipality*

Any further remedy in Category 1, either as requested by the parties or as ultimately set out by the courts, tends to seek an alternative way in which to solve the root cause(s) of the underlying challenges faced by a municipality (such as municipal dysfunction, poor service delivery or an underlying socio-economic rights violation) in place of a section 139 intervention.

In this context, the courts have discussed alternative remedies to a section 139 intervention without prescribing compliance with such remedies by the parties, considered (but not granted) an order compelling service delivery and supporting a section 139 intervention, required

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[216] *Overberg* supra note 10; *Ngaka Modiri Molema* supra note 11; *Tshwane* supra note 12; *Mnquma* supra note 7; *Posthumous* supra note 184; *Nelson Mandela Bay* supra note 173.

[217] *Mogalakwena* supra note 8.

councillors to attend and remain in attendance at all meetings of a municipal council unless they have a lawful reason to be absent, and required the MEC to investigate the cause of a municipal deadlock and to make a recommendation as to the appropriate sanction.

These alternative remedies appear to be more likely to be granted in situations in which there is a likelihood of serious harm resulting from the section 139 intervention itself or where endemic local government dysfunction is paired with systemically weak intergovernmental monitoring and support mechanisms. However, the courts have also recognised the limits of the just and equitable remedial powers when the evidence does not necessitate or support such additional remedy.

When considering an alternative remedy, the majority in *Tshwane* was particularly prescriptive, seemingly guided by its perception of what was required: to ensure that there was compliance with Chapters 3 and 7 of the Constitution, to uphold the autonomy and integrity of local government, and to ensure a functioning municipality that is able to achieve service delivery and fulfil residents' socio-economic rights without judicial oversight. It accordingly favoured an approach of deferring the resolution of the underlying dispute to alternative participatory, dialogic and democratic channels to ensure 'meaningful engagement' and cooperation between the provincial executive and the municipality (similar to the approach adopted in the second wave of socio-economic rights decisions).[218]

The 'meaningful engagement' approach in Category 1 has potential: it can catalyse a political solution to a section 139 intervention dispute, deepen intergovernmental cooperation and support, and ensure that local government and intergovernmental dispute resolution institutions and mechanisms exist, function and are strengthened. However, this approach will not always be merited. For example, a focus on 'meaningful engagement' may not be effective where democratic structures have been completely incapacitated or have become irreparably dysfunctional, which may result in applicants being abandoned to the failed democratic channels that led to the initial litigation.

[218] See paragraph 2.3.5 of Chapter 2.

3.5.4. Factors shaping a review of the section 139 discretion

The courts' proposed level of scrutiny and remedial prescriptiveness in Category 1 is, perhaps intentionally, inherently variable and flexible, depending on both the normative and factual context. This creates a continuum of possible judicial outcomes.

For example, any section 139 intervention decision that has a limited intrusion on local government autonomy, where provincial and local government have cooperated in good faith, mutually supported each other and explored various intergovernmental support mechanisms prior to the intervention, and where there are limited underlying socio-economic rights violations, would likely trigger a light-touch judicial review meaning a wide band of options available to provincial government and requiring only some substantive basis supporting the outcome.

However, any section 139 intervention decision that is restrictive of local government autonomy, where alternative intergovernmental monitoring and support mechanisms have not been adequately explored, where the conduct of the provincial and/or local government is questionable, and where the court perceives that the intervention may itself impact on fundamental rights, would likely trigger a higher level of scrutiny and result in the application of the stricter proportionality-type inquiry with a smaller band of options available to provincial government.

This inherent variability enables the courts to adopt a flexible approach to section 139 intervention decisions, allowing the intensity of the scrutiny and remedial prescriptiveness to be tightened or loosened based on the courts' understanding of the applicable factual and contextual background. This allows the courts to be responsive and sensitive to a specific context and could form a good doctrinal basis for a transformative interpretation of section 139 of the Constitution.

In particular, the four factors identified in Chapter 2 appear to play a role in guiding, in their interaction, the variability of the level of scrutiny and remedial prescriptiveness adopted by the courts in Category 1.

3.1.1.9. *Separation of powers*

The courts' understanding of the doctrine of separation of powers in Category 1 can be categorised in one of two ways, as illustrated by the majority and dissenting judgments in the Constitutional Court in *Tshwane*.

The *Tshwane* majority, in finding the section 139 intervention decision unlawful, focused on respect and support for municipal autonomy as well as a type of 'vertical' separation of powers.[219] In comparison, in supporting the section 139 intervention decision, the dissenting judgments focused on a more traditional 'horizontal' doctrine of separation of powers, which incorporated institutional competence and a type of deferential review.

All three judgments of the Constitutional Court in *Tshwane* relied on the democratic principle. Under a traditional doctrine of separation of powers, the democratic principle would motivate against judicial involvement. However, a section 139 intervention, by its nature, places strain on the democratic principle given that it may permit the dissolution of a duly-elected municipal council and intrude on municipal autonomy. As such, the *Tshwane* majority's assessment of a provincial executive's decision fundamentally supports the democratic principle, given that its approach requires minimal intrusion in municipal autonomy (and local democracy) with its requirement of 'less intrusive' steps and the resultant proportionality-infused test based on Chapters 3 and 7 of the Constitution. The *Tshwane* majority thus missed an opportunity to use this support of the democratic principle, and an engagement with the doctrine of separation of powers, to further justify judicial involvement in Category 1.

While the majority decision in *Tshwane* may be contested from a traditional separation of powers perspective (see Mogoeng CJ's dissent), its role may also be justified under Cachalia's 'democracy protective rationale' in its attempt to manage the harm to the democratic process and the harmful consequences for individuals and minorities that might result from 'political dysfunction',[220] but in a way that preserves municipal autonomy and promotes and strengthens intergovernmental monitoring and support mechanisms. In other words, the approach of the

[219] *Tshwane* supra note 12 para 88.

[220] Cachalia op cit note 44 at 57, 66, 78.

majority in *Tshwane* could be linked with, or categorised as, a 'tactical' and flexible approach to the doctrine of separation of powers for the purposes of democracy-preservation.[221]

3.1.1.10. *The reason for the dispute*

The courts' understanding of the reason or root causes for the challenges facing a municipality (whether governmental inaction and a lack of responsiveness or political interests) plays a consistent role throughout Category 1.

It appears that where a municipality is perceived by the courts to be merely lacking in capacity, but is responsive and engaged, and where the provincial executive has failed to fulfil its intergovernmental monitoring and support obligations, the courts will more readily come to the aid of the municipality by placing more weight on municipal autonomy in the proportionality assessment (as occurred in *Overberg* and the majority judgment in *Tshwane*).

On the other hand, where the municipality is perceived by the courts to be intransigent (or completely dysfunctional) in relation to its actions, communications, responsiveness and/or openness with the courts, the courts will be more willing to uphold a section 139 intervention decision, thereby placing less weight on municipal autonomy in the proportionality assessment. This judicial assessment may be aided where the provincial executive has undertaken various intergovernmental monitoring and support measures prior to exercising its section 139 discretion, and where there are no underlying socio-economic rights violations arising due to the section 139 intervention itself.

Further, given that the principle of legality means that it is not the role of the courts to consider the political merits or demerits of a decision, in Category 1 the courts tend to adopt one of three strategies to navigate the role of politics.

The first judicial strategy is to acknowledge that party political interests are an inherent component or 'bedrock'[222] of a multi-party system of democracy and will inevitably be interwoven within a section 139 intervention decision and the factual matrix supporting such intervention decision. However, the courts then attempt to avoid or sidestep the political issues

[221] Ibid. Also see Huq op cit note 44 at 26.

[222] *Tshwane* supra note 12 para 134.

by illustrating that it is irrelevant to the key question of whether there was compliance with section 139 of the Constitution and whether the steps adopted by the provincial executive were appropriate.[223] For example, the two dissenting minority judgments in *Tshwane* appeared to consider the good faith or ulterior motive inquiry, with Jafta J remitting this to the High Court for consideration given the lack of evidence[224] and Mogoeng CJ dismissing the argument based on the existing factual matrix.[225] In this manner, the minority judgments in *Tshwane* effectively removed and invalidated the argument that the section 139 intervention in the municipality could have been a bad faith political intervention.[226]

The second judicial strategy, as set out in the majority judgment in *Tshwane*, is for the courts to attempt to ensure that the parties act as non-partisan office bearers, despite the underlying political issues: '[o]ur democracy and municipal councils will prevail if elected officials put aside their differences to ensure the delivery of basic services'.[227] This creates a proportionality-infused test for the discretion exercised by the provincial executive in terms of section 139 of the Constitution and imposes a 'meaningful engagement' remedy, both of which must be read with chapters 3 and 7 of the Constitution. The test and the remedy imposed by the majority in *Tshwane* both effectively require the parties to act in a non-partisan manner, in good faith, and in cooperation 'with their counterparts' to ensure the fulfilment of their executive obligations.

A third judicial strategy adopted on occasion in the High Court recognises an argument that an intervention may be political and may be taken in bad faith. For example, in *Mogalakwena* the High Court held that the section 139 intervention appeared to be an attempt to 'gain control of and administer every facet of the municipality' and was 'designed to misuse the Constitution' to 'subvert democracy and advance purely factional party political interests', which could have 'devastating effects on a municipality'.[228] The High Court was also critical of a litigious

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[223] Ibid paras 135, 151, 200, 204-6, 253-7.

[224] Ibid para 220.

[225] Ibid para 257.

[226] Also see the adoption of this approach in the High Courts: *Tshwane* (High Court) supra note 83 para 105, *Kannaland* supra note 194 paras 38, 75, *Mnquma* supra note 7 para 95.

[227] *Tshwane* supra note 12 para 126.

[228] *Mogalakwena* supra note 8 paras 26, 46, 55, 80.

approach which uses public money, diverted from its 'proper purpose of building communities and supplying them with resources', to resolve a political dispute.[229] It does seem that the High Court could have avoided the political issue in this matter by instead adopting the 'neutral' approach, as set out by the majority in *Tshwane*, rather focusing on compliance with Chapters 3 and 7 of the Constitution.

3.5.4.3 *The integrity and healthy functioning of the applicable democratic institutions, structures and processes*

When the courts are satisfied that the democratic institutions, structures and processes are functioning or have the potential to function, they will be more willing to encourage an intergovernmental dialogue and the (meaningful) engagement of these institutions and structure a corresponding remedy in a type of dialogic review (as was the case in *Overberg* and the majority judgment in *Tshwane*).

On the other hand, where the courts are satisfied that local government democratic institutions, structures and processes are dysfunctional or inactive, and require intervention from the provincial executive to ensure the reinvigoration of these institutions, structures and processes, the courts will be more willing to permit a section 139 intervention, adhering to a type of deferential review as evident from *Ngaka Modiri Molema* and the two minority judgments in *Tshwane*.

3.5.4.4. *The severity of the rights violation*

In general, the courts in Category 1 matters will not have the necessary information on the extent of a possible socio-economic rights violation (which may have contributed to the decision to initiate a section 139 intervention or which may arise as a result of the section 139 intervention). However, the parties often suggest that such underlying socio-economic rights violation is present, without attempting to position the litigation within the socio-economic rights remedial paradigm. The courts thus often attempt to take steps to ascertain the severity of the socio-economic rights violation, based on either the presence or absence of a section 139 intervention.

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[229] Ibid.

The majority in *Tshwane*, for example, appeared to perceive a section 139 intervention, and in particular a dissolution decision, as potentially being more harmful to service delivery and the socio-economic rights of the residents, given the specific context (although it did not ask for evidence of the health of socio-economic rights, in a similar manner to the Constitutional Court in *Ngaka Modiri Molema*).[230] This perception appeared to support the majority's approach for a step that was less restrictive of local government autonomy.

By corollary, this seems to imply that where a section 139 intervention is triggered by a malfunction in the political processes of the municipality (a failure to adopt a budget or to have quorate meetings), the courts would likely find that dissolution would only be appropriate if such malfunction had caused a socio-economic rights violation.

However, based on the Constitutional Court's approach in *Ngaka Modiri Molema* and the recognition in the majority judgment in the Constitutional Court in *Tshwane*, it seems likely that where the courts perceive that there are underlying socio-economic rights violations that could be addressed by a section 139 intervention decision, the severity of such rights violations would weigh more heavily in the proportionality assessment (even where such decision is more restrictive of local government autonomy). In other words, a dissolution decision would more likely be considered appropriate by the courts if the underlying rights violation cannot be addressed in ways that are less restrictive of local government autonomy.

3.6. Conclusion

In Category 1 the courts have repeatedly confirmed the 'in principle' justiciability of section 139 intervention decisions. While the courts have considered various 'mild-justiciability' factors, these tend not to be considered to be a bar to justiciability, with the courts preferring to incorporate these factors into their assessments of the extent of judicial involvement.

It appears that the courts tend to adopt a catalytic role, as identified by Young in the context of socio-economic rights disputes,[231] in the judicial review of a section 139 intervention decision, depending on their understanding of the doctrine of separation of powers (including whether

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[230] *Tshwane* supra note 12 para 49 quoting with approval from *Ngaka Modiri Molema* supra note 11 para 9. This was not something that was specifically explored by the SCA in *Overberg*.

[231] See paragraph 2.3.5 of Chapter 2 and Young op cit note 39 at 125, 153-4, 188-212.

to second-guess the decision of the provincial executive), the reason for the dispute, the health and integrity of the democratic institutions, structures and processes, and the severity of any underlying socio-economic rights violations.

Overall, and considering the influence of these factors, the judicial role in Category 1 is constrained by two considerations: first, continuing deference shown by the courts to the democratic legitimacy and democratic mandate of local government and to the principles of co-operative government. Second, courts prefer continuing preservation and support for intergovernmental accountability and support mechanisms to address the underlying or root causes of the challenges faced by local government, without undue judicial interference.

As a result, the courts will likely adopt one or more of the following approaches to the Category 1 matters. First, the courts may defer to the provincial executive's preference for a step adopted under section 139 of the Constitution, including the dissolution of a municipal council. Second, the courts may consider and halt steps which are not substantively or procedurally appropriate to the extent that they intrude on local government autonomy and/or result in a democratic process malfunction and/or trigger a socio-economic rights violation, guided by respect for local government autonomy, support for intergovernmental monitoring and support measures, and as understood within the context of chapters 3 and 7 of the Constitution. Third, the courts may require participation, cooperation and meaningful engagement, by both the provincial and local government, when the section 139 intervention decision is taken, during the section 139 intervention and in terms of any remedy that may be imposed by the court.

CHAPTER 4: CATEGORY 2 – THE JUDICIAL ROLE IN FAILURES TO INITIATE A SECTION 139 INTERVENTION

'*Courts safeguard the public interest and help preserve and deepen the democratic project… [including] clean and people-centred governance, the rule of law, democratic oversight and accountability and a dedicated, honest and prudent use of public resources to achieve social justice and equality*'.[1]

4.1. Introduction

Despite an increasing number of initiated section 139 interventions by both provincial and national government, there remains a rising tide of municipalities experiencing crises in their financial affairs, paired with a failure to provide basic services or to meet financial commitments, in which no interventions have been initiated. With the concomitant failures in the constitutional accountability and intergovernmental monitoring and support mechanisms meant to address such crises, and the rise of increasingly desperate communities seeking assistance, the necessary corollary has been an enhanced judicial role arising from (primarily community-led) litigation: Category 2.

Category 2 is characterised by the judicial review of the conduct of the provincial or national executive in failing to initiate a 'mandatory' intervention in a municipality in terms of sections 139*(4)*, *(5)* or *(7)* of the Constitution, read with the relevant provisions of the MFMA, where the jurisdictional facts for such intervention (such as, amongst other things, a crisis in the municipality's financial affairs) have been established.

The litigation in Category 2 is generally initiated as a 'last resort' to compel government action or responsiveness in the face of continued municipal dysfunction. The main remedy sought in Category 2 is thus a section 139 intervention in the dysfunctional municipality, with the added specificity that this must assume a specific form (such as the imposition of a financial recovery plan or the dissolution of the municipal council). In effect, the courts are asked to ensure that

[1] *Unemployed Peoples Movement v Premier, Province of the Eastern Cape* 2020 (3) SA 562 (ECG) ('*UPM1*') para 94.

the executive exercises its margin of discretion in assessing the establishment of the jurisdictional facts and initiating a mandatory section 139 intervention in a dysfunctional municipality, while simultaneously circumscribing the executive's discretion in relation to the manner or form of such intervention.

The judicial role in Category 2 triggers a consideration of the following: first, how intensively the courts should examine a failure of the provincial or national executive to initiate a section 139 intervention and how prescriptive to be in remedying the underlying crises; second, the reasons for the failure to initiate a section 139 intervention which may be linked to national and/or provincial government (in)action and responsiveness; third, the integrity and healthy functioning of the applicable democratic institutions, structures and processes (which may need to be utilised prior to the initiation of a section 139 intervention); and fourth, the severity of any underlying rights violation for those resident within the jurisdiction of the municipality (which may necessitate urgent action).

The first litigation in Category 2, in relation to the Ngwathe Local Municipality, was considered by the High Court in 2015 (referred to as the 'first instance' in this Chapter). In this first instance, the municipality had sought an interdict against Eskom disconnecting its supply of bulk electricity in the main application, while Eskom had sought a court-ordered mandatory section 139 intervention against the municipality in a counter application.[2] Since this isolated (and ultimately unsuccessful) first instance, Eskom has not again attempted to seek a court order compelling a section 139 intervention in a municipality, despite there being a plethora of matters brought by and against Eskom in relation to municipalities in various stages of financial crisis across the country and Eskom's continued attempts to grapple with overwhelming local government non-payment and debt relating to the supply of bulk electricity.

From 2017, the High Court was increasingly drawn into Category 2 matters following community-led litigation initiated in respect of (at least) six local municipalities including: Emalahleni, Enoch Mgijima, Maluti-a-Phofung, Lekwa, Modimolle-Mookgophong and Musina (referred to as the 'first wave' in this Chapter). In this first wave, the applicants expressly sought a court-ordered mandatory section 139 intervention in the relevant

[2] *Ngwathe Local Municipality v Eskom Holdings* [2015] ZAFSHC 104 (28 May 2015).

municipality, although in each instance this litigation was ultimately settled by agreement between the parties, occasionally being made an order of the High Court, either before the hearing of the matter or before judgment was handed down.

From 2020, the High Court continued to be drawn into Category 2 matters, with the distinguishing feature being a failure to settle the litigation by agreement between the parties, resulting in judicial consideration of the applicants' requests for court-ordered section 139 interventions in the affected municipalities (referred to as the 'second wave' in this Chapter). Community-led litigation was initiated in this second wave in relation to both the Makana Local Municipality (in 2020)[3] and the Mafube Local Municipality (in 2022).[4] Similar litigation is currently being pursued in Ditsobotla Local Municipality and Naledi Local Municipality[5] and is being threatened in other municipalities, including Sakhisizwe Local Municipality.[6]

Despite the increasingly prolific initiation of litigation, the SCA and the Constitutional Court have not yet had an opportunity to consider the scope and ambit of the judicial role in Category 2. As such, the first instance, first wave and second wave decisions of the High Court provide the foundation for the discussion here.

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[3] *UPM1* supra note 1; *Unemployed Peoples Movement v Premier for the Province of the Eastern Cape* (553/2019) [2020] ZAECGHC 47 (21 May 2020) ('*UMP2*').

[4] *Mafube Business Forum v Mafube Local Municipality* [2022] ZAFSHC 86 (28 April 2022).

[5] See 'Further relief granted in Sakeliga's favour over water in Ditsobotla, but big fight still lies ahead' *Sakeliga* (10 March 2023) available at https://sakeliga.co.za/en/further-relief-granted-in-sakeligas-favour-over-water-in-ditsobotla-but-big-fight-still-lies-ahead/, accessed 22 June 2023.

[6] It has been reported that civil society organisations are considering approaching the High Court for an order reviewing the CoGTA Minister's failure to consider their request for a section 139*(7)* intervention by the national executive in the municipality, read with the relevant provisions of the MFMA; see Estelle Ellis 'Dlamini Zuma faces legal battle over Eastern Cape's "failed intervention" in Sakhisizwe municipality' *Daily Maverick* (11 April 2022) available at https://www.dailymaverick.co.za/article/2022-04-11-dlamini-zuma-faces-legal-battle-over-eastern-capes-failed-intervention-in-sakhisizwe-municipality/, accessed 22 June 2023.

4.2. 2015: The first instance of litigation seeking a court-ordered mandatory section 139 intervention

The Ngwathe Local Municipality is situated in the northern part of Fezile Dabi District Municipality in the Free State.[7] Towns within the jurisdiction of the municipality include Parys, Vredefort, Heilbron, Koppies and Edenville.

The municipality has received varied (but consistently poor) audit results, including a disclaimed audit with findings (in the 2012/13, 2013/14 and 2017/18 financial years), an unqualified audit with findings (in the 2014/15 and 2015/16 financial years), and a qualified audit with findings (between the 2018/19 and 2021/22 financial years).[8] In the 2016/17 financial year, the municipality's audit was not finalised by the required date. A section 139 intervention has never been initiated in the Ngwathe Local Municipality.

From around 2009, the municipality started missing payments to Eskom for its supply of bulk electricity (which it, in turn, supplied to end-users within the municipal borders).[9] Following a number of (ultimately unsuccessful) negotiations, agreements and payment plans between Eskom and the municipality, Eskom published a notice in July 2014 indicating that the supply of electricity to the municipality would be disconnected.[10] While subsequent negotiations suspended Eskom's threatened disconnection, a further disagreement on payment plans resulted in Eskom reviving its notice of disconnection.[11]

Following this revival notice, the municipality applied to the High Court on an urgent basis to interdict Eskom from disconnecting the bulk electricity supply (fundamentally an interdict to 'keep the lights on') and to order Eskom to resume negotiations regarding the municipality's

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[7] See Municipalities of South Africa 'Ngwathe Local Municipality (FS203)' available at https://municipalities.co.za/overview/1042/ngwathe-local-municipality, accessed 22 June 2022.

[8] See AGSA *Consolidated General Report on the local government audit outcomes: MFMA 2015-16* (2017) at Annexure 3 and AGSA *Consolidated General Report on the local government audit outcomes: 2021-22* (2023) at Annexure 3.

[9] *Ngwathe* supra note 2 para 4. Also see *Afriforum v Eskom Holdings* [2017] 3 All SA 663 (GP) paras 5-11 for a discussion of the statutory framework applicable to the distribution of electricity in South Africa.

[10] Ibid paras 4-7.

[11] Ibid paras 8-10.

outstanding arrears payments. The municipality relied on the co-operative governance principles contained in Chapter 3 of the Constitution and the IRFA to argue that Eskom had failed to co-operate and negotiate in good faith, had failed to make every reasonable effort to settle the dispute and had failed to exhaust all reasonable other remedies to resolve the dispute.[12] Eskom, the CoGTA MEC and the Finance MEC for the province were all cited as respondents to the urgent application.

The parties initially reached an 'interim understanding' which was made an order of the High Court: first, Eskom agreed not to disconnect the electricity supply to the municipality pending the finalisation of the application; second, the municipality agreed to pay all debt collected for electricity to Eskom; and third, the municipality was permitted to file supplementary affidavits while Eskom was permitted to file a counter application.[13]

Eskom, in due course, filed its counter application (which was subsequently amended) requesting a declaratory order that the municipality had failed to pay the collected debt to Eskom, that the municipality was in contempt of court, and that Eskom had complied with its statutory duties and was entitled to discontinue the supply of electricity to the municipality. Eskom also requested a declaratory order that, 'in all the circumstances', the provincial government is 'compelled to intervene in the affairs of the applicant as contemplated in section 139 of the Constitution'.[14]

The High Court handed down its judgment on 28 May 2015.

4.2.1. Was the High Court willing to consider the matter?

The High Court found that there was no dispute (meaning that the statutory provisions relating to disputes and dispute resolution were not applicable) and that only the statutory provisions relating to cooperation, assistance and mutual support were relevant.[15] In dismissing the main application, the High Court held that it was the municipality, and not Eskom, that had failed in its duties under Chapter 3 of the Constitution, by encroaching on and 'endangering' the

[12] Ibid paras 13-24.

[13] Ibid paras 2-3.

[14] Ibid paras 11-1, 29. Also see paragraphs 1.7 and 1.8 of the prayers contained in Eskom's counter application.

[15] Ibid paras 25-9.

functional integrity of Eskom and the 'wellbeing' of the people of South Africa, as a result of its failure to pay Eskom.[16]

In considering the counter application, the High Court agreed that '[i]t appear[ed] to be clear' that the Ngwathe Local Municipality was in a 'financial crisis', finding that the municipality itself had admitted that it was 'unable to meet its obligations and financial commitments'.[17] The court accordingly held that the municipality 'clearly complies' with the requirements for intervention by the provincial executive in terms of section 139 of the Constitution.[18]

Despite these findings, the High Court's involvement was, in its view, materially stymied by a procedural flaw: the failure of Eskom to cite and join 'the Premier' of the Free State province in the counter application.[19] As such, the court was 'not convinced' that a declaratory order compelling a section 139 intervention could be granted in the circumstances.

4.2.2. Reflections: A judicial role conception in this first instance

The High Court adopted an approach in which it effectively sidestepped both the question of the appropriate judicial role in a section 139 intervention and the underlying issues facing the municipality. This reflects an apparent reluctance to consider a potentially controversial court-ordered mandatory section 139 intervention (the first of its kind), where this did not necessarily have to be decided to resolve the matter (which was fundamentally an interdict by the municipality to 'keep the lights on'). Further, despite its acknowledgment of the undisputedly dire situation in the municipality, the court appears to champion an unstated but implicit underlying belief in the role and ability of local government, together with provincial and national government, to fix any problems without judicial intervention.

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[16] Ibid paras 24-35, 43.

[17] Ibid paras 35, 37, 40. The municipality had submitted in the main application that any order allowing Eskom to discontinue the electricity supply would seriously affect the people within the municipality's jurisdiction.

[18] Ibid para 40.

[19] Ibid. It seems that the High Court could have also relied on Eskom's failure to join other key role players, such as those within the local government sphere (the mayor, the municipal manager and the municipal council), the provincial government sphere (the provincial executive council), and the national government sphere (the CoGTA Minister, the Minister of Finance and the NCOP).

The timing of this matter and the High Court's apparent faith in the existing democratic institutions, structures and processes thus seem to have implicitly justified its narrow approach of focussing exclusively on the procedural challenges to a court-ordered section 139 intervention. The consequence, however, is that the court missed an opportunity to conceptualise the judicial role in relation to section 139 interventions at this early stage. In adopting this narrow approach, the court did not properly interrogate the health or integrity of the relevant democratic institutions, structures and processes, the democratic legitimacy and mandate of a failing local government, the reasons for such failure, or the efficacy of the intergovernmental accountability and support mechanisms.

The High Court also did not appear to consider the severity of any existing or potential socio-economic rights violations arising from the financial crisis or the potential disconnection of the bulk supply of electricity to the municipality. Instead, in addressing the main application, it held, rather abruptly, that it was the duty of the municipality and the provincial and/or national executive to 'take the necessary steps' to prevent a 'riotous uproar' from the community in response to any discontinuation of the electricity supply.[20] The result is that the court failed to interpret section 139 of the Constitution as a human rights-creating or enhancing provision, or to engage with the applicable context so as to further a project of transformative constitutionalism. Instead, it assumed an excessively deferent approach by choosing not to even engage with the substantive challenges of a court-ordered section 139 intervention, despite the apparent fulfilment of the requisite jurisdictional facts and the social implications of its deferent approach.[21]

Perhaps inevitably, given the state of affairs at local government level, this was not Eskom's last interaction with a dysfunctional Ngwathe Local Municipality which, itself, has been the

[20] Ibid para 43.

[21] See also Danie Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22 *SLR* 614; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 128; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 63-5.

subject of ongoing litigation.[22] However, Eskom has not attempted a further request for a court-ordered mandatory intervention in the municipality. This is discussed further in Chapter 5.

4.3. 2017 to 2021: The first wave of community-led litigation seeking a court-ordered mandatory section 139 intervention

Local government elections are held every five years to elect councillors who are responsible for governing a municipality for the next five years.[23] The 2016 South African local government elections, held in August 2016, signalled some significant shifts in the municipal political and governance landscape. First, the election results signalled a decline in the local government electoral stronghold of the ANC, including a loss of the ANC's control of the major metropolitan municipalities of Johannesburg, Tshwane and Nelson Mandela Bay. Second, the results ignited a period of unstable coalition arrangements, ongoing scrabbles for political power and, in some local municipalities, an increased role for community-led associations.[24]

These election results occurred within a broader national context which included factional struggles within political parties and inter-party hostilities (which extended to local and provincial government),[25] a 'crisis of legitimacy' in relation to political institutions governing South Africa,[26] high levels of corruption,[27] the permeation of state institutions with party

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[22] See, for example, *Afriforum v Ngwathe Local Municipality (Parys)* [2022] 4 All SA 666 (FB), regarding complaints relating to electricity supply, sanitation issues and water issues; *Eskom Holdings v Vaal River Development Association* 2023 (4) SA 325 (CC).

[23] See Independent Electoral Commission of South Africa *2016 Municipal Elections Report* (2016).

[24] David Everatt & Marius Pieterse 'Outsourcing governance: Local government and the future of democracy in South Africa' (2022) 48(5) *JSAS* at 787-9, 792, 794, 799; Marius Pieterse 'A year of living dangerously? Urban assertiveness, cooperative governance and the first year of three coalition-led metropolitan municipalities in South Africa' (2019) 46(1) *Politikon* 51-70.

[25] Everatt & Pieterse op cit note 24 at 789-91, 799, Pieterse op cit note 24 at 139-40, Karl von Holdt 'The political economy of corruption: elite-formation, factions and violence' (Working Paper 10) *Society, Work & Politics Institute* (February 2019).

[26] South African Parliament *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017) at 431.

[27] Ibid 379, 381-4; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) paras 57, 170.

politics,[28] a coordinated state capture project,[29] and failing legislated structures and processes for community participation with local government.[30]

At the same time, and as a likely corollary, there developed an increasing tendency to involve the courts in the resolution of a wide variety of issues, leading to an enhanced judicial role, triggering debates as to the possible challenges of such enhanced judicial role.[31]

Faced with a similar context at local government level, and following the 2016 local government election results, a new type of community-led litigant emerged: litigants, often categorised as 'desperate' individuals, community groups or associations, non-governmental organisations and local businesses falling within the jurisdiction of a local municipality, seeking judicial assistance in the form of a court-ordered mandatory section 139 intervention, in an attempt to halt (and cure) seemingly endemic local government collapse.

Litigation in this first wave was initiated in (at least) six local municipalities including in Emalahleni (November 2017), Enoch Mgijima (December 2019), Maluti-a-Phofung (April

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[28] Mosa Phadi, Joel Pearson and Thomas Lesaffre 'The seeds of perpetual instability: The case of Mogalakwena Local Municipality in South Africa' (2018) 44(4) *JSAS* 593 at 595-7; Firoz Cachalia 'Precautionary constitutionalism, representative democracy and political corruption' (2019) 9 *CCR* 45.

[29] See the various reports published by the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State (generally known as the 'Zondo Commission'), Public Protector of South Africa *State of Capture* (2016), State Capture Research Project *Betrayal of the Promise: How South Africa is Being Stolen* (May 2017), Crispian Olver *How to Steal a City: the Battle for Nelson Mandela Bay* (2017).

[30] Everatt & Pieterse op cit note 24 at 795, 798-9.

[31] See paragraph 2.2 of Chapter 2.

2018), Lekwa (May 2018), Modimolle-Mookgophong (in June 2018)[32] and Musina (in November 2018).[33] Four of these resulted in judgments, which are discussed below.

4.3.1. Emalahleni Local Municipality

The Emalahleni Local Municipality is located within the Nkangala District Municipality in the Mpumalanga province.[34] Towns within the jurisdiction of the municipality include eMalahleni, Kriel, Phola and Ogies.

The municipality has received a qualified audit with findings since the 2016/17 financial year, and a disclaimed audit with findings between the 2012/13 and 2016/17 financial years.[35] The municipality was under a section 139*(1)(b)* intervention from May 1999 to December 2000, a further section 139*(1)(b)* intervention from April 2013 to March 2015 and an ongoing section 139*(5)* intervention since October 2018.[36]

On 20 November 2017, two individuals applicants, Mr Coetzee (an attorney) and Mr Nape (a businessman), who both also purported to act on behalf of 'interested and affected parties in terms of section 38 of the Constitution' who alleged an infringement of their constitutional

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[32] See DCoGTA 'Annual Performance Plan 2020/2021' (March 2020) at 31 available at https://www.cogta.gov.za/cgta_2016/wp-content/uploads/2016/06/DTA-2020.2021-Annual-Performance-Plan.pdf, accessed 22 June 2022. This litigation, which was launched by the Limpopo Province Waterberg Chamber of Business, became moot following the Limpopo provincial executive's decision to initiate a section 139 intervention in the municipality.

[33] Ibid at 31. This litigation, which was launched by Sakeliga and a private individual, was abandoned following the withdrawal of Eskom's decision to terminate the supply of bulk electricity to the municipality.

[34] See Municipalities of South Africa 'Emalahleni Local Municipality (MP312)' available at https://municipalities.co.za/overview/1157/emalahleni-local-municipality, accessed 22 June 2022.

[35] AGSA op cit note 8.

[36] Tracy Ledger & Mahlatse Rampedi *Mind the Gap: Section 139 Interventions in Theory and in Practice* (2019) at Annexure B; DCoGTA 'Provincial Intervention in Local Government in terms of Section 139 of the Constitution and the Municipal Finance Management Act' (29 March 2022) available at https://www.cogta.gov.za/index.php/2022/03/29/provincial-intervention-in-local-government-in-terms-of-section-139-of-the-constitution-and-the-municipal-finance-management-act-as-of-february-2022/, accessed 22 June 2022.

rights, and the Save eMalahleni Action Group[37] approached the High Court for an order compelling a mandatory section 139*(5)* intervention by the Mpumalanga provincial executive in the governance and financial affairs of the Emalahleni Local Municipality.[38]

The applicants alleged that the municipality had a crisis in its financial affairs and was failing to provide basic services and to meet its financial commitments (including a R1.2 billion debt owed to Eskom and the threat of an imminent interruption to the bulk supply of electricity).[39] The applicants further alleged that the provincial government (including the CoGTA MEC) had been aware of the 'severity' of the municipality's failures since 'before 2016' but had consistently failed to take the necessary steps to support and strengthen the municipality, as required in terms of Chapter 7 of the Constitution.[40] This included a failure to initiate a mandatory section 139*(5)* intervention in the municipality.

The respondents included local government respondents (the municipality and the executive mayor), provincial government respondents (the premier, the provincial executive council, the relevant MECs for co-operative governance and finance), and the national government respondents (the NCOP, CoGTA Minister, Minister of Finance and President). Eskom, the MFRS and SALGA were also joined as respondents.

The respondents argued that the application was 'premature' given that there was a pending review application to stop Eskom from interrupting the bulk electricity supply to the municipality.[41] The respondents also relied on various 'informal' intervening steps which were going to be taken 'on a general basis' in respect of 'all municipalities in distress' within the province.[42] For example, the respondents alleged that a task team would be investigating and

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[37] This group was described as a 'constitutional class…[comprising] some 4000 persons and entities', all members of the Emalahleni community.

[38] See paras 12 and 43 of the applicant's heads of argument and para 23 of the applicant's founding affidavit.

[39] See paras 4 and 37-8 of the applicant's heads of argument; paras 3.3, 19-21, 79 of the applicant's founding affidavit.

[40] See paras 18 and 22 of the applicant's founding affidavit.

[41] Ibid paras 18.3, 59-60. This was a reference to the review application launched by Resilient Properties and the subsequent appeals, discussed in Chapter 5 of this Thesis.

[42] See paras 1, 13-14, 37, 52-7, 75.2 of the provincial respondents' answering affidavit; para 18.3.3 of the applicant's supplementary affidavit; para 9 of the applicant's heads of argument.

implementing steps 'to normalise the affairs' of all defaulting municipalities in the Mpumalanga province, specifically in relation to Eskom, and determining whether or not the conditions for a section 139 intervention were present.

In effect, the respondents carved out a type of territorial separation of powers claim, by asserting that the provincial executive was best-placed to assess the reasons for the municipal dysfunction and relying on the effectiveness of the existing constitutional accountability and intergovernmental monitoring and support mechanisms, albeit that these were not in the manner and form requested by the applicants. The respondents also argued that various measures could co-exist (possibly including a mandatory or discretionary section 139 intervention), but that it was the provincial government which retained a margin of discretion in assessing the applicable circumstances and the required steps.

However, by September 2018 (and despite an initial denial by the local government respondents), all of the respondents had conceded that there was indeed a crisis in the municipality's financial affairs and that the jurisdictional facts for a mandatory section 139*(5)* intervention had been fulfilled.[43]

Against this background, the parties reached an agreement that a mandatory section 139*(5)(a)* intervention by the provincial executive into the affairs of the municipality was to be initiated, and that a financial recovery plan was to be finalised, approved and implemented. This agreement was made an order of court on 9 October 2018.[44] Specified and mandatory time periods were included in the court order for each of these steps, as well as various reporting requirements on the progress of the intervention.[45] The court order also provided a safety net for the applicants: in the event that the provincial government respondents failed to comply with the order, the parties were permitted to apply for further relief, including a court order compelling a section 139*(7)* intervention by the national executive.[46]

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[43] See para 18.1 of the applicant's supplementary affidavit.

[44] *Coetzee v Premier, Mpumalanga Province* (2799/2017) [2018] ZAGPPHC (9 October 2018) paras 1, 4-6.

[45] Ibid para 7. For example, the relevant MECs were directed to review the section 139 intervention every three months and to provide written reports to the applicants.

[46] Ibid para 8.

4.3.2. Enoch Mgijima Local Municipality

The Enoch Mgijima Local Municipality is located within the Chris Hani District Municipality in the Eastern Cape province.[47] Towns within the jurisdiction of the municipality include Komani (Queenstown), Molteno, Sada and Whittlesea.

Following its establishment in August 2016 with the amalgamation of the former Tsolwana, Inkwanca and Lukhanji local municipalities,[48] the Enoch Mgijima Local Municipality received a disclaimed audit with findings in both the 2016/17 and 2017/18 financial years, an adverse audit with findings in the 2018/19 financial year, and a qualified audit with findings since the 2019/20 financial year.[49]

In May 2018, the municipality was identified by the DCoGTA as a priority municipality which was 'distressed or dysfunctional requiring urgent intervention'.[50] It was subsequently placed under a section 139*(1)(b)* and section 139*(5)(a)* intervention by the Eastern Cape provincial executive in August 2018,[51] with the provincial government also appointing an administrator for the municipality in September 2018.[52] A financial recovery plan was prepared in terms of the section 139*(5)* intervention, although 'little or no progress' was reportedly made in implementing this plan.[53]

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[47] See Municipalities of South Africa 'Enoch Mgijima Local Municipality (EC139)' available at https://municipalities.co.za/overview/1234/enoch-mgijima-local-municipality, accessed 22 June 2022.

[48] Provincial Notice 182 in *Provincial Gazette* 3717 of 2016.

[49] AGSA op cit note 8.

[50] See DCoGTA 'List of Dysfunctional and Distressed Municipalities' (23 May 2018) available at https://www.cogta.gov.za/index.php/2018/05/23/list-of-dysfunctional-and-distressed-municipalities/, accessed 22 June 2022.

[51] Ledger & Rampedi op cit note 36 at Annexure B; DCoGTA op cit note 36.

[52] *Twizza v Enoch Mgijima Local Municipality* [2020] ZAECGHC 144 (8 December 2020) para 16.

[53] See *Let's Talk Komani v The Premier, Province of the Eastern Cape* (3687/2019) ZAECGHC (25 June 2020) para 2; DCoGTA and National Treasury 'Enoch Mgijima Local Municipality: Financial Recovery Plan' (December 2022) available at https://www.treasury.gov.za/comm_media/press/2023/2023013001%20Financial%20Recovery%20Plan%20-%20Enoch%20Mgijima.pdf, accessed 5 July 2023.

In 2019, following Eskom's undertaking to cut the supply of bulk electricity due to the municipality's ongoing failure to make payment of its accounts (at this stage approximately R147 million), a number of local businesses and the Border-Kei Chamber of Business launched an application in the High Court to ensure that the 'lights were kept on' in the municipality.[54] The High Court granted an order, on agreement between the parties, that Eskom would continue to supply electricity to the municipality provided that the municipality complied with a new payment agreement (which was also made an order of court).[55]

However, because of the municipality's ongoing inability to meet its financial obligations or to provide basic services,[56] in December 2019 Let's Talk Komani (a civil society umbrella organisation[57]) launched an application in the High Court to compel the Eastern Cape provincial executive to initiate section 139*(1)* and 139*(5)* interventions in the municipality and to dissolve the municipal council. As part of the relief, Let's Talk Komani also requested various declaratory orders, including that the municipality was in breach of its constitutional obligations and that the jurisdictional facts for section 139*(1)(b)* and section 139*(5)* interventions had been satisfied. Let's Talk Komani submitted that any official opposing the application should be held personally accountable for the legal costs as they would be trying to 'defend the indefensible'.[58]

The respondents included the provincial government respondents (the premier, the provincial executive council, and the provincial MECs for co-operative government and finance), the

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[54] *Twizza* supra note 52 para 4.

[55] Ibid paras 4, 6-7. Also see the subsequent litigation in *Enoch Mgijima Local Municipality v Twizza In re: Border-Kei Chamber of Business v Eskom Holdings* [2022] ZAECMKHC 61 (26 August 2022); *Enoch Mgijima Local Municipality v Eskom Holdings* [2023] ZAECMKHC 24 (14 February 2023).

[56] This included Eskom's threatened interruptions to the supply of bulk electricity, legally non-compliant management of waste sites, collapsing road infrastructure, and an insufficient number of waste removal vehicles; see Estelle Ellis 'Eastern Cape government backs down on another municipal court case' *Daily Maverick* (25 June 2020) available at https://www.dailymaverick.co.za/article/2020-06-25-eastern-cape-government-backs-down-on-another-municipal-court-case/, accessed 22 June 2022.

[57] Let's Talk Komani included various church, religious groups and schools in the area, concerned residents, ratepayers, associations and foundations, such as the Black Management Forum, the Border-Kei Business Chamber and the Mlungisi and Queenstown Farmers' Association.

[58] DCoGTA *Annual Performance Plan* (2020/21) at 33.

local government respondents (the municipality, executive mayor, municipal manager and municipal council), the national government respondents (the CoGTA Minister, Minister of Finance and the President), as well the NCOP, SALGA and two trade unions.

However, following an agreement between the parties that it would 'not be prudent to continue with the court application when pragmatic actions were being taken by a higher sphere of government',[59] the High Court was not required to consider its involvement in the matter. Instead, on 25 June 2020 and by agreement between the parties, the financial recovery plan prepared by the provincial executive was made an order of court.[60]

In terms of this court order, the municipality was required to implement the financial recovery plan within three months, while the provincial executive was ordered to provide progress reports on its implementation to the High Court on a quarterly basis. The court order expressly provided that the provincial executive was not prohibited from dissolving the municipal council if it was of the view that this was necessary. Let's Talk Komani was also permitted to re-enrol the matter if it was of the view that the reports did 'not reflect sufficient progress'.[61]

Following this court order, the provincial executive resolved to re-instate the provincial section 139 intervention 'to the extent that it may have lapsed' with a new administrator being appointed to monitor the implementation of the financial recovery plan.[62] However, the implemented intervention(s) did not appear to render positive change: in 2021, local businesses

[59] Ibid.

[60] *Let's Talk Komani* supra note 53 para 2. Also see Tembile Sgqolana 'Enoch Mgijima Municipality takes Eastern Cape government to court over botched administration' *Daily Maverick* (21 February 2022) available at https://www.dailymaverick.co.za/article/2022-02-21-enoch-mgijima-municipality-takes-eastern-cape-government-to-court-over-botched-administration/, accessed 22 June 2022.

[61] Ibid paras 3-7.

[62] *Twizza* supra note 52 paras 9, 17.

were threatening to relocate (in the face of continued service delivery failures)[63] and local residents were expressing dissatisfaction with the effectiveness of the court orders.[64]

In response, national government decided to take a more drastic step. On 6 April 2022, the national cabinet approved a section 139*(7)* intervention in the Enoch Mgijima Local Municipality.[65] This intervention by national government was initiated in the absence of litigation and was based on the municipality having 'experience[ed] significant financial and service delivery failures for a prolonged period' and its failure 'to make progress in improving its financial and service delivery performance' despite the provincial intervention(s) since 2018.[66] A financial recovery plan was approved by the Minister of Finance on 14 December 2022 and was submitted to the municipality. While the municipality was required to ensure that the financial recovery plan was implemented and to oversee progress, it was reported in April 2023 that the municipality was refuting the validity of the plan.[67]

In 2023, protest action (which was the subject of judicial challenge[68]) attempted to exert pressure for the dissolution of the municipality following a continued failure to deliver services.

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[63] See Andisa Bonani 'Komani municipal meltdown reaches tipping point' *Sowetan Live* (17 June 2021) available at https://www.sowetanlive.co.za/news/south-africa/2021-06-17-komani-municipal-meltdown-reaches-tipping-point/, accessed 22 June 2022.

[64] See Queenin Masuabi 'Disenchanted resident enters elections race to "get things done right" at Enoch Mgijima Municipality' *News24* (6 October 2021) available at https://www.news24.com/citypress/politics/disenchanted-resident-enters-elections-race-to-get-things-done-right-at-enoch-mgijima-municipality-20211006, accessed 22 June 2022.

[65] Published under Government Notice 2051 in *Government Gazette* 46289 of 28 April 2022.

[66] See DCoGTA 'National intervention in the Mangaung Metropolitan and Enoch Mgijima Local Municipalities' (7 April 2022) available at https://www.cogta.gov.za/index.php/2022/04/07/national-intervention-in-the-mangaung-metropolitan-and-enoch-mgijima-local-municipalities/, accessed 22 June 2022.

[67] National Treasury 'Media Statement: Response to SABC interview with the Speaker of the Enoch Mgijima Local Municipality' available at https://www.treasury.gov.za/comm_media/press/2023/2023042001%20Media%20Statement%20-%20Enoch%20Mgijima%20LM.pdf, accessed 22 June 2023.

[68] *Enoch Mgijima Local Municipality v Komani Protest Action* [2023] ZAECMKHC 64 (23 May 2023).

In April 2023, Let's Talk Komani and The Independents (a registered political party) reportedly launched legal proceedings for the dissolution of the municipal council.[69]

4.3.3. Maluti-A-Phofung Local Municipality

The Maluti-A-Phofung Local Municipality is located within the Thabo Mofutsanyana District Municipality in the Free State province.[70] Towns that fall within the jurisdiction of the municipality include Harrismith, Kestell and Phuthaditjhaba.

The municipality has consistently received a disclaimed audit with findings since the 2012/13 financial year (except for the 2016/17 financial year in which it received a qualified audit with findings).[71] Further, in 2014, following litigation between Eskom and the municipality, the High Court held that it owed a 'phenomenal amount of money' to Eskom, arising due to 'incompetence and mismanagement on the part of the functionaries of the municipality'.[72] In December 2017, Eskom obtained judgment against the municipality, by agreement between the parties, for payment under a repayment plan of over R2 billion for bulk electricity.[73]

In February 2018, the municipality was placed under a section 139*(1)(b)* intervention by the Free State provincial executive due to its inability to make payments when required and its defaults on financial obligations including, for example, an Eskom debt of R2.2 billion and non-payment of third parties amounting to R206 million.[74] Despite the intervention, the municipality's debt to Eskom continued to escalate, resulting in Eskom threatening to disconnect the supply of bulk electricity to the municipality. In response, the Harrismith Business Forum and thirteen other organisations approached the High Court for relief and

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[69] Sidima Mfeku 'Enoch Mgijima Local Municipality to oppose dissolution application' *SABC News* (18 April 2023) available at https://www.sabcnews.com/sabcnews/enoch-mgijima-local-municipality-to-oppose-dissolution-application/, accessed 22 June 2023.

[70] See Municipalities of South Africa 'Maluti-A-Phofung Local Municipality (FS194)' available at https://municipalities.co.za/overview/1051/maluti-a-phofung-local-municipality, accessed 22 June 2022.

[71] AGSA op cit note 8.

[72] See *Eskom Holdings v Maluti-A-Phofung Municipality; In re: Maluti-A-Phofung Municipality v Eskom Holdings* [2015] ZAFSHC 203 (10 September 2015) para 11.

[73] *Maluti-A-Phofung Municipality v Eskom Holdings* [2020] ZAFSHC 213 (9 October 2020) para 7.

[74] Ledger & Rampedi op cit note 36 at Annexure B; DCoGTA op cit note 36.

successfully obtained an interdict against Eskom, preventing it from discontinuing the electricity supply.[75] As part of the interim order, the High Court ordered the applicants to pay Eskom directly, rather than through the municipality.[76]

In the main application, the applicants sought an order compelling national government to intervene in the municipality in terms of section 139*(7)* of the Constitution, together with a declaratory order that the failure by both the provincial and national executive to initiate a section 139 intervention in the municipality was unconstitutional.[77]

The respondents included local government respondents (including the municipality), national government respondents (including the President, and the energy, finance, public enterprises and CoGTA Ministers), provincial government respondents (the premier, CoGTA MEC and provincial treasury), Eskom, NERSA (the energy regulator) and SALGA.

The respondents, led by the CoGTA Minister, adopted a 'mediatory approach' resulting in various engagements between the parties and the conclusion that the matter should be resolved amicably 'without the court's involvement'.[78] A settlement agreement was duly reached, which was made an order of the court by the consent of all the parties, on 22 October 2018. In terms of the court order, the parties were required to 'attempt to resolve the matter' in compliance with section 41 of the Constitution (with Eskom also being prohibited from interrupting the

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[75] Zweli Mkhize 'Statement by Minister Zweli Mkhize on the inauguration of the Maluti-A-Phofung Municipality Recovery Consultative Committee' *South African Government Media Statements* (15 November 2018) available at https://www.gov.za/speeches/statement-minister-zweli-mkhize-inauguration-maluti-phofung-municipality-recovery, accessed 22 June 2022; Staff Reporter 'Investigation launched' *News24* (28 November 2018) available at https://www.news24.com/news24/investigation-launched-20181127, accessed 22 June 2022.

[76] This did not end the litigation between Eskom and the municipality. In January 2019, judgment was granted against the municipality for the payment of the sum of over R1 billion for bulk electricity, while in March 2019 the sheriff attached and removed the municipality's movable assets following Eskom issuing a writ in execution of a R2.4 billion judgment. A further settlement agreement was reached in December 2020, which involved Eskom taking over the electricity function in municipality.

[77] DCoGTA op cit note 58 at 29.

[78] Mkhize op cit note 75.

bulk supply of electricity during the implementation of the court order and the financial recovery plan).[79]

The court order (through the settlement agreement) recognised that the jurisdictional facts for a mandatory section 139*(5)* intervention had been established.[80] However, these parts of the court order were suspended by agreement between the parties (with the possibility of revival),[81] with a preference expressed for the determination of the terms of the intervention to be left to a political process.

In this regard, the court order required the establishment of a consultative committee chaired by the CoGTA Minister as well as the preparation and implementation of a financial recovery plan which was to be presented to the CoGTA Minister and Minister of Finance within 60 days of the order.[82] The order thus specifically targeted the crisis in the financial affairs of the municipality.

The Maluti-A-Phofung Municipality Recovery Consultative Committee was duly formed, comprising of representatives from government and the business community within the municipality, and met for the first time on 15 November 2018.[83]

Unfortunately, the court order (including the presentation, consideration and approval of the financial recovery plan) appeared not to have been implemented more than two years after it was granted.[84] While the applicants had indicated their intention to approach the court again in

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[79] See clause 2.1 of the Settlement Agreement; *Maluti-A-Phofung* supra note 73 para 21; Olebogeng Motse 'FS High Court puts planned Maluti-A-Phofung power cuts on hold' *OFM* (23 October 2018) available at https://www.ofm.co.za/article/local-news/266573/fs-high-court-puts-planned-maluti-a-phofung-power-cuts-on-hold-, accessed 22 June 2022.

[80] See clauses 1.1 and 1.2 of the Settlement Agreement.

[81] See clause 4 of the Settlement Agreement: revival was possible if the applicants believed that appropriate changes had not been made to the municipality's governance, financial or technical issues; see clause 6 read with clauses 1.3 and 4 of the Settlement Agreement.

[82] Mkhize op cit note 75; *Maluti-A-Phofung Municipality* supra note 73 para 21.

[83] The Consultative Committee consisted of two representatives from each of the MFRS, Free State provincial government, national government (nominated by the CoGTA Minister), Eskom, NERSA, the municipality and five representatives from the applicants; *Maluti-A-Phofung Municipality* supra note 73 para 21.

[84] *Maluti-A-Phofung Municipality v Eskom Holdings* [2021] ZAFSHC 3 (15 January 2021) paras 5-6.

terms of the order, further meetings and negotiations have meant that the applicants have not, as yet, approached the court for further assistance.

4.3.4. Lekwa Local Municipality

The Lekwa Local Municipality is located within the Gert Sibanda District Municipality in the Mpumalanga province.[85] Towns within the jurisdiction of the municipality include Morgenzon and Standerton.

The municipality's audit reports have been getting steadily worse: it received an unqualified audit with findings between the 2013/14 and 2017/18 financial years, a qualified audit with findings in the 2017/18 financial year, and a disclaimed audit with findings since the 2018/19 financial year.[86] The municipality was first placed under a section 139(1)(b) intervention between October 2009 and June 2011.[87]

From 2016, Eskom repeatedly threatened to discontinue the supply of bulk electricity to the municipality, including implementing scheduled interruptions of electricity supply, due to non-payment of outstanding amounts.[88] A subsequent decision by Eskom to interrupt electricity supply to the municipality was challenged by Astral Operations ('Astral'), a poultry producer and the largest business and employer in Standerton, together with other local businesses, each of which had diligently ensured payment of their electricity accounts to the municipality (which had then failed to make payment to Eskom). The parties reached a settlement agreement, which was made an order of court on 3 May 2017, permitting direct payment of the monthly electricity

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[85] See Municipalities of South Africa 'Lekwa Local Municipality (MP305)' available at https://municipalities.co.za/overview/1150/lekwa-local-municipality, accessed 22 June 2022.

[86] AGSA op cit note 8.

[87] Ledger & Rampedi op cit note 36 at Appendix A.

[88] *Lekwa Local Municipality v Eskom Holdings* [2020] ZAMPMHC 24 (8 July 2020) para 17; *Afriforum v Eskom Holdings* [2017] 3 All SA 663 (GP) para 24.

accounts to Eskom rather than to the municipality.[89] By 2018, however, Eskom advised Parliament that the municipality's debt was at almost R500 million.[90]

In May 2018, two local businesses, Astral and Meadow Feeds Standerton, applied to the High Court for an order directing the 'Government of the Republic South Africa' to intervene in the affairs of Lekwa Local Municipality, based on its continued failure to make payment of its accounts to both Eskom and the Rand Water Board, as well as on allegations that the service infrastructure of the municipality had fallen into disrepair.[91] Other respondents included the Minister of Finance, the premier and the MEC responsible for finance in the province.

The government respondents sought to resolve the matter 'amicably without the involvement of the court' and, in August 2018, the parties reached an agreement to temporarily suspend the litigation provided certain measures were implemented.[92] These measures included the appointment of an entity to investigate the state of the municipal infrastructure and propose resolutions (which was undertaken and which identified various issues in the municipality, including failing and ageing infrastructure and inadequate infrastructure developments) and the initiation of a section 139*(5)(a)* intervention by the provincial government (which took place on 11 October 2018).[93] However, the requisite financial recovery plan for the section 139*(5)* intervention was only approved over a year later and was, in effect, never implemented.[94]

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[89] *Afriforum* supra note 88 paras 25-7.

[90] See Lynley Donnelly 'Another town bites the dust' *Mail & Guardian* (28 June 2019) available at https://mg.co.za/article/2019-06-28-00-another-town-bites-the-dust/, accessed 22 June 2022.

[91] DCoGTA op cit note 58 at 25. This application was based on section 139 of the MFMA read with section 139*(7)* of the Constitution.

[92] Ibid. Also see Thabile Chonco 'Court orders national government to leapfrog into Lekwa Local Municipality' (September 2021) 16(3) *Dullah Omar Institute* available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-16-issue-2-september-2021/court-orders-national-government-to-leapfrog-into-lekwa-local-municipality, accessed 22 June 2022.

[93] DCoGTA op cit note 58 at 25.

[94] Chonco op cit note 92.

Meanwhile, the municipality's debt owed to Eskom and Rand Water continued to escalate, together with continued interruptions of water and electricity supply to the community.[95] In 2019, further litigation in relation to water supply problems in the municipality resulted in water emergency arrangements, including Astral being appointed as an emergency service provider to the municipality.[96] In February 2020, Eskom demanded payment of the amount owed on the municipality's current account: approximately R1-billion.[97]

In 2020, the SAHRC advised the DCoGTA to initiate a section 139*(1)(b)* intervention due to the 'deteriorating situation' in the municipality which was 'not self sustainable', 'on the brink of collapse' and 'incapable of discharging its constitutional obligations to its citizens'.[98]

Against this background, Astral decided to 'revive' its May 2018 litigation, seeking a court-ordered mandatory section 139*(7)* intervention by the national executive in the Lekwa Local Municipality. It was argued that jurisdictional requirements had been satisfied: the municipality was in 'serious or persistent material breach' of its obligations to provide basic services to its community and was also 'in persistent breach of meeting its financial obligations' with Eskom and Rand Water as a result of a crisis in its financial affairs.[99] It was further submitted that the provincial executive council had previously intervened (in terms of section 139*(5)(a)*) but had done so 'inadequately'.

The national government submitted that it was 'premature' for section 139*(7)* of the Constitution to be initiated given that this is a 'measure of last resort', that it was inappropriate

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[95] Penelope Mashego 'Standerton chicken producer gets court order to force govt to supply town with water, electricity' *News24* (13 April 2021) available at https://www.news24.com/fin24/companies/standerton-chicken-producer-gets-court-order-to-force-govt-to-supply-town-with-water-electricity-20210413, accessed 22 June 2022.

[96] Donnelly op cit note 90**;** 'Astral signs emergency water agreement' *Freight News* (26 June 2019) available at https://www.freightnews.co.za/article/astral-signs-emergency-water-agreement, accessed 22 June 2022.

[97] *Lekwa* supra note 88 para 4.

[98] See Mpumalanga Province CoGTA 'NCOP Provincial Week MEC's Overview: Presentation on Lekwa Local Municipality' available at https://www.parliament.gov.za/storage/app/media/Pages/2020/october/20-10-2020_National_Council_of_Provinces_Provincial_Week_2020/presentations/Mpumalanga/NCOP_overview_on_Lekwa_October_26_October_2020.pdf, accessed 22 June 2022.

[99] Chonco op cit note 92.

to 'overstep' the provincial executive's resolution to intervene, and that a national intervention is 'complex, policy-laden, required the entire cabinet's participation and…[is] politically sensitive requiring careful assessment'.[100]

However, the matter was resolved out of court by the consent of all parties which agreement was subsequently made an order of court on 12 April 2021. In terms of this order, the parties agreed to a mandatory intervention by the national executive in the municipality, with a financial recovery plan to be prepared and approved within 6 months (by October 2021). The court order also contemplated 'supplementary relief' if the recovery plan was not implemented.[101]

National government duly intervened in the municipality on 12 May 2021, with the national cabinet resolving that a financial recovery plan should be imposed, the municipal council should be dissolved and an administrator should be appointed.[102] A financial recovery plan, to be implemented over a three-year period, was duly prepared for the municipality by September 2021.[103] However, by June 2023, concerns were being raised that the national intervention seemed 'ineffective' given that the municipality is still listed as a dysfunctional municipality.[104]

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[100] Ibid. Also see Staff Reporter 'A business took a failing municipality to court in a landmark case – and now it could happen across South Africa' *BusinessTech* (8 June 2021) available at https://businesstech.co.za/news/business/496737/a-business-took-a-failing-municipality-to-court-in-a-landmark-case-and-now-it-could-happen-across-south-africa/, accessed 22 June 2022.

[101] *Astral Operations v Government of the Republic of South Africa* (35106/2018) ZAGPPHC 230 (12 April 2021) paras 1-4.

[102] See 'Statement on the Cabinet Meeting of 12 May 2021' (13 May 2021) available at https://www.gcis.gov.za/newsroom/media-releases/statement-cabinet-meeting-12-may-2021, accessed 22 June 2022, para 5.2

[103] National Treasury 'Financial Recovery Plan prepared for the Lekwa Local Municipality' (September 2021) available at https://www.treasury.gov.za/comm_media/press/2021/LekwaFRP/02%20Final%20Lekwa%20LM%20FRP%20Report.pdf, accessed 22 June 2023.

[104] DA Mpumalanga 'CoGTA intervention in Lekwa municipality seems ineffective' (5 June 2023) available at https://mpumalanga.da.org.za/2023/06/cogta-intervention-in-lekwa-municipality-seems-ineffective, accessed 22 June 2023.

4.3.5. Reflections: A judicial role conception in the first wave

There are certain key characteristics shaping the role of the courts in the first wave. First, the possibility of judicial involvement arises from community-led litigation: various desperate individuals, community groups and/or local businesses within the jurisdiction of a dysfunctional municipality, seeking judicial assistance to 'fix' that municipality through a court-ordered, mandatory section 139 intervention.

Second, the involvement of the courts tend to arise only after extensive (but unsuccessful) attempts to engage with the local, provincial and/or national spheres of government to resolve the challenges facing the municipality. This seems to indicate that the dysfunction of the existing democratic institutions, structures and processes, with insufficient and ineffective non-litigious sites for mediating conflict, as well as inattentive (at best), incompetent, or intransigent government actors, have contributed materially to the first wave and the associated judicial role.[105]

Third, the first wave is characterised by an emphasis on the importance of a 'mediatory' and 'amicable' approach, in compliance with the requirements of co-operative government in section 41 of the Constitution, without the involvement of the courts. In this regard, the government respondents would communicate an intention to take the necessary steps to facilitate a political solution, developed in terms of Chapter 3 of the Constitution, for the challenges faced by local government. This is often paired with an argument that it would not be 'prudent' for applicants to pursue litigation when 'pragmatic' actions or other 'intervening steps' are being taken by a higher sphere of government.

Fourth, the parties reach a mutually acceptable agreement (or settlement agreement), effectively agreeing to divert the dispute into appropriate political channels, beyond the courts' purview and prior to any judicial consideration of the matter.[106] These agreements reflect the

[105] See the paragraphs 2.2.4.3, 2.3.2, 2.3.5 of Chapter 2.

[106] See Curtly Stevens 'Provincial governments are not intervening when they are supposed to: The Case study of Emalahleni Local Municipality' *Dullah Omar Institute* (September 2019) available at https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-14-lgb/the-

government respondents' clear preference for a political resolution, almost as a type of territorial separation of powers claim. Moreover, as litigants agree to be relegated back into the political arena, it reflects an underlying belief in the ability of constitutional accountability mechanisms to address local governance collapse.

Fifth, as the parties agree to make the settlement agreement an order of court, the applicants do obtain some comfort that local government will be held to its constitutional obligations. This generally takes the form of a declaratory order that the jurisdictional facts for a section 139 intervention have been established and that an intervention will be implemented (occasionally within broad step and time parameters). However, the actual terms of the intervention are left to be determined at a political level, with the court typically affording the democratically elected government a considerable margin of discretion, and a malleable scope, to decide how to correct the municipal failures.

When viewed holistically, the courts' role in the first wave has been shaped as a type of catalyst to a political process or solution, enabling them to limit their involvement by converting consensual agreements between the parties into court orders. This catalytic judicial role can be viewed as an encouraging mechanism to compel political accountability (through provincial and/or national executive action) and to strengthen the democratic accountability channels in response to a dysfunctional and failing municipality. The benefit for the courts is that local government dysfunction can be addressed with the involvement of multiple role-players, without accusations of judicial overreach or a violation of the doctrine of separation of powers. This approach can accordingly help strengthen the courts' relationship with the 'democratic branches' of government.

However, this catalytic judicial role has meant that, in this first wave, the courts have not interrogated the underlying reasons for the municipal dysfunction, the real efficacy of the democratic institutions, structures and processes (especially given the history of unsuccessful engagements with the government actors), or any underlying rights violations. In other words,

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intersection-of-the-role-of-municipalities-under-the-spatial-planning-and-land-use-management-act-16-of-2013-and-the-role-of-traditional-leaders-in-the-process-of-allocating-land, accessed 22 June 2022.

it has enabled political structures even in instances where service delivery collapse and lack of local or provincial government responsiveness suggest fundamental democratic failure.[107]

The courts' role in this first wave is also fundamentally dependant on community-led litigants pursuing litigation to trigger the required political solution, which has inherent (and sometimes insurmountable) time and cost implications.[108] Moreover, based on the current state of each of the municipalities discussed above, the long-term sustainability of a court order by agreement as an intervention mechanism appears to be doubtful.

4.4. 2020 to 2022: The second wave of community-led litigation for a court-ordered mandatory section 139 intervention

While the first wave is characterised by the acceptance of a political solution to local government challenges, thereby relegating the judicial role to that of a catalyst to the political process, the second wave is characterised by a rejection of the proposed political solutions to local government challenges brought by community-led applicants.

Litigation has been initiated in two local municipalities in this second wave: Makana Local Municipality (in 2020) and Mafube Local Municipality (in 2022).

4.4.1. Makana Local Municipality

The Makana Local Municipality is situated in the Sarah Baartman District Municipality in the Eastern Cape province.[109] Towns within the jurisdiction of the municipality include Alicedale, Makhanda (formerly Grahamstown) and Rhini. The municipality has received a qualified audit with findings between the 2014/15 and 2017/18 financial years, and a disclaimed audit with

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[107] See, for example, Jackie Dugard & Theunis Roux 'The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004' in Gargarella R et al (eds) *Courts and Social Transformation in New Democracies – An Institutional Voice for the Poor?* (2006) 107-25; Cachalia op cit note 28.

[108] Lisa Chamberlain & Thato Masiangoako 'Third time lucky? Provincial intervention in the Makana Local Municipality' (2021) 136(2) *SALJ* 423 at 455-6.

[109] See Municipalities of South Africa 'Makana Local Municipality (EC104)' available at https://municipalities.co.za/overview/1017/makana-local-municipality, accessed 22 June 2022.

findings since the 2018/19 financial year (as well as in the 2012/13 and 2013/14 financial years).[110]

In 2005, the Makana Local Municipality held more than R50 million in financial reserves and received an award for excellence in service delivery. However, by 2014 the municipality was in debt (for an amount of over R150 million) and was struggling with various challenges, including water outages, water quality problems, insufficient road maintenance, a failure to collect refuse on time, the inability to manage waste sites, illegal dumping, and aging municipal infrastructure.[111]

In an attempt to address these challenges, the provincial executive placed the Makana Local Municipality under a section 139*(1)(b)* intervention in September 2014, with an administrator being appointed for a period of about 9 months.[112] Despite not being a requirement under section 139*(1)(b)* of the Constitution, a financial recovery plan was developed by the MFRS (referred to here as the '2015 Financial Recovery Plan'). The provincial government was required to consider dissolving of the municipal council if the 2015 Financial Recovery Plan was not implemented.[113]

Despite the municipality's 2016/17 annual report indicating that the 2015 Financial Recovery Plan was being implemented, the municipality's financial status showed no improvement and it was alleged that there were no material improvements in municipal service delivery. A different administrator was appointed for the municipality between March and July 2016. By May 2018, Eskom threatened to discontinue the supply of bulk electricity to the municipality unless its outstanding debt (at that stage approximately R58 million) was paid.[114]

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[110] AGSA op cit note 8.

[111] Chamberlain & Masiangoako op cit note 108 at 435-6; *UPM1* supra note 1 paras 9, 53, fn 11.

[112] Ibid at 438.

[113] *UPM1* supra note 1 para 9.

[114] Ibid paras 4-7; Chamberlain and Masiangoako op cit note 108 at 439.

Against this background, the Legal Resources Centre, acting on behalf of the Unemployed Peoples Movement ('UPM'),[115] requested assistance from the DCoGTA, arguing that the municipality was 'still in a state of… collapse' despite the section 139 interventions and various reports setting out the required steps to 'fix' the municipality and ensure service delivery.[116]

In August 2018, the CoGTA Minister advised that this request had been referred to the premier and that the provincial executive council would 'assess the situation in the municipality and, thereupon, consider instituting an intervention, if necessary'.[117] By February 2019 there had still been no improvement in service delivery or in the state of the municipality, with the municipality's debt reportedly having risen to around R170 million.[118]

As a result, the UPM, on behalf of the municipality's residents, approached the High Court to compel the Eastern Cape provincial executive to intervene in terms of section 139*(1)(c)* of the Constitution, read with sections 139 and 140 of the MFMA (a 'discretionary' section 139 intervention), to dissolve the municipal council and to appoint an administrator until a newly elected municipal council was elected. The UPM argued that the dissolution of the municipal council, which had failed to implement the 2015 Financial Recovery Plan, was essential to address the inherent failures in the municipality's governance, management and administrative structures, which had not been addressed in the two previous provincial interventions.[119]

The UPM also sought various declaratory orders from the High Court, including that the jurisdictional facts for a section 139 intervention were present, and that the municipality was in breach of its constitutional obligations by failing to provide sustainable service delivery, promote a safe and healthy environment, and structure and manage its processes to give priority to basic needs and to promote social and economic development of its community.[120]

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[115] The UPM is a human rights organization which operates predominantly in the Eastern Cape and KwaZulu-Natal, aiming to create awareness and advocate for the enforcement of the constitutional rights of poor people who are socially and economically disenfranchised and often also unemployed.

[116] *UPM1* supra note 1 paras 7, 9; Chamberlain & Masiangoako op cit note 108 at 439.

[117] Ibid para 7.

[118] Ibid para 7, fn 2.

[119] Ibid paras 16, 74.

[120] Ibid paras 1, 58, referring to sections 152 and 153*(a)* of the Constitution.

The respondents who opposed the application[121] were grouped into three main categories: the provincial government respondents (the premier, provincial executive council, and relevant MECs for co-operative government and finance), the local government respondents (the municipality, executive mayor, municipal manager and municipal council) and a national government respondent (the CoGTA Minister).

The respondents conceded that the jurisdictional facts could be established since there was a crisis in the municipality's financial affairs which had resulted in serious and persistent material breaches of the municipality's obligation to provide basic services and to meet its financial obligations.[122] The provincial government respondents further conceded that 'a mandatory [section 139*(5)*] intervention involving the development of a [financial recovery plan] is regarded as also necessary'.[123]

As a result, on 10 April 2019 (after the UPM's application was launched), the CoGTA MEC resolved to recommend to the provincial executive that a financial recovery plan 'aimed at securing the [municipality's] ability to meet its obligations to provide basic services and its financial commitments', should be imposed.[124]

The UPM, however, contended that this was merely an attempt by the respondents to hide behind a promised (but not implemented) mandatory section 139 intervention, which did not include the dissolution of the municipal council or further structured relief, and which failed to achieve the aims of the Constitution, 'vindicate the infringed rights' of the residents, or take due consideration of the factual history.[125] In any event, the UPM submitted that the provincial executive's proposed mandatory section 139*(5)* intervention and the UPM's requested court-ordered discretionary section 139*(1)(c)* intervention could exist together, reflecting an apparent understanding of the multifaceted nature of a crisis which may require a range of simultaneous and possible varied interventions.

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[121] Other respondents, who did not oppose the application, included the Minister of Finance, President, NCOP, SALGA and two trade unions.

[122] *UPM1* supra note 1 paras 8, 13, 25-6, 55.

[123] Ibid para 12.

[124] Ibid paras 8-12, 25, 29.

[125] Ibid paras 68, 74, 87.

The respondents disagreed, criticising the UPM's request for a 'discretionary' intervention and arguing that the intervening steps of the provincial executive, by deciding to implement a section 139*(5)* intervention, effectively precluded further relief under section 139*(1)(c)* of the Constitution.[126] The CoGTA Minister argued further that the UPM could only succeed if the High Court found that the provincial executive's existing section 139*(5)* intervention decision was reviewable, otherwise its existence would automatically 'supersede any discretionary provincial intervention', court-ordered or otherwise.[127]

These arguments appear to mirror the position adopted in the first wave: the idea that a political solution is preferable to, and effectively negates, the involvement of the courts. It further appears to reflect a view that a discretionary and mandatory section 139 intervention cannot coexist, and that any municipal challenges can only be addressed by a single intervention process.

The respondents argued further that the High Court cannot sidestep the applicable, sequenced preconditions in section 139*(5)* of the Constitution (or the threshold requirement in section 139*(1)(c)* of the Constitution) by compelling the dissolution of a municipality, as this would effectively amend the Constitution and create 'further instability' to an 'already precarious municipality'.[128] This approach appears to demonstrate an implicit support for a consideration of less restrictive measures prior to dissolution.[129]

Finally, the respondents argued that it would be a violation of the doctrine of separation of powers, and amount to overreaching and an 'impermissible intrusion', for the High Court to compel the provincial government to conduct a 'policy-laden' and 'polycentric' discretionary intervention.[130] For the respondents, this argument was fortified by the (more drastic) steps that had already been taken by the provincial executive to remedy the situation under section 139*(5)* of the Constitution.

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[126] Ibid paras 9-10, 23, 56-8, 67.

[127] Ibid paras 14, 58, 66.

[128] Ibid paras 14, 75.

[129] Ibid para 12; Chamberlain & Masiangoako op cit note 108 at 441.

[130] *UPM1* supra note 1 paras 13-4, 79-80.

The local government respondents argued further that the courts have 'no authority' as it was the provincial government's role to decide 'whether it will intervene and what sort of intervention it will require', while the CoGTA Minister similarly argued that provincial government must be permitted the 'requisite latitude to investigate the [municipality's] dysfunctionality and the underlying reasons' and then to 'tailor' a provincial intervention to address those reasons.[131] The respondents' argument was essentially that there was no role for the court other than to 'perhaps require… the municipality and provincial government to make reports to [the high] court as to the progress'.[132] Implicit within these arguments is a concern that the provincial government may find itself constrained by an order of court, particularly given the respondents' underlying preference for political solutions to municipal dysfunction.

The High Court handed down its decision, which focused on the plight of the 'desperate applicants' and the generally dilatory responses of the respondents, on 14 January 2020.

4.1.1.1. *Was the High Court willing to consider the matter?*

Although a specific challenge to the UPM's legal standing was abandoned at the hearing, the High Court appeared to accept that the 'dictates of the Constitution' and the definition of 'community' in the Systems Act[133] meant that the UPM, with its members living 'within Makana's jurisdiction' and being the recipients of service delivery, had legal standing.[134] The reliance on the 'dictates of the Constitution' appears to be a tacit acknowledgment by the High Court that legal standing would arise under section 38 of the Constitution, in the context of the underlying socio-economic rights violations, with the High Court expressly categorising the application as being 'based in essence' on the constitutional rights to a healthy environment, health care, food, water and social security.[135]

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[131] Ibid paras 14, 67.

[132] Ibid para 47.

[133] A 'community' is defined in the Systems Act to mean a body of persons comprising the municipality's residents, ratepayers, civic organisations and non-governmental, private sector or labour organisations involved in the local affairs of the municipality.

[134] *UPM1* supra note 1 paras 3-4, fn 50.

[135] Ibid para 6.

The High Court expressly rejected a subsidiarity argument (that the UPM should have rather sought relief under section 137 of the MFMA), finding that the courts have broad powers to grant just and equitable relief under section 172 of the Constitution in respect of any conduct that is inconsistent with the Constitution. The High Court's approach was linked with the nature of the UPM's complaints, the ongoing absence of a response to those complaints, the factual matrix of the matter and the applicant's '[c]onstitutionally entrenched rights'.[136]

In response to the respondents' argument that the courts 'should not and cannot' compel a discretionary intervention (particularly given the provincial executive's 'intervening' section 139*(5)* intervention decision and the applicant's misplaced reliance on a discretionary intervention), the court held that it was not precluded from considering the matter.[137]

First, in the context of the doctrine of separation of powers, the High Court held that when the Constitution requires the courts to decide a particular controversy (including whether a municipality is in breach of its constitutional obligations and/or whether the jurisdictional facts for a mandatory intervention are present) it can never amount to judicial overreach. Rather, it is a judicially permitted 'symbiotic' relationship in pursuit of the democratic project, and safeguarding the public interest, with the courts making rulings on 'wide and divergent disputes provided they can be resolved by application of the law'.[138] The commitment to a pursuit of the democratic project, in particular, suggests judicial support for a role and relief which may transcend the bounds of the constitutional provisions or legislative instruments, possibly within the broader scope of transformative adjudication.

Second, the High Court held that it was clear that the parties were in undisputed agreement that the municipality was experiencing a crisis in its financial affairs, and was not meeting its obligations to provide basic services or meeting its financial obligations (which, the High Court held, constituted a serious and persistent breach of the municipality's constitutional

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[136] Ibid para 22.

[137] Ibid paras 47, 58.

[138] Ibid para 94. The court considered its role as similar to that in socio-economic rights disputes or in the judicial assessment of a policy's alignment with the Constitution.

obligations).[139] Against this background, the High Court was satisfied that its involvement, and the operation of section 172 of the Constitution, were triggered.

Third, the High Court was not satisfied that it was precluded from considering the matter unless the UPM first reviewed the provincial executive's recent (or any other) section 139(5) interventions. The court held that the applicants could not review an intervention which, based on the information before the High Court, had 'progressed no further than having been mentioned in the context of a triad of resolutions'.[140] Further, the court held that it did not appear to be the respondents' argument that a review of the 2015 Financial Recovery Plan was required. This background instead motivated the court to question whether the purported mandatory intervention proposed by the provincial executive, which appeared to signal 'another empty "same old, same old" promise', was merely for the purpose of 'pacify[ing] the people' and, presumably, the High Court.[141]

Fourth, the High Court held that it was provided with scant comfort that its involvement was not required, on the respondents' version, given the history of the matter and the government respondents' repeated failures to provide the court with sufficient information. In particular, it criticised the lack of evidence placed before it in relation to the action that had been taken, or progress that had been made, by the respondents in implementing the proposed section 139(5) intervention and the extent to which the UPM's underlying 'constitutionally-based concerns' had been addressed.[142]

4.1.1.2. *What was the extent of the High Court's involvement?*

The High Court noted that, despite the respondents being in the 'best position' to advise it on what had 'been achieved at the coalface', they had opted not to dispute the factual allegations (and the establishment of the jurisdictional facts for a mandatory section 139 intervention) or

[139] Ibid paras 5, 55.

[140] Ibid paras 61-2.

[141] Ibid para 62.

[142] Ibid paras 13, 27-34.

provide any contrary evidence on the state of the municipality, instead relying only on the intended mandatory section 139 intervention.[143]

For the High Court, this was a clear 'admission' that the municipality was in 'serious and persistent breach' of its constitutional obligations (as set out in sections 152 and 153*(a)* of the Constitution).[144] It would appear that the High Court also considered that there had been a breach of the constitutional rights to a healthy environment, health care, food, water and social security, although a declaration relating to the infringement of these rights did not form part of the order (or, indeed, any express part of the applicants' prayers).[145] The court also made no reference to the possible role of section 38 of the Constitution relating to the entitlement to enforce these rights.

Nevertheless, given the municipality's admitted failure to fulfil its constitutional obligations, the High Court held that it 'goes without saying that it is not in dispute' that section 172*(1)(a)* of the Constitution was triggered.[146] In adopting this approach, the court thus extended its involvement beyond the bounds of the subsidiary legislation or section 139 of the Constitution, clearly situating its role within the broad scope of section 172 of the Constitution. This meant that the court could, and was obliged to, declare the municipality in breach of its constitutional obligations and its conduct constitutionally invalid.

When considering the type of section 139 intervention that was warranted in the circumstances, the court held that the jurisdictional facts which trigger a section 139*(5)* of the Constitution were clearly present, further demonstrated by the financial problems reaching 'crisis proportions'.[147] In these circumstances, it held that it was 'incumbent' on the provincial government to intervene under section 139*(5)*, which was what the respondents had gone to 'extraordinary lengths' to argue was 'sensible, logical, practical and obvious in the circumstances' and which they 'appeared to be offering anyway'.[148]

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[143] Ibid para 5, 13, 15, 55, 84-7.

[144] Ibid para 49, 55.

[145] Ibid para 6.

[146] Ibid paras 15, 55, 84-5, 94.

[147] Ibid paras 49, 55.

[148] Ibid paras 52, 86, 93.

However, the High Court held that it was 'imperative' for the respondents to explain the status of the 2015 Financial Recovery Plan (which the municipal council had consistently failed to implement), why there had been another resolution for mandatory intervention, what steps had been taken in terms of this proposed intervention, and how a new resolution (and new proposed intervention) would provide relief.[149] The court found that the respondents had, consistently, failed to provide this information. In fact, much to the court's (clearly expressed) exasperation, the provincial government respondents provided no further information regarding the implementation of the resolution to intervene or the alleged section 139 intervention itself. [150]

It appears that, implicit within this information-gathering exercise and exasperation, was the High Court's fundamental concern with the integrity and healthy functioning of the applicable democratic institutions, structures and processes, and the ability of the existing constitutional accountability mechanisms to address governance collapse in the municipality.[151] This concern was amplified by the lack of responsiveness by both local and provincial government in their interactions with the court, and by the court's unwillingness to abandon the applicants to a dysfunctional and non-responsive political arena without some judicial oversight.

In the absence of sufficient evidence to the contrary and based on the particular history of the matter, the High Court thus chose to 'fortify' the provincial government respondents' assurance that a section 139*(5)* intervention was indeed underway with an order to that effect, and further directed the provincial executive council to implement a recovery plan and to submit progress reports to the court.[152] It also attempted to craft an order which would 'encourage' the provincial government respondents to make use of the 2015 Financial Recovery Plan (which it viewed favourably) as a 'living' document which could be updated as and when required.[153]

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[149] Ibid paras 36, 60.

[150] Ibid paras 13, 97.

[151] See Everatt & Pieterse op cit note 24 at 798-800, 804. The court had even asked the parties whether it had the power to accelerate or truncate the steps in a section 139 intervention, although it ultimately appeared to accept the respondents' submission that this was not permissible as the timeframes were determined by an act of Parliament; see *UPM1* supra note 1 para 65.

[152] *UPM1* supra note 1 paras 51, 65.

[153] Ibid paras 36, 89-91.

On the question of the dissolution of the municipal council, the court noted that both the MFMA and the 2015 Financial Recovery Plan made provision for dissolution if the municipality had delayed or failed to implement the recovery plan.[154] The court also specifically acknowledged that the UPM and the people falling within the jurisdiction of the municipality had 'done their *level* best and appear[ed] to have exhausted *every* remedy available to them, in order to obtain some sort of a reaction from the respondents, either to be met with no reaction whatsoever, or by the "same old, same old" story'.[155] Against this background and, it would seem, building on a type of transformative constitutionalism envisaging a culture of democracy and transparent governance, the High Court held that it had the authority (mandated under section 172*(1)(b)* of the Constitution) to order the dissolution of the municipal council and the appointment of an administrator.

While not expressly stated, it would further appear that there was an implicit recognition in this order that the corrective principle in section 172*(1)* of the Constitution (allowing correction to the extent of the constitutional inconsistency) ensured that there would be no violation of the doctrine of separation of powers.[156] The High Court concluded by justifying its order under section 172*(1)(b)* of the Constitution as just (as it promoted a 'healthy and cooperative system of checks and balances') and equitable (as it attempted to 'ensure that the relief granted would promote rather than interfere with good governance in the best welfare interests' of the affected people).[157]

4.4.2. Makana Local Municipality (application for leave to appeal to the High Court)

An application for leave to appeal was lodged against the judgment of the High Court by both the provincial and local government respondents, based on four main grounds.[158]

First, the respondents argued that the High Court had incorrectly interpreted the legislative provisions by declaring that a failure to act was constitutionally invalid which, in turn, triggered

[154] Ibid para 90.

[155] Ibid para 60.

[156] *UPM1* supra note 1 paras 92-5. Also see *AllPay2* supra note 105 para 45.

[157] Ibid para 95.

[158] *UPM2* supra note 3 paras 5-7.

section 172 of the Constitution. Second, the respondents argued that the decision was incorrect in that the High Court had granted relief that had not been requested (based on section 139*(5)* of the Constitution, despite the UPM seeking relief under section 139*(1)* of the Constitution). Third, the respondents relied on a 'less restrictive measures' type of argument that the provincial government respondents were still in the process of taking steps and implementing a recovery plan and that the dissolution decision was accordingly premature and needlessly drastic. Fourth, the respondents argued that the High Court's decision contravened the doctrine of separation of powers and amounted to judicial overreach.

On 21 May 2020 the High Court handed down judgment denying the application for leave to appeal on each of these grounds.

At the hearing of the matter, it was clear that the provincial government had continued to implement its mandatory section 139*(5)* intervention and had sought to take responsibility for the functions of the municipality, rather than seeking to dissolve the municipal council.[159] The High Court also noted that the provincial treasury had requested the MFRS to consider and update the 2015 Financial Recovery Plan.[160]

However, the High Court continued to stress its disapproval of the confusion and disorganisation of the respondents, holding that they had 'egg on their face' and 'ought to be hanging their heads in shame'.[161] The court held that the situation in the municipality, and the manner in which it had been handled, was 'so embarrassing' at 'so many different levels' that it may have even considered granting a national intervention under section 139*(7)* of the Constitution if this had been requested.[162]

In refusing the application for leave to appeal, the High Court reinforced its reliance on section 172 of the Constitution which 'obliges' or 'mandates' courts to declare that a failure to fulfil the objects set out in section 152 of the Constitution and to comply with the prescriptive conditions of section 153 of the Constitution is 'legally unacceptable and that such

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[159] Chamberlain & Masiangoako op cit note 108 at 443.

[160] *UPM2* supra note 3 para 21.

[161] Ibid paras 31-2.

[162] Ibid para 32.

lackadaisical conduct will not be Constitutionally countenanced'.[163] In other words, when deciding a constitutional matter, the courts must declare unlawful and invalid any conduct by a municipality that is inconsistent with the Constitution, as required by section 172*(1)(a)* of the Constitution. The court also clarified that it was not disputed that the rights of the UPM's 'people' set out in, amongst others, sections 10, 24 and 27 of the Constitution (and which they were entitled to enforce under section 38 of the Constitution), had been infringed.[164]

Building on the reasoning in *UPM1*, this appears to suggest that, where the High Court considers a section 139 intervention to be effective and appropriate relief for a constitutional infringement (including a rights violation or breach of constitutional obligations), it is permitted to make such an order in terms of section 38 and 172 of the Constitution. The courts are thus afforded a generous discretionary power to make 'any order that is just and equitable' and 'appropriate'. This again clarifies that the High Court did not consider itself to be bound by the narrow provisions of any applicable subsidiary legislation or section 139 of the Constitution; rather, it considered it appropriate, based on the context, to transcend these limitations and grant relief under the broad remedial powers of section 172 of the Constitution.

As such, the High Court held that once it had declared that the jurisdictional facts for a mandatory section 139 intervention were present, it was entitled and mandated to exercise its discretion in terms of section 172*(1)(b)* of the Constitution to make any just and equitable order (whether requested or not).[165] The court was satisfied that there were no reasonable prospects that another court would differ from this finding.

Again relying on section 172*(1)* of the Constitution, the court further confirmed that courts have the power to order the provincial executive to dissolve a municipal council, provided that the legislative preconditions are present and the relief is just and equitable, such as was the

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[163] Ibid paras 9, 11, 34.

[164] Ibid para 34. The High Court referred with approval to *Ngomane v City of Johannesburg* 2020 (1) SA 52 (SCA) paras 21-2, 69 in which the SCA held that the infringement of rights caused distress and was a breach of the right to dignity.

[165] Ibid para 13. The High Court relied on *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), *Ngomane* supra note 164 para 22, *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) para 26.

case in the Makana Local Municipality.[166] The High Court emphasised multiple factors which influenced this just and equitable decision, including the long history of the matter,[167] the undisputed cause of the problems faced by the municipality, the municipal council's undisputed failure to implement specifically-designed solutions, the provincial government's undisputed failure to intervene 'at any level' or exercise its discretion at all,[168] and the respondents' consistent failure to place sufficient evidence before the court. The High Court was again satisfied that there were no reasonable prospects that another court would differ from this finding.

Finally, the High Court, clearly appreciative of the need to respect local government autonomy, cautioned that its decision should not set a precedent for all courts to compel the dissolution of a municipal council, noting that each municipality would experience a different factual matrix which would require judicial consideration of the particular circumstances and facts, and which would inevitably result in a diversity of judgments and orders.[169]

4.4.3. Makana Local Municipality (application for leave to appeal to the SCA)

The provincial and local government respondents petitioned the SCA for leave to appeal the judgment of the High Court.

At this stage, however, the SCA served only as a catalyst for a political solution, by converting a consensual agreement between the parties into a court order. This catalytic judicial role was necessarily intertwined with the prevailing attitudes of the parties, including a strong assertion by the respondents that a section 139 intervention falls within the exclusive domain of the

[166] Ibid paras 23-7, with reference to the statements on the doctrine of separation of powers set out in David Dyzenhaus 'The constitution of law: Legality in a time of emergency' (2006) at 5.

[167] Ibid paras 23, 31. This history included 'four years of reminders, queries and prompting (both in respect of the local and provincial respondents)' with the municipality still not implementing the financial recovery plan 'despite its stated urgency back in 2015' and that 'but for the intervention of the UPM, "same old same old" would no doubt still be in existence today'.

[168] Ibid paras 24-5, 28-9.

[169] Ibid paras 35, 37.

executive and the inevitable effluxion of time which, in any event, had led to a replacement of the municipal council following the 2021 local government elections.

As such, on 10 March 2022, the SCA by agreement between the parties declared the Makana Local Municipality's updated financial recovery plan an order of court. The court order further required the provincial executive to prepare progress reports every 3 months and permitted the UPM to approach the court if insufficient progress was reflected in these reports.[170]

As of August 2023, the Makana Local Municipality remains under an ongoing section 139*(5)* intervention.

4.4.4. Mafube Local Municipality

The Mafube Local Municipality is a local municipality located within the Fezile Dabi District Municipality in the Free State province.[171] Towns that fall within the jurisdiction of the municipality include Cornelia, Frankfort, Tweeling and Villiers.

The municipality has consistently received poor audit findings, including a qualified audit with findings between the 2018/19 and 2020/21 financial years and a disclaimed audit with findings between the 2012/13 and 2015/16 financial years (and again in the 2017/18 financial year).[172] In the 2016/17 and 2021/22 financial years, the municipality's audit was not finalised by the required date.

Mafube Local Municipality has also experienced challenges with service delivery and the maintenance of municipal infrastructure over a number of years. It has struggled with ensuring refuse removal, managing dumping sites, protecting the environment (including the upper Vaal River), and repairing and maintaining sewage pumps, works and roads. The High Court ordered the municipality to repair the sewage pumps servicing the Namahadi township in Frankfort on

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[170] See Rod Amner 'Makana's Financial Recovery Plan now an order of the Supreme Court of Appeal' *Grocott's Mail* (10 March 2022) available at https://grocotts.ru.ac.za/2022/03/10/makanas-financial-recovery-plan-now-an-order-of-the-supreme-court-of-appeal/, accessed 22 June 2022.

[171] See Municipalities of South Africa 'Mafube Local Municipality (FS205)' available at https://municipalities.co.za/overview/1039/mafube-local-municipality, accessed 22 June 2022.

[172] AGSA op cit note 8.

two occasions (in June 2004 and August 2008), and granted various orders against the municipality in relation to continued sewage spillages caused by failing sewage works and by the municipality's persistent failure to comply with those court orders between October 2014 and January 2017.[173]

The municipality has also faced challenges in paying its Eskom account (leading to Eskom disconnecting the supply of bulk electricity to the municipality) and in paying the salaries of its employees between 2014 and 2020 (resulting in industrial action and protest action which further exacerbated its service delivery failures).[174]

On 6 April 2017, the CoGTA MEC announced that the provincial executive was commencing a discretionary section 139*(1)(b)* intervention in Mafube Local Municipality (although there were subsequent allegations that this process was flawed), with the MFRS reportedly preparing a draft financial recovery plan for the municipality (although it was alleged that this was never implemented).[175]

The situation in the municipality did not improve. Some of the municipality's movable and immovable property was attached between 2016 and 2018 in terms of various court orders and a further attachment order in favour of Eskom (in the amount of approximately R61 million) was issued in August 2020. Further, in a complaint to the SAHRC dated 30 November 2018, the municipality was identified as being primarily responsible for the pollution of the upper Vaal River. The community offered to assist the municipality, proposing clean-up programmes and offering to make repairs at water treatment plants.[176] Further, following various meetings and workshops between September and November 2019, the Mafube Business Forum[177] offered to assist with revenue generation and debt collection. These meetings and workshops culminated in a proposed joint venture between government and the business community to

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[173] *Mafube* supra note 4 paras 15-7.

[174] Ibid paras 18-20.

[175] Ibid paras 29, 32-3, 46.

[176] Ibid paras 21-4, 27.

[177] The Mafube Business Forum is a non-profit organisation, formed during August 2019 to represent business interests in the municipality and includes farmers and construction, engineering and local businesses.

address the municipality's challenges 'in a co-operative fashion and by involvement of the local community', although these were ultimately unsuccessful.[178]

In both May and November 2020, the Mafube Business Forum sent letters to the CoGTA Minister setting out the situation in the municipality and noting the national executive's obligations in terms of section 139*(7)* of the Constitution.[179] No response was received to either of these letters. In fact, the outcome was quite the opposite: on 11 December 2020, the provincial executive resolved to terminate the section 139*(1)(b)* intervention in the municipality with effect from 30 March 2021, albeit with an undertaking to provide continued post-intervention support under section 154 of the Constitution.[180]

Concerned with this outcome, the Mafube Business Forum and Afriforum[181] approached the High Court on 4 May 2021 for an order to compel the national executive to intervene in the municipality in terms of section 139*(7)* of the Constitution, effectively 'leapfrogging' a mandatory section 139*(5)* intervention by the provincial executive.[182] (In the alternative, the applicants sought an order compelling a mandatory provincial intervention in terms of sections 139*(4)* and *(5)* of the Constitution.) While the applicants did initially seek the dissolution of the municipal council, this relief was abandoned at the hearing of the matter in January 2022, given that the 2021 local government elections had superseded the relief sought and that there was no evidence that the newly elected municipal council had committed any 'wrongs or failures'.[183]

Relying on *UPM1*, the applicants also requested a declaration that the municipality was in breach of its constitutional obligations (under sections 152*(1)* and 153*(a)* of the Constitution), that the provincial discretionary section 139 intervention had failed, that the jurisdictional facts

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[178] *Mafube* supra note 4 paras 24, 53-4. The joint venture was referred to as the 'Dawning of a New Day: The Mafube Stakeholders' Compact'.

[179] Ibid para 45.

[180] Ibid para 33.

[181] Afriforum is a non-profit organisation acting on behalf of its members residing within the jurisdiction of the municipality.

[182] *Mafube* supra note 4 paras 41-4, 46.

[183] Ibid paras 1, 12, 58, 62.

for a mandatory national intervention had been established, and that the provincial government respondents had failed to fulfil their mandate under section 139 of the Constitution and the MFMA (through their failure to escalate the section 139 intervention proactively).[184] The applicants also sought an order permitting the Mafube Business Forum to temporarily oversee and assist in the municipality's administration, until the municipality could 'demonstrate to the [high] court that it can successfully execute its constitutional and legislative obligations'.[185]

The local and provincial government respondents (including the municipality, executive mayor, municipal manager, administrator, municipal council, premier, provincial executive council, and relevant MECs) submitted a single answering affidavit. The Minister of Finance and the President also each filed answering affidavits.[186]

The local and provincial government respondents did not dispute that the municipality was facing 'serious challenges', that its financial state was 'dire', and that it had breached its constitutional obligations.[187] The Minister of Finance also conceded that, since the implementation of the discretionary section 139 intervention, the financial position of the municipality had 'in fact worsened', resulting in the municipality owing creditors approximately R716 000 million.[188]

As such, all of the respondents accepted that a decision by the provincial executive for a mandatory section 139*(4)* and *(5)* intervention was required and conceded that such mandatory provincial intervention would be implemented imminently and 'in consultation with the national sphere of government and the [m]unicipality'.[189] The applicants, in response, noted that the province had 'yet to implement such mandatory intervention', placing reliance on the High Court's consideration of similarly vague undertakings in *UPM1*.[190]

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[184] Ibid paras 1, 38, 44-6, 50.

[185] Ibid para 57.

[186] Other respondents included the relevant district municipality, the CoGTA Minister and the NCOP.

[187] *Mafube* supra note 4 paras 28, 30-1, 46-7.

[188] Ibid paras 32-3, 46-7.

[189] Ibid paras 13, 46-7, 62, 73.

[190] Ibid paras 46-51.

The Minister of Finance and President also submitted that, in interpreting section 139*(7)* of the Constitution, consideration must be given to the 'constitutional scheme of co-operative governance' and the context of the Constitution 'as a whole'.[191] In the circumstances, the Minister of Finance and President argued that the requested relief under section 139*(7)* of the Constitution was 'inconsistent with the constitutional and legislative scheme', 'not competent', 'unlawful' and 'premature' given that the requisite jurisdictional facts had not been established, as well as an 'inappropriate' and 'impermissible intrusion' on the powers of national government.[192]

The High Court handed down its decision on 28 April 2022.

4.1.1.3. *Was the High Court willing to consider the matter?*

Arguments regarding the possible preclusion of judicial involvement (based on, for example, the applicants' *locus standi*, the principle of subsidiarity or the inherent justiciability of section 139 disputes) were not raised by the applicants or considered by the High Court. Instead, the High Court considered the interpretation of section 139*(7)* of the Constitution and its authority to 'leapfrog' over the role of the provincial government and to 'sanction' such national intervention.[193]

The High Court appeared to accept the in-principle justiciability of the matter and, as in *UPM1*, positioned the need for its involvement within the context of the plight of the applicants[194] and the generally dilatory responses of the respondents (despite the respondents' indication that a mandatory section 139 intervention would be initiated).[195] Further, as was the case in *UPM1*, a relevant consideration for judicial involvement was the undisputed agreement that the municipality was facing serious challenges, was in 'financial distress' with a 'dire' financial

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[191] Ibid para 65, with reference to *Premier, Gauteng v Democratic Alliance* 2022 (1) SA 16 (CC) ('*Tshwane*') paras 63-4, 94.

[192] Ibid paras 14, 62-5, 73. The jurisdictional facts to be established include a declaration of a mandatory section 139*(4)* or *(5)* intervention and a subsequent failure by the provincial government in implementing such intervention.

[193] Ibid para 3

[194] Ibid paras 3, 69-70, 83-4.

[195] Ibid paras 72, 74, 80-1, 83.

state, and was unable to 'execute its most basic constitutional functions' regarding service delivery and maintenance of infrastructure.[196]

Further, the court was not convinced that it was precluded from considering the matter by virtue of the provincial executive's indication that a mandatory intervention in terms of sections 139*(4)* and *(5)* of the Constitution, involving consultation with all three spheres of government, was 'imminent'.[197] In particular, the court took cognisance of the history of events, the unsuccessful discretionary section 139 intervention, the province 'sitting on its hands' since (at least) March 2021 when it was 'evident' that mandatory intervention was required, a consistent failure of the constitutional accountability and intergovernmental monitoring and support mechanisms, and only a 'vague concession' that a mandatory intervention would be forthcoming, all of which provided the court with scant comfort that its involvement was not required.[198]

Finally, while the High Court did not engage with the doctrine of separation of powers (beyond noting the applicants' reliance on *UPM1* in this regard), it indicated its 'satisfaction' that, in terms of the corrective nature of section 172*(1)(a)* of the Constitution, courts are 'entitled' to declare conduct unconstitutional where it fails to comply with the Constitution.[199]

4.1.1.4. *What was the extent of the High Court's involvement?*

The High Court positioned the interpretation of section 139*(7)* of the Constitution (which it noted had not previously been undertaken by the courts) within the context of the Constitution as a whole, and with due consideration of the broad statutory powers available to the provincial executive (including under the Systems Act).[200] It thus emphasised the autonomy of local government and the principles of co-operative governance, as well as the obligation imposed on both national and provincial government to support and strengthen the capacity of

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[196] Ibid paras 19, 28, 31, 33, 41, 46.

[197] Ibid paras 31, 46-7.

[198] Ibid paras 73-4, 81. Also see the similar findings in *UPM1* supra note 1 paras 92, 96.

[199] Ibid paras 81, 83.

[200] Ibid paras 41-2.

municipalities.[201] This approach bears a strong similarity to the approach adopted by the majority in *Tshwane*.[202]

The High Court held that none of the respondents had disputed the allegations of a breach of constitutional obligations by the municipality, although the provincial government did allege that conditions had improved since the discretionary intervention.[203] The court also held, in the context of the requirements for a structural interdict involving the Mafube Business Forum's possible assistance to the municipal council, that the applicants had demonstrated 'clear rights that accrue to themselves and the residents of the [m]unicipality' and that these rights were still being 'violated directly and indirectly by abject failure of good governance'.[204]

Against this background, the court was satisfied that it was 'entitled' under section 172*(1)(a)* of the Constitution to declare the local government respondents in breach of their 'constitutional, legislative and regulatory obligations towards their residents' and to declare their conduct constitutionally invalid.[205] As was the case in *UPM1,* the court thus extended the scope of its involvement beyond the ambit of the subsidiary legislation or section 139 of the Constitution, into the realm of the discretionary remedial powers contained in section 172 of the Constitution.

When considering the type of intervention that was warranted in the circumstances, the court noted that the respondents had all conceded that a mandatory provincial intervention was required.[206] As such, the court had no difficulty in finding that the jurisdictional facts which trigger such mandatory intervention 'are now present and have consistently been present in the past'.[207]

The question remained, however, whether the court could sanction a national intervention which would 'leapfrog over' any possible further mandatory provincial intervention. The court

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[201] Ibid para 34-7, 66-8.

[202] See *Tshwane* supra note 191 paras 49, 55, 60-4, 81, 89, 91, 95, 108, 116, 123.

[203] *Mafube* supra note 4 paras 28, 30, 33, 46, 83.

[204] Ibid paras 50, 52, 56, 84.

[205] Ibid para 83, Orders 1.1 and 1.2.

[206] Ibid paras 13, 46-7, 62, 73, 81-3.

[207] Ibid para 70, Order 1.5.

was dismissive of the respondents' 'vague' indications of intent to initiate a mandatory provincial intervention, in the absence of any 'clear terms' setting out 'exactly what and when it intends to do so'.[208] It thus held that the provincial government respondents' failure to intervene and resolve the issues was inconsistent with the Constitution and constitutionally invalid. The court also acknowledged the similarities with *UPM1,* in that the applicants and residents had done their 'level best' to obtain intervention by the provincial and national executive 'to provide a solution for the ongoing difficulties experienced by the municipality', to no avail.[209]

As was the case in *UPM1*, these findings indicate an underlying concern with the integrity and healthy functioning of the applicable democratic institutions, structures and processes, the ability of the available constitutional accountability mechanisms to address governance collapse, and the responsiveness of local and provincial government.

In the circumstances, the High Court held that an order for a mandatory provincial intervention, 'at least', was required. However, despite the suggestion (in similar circumstances) in *UPM2* that the court may have considered granting a national intervention under section 139*(7)* of the Constitution if this had been requested,[210] the Hight Court in *Mafube* adopted a deferent approach to this request. The court held that, on a proper interpretation of section 139*(7)* of the Constitution read within the appropriate constitutional scheme, national intervention could only be triggered if a province cannot or has not exercised the powers and performed the functions set out in sections 139*(4)* and *(5)* of the Constitution. In this matter, the High Court held that it could not presuppose that the provincial executive would 'inevitably fail to intervene successfully'; this was something that remained to be seen, meaning that it was premature for the High Court to consider this constitutional issue.[211]

However, the High Court was satisfied that section 172*(1)(a)* of the Constitution entitled courts to grant structural interdictory relief.[212] As such, the order included specific directions

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[208] Ibid para 83.

[209] Ibid. Also see *UPM1* supra note 1 para 62.

[210] Ibid para 32.

[211] Ibid paras 77-9, 89-90.

[212] *Mafube* supra note 4 para 83.

regarding the approval of a temporary budget or revenue raising measure to give effect to the financial recovery plan, the implementation of a recovery plan (with due regard to the existing financial recovery plan) and immediate action to ensure that pollution of the Vaal River by the municipal sewage works ceased immediately.[213]

Finally, and presumably to demonstrate that its order was just and equitable, the High Court specifically held that its order 'goes toward' ensuring the provision of basic services to the municipality's residents and resolving the ongoing financial crisis in the municipality.[214]

On 11 May 2022, following the decision, the Free State provincial executive announced its decision to initiate a section 139*(5)(a)* and *(c)* intervention in the Mafube Local Municipality.[215] However, this does not appear to have resolved the municipality's challenges: in May 2023, the applicants again approached the High Court requesting that the provincial government take effective action to comply with the order. On 3 October 2023, the High Court dismissed this application, finding that steps had indeed been taken to comply with the order.[216]

4.4.5. Reflections: A judicial role conception in the second wave

As in the first wave, judicial involvement in the second wave cases arises from community-led litigation in which assistance is sought to 'fix' the municipality through a court-ordered mandatory section 139 intervention. Further, the involvement of the courts tends to arise only after extensive, unsuccessful attempts to engage with the local, provincial and/or national spheres of government to resolve the challenges facing the municipality. Finally, as in the first wave, judicial involvement catalyses a political solution, with the government respondents conceding that the jurisdictional facts have been established and that a mandatory provincial section 139 intervention is required. Certain preliminary steps are generally taken, which

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[213] Ibid Order 2.

[214] Ibid para 83.

[215] See NCOP Cooperative Governance and Traditional Affairs, Water and Sanitation and Human Settlements Committee 'Withdrawal of section 139 interventions; Mafube and Maluti a Phofung Local Municipalities; State of forensic investigations in municipalities' (17 May 2022) available at https://pmg.org.za/committee-meeting/34935/?via=homepage-card, accessed 22 June 2022.

[216] *Mafube Business Forum v Premier of the Free State Province* [2023] ZAFSHC 377 (3 October 2023) paras 46-9.

(purportedly) reflect the government respondents' intention to take the necessary steps to facilitate a mandatory intervention.

However, unlike in the first wave, these statements of intent and preliminary steps, and the government respondents' political claim over the section 139 intervention decision, do not result in the conclusion of a settlement agreement. Instead, litigants refuse to be relegated to a hostile and ineffectual political arena amid growing scepticism of the ability of constitutional accountability mechanisms to address local governance collapse, without judicial oversight and supervision. The enhanced judicial role also appears to be indicative of a recognition that the challenges faced by local government are too immense, and the local government collapse too fundamental, to allow the courts to function only as a catalyst of political solutions.

The judicial role conception in the second wave of Category 2 is thus shaped by three core questions. First, assuming the fulfilment of the jurisdictional facts, whether the courts should question the provincial executive's failure (or mere indication of intent) to initiate a section 139 intervention in a municipality (a type of justiciability assessment). Second, whether the courts should adopt a high level of scrutiny over the provincial executive's failure to initiate, or delayed response in initiating, a section 139 intervention (an assessment of the extent of the courts' involvement). Third, whether the courts should be prescriptive in their oversight role (an assessment of remedial prescriptiveness).

4.1.1.5. *The justiciability of a failure to initiate a section 139 intervention*

The courts have adopted a liberal approach to the justiciability of a provincial or national executive's failure to initiate a section 139 intervention in a dysfunctional municipality. In particular, the High Courts have (at this stage) rejected any potentially constraining factors which have been argued as a limitation on the judicial consideration of Category 2 matters.

For example, while the issue of standing was not comprehensively considered in either *UPM1* or *Mafube*, the court appeared to accept that standing arises if applicants (or their members) live within the jurisdiction of the municipality as recipients of service delivery.[217] As set out in *UPM2*, this suggests judicial acceptance that standing arises in the second wave based on an

[217] *UPM1* supra note 1 paras 3-4, fn 50.

underlying socio-economic rights infringement in the municipality, in terms of section 38 of the Constitution.[218]

Further, the High Court has chosen to sidestep the subsidiarity argument with a preferred reliance on the broad powers of the courts to grant just and equitable relief under section 172 of the Constitution in respect of any conduct that is inconsistent with the Constitution, rather than a reliance on the more restrictive parameters of section 139 of the Constitution or the relevant subsidiary legislation. This reliance has been broadly justified with reference to local government's admission of a breach of their constitutional obligations, intertwined with the nature and history of the disputes, the dilatory responses of the government respondents, and the underlying infringement of constitutional rights.[219]

The High Court has also rejected arguments that judicial involvement is precluded where the provincial government respondents have, in the interim, elected to (or indicated an intention to) take peremptory action or 'intervening steps' in terms of section 139*(5)* of the Constitution. In other words, the courts have not acceded to the executive's attempts to assert a political separation of powers claim over the section 139 intervention decision to preclude judicial involvement, particularly in circumstances in which the executive fails to acknowledge or address its own dysfunction. This appears to reflect the courts' concern with the plight of the applicants (implicitly paired with the underlying rights violations) and faltering belief in the ability of the democratic institutions, structures and processes to address the challenges in local government. This concern is enhanced by the inattentive, incompetent and, at times, intransigent approach of the executive in taking action and in providing the court with detailed information as to the nature and progress of the initiated or proposed section 139 intervention.

However, the executive's attempts to assert a political separation of powers claim over the section 139 intervention decision to preclude judicial involvement may be more persuasive in a 'political type-of intervention' (such as litigation where a municipality fails to pass a

[218] *UPM2* supra note 3 para 34.

[219] *UPM1* supra note 1 para 22; *Mafube* supra note 4 para 83.

budget[220]) where separation of powers concerns may require a higher degree of judicial deference. However, this type of matter is yet to be considered by the courts.

4.1.1.6. *The level of judicial scrutiny*

The level of judicial scrutiny adopted by the courts in the second wave has been substantially guided by the approach of the government respondents who have not disputed, or have conceded, that the relevant municipality is experiencing a crisis in its financial affairs which has resulted in a serious or persistent material breach of its obligations to provide basic services and to meet its financial commitments. The provincial executive has also conceded that a mandatory intervention is required in the circumstances and has indicated an intention to take peremptory action or 'intervening steps' in terms of section 139*(5)* of the Constitution. Based on these acknowledgements and concessions, the courts have accordingly not been required to assess whether the jurisdictional facts for a mandatory section 139 intervention have been established in the second wave.

Based on a traditional understanding of the doctrine of separation of powers, it would arguably fall outside the parameters of the judicial role to prescribe to the provincial executive to implement a mandatory section 139 intervention, when the provincial executive has already indicated that it intends to do just that and, in the process, has already provided a solution to the concerns raised by the applicants.[221] In other words, there is an argument that respect should be shown for the processes adopted by the provincial executive, which may resolve the issues without judicial involvement. In a different context, the Constitutional Court has held that courts are 'not meant or empowered to shoulder all the governance responsibilities of the South African state'.[222]

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[220] This seems increasingly possible, including in municipalities run by coalition governments. See, for example, Rapula Moatshe 'Gauteng threatens to put City of Tshwane under administration again' *IOL* (17 April 2023) available at https://www.iol.co.za/pretoria-news/news/gauteng-threatens-to-put-city-of-tshwane-under-administration-again-45fca46e-7918-47d0-b312-d71fce3e7583, accessed 22 June 2023.

[221] Also see paragraph 2.3.2 of Chapter 2.

[222] See *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC) paras 66-8.

In the second wave, however, the High Court has been willing to extend its involvement and accept a higher level of scrutiny, despite the provincial executive's indicated intention. In this regard, the High Court has focused on the adjudication of both the breach of the constitutional obligation(s) of a dysfunctional municipality and the breach of the constitutional duty by the provincial executive in failing to timeously initiate a mandatory section 139 intervention when the jurisdictional facts have been established. In the process, and with a contextual understanding of section 139 of the Constitution,[223] the High Court has clearly situated its role within the broader scope of section 172 of the Constitution, beyond the bounds of the subsidiary legislation or section 139 of the Constitution.

This approach has developed in the context of admitted local government dysfunction and collapse, persistent service delivery failure, endemic government incompetence and intransigence, the systemicity[224] of the cases and the importance to the public.[225] In adopting this approach, the High Court does not appear to regard itself as usurping the provincial executive's powers and discretion. Rather, its orders effectively direct the provincial executive to ensure the implementation of the section 139 intervention without delay based on the history of the matters and the resultant special and dire circumstances.

This democracy-reinforcing or protective type of judicial review, which extends judicial involvement and permits a higher level of scrutiny, focuses on the harm caused to the democratic process (as illustrated though the long history of the matters), the executive's adoption of an unhelpful or obstructionist stance and its failure to provide important information at relevant times, and the harm to individuals arising from the democratic process

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[223] See *Mafube* supra note 4 paras 41-2; *UPM1* supra note 1 paras 15, 55, 84-5, 94.

[224] See Gaurav Makherjee & Juha Tuovinen 'Designing remedies for a recalcitrant administration' (2020) 36(4) *SAJHR* 386 at 394, in which the term was used to refer to 'the characteristics of an individual case to be representative of the underlying systemic problem of governmental incompetence, inattentiveness, intransigence, or persistent non-compliance with a judicial order'.

[225] Also see the discussion in paragraph 2.3.5 of Chapter 2.

dysfunction (through the underlying and ongoing socio-economic rights violations, albeit that these are only noted and not directly addressed by the court).[226]

This approach also seems to suggest implicit judicial support for the role of litigation in the second wave, despite its expense and requirement for expertise, to the extent that it enhances participative democracy, ensures that government is held accountable (particularly between elections), and results in a more responsive provincial executive, acting in good faith to fulfil its constitutional duties in providing monitoring and support and, where applicable, intervention in local government.[227]

4.1.1.7. *The remedial prescriptiveness of the courts*

The main remedies sought in the second wave include a declaratory order that a municipality is in breach of its constitutional obligations or that the jurisdictional facts for a mandatory section 139 intervention are present, and an order compelling a provincial or national executive to intervene in a dysfunctional municipality in terms of section 139 of the Constitution, as read with the relevant provisions of the MFMA. An alternative remedy to solve the root cause(s) of some of the underlying challenges faced by a municipality (such as municipal dysfunction, poor service delivery or an underlying socio-economic rights violation) may also be requested or considered by the courts, but not as a substitute for the section 139 intervention.

The remedial prescriptiveness of the courts in the second wave is materially shaped by the triggering of sections 172*(1)(a)* and *(b)* of the Constitution and the courts' understanding of the mandate to declare invalid any conduct that is unconstitutional and to provide just and equitable relief, as well as appropriate relief for infringements of constitutional rights. In this context, the courts have indicated a willingness to grant the requested declaratory relief, particularly where the breach of constitutional obligations is not disputed and the factual matrix is generally agreed upon by all the parties.

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[226] See the paragraph 2.3.5 of Chapter 2 and the similarities with *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) paras 73-5 and *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC) paras 36, 56-8, 66.

[227] See the approach of the Constitutional Court in *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) paras 8, 59, 160-5, regarding the role of litigation in socio-economic rights disputes.

The courts have further demonstrated a willingness to compel or fortify a mandatory section 139 intervention, where they perceive that failure to make such an order would result in the incapacitation or collapse of the municipality or would be more harmful for service delivery with the potential to trigger a potentially catastrophic socio-economic rights violation or would relegate desperate communities to already dysfunctional democratic institutions, structures and processes. This perception appears to be shaped by the courts' understanding of the history of the municipal dysfunction and the steps that have been taken to address this dysfunction, as well as the responsiveness of the government respondents during the litigation and interactions with the courts which suggest incompetent or intransigent governmental conduct.

However, there have been instances of deference in the second wave. For example, the 2015 Financial Recovery Plan was supported by the High Court as a 'living' document in *UPM1*, while the High Court did not support 'leapfrogging' over a mandatory provincial section 139 intervention in *Mafube*. This suggests an underlying judicial cognisance of the bounds of the doctrine of separation of powers, respect for the margin of discretion afforded to the provincial executive and an intention not to bypass the democratic process envisaged by the Constitution without good cause.

Although not yet considered in this second wave, it further seems likely that the courts would refuse to compel or fortify a mandatory section 139 intervention where the facts are disputed, or if the courts hold the view that compelling an intervention would amount to judicial overreach, intrude impermissibly into local government autonomy, undermine the integrity and functioning of democratic institutions, structures and processes (assuming the executive has given an indication of intent to initiate a section 139 intervention) or would be more harmful to the fulfilment of service delivery and underlying socio-economic rights of residents than non-intervention.

A further remedy which may be sought in the second wave is for the intervention to assume a specific form (such as the imposition of a financial recovery plan or the dissolution of the municipal council). This means that the courts are asked to ensure that the executive exercises its margin of discretion in assessing the establishment of the jurisdictional facts and initiating a mandatory section 139 intervention in a dysfunctional municipality, while simultaneously circumscribing the executive's discretion in relation to the manner or form of such intervention.

In this context, the remedial prescriptiveness is shaped by the broad remedial powers in section 172*(1)(b)* of the Constitution, which enable the courts to fashion more prescriptive remedies including, for example, the dissolution of the municipal council. However, in a similar manner to the caution expressed by the Constitutional Court in relation to its remedy in *Black Sash1*,[228] the High Court in *UPM1* stressed that dissolution was to be used cautiously and in exceptional circumstances only. The court thus seemed to recognise the underlying importance of respecting local government autonomy and to favour a less restrictive measure, similar to the approach adopted by the majority in the Constitutional Court in *Tshwane*,[229] unless exceptional circumstances are established. It is thus likely that more invasive remedies (such as dissolution of the municipal council which has previously obtained the necessary political support to remain in office) will only be granted where there is a perceived likelihood of non-compliance with the court order based on the history of the matter or where there is the likelihood of serious harm.[230]

4.1.1.8. *The factors shaping a review of a failure to initiate a section 139 intervention*

The courts' level of scrutiny and remedial prescriptiveness in the second wave has been broadened and heightened with the judicial acceptance of the triggering of section 172 of the Constitution. The four factors identified in Chapter 2 further appear to play a role in guiding, in their interaction, the level of scrutiny and remedial prescriptiveness adopted by the courts in the second wave.

First, the courts appeared to apply the doctrine of separation of powers in a flexible and tactical manner to justify their approach to systemic dysfunction in the democratic institutions, structures and processes, in line with transformative constitutionalism and a need to protect the 'democratic project'.[231] In other words, democratic process dysfunction appeared to provide the rationale for judicial intervention in the second wave for the purposes of protecting

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[228] *Black Sash* supra note 226 paras 14, 22, 51.

[229] Also see *Tshwane* supra note 191 paras 78, 87-8, 126.

[230] See paragraphs 2.2.4.3 and 2.3.5 of Chapter 2. Also see *Mwelase v Director-General: Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) para 69: with Cameron J observing the existence of 'failing institutional functionality of an extensive and sustained degree' that 'cried out for remedy'.

[231] *UPM1* supra note 1 para 94.

democracy.[232] Further, while not expressly stated, there was a suggestion of judicial recognition of the corrective principle in section 172*(1)* of the Constitution (allowing correction to the extent of the constitutional inconsistency), which ensures that there will be no violation of the doctrine of separation of powers.[233] However, the courts did not engage with the content of the doctrine of separation of powers or explain how and why it was applied in a specific manner in the particular circumstances of the second wave.

Second, the courts paid particular attention in the second wave to governmental action and responsiveness. In both *UPM1* and *Mafube*, for example, the executive's dilatory, unhelpful and vague responses, and delayed and half-hearted actions, appeared to catalyse the High Court to adopt a more interventionist approach through triggering section 172 of the Constitution, in an attempt to protect desperate communities more directly. This galvanised the High Court to 'fortify' promises of mandatory provincial section 139 interventions with court orders and, in exceptional circumstances, to direct the dissolution of a municipal council despite the intrusion on municipal autonomy.

This more interventionist judicial approach could be seen as enhancing and supplementing participative democracy by attempting to hold an incompetent or intransigent government accountable, particularly between elections. However, the necessary corollary to this approach is that the courts will be more likely to impose a lower level of scrutiny and a less prescriptive remedy when the government is merely inattentive or lacking in capacity but is responsive and engaged.[234]

Third, the approach of the courts to 'fortify' a promise of a mandatory provincial section 139 intervention with a court order suggests the courts' concern with the integrity and healthy functioning of the applicable democratic institutions, structures and processes. As observed in the second-wave socio-economic rights disputes, when the courts are satisfied that the democratic institutions, structures and processes are functioning, there is more willingness to encourage an intergovernmental dialogue and the (meaningful) engagement of these

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[232] See the discussion in paragraph 2.3.2 of Chapter 2.

[233] *UPM1* supra note 1 paras 92-5. Also see *AllPay2* supra note 226 para 45.

[234] See *Mazibuko* supra note 227 paras 8, 59, 160-1.

institutions, and to structure a corresponding remedy, in a type of dialogic review.[235] In the second wave, it would seem that the courts' belief in the ability of the constitutional accountability and intergovernmental monitoring and support mechanisms to avert or correct governance collapses, appears to be faltering, but has not yet failed completely. Of course, this approach may be misplaced when democratic structures and processes have, historically, been unresponsive, ineffective and dysfunctional, which may motivative the courts to apply a higher level of scrutiny and impose a more prescriptive remedy.[236]

Fourth, while applicants in the second wave have not yet directly argued a socio-economic rights violation, the courts have been aware of the underlying rights violations within the municipalities. While they have not directly assessed or engaged with these violations, this is what seemingly motivates the courts to transcend the confines of section 139 of the Constitution and resort to section 172 to ground their orders. This seems to imply that, where the impact of the government's acts or omissions on socio-economic rights is severe or has the potential to be severe, the level of judicial scrutiny and remedial prescriptiveness will be heightened.

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[235] See paragraph 2.3.5 of Chapter 2; Katharine Young *Constituting Economic and Social Rights* (2012) at 167-176; Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 1 *VRÜ* 25.

[236] See, for example, Stuart Wilson & Jackie Dugard 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 22 *SLR* 664 at 665, 670-672.

CHAPTER 5: CATEGORY 3 – THE JUDICIAL ROLE IN MATTERS WHICH (SHOULD) TRIGGER A CONSIDERATION OF SECTION 139 OF THE CONSTITUTION

'The facts… graphically illustrate the distressing state of municipal governance in [South Africa] and depict the dysfunctional state of affairs bedevilling local government'.[1]

5.1. Introduction

Despite the developing trend of community-led litigation seeking a court-ordered mandatory section 139 intervention in dysfunctional municipalities, such relief is often not sought as relief or considered by the courts, even when it appears to be highly likely that the jurisdictional facts for such intervention could be established: Category 3.

In Category 3, the affected municipality is (often admittedly) experiencing a financial crisis, which has led to a serious or persistent failure to meet its financial commitments (often to Eskom), or to provide basic services (such as electricity, water and sanitation services), or both. This financial crisis, and the municipality's concomitant breach of its constitutional and statutory obligations, has the potential to trigger ongoing macro-level socio-economic rights violations. Further, the constitutional accountability and intergovernmental monitoring and support mechanisms which should be utilised in response to such systemic municipal dysfunction and collapse, in terms of Chapters 3 and 7 of the Constitution, appear to be failing.

Category 3 thus operates as a 'catch-all category', considering the judicial role in these matters which trigger or, this Chapter argues, *should* trigger a consideration of the mandatory section 139 intervention mechanism in a dysfunctional municipality.

The judicial role in Category 3 originates in litigation challenging systemic municipal dysfunction. This litigation may be initiated by disgruntled local businesses or community-led litigants, municipalities or Chapter 9 institutions. Instead of a court-ordered mandatory section 139 intervention, the Category 3 litigants seek some kind of alternative relief to avoid the consequences or address the effects of municipal collapse, which would otherwise trigger a

[1] *Eskom Holdings v Resilient Properties* 2021 (3) SA 47 (SCA) ('*Resilient*') para 2.

section 139 intervention. For example, litigants may request either adherence to traditional constitutional accountability and intergovernmental monitoring, support and dispute resolution mechanisms, or a bypassing of such mechanisms in favour of 'innovative' alternatives, such as a court-sanctioned assumption of control by a community over the affected municipal services or the ring-fencing of funds.

The relief sought may be linked with litigants' uncertainty as to the underlying causes for the underperformance or failures of a particular municipality,[2] or in relation to the efficacy of traditional intergovernmental dispute resolution or intervention mechanisms to bring about a material change or improvement in a dysfunctional municipality.

The absence of any request for a court-ordered section 139 intervention poses a challenge for the appropriate judicial role in the context of these 'doomed'[3] municipalities that are, on the facts, experiencing a financial crisis, unable to meet their financial commitments and/or unable to ensure adequate service delivery. Questions include whether the (often contested) establishment of the jurisdictional facts for a section 139 intervention should automatically 'ignite' judicial consideration of such intervention, and whether courts can nevertheless compel a mandatory section 139 intervention as appropriate relief for large-scale socio-economic rights violations.

Category 3 is separated into two sub-categories. The first sub-category considers the judicial role in matters where litigants (a municipality, community, local businesses, chambers of commerce, and/or non-governmental organisations) are seeking to 'keep the lights on'. This sub-category necessarily involves the public-law relationships and reciprocal rights and duties between Eskom (a public service provider with a financial concern about supplying electricity without payment), dysfunctional municipalities (which are 'seemingly the cause of the whole problem' and often admit to being unable to meet financial commitments to Eskom), and consumers of electricity resident within the municipality (who would experience catastrophic consequences if the electricity supply was interrupted or reduced and who may already be subject to socio-economic rights violations as a result of the municipality's financial crisis).

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[2] See, for example, *Sakeliga v Auditor-General South Africa* [2023] ZAGPPHC 501 (30 June 2023) paras 3-4, 7-8, 45.

[3] *Resilient* supra note 1 para 97.

The judicial role in this sub-category thus requires a consideration of intergovernmental dispute resolution mechanisms as either a remedy or as part of the structural background that influences the judicial role.

The second sub-category encompasses the judicial role in matters falling outside of any public-law relationship, where litigants (community-led litigants or local businesses) are seeking to jettison traditional constitutional intervention or intergovernmental dispute resolution mechanisms.

5.2. The first sub-category: The judicial role in the tale of Eskom, dysfunctional local government and end-users

The Constitutional Court has held that there is a 'special cluster of relationships' involved in essential service delivery that give rise to public-law rights and obligations between public service providers, local government and users of the service, which extend beyond the realm of contract law.[4]

The Constitutional Court has held further that Eskom, an organ of state that supplies electricity to local government and through local government to end users, falls within this special cluster of relationships. As a result, Eskom's rights and obligations have been extended by the Constitutional Court beyond mere contractual obligations and remedies, to incorporate public-law obligations towards end-users, as well as obligations to engage in intergovernmental dispute resolution, to support the developmental obligations of local government, and to contribute to the progressive realisation of the rights contained in the Constitution.[5]

Within this 'special cluster of relationships', municipalities are constitutionally and statutorily

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[4] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 343; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 23-4, 34-5; *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 38.

[5] *Cape Gate v Eskom Holdings* 2019 (4) SA 14 (GJ) ('*Cape Gate 1*') paras 8, 118-35; *Eskom Holdings v Emfuleni Local Municipality* [2023] ZAGPPHC 497 (5 July 2023) ('*Cape Gate 2'*) para 57; *Resilient* supra note 1 paras 29-34, 58-60, 61-7, 88; *Eskom Holdings v Lekwa Ratepayers Association; Eskom Holdings v Vaal River Development Association* 2022 (4) SA 78 (SCA) ('*Vaal River 2'*) paras 6, 24, 27-31; *Eskom Holdings v Vaal River Development Association* 2023 (4) SA 325 (CC) ('*Vaal River 3'*) paras 268-71.

required to discharge their constitutional mandate and conduct their affairs in such a way as to ensure that end-users receive services. This means that a municipality is expected to act in accordance with its developmental obligations, including by ensuring that the appropriate portion of service payments received are passed on to Eskom, even where it is only acting as a 'mere conduit' for electricity supply between Eskom and end users.[6]

Unfortunately, the 'woeful and reprehensible failure' by certain errant and dysfunctional municipalities to pay Eskom for the supply of bulk electricity, despite receiving payment from end-users for their electricity consumption, has resulted in an astronomical and spiralling municipal debt owed to Eskom.[7] In response to this 'widespread [municipal] delinquency' and in an attempt to encourage and incentivise the collection of outstanding debts, Eskom has adopted a two-pronged approach: either interrupting the supply of bulk electricity to a municipality during pre-arranged and advertised times, or substantially reducing the electricity load to a municipality's contractually agreed notified maximum demand ('NMD').[8]

Eskom's approach has led to direct consequences for end-users falling within the jurisdiction of the affected municipalities, including 'abject misery and horrendous violation of [multiple] fundamental rights', with an impact on the provision of basic services such as sewage treatment, municipal water reticulation and electricity supply.[9]

This intersection between Eskom's approach, a dysfunctional local government in financial crisis and ongoing macro-level socio-economic rights violations has, perhaps inevitably, resulted in an increase in litigation. This Chapter focuses on only a few of these matters, as representative of the key issues and judicial role in this first subcategory, in the following jurisdictions: Emfuleni, Thaba Chweu and Emalahleni, Letsemeng, Ngwathe and Lekwa, and Maluti-a-Phofung.

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[6] *Cape Gate 1* supra note 5 para 130; *Vaal River 2* supra note 5 paras 35-6; *Vaal River 3* supra note 5 paras 105-23, 139, 189.

[7] See, for example, *Resilient* supra note 1 paras 88, 93-4; *Vaal River 3* supra note 5 paras 189.

[8] See, for example, *Afriforum v Eskom Holdings* [2017] 3 All SA 663 (GP) paras 4, 15, 20.

[9] See *Vaal River 3* supra note 5 paras 191, 194, 204. Affected rights may include residents' right to dignity, access to healthcare services, to an environment that is not harmful to health or well-being, to basic education and to life.

5.2.1. Emfuleni Local Municipality

The Emfuleni Local Municipality is located within the Sedibeng District Municipality in the Gauteng province.[10] Towns within its jurisdiction include Evaton, Sebokeng, Vanderbijlpark and Vereeniging. The municipality received an unqualified audit with findings between the 2012/13 and 2017/18 financial years (and again in the 2020/21 financial year), and a qualified audit with findings between the 2018/19 and 2019/20 financial years and in the 2021/22 financial year.[11]

Between September 2016 and February 2018, Eskom and the municipality were involved in a protracted engagement regarding the municipality's escalating and unpaid debt for the supply of bulk electricity. A ministerial task team meeting, coordinated by DCoGTA, was arranged in February 2018 'to intervene at national level' for the purposes of encouraging the conclusion of an agreement between Eskom and various municipalities across the country.[12]

Eskom and the municipality subsequently concluded an acknowledgement of debt and repayment plan agreement, which was made an order of court in March 2018.[13] Although the municipality subsequently defaulted on its repayments, this judgment was not executed, purportedly as Eskom was concerned that this would cause a 'total collapse of the business' of the municipality.[14] By May 2018, the municipality had been identified by the CoGTA Minister as a priority municipality which was distressed or dysfunctional, requiring 'urgent intervention'.[15]

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[10] See Municipalities of South Africa 'Emfuleni Local Municipality (GT421)' available at https://municipalities.co.za/overview/1060/emfuleni-local-municipality, accessed 29 September 2022.

[11] See AGSA *Consolidated General Report on the local government audit outcomes: MFMA 2015-16* (2017) at Annexure 3 and AGSA *Consolidated General Report on the local government audit outcomes: 2021-22* (2023) at Annexure 3.

[12] *Cape Gate 1* supra note 5 para 14.

[13] Ibid paras 16-7.

[14] Ibid para 51.

[15] See DCoGTA 'List of Dysfunctional and Distressed Municipalities' (23 May 2018) available at https://www.cogta.gov.za/index.php/2018/05/23/list-of-dysfunctional-and-distressed-municipalities/, accessed 22 June 2022.

In June 2018, the provincial executive noted that the financial position of the municipality 'was continuing to deteriorate' and that it was 'no longer able to guarantee the provision of minimum services', despite the institutional support which it had been providing to the municipality since November 2015 under section 154 of the Constitution.[16] The provincial executive thus took a decision to place the municipality under both a section 139*(1)(b)* and section 139*(5)(a)* intervention (which included the requirement for a financial recovery plan), with a work stream dedicated to focusing on energy and electricity.

Apparently unaware of this intervention decision, Eskom published a notice in June 2018 inviting submissions on its proposed interruption of the supply of bulk electricity to the municipality. The proposed interruption was based on the municipality's outstanding debt of R1-billion (at that stage) and its continued non-payment for on-going consumption of electricity. The provincial finance MEC (as well as various manufacturers based in the municipality) submitted that the section 139 intervention, together with the conclusion of a financial recovery plan within 90 days, would address the municipality's financial issues. Eskom, however, 'was not willing to sit back and wait' for such financial recovery plan and, in July 2018, took the decision to interrupt the supply of bulk electricity to the municipality.[17]

Businesses (including Cape Gate, a manufacturer of wire and steel products, based in the municipality's jurisdiction) sought to interdict Eskom from implementing this decision and, as final relief, sought to its review. These applications were based on the 'cataclysmic' effect of interruption on the applicants' businesses, which had consistently paid for their electricity usage.[18] The municipality, provincial premier and NERSA were included as respondents.

Some of the applicants, supported by the municipality and premier, argued that the section 139 intervention decision demonstrated that the provincial executive had commenced a process to resolve the municipality's issues and to manage its debt, and that 'Eskom should not have

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[16] *Cape Gate 1* supra note 5 paras 11-4, 18-9.

[17] Ibid paras 25-6. While Eskom proposed not interrupting the electricity supply if certain large electricity consumers paid it directly, the municipality and provincial executive refused this proposal on the basis that the financial recovery plan that was being prepared would 'holistically address all the issues'.

[18] Ibid paras 4-7, 41.

turned its face against this process but should have honoured it'.[19] This line of argument appears to reflect an implicit belief in the effectiveness of the constitutional intervention mechanism (and of the intergovernmental monitoring and support mechanisms in general), as well as a preference for judicial deference to political solutions and existing executive action which was underway. This approach aligns with the government respondents' arguments in Chapter 4 of this Thesis (the Category 2 matters): that the executive is best placed to decide whether and how to intervene in a municipality, and that the courts should not be prescriptive or interfere with this discretion. As a result, the applicants did not specifically seek any judicial assistance in, for example, fortifying the existing section 139 intervention.

In a counter-application, the municipality sought an order to stay the proceedings against it (including an order to suspend its financial obligations to creditors until it was able to meet those obligations) on the basis that the section 139 intervention was underway, that a financial recovery plan had been approved, and that it would 'likely' collapse and be unable to fulfil its developmental duties without the protection of such a court order.[20] This counter-application was, however, rejected by the High Court: by the time the matter was argued in October 2018, no financial recovery plan had been placed before the court, meaning that it was unable to assess whether the municipality would 'likely' fail without the protection of the requested order.[21]

In response to the application, Eskom argued that it had no constitutional obligation to supply electricity to the municipality or to end-users and that its decision (to stop the municipality's debt from 'spiralling completely out of control' and to address its ongoing non-payment for the supply of electricity) was both rational and reasonable.

A full bench of the High Court handed down judgment in November 2018. The court was clear that Eskom's inclusion within the 'special cluster of relationships' resulted in it incurring

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[19] Ibid paras 53-8, 72, 77-9.

[20] Ibid paras 35-8. The applicable legislative framework for this counter-application includes sections 152*(1)* and 153*(1)(a)-(b)* and *(2)(b)* of the MFMA.

[21] Ibid para 39.

public-law obligations of administrative justice and procedural fairness towards end-users.[22] The court was further clear that it was required to decide a 'constitutional matter' for the purposes of section 172 of the Constitution, and that it was thus permitted to make any order that was just and equitable.[23]

The High Court balanced various considerations in its judgment, including the prior conduct of Eskom in trying to obtain payment from the municipality (including its litigation and requests for the premier's involvement), the effect of the interruption decision on the survival of local businesses (most likely catastrophic), the likely consequence of the interruption decision (being to halt the provision of electricity without payment, rather than the realistic satisfaction of the municipality's debt given its admitted financial crisis), the effect of continuing municipal non-payment on the economic viability of Eskom (most likely catastrophic and on a national scale), and the role of the municipality (which, Eskom argued, should be responsible for the consequences of its own financial mismanagement).[24]

The court identified that the underlying problem was 'likely' the result of the municipality's 'financial mismanagement' and that the issue for consideration was the resolution of the municipality's indebtedness in circumstances in which it is not paying, apparently cannot pay, and 'admittedly has what the Constitution has described as a "crisis in its financial affairs", whatever the cause'.[25] The court was further satisfied, given Eskom's position in the 'special cluster of relationships', that the resolution of the municipality's indebtedness should be pursued through various intergovernmental dispute resolution mechanisms and procedures (rather than within a contractual framework). These mechanisms and procedures included the provisions of the IRFA and a section 139 intervention as set out in the Constitution and MFMA, in terms of which national treasury and 'ultimately' the national government are required to 'step in when and where local authorities fail'.[26]

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[22] Ibid paras 148, 160. The court was also satisfied that a 'dispute' existed for the purposes of section 41*(3)* of the Constitution and held that the applicants had established the requirements for an interim interdict; see paras 112-54, 155-61.

[23] Ibid paras 8, 155.

[24] Ibid paras 139-154.

[25] Ibid paras 151, 159.

[26] Ibid paras 118, 130–40, 148, 160, 174.

Of course, a section 139 intervention was already underway in the municipality. The High Court thus adopted a deferential approach, finding that both provincial and national government had already 'statutorily stepped into the breach' and embarked on the 'constitutionally and statutorily envisaged route' with the implementation of a section 139 intervention and the development of a financial recovery plan (although the court acknowledged that the existence of this recovery plan was unclear) to resolve the municipality's 'admitted financial crisis'.[27] Within this context, the court held that it was Eskom which was not prepared to wait for the political process to unfold, suggesting that Eskom's conduct was unreasonable and unbecoming.

The court's order, which embraced the implementation of the intergovernmental dispute resolution mechanisms and reflected an underlying belief in the efficacy of the democratic institutions, structures and processes, afforded Eskom and the municipality a period of six months to resolve the dispute through intergovernmental relations channels.[28] An interim regime was also established under section 172*(1)(b)* of the Constitution, pending the resolution of the dispute: both Eskom and the municipality were interdicted from interrupting the electricity supply, while the applicants were authorised to pay the Eskom tariff directly to Eskom, thereby bypassing the municipality.[29]

A subsequent attempt by the municipality to pressure the applicants into paying it rather than Eskom by threatening to terminate their electricity supply, was declared unlawful and interdicted by the High Court in February 2019.[30] The municipality sought leave to appeal this decision before both the High Court and the SCA, without success.

Unfortunately, as evidenced by the effluxion of time, Eskom and the municipality were not able to resolve their dispute, with Eskom obtaining summary judgment against the municipality

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[27] Ibid paras 151-2, 159.

[28] Ibid paras 151, 159-60. A similar approach was followed in *Nketoana Local Municipality v Eskom Holdings* [2021] ZAFSHC 1 (7 January 2021), which also involved the 'classic problem' of a municipality unable to pay its spiralling debt to Eskom. In *Nketoana*, the High Court held that every reasonable effort to settle the dispute by means of mechanisms and procedures provided, including section 139 of the Constitution, must be made prior to resorting to litigation, and that this had not occurred; see paras 7-18, 29, 46-7, 49-50.

[29] *Cape Gate 1* supra note 5 paras 148, 154-60, 163, 174.

[30] *Cape Gate v Emfuleni Local Municipality* [2019] ZAGPJHC 39 (6 February 2019).

for the debts owing to it in August 2021.[31] (This included judgment for R25-million owing in terms of an acknowledgement of debt, as well as a debt of over R1.3 billion owing for the bulk supply of electricity to the municipality.) No mention of the ongoing section 139 intervention was made in Eskom's successful attempt to obtain summary judgment, despite the continuing financial crisis in the municipality, the persistent inability to settle the dispute, and the apparent ineffectiveness of the initiated section 139 intervention.

In August 2022, it was reported that new litigation was being considered for the purpose of seeking a mandatory section 139*(7)* intervention in the municipality by national government (although no such litigation had yet been initiated).[32]

In March 2023, Eskom approached the High Court for relief once more, this time requesting a declaration that the municipality and municipal manager were in contempt of the order in *Cape Gate 1* and seeking an order permitting Eskom to take over the electricity business from the municipality, with end-users paying it directly.[33] Eskom argued that the municipality's debt had escalated to R3.5 billion by 2021 and was continuing to grow, with any payments made to Eskom being only a 'proverbial drop in the ocean'.[34] The provincial premier, NERSA and the administrator of the municipality were all cited as respondents, while three local businesses and Emfuleni for Change (which represented more than two hundred other businesses) joined the application, also seeking just and equitable relief. This relief, however, was focused on managing payments to Eskom, rather than addressing any underlying municipal dysfunction or the efficacy of the existing section 139 intervention.

The respondents, in particular the municipality, argued that this application should be rejected as it was merely an attempt by the applicants to bypass the adjudication of the final relief (the review of Eskom's interruption decision) which had not been considered in *Cape Gate 1*. On the other hand, the applicants argued that judicial involvement was permissible based on the

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[31] *Eskom Holdings v Emfuleni Local Municipality* [2021] ZAGPPHC 546 (21 August 2021) para 8.

[32] See Ernest Mabuza 'Frustrated Emfuleni ratepayers and businesses want council dissolved' *SowetanLive* (17 August 2022) available at https://www.sowetanlive.co.za/news/2022-08-17-frustrated-emfuleni-ratepayers-and-businesses-want-council-dissolved/, accessed 29 September 2022.

[33] *Cape Gate 2* supra note 5 para 111.

[34] Ibid para 45.

government respondents' conduct in frustrating the interim relief and the ongoing failure of the intergovernmental dispute resolution mechanisms.

A full bench of the High Court handed down its judgment in July 2023. While expressing a preference for the political resolution of the matter (rather than judicial involvement), the court noted that there was an apparent 'unwillingness, ineptitude, lack of capacity or inability to engage meaningfully' by organs of state to resolve electricity payment disputes despite the resultant socio-economic rights violations.[35] The courts' perception of incompetent or inadequate governmental action and responsiveness thus appears to increase the likelihood of judicial involvement in this subcategory.

The High Court was satisfied that the municipality's 'astronomical' and constantly expanding debt owed to Eskom was not in dispute, with the municipality admitting that it was unable to repay the debt.[36] However, the matter was not characterised as a simple debt collection; instead, the court specifically considered the underlying challenges facing the municipality, finding that it had created but not 'realistically confront[ed]' these challenges, including financial delinquency and broader dysfunction.[37]

The court identified 'apparent constitutional dimensions' within the municipality's dysfunction. These included the failure of the co-operative government dispute resolution mechanisms and a failure to provide electricity to end-users, thereby affecting a right to electricity (which 'facilitates the very basic tenets of life that the Constitution protects').[38] The court held that the municipality's behaviour was affecting Eskom's ability to meet its constitutional obligations. It was also acting outside of its own statutory and constitutional obligations and was undermining the provision of basic services to, and economic development of, its community.[39]

The High Court acknowledged that the requested relief required it to engage its powers under

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[35] Ibid paras 1, 3-4.

[36] Ibid paras 69-70, 89-93.

[37] Ibid paras 68-70, 94-7, 99, 109.

[38] Ibid paras 4, 100. These rights include the right to 'dignity, trade and occupation, food security and healthcare, basic nutrition for children, schooling, equality and housing'; see para 102.

[39] Ibid paras 78, 103, 105-9.

section 172*(1)(b)* of the Constitution to grant just and equitable relief.[40] It further took specific judicial notice of the parties' co-operative governance obligations and the steps taken by Eskom before approaching the court, including seeking governmental intervention and negotiating with the municipality.[41]

Against this background, the court held that the municipality and the municipal manager were in contempt of the order in *Cape Gate 1*, and their failure to pay Eskom was declared unlawful and unconstitutional. The court was clear that it was not required to 'shy away from the challenge… purely because another court had dealt with some of the facts', particularly given that the evolution and advancement of the facts would necessarily occur with the passage of time.[42] It thus ordered the municipality to appoint Eskom to act on its behalf in undertaking electricity reticulation and ordered the applicants to continue paying Eskom for their electricity consumption. The difference between the municipal tariff and Eskom tariff was still to be paid to the municipality, so that the finances of the municipality would not be negatively affected.[43]

In adopting this approach, the High Court was clearly focused on finding a solution to 'keep the lights on', but in the process made no attempt to address the admitted and recognised challenges facing the municipality or the effectiveness of the existing section 139 intervention. Further, no additional information relating to the role of the existing section 139 intervention in addressing the municipality's collapse and dysfunction was sought or requested, despite the administrator of the municipality being a party to the litigation.[44]

The High Court's approach is partly driven by the relief requested by the applicants (Eskom and the intervening parties) which was aimed at addressing Eskom's financial stability, rather than the municipality's dysfunction. In contrast, relief sought in matters discussed in Chapter 4 (such as in *Makana* and *Mafube*), required the courts to consider whether to compel a

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[40] Ibid paras 80-7, 109-10.

[41] Ibid paras 4, 54, 67-8, 112.

[42] Ibid paras 86-7.

[43] Ibid paras 80-8.

[44] See, for example, the approach adopted by the Constitutional Court in *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2015 (1) BCLR 72 (CC) as discussed in paragraph 3 of Chapter 3.

mandatory section 139 intervention or to fortify an existing intervention, for the specific purpose of addressing the municipal dysfunction.

Here, the High Court's approach is further driven by a recognition of the ongoing failure of these democratic institutions, structures and processes, linked with an appreciation of governmental incompetence or intransigence and resultant underlying socio-economic rights violations. As a result, the court in *Cape Gate 2* appeared to be more willing (when compared with the approach adopted in *Cape Gate 1*) to employ an enhanced level of scrutiny and a more prescriptive remedy. However, this did not extend to a direct consideration of the existing section 139 intervention and its effectiveness, or whether it should be fortified. Instead, with almost implicit recognition of the ineffectiveness of the section 139 intervention mechanism, the High Court specifically looks outside section 139 of the Constitution for relief.

5.2.2. Thaba Chweu Local Municipality and Emalahleni Local Municipality

The Thaba Chweu Local Municipality is located within the Ehlanzeni District Municipality in Mpumalanga (and includes the towns of Graskop, Lydenburg, Mashishing and Sabie),[45] while the Emalahleni Local Municipality is located within the Nkangala District Municipality in the same province.[46]

Thaba Chweu Local Municipality received a disclaimed audit with findings between the 2012/13 and 2016/17 financial years, a qualified audit with findings between the 2017/18 and 2019/20 financial years, and a financially unqualified audit in both the 2020/21 and 2021/22 financial years. Emalahleni Local Municipality, on the other hand, received a disclaimed audit with findings between the 2012/13 and 2015/16 financial years and a qualified audit with findings between the 2016/17 and 2021/22 financial years.

In May 2018, both municipalities were identified by the CoGTA Minister as priority municipalities which were distressed or dysfunctional requiring urgent intervention and, in October 2018, the provincial executive placed both municipalities under (separate) section

[45] See Municipalities of South Africa 'Thaba Chweu Local Municipality (MP321)' available at https://municipalities.co.za/overview/1145/thaba-chweu-local-municipality, accessed 29 September 2022.

[46] See Municipalities of South Africa 'Emalahleni Local Municipality (MP312)' available at https://municipalities.co.za/overview/1157/emalahleni-local-municipality, accessed 29 September 2022.

139*(5)(a)* interventions.[47]

However, with both municipalities consistently failing to pay Eskom for their supply of bulk electricity, and failing to fulfil obligations under various payment arrangements, Eskom took the decision to interrupt the bulk supply of electricity to both municipalities at scheduled times.[48]

Various entities in the two municipalities (including Resilient Properties, a private company which owned a retail shopping centre in Emalahleni, and various chambers of commerce and tourism, such as the Sabie Chamber of Business representing businesses in Thaba Chweu) initiated separate applications in the High Court for the review and setting aside of Eskom's decisions. While these applications were not formally consolidated, they were ultimately heard together, with the High Court granting an order, on 7 March 2019, for the review and setting aside of Eskom's decisions to interrupt the bulk supply of electricity to the municipalities.

Eskom appealed the judgment, with the SCA handing down its unanimous judgment on 29 December 2020. The SCA held that Eskom's interruption decisions were an irrational and 'radical step', contrary to its own constitutional obligations within the 'special cluster of relationships', and affected residents and the municipalities, which were then unable to fulfil their own constitutional and statutory mandates to provide basic services.[49]

The SCA was dismissive of Eskom's attitude towards its co-operative governance obligations, given its knowledge that the municipalities' failures to meet their financial commitments were based on their ongoing financial crises.[50] The SCA was equally clear that the two municipalities were 'financial delinquents, dysfunctional municipalities, and municipalities plagued by poor governance and financial mismanagement', which 'graphically illustrate[d] the distressing state of municipal governance' and the lack of 'requisite capacity to effectively manage

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[47] Thaba Chweu Local Municipality was also under a section 139(1)(b) intervention between January 2005 and July 2006 and between October 2009 and December 2010; see paragraph 3.1 of Chapter 4 for an overview of the section 139 intervention history for Emalahleni Local Municipality.

[48] *Resilient* supra note 1 paras 11, 25-6, 88.

[49] Ibid paras 13, 19-24, 38, 58-60, 71, 74-80, 88.

[50] Ibid paras 28, 67, 80-1, 84, 88, 91, 97.

[municipal] affairs' in South Africa.[51] The SCA was also highly critical of the supine engagement of the national and provincial government (specifically the CoGTA MECs and Minister) in the proceedings, which was exacerbated by their apparent failure to carry out their constitutional accountability and intergovernmental monitoring and support responsibilities.[52]

Against this background, the SCA held that Eskom was required to make every reasonable effort to resolve the payment dispute using intergovernmental relations mechanisms and exhausting all other remedies, before interrupting (or threatening to interrupt) the bulk supply of electricity to the municipalities.[53] It was particularly critical of Eskom's failure to take material steps to engage provincial or national government to intervene in the municipalities, and its unwillingness to 'wait for that process to unfold', where 'overwhelming evidence' demonstrated that these steps were required to 'turn [around] the fortunes' of the municipalities which were 'hopelessly languishing in financial distress'.[54] Given that it was not possible for the municipalities to extricate themselves from this 'colossal crisis', the SCA held that the situation 'oblige[d]' national and provincial government to intervene, in accordance with applicable constitutional and statutory requirements (including a section 139 intervention).[55] In other words, the SCA was clear that the national and provincial government could not decline to intervene in the financial crises experienced by the municipalities, because, without this intervention, 'all [such municipalities] are doomed'.[56]

While both municipalities were under existing section 139*(5)* interventions when the SCA considered the matter, no relief relating to these mandatory interventions had been requested by the applicants, perhaps erroneously so. Further, while the SCA was clear on the steps that were required to be taken by provincial and national government, and was evidently concerned with the state of local government, it did not itself assume an active role in seeking to obtain more information from the parties on the state of the ongoing section 139*(5)* interventions or the severity of any underlying socio-economic rights violations.

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[51] Ibid para 93.

[52] Ibid paras 93, 97.

[53] Ibid paras 61-7, 75, 80-1.

[54] Ibid paras 77, 81-2, 88, 94.

[55] Ibid paras 93-6. Also see *Cape Gate 1* supra note 5 paras 118, 130–40, 148.

[56] Ibid para 97.

Instead, the SCA appears to have understood its role as necessarily deferential, adopting a non-prescriptive order requiring the parties to explore intergovernmental dispute resolution mechanisms and channels. As such, the SCA does not trigger or direct that a particular intergovernmental dispute resolution process must be followed (such as mediation, or a discretionary or (judicially fortified) mandatory section 139 intervention), rather leaving the resolution of the dispute, the exercise of constitutional powers, and the accompanying decisions to the provincial and/or national government.

5.2.3. Maluti-a-Phofung Local Municipality

The Maluti-A-Phofung Local Municipality, which is located within the Thabo Mofutsanyana District Municipality in the Free State, has received a disclaimed audit with findings since the 2012/13 financial year (with the exception of the 2016/17 financial year).

The municipality was placed under a section 139*(1)(b)* intervention from February 2018 and, in May 2018, was identified by the CoGTA Minister as a priority municipality which was distressed or dysfunctional requiring urgent intervention. The community-led litigation against the municipality which resulted in a settlement agreement, subsequently made an order of court in October 2018 (the '2018 court order'), and the process leading up to this order, was discussed in paragraph 3.3 of Chapter 4. The 2018 court order confirmed that the jurisdictional facts for a mandatory section 139*(5)* intervention in the municipality had been established and that such intervention was required. However, these parts of the 2018 court order were suspended by agreement between the parties (with the possibility of revival), with a preference expressed for the determination of the terms of the intervention to be left to a political process in compliance with section 41 of the Constitution.

The municipality was also engaged in separate litigation with Eskom: in December 2017, Eskom obtained judgment against the municipality for the payment of more than R2.4 billion for the bulk supply of electricity.[57] Following this decision, and the municipality defaulting on its payment arrangements, Eskom obtained a further court order for the attachment of the municipality's funds in its bank account. The municipality approached the High Court for relief. It sought an order lifting the attachment of its funds and requested that the court prohibit

[57] *Maluti-a-Phofung Municipality v Eskom Holdings* [2020] ZAFSHC 213 (9 October 2020) paras 7-12.

Eskom from executing judgment until the intergovernmental dispute resolution process, as set out in the 2018 court order, was complete.[58]

The judgment of the High Court was handed down on 9 October 2020. It noted that the attachment of funds by Eskom had resulted in the municipality being unable to 'execute its constitutional functions', which affected its residents' fundamental rights and resulted in the spillage of raw sewerage.[59] Eskom, however, had argued that the underlying socio-economic rights violations were a result of the municipality being 'insolvent [and] mismanaged' and that both the provincial and national government had failed to takes steps to implement a mandatory section 139 intervention, despite this remedy, its basis and trigger being set out in the 2018 court order. Eskom further argued that the work of the intergovernmental consultative commission established under the 2018 court order was 'a total failure and had yielded no results'.[60]

The court rejected these arguments holding that, when Eskom decided to follow a parallel process of taking default judgment in other litigation and executing against the municipality's bank account, it was 'fully aware' that the municipality was in 'dire straits' and that the 2018 court order, which was targeted at the municipality's financial crisis, required all parties to resolve their issues within the applicable intergovernmental dispute resolution channels.[61] The High Court thus held that Eskom's decision to attach the municipality's funds was premature, not in good faith and ignored other possible remedies (such as raising its dissatisfaction with the intergovernmental consultative committee).[62]

Eskom applied for leave to appeal this decision based on, amongst other things, the efficacy of the 2018 court order and the parties' failure to meet the stipulated time periods set out in that order.[63] The High Court, handing down its judgement on 15 January 2021, dismissed the application. The court criticised Eskom for not being prepared 'to wait for the process to

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[58] Ibid para 2.

[59] Ibid para 17.

[60] Ibid para 18.

[61] Ibid paras 21, 24-7.

[62] Ibid paras 25, 31.

[63] *Maluti-a-Phofung Municipality v Eskom Holdings* [2021] ZAFSHC 3 (15 January 2021) paras 4-5.

unfold' despite it recognising that the 'parlous state' of the municipality required intervention by either the provincial or national government.[64] It held further that Eskom's obligation to comply with the intergovernmental dispute resolution mechanisms did not cease with the 2018 court order, especially when the underlying reasons for the municipality's inability to pay the debt had not been addressed. Referring with approval to *Resilient*, the court observed that a financial crisis in a municipality is a 'dire situation [which] obliges the national and provincial governments to intervene, consonant with the letter and spirit of the [applicable] constitutional and statutory prescripts'.[65]

The approach of the High Court in this matter is distinguishable from the judicial approach in *Cape Gate 1* and *Resilient*. While the High Court adopts a similar deferential role, embracing the need to utilise intergovernmental dispute resolution mechanisms, it also recognises the existing mechanisms and processes already underway in terms of the 2018 court order. Although the court makes no mention of the doctrine of separation of powers, the doctrine appears to infiltrate its reasoning, with the court indicating a clear preference for deferring the resolution of the dispute between Eskom and the municipality, as well as the underlying challenges facing the municipality, to the executive. However, the court did not appear to take any steps to interrogate the efficacy of these mechanisms and processes, with Eskom being chastised for failing to wait for these processes to unfold. As such, as with *Cape Gate 1* and *Resilient*, the High Court did not prescribe that any particular intergovernmental dispute resolution process should be followed, nor did it attempt to fortify the 2018 court order.

5.2.4. Letsemeng Local Municipality

The Letsemeng Local Municipality is located within the Xhariep District Municipality in the Free State.[66] Towns that fall within the jurisdiction of the municipality include Koffiefontein, Luckhoff and Jacobsdal.

The municipality has received a qualified audit every year since the 2014/15 financial year

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[64] Ibid paras 7, 8.

[65] Ibid paras 9-14.

[66] See Municipalities of South Africa 'Letsemeng Local Municipality (FS161)' available at https://municipalities.co.za/overview/1056/letsemeng-local-municipality, accessed 29 September 2022.

(with the exception of the 2016/17 financial year in which it received a disclaimed audit).[67] In May 2018, the municipality was identified by the CoGTA Minister as a priority municipality which was distressed or dysfunctional requiring urgent intervention. However, a section 139 intervention (whether discretionary or mandatory) has never been initiated in the municipality.

In February 2020, Eskom issued a final notice to the municipality of its intention to interrupt the supply of bulk electricity, following a long-running dispute over the municipality's failure to pay its electricity supply account (which was in excess of R41 million by January 2020). In response, the municipality sought an interim interdict from the High Court to halt this interruption, pending a review of Eskom's decision, on the basis that it would result in 'disastrous' consequences for the community.[68]

Eskom filed a counter application seeking to compel the municipality to pay all outstanding amounts owed to it and requested a declaratory order that the municipality was in breach of its constitutional obligations (as it had failed to structure and manage its administration, budgeting and planning processes to give priority to basic needs, including payment to Eskom, and to promote the community's social and economic development).[69] These are the same constitutional obligations relied upon by litigants in Chapter 4, who sought court-ordered mandatory section 139 interventions as relief. However, in this matter, Eskom did not seek a court-ordered mandatory intervention, instead opting to argue that the municipality was prohibited from claiming relief on the grounds that any disastrous consequences experienced were a direct result of its own wrongdoing.

The High Court handed down judgment on 23 July 2020. In granting the interim interdict, the court balanced Eskom's continued provision of electricity without payment against the 'widespread human catastrophe' of an electricity interruption for the municipality's residents, Eskom's actions in allowing the municipality's debt to spiral and its failure to utilise other legal processes to remedy the default.[70] The court also dismissed Eskom's counter-application

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[67] AGSA op cit note 11 at Annexure 3.

[68] *Letsemeng Local Municipality v Eskom Holdings* [2020] ZAFSHC 126 (23 July 2020) paras 6, 16.

[69] Ibid para 8. Also see section 153*(a)* of the Constitution.

[70] Ibid paras 6, 15-7, 20, 22-5. Also see *Resilient* supra note 1 paras 10-1**;** *Tokologo Municipality v Eskom Holdings* [2019] ZAFSHC 241 (13 December 2019).

holding that, from a practical perspective, it could not grant an order compelling payment when the municipality, on its own admission, had no funds with which to satisfy the debt.[71] The court made only one reference, in passing, to the possibility of a section 139 intervention, stating that the municipality itself had noted that its problems could 'only be resolved with assistance' from provincial or national government.[72] This acknowledgment was taken no further by the court.

Eskom appealed against the dismissal of its counter-application, with the SCA handing down judgment on 9 March 2022. The majority held that the municipality's claims of financial weakness should not exonerate it from its payment obligations to Eskom and that the IRFA provided no defence for the municipality, as Eskom was permitted to seek counter-performance for having to supply electricity without payment.[73] As such, the majority directed the municipality, which it held had 'displayed bad faith throughout', to ensure payment to Eskom of its portion of the equitable share relating to electricity, of the amount provided by National Treasury for payment of its electricity debt, and for its ongoing electricity consumption and debt.[74] Despite these findings, the majority was not satisfied that there was sufficient evidence for an order declaring the municipality in breach of its constitutional obligations.[75]

The judicial role adopted by the majority reflects growing judicial exasperation with the poor conduct of municipalities and with claims of financial weakness to avoid the payment of debts. This appears to have resulted in a willingness by the majority to 'judicialise' the municipal debt and to jettison constitutional intervention and dispute resolution mechanisms and processes, as would be the case in an ordinary debt dispute. The majority also rejected any attempt to extend the scope of its involvement with a finding that the municipality had breached its constitutional obligations. As a result, unlike in the matters discussed in Chapter 4, the majority did not seek to rely on the discretionary remedial powers contained in section 172 of the Constitution.

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[71] Ibid paras 20-2.

[72] Ibid paras 5, 21.

[73] *Eskom Holdings v Letsemeng Local Municipality* [2022] 2 All SA 347 (SCA) paras 1, 5-10, 21-2, 24. Also see *City of Matlosana Local Municipality v Eskom Holdings: In re: Eskom Holdings v City of Matlosana Local Municipality* [2022] ZAGPJHC 464 (5 July 2022) paras 7-22, 64, 70-4.

[74] Ibid para 27.

[75] Ibid paras 17-8.

A concurring majority judgment, penned by Plasket JA, was particularly scathing of the municipality's conduct. Plasket JA held that the municipality had 'behaved disgracefully throughout' with open 'duplicity and dishonesty' and that, if it had conducted itself appropriately, with honesty and good faith, and had fulfilled its constitutional obligations, 'it would have reported its delinquency' to the provincial government in 2017, enabling the provincial government to take steps to intervene at an early stage.[76] However, the concurring majority judgment makes no further finding in this regard.

Finally, a minority judgment disagreed with the majority's order, finding that practical difficulties would arise in implementing this order when the municipality was clearly 'in financial crisis' and was unable to pay Eskom.[77] Relying on *Resilient*, the minority noted that the SCA had already 'emphasised that government intervention in a case such as this is critical' and that the municipality's financial crisis 'would not be resolved without the assistance of the provincial or national governments, nor could it'.[78] The minority thus held that both parties, as organs of state, had a constitutional and statutory duty to make every reasonable effort to resolve the financial dispute without judicial involvement and in line with the requirements of co-operative government, including by considering the provisions of the IFRA, as 'buttressed' by a section 139 intervention under the Constitution and the MFMA, and reporting the matter to National Treasury for mediation.[79]

As such, the minority proposes adherence to the emerging trend of judicial deference (as set out in *Cape Gate 1* and *Resilient*), in which the utilisation and efficacy of intergovernmental dispute resolution mechanisms is embraced by the courts, with a recognition that a section 139 intervention forms part of the executive's arsenal of tools to resolve a municipality's crises, without further judicial involvement.

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[76] Ibid paras 69, 71.

[77] Ibid paras 57, 59-61, 65.

[78] Ibid paras 58, 62-4. Also see *Resilient* supra note 1 para 97; *Cape Gate 1* supra note 5 para 148.

[79] Ibid paras 34-8, 43-5, 51, 66-7. Also see *Resilient* supra note 1 para 95; *Uthukela District Municipality v President of the Republic of South Africa* 2003 (1) SA 678 (CC) para 14.

5.2.5. Ngwathe Local Municipality and Lekwa Local Municipality

As set out in Chapter 4, both the Ngwathe Local Municipality (located within the Fezile Dabi District Municipality in the Free State) and Lekwa Local Municipality (located within the Gert Sibande District Municipality in Mpumalanga) have received consistently poor audit reports.[80]

While a section 139 intervention has never been initiated in the Ngwathe Local Municipality, the Lekwa Local Municipality was under section 139*(1)(b)* intervention from October 2009 to June 2011, a section 139*(5)(a)* intervention from October 2018, and is currently under an ongoing section 139*(7)* intervention from May 2021.

Between 2008 and 2010, both municipalities signed electricity supply agreements with Eskom, which included agreed contractual demand (or NMD) levels. Over time, however, both municipalities' electricity demand surpassed the agreed-upon NMD supply levels, with Eskom duly providing this supply (with monthly fines) for an extended period even though the municipalities were consistently failing to pay Eskom for the electricity supplied. In due course, both municipalities applied to Eskom to increase their NMD levels to meet their additional electricity demand, but Eskom refused these requests.

In 2020, Eskom took a decision to reduce both municipalities' bulk electricity supply to the NMD levels specified in the supply agreements, resulting in the municipalities imposing rotational blackouts which affected their ability to provide basic municipal services including water supply and sewage disposal. Only the municipalities (and not the residents or business communities within the jurisdictions of these municipalities) were informed of Eskom's reduction decision. Negotiations between Eskom and the municipalities were unsuccessful in resolving the disputes, while residents also engaged with Eskom, their provincial government and municipality without success.

As a result, non-profit residents' associations in each municipality (the Vaal Development Association and the Lekwa Ratepayers Association) approached the High Court seeking an interim interdict to prevent Eskom from implementing its reduction decision and to restore the supply of electricity to the levels before the reductions were introduced. The municipalities did

[80] AGSA op cit note 11 at Annexure 3.

not oppose the relief sought.

The applicants argued that Eskom's reduction decisions were causing 'an unfolding human and environmental catastrophe' (including sewerage spillages into the Vaal River system) affecting businesses and residents within the jurisdiction of the municipalities.[81] On the other hand, Eskom argued that it was entitled to enforce its contractual rights against the municipalities and that the applicants' rights should instead be enforced against the defaulting municipalities.

The High Court handed down judgment on 28 August 2020. It recognised that Eskom's reduction decisions were adversely affecting municipal services and 'wreaking havoc on the lives of residents'.[82] The court rejected Eskom's argument that the applicants' rights should be enforced against the municipalities which, it held, had 'no prospect whatsoever, without outside intervention or assistance, of paying their outstanding debt to Eskom'.[83] Ultimately, the court was satisfied that the balance of convenience for the interim relief favoured the applicants and ordered Eskom to increase, or alternatively to restore, the maximum electricity load supply to the level supplied prior to its decision (pending the final adjudication of the review of Eskom's decision). Despite the court's recognition of the dire state of the municipalities and the need for 'outside intervention or assistance', its order was focussed on the immediate concern of 'keeping the lights on'.

Eskom appealed the judgment, with the SCA unanimously dismissing this appeal on 21 January 2022. In considering the requirements for an interim interdict, the SCA outlined the 'unfolding catastrophe with socio-economic and humanitarian consequences' flowing from the electricity reductions and the role of the two 'dysfunctional' and 'delinquent' municipalities in this catastrophe.[84] It also considered the various (unsuccessful) efforts made by the residents in the two municipalities including, for example, calls for the provincial executive to intervene.

The SCA held that there was 'no real dispute' regarding the existence of the debts owed to

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[81] *Vaal River Development Association v Eskom Holdings; Lekwa Rate Payers Association v Eskom Holdings* [2020] ZAGPPHC 429 (28 August 2020) ('*Vaal River 1')* paras 21-9.

[82] Ibid paras 41-5.

[83] Ibid paras 38-40, 47.

[84] *Vaal River 2* supra note 5 paras 14, 17-9.

Eskom or the inability of these 'recalcitrant and dysfunctional municipalities' to fulfil their payment obligations due to their 'parlous financial state.'[85] The SCA, with reference to its decision in *Resilient*, held that Eskom and the affected municipalities were constitutionally obliged to make 'every reasonable effort' to avoid or settle the intergovernmental dispute, including the use of a section 139 intervention where required, but had failed to do so.[86]

The SCA held that, if the intergovernmental dispute resolution mechanisms had been followed, it may have resulted in the intervention of the provincial and/or national government, which appeared to be 'warranted' and without which the municipalities were 'unlikely to turn their fortunes around'.[87] While noting that this avenue was not explored because Eskom was not prepared to wait for the dispute resolution process to unfold, the SCA did not seek additional information on any existing section 139 intervention processes underway at the time of hearing. Whereas no such intervention had been initiated in the Ngwathe Local Municipality, a mandatory national section 139*(7)* intervention had been initiated in the Lekwa Local Municipality in May 2021.

The SCA thus adopted a deferential approach, in which it recognised the dire state of affairs in the municipalities but chose to set out a non-prescriptive order embracing the utilisation of intergovernmental dispute resolution mechanisms and processes. This seems, again, to reflect an inherent belief in the existing democratic processes, structures and procedures, which effectively enabled the SCA to 'keep the lights on' without entangling itself in considerations of a section 139 intervention mechanism or the separation of powers.

Eskom appealed to the Constitutional Court, arguing that the municipalities had effectively been absolved of their constitutional obligations by the decisions of the High Court and SCA.[88] No submissions were filed by either the premiers or the CoGTA MECs. A divided Constitutional Court handed down judgment on 23 December 2022. The majority judgment

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[85] Ibid paras 29-30. The SCA did, however, note that other disputes had arisen such as the manner in which the debt would be liquidated, the remedies available to Eskom in the event of default, and the terms upon which Eskom would agree to increase the municipalities' NMD levels.

[86] Ibid paras 6, 24, 27-31. Also see *Resilient* supra note 1 paras 29-34, 74, 80.

[87] Ibid paras 30-1.

[88] *Vaal River 3* supra note 5 paras 39-43.

was penned by Madlanga J (with Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring), while the minority judgment was penned by Unterhalter AJ (with Kollapen J, Majiedt J and Mlambo AJ concurring). Both judgments held that determining Eskom's constitutional and statutory duties, and assessing the scope and application of these duties, was a constitutional matter which engaged the jurisdiction of the Constitutional Court.

The majority held that residents, as a result of the dispute between Eskom and the 'errant municipalities', were subjected to a situation that violated a number of their fundamental rights, including dignity, access to healthcare services and sufficient water, an environment that is not harmful to health or well-being, and education.[89] At an interim stage and pending the finalisation of review proceedings, the majority held that it could not allow the residents to be subjected to such 'abject misery and horrendous violation of fundamental rights' and the judicial focus was thus on seeking to correct Eskom's legally impermissible action by restoring the usual electricity supply to the municipalities ('keeping the lights on' and thereby suspending the resultant rights violation).[90] The majority thus refused Eskom's appeal.

It is clear that the majority's judicial recognition of the underlying rights violations materially influenced and provided a justification for its approach. This judicial role is similar to that adopted in *AllPay1, AllPay2* and *Black Sash*,[91] which highlighted the Constitutional Court's willingness to adopt a higher level of scrutiny and remedial prescriptiveness to stop measures which disregard socio-economic rights or in which a dysfunctional government triggers a potentially catastrophic socio-economic rights violation. However, while the majority recognised the underlying challenges facing the two municipalities, it neither explored nor imposed a more prescriptive remedy, such as a court-ordered mandatory provincial section 139 intervention in Ngwathe or the fortification of the section 139*(7)* intervention in Lekwa. Nor did it attempt to remedy the underlying rights violations. Further, because of its recognition of the underlying rights violations, the majority made no further finding on whether the municipalities' residents had a constitutional right to the supply of electricity by Eskom.

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[89] Ibid paras 189, 256-60.

[90] Ibid para 194. For the majority, electricity reductions or terminations must take place in a manner not susceptible to a PAJA review, meaning that Eskom must give residents notice and an opportunity to make representations; see paras 207-8.

[91] See the discussion on this trilogy of matters in paragraph 2.3.5 of Chapter 2.

In contrast, the minority would have upheld Eskom's appeal, finding that Eskom does not owe a duty to supply, and that residents do not have a correlative right to claim, electricity.[92] The minority also disagreed with the majority's judicial recognition of the underlying rights violations, on the basis that these had not been argued before, or established by, the Constitutional Court.

The minority held further that municipalities must carry out their constitutional and statutory duties and that their failure to do so was the 'true source of the problem'.[93] Where municipalities do not carry out their constitutional and statutory duties, the minority held that they must be made to do so, in accordance with the applicable constitutional accountability and intergovernmental monitoring and support mechanisms, including the section 139 intervention mechanism. The minority expressed particular concern that this scheme of constitutional responsibility could be 'subverted' through the 'floodgates' potential of using interim orders to assign the duties of dysfunctional municipalities to Eskom.[94] The minority also rejected the judicial approach, relied upon by the SCA in *Resilient* and *Vaal River 2* of requiring Eskom to make every reasonable effort to settle an intergovernmental dispute in terms of its co-operative governance obligations, finding that there can be no duty to co-operate with a sphere of government that 'has abdicated its own constitutional responsibilities'.[95]

While the minority did not consider a court-ordered mandatory provincial section 139 intervention or the fortification of the existing national section 139 intervention, despite such interventions seemingly being custom-made for the municipalities, it seems conceivable that it would have been amendable to such relief under the broad remedial powers of section 172 of the Constitution, had this been requested by the applicants.

5.2.6. Reflections: Judicial role conception in the first sub-category

There are similar influences shaping the judicial role in the matters considered in this first sub-category. First, judicial involvement arises from litigation in which assistance is sought by the

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[92] *Vaal River 3* supra note 5 paras 99-101.

[93] Ibid paras 105, 170-1, 173, 180-2.

[94] Ibid paras 182-3.

[95] Ibid paras 170-1, 173.

municipality, community groups, local businesses, chambers of commerce and non-governmental organisations, to 'keep the lights on'. Second, the litigation arises in an attempt to address, or as a result of, Eskom's strategic decision to interrupt or reduce the supply of bulk electricity to a municipality, which decision has its genesis in an ongoing monetary dispute between Eskom and errant and dysfunctional municipalities facing a financial crisis. Third, judicial assistance in 'fixing' a municipality is not specifically sought by applicants and no court-ordered mandatory section 139 intervention (or the fortification of an existing section 139 intervention) is requested by the litigants in these matters. This highlights an important limiting role of litigation in this Chapter.

Unlike in Chapter 4, judicial involvement in the first sub-category does not (itself) catalyse a political solution to the underlying municipal dysfunction. However, there appears to be implicit judicial support for the role of litigation in the first sub-category, despite its expense, to the extent that it addresses the challenge of 'keeping the lights on' and, as a result, any underlying rights violations.

Again, unlike in Chapter 4, while the courts may refer to a section 139 intervention (either as falling within the arsenal of tools available within intergovernmental dispute resolution channels or as a necessary response to municipal collapse), they have not sought to compel the provincial and/or national government to initiate, or to consider initiating, a section 139 intervention, nor have they sought to obtain additional information on an existing section 139 intervention or to fortify such intervention. This approach has been adopted despite the mandatory section 139 intervention mechanism appearing to be custom-made for the situation in each of the municipalities, whether through addressing the underlying financial crisis of the municipality by the development of a financial recovery plan so as to ensure service delivery and the meeting of financial commitments or dissolving the municipal council of a dysfunctional municipality.

However, as noted by Bilchitz, the 'decision not to decide a case in a particular way is sometimes just as interesting and revealing as the basis that is given for the decision'.[96] When the courts have engaged with the various permutations of Eskom's interruption or reduction

[96] David Bilchitz 'Citizenship and community: exploring the right to receive basic municipal services in *Joseph*' 2010 (3) *CCR* 45 at 50.

decisions, three possible judicial roles appear to be emerging in this first sub-category. These are influenced by the courts' consideration of the threshold for judicial involvement, the extent to which they should prescribe an intergovernmental dispute resolution process and, when the intergovernmental dispute resolution process has failed or is not appropriate, the extent to which they are willing to assume a more active or intrusive role.

The first possible judicial stance, which is currently predominant, is triggered when residents (individuals, associations or local businesses) within a dysfunctional municipality approach the courts for assistance when 'the lights are off' which has, in turn, triggered multiple socio-economic rights violations. While the courts accept the municipality's dire financial state and, often, the underlying socio-economic rights violations, as uncontested, they tend to then assume a deferent role requiring Eskom, as an organ of state, to make reasonable efforts to settle its municipal debt disputes through applicable intergovernmental dispute resolution channels under the Constitution and the IRFA (*Cape Gate 1*, *Resilient,* the minority judgment in *Letsemeng, Vaal River 2*). The influence of the 'special cluster of relationships' and the resultant reliance on intergovernmental relations and co-operative governance obligations thus becomes a structural factor for the judicial role and materially influences the remedial framework.

As a result, the courts effectively guide the parties towards existing intergovernmental dispute resolution mechanisms within which, the courts suggest, the application and implementation of a section 139 intervention, amongst other possibilities, could be explored. The courts, however, do not prescribe to organs of state how to resolve their disputes or how to exercise their constitutional powers, instead demonstrating a preference to defer to a decision by the provincial or national government on whether a section 139 intervention is required, as well as on the terms and content of such intervention. The courts thus afford Eskom and local government a broad margin of discretion, requiring that reasonable efforts be pursued before Eskom implements any drastic actions that may adversely affect a municipality's ability to deliver services. Eskom, in turn, is required to allow this process to 'unfold'.

With strong parallels to the approach adopted in the second wave of socio-economic rights disputes, the courts appear to prefer this deferent, democracy-enhancing role to a judicial

resolution of the dispute, at this stage.[97] This suggests respect for the doctrine of separation of powers (albeit that the courts have not expressly engaged with this doctrine in these matters), the principles of co-operative governance, local government autonomy and the ability of governmental parties to resolve their dispute, as well as belief in the effectiveness of existing democratic institutions, structures and processes to avoid and rectify the underlying municipal collapse, financial crises and socio-economic rights violations.

However, this approach is clearly focused on seeking to 'keep the lights on' rather than to directly address the underlying municipal dysfunction or macro-level socio-economic rights violations in a municipality. The courts thus tend to decide these matters with the underlying rights violations in the background: the rights violations are acknowledged by the courts but do not play a material role in influencing the level of scrutiny or remedial prescriptiveness ultimately adopted. When assuming this first judicial stance, the courts also do not take decisive steps to hold local government to their constitutional and statutory obligations, despite recognising the challenges faced by local government and resulting macro-level socio-economic rights violations (see, for example, the concerns raised in the minority judgment in *Vaal River 3*).

This first judicial stance presents the risk of a prolonged intergovernmental dispute resolution process which requires consensus and which can result in a lack of accountability and a wholesale failure to address the underlying municipal dysfunction, potential socio-economic rights violations and apparent lack of government responsiveness (in terms of its monitoring, support and intervention obligations), all of which are suggestive of democratic failure.[98] As a result, this approach has the real potential of relegating residents of dysfunctional municipalities to political structures that have already proved inattentive (at best), incompetent, or intransigent (at worst) to the municipal dysfunction, a spiralling Eskom debt and service-delivery collapse.[99]

The second possible judicial stance is triggered when Eskom approaches the courts to assert its

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[97] See the discussion in paragraph 2.3.5 of Chapter 2.

[98] See, for example, Stuart Wilson and Jackie Dugard, 'Taking poverty seriously: The South African Constitutional Court and socio-economic rights' (2011) 22(3) *SLR* 664.

[99] See the discussion in paragraphs 2.2.4.3 and 2.3.5 of Chapter 2.

rights by obtaining a court order. In these matters, the courts appear to attempt to 'judicialise' the municipal debt and express a willingness to bypass the intergovernmental dispute resolution channels in a manner akin to an ordinary 'debt' dispute (*Cape Gate* 2 and the majority judgment in *Letsemeng*). This seems to suggest diminishing willingness to defer to intergovernmental dispute resolution channels to solve a dispute when it appears that the failure of these channels has become part of the problem. In this second judicial stance, the courts have thus crafted a method of 'keeping the lights on' and, by corollary, averting the alleged socio-economic rights violations outside of the intergovernmental relations channels, by ordering the parties to pay Eskom directly (*Cape Gate 1* and *Cape Gate 2*) or ordering the municipality to pay Eskom (*Letsemeng*).

However, under this second judicial stance, the courts still express a preference of deferring to a decision of the provincial or national government on whether a section 139 intervention is required, as well as on the terms and content of such intervention. As with the first possible judicial stance, the courts are also focused on 'keeping the lights on', rather than directly addressing any underlying municipal dysfunction or macro-level socio-economic rights violations.

The third (and emerging) judicial stance is triggered when the courts expressly focus on the underlying rights violations occurring in the municipality. For example, the majority of the Constitutional Court in *Vaal River 3* explicitly held that several fundamental rights had been violated, with this finding materially influencing and justifying the approach ultimately adopted by the majority (in rejecting Eskom's appeal and, in the process, 'keeping the lights on' and averting the underlying rights violations). While the majority did not target their order at remedying the underlying rights violation (only focusing on not making it worse), the express acknowledgment of the rights violation suggests courts' increasing willingness to adopt a higher level of scrutiny and remedial prescriptiveness if they consider this to be necessary to stop measures which disregard socio-economic rights or to address a potentially catastrophic socio-economic rights violation triggered by a dysfunctional government.[100]

The minority judgment in *Vaal River 3* provides some criticism of this possible judicial stance:

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[100] This also recalls the approach set out by Thomas J. Bollyky 'R if C > P + B: A paradigm for judicial remedies of socio-economic rights violations' (2002) 18 *SAJHR* 161 at 164-5, 169.

the minority refused to consider, or be influenced by, alleged rights violations given that these were not expressly argued, analysed or proven before the Constitutional Court. The minority also expressed concerns that dysfunctional municipalities were not being held to their constitutional and statutory duties, including through a section 139 intervention. While the minority did not compel a section 139 intervention (with the applicants also not seeking such relief), it seems possible that it may have been willing to consider relief ensuring the effective performance by the municipalities of their functions, including a mandatory section 139 intervention, as just and equitable in terms of section 172*(1)(b)* of the Constitution. However, based on the view of the minority in *Vaal River 3*, such relief would likely fall outside a socio-economic rights remedial framework, unless underlying rights violations had been specifically argued and established before the courts.

5.3. The second sub-category: The judicial role in attempts to bypass the section 139 intervention mechanism

Unlike the first sub-category, in which the 'special cluster of relationships' operated as a defining and structural force on the judicial role, the judicial role in the second sub-category is not influenced or shaped by public-law relationships or the accompanying intergovernmental dispute resolution obligations.

Against this background, the second sub-category concerns the judicial role in matters where litigants (municipalities, community groups and local businesses) request alternative and often innovative relief which, in effect, bypasses traditional constitutional structures, mechanisms and processes, including the section 139 intervention mechanism. This Chapter focuses on only a few of these matters, as representative of the key issues and judicial role in this second subcategory, in the following jurisdictions: Matjhabeng, Madibeng and Kgetlengrivier.

5.3.1. Matjhabeng Local Municipality

The Matjhabeng Local Municipality is located within the Lejweleputswa District Municipality in the Free State.[101] Towns within the jurisdiction of the municipality include Ventersburg,

[101] See Municipalities of South Africa 'Matjhabeng Local Municipality (FS184)' available at https://municipalities.co.za/overview/1044/matjhabeng-local-municipality, accessed 22 June 2022.

Virginia and Welkom. The municipality has received a qualified audit opinion with findings every year since the 2017/18 financial year, a financially unqualified audit opinion with findings in the 2015/16 and 2016/17 financial years, and a disclaimed audit with findings between the 2012/13 and 2014/15 financial years.[102]

While the municipality has never been placed under a section 139 intervention, it has been involved in litigation (particularly between March 2013 and September 2017) arising from Eskom's protracted attempts to force it to pay for its bulk electricity supply. In this regard, a court order was issued in favour of Eskom for the regulation of the municipality's monthly payments under a settlement agreement. When the municipality failed to comply with this order, a further order was issued imposing various obligations on the municipality and the municipal manager. Following non-compliance with this further order, another order was granted which required the municipal manager to file a report justifying the non-compliance. While the municipal manager set out various efforts to settle the dispute, the High Court found that the non-compliance was both wilful and in bad faith and the municipal manager was held in contempt of court and sentenced to six months' imprisonment, wholly suspended (although this was subsequently overturned by the Constitutional Court).[103]

The litigation shifted in July 2018, with the municipality requesting an order staying an execution of judgment (and any potential and/or actual sales in execution) against it in favour of three private companies.[104] The municipality requested that the High Court mediate any dispute on payment terms and set out its challenges in making full payments, arguing that its ability to provide basic services would be prejudiced if an execution of judgment was permitted.[105] The three private companies opposed a court mediation arguing, amongst other things, that there was another remedy available: a section 139 intervention.[106] The municipality rejected this suggestion, arguing that its inability to pay a single creditor should not 'ignite' a

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[102] AGSA op cit note 11 at Annexure 3.

[103] A comprehensive overview of this background is set out in *Matjhabeng Local Municipality v Eskom Holdings; Mkhonto v Compensation Solutions* 2018 (1) SA 1 (CC) paras 6-13.

[104] *Matjhabeng Local Municipality v Man in One* [2018] ZAFSHC 121. The respondents included these three private companies: Man in One, Phakama Security Services and MBV Security.

[105] Ibid paras 6-7, 16.

[106] Ibid para 12.

section 139 intervention and that it was not in 'such a crisis as would require an intervention'.[107]

While the High Court held that there was insufficient evidence to conclude that the municipality was in a 'serious financial crisis' for the purposes of section 139 of the Constitution (and did not explore this further), it held that the municipality did not dispute its indebtedness (in respect of which judgments had been granted) and that it was clearly unable to 'meet its financial obligations'.[108]

The court held that, in such cases of 'challenges and serious crisis in its finances', the ordinary remedy was 'clear': the municipality was 'obliged as of law' to adopt the 'mandatory and statutory steps' of seeking intervention of the provincial government, rather than seeking an interdict to stay the sales in execution with the High Court mediating a payment plan.[109] This was held to be bolstered by section 157 of the MFMA which provides specific machinery, coupled with a mandatory section 139 intervention, to stay any such legal proceedings. The court was thus satisfied that the circumstances did not justify the judiciary being placed in the 'invidious position of having to oversee state action' by mediating a payment plan, especially when there was another statutory and constitutional remedy (a section 139 intervention) available to the parties.[110]

The key distinction in this matter, when compared with the first sub-category, is that the municipality was litigating against private third-party creditors rather than an organ of state. This enabled the High Court to jettison the constraints imposed under the 'special cluster of relationships', the principles of co-operative government and the need to follow intergovernmental dispute resolution channels for the resolution of payment disputes.

However, with its recognition of the available remedy (a section 139 intervention), paired with its decision not to compel such remedy, the High Court adopted an approach of deference. In particular, the court suggested some hesitance in ordering a mandatory section 139

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[107] Ibid para 20.

[108] Ibid paras 20-1, 25.

[109] Ibid paras 13, 18, 21, 25, 37.

[110] Ibid paras 23-5. Also see *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* 2008 (5) SA 94 (CC) para 85.

intervention, despite recognising that this appeared to be required, on the basis that insufficient evidence had been provided. As a result, it appeared to be more comfortable with deferring to the decisions to be taken by provincial (or national) government in relation to a section 139 intervention, despite making no reference to the doctrine of separation of powers. This appears to be similar to the approach adopted in the second wave of socio-economic rights matters. The court demonstrates a clear preference for referring a decision to what it considers as functional and effectiveness democratic systems, processes and procedures.[111] The court's apparent belief in the ability of the section 139 intervention mechanism to rectify the municipality's challenges may have also been based on the recognition that the municipality had never been placed under a section 139 intervention.

This approach does, however, suggest that the courts may be willing to adopt a less deferent approach if there are concerns with the efficacy and integrity of the democratic systems, processes and procedures, and, if the courts feel like these do not exist (such as in the matters discussed in Chapter 4), they may be more willing to step in with an order compelling the provincial government to consider intervention where it is concerned that these systems are collapsing or where there is bad faith. The approach adopted by the High Court in this matter, in which it is not constrained by the 'special cluster of relationships', further illustrates what could happen if the courts ultimately decide to jettison considerations of intergovernmental relations and co-operative governance in the first sub-category matters, where there is a faltering belief in the efficacy of the democratic institutions, structures and processes.

5.3.2. Madibeng Local Municipality

The Madibeng Local Municipality is located within the Bojanala Platinum District Municipality in the North West.[112] Towns within the jurisdiction of the municipality include Brits, Hartbeespoort and Mooinooi. The municipality received a financially qualified audit with findings between the 2012/13 and 2014/15 financial years but has since deteriorated to receive

[111] See, for example, Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 1 *VRÜ* 25.

[112] See Municipalities of South Africa 'Madibeng Local Municipality (NW372)' available at https://municipalities.co.za/overview/1188/madibeng-local-municipality, accessed 29 September 2022.

a disclaimed audit with findings every year from the 2015/16 financial year.[113]

The municipality has been placed under a section 139*(1)(b)* intervention six times: between March 2010 and March 2011, between December 2012 and January 2013, between February 2014 and March 2014, between March 2015 and August 2016, between July 2019 and June 2020, and between August 2020 and January 2021.

In 2005, the Kosmos Ridge Homeowners' Association, a community association falling within the municipality's jurisdiction, obtained a court order for the municipality to erect a complete and suitable purification or reticulation plant (the '2005 order'). The municipality, however, did not comply with the 2005 order because of, amongst other things, its 'lack of the necessary funds'.[114] A subsequent court order obtained in November 2009 required the municipality to submit a comprehensive progress report for acquiring an environmental authorisation for the construction of the sewage treatment plant. Given that there had still been no compliance with the 2005 order, a further order was obtained in October 2011, which incorporated certain undertakings made by the municipality relating to the fulfilment of the 2005 order.[115]

However, following further non-compliance with the various court orders, the High Court granted a contempt order against the municipality in July 2019, together with further orders to ensure fulfilment of the 2005 order.[116] The High Court provided for supplementary relief, if required, namely that the municipal manager be required to provide reasons why the court should not consider his imprisonment pending compliance with the order.

Further relief, ordering the Minister of Finance to intervene by holding or ring-fencing the funds allocated or required for the erection of the sewerage plant separately, was postponed. In subsequent litigation, however, the Kosmos Ridge Homeowners' Association argued that the Minister of Finance's intervention, while not expressly contemplated in any constitutional or legislative provision, was required on the 'basis of necessity' as read with section 172*(1)(b)* of

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[113] AGSA op cit note 11 at Annexure 3.

[114] *Kosmos Ridge Homeowners' Association v Madibeng Local Municipality* 2022 (2) SA 207 (GP) paras 5-6.

[115] Ibid paras 7-10.

[116] Ibid para 11.

the Constitution.[117] In particular, the applicant argued that the municipality's consistent non-compliance with various court orders had the effect of the municipality 'forfeit[ing]' its constitutional autonomy, including any decisions on how to allocate its resources.[118]

The Minister of Finance, on the other hand, set out the constitutional role of municipalities and the importance of municipal autonomy, including the allocation of resources to meet the needs of communities and to respond to local priorities.[119] The Minister referred to the section 139 intervention mechanism, which he noted was 'not applicable in the present matter', and emphasised that national and provincial government may not otherwise abrogate to themselves the powers or take over the executive functions of the municipality.[120]

The High Court handed down judgment in October 2020, substantially agreeing with the submissions of the Minister of Finance and refusing to grant the requested relief. The court held that local government autonomy could only be limited through appropriate constitutional mechanisms, such as the clearly circumscribed section 139 mechanism, understood with the relevant constitutional accountability and intergovernmental monitoring and support mechanisms set out in Chapter 7 of the Constitution. The court thus held that the relief sought was not competent in law, as a national minister cannot 'ring-fence' funds on the basis of 'necessity' and 'empathy'.[121]

However, the court did note that the municipality was 'dysfunctional' and had consistently failed to comply with its statutory and constitutional obligations and any court orders 'through institutional incompetence, maladministration and mala fides'.[122] It further observed that the Constitution provides specific mechanisms, including the section 139 intervention mechanism,

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[117] Ibid paras 15-6.

[118] Ibid paras 17.5 to 17.6. This argument relied on section 155*(7)* of the Constitution (setting out the constitutional oversight function of national government), section 216 of the Constitution (dealing with the duties of national treasury) and certain provisions of the MFMA.

[119] Ibid paras 17.1-4. Also see *City of Johannesburg Metropolitan Municipality v Chairman of the National Building Regulations Review Board* 2018 (5) SA 1 (CC) paras 26-7.

[120] Ibid paras 17.6 to 17.8, 19.2-19.3.

[121] Ibid paras 30-1.

[122] Ibid paras 1, 15.

to deal with 'errant municipalities'.[123] While the court was advised, during argument, that the municipality had been placed under a section 139*(1)(b)* intervention (in August 2020) and appeared to be willing to engage with this section 139 intervention, specifically inviting the applicant to provide further written submissions regarding the powers and duties of the administrator, 'no specifics could be provided', hence limiting the court to noting only that it 'seem[ed] as if a "Task Team" had been appointed by the [CoGTA Minister] during August 2020'.[124]

Without any further submissions on this point, the High Court held that the applicant had the detailed 2019 court order and 'must exercise its rights thereunder, no matter how difficult it may be'.[125] The court also held that there are specific mechanisms for dealing with contempt of court orders and that those processes do 'not involve shifting the constitutional obligation for compliance' with the orders away from the municipality to the Minister of Finance.[126]

As such, without further information and despite its underlying concerns, the High Court adopted a deferent approach, unwilling to jettison local government autonomy with an invasive order outside of the constitutionally-permissible section 139 intervention mechanism. The court was further unwilling to venture into the possible fortification of a section 139*(1)* intervention (of which no specifics had been provided) or the contemplation of a section 139*(5)* intervention (in the absence of the executive's decision in this regard). In other words, the High Court appeared to have been influenced by the existence of a section 139*(1)* intervention in the municipality and its belief in the effectiveness of the constitutional accountability and intergovernmental monitoring and support mechanisms.

However, just over a year after this judgment (in January 2022), the provincial executive took a decision to place the municipality under a section 139*(5)(a)* and *(c)* intervention.

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[123] Ibid para 19.2.

[124] Ibid para 14.

[125] Ibid paras 1, 14.

[126] Ibid para 18.

5.3.3. Kgetlengrivier Local Municipality

The Kgetlengrivier Local Municipality is located within the Bojanala Platinum District Municipality in the North West.[127] Towns within the jurisdiction of the municipality include Derby, Koster and Swartruggens. The municipality has received a disclaimed audit with findings every year since the 2017/18 financial year and in May 2018 was identified by the CoGTA Minister as a priority municipality which was distressed or dysfunctional requiring urgent intervention.

The municipality was subsequently placed under a section 139*(1)(b)* intervention between September 2018 and August 2019. The close-out report for the section 139 intervention noted, amongst other things, that the municipality had replaced water reticulation for Koster and Swartruggens, was addressing the sewerage spillage, and that the major waste-water treatment plant at Swartruggens was near completion.[128]

In December 2020, the Kgetlengrivier Concerned Citizens (a residents' association within the municipality's jurisdiction) and Mr Carel van Heerden (a resident in the municipality) launched an urgent application in the High Court regarding the municipality's failure to provide adequate water services to Koster and Swartruggens and its failure to prevent the pollution of the Elands and Koster rivers due to continuous untreated sewerage spills from failing sewerage works.[129] The provincial and national executive respondents (including the MEC and national minister for environmental affairs and the national minister responsible for water and sanitation) all indicated that they would abide by the High Court's decision.

The High Court handed down an interim order on 18 December 2020, finding that the municipality was in breach of its statutory and constitutional obligations to prevent

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[127] See Municipalities of South Africa 'Kgetlengrivier Local Municipality (NW374)' available at https://municipalities.co.za/overview/1187/kgetlengrivier-local-municipality, accessed 22 June 2022.

[128] CoGTA MEC 'Progress Report on the implementation of section 139(1)(b) of the Constitution in identified municipalities in the province' (September 2020) available at https://pmg.org.za/files/200909NCOP_Section_139_Presentation.pptx_1_September_2020_Final_Draft.pptx, accessed 22 September 2023.

[129] *Kgetlengrivier Concerned Citizens v Kgetlengrivier Local Municipality* [2020] ZANWHC 95 (18 December 2020).

contamination of the environment.[130] It ordered the municipality and the municipal manager to halt the flow of raw sewerage into local rivers and to take remedial steps to fix both the cause and the effects of the pollution.[131]

As a result of its understanding of the clear violation of the Bill of Rights and the municipality's statutory obligations, the High Court deemed it appropriate to order a criminal sanction: a 90-day imprisonment for the municipal manager unless the potable water supply was restored and the flow of sewerage into the local rivers was remedied within ten days (although the municipal manager did manage to avoid this proposed incarceration). The municipal manager was further ordered to report to the court on the steps taken to resolve the issues and to prevent future recurrences.[132]

The court went further, demonstrating diminishing deference to local government autonomy and the municipality's discretion for determining how to provide services, ordering that the Kgetlengrivier Concerned Citizens could 'take control of' the sewage and water works at Koster and Swartruggens and could 'employ suitable qualified people' to operate these facilities, if the sewage pollution and water provision issues were not resolved within ten days.[133] The 'handing over' of municipal assets to community organisations raises interesting legal questions, including whether the court is permitted to compel or endorse municipalities effectively bypassing the provisions of the Systems Act in relation to the permitted mode of service delivery. While this poses questions on the judicial role, it falls outside the ambit of this Thesis which seeks to conceptualise the judicial role in relation to section 139 of the Constitution.

In this regard, it is noted that the court made no reference to the section 139 intervention mechanism which expressly caters for a more interventionist role for the provincial executive

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[130] Ibid paras 2-5, 11-3.

[131] Ibid para 5.

[132] Ibid paras 9, 14.

[133] Ibid paras 10, 15. Some commentators have argued further that allowing residents to take on municipal functions can 'only ever be a short-term solution' and is not sustainable; see Alana Potter 'Beyond Kgetlengrivier: Citizen groups taking over collapsed municipal services is only a short-term solution' *Daily Maverick* (28 February 2021) available at https://www.dailymaverick.co.za/article/2021-02-28-beyond-kgetlengrivier-citizen-groups-taking-over-collapsed-municipal-services-is-only-a-short-term-solution/, accessed 29 September 2022.

when a municipality is unwilling or unable to fulfil an executive obligation or is experiencing a financial crisis which results in a serious or persistent failure to ensure service delivery. The section 139 intervention mechanism would have enabled the provincial executive, rather than the residents' association, to take over service delivery in the municipality, and to address any underlying financial crisis of the municipality through the development of a financial recovery plan or even to dissolve the municipal council.

The High Court may have been influenced by the absence of any section 139 intervention in the municipality at this stage, the willingness of the provincial and national executive respondents to adopt a supine attitude and merely abide by the High Court's decision, and the apparent ineffectiveness of the constitutional accountability and intergovernmental monitoring and support mechanisms.[134] Its approach may have been further bolstered by the section 100 intervention that was underway in the North West provincial government at the time. In any event, its willingness to bypass the section 139 intervention mechanism appears to highlight the court's decreasing deference to the democratic legitimacy of local government and its diminishing faith in the applicable constitutional accountability and intergovernmental monitoring, support and intervention mechanisms to avoid and address governance collapses.[135]

The Kgetlengrivier Concerned Citizens did subsequently take control of the water and sewage works and restored these to working order. In January 2021, the court order was amended by agreement between the parties to reflect the Kgetlengrivier Concerned Citizens' control of the water and sewerage works conditional on a transfer to a 'suitable implementing agent' appointed by the municipality by the end of January 2021.[136] The municipality also agreed to pay the costs of the Kgetlengrivier Concerned Citizens and their contractors for the operation of the water and sewerage works until the handover.

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[134] For example, the High Court observed that the provincial MEC had been aware of the raw sewerage spillage but had failed to resolve the issue. Also see the discussion in paragraph 2.3.2 of Chapter 2.

[135] David Everatt & Marius Pieterse 'Outsourcing governance: Local government and the future of democracy in South Africa' (2022) 48(5) *JSAS* at 798-800, 804.

[136] See *Kgetlengrivier Concerned Residents v Kgetlengrivier Local Municipality* [2023] 2 All SA 452 (NWM) paras 16-7.

When these costs were not paid, the Kgetlengrivier Concerned Citizens again seized control of the water works but the High Court ordered that control be handed back to the appointed implementing agent and the municipality.[137] Just over a year after the initial judgment (in January 2022), the provincial executive finally placed the municipality under a mandatory intervention in terms of section 139*(5)(a)* and *(c)* of the Constitution.

5.3.4. Reflections: A judicial role conception in the second sub-category

In the second sub-category, the courts were called upon to consider requests for innovative relief, including: a court mediation of a dispute, a forfeiture of municipal autonomy and the ring-fencing of funds by the Minister of Finance and the assumption of control by a community over affected municipal services. However, unlike the first sub-category, the courts were not constrained by any 'special cluster of relationships' and there was no accompanying requirement for judicial deference to applicable intergovernmental dispute resolution channels.

Despite this, the section 139 intervention mechanism formed no part of the court orders in this second sub-category (as was the case in the first sub-category), even though a section 139 intervention appeared to be custom-made for the type of systemic municipal collapse, financial crisis and persistent or ongoing service delivery failures or a failure to meet financial commitments often evident in this sub-category.

Instead, the courts expressly dismissed any attempts to bypass the appropriate constitutional accountability and intergovernmental monitoring, support and intervention mechanisms, demonstrating an implicit acceptance that dysfunctional municipalities can still be fixed within the constitutional framework of co-operative governance. The courts thus maintained an approach of judicial deference to provincial and national decisions relating to the need for and structure of a section 139 intervention, as well as to the democratic legitimacy of local government and its decisions on how to deliver services and deal with its own problems.

However, the High Court's approach in *Kgetlengrivier* illustrates the development of a possible shift in the judicial approach, with courts potentially being more willing to accept and sanction

[137] Mmoloki Cwaile 'MEC Mmoloki Cwaile welcomes court ruling on Kgetlengrivier' (19 May 2021) available at https://www.gov.za/speeches/mec-mmoloki-cwaile-welcomes-court-ruling-kgetlengriver-19-may-2021-0000, accessed 29 September 2022.

attempts to bypass conventional constitutional accountability and intergovernmental monitoring, support and intervention mechanisms in certain circumstances (including where these are failing), with decreasing deference to the democratic legitimacy of a dysfunctional local government.

This further suggests the possibility of a judicial role positioned within a broader socio-economic rights remedial framework in terms of which just, equitable and appropriate relief may be ordered under sections 38 and 172*(1)(b)* of the Constitution, including a section 139 intervention to remedy macro-scale socio economic rights violations in a municipality.

5.4. Conclusion

The courts are emerging with an important and catalytic judicial role in Category 3, influenced by their understanding of the doctrine of separation of powers (and the need for deference to both national and provincial decision-making processes and local government autonomy), the reason for the dispute (for example, 'keeping the lights on' or attempting to address the underlying municipal dysfunction), the health and integrity of the democratic institutions, structures and processes including intergovernmental dispute resolution mechanisms, and the severity of underlying socio-economic rights violations.

However, the section 139 intervention mechanism, which is custom-made for the type of systemic municipal collapse, financial crisis, and persistent or ongoing service delivery failures or a failure to meet financial commitments often evident in this Chapter, consistently fails to form part of any court orders in the Category 3 matters.

Viewed holistically, the judicial role in Category 3, and the failure to trigger section 139 of the Constitution, appears to be constrained and shaped by three factors: first, continuing deference to the democratic legitimacy and mandate of local government;[138] second, continuing preservation and support for the principles of co-operative government (intertwined with the application and implications of the 'special cluster of relationships', where applicable) and for constitutional accountability and intergovernmental monitoring, support and dispute resolution mechanisms to address the underlying or root causes of the challenges faced by local

[138] Also see Everatt & Pieterse op cit note 135 at 798-800, 804; Marius Pieterse 'Urban autonomy in South African intergovernmental relations jurisprudence' (2019) 13(2) *Vienna Journal on International Constitutional Law* 119-146.

government without undue judicial interference; and third, an interest in addressing the immediate issue (such as 'keeping the lights on' or an attempt to bypass a section 139 intervention mechanism) without any entanglement in the underlying municipal dysfunction and socio-economic rights violations. These factors are evident across both sub-categories.

There are, however, some emerging developments in the judicial role in these Category 3 matters, shaped by the following factors: first, a diminishing deference to the democratic legitimacy and mandate of a dysfunctional local government; and second, a faltering belief in the ability of constitutional accountability and intergovernmental monitoring, support and dispute resolution mechanisms to avoid and address governance collapses and cure underlying socio-economic rights violations. A further factor was highlighted by the majority in *Vaal River 3*: an increased judicial focus on recognising the underlying macro-scale socio-economic rights violations which arise in the context of municipal dysfunction and financial crisis and ensuring that the level of judicial scrutiny and remedial prescriptiveness adequately address those violations.

These emerging developments further suggest the possibility of an increased judicial willingness to intensify the level of scrutiny and remedial prescriptiveness in Category 3, with a focus on fixing the underlying issues facing the municipality and remedying any resulting rights violations, potentially though the consideration of a court-ordered mandatory section 139 intervention, or the fortification of an existing section 139 intervention, in a dysfunctional municipality (albeit that this has not yet taken place).

CHAPTER 6: REFLECTIONS, RECOMMENDATIONS AND FURTHER RESEARCH

'*Determining the boundaries of the courts' proper role, however, cannot be reduced to a simple test or formula; it will vary according to the right at issue and the context of each case*'.[1]

6.1 Introduction

The South African constitutional and legislative framework assumes that local government will function effectively and competently and will fulfil its 'coalface' role. It proposes only limited monitoring and support from national and provincial government and intervention by the provincial (or, where applicable, national) executive only in the event of a crisis. Within this framework, the judiciary is expected to assume only a very limited and non-interventionist role. This means that effective and functional democratic institutions, structures and processes should be established and maintained so as to address any possible municipal dysfunction or collapse and to limit any possible judicial involvement.

In practice, however, high levels of municipal dysfunction, ongoing service delivery failures and spiralling financial crises at local governmental level have become systemic. There has been limited relief from the relevant constitutional accountability and intergovernmental monitoring and support mechanisms.[2] The 'last resort' section 139 intervention mechanism has been poorly implemented, if at all.[3]

Among the consequences of this is an increasing reliance on the courts to consider and resolve the challenges besetting local government, despite this not being expressly contemplated under the monitoring, support, oversight and intervention framework. Judicial involvement has thus increased, in different ways, with the judicial adjudication of municipal collapse (in general)

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[1] *Doucet-Boudreau v Nova Scotia (Minister of Education)* 2003 SCC 62 para 36.

[2] See, generally, David Everatt & Marius Pieterse 'Outsourcing governance: Local government and the future of democracy in South Africa' (2022) 48(5) *JSAS* 787 and paragraph 1.2 of Chapter 1.

[3] See paragraphs 1.3.3 and 1.3.4 of Chapter 1.

and the section 139 intervention mechanism (more specifically) becoming almost commonplace.

A better understanding of the developing judicial stances adopted in matters relating to section 139 of the Constitution would enable the development of a broader judicial role conception for these matters. This would then enable the courts to utilise a transparent framework and guiding principles to assess compliance with provincial monitoring obligations under sections 105 and 106 of the Systems Act,[4] or to assess the NCOP's compliance with its duty to hold the executive accountable for the exercise of a section 139 intervention.[5] It would further enable the courts to better navigate the different strands of litigation considered in this Thesis.

Accordingly, this Thesis has examined the ways in which the courts have, thus far, approached their involvement in matters pertaining to section 139 of the Constitution. Chapter 1 discussed the constitutional and legislative framework for the section 139 intervention mechanism, considered its practical application and proposed a broad categorisation of judicial involvement in matters pertaining to section 139 across three categories: first, the judicial review of a decision to initiate a section 139 intervention; second, the judicial review of a failure to take such a decision; and third, the judicial involvement in matters arising from the consequences of municipal failure which should trigger a consideration of section 139 of the Constitution.

Chapter 2 developed a conceptual, analytical and evaluative framework for constructing a judicial role conception in matters relating to section 139, by drawing on case law and academic literature relating to South African courts' adjudication of different subject matters or 'streams' (each of which have elements pertaining to the section 139 intervention mechanism). As will be elaborated in this concluding chapter, this judicial role conception centres around the courts' understanding of four intersecting factors: the doctrine of separation of powers, the impact of governmental action and responsiveness, the integrity and healthy functioning of the democratic institutions, structures and processes and the seriousness of any underlying socio-economic rights violations. Chapters 3, 4 and 5 then applied this framework to systematically

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[4] See paragraph 1.2.1 of Chapter 1.

[5] See paragraph 1.3.2 of Chapter 1. Also see, broadly, *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC); *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC).

analyse the case law falling within the three identified categories of matters relating to section 139, tracing doctrinal developments and building a conception of a judicial role with a focus on justiciability, judicial scrutiny and remedial prescriptiveness.

When consolidating insights from the three identified categories discussed in Chapters 3, 4 and 5 of this Thesis, it is clear that the South African environment is generally conducive to litigation relating to section 139 of the Constitution. The courts, once involved, embrace a catalytic and flexible judicial role within and across each category, shifting strategically between different levels of scrutiny and remedial prescriptiveness.

6.2 The courts' approach to justiciability in the adjudication of matters relating to section 139 of the Constitution

As discussed in Chapter 2 of this Thesis, the judicial role is shaped by an initial (often latent) justiciability-inquiry stage in which the courts consider and justify the extent of their involvement.

Despite section 139 of the Constitution not expressly contemplating a role for the courts, the matters discussed in this Thesis illustrate an environment which is generally conducive to litigation relating to section 139 of the Constitution. For example, in each of the matters discussed in this Thesis, the courts demonstrated a willingness to adopt a generally permissive approach to standing. This includes an acceptance that political parties with substantial representation in a municipal council and a mayor acting in a personal capacity have standing (as discussed in Chapter 3). It also includes a suggestion that any underlying rights violations will trigger the application of section 38 of the Constitution, enabling anyone whose rights have been affected or threatened to approach the courts for relief (as discussed in Chapters 4 and 5).

At this stage, there is no indication that judicial involvement will be precluded if the non-curial mechanisms contained in section 139 of the Constitution or the non-curial constitutional safeguards meant to prevent governance failures,[6] have not yet been exhausted by the parties. There is also currently no suggestion that judicial involvement will be precluded where a

[6] See paragraphs 1.2 and 1.3.2.3 of Chapter 1.

section 139 intervention has not been initiated or requested by the parties, despite this being the obvious remedy for the consequences of municipal dysfunction and collapse.

Further, the courts have not been persuaded that the principle of subsidiarity would preclude judicial involvement where applicants have relied directly on section 139 of the Constitution. Instead, they have demonstrated a preference for reliance on their broad powers to grant just, equitable and, where relevant, appropriate relief under section 172 of the Constitution. However, as set out below, the finalisation and commencement of draft legislation (the draft Intergovernmental Monitoring, Support and Intervention Bill) being prepared under section 139*(8)* of the Constitution (which will regulate the implementation of section 139 of the Constitution) may require the courts to consider this argument in more detail in future.

While the courts have considered (and rejected) various arguments which tend to form part of a broader type of justiciability assessment, they have not yet conducted any express justiciability inquiries in the matters evoking section 139 of the Constitution. Instead, the courts have generally tended to rely on the provisions and values of the Constitution as providing direct constitutional legitimisation for their involvement.

As a result, the courts have not yet expressly considered whether the doctrine of separation of powers should preclude any judicial involvement. This is important given that the courts are effectively being requested, in matters such as those discussed in Chapters 3 and 4 of this Thesis, to second-guess the provincial executive's decision to initiate a section 139 intervention, or not, in a dysfunctional municipality. Instead, the courts have seemingly preferred to avoid or side-step, where possible, considerations of the political nature of a section 139 intervention or any preceding decisions. They have also not been influenced by any political separation of powers claims made by the executive in respect of a section 139 intervention decision, including in instances where an intervening political solution to municipal dysfunction has been proposed by the provincial executive following the initiation of litigation (as discussed in Chapter 4).

This is not to say that the courts have entirely jettisoned conventional separation of powers concerns. It remains feasible that the courts may decline involvement on the basis of separation of powers, depending on the facts of a particular matter. For example, a court may decline to consider a matter where litigation arises out of a municipality's failure to pass a budget, where separation of powers concerns may require a higher degree of judicial deference.

Nevertheless, viewed holistically, the courts appear to have accepted and confirmed the 'in principle' justiciability of the consequences of municipal dysfunction and collapse as well as a section 139 intervention decision or the failure to take such decision. In the process, the courts appear to be increasingly accepting of their involvement in these matters, as local government collapse becomes progressively acute, political solutions are either non-existent or non-functioning, the conventional constitutional accountability and intergovernmental monitoring, support and intervention mechanisms are not being utilised or are failing, and the plight of residents within the municipalities, who are experiencing the resultant rights violations, continues to escalate.

The current approach is consistent with South African courts' more general 'liberal approach' to the justiciability of exercises of public power, and their hesitance in developing a political question doctrine.[7] It further suggests an implicit rejection by the courts of concerns of 'lawfare'[8] (albeit that this has not yet been expressly argued in these matters) and a willingness to embrace transformative constitutionalism.[9]

A note of caution does appear to be required here. Despite this apparent judicial acceptance of the 'in principle' justiciability of the consequences of municipal dysfunction and collapse, a section 139 intervention decision and the failure to take such decision, the courts should ensure that they remain astute when considering matters relating to section 139 of the Constitution, so as not to assume justiciability and to, in each case, conduct a justiciability assessment based on the relevant factual matrix.

6.3 The courts' approach to judicial scrutiny and remedial prescriptiveness in the adjudication of matters relating to section 139 of the Constitution

Following the initial justiciability inquiry, the judicial role appears to then be materially shaped and influenced by the courts' explicit, and at times implicit, understanding of four intersecting factors which play a role in guiding, in their interaction, the variability of both the level of scrutiny and the remedial prescriptiveness adopted by the courts. These are the doctrine of

[7] See paragraph 2.2.4.1 of Chapter 2.

[8] See paragraph 2.2.1 of Chapter 2.

[9] See paragraph 2.2.2 of Chapter 2.

separation of powers, the impact of governmental action and responsiveness, the integrity and functioning of the applicable democratic institutions, structures and processes, and the seriousness of any underlying socio-economic rights violations.

6.3.1 The judicial role in reviewing initiated section 139 interventions

As set out in Chapter 3, while there have been instances in which the courts have suggested that a deferential approach should be adopted in the review of a provincial executive's decision to initiate a section 139 intervention, there is a growing tendency for the courts to conduct a more rigorous review of initiated intervention decisions.

In these matters, the courts appear to favour a proportionality-infused standard of review in terms of which they exercise great care not to restrict the autonomy or integrity of local government or to subvert formal democratic processes. In embracing this substantive dimension of the standard of review, the courts seem to prefer to halt any steps which could intrude on local government autonomy, cause a possible democratic process malfunction or trigger a serious socio-economic rights violation. Unfortunately, the courts have not been particularly transparent in identifying this as the favoured standard of review. They have also, thus far, failed to clearly explain the shift to a higher level of scrutiny or the factors which may operate to influence the intensity of such scrutiny. The development of clear guiding principles would ensure a more standardised, reasoned and justified approach by the courts in these matters.

There is also an indication in Chapter 3 that the courts are developing a preference for deferring the resolution of disputes to alternative participatory, dialogic and democratic channels, whether existing or yet-to-be-created.[10] This has the potential benefit of ensuring meaningful engagement between the parties, the achievement of mutually acceptable solutions and, ultimately, the enhancement of democracy and an effective local government.

The emerging standard of review, with its substantive and procedural dimensions, has clear implications for the remedies that are preferred by the courts. Based on the matters considered

[10] This recalls one of the 'modes of review', forming part of a broader catalytic judicial role conception, identified by Katharine Young *Constituting Economic and Social Rights* (2012) at 125, 152-4, 188-212, as well as the observations in the second wave of socio-economic rights cases, discussed in paragraph 2.3.5 of Chapter 2.

in Chapter 3, it appears that the courts will be willing to set aside a section 139 intervention decision (including a decision to dissolve the municipal council) if it is perceived to intrude impermissibly into local government autonomy, particularly in circumstances where the municipal council is temporarily incapacitated but demonstrates responsiveness and engagement or where the decision was taken without first considering or using any possible (less drastic) intergovernmental monitoring and support measures. With this approach, the courts appear to be attempting to champion both local government autonomy and the importance of co-operative government and intergovernmental relations.

Of course, the courts would likely refuse to set aside a section 139 intervention (and a decision to dissolve a municipal council) if there were concerns that the absence of the intervention would cause more harm based on, for example, the complete incapacitation or collapse of the municipality. It thus appears that the courts may take a different approach when a section 139 intervention is spurred by a malfunctioning of the municipality's political structures or processes, compared with a situation where a section 139 intervention is initiated in a functioning municipality which appears to be incapable of delivering services.

The matters discussed in Chapter 3 also support a suggestion that courts will consider setting aside a section 139 intervention if there is a concern that the continuation of that intervention would actually be more harmful to the fulfilment of service delivery and the underlying socio-economic rights of residents than non-intervention.

A further observable trend in the matters considered in Chapter 3 is the courts' willingness to consider alternative remedies which may solve the root causes of the underlying challenges facing a municipality (other than a section 139 intervention). This willingness seems to be enhanced when the courts are particularly worried that the section 139 intervention itself will cause more harm, or where there is endemic local government dysfunction and weak intergovernmental monitoring and support mechanisms.

The acceptance and use of these alternative remedies by the courts does not necessarily imply that they have abandoned considerations of separation of powers. Instead, it suggests that the courts engage the doctrine tactically, focussing on the harm to the democratic process and the

harmful consequences for residents that might result from 'political dysfunction'[11] in a way that preserves municipal autonomy and promotes and strengthens intergovernmental monitoring and support mechanisms.

Unfortunately, in these matters the courts appear to be missing an opportunity to justify their approach more clearly by developing their own conception of the doctrine of separation of powers, infused with this support for local government autonomy and considerations of democratic principle. For example, given that section 139 of the Constitution already places strain on the democratic principle (by permitting the dissolution of a duly elected municipal council), the courts could attempt to more clearly, and tactically, justify their approach under the democratic principle (in that respect for local government autonomy underlies the substantive dimension of the section 139 discretion). A failure to explore this may leave the judicial approach insufficiently nuanced and open to criticism and perceptions of impermissible expansions of judicial power.

6.3.2 The judicial role in reviewing failures to initiate a section 139 intervention

The matters discussed in Chapter 4 reveal the increasingly dire situation of local government in South Africa as well as the plight of desperate communities seeking assistance from the courts. This has led to a growing and evolving judicial role infused with both flexibility and responsiveness.

In these matters, the executive has consistently attempted to assert a type of political separation of powers claim over section 139 intervention decisions, but without acknowledging or addressing its own dysfunction. In response, the courts initially leaned towards an approach of deference. This was illustrated by the courts' initial reluctance for any judicial involvement, which gradually developed into a willingness to support an intergovernmental dialogue that resulted in mutually-acceptable political solutions which, at the time, appeared to be responsive to communities' demands and concerns.

More recently, there has been a notable reduction in deference and, gradually, more remedial prowess on the part of the courts when reviewing failures to initiate a section 139 intervention.

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[11] This recalls the democracy-preserving conception proposed by Firoz Cachalia 'Precautionary constitutionalism, representative democracy and political corruption' (2019) 9 *CCR* 45, discussed in paragraph 2.3.2 of Chapter 2.

As a result, courts have started embracing an extended judicial role in these matters, which stretches beyond the textual constraints of section 139 of the Constitution and incorporates a heightened level of judicial scrutiny and the adoption of a just and equitable remedial framework under section 172 of the Constitution. In terms of this approach, the courts have appeared willing to declare local government in breach of applicable constitutional obligations, often with broad reference to possible socio-economic rights violations, and to either compel or fortify a mandatory provincial section 139 intervention with a court order.

While the courts' belief in the ability of the constitutional accountability and intergovernmental monitoring and support mechanisms to avert or correct governance collapses appears to be faltering, it has not yet failed completely. The courts thus appear willing to structure a democracy-enhancing remedy which encourages intergovernmental dialogue and the meaningful engagement of democratic institutions, structures and processes (which they see as having some potential to function), rather than to propose relief which is overly structural and prescriptive. In the process, the courts appear to be willing to afford the provincial executive some margin of discretion. This can be seen through their willingness to support and fortify existing financial recovery plans as 'living' documents and their refusals to 'leapfrog' over mandatory provincial section 139 interventions.

Nevertheless, the courts have also indicated a willingness to be more prescriptive in certain circumstances, such as by ordering the dissolution of a municipal council despite the executive's express requests for 'less restrictive measures' (the approach preferred by the courts in the review of an instituted section 139 intervention). The courts have been clear that this more prescriptive remedy is dependent on the factual context of a particular matter, as influenced by their concern, and increasing desperation, with the sheer magnitude and scale of the local government crisis, the systemic dysfunction in the relevant democratic institutions, structures and processes that are meant to provide monitoring, support and intervention, and the executive's tendency in these matters to adopt dilatory, vague and ultimately unhelpful responses and actions. It would seem that judicial concern with possible rights violations also plays a role, although these are usually acknowledged in the background rather than as materially shaping and influencing the judicial approach.

As was also observed in the matters discussed in Chapter 3, the courts in Chapter 4 failed to engage comprehensively with the doctrine of separation of powers in reaching decisions. Again, engagement with this doctrine may provide the nuance required to further develop and

justify the judicial stance, including its potential persuasiveness in a 'political type-of intervention' (such as litigation where a municipality fails to pass a budget[12]) where separation of powers concerns may require a higher degree of judicial deference.

6.3.3 The judicial role in reviewing matters which (should) trigger a consideration of section 139 of the Constitution

Chapter 5 tells a tale of ongoing municipal dysfunction, graphically illustrated through municipalities' astronomically expanding Eskom debt and ongoing service delivery failures, where the courts are not specifically being asked to compel a mandatory provincial (or national) section 139 intervention.

In some of these matters, where the applicants are seeking to 'keep the lights on', the predominant judicial stance appears to have been materially influenced and shaped by the 'special cluster of relationships' and concomitant rights and obligations that arise in public law.[13] The judicial approach thus leans towards a preference for intergovernmental dispute resolution mechanisms to resolve the immediate issue (keeping the lights on). While the intention is likely for the underlying issues, such as general municipal dysfunction, to also be addressed in the process, the courts tend to only mention a section 139 intervention (which appears to be custom-made for addressing the underlying issues) as forming part of the general arsenal of intergovernmental dispute resolution mechanisms available, rather than to specifically consider compelling such intervention.

However, an emerging judicial stance in these Eskom matters has suggested some willingness on the part of the courts to bypass intergovernmental dispute resolution mechanisms, particularly when the courts perceive that these mechanisms are failing or are dysfunctional. Where the courts adopt this approach, there is a tendency to categorise municipal debt as ordinary 'debt', with orders for the parties to pay Eskom directly or orders for the municipality

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[12] This seems increasingly possible, including in municipalities run by coalition governments. See, for example, Rapula Moatshe 'Gauteng threatens to put City of Tshwane under administration again' *IOL* (17 April 2023) available at https://www.iol.co.za/pretoria-news/news/gauteng-threatens-to-put-city-of-tshwane-under-administration-again-45fca46e-7918-47d0-b312-d71fce3e7583, accessed 22 June 2023.

[13] See paragraph 2 of Chapter 5.

to pay Eskom. This, again, addresses the immediate issue (attempting to resolve Eskom's debt) rather than the more troubling underlying issues facing the municipality.

Most recently, there has been an indication that the courts may be willing to shift their focus directly onto the underlying rights violations in these matters. Whereas previously these have been acknowledged in the background by the courts, this slight shift may allow these rights violations to justify a heightened level of scrutiny and remedial prescriptiveness, while still ensuring that the immediate issue ('keeping the lights on') is addressed. (The alternate approach, of course, is for the courts to refuse to consider such socio-economic rights violations unless these are first expressly proven by the parties.)

Chapter 5 also discusses some other matters which fall outside the 'special cluster of relationships' which potentially lifts some constraints on the parameters of the judicial approach, to the extent that the rights and obligations that arise in public-law relationships do not require consideration. Despite this, the section 139 intervention mechanism has formed no part of the court orders in these matters, even though it appears to be custom-made for the type of systemic municipal collapse, financial crisis, persistent or ongoing service delivery failures or failures to meet financial commitments that is often evident. Instead, the courts have adopted a broad-brush approach, expressly dismissing attempts to bypass the appropriate constitutional accountability and intergovernmental monitoring, support and intervention mechanisms, including a section 139 intervention. This seems to demonstrate an implicit judicial belief that dysfunctional municipalities can still be fixed within the constitutional framework of co-operative government.

More recently, however, there has been an indication that the courts may be increasingly willing to consider sanctioning attempts to bypass conventional constitutional accountability and intergovernmental monitoring, support and intervention mechanisms (including even compelling a section 139 intervention) in certain exceptional circumstances. This seems to arise where the courts' belief in the legitimacy of local government and the various constitutional accountability and intergovernmental monitoring and support mechanisms starts to falter.

Viewed holistically, the matters discussed in Chapter 5 are broadly illustrative of the courts' preference for deference to provincial and national decisions relating to the need for and structure of a section 139 intervention, as well as deference to the democratic legitimacy of local government and its decisions on how to deliver services and deal with its own problems.

They also suggest a fundamental judicial belief in the effectiveness of existing democratic institutions, structures and processes to avoid and rectify municipal collapses and financial crises, and the ability of the governmental parties to resolve their disputes. In the same breath, however, the courts made no attempt to fix the underlying challenges facing local government in the matters discussed in Chapter 5, instead preferring to address only the immediate issues.

The emerging judicial approach, however, appears to recognise this concern, and displays decreasing deference to the democratic legitimacy of a dysfunctional local government and a faltering belief in the ability of constitutional accountability and intergovernmental monitoring, support and dispute resolution mechanisms to avoid and address governance collapses and cure underlying socio-economic rights violations.

6.4 Reflections: Principles guiding the judicial role conception

Overall, the courts are emerging with an important judicial role conception in matters relating to section 139 of the Constitution. While the overall positioning of the courts could be described as catalytic[14] and flexible,[15] a range of individual and discrete forms of judicial review, each facilitating the Constitution, are engaged by the courts in the matters relating to section 139 of the Constitution. By adopting these different stances, the courts are seeking to catalyse a transformation or significant change, calibrated to their understanding of the background political, institutional (or structural)[16] and practical challenges, as well as any underlying rights violations.

When considered holistically across the matters discussed in this Thesis, the judicial role appears to be materially shaped and influenced by the four main intersecting factors which were identified as forming part of the conceptual, analytical and evaluative framework developed in Chapter 2.

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[14] This recalls the conception of a catalytic court developed by Katharine Young op cit note 10 in the context of the adjudication of socio-economic rights disputes, discussed in paragraph 2.3.5 of Chapter 2.

[15] This recalls the malleable and flexible adjudicative approaches adopted by the courts in the adjudication of executive action and administrative action, discussed in paragraphs 2.3.3 and 2.3.4 of Chapter 2.

[16] See paragraph 2.2.4 of Chapter 2.

The first factor is the courts' understanding of the doctrine of separation of powers. Overall, the tendency has been to continue to embrace the doctrine of deference in relation to both judicial scrutiny and remedial prescriptiveness.[17] This is evident in the courts' overwhelming preference for a deferent approach to the constitutional organs of state that the courts consider as being better positioned and suited to solve the problems and challenges besetting local government. It is implicitly guided by the general duty of the courts to respect the competence and political autonomy of the other branches of the state (the 'principle of comity') and obtains justification through considerations of institutional competence and the democratic principle.

Deference, linked with separation of powers considerations, is particularly evident within two broad judicial stances that have been assumed in the matters relating to section 139 of the Constitution. First, the courts tend to adopt a deferent approach when seeking to preserve the democratic legitimacy, autonomy and mandate of local government.[18] This gives local government, which is a critical sphere of government within the South African constitutional scheme and the sphere which is most directly embroiled in the challenges of municipal dysfunction and collapse, an opportunity to exercise its powers and perform its functions and to solve these challenges without undue judicial interference. The preference for a judicial stance of deference to local government autonomy appears to recognise the fundamentally important coalface role of local government and signifies a judicial attempt to support and build local government capacity so as to ensure the fulfilment of its developmental obligations.

Second, the courts tend to adopt a deferent approach to the provincial and national executive in their oversight roles within the broader constitutional structure and within the context of section 139 of the Constitution in particular (a type of 'constitutional competence').[19] This appears to reflect judicial recognition of the important monitoring and supporting role of provincial and national government, as part of a network of intragovernmental support, co-operation and oversight, when properly conceived and implemented.[20] The preference for deference to provincial and national government appears to recognise that it is the role of

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[17] See paragraph 2.2.4.2 of Chapter 2.

[18] See paragraph 1.2 of Chapter 2.

[19] See paragraph 2.2.4.2 of Chapter 2.

[20] See paragraphs 1.2.1 and 1.2.2 of Chapter 2.

provincial government to decide how and when to intervene in local government, as duly constrained by the Constitutional and applicable legislation.

While such deference is evident across the matters discussed in this Thesis, the intersection and interaction with the other factors (discussed below) has resulted in the gradual emergence of a willingness by the courts to temper their reliance on judicial deference in circumstances in which they can act as a catalyst to change. Decreasing deference is observable where the courts have accepted increased judicial intervention for democracy-protection purposes when there is democratic process dysfunction[21] and to address incompetent or intransigent governmental action and responsiveness.[22] In future, such acceptance may also include increased judicial intervention so as to provide appropriate and effective relief for macro-level socio-economic rights violations as elaborated below.

There appears to be an opportunity here for the courts to develop a more nuanced approach in matters relating to section 139 of the Constitution, with a clear discussion of the doctrine of separation of powers in this context. While the courts are not compelled (and it would probably not be advisable) to provide a detailed explanation of the content of the doctrine of separation of powers or how and why it applies in a specific manner in particular circumstances, they could discuss their broad understanding of the doctrine, and how it may be utilised in a flexible (or tactical) manner, when appropriate to justify a particular stance in these matters.

The second factor which weaves its way throughout the matters discussed in this Thesis is the courts' understanding of the dispute as linked with governmental action and responsiveness by each of local, provincial and national government. The courts appear more willing to adopt an interventionist approach to justiciability, scrutiny and remedial prescriptiveness where the government is intransigent in relation to its actions, communications, responsiveness and

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[21] This recalls the democracy-preserving conception proposed by Cachalia op cit note 11, discussed in paragraph 2.3.2 of Chapter 2.

[22] This recalls the set of guidelines linked with the reasons for governmental non-compliance with constitutional standards, to be used for determining an 'appropriate' judicial response and remedial prescriptiveness, proposed by Kent Roach & Geoff Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' (2005) 122 *SALJ* 325, and discussed in paragraph 2.2.4.3 of Chapter 2.

openness with the courts.[23] In these instances, the courts have displayed some exasperation with the supine attitude and dilatory conduct of the government actors in the face of the crisis being experienced by local government, paired with a faltering belief in the ability of these government actors to address the problems facing local government without some judicial guidance.

The result, particularly in the matters discussed in Chapters 4 and 5, is a gradual decrease in deference shown to the autonomy of a dysfunctional local government and to the provincial and national executive in their oversight roles. In other words, where the courts perceive the ability and willingness of the constitutional actors to address the challenges facing local government to be lacking, particularly within the context of judicial awareness of the growing malaise affecting local government, they appear much more willing to act as a real catalyst to change. On the other hand, where the local government is merely inattentive or lacking in capacity but is responsive and engaged (as discussed in Chapter 3), the courts tend to maintain an approach of deference to the autonomy of local government, with an increasing willingness to explore remedies that may be less intrusive even if this, in turn, demonstrates a decrease in deference shown to the provincial and national executive in their oversight roles.

The third factor which infuses each of the matters discussed in this Thesis, acting as an influencing and shaping factor of the judicial approach, is the courts' understanding of the integrity and healthy functioning of the applicable democratic institutions, structures and processes.[24] Across the matters discussed in this Thesis, there is an observable trend of the courts demonstrating a clear preference for engaging with and deferring to existing or yet-to-be established constitutional mechanisms, provided that these are functioning and effective. This reflects a judicial appreciation and recognition that these mechanisms are specifically designed to moderate disputes and to address municipal dysfunction and the underlying or root causes of the challenges faced by local government, without undue judicial interference. This

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[23] This again recalls the approaches set out by Roach & Budlender op cit note 22, discussed in paragraph 2.2.4.3 of Chapter 2, and developed by Young op cite note 10 in relation to socio-economic rights disputes, discussed in paragraph 2.3.5 of Chapter 2.

[24] This recalls the approaches of Cachalia op cit note 11, Young op cite note 10 and Marius Pieterse 'Socio-economic rights adjudication and democratic urban governance: Reassessing the "second wave" jurisprudence of the South African Constitutional Court' (2018) 1 *VRÜ* 25, discussed in paragraphs 2.3.2 and 2.3.5 of Chapter 2.

appears to be a judicial attempt to strengthen and maintain democratic institutions, systems and processes, even in periods of crisis, so that local government challenges may be resolved within these alternative intergovernmental dispute resolution channels, wherever possible.

However, there are emerging incidents which suggest that the courts' belief in the health and integrity of these democratic institutions, structures and processes is starting to falter. This may increasingly result in a judicial approach which is more interventionist, with a higher level of scrutiny and more prescriptive remedy.

The fourth factor, which is steadily growing in influence, is the courts' understanding of whether and how gravely rights are being threatened or infringed (in other words, the severity of the rights violation). Across the matters discussed in this Thesis, the courts have tended to attempt to try to solve whatever problem or immediate crisis is presented to them, in the least intrusive way possible. Sometimes, however, the courts have recognised that there are underlying socio-economic rights violations which coincide with, or operate independently of, the immediate crisis to be solved.

While the courts have not specifically assessed or evaluated any of these socio-economic rights violations, they have tended to acknowledge the violations, almost in the background and within a broader discussion of the state of local government. This judicial notice or acknowledgment of the existence of rights violations appears to have subtly influenced the level of deference and the kind of judicial stance adopted across the matters considered in this Thesis, with the discretion in relation to the review standard being narrowed, and the remedy becoming increasingly prescriptive, where the courts' perceive the rights violation to be severe.[25] As explored further below, a purposeful and deliberate shift towards a socio-economic rights remedial paradigm in matters where the rights violation is perceived to be severe, may assist the courts in justifying their approach in matters relating to section 139 of the Constitution.

Against this background, the courts appear to operate along a continuum of judicial scrutiny and remedial prescriptiveness in matters relating to section 139 of the Constitution, shifting strategically depending on the interaction and influence of the four factors set out above. In

[25] See paragraph 2.3.5 of Chapter 2.

particular, it appears that the context of a matter can result in greater judicial involvement, particularly when necessary to catalyse a change, manifesting through diminishing deference shown by the courts to provincial and national government in their oversight role or to the democratic legitimacy, autonomy and mandate of local government, a faltering judicial belief in the ability of constitutional accountability mechanisms to avoid and address governance collapses and an enhanced need to address underlying socio-economic rights violations.

6.5 Recommendations for the development of a judicial role in section 139 intervention disputes triggered by local government collapse

It seems clear that South African courts are currently involved in, and will continue to be involved in, considering decisions to initiate a section 139 intervention, the failure to take such decisions, as well as matters which would appear to trigger a section 139 intervention, although no such intervention has been requested or considered by the parties.

This Thesis accepts this hypothesis and argues that there is a role for the courts in matters relating to section 139 of the Constitution. Chapters 3 to 5 of this Thesis set out what this judicial role seems to be and how it has developed over time.

This is clearly uncharted territory for the courts. Any model of judicial review adopted in these matters (and the courts' corresponding choice of standard of review and remedy) must take into consideration the various background structural forces, including various 'institutional concerns'. These intersecting factors play a crucial role in guiding, in their interaction, the variability of both the level of scrutiny and the remedial prescriptiveness adopted by the courts in these matters.

As the courts navigate matters relating to section 139 of the Constitution, they are also required to develop clear principles (which should be based on the factors set out above) for determining the parameters and boundaries of a flexible judicial role, ensuring transparency in their reasoning, clearly engaging with the background structural forces and other relevant factors and, at all times, ensuring that they fully and clearly justify each judicial stance adopted in the circumstances. Vigilance will thus be required to ensure reasoned, principled decisions and that a higher standard of review is not automatically applied by the courts when dealing with

'exasperating' government actors.[26] The absence of such guiding principles may expose the courts to allegations of judicial overreach, may create legal uncertainty and sharply divergent judicial outcomes, and may undermine respect for the courts, the rule of law and the Constitution.[27]

A particular criticism of the current judicial role in matters relating to section 139 of the Constitution is that the courts appear, thus far, to be deciding matters with the underlying socio-economic rights violations in the background. The result is that these matters are being considered without a proper engagement with possible socio-economic rights violations, thus not effectively (or appropriately) vindicating these rights in line with transformative constitutionalism.[28]

Given that the matters discussed in this Thesis appear to inevitably overlap with socio-economic rights violations, a recommendation is for the courts to develop and embrace a more explicit remedy-oriented approach under a socio-economic rights remedial paradigm in terms of section 38 and section 172 of the Constitution. This means that a section 139 intervention could be considered to be 'appropriate' and effective relief in the case of ongoing socio-economic rights violations arising from persistent and serious service delivery failures, paired with a municipal financial crisis and general municipal dysfunction. It would also enable the promotion of a culture of democracy and transparent governance in a manner that furthers the Constitution's transformative purpose and the progressive realisation of socio-economic rights.

The following paragraphs set out some ways in which this remedy-oriented approach might be realised by the courts, while remaining respectful of institutional integrity, the autonomy of local government, the democratic principle, institutional and constitutional competence and the principles of co-operative governance.

If litigants argue a socio-economic rights violation in matters relating to section 139 of the Constitution, together with a breach of local government's developmental and constitutional

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[26] Kate O'Regan 'Helen Suzman Memorial Lecture. A forum for reason: Reflections on the role and work of the Constitutional Court' (2012) 28 *SAJHR* 116 at 128.

[27] See, for example, Roach & Budlender op cit note 22 at 351.

[28] See paragraph 2.2.2 of Chapter 2.

obligations, the courts could utilise a socio-economic rights remedial framework to justify both the extent of their involvement, level of scrutiny and remedial prescriptiveness in compelling (or fortifying) a section 139 intervention.

Even where litigants have not expressly argued a socio-economic rights violation in a matter which relates to section 139 of the Constitution, there are exceptions to the adversarial principle that a court is confined to issues of law explicitly raised by the parties.[29] In fact, the Constitutional Court has, on previous occasions, granted relief on the basis of claims that were not raised 'directly, fully or at all' by the parties.[30] The courts have also stressed the need for the judiciary to be 'creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights'.[31]

Building on the premise that the courts will adopt a judicial approach within a socio-economic rights remedial framework, the role of the courts in the adjudication could be delineated as catalysts of change and transformation.[32] For example, if government takes no steps to initiate a mandatory provincial section 139 intervention or to utilise constitutional accountability and intergovernmental monitoring and support mechanisms, the courts may require the government to take such steps. If government's adopted approach demonstrates incompetence or intransigence, the courts may require that additional steps be taken where no provision is made for communities desperately in need, where the government has acted unresponsively and poorly, and where the government has failed continually to take steps to ensure a functional local government. In other words, focusing on the rights violation may provide a further

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[29] See, for example, *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (4) SA 222 (CC) paras 36-9.

[30] See, for example, *Head, Department of Education, Free State Province v Welkom High School* 2014 (12) SA 228 (CC) para 108; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 40.

[31] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) paras 31-6; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36.

[32] As guided by the reasonableness analysis for a socio-economic rights violation set out in *Government of the Republic of South Africa v Grootboom* 2000 (1) SA 46 (CC) and *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), discussed in paragraph 2.5.3 of Chapter 2.

justification for courts to adopt a more intense review, with less deference shown, in order to ensure effective relief.[33]

This may also create an opportunity for the courts to explore the typical socio-economic rights remedial framework, including structural or supervisory relief which would enable judicial involvement in a process of meaningful engagement and deliberation with all the parties so as to ensure the implementation of the order, continued performance by the government respondents, regular reporting by the parties and ongoing endorsement by the courts. As is the case in the context of socio-economic rights disputes, this process could be seen as 'deeply democratising since it promotes government accountability and community participation'.[34]

6.6 Possibilities for further research

This Thesis purports only to act as a 'first step' with the intention for extra-legal methods being used to advance the analysis in future research. For example, the material consequences and impact of the decisions of the courts, the effectiveness of the remedies awarded and the political and governance changes (such as changing governmental responses, actions and structures) that resulted, merit further investigation. It would be valuable to consider whether the form of litigation adopted affects practical outcomes and whether specific relief (such as a structural interdict or the monitoring and enforcement of compliance) affects the impact of the decisions, effectiveness of the remedies or results in material political and governance changes. This should be evaluated contextually, rather than against a supposed ideal of perfectly functioning democratic institutions, structures and processes and co-operative accountability and intergovernmental monitoring and support mechanisms.

The state of local government, the use of the section 139 intervention mechanism and, by corollary, the courts' adjudication of both municipal dysfunction and matters relating to section 139 of the Constitution, is both dynamic and evolving. Future research should thus focus on the evolution of this subject matter and should further develop the theoretical framework,

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[33] This recalls the discussion in paragraph 2.3.5 of Chapter 2, as well as the approaches adopted by both Thomas Bollyky 'R if C > P + B: A paradigm for judicial remedies of socio-economic rights violations' (2002) 18 *SAJHR* 161 and Roach & Budlender op cit note 22, discussed in paragraph 2.2.4.3 of Chapter 2.

[34] See Geoff Budlender 'The role of the courts in achieving the transformative potential of socio-economic rights' (2007) 8(1) *ESR Review* 9 at 11.

categorisation of matters relating to section 139 of the Constitution and conceptualisation of the judicial role, as contemplated in this Thesis. In particular, the judicial role may evolve with the increased usage, and potential failure, of the mandatory national section 139 intervention or the use of a section 139 intervention mechanism as a strategy of governance. The judicial role may also evolve with a shift to a socio-economic rights remedial framework, within the context of judicial recognition of ongoing and escalating macro-scale socio-economic rights violations.

Further, while this Thesis focused on the application of the theoretical framework developed in Chapter 2 to matters relating to section 139 of the Constitution, the framework also invites application to the establishment and maintenance of democratic institutions, structures and processes, including the constitutional accountability and intergovernmental monitoring and support mechanisms (such as improved parliamentary oversight and responsiveness by the executive), which should ideally be utilised both prior to, and in conjunction with, the initiation of a section 139 intervention.

The role of alternate dispute resolution structures, including those involving Chapter 9 institutions such as the SAHRC, in addressing municipal dysfunction, ongoing service delivery failures, financial crises and macro-level socio-economic rights violations, has not been considered in this Thesis.[35] The SAHRC, for example, already plays a notable and influential role in matters relating to section 139 of the Constitution, having conducted investigations and recommended the initiation of, for instance, a section 139*(1)(b)* intervention in the Lekwa Local Municipality (in 2020),[36] a section 139*(7)* intervention in the Emfuleni Local Municipality (in February 2021) in the face of an 'incapacitated provincial executive',[37] and a section 139*(7)* intervention in the City of Tshwane Metropolitan Municipality, particularly in

[35] See sections 184 of the Constitution read with the South African Human Rights Commission Act 40 of 2013.

[36] See Mpumalanga Province DCoGTA 'NCOP Provincial Week MEC's Overview: Presentation on Lekwa Local Municipality' available at https://www.parliament.gov.za/storage/app/media/Pages/2020/october/20-10-2020_National_Council_of_Provinces_Provincial_Week_2020/presentations/Mpumalanga/NCOP_overview_on_Lekwa_October_26_October_2020.pdf, accessed 29 September 2022.

[37] SAHRC *Final Report of the Gauteng Provincial Inquiry Into the Sewage Problem of the Vaal River* (17 February 2021) at 5-9; 110-3; Marius Pieterse 'Anatomy of a crisis' (2021) 32 *Urban Forum* 1 at 2-4.

respect of the water and sanitation departments (in October 2021).[38] The role and influence of extra-curial dispute resolution structures, and the possible interaction with the judicial role, could provide interesting ground for future research.

Finally, the finalisation and commencement of the draft legislation being prepared under section 139*(8)* of the Constitution (the draft Intergovernmental Monitoring, Support and Intervention Bill) may invite further investigation of future litigation and the judicial role conception, including a more detailed consideration of the application of the principle of subsidiarity and the framing of relief under applicable statutory provisions, rather than a direct reliance on constitutional provisions.

6.7 Conclusion

Municipalities, with their coalface role and essential developmental obligations, are the heartbeat of South Africa's constitutional and democratic structure. The success and survival of local government, while preserving local government autonomy and integrity, is critical to municipalities' function of delivering on their developmental mandate in a rights-protective manner which respects the principles of co-operative government. Unfortunately, local government dysfunction and collapse undermines the rights in the Constitution and endangers democracy, thereby necessitating the involvement of the courts or some other alternative dispute resolution mechanisms.

If the courts are to be involved, then their role should ideally be flexible, depending on context in a particular matter, seeking to catalyse and realise the success and survival of local government, while progressively realising socio-economic rights, preserving and deepening the democratic project and ensuring constitutional transformation.

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[38] SAHRC *Report of the Gauteng Provincial Inquiry Into the Sewage Pollution of the City of Tshwane's Rivers and the Roodeplaat Dam* (26 October 2021) paras 2.17–26, 9.6–9, 10.6.

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