

The purpose of the review power of interventions by the NCOP is to ensure that national government does not abuse the power to intervene in provinces. It ensures that national government does not encroach in provincial competences. However the purpose of review of national government interventions cannot be realised if the NCOP does not have a process which provides for detailed steps and what kind of information the NCOP needs to assess to review the intervention.

Furthermore the way the intergovernmental structures and processes have been developed is that the NCOP comes in too late after other intergovernmental structures have attended to the matter and this renders the relevance and existence of the NCOP questionable and doubtful. This raises the question whether the review function by the NCOP is important.

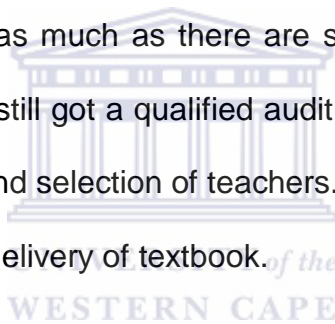
One of the roles of the NCOP in interventions is mediation between disputing parties and this includes section 139 interventions. It will therefore be argued that mediation is demanding and with the number of interventions and the capacity of the NCOP, these interventions cannot be dealt with by the NCOP adequately because of the lack of capacity and resources in the NCOP.

The poor or inaccurate information submitted to the NCOP renders the review of the intervention inadequate and results in the NCOP expending considerable effort establishing the situation. The poor or inaccurate information further results in the NCOP making wrong decisions.

The NCOP, in performing its review function in terms of section 100 in the Eastern Cape and Limpopo provinces, followed an approach, processes, procedures and rules similar to those used for section 139 provincial interventions in municipalities and that approach may not be conducive for national intervention.

It will be argued that the NCOP has not or is not exercising the review power in the national government interventions in the Eastern Cape and Limpopo provinces adequately.

In the Eastern Cape Province as much as there are some positive improvements in the Department of Education, they still got a qualified audit in 2013. There were still problems with regard to the recruitment and selection of teachers. In the Limpopo Province there are still problem with regard to the delivery of textbook.



As it appears, the problems in both provinces need the NCOP to have capacity and proper resources. At present, the NCOP, without clear criteria on how to deal with national government interventions and without resources, the review in these interventions cannot be dealt with adequately. The NCOP is not only reviewing national interventions but provincial interventions in municipalities. Therefore the capacity and resources of the NCOP to review both these interventions at the same time is not enough.

1.5 Literature review

There is little literature on the review function of NCOP with respect to national executive interventions in provinces. However, there is more literature on other matters concerning the NCOP for example cooperative governance and intergovernmental relations, roles and responsibilities of the NCOP and evaluation and impact of the NCOP.

The existing literature focuses on the role the NCOP played in respect of national government interventions in terms of section 100(1)(a) of the Constitution and in respect of provincial interventions in municipalities.

As the national executive didn't apply section 100(1)(b) intervention until 2011, evaluating the role of the NCOP in reviewing national interventions in provincial governments will add value to the existing literature as it will be evaluating the review function of the NCOP in the national government interventions in the Eastern Cape and Limpopo provinces.

Malherbe although she writes about both national and provincial interventions, Malherbe argues that the powers of national government to intervene in provincial affairs and of provinces to intervene in local government affairs are increasingly being utilised for the purposes of centralisation.⁵

⁵ Cloete F, De Villiers B & Malherbe R 'et al' *The future of the provinces: Constitutional and structural aspects' Review of provinces and local governments in South Africa: Constitutional Foundations and Practice'* November (2008) ch 4 49-50.

Malherbe further argues that the powers of the national government to guide, support or intervene are not intended to dominate the other spheres and centralise all powers, or even to take over the powers of the other spheres completely. Rather, they are mechanisms to assist the other spheres to acquire and develop the capacity they need for exercising their constitutionally conferred powers. The provincial and local governments have a particular purpose to establish and strengthen democracy. In a democracy powers should be decentralised in order to promote voter participation, bring government closer to the people, and prevent the centralisation of powers which may lead to abuse.⁶

Malherbe further argues that under certain narrowly defined circumstances, the national government may intervene in provincial affairs, and provinces may intervene in local affairs. These powers are intended to be exercised only when necessary; in other words in exceptional circumstances. The Constitution accordingly provides for the circumstances and procedures on how the national government may intervene in a provincial matter at the executive level.⁷

The importance of the review function by the NCOP has also been emphasised by De Visser who states that the NCOP must review regularly and make appropriate recommendations in respect of the intervention and, on approval, must establish a time frame for the review.⁸

⁶ Cloete F, De Villiers B & Malherbe R 'et al' *'The Constitutional Distribution of powers' Review of provinces and local governments in South Africa: Constitutional Foundations and Practice'* November (2008) ch 2 28.

⁷ Cloete F, De Villiers B & Malherbe R 'et al' *'The Constitutional Distribution of powers' Review of provinces and local governments in South Africa: Constitutional Foundations and Practice'* November (2008) ch 2 27.

⁸ De Visser J 'A legal analysis of provincial intervention in a municipality' (1999) 34.

Mathebula also argues that in exercising its review function the NCOP must indicate its approval and or disapproval of certain national and provincial executive functions.⁹

Murray 'et al' argue in their report that the NCOP is often given extremely poor information about an intervention and needs to go to a considerable effort to establish the real situation. This report suggests that this problem of poor information may be addressed to some extent if the NCOP Rules set out clearly what information should be laid before it. This report further suggests that the NCOP needs to set a series of questions the NCOP should answer in reaching its decision. It is further suggested in this report that unless the goals of an intervention are clearly stated at the outset, with precise, measurable indicators of success, the process to be followed by the NCOP when they are exercising their review function will be difficult.¹⁰

Mugoya argues that the review function of the NCOP ensures that provincial interventions are carried out within appropriate intergovernmental relations. Specifically, the NCOP is meant to ensure that provincial intervention does not go beyond the constitutional mandate of provinces. Where this happens, the NCOP has a role to engage the province in order to ensure that such intervention remains within the constitutional confines.¹¹ This shows that the NCOP's review function in national government interventions is meant to ensure that national government intervention does not go beyond the constitutional mandate of national government.

⁹ Mathebula FM *'Intergovernmental Relations Reform in a newly emerging South African Policy'* (2004) 151.

¹⁰ Murray C, Bezruki D & Ferrel L 'et al' *'NCOP's Role in the Oversight Process' Interim Report, Speeding Transformation'* (2000) 12.

¹¹ Mugoya BC *'Evaluation and impact of the National Council of Provinces'* 12.

2.2 National government interventions

Section 100(1)(b) of the Constitution provides that national executive may intervene in a province by assuming responsibility for the relevant obligation in that province when it is necessary to do so. The Constitution further specifies when it is necessary to intervene in a province and that will be discussed below. The intervention happens as a result of one or more departments in a province failing to fulfil their executive obligations.¹⁶ National executive intervention in a provincial executive happens when a province cannot or does not fulfil an executive obligation in terms of legislation. National executive may intervene by issuing a directive to the provincial executive and assuming responsibility for the relevant obligation in that province.

The Constitutional Court in the *Certification of the Constitution of the Republic of South Africa*, argued that section 100 serves the limited purpose of enabling the national government to take appropriate executive action in circumstances where this is required because a provincial government is unable or unwilling to do so itself. This is consistent not only with Constitutional Principle XXI.2 but also with Constitutional Principle XX in the Interim Constitution, which requires the allocation of powers to be made on a basis that is conducive to effective public administration. Any attempt by the national government to intervene at an executive level for other purposes would be inconsistent with the Constitution and unjustifiable. The Constitutional Court further argued that section 100 does not diminish the right of provinces to carry out the functions vested in them under the

¹⁶ S 100 Constitution.

Constitution; it makes provision for a situation in which they are unable or unwilling to do so. This cannot be said to constitute an encroachment upon their legitimate autonomy.¹⁷

The Gauteng Division in the *Mogalakwena Local Municipality vs Provincial Executive Council*, Limpopo and others referred to the *Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and others* judgment, and argued that neither the national nor a provincial government may usurp the functions of a municipality except temporarily and in compliance with strict procedures.¹⁸ Although this judgment is referring to the intervention in a municipality by the provincial government, it is a useful judgment to refer to when national executive intervenes in a province. The intervention by the national executive in a province is a temporary measure and cannot be said to constitute an encroachment upon the provincial legitimate autonomy.

Malherbe argues that under certain narrowly defined circumstances, the national government may intervene in provincial affairs, and provinces may intervene in local affairs. These powers are intended to be exercised only when necessary; in other words in exceptional circumstances. The Constitution accordingly provides for the circumstances and procedures on how the national government may intervene in a provincial matter at the executive level.¹⁹

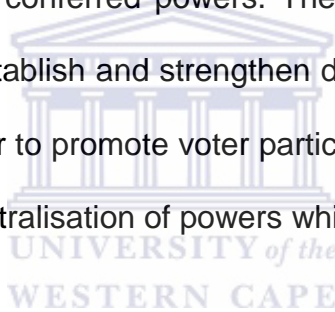
¹⁷ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 266.

¹⁸ *Mogalakwena Local Municipality vs Provincial Executive Council, Limpopo and Others* (35248/14)[2014] ZAGPPHC 400 (19 June 2014) para 31; *Johannesburg Metropolitan Municipality vs Gauteng Development Tribunal and Others* 2010 6 SA 182 CC para 44.

¹⁹ Cloete F, De Villiers B & Malherbe R 'et al' 'The Constitutional Distribution of powers' *Review of provinces and local governments in South Africa: Constitutional Foundations and Practice* November (2008) ch 2 27.

Malherbe argues that the powers of national government in provincial affairs and by provinces in local government affairs are increasingly being utilised for the purposes of centralisation.²⁰

Malherbe further argues that the powers of the national government to guide, support or intervene are not intended to dominate the other spheres and centralise all powers, or even to take over the powers of the other spheres completely. Rather, they are mechanisms to assist the other spheres to acquire and develop the capacity they need for exercising their constitutionally conferred powers. The provincial and local governments have a particular purpose to establish and strengthen democracy. In a democracy powers should be decentralised in order to promote voter participation, bring government closer to the people, and prevent the centralisation of powers which may lead to abuse.²¹



2.2.1 Issuing a directive

Section 100(1) (a) of the Constitution provides that when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligation.

²⁰Cloete F, De Villiers & B Malherbe R 'et al' *'The future of the provinces: Constitutional and structural aspects' Review of provinces and local governments in South Africa: Constitutional Foundations and Practice* November (2008) ch 4 49-50.

²¹Cloete F, De Villiers B & Malherbe R 'et al' *'The Constitutional Distribution of powers' Review of provinces and local governments in South Africa: Constitutional Foundations and Practice* November (2008) ch 2 28.

The practice in respect of the issuing of a directive has been that the provincial government requests the national government for assistance with the fulfilling of an obligation. In 1998 and in 1999 the Eastern Cape Province and the Free State Province Provinces requested national government to assist them in terms of section 100(1)(a) of the Constitution respectively. Both provinces could not meet their financial obligations and the directive which was issued was to assist the provinces with their financial obligations.²²

If a directive is issued as a result of a province requesting assistance from the national government, it may be that the assumption of responsibility will not be implemented. The reason is that a province which requested for assistance, will implement the directive. Steytler, De Visser and Levy *et al* argue that because provinces call for the assistance from the national government, the issue of whether the interventions in terms of section 100 (1)(b) is necessary does not arise.²³

A directive is necessary in that national government cannot assume responsibility in a province without first issuing a directive. Section 100 enjoins the issuing of a directive and the assumption of responsibility by the word “and”. The purpose of the word “and” is to ensure that the national government, when intervening in a province, does not apply section 100(1)(b) without applying section 100(1)(a) first. In the *Certification of Amended Text Judgment*, KZN argued that the separation of powers required by Constitutional Principle VI was not complied with in the section 100 of the Constitution. KZN further

²² Steytler N, De Visser J & Levy N 'et al' *The intergovernmental relations audit - towards a culture of co-operative government* Pretoria: Department of Provincial and Local Government Pretoria: (2000) 72.

²³ Steytler N, De Visser J & Levy N 'et al' *The intergovernmental relations audit - towards a culture of co-operative government* Pretoria: Department of Provincial and Local Government Pretoria: (2000) 72.

argued that national executive is permitted to intervene under section 100(1)(b) without first taking steps referred to in section 100(1)(a). The Constitutional Court argued that section 100(1)(a) and (b) deal with one process. This follows from the fact that they have not been formulated in the alternative, but are linked by the conjunction “and”. The Constitutional Court further argued that a directive issued in terms section 100(1)(a) has no consequences in itself; it only has relevance as part of a process which requires a directive to be issued before the intervention sanctioned by section 100(1)(b) takes place. If intervention in terms of section 100(1)(b) occurs, the requirements of section 100(2) have to be complied with. These successive steps constitute the process referred to in section 100(3) which may have to be regulated by legislation.²⁴

In arguing that a directive does not have a consequence in its self, the Constitutional Court did not mean that a directive does not have obligations. The Constitutional Court meant that when a responsibility has been assumed after a directive has been issued, both the directive and assumption of responsibility have consequences together. When a directive is issued as a first step, a province to which that directive has been issued is required to comply with that directive.

It must be highlighted that there is a difference in the wording of section 100 and section 139 of the Constitution although these sections both deal with intervention by one sphere of government in another sphere of government. Section 100(1)(a) and (b) are enjoined by the word ‘and’ and section 139(1)(a) to (c) are enjoined by the word ‘or’.

²⁴ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996 (CCT37/96) para 120.*

A directive should state the extent of the failure by a province and steps to be followed by that province in order to fulfil an obligation. De Visser and Steytler argue that the directive should include time frames within which the directive is to be carried out.²⁵

2.2.2 Assumption of responsibility

Section 100(1)(b) of the Constitution provides that the national executive may intervene by assumption of responsibility for the relevant obligation in a province if that province cannot or does not fulfil an executive obligation.

The assumption of responsibility for the relevant obligation in a province is limited and may only be done to the extent necessary to, maintain essential national standards or meet established minimum standards for the rendering of a service, maintain economic unity, maintain national security or prevent that province from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.²⁶ The limitation of the assumption of responsibility for the relevant obligation in a province has been introduced by the Constitution in order to guard against the abuse of power by national government in provinces. In order to ensure that the national executive does not abuse its powers, the assumption of responsibility in a province must be done according to the requirements in section 100(1)(b) of the Constitution.

²⁵ De Visser J & Steytler N *'Intervening in Provinces and Municipalities' Guidelines for the Application of Sections 100 & 139 of the Constitution prepared for the Department of Provincial and Local Government* (2007) 10.

²⁶ *Certification of the Amended Text of the Constitution of the Republic of South Africa 1996* (CCT37/96) para 119.

Steytler and De Visser, on provincial executive intervention in a municipality, wrote that the assumption of responsibility is a drastic measure and one of the three threshold requirements in section 139(1)(b) of the Constitution must be met. First the assumption of responsibility must be necessary to maintain national essential standards or to meet established minimum standards for rendering of service. Secondly, it must be necessary to prevent the municipal council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole. Thirdly, the assumption of responsibility must be necessary to maintain economic unity.²⁷

It must be mentioned that section 139(1)(b) provides that one of the three threshold requirements must be met whereas section 100(1)(b) provides that both requirements must be complied with. It is not clear why the legislator used the word “or” in respect of national executive intervention in a province and used the word “and” in respect of provincial executive intervention in a municipality. When national executive intervenes in a province in terms of section 100 of the Constitution, national executive is required to issue a directive before the national executive assumes responsibility for the relevant obligation in that province. Whereas a provincial executive can apply any step of intervention in a municipality in terms of section 139 of the Constitution depending on the seriousness of the non-fulfilment of a statutory obligation. The application of section 139(1)(b) was argued in the *Mnquma Local Municipality and Another v Premier of the Eastern Cape and others*

²⁷ Steytler N & De Visser J ‘Local Government’ *Constitutional Law of South Africa* 2 ed (2013) ch 22.

judgment. The Court stated that the word “and” linking paragraphs (a) and (b) in section 139 was deleted and the said paragraphs are now linked with the word “or”.²⁸

The limitation of the power of national government to intervene in a province can be compared to section 44(2) of the Constitution where Parliament is limited in passing legislation that affects provinces and may intervene in passing such legislation when it is necessary.²⁹

In the *Certification Judgment*, the Constitutional Court in explaining section 44(2) of the Constitution said that an invasion of the exclusive powers of a province is permissible in terms of section 44(2) read with section 147(2), but the requirements of Constitutional Principle XIX with regard to “exclusive powers” must be read subject to Constitutional Principle XXI.2. Clearly, the drafters did not intend “exclusive” to mean immune from encroachment under the conditions contemplated by Constitutional Principle XXI.2.³⁰

As the invasion of the exclusive powers of a province is permissible in terms of section 44(2) in respect of the passing of legislation that affects provinces, national government intervention in a province is permissible in terms of section 100(1)(b) when it is necessary as provided for in section 100(1)(b)(i)-(iv). The same test which is used by Parliament when intervening by passing legislation that affects provinces exclusively in terms of

²⁸ *Mnquma Local Municipality and Another v Premier of the Eastern Cape and others* (231/2009)[2009]ZAECBHC 14 (5 August 2009) para 16.

²⁹ Parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area listed in Schedule 5, when it is necessary-

- (a) To maintain national security;
- (b) To maintain economic unity;
- (c) To maintain essential national standards;
- (d) To establish minimum standards required for the rendering of services; or
- (e) To prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole.

³⁰ *Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 234.

section 44(2) is useful when national executive intervenes in a province by assuming responsibility for the relevant obligation in that province.

Having dealt with national executive intervention in a province in terms of section 100 of the Constitution, the role of the NCOP in national executive intervention in a province will be discussed hereunder. This will include a discussion of how the NCOP Rules deal with the review process on national executive intervention in a province.

2.3. The role of the NCOP and Rules of the NCOP

2.3.1 The role of the NCOP

The NCOP represents provinces to ensure that provincial interests are taken into account in the national sphere of government. The NCOP represents provinces by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces.

The Constitution does not specifically mention a general oversight role for the NCOP, unlike the National Assembly which is specifically tasked with a general oversight function in sections 42(3) and 55(2) of the Constitution. The oversight role of the NCOP is implicit in its constitutional function- a concomitant function of any legislature which passes legislation is to monitor the implementation of that legislation. Moreover section 92(2) of the Constitution clearly indicates that members of the cabinet are responsible, individually and collectively, to Parliament as a whole, and not only to the National Assembly.³¹

³¹ Corder H, Jagwath S & Soltau F *Report on Parliamentary Oversight and Accountability* July (1999) 21.

Corder, Jagwath and Soltau argue that the NCOP has a limited oversight role to issues which affect provinces on a national level and intergovernmental relations. In particular the Constitution envisages the NCOP overseeing any executive interventions in terms of sections 100 and 139.³²

Corder, Jagwath and Soltau further argue that the NCOP is clearly a crucial part of the framework of intergovernmental institutions designed to ensure the effective functioning of the different spheres of government in South Africa and that the extensive concurrent powers of provinces and national government do not lead to overlap or conflict. This is consistent with the role of the NCOP as the representative of provinces and local government in the national legislative arena. It also seems clear that the NCOP should exercise oversight over the general conduct of intergovernmental relations structures.³³

In the light of the above discussion, the question to be asked is whether the NCOP has an oversight role over the spheres of government. The NCOP does have an oversight role over the spheres of government; however it is important to recognise that the NCOP does not mirror the National Assembly's oversight mandate by overseeing all of national government, but rather exercises oversight over the national aspect of provincial and local government.

³² Corder H, Jagwath S & Soltau F *Report on parliamentary Oversight and Accountability July (1999)* 2.

³³ Corder H, Jagwath S & Soltau F *Report on Parliamentary Oversight and Accountability July (1999)* 9.

Corder, Jagwath and Soltau further argue that the NCOP has an oversight role in cases where one sphere intervenes in another sphere in a manner that may affect its integrity. The NCOP is entrusted with the task of guarding against the abuse of the various powers of intervention.³⁴

Murray, Bezruki, Ferrell and Hughes in their article on the oversight by the NCOP in national and provincial government interventions, argue that the South African system of multi-level government does not set up hard divisions between the spheres. Instead, it gives both provincial and national governments concurrent power in the number of areas most important to transformation. It also allows one level to intervene in the affairs of another in a number of circumstances. The possibility of such interventions is important in achieving effective government. However, it also makes levels of government vulnerable to actions by other levels. The NCOP is mandated to protect the provincial government integrity when such interventions occur.³⁵

The structures and processes which have been developed in terms of the Intergovernmental Relations Act 13 of 2005 to promote intergovernmental relations and resolves conflicts between the government spheres appear to be reducing the role of the NCOP. Therefore the role of the NCOP which is to represent provincial interests in the national decision making has been reduced to that of a rubber stamp. That is why the relevance of the NCOP has forever been doubted by the people. When the national executive intervenes by issuing a directive, the NCOP is not involved. Yet the NCOP is an

³⁴ Corder H, Jagwath S & Soltau F *Report on Parliamentary Oversight and Accountability, July (1999)* 8.

³⁵ Murray C, Bezruki D & Ferrel L 'et al' *'NCOP's Role in the Oversight Process' Interim Report, Speeding Transformation (2000)* 11.

institution which is responsible for ensuring good relationship amongst the spheres of government especially in ensuring the provincial interests in national government.

When the national executive intervenes in a province by assuming responsibilities in that province, section 100(2)(a) of the Constitution provides that it must submit a written notice of the intervention to the NCOP within 14 days after the intervention began. Once the NCOP receives the written notification, the NCOP has two options namely, to approve or disapprove the intervention.

2.3.1.1 Disapproval of intervention

Section 100(2)(b) provides that the intervention must end if the NCOP disapproves the intervention within 180 days after the intervention began or by the end of the period has not approved the intervention. In this subsection, the NCOP is given powers to disapprove the intervention if it does not agree with the national executive.

De Visser and Steytler referred to disapproval of intervention by the NCOP as positive disapproval. The NCOP may terminate the intervention by positively disapproving thereof. This option is open any time during the period of 180 days after the intervention commenced.³⁶

³⁶ De Visser J & Steytler N *'Intervening in Provinces and Municipalities' Guidelines for the Application of Sections 100 & 139 of the Constitution prepared for the Department of Provincial and Local Government (2007) 14.*

2.3.1.2 Approval and review of the intervention

Once the national executive intervention in a province is approved by the NCOP, section 100(2)(c) of the Constitution provides that the NCOP must, while the intervention continues, review the intervention regularly and may make any recommendations to the national executive.

Murray, Bezruki and Ferrel suggest a series of questions the NCOP should answer in reaching its decision. They argue that unless goals and plans on the review of an intervention are clearly stated, with precise, measurable indicators of success, the process of review of intervention by the NCOP would be difficult. They further argue that NCOP resolutions in approving interventions should include measurable goals.³⁷

2.3.2 Rules of the NCOP

The NCOP has, in order to exercise its oversight function on government including the exercise of its review power in national executive interventions in provinces, developed Rules.³⁸ Rule 254 of the NCOP Rules provides for steps to be followed by the NCOP when the NCOP is reviewing the national executive intervention in a province.

³⁷ Murray C, Bezruki D & Ferrel L 'et al' 'NCOP's Role in the Oversight Process' *Interim Report, Speeding Transformation* (2000) 12.

³⁸ National Council of Provinces Rules (2008) 61-62 (hereafter NCOP Rules).

2.3.2.1 Written notice to be accompanied by a memorandum

Rule 254(1) of the NCOP Rules provides that whenever the national executive intervenes in a provincial executive in terms of section 100(1)(b) of the Constitution, the Cabinet member responsible for provincial affairs must submit a written notice of intervention to the NCOP within 14 days after the intervention began. This Rule is giving clarity on who must, from the national executive, inform the NCOP whenever the national executive intervenes in a province.

Rule 254(2) provides that the notice referred to in Rule 254 (1) must be accompanied by a memorandum explaining the reasons for the intervention. Murray, Bezruki and Ferrel argue in their report that the NCOP cannot approve or disapprove an intervention unless it is in possession of certain information. According to Murray, Bezruki and Ferrel, the NCOP is experiencing considerable difficulty in securing the information it needs.³⁹

It must be stated that the considerable difficulty in securing the information by the NCOP referred to by Murray, Bezruki and Ferrel, has been in respect of provincial interventions in municipalities. However this difficulty can be experienced in the national government interventions in provinces if the NCOP Rules are not clear about the information to be provided in the memorandum.

³⁹ Murray C, Bezruki D & Ferrel L 'et al' *'NCOP's Role in the Oversight Process' Interim Report, Speeding Transformation* (2000) 57.

Murray, Bezruki and Ferrel, in reporting on the NCOP Rules as they stood then, wrote that the NCOP Rules, with regard to national government interventions in provinces, are very sparse, in effect requiring only that the national minister or province must supply a memorandum explaining the reasons for the intervention. They suggest that it should be appropriate for the NCOP Rules to set out more clearly what information the national executive should submit to the NCOP.⁴⁰

Section 69 of the Constitution and Rule 103 of the NCOP provide that the NCOP may summon any person to appear before it to give evidence on oath or affirmation. Section 69 further provides that the NCOP may require any institution or person to report to it in terms of national legislation or the rules and orders. Furthermore the NCOP may compel any person or institution to comply with a summons or requirement. The NCOP may receive petitions, representations or submissions from any interested persons or institutions.⁴¹

2.3.2.2 Investigation of the intervention

Rule 254(3) provides that the notice of intervention and the memorandum must be referred to the appropriate committee of the NCOP. It is not clear in the NCOP Rules what comprises an “appropriate committee”. The establishment of the appropriate committee may not always be straight forward. The NCOP Rules are not clear on the inclusion of different select committees in the appropriate committee if more than one department is under intervention in a province.

⁴⁰ Murray C, Bezruki D & Ferrel L ‘et al’ *‘NCOP’s Role in the Oversight Process’ Interim Report, Speeding Transformation* (2000) 57.

⁴¹ S 69 Constitution

Once the appropriate committee receives the notice of intervention and the memorandum, it is required to investigate whether the intervention is necessary or not.⁴² In conducting such investigation, the committee must afford the provincial administration concerned and the national executive each the opportunity to state their case.⁴³

The committee is required to confer with the select committee responsible for finance and the select committee responsible for security matters as the case may be.⁴⁴ The NCOP Rules do not require the committee to confer with the select committee responsible for cooperative governance.

The NCOP Rules further requires that the committee must make recommendations and report their recommendations on whether the intervention should be approved or not to the NCOP within 10 days of the report having been referred to it.⁴⁵ The recommendations on whether the interventions should be approved or disapproved must be compiled in a report in terms of Rule 254(5).

2.3.3 Regular review of intervention

Rule 254(6) provides that if the NCOP approves the intervention, the appropriate committee must investigate whether or not it is necessary to continue the intervention and report to the NCOP.

⁴² Rule 254(4)(a) NCOP Rules.

⁴³ Rule 254(4)(b) NCOP Rules.

⁴⁴ Rule 254(4)(c)(d) NCOP Rules.

⁴⁵ Rule 254(4)(e) NCOP Rules.

The NCOP Rules confirms what is provided in the Constitution that the NCOP is required to review the intervention regularly and make any appropriate recommendations to the national executive.⁴⁶

Rule 254(8) provides that the Secretary must communicate any relevant resolution of the NCOP to the national executive, the provincial legislature concerned and to the Premier of the province concerned.

Although the NCOP Rules provide for the process to be followed with regard to the investigation of the notice of intervention, the NCOP Rules do not provide for the criteria and the process to be followed by the NCOP when the national executive intervention in a province is ongoing.

Having discussed the role of the NCOP in national executive intervention in a province in terms of section 100(2) of the Constitution and the review process of national executive intervention in a province as provided in the NCOP Rules, gaps in the view process of national executive intervention in a province will be identified and discussed.

2.4 Gaps in section 100 interventions and NCOP Rules

Section 100 does not require national government, when intervening in a province by issuing a directive, to send a copy of that directive to the NCOP. It may be useful to look at section 106 of the Municipal Systems Act which provides that an MEC issuing a notice to conduct an investigation in a municipality must submit a written statement to the NCOP

⁴⁶ Rule 254(7) NCOP Rules.

motivating the action. Section 106 of the Municipal Systems Act provides that a Member of the Executive Council (MEC) must conduct an investigation in a municipality if he or she has a reason to believe that a municipality cannot or does not fulfil a statutory obligation binding in that municipality or maladministration, fraud corruption or any other serious malpractice has occurred or is occurring in that municipality.⁴⁷ The Municipal Systems Act provides that the MEC must submit a report on that investigation to the NCOP.⁴⁸

Although section 106 investigations do not always lead to the application of section 139 interventions, the report submitted to the NCOP in respect of the section 106 investigations may be useful when section 139 is applied by the provincial executive in a municipality.

The NCOP Rules do not provide for the type of information to be submitted by the national executive other than to say that the national executive must submit a memorandum explaining the reasons for the intervention.

The NCOP Rules are not clear on how an “appropriate committee” should be established. As it has been discussed earlier, the establishment of the appropriate committee may not always be straight forward because different provincial departments may be affected by the intervention.

The NCOP Rules do not provide for a clear process and criteria to be followed by the NCOP when the national executive intervention in a province is ongoing.

⁴⁷ S 106(1) Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) (herein referred “Systems Act”).

⁴⁸ S 106(4) Systems Act.

2.5 The criteria for the review power of the NCOP and the process to be followed by the NCOP

The following criteria and process for the review power of the NCOP would address the gaps that have been identified earlier. The criteria and the process for the review power of the NCOP would be further of assistance to the NCOP when exercising its review power in national government interventions.

2.5.1 Consideration of the notice of intervention

When the NCOP receives the notice of intervention from the cabinet member responsible for provincial affairs, the NCOP must consider that notice for purposes of approving or disapproving it. Steytler and De Visser argue that the NCOP should consider whether the requirements of section 100(1)(b) have been met. Secondly it must consider whether the discretionary power to intervene was exercised appropriately. Thirdly the NCOP should consider whether the measures are appropriate to correct and remedy the problem that lies at the root of the non-fulfilment of an executive obligation.⁴⁹

The Court in the *Mogalakwena Local Municipality vs Provincial Executive Council, Limpopo and others*, argued that section 139 requires an objective state of affairs, not a mere opinion by the decision maker that such a state of affairs exists.⁵⁰ Although the court in this case argued the application of section 139, the NCOP should, when considering the

⁴⁹ Steytler N & De Visser J *Intervening in Provinces and Municipalities: Guidelines for the Application of Sections 100 & 139 of the Constitution prepared for the Department of Provincial and Local Government* (2007) 15.

⁵⁰ *Mogalakwena Local Municipality vs Provincial Executive Council, Limpopo and Others (35248/14)[2014] ZAGPPHC 400 (19 June 2014)* para 33.

notice of intervention in terms of section 100, determine whether an objective state of affairs was applied, not a mere opinion by the national executive that such a state of affairs exists.

In order for the NCOP to consider the notice of intervention for purposes of approving or disapproving that notice, the following should be incorporated in the memorandum accompanying the notice of intervention:

- a copy of section 100(1)(a) directive;
- a description of any progress made to fulfil the obligation after a directive was issued;
- a details of the statutory obligation that the province has failed to fulfil;
- a description of the ways in which the obligation has been neglected;
- a description of the action that the national executive has taken and the results of that action together with the a description of specific goals of the intervention and the time within specific results are expected; and
- an estimation of the length of the intervention.⁵¹

2. 5.1.1 Copy of a directive

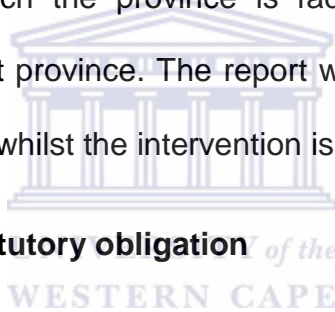
It has been argued earlier that the national executive cannot assume responsibility for an obligation in a province without issuing a directive first. Although the Constitution and the NCOP Rules do not specifically provide for the national executive to notify the NCOP when it decided to issue a directive, notifying the NCOP of the issuing of a directive may

⁵¹ Murray C, Bezruki D & Ferrel L 'et al' *'NCOP's Role in the Oversight Process' Interim Report, Speeding Transformation* (2000) 57.

assist the NCOP when the NCOP assesses the notice of intervention. Therefore a copy of a directive should be attached to the notice of intervention in terms of section 100(1)(b) of the Constitution.

2.5.1.2 Progress status after a directive was issued

When the national executive assumes responsibility in a province, a report on how that province has performed after a directive was issued, should be attached to the notice of intervention to assume responsibility. The report should state whether there was any progress made or whether the directive had no effect. The report would assist the NCOP in identifying the problem which the province is facing and what steps the national executive has done to help that province. The report would further help the NCOP to set terms and conditions to be met whilst the intervention is continuing.



2.5.1.3 Details of the statutory obligation of the

The cabinet member responsible for provincial affairs should provide in the memorandum a detailed statutory obligation that the province has failed to fulfil. The name of the legislation and the provisions which a province has failed to fulfil as required should be explained in the memorandum. The memorandum should further detail the consequences of the failure in fulfilling the statutory obligations by that province.

2.5.1.4 Specific objectives of the intervention

The cabinet member responsible for provincial affairs should include in the memorandum the objectives of the intervention. This means the memorandum should provide in detail what the intervention aims to achieve.

Furthermore the cabinet member responsible for provincial affairs should include in the memorandum time frames within which the expected outcome of the results must be achieved.

2.5.1.5 Length of the intervention

An estimation of how long the intervention will take should be included in the memorandum. The estimation would assist the NCOP in planning for their regular review in the event the intervention is approved.

2.5.2 Regular review of ongoing intervention

After the NCOP has approved the intervention, section 100 provides that the NCOP must review the intervention regularly. The NCOP must continue to review the intervention until the objectives of the intervention are achieved. The NCOP should review the intervention by assessing reports on the progress of the intervention. The reports on the progress of the intervention should be submitted by the cabinet member responsible for provincial affairs to the NCOP.

Furthermore the NCOP should conduct site visits in the province concerned. The aim of the site visits should be to gather more information and to consult with relevant stakeholders. In reviewing the intervention, the NCOP should further obtain information from independent sources which can be the Auditor General or Public Protector to assist the NCOP in assessing the progress of the intervention.

2.5.3 End of the intervention

It has been argued earlier in this chapter that intervention is a temporary measure and it must end when the objectives have been achieved. The intervention ends when the reason for it ceases to exist. The cabinet member responsible for provincial affairs should give a report to the NCOP on the progress of the intervention and the termination thereof. However the NCOP cannot pro-actively end the intervention against the wishes of the national executive. Section 100 of the Constitution provides that the NCOP may make recommendations to the national executive.

The Constitution does not provide for the NCOP to end the intervention after the NCOP has approved that intervention. It is submitted therefore that the national executive does not need the NCOP's approval to end the intervention. Furthermore the NCOP cannot force the national executive to end an intervention.

The NCOP also does not review the decision to end the intervention by the national executive but give recommendations to the national executive. It is further submitted that the NCOP scrutinises the report by the cabinet member responsible for provincial affairs on the termination of the intervention. The NCOP therefore would recommend to the national executive what it cannot do based on the report but the NCOP cannot tell the national executive what it can do.

Steytler and De Visser argue that, in reviewing the ongoing intervention, the NCOP should review the intervention in terms of the overall objectives of such intervention and the following questions should be asked whether such objectives have been achieved:

2.5.3.1 Has the executive obligation been fulfilled?

The cabinet member responsible for provincial affairs reports to the NCOP on the achievements and even challenges of the intervention. A report on the intervention by the cabinet member responsible for provincial affairs should state whether the objectives of the intervention have been achieved. The NCOP discusses the report and make recommendations to the national executive.

2.5.3.2 Have the appropriate measures been taken to ensure that the non-fulfilment of the executive obligation will not occur again in future?

The report by the cabinet member responsible for provincial affairs should state the appropriate measures which have been taken to ensure that the non-fulfilment of the executive obligation will not occur again in future. The report should show the problems, the causes of the problems and the challenges which faced the province and led to an intervention by the national executive. Furthermore the report should show the appropriate measures taken to ensure that the problems will not occur again and the province will not face those challenges again.

The cabinet member responsible for provincial affairs should provide a detailed plan on how the national executive will monitor and evaluate the performance of the province with regard to the fulfilment of the executive obligation.

2.6. Conclusion

Although Chapter 3 of the Constitution provides that each sphere of government should respect another sphere of government and not assume power or function except for those conferred in terms of the Constitution, national government may intervene in a province when it is necessary.

The national government may intervene in a province by issuing of a directive and by assuming responsibilities in that province. The national government's assumption of responsibility in a province is not regarded as encroachment in the provincial sphere.

The Constitution does not provide for the national executive to notify the NCOP when the national executive has intervened in a province by issuing a directive. The assumption of responsibility by the national government cannot be done without issuing a directive first.

The NCOP exercises an oversight role in national executive interventions in provinces. The NCOP may approve or disapprove national executive intervention in a province. In order to assist in exercising the oversight role in national executive interventions in provinces, the NCOP has Rules.

Although the NCOP Rules provide for the process to be followed when the NCOP is reviewing national executive intervention in a province, there are gaps in the NCOP Rules.

The NCOP Rules do not provide clearly what information must be submitted by the national executive other than a memorandum explaining reasons for the national government intervention in a province. Furthermore the NCOP Rules do not provide how that appropriate committee is established or what comprises of the appropriate committee. The NCOP Rules do not provide for criteria and process to be followed when the national executive intervention in a province continues.

The name of the legislation and the provisions which a province has failed to fulfil as required should be explained in the memorandum. The cabinet member responsible for provincial affairs should include in the memorandum the objectives of the intervention. Furthermore the cabinet member responsible for provincial affairs should include in the memorandum time frames within which the expected outcome of the results must be achieved and an estimation of how long the intervention will take.

It is submitted that when investigating a notice of intervention, the NCOP should consider whether the requirements of section 100(1)(b) have been met, whether the discretionary power to intervene was exercised appropriately and whether the measures are appropriate to correct and remedy the problem that lies at the root of the non-fulfilment of an executive.

The reports on the progress of the intervention from the national executive and site visits by the NCOP would inform the NCOP whether the specific objectives of the intervention are being achieved and whether the executive obligation has been fulfilled.

This would therefore take us to the case studies on national executive interventions in the Eastern Cape and Limpopo Provinces and the review process followed by the NCOP in those interventions. The following questions which will be addressed by the case studies:

- Whether a directive was issued and whether the NCOP insisted on the directive;
- Whether the notice of intervention was submitted to the NCOP by the national executive within the constitutional deadlines;
- Who briefed the NCOP after the notice of intervention was submitted to the NCOP;
- How many committees were involved, in investigating the notice of intervention and in reviewing the intervention regularly;
- Whether the NCOP after the approval of the intervention, the NCOP set time frames in order to review the intervention regularly;
- How many meetings the NCOP had on the review of the intervention;
- How many site visits conducted by the NCOP when reviewing the intervention;
- What organ of State was consulted by the NCOP during site visits and during meetings of the NCOP;
- What are the intervals between the site visits before the NCOP conducts another visit;
- Did the NCOP consider whether the requirements of section 100(1)(b) have been met;
- Did the NCOP consider whether the discretionary power to intervene was exercised appropriately;

- Did the NCOP consider whether appropriate measures are in place to correct and remedy the problem that lies at the root of the non-fulfilment of an executive obligation;
- How was the NCOP involved in ending the intervention?

Having discussed the overview of section 100, the role of the NCOP on national government interventions, the NCOP Rules and the gaps in section 100 and NCOP Rules, a case study on how the NCOP exercises its review power on the national executive intervention in a province will be dealt with in chapters 3 and 4. The questions listed above would assist in analysing the case studies.



CHAPTER 3

CASE STUDY: NATIONAL EXECUTIVE INTERVENTIONS IN THE EASTERN CAPE

3.1 Introduction

The national executive intervened in the Department of Education in the Eastern Cape Province in 2011. The intervention was as a result of continuous challenges in the Department of Education.⁵² The challenges were in respect of over-expenditure of the budget for compensation of employees, because the Department could not comply with policies, norms and standards relating to Educator Post Provisioning. Furthermore the Department was failing to provide textbooks and stationery to section 20 schools due to poor management of the procurement processes.⁵³

Other challenges were the suspension of the scholar transport programme because the Department over-spent the budget. Termination of the school nutrition programme before the end of the financial year was another challenge. Furthermore the Department could not manage its budget and supply chain processes. The Department could not effectively manage the school infrastructure development programme. This had resulted in funding earmarked for school infrastructure being returned to the National Treasury although the Province was faced with serious infrastructural backlogs.⁵⁴

⁵² *Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011 1.*

⁵³ S 20 & 21 of the South African Schools Act, 1996 (Act No. 84 of 1996).

⁵⁴ *Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011 2.*

3.2 Issuing of a directive

The reports by the Minister of Basic Education and the Deputy Minister of Basic Education are silent on whether a directive was issued to the Department of Education in the Eastern Cape before the national executive intervened in terms of section 100(1)(b) of the Constitution. If a directive was issued by the national executive to the Department of Education, the Minister and the Deputy Minister of Basic Education should have briefed the NCOP on that directive. Furthermore it is not clear in the reports whether the NCOP insisted on issuing of a directive by national executive to the Eastern Cape Department of Education.

3.3 Constitutional deadlines with regard to the notice of intervention

The national executive decided to intervene in the Department of Education in the Eastern Cape Province on 2 March 2011 in terms of section 100(1)(b) of the Constitution.⁵⁵ It was resolved by the national executive at the meeting of the 2 March 2011 that the Minister of Basic Education would assume responsibility for the areas in which the Department of Education was struggling to meet minimum standards of service delivery.⁵⁶ It is not clear why the national executive gave the responsibility to the Minister of Basic Education alone whereas the problems in the Eastern Cape Department of Education included financially related matters.

⁵⁵ *Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education* 17 March 2011 1.

⁵⁶ *Basic Education Minister Briefing on the Eastern Cape Education Department Intervention* 16 March 2011 2.

On 15 March 2011 a notice of intervention was submitted to the NCOP.⁵⁷ The Minister of Basic Education, Mrs Angie Motshekga briefed the National Assembly on the intervention in the Department of Education on 15 March 2011.⁵⁸

Section 100(2) provides that a notice of intervention must be submitted to the NCOP within 14 days after the intervention has begun. The notice of intervention in this case was submitted on 15 March 2011, 13 days after the decision to intervene was taken by the national executive. Therefore the notice of intervention by the national executive in the Eastern Cape Department of Education was submitted within the time frame as provided in the Constitution.

However it is not clear from the briefing by the Minister of Basic Education whether the notice of intervention was accompanied by the memorandum as required by the NCOP Rules. It is further not clear from the Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department whether the memorandum was submitted with the notice of intervention.⁵⁹

⁵⁷ *Basic Education Minister Briefing on the Eastern Cape Education Department Intervention* 16 March 2011.

⁵⁸ *Basic Education Minister Briefing on the Eastern Cape Education Department Intervention* 16 March 2011.

⁵⁹ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011.

3.4 Briefing on the decision to intervene

On 17 March 2011 the Deputy Minister of the Department of Basic Education, Mr Mohamed Enver Surty, briefed the NCOP on the decision to intervene in the Department of Education in the Eastern Cape.⁶⁰

Rule 254(1) of the NCOP Rules provides that a cabinet member responsible for provincial affairs must submit a written notice of intervention to the NCOP. The cabinet member responsible for provincial affairs should therefore brief the NCOP on the decision to intervene in a province.

In this case the national executive decided that the Minister of Basic Education should lead the intervention. The Deputy Minister of Basic Education briefed the NCOP on the steps taken by the Department of Basic Education that led to the decision to intervene in the Department of Education. The Deputy Minister reported that extensive consultations with the leadership of the Eastern Cape Province in particular the Premier and the MEC for the Department of Education were conducted. The Deputy Minister reported that during consultations it became apparent that there were serious challenges of capacity in the Department of Education. Furthermore the Deputy Minister briefed the NCOP on the objectives of the intervention.⁶¹

⁶⁰ Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011.

⁶¹ Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011 1.

3.5 Constitutional deadlines with regard to approval of the intervention

The notice of intervention was referred by the NCOP to the Select Committee on Education and Recreation for consideration and report to the NCOP.⁶² The Select Committee on Education and Recreation did not include any other committee or committees. Most importantly the Select Committee on Cooperative Governance was not included though it is a Select Committee which is mandated with intergovernmental relations. This confirms what has been discussed in chapter two that the NCOP Rules do not provide for what comprises an “appropriate committee”.

A briefing meeting was held by the Select Committee on the 22 March 2011.⁶³ The purpose of the briefing meeting was to enable the Select Committee to consider the notice of intervention and make recommendations to the NCOP as provided for in Rule 254(4) of the NCOP Rules.

The Director-General of the Department of Basic Education made a presentation to the Select Committee on the purpose, scope and nature and progress of the intervention.⁶⁴

⁶² *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011.

⁶³ *Department of Basic Education on Notice of intervention in Eastern Cape Department of Education in terms of section 100* 22 March 2011.

⁶⁴ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011.

The Select Committee, after it interacted with the Department of Basic Education and the Eastern Cape Department of Education, recommended that the NCOP approves the intervention. Furthermore the Select Committee recommended that the Department of Basic Education provide quarterly reports on the progress made in the Eastern Cape Education Department.⁶⁵

Another recommendation was that the Select Committee on Education and Recreation in collaboration with the standing committee in the Provincial Legislature should undertake an oversight visit to Eastern Cape Department of Education once the NCOP has approved the said intervention.⁶⁶

However, the Report of the Select Committee does not say how the Select Committee considered the notice of intervention and the briefing on the notice of intervention by the Minister and the Deputy Minister of Basic Education. The report is silent on whether the Select Committee considered whether the requirements of section 100(1)(b) were met. The Report does not say whether the Select Committee considered whether the discretionary power to intervene was exercised appropriately and whether appropriate measures are in place to correct and remedy the problem.

⁶⁵ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011 6.

⁶⁶ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011 6.

The Report of the Select Committee on Education and Recreation indicates that the report was to be considered by the NCOP.⁶⁷ The intervention was approved by the NCOP on 25 August 2011.⁶⁸ The notice of intervention was submitted to the NCOP on 15 March 2011, and the intervention was approved within the constitutional time frames of 180 days.

Furthermore, the Select Committee indicated in the Report that the intervention will last for three to four years.⁶⁹ However the Select Committee did not recommend any time frames for review of the intervention by the NCOP.

3.6 Site visits

The Select Committee has a responsibility in terms of the NCOP Rules to investigate the notice of intervention. The approach the Select Committee followed was to conduct site visits gathering information to be able to investigate the notice of intervention. The Select Committee visited the Eastern Cape on 16-19 August 2011. The purpose of the site visit was to consult with relevant stakeholders.⁷⁰ Meetings were held with members of the Provincial Legislature, unions and other relevant stakeholders. The Select Committee further interacted with the MEC for Education, Head of Department and the Administrator of the intervention task team.

⁶⁷ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011.

⁶⁸ *Minutes of Proceedings of the National Council of Provinces, Third Session, Fourth Parliament* No. 28 of 2011 2969.

⁶⁹ *Report of the Select Committee on Education and Recreation on the Briefing by Basic Education Department on the Intervention in the Eastern Cape Department of Education* 13 April 2011 4.

⁷⁰ *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape* 08 August 2012.

A follow-up site visit was conducted by the Select Committee in March 2012 to measure the progress of intervention for purposes of reviewing the on-going intervention.⁷¹ On 13 March 2012, the Select Committee visited the Education Leadership Institute in East London and further met with the members of the Provincial Legislature and officials of the Department of Education.⁷²

On 14 March 2012, the Select Committee met with educators and the school governing bodies of the two schools the Select Committee visited . On 15 March 2012, the Select Committee met with provincial officials and the National Department of Basic Education officials.⁷³ The Report of the Select Committee provides that the purpose of the site visits was to get progress reports from all the relevant stakeholders and the Department of Education on the implementation of the intervention.⁷⁴

The intervals between site visits were six months. The Select Committee spent four days during their first visit in Eastern Cape and spent three days during their second visit. Although the intervals between site visits were six months, it seems the Select Committee last visited the Department of Education in the Eastern Cape in March 2012. In 2014 which is two years since their last site visit, there is no report of the Select Committee on

⁷¹ *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape* 08 August 2012.

⁷² *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape* 08 August 2012 1.

⁷³ *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape* 08 August 2012 1.

⁷⁴ *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape* 08 August 2012 1.

the NCOP website that says there had been site visits after March 2012 or the intervention has ended in the Eastern Cape.

Having conducted the oversight visit in 2012 in the Eastern Cape, the Select Committee recommended that the Eastern Cape Department of Education should continue to work hand in hand with the Department of Basic Education to bring a sustainable turnaround and to ensure an efficient and effective delivery of educational services in the Province. Furthermore the Select Committee recommended that the NCOP should continue to review the intervention regularly and make further recommendations to the national executive if and when necessary.⁷⁵

3.7 Meetings of the NCOP on the intervention

The first meeting of the NCOP was held on 17 March 2011 after the notice of intervention was submitted to the NCOP on 15 March 2011. The purpose of the meeting was to brief the NCOP on the intervention in the Eastern Cape Department of Education.⁷⁶ In this meeting, it appears that the NCOP members didn't have an understanding of how to deal with the report on the intervention. The Members of the NCOP were not clear on whether the briefing was supposed to be debated or not until the Chief Whip of the Council advised the Members that the briefing was just a statement by the Deputy Minister and not open for debate.

⁷⁵ *Report of the Select Committee on Education and Recreation on its follow up oversight visit to the Eastern Cape 08 August 2012 11.*

⁷⁶ *Report on National Intervention in Eastern Cape Education Department in terms of section 100 of the Constitution of RSA: Statement by the Deputy Minister of Basic Education 17 March 2011.*

The second meeting of the NCOP was held on 22 March 2011 when the Administrator responsible for the Department of Education presented reasons for intervention. Furthermore the turnaround strategy which aimed at stabilising the education system and addressing decisively the administrative, management and systematic challenges facing the Department was presented.⁷⁷

During the discussions in the meeting, the Members commented that they should be provided with the detailed report on what led to the intervention in order for them to exercise proper oversight.⁷⁸ The Department of Basic Education reported that it would provide the NCOP with plans, strategies and updates for the NCOP to be able to assess the intervention properly. This was the second meeting yet the NCOP had not yet started assessing or reviewing the intervention. This shows that the report on the decision to intervene may not have included a detailed report on what led to the intervention. It appears therefore that the memorandum was not attached to the notice of intervention as required by the NCOP Rules.

The NCOP held a meeting on 15 February 2012. In this meeting, the Minister and the Department of Basic Education briefed the NCOP on the progress of the intervention. The Department of Basic Education indicated during the meeting that the NCOP would be asked to extend the time frame for the intervention because the enabling environment was in place to achieve the results desired by the intervention. When national executive

⁷⁷ Department of Basic Education on Notice of Intervention in the Eastern Cape Department of Education in terms of section 100 of the Constitution 22 March 2011.

⁷⁸ Department of Basic Education on Notice of Intervention in the Eastern Cape Department of Education in terms of section 100 of the Constitution 22 March 2011 4.

intervened in the Eastern Cape, initially the Eastern Cape Province did not accept the intervention in terms of section 100(1)(b). *The Minister therefore indicated that since the Province had accepted the implementation of section 100(1)(b) in full therefore the time frame for the intervention should be extended.*⁷⁹

During the meeting the members NCOP sought explanations with respect to the actions to be taken against officials who didn't deliver. Members were further interested to hear about plans to ensure that the education system does not deteriorate but improve. The question about plans to ensure that education system does not deteriorate but improve addresses the question of whether appropriate measures have been taken to ensure that non-fulfilment of the executive obligation does not occur again in future.

The Minister of Basic Education reported on the progress made in the intervention during the meeting of the NCOP on 11 September 2013. The Minister reported on the achievements by the intervention and problems which the Department of Basic Education had been complaining about initially had been resolved. The Department of Education offices were now properly structured and the Chief Financial Officer has been appointed.⁸⁰ The Minister further indicated to the NCOP that the intervention team was ready to leave the Province.⁸¹

⁷⁹ *Ministerial and Departmental briefings on intervention in Eastern Cape Department of Education* 15 February 2012.

⁸⁰ *Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports* 11 September 2013 14.

⁸¹ *Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports* 11 September 2013 15.

3.8 End of intervention and involvement of the NCOP in ending the intervention

At the time of writing this paper, the intervention in the Eastern Cape Department of Education has not yet ended. However, the Minister of Basic Education indicated in a statement on the Eastern Cape Education intervention that they received a full report on the progress of the intervention in the Eastern Cape Department and they are of the view that they need to downgrade the intervention to section 100(1)(a).⁸² There was no report which formally requested the downgrade before the NCOP at the time of writing this paper.

The Constitution does not provide for the NCOP to end the on-going intervention. The statement made by the Minister of Basic Education to the effect that the intervention team was ready to leave the Province, further shows that the NCOP cannot pro-actively end the intervention. The NCOP could not tell the national executive to end the intervention but had to wait for reports from the national executive that say the challenges have been dealt with. The NCOP should therefore scrutinise the report and make recommendations to the national executive.

Table 1: Timeline of the review process of the intervention in the Eastern Cape Department of Education

The table below will show the dates with respect to the decision to intervene by the national executive and the approval of intervention by the NCOP. The number of site visits

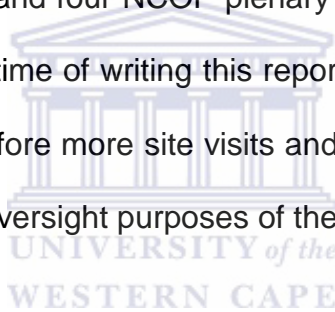
⁸² *Statement by Angie Motshekga, Basic Education Minister, clarity on Eastern Cape Education intervention* 10 April 2013.

of the Select Committee and intervals between site visits including the number of meetings of the NCOP will also be shown in this table.

Decision to intervene	Notice of intervention submitted to the NCOP	Briefings to the Select Committee for approval of intervention	Approval of intervention	Site Visits	Meetings of the NCOP	End of intervention
2 March 2011	15 March 2011	17 March 2011	Assumed approved after the briefing which was done on 13 April 2011	16-19 August 2011	17 March 2011	
		23 March 2011		13 March 2012	22 March 2011	
		13 April 2011		14 and 15 March 2012	15 February 2012	
					11 September 2013	

According to this table, the Select Committee held three briefings to enable it to consider the notice of intervention. It conducted four site visits in the Eastern Cape Province for purposes of reviewing intervention in the Department of Education. The NCOP plenary held four meetings for purposes of being briefed on the progress of the intervention and for purposes of reviewing that intervention.

The time frame for the intervention to continue in the Eastern Cape is three to four years from March 2011. Furthermore an extension of 18 months was requested. Three site visits by the Select Committee and four NCOP plenary meetings may not be enough to review the intervention. By the time of writing this report, the intervention in the Eastern Cape was still continuing, therefore more site visits and NCOP plenary meetings on the intervention are necessary for oversight purposes of the NCOP.



3.9 Conclusion

Having dealt with the intervention in the Eastern Cape Department of Education, conclusions have been reached in respect of the process followed by national executive when intervening in the Department of Education. Furthermore conclusions have been made in respect of the process followed by the NCOP in reviewing that intervention.

A directive was not issued by the national executive to the Eastern Cape Department of Education. Therefore the national executive did not comply with section 100(1)(a) of the Constitution. It is further submitted that the NCOP did not insist on issuing of a directive to the Department of Education by the national executive either. The NCOP therefore failed to exercise the oversight role of ensuring that national executive issue a directive to the Department of Education when intervening in that department.

The national executive did comply with section 100(1)(b) of the Constitution in that a notice of intervention in the Eastern Cape Department of Education was submitted to the NCOP on the 17 March 2011 by the Minister of Basic Education within 13 days after the intervention began. Rule 254(1) of the NCOP Rules was complied with in respect of submission of the written notice to intervene to the NCOP.

The national executive decided that, in this case, cabinet member responsible for provincial affairs was the Minister of Basic Education although the problems that led to intervention in the Eastern Cape included financially related matters.

A memorandum as required by the NCOP Rules did not accompany the notice of intervention.

The notice of intervention was referred to the Select Committee on Education and Recreation for consideration and reporting to the NCOP plenary. The “appropriate committee” referred to in the NCOP Rules is the Select Committee on Education and Recreation and no other select committees were involved in the intervention. The Select Committee on Cooperative Governance was not included despite the fact that it has a specific mandate on intergovernmental relations.

During the investigation of the notice of intervention, the Select Committee did not address questions of, whether the requirements of section 100(1)(b) have been met. It didn't consider whether the discretionary power to intervene was exercised appropriately and whether appropriate measures are in place to correct and remedy the problem.

The intervention was approved by the NCOP plenary within the constitutional time frames. The three site visits conducted by the Select Committee may not be enough to review the intervention in the Eastern Cape adequately.

The fact that the NCOP requested a detailed report on the cause of the intervention during the second meeting shows that the NCOP does not get proper information during the briefing on the decision to intervene.

The NCOP in order to review the on-going intervention followed an approach of conducting oversight visits, getting information, reports and presentations from the Department of Education and the Department of Basic Education and other relevant stakeholders.

Although site visits may be costly or may take much time of the NCOP to do its work properly, it is necessary to consult with the relevant stake holders on the intervention and listen to their views. Reports and presentations from the Department of Basic Services and from the Department of Education on the progress of intervention would assist the NCOP in reviewing the intervention.

CHAPTER 4

CASE STUDY: NATIONAL EXECUTIVE INTERVENTIONS IN THE LIMPOPO PROVINCE: DEPARTMENTS OF TREASURY, EDUCATION, HEALTH, PUBLIC WORKS, AND ROADS AND TRANSPORT

4.1 Introduction

This chapter will deal with the case study on national executive intervention in the Limpopo Province. The national executive intervened in the five Departments of Treasury, Education, Health, Public Works, and Roads and Transport on 5 December 2011. The reason for the intervention was that the Province could not meet its financial obligations. Payments of various civil servants, including doctors, teachers and nurses could not be met by the Limpopo Province.⁸³

⁸³ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings* 9 February 2012.

The Province had a large accumulated unauthorised expenditure, which grew from R1.5 billion in 2009 to R2.7 billion in 2011. There was a practice of not paying invoices on time by the Departments in question. As a result there were accruals of R500 million in unpaid invoices by March 2011. The Department of Treasury had largely collapsed, and budget and payment systems were dysfunctional.⁸⁴

Various problems in each of these Departments included the accumulation of debt, unauthorised expenditure, lack of tender procedures, poor asset management, irregular expenditure, and projected overspending.⁸⁵

4.2 Issuing of a directive

As discussed in chapter two section 100(1)(a) of the Constitution provides that a directive must be issued before the intervention sanctioned by section 100(1)(b) takes place. The reports by the Minister of Treasury and the other Ministers are silent on whether a directive was issued to the Departments under intervention in Limpopo Province before the national executive intervene in terms of section 100(1)(b) of the Constitution. It appears therefore that the national executive did not comply with section 100(1)(a) of the Constitution. Furthermore the reports of the Select Committee on Finance are silent on whether the NCOP insisted on issuing of the directive by national executive to the Departments in Limpopo Province.

⁸⁴ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings* 9 February 2012.

⁸⁵ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings* 9 February 2012.

4.3 Constitutional deadlines with regard to the notice of intervention

On 5 December 2011, the national executive decided to intervene in the Limpopo Province.⁸⁶ As discussed in chapter two, section 100(2) provides that a notice of intervention must be submitted to the NCOP within 14 days after the intervention begun. A notice of intervention was submitted to the NCOP on 7 December 2011 within the constitutional time frame of 14 days after the decision has been made by the national executive.⁸⁷

The intervention in Limpopo Province was led by the National Department of Finance. The reason for the intervention to be led by the National Department of Finance may be that all the Departments under intervention in Limpopo had financially related problems. The briefings by the Ministers and reports of the Select Committee on Finance do not address whether the notice of intervention was accompanied by the memorandum as required by the NCOP Rules.

⁸⁶ *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May 2012.

⁸⁷ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings* 9 February 2012.

4.4 Briefing on the decision to intervene

On 12 February 2012, the Ministers and the Deputy Ministers of the respective Departments of Treasury, Higher Education, Basic Education, Transport, Public Service and Administration, and Health participated in a briefing to a joint sitting of the Select Committees on Finance, Public Services, Education, Appropriations and Social Services.⁸⁸

Rule 254(1) of the NCOP Rules provides that a cabinet member responsible for provincial affairs must submit a written notice of intervention to the NCOP. The cabinet member responsible for provincial affairs should therefore brief the NCOP on the decision to intervene in a province. In this case the cabinet member responsible for provincial affairs was decided by the national executive as the Minister of Finance.

The Minister of Finance led the briefing and reported on the objectives of the intervention and challenges faced the Limpopo Province which led to the decision to intervene in Limpopo. The challenges which were cutting across the five Departments under intervention were these Departments could not meet their financial obligations in terms of sections 38, 39, 40 and 81 -86 of the Public Finance Management Act, 1999 (Act No. 1 of 1999). These sections deal with unauthorised expenditure, contravention of the Act, budget control, responsibilities of Head of Departments and Members of Executive Councils and financial misconduct. Ministers responsible for other Departments under intervention reported on matters affecting those Departments. The

⁸⁸ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings 9 February 2012.*

challenges in those Departments included accumulation of debt, unauthorised expenditure, lack of tender procedures, poor asset management and irregular expenditure.

4.5 Constitutional deadlines with regard to approval of the intervention

The notice of intervention was referred to the Select Committee on Finance for consideration and report to the NCOP on 13 December 2011.⁸⁹ The Select Committee on Finance was thus regarded as the “appropriate committee” as provided for in the NCOP Rules. The Select Committee on Finance consulted with and involved the Select Committees on Education, Social Services and Public Services. As in the case of the intervention in the Eastern Cape Department of Education, the Select Committee on Cooperative Governance was not included in the “appropriate committee”.

The exclusion of the Select Committee on Cooperative Governance from the “appropriate committee” again shows that the NCOP Rules do not have clear criteria on what comprises the appropriate committee.

According to the Report of the Select Committee on Finance, Appropriation, Social Services and Public Service, presentations were made to the Select Committee by the Administrators of the Departments under intervention on 23 May 2012.⁹⁰ The purpose of the meeting was to enable the Select Committee to consider the notice of intervention and make recommendations to the NCOP as provided for in Rule 254(4) of the NCOP Rules.

⁸⁹ *National Government interventions in Gauteng, Free State and Limpopo: Ministerial Briefings* 9 February 2012 3.

⁹⁰ *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May 2012.

The Select Committee on Finance, Appropriation, Social Services and Public Service after it has interacted with the Administrators of the Departments under intervention, recommended that the NCOP approves the intervention in terms of section 100 (1) (b) of the Constitution, 1996, in the five Provincial Departments to ensure good governance and sound financial management as required by the PFMA. The Select Committee further recommended that the NCOP, in terms of section 100 (2)(c) of the Constitution, 1996, while the intervention continues, review the intervention regularly and make any appropriate recommendations to the national executive.⁹¹

It appears from the Report of the Select Committee that the Select Committee did not consider whether the requirements of section 100(1)(b) have been met. Furthermore the report is silent as to the Select Committee did consider whether the power to intervene was exercised appropriately. It does not appear that the Select Committee did address the question of whether appropriate measures are in place to correct and remedy the problem.

Furthermore referring to sub-section 100(3) of the Constitution, 1996, which refers to national legislation that may regulate the national intervention process in provinces, the Select Committee recommended that the Minister of Cooperative Governance and Traditional Affairs should consider introducing national legislation to regulate the process of national interventions in provinces. The recommendation suggests that the

⁹¹ *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May (2012) 18.

NCOP is not clear of their role and responsibilities with regard to national executive intervention in a province.⁹²

It was recommended by the Select Committee that the Minister of the Department of Treasury should submit action plans based on the diagnostic analyses by the five administrative task teams in the NCOP as a matter of urgency.⁹³

The intervention in the Limpopo Province was approved by the NCOP plenary on 29 May 2012 after the notice to intervene was submitted of 7 December 2011 within the Constitutional time frames of 180 days.⁹⁴ The Report of the Select Committee which recommended approval of the intervention did not provide for time frames for the NCOP to review the intervention.



4.6 Site visits

The Select Committees on Finance, Appropriation, Social Services and Public Service undertook a site visit to Limpopo Province on 25-30 March 2012.⁹⁵ The purpose of the visit was to gather information that would assist the Select Committee in making a decision about the intervention. For purposes of the consideration of the notice of intervention, it appears that the relevant Select Committee visits the province under intervention to consult with relevant stakeholders and collect information.

⁹² *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May 2012.

⁹³ *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May (2012) 18.

⁹⁴ *Minutes of the Proceedings of the National Council of Provinces Fourth Session, Fourth Parliament* No. 15 of 2012, 1960 29 May 2012.

⁹⁵ *Report on the Select Committee on Finance on section 100(1)(b) of the Constitution, Intervention by National Executive in the Limpopo Province, in the Provincial Departments of Treasury, Education, Health, Public Works, and Roads and Transport* 23 May 2012.

The Select Committees on Finance, Appropriations, Social Services, Education and Public Services undertook a follow-up visit in Limpopo Province on 1-5 October 2012.⁹⁶

The main objectives of the follow-up oversight visit in Limpopo by the Select Committee on Finance were to review and measure progress made between 27 March 2012 and September 2012. It was 6 months since the Select Committee's previous oversight visit.

A further follow-up visit by the Select Committees in Limpopo Province was conducted on 22-26 April 2013.⁹⁷ The objective of the visit was to measure progress with respect to the enforcement and implementation of sections 38, 39, 40 and 81 -86 of the Public Finance Management Act. Furthermore the follow-up visit by the Select Committee was to measure progress made regarding the development and implementation of the action plans. The Select Committee was to further determine whether the intervention was effective, should be extended or discontinued. The transferring of skills to officials of the Departments by the Administrators was further determined by the Select Committee.

The intervals between site visits was six months, which means the Select Committee gave Limpopo Province a period of six months to enforce and implement what has been agreed upon between the Departments and the Select Committee. The Select Committee would then conduct a follow up visit to determine the progress of the intervention.

⁹⁶ *Report on the Select Committee on Finance on the follow-up visit to Limpopo in terms of section 100(2)(c) of the Constitution* 16 November 2012.

⁹⁷ *Report of the Select Committee on Finance on the follow-up visit to Limpopo in terms of section 100(2)(c) of the Constitution* 18 June 2013.

The Select Committees on Finance, Finance, Appropriations, Social Services, Education and Public Services met with the Premier, Administrators of the respective Departments and the HODs and other relevant officials of the Departments.

The Premier, the Department of Public Service and Administration (DPSA), Administrators and Heads of Departments (HODs) under intervention made presentations on the progress made since the intervention, implementation of the recovery and turnaround plans, challenges encountered and the way forward.⁹⁸

Based on the presentations as mentioned above, Select Committees made some reservations, findings and recommendations. The Select Committees noted progress achieved in turning around the financial status of the Province and improvements in communication between the Administration team, the officials of different departments and the Office of the Premier. The Select Committees further noted that it was necessary to measure the impact made on the people of the Province.⁹⁹

4.7 Meetings of the NCOP on the intervention

The first meeting of the NCOP was held on 9 February 2012 after the notice of intervention was submitted to the NCOP on 7 December 2011. The purpose of the meeting was for the NCOP to be briefed by the Departments that were under intervention.

⁹⁸ *Report on the Select Committee on Finance on the follow-up visit to Limpopo in terms of section 100(2)(c) of the Constitution* 16 November 2012.

⁹⁹ *Report on the Select Committee on Finance on the follow-up visit to Limpopo in terms of section 100(2)(c) of the Constitution* 16 November 2012.

Another meeting of the NCOP was held on 11 September 2013.¹⁰⁰ The purpose of the meeting was to report on the progress made by the Limpopo Province since the intervention by the national executive. The progress report was presented by the Administrators of the respective Departments under intervention. The concern of the NCOP members in this meeting was that they didn't receive presentations on time to be able to prepare for the meeting.¹⁰¹ This shows that if the NCOP does not receive documentation in time, the Members would not be able to exercise their powers of assessing the documents for purposes of reviewing intervention.

A meeting was held by the NCOP on 15 October 2013. The purpose of the meeting was to brief the NCOP on the progress of intervention by the Premier, Directorate for Priority Crime Investigation, Anti-Corruption Task Team and Chief Administrator. The Premier reported that the work by the team of Administrators had brought relief to the people of Limpopo. The Premier likened Limpopo Province to a patient in hospital and reported that the patient was out of the intensive care unit and needed to be discharged. The Premier further indicated that the Administrators would report that the Limpopo Province had recovered significantly from the financial challenges.¹⁰² It is clear from the presentation by the Premier that the intervention in Limpopo was ending.

¹⁰⁰ *Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports* 11 September 2013.

¹⁰¹ *Section 100(1)(b) interventions in Limpopo and Eastern Cape: Minister & Department of Basic Education progress reports* 11 September (2013) 3.

¹⁰² *Review of Limpopo intervention in terms of section 100(2)(c) of the Constitution: Input by Premier, Directorate for Priority Crime Investigation, Anti-Corruption Task Team and Chief Administrator* 15 October 2013.

The NCOP held a meeting on 16 October 2013. This was the second day of presenting the progress reports on the Limpopo Province intervention. The purpose of the meeting was to give reports on the progress by the Administrators of each Department under intervention in Limpopo Province.¹⁰³

4.8 End of the intervention and the involvement of the NCOP

According to the Report of the Select Committee on Finance, on 12 August 2013 national executive announced that the Administration teams should start a six months period of hand-over to the Premier and his Provincial Executive. The Select Committee therefore recommended that the NCOP should approve the lifting of the section 100(1) (b) intervention in Limpopo with the condition that a transition phase is entered into, and that the Administration team should hand over the provincial management by the 31 March 2014.¹⁰⁴ However the Administration team could not meet the time frame specified.

More than 8 months after the national executive announced that the intervention was ending, the NCOP held a meeting on the termination of section 100 in Limpopo Province on 30 July 2014.¹⁰⁵ During the meeting, the Departments under the intervention briefed the NCOP on the readiness of the Limpopo Province to take back

¹⁰³ *Review of Limpopo intervention in terms of section 100(2)(c) of the Constitution: Input by Administrators (day2)* 16 October 2013.

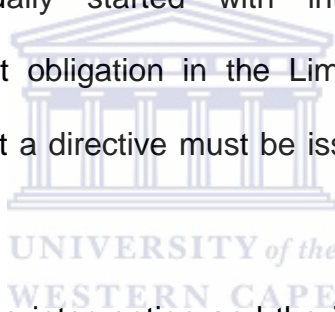
¹⁰⁴ *Report of the Select Committee on Finance on the Review of Limpopo Intervention in terms of section 100(2)(c) of the Constitution* 13 November 2013.

¹⁰⁵ *Termination of section 100 Limpopo intervention* 30 July 2014.

the administration of its Departments. The NCOP acknowledged the progress made in Limpopo and reported that a termination report would be compiled for adoption.

It appears that the national executive has actually ended the intervention in terms of section 100(1)(b) and instead applied section 100(1)(a) which refers to the issuing of a directive.¹⁰⁶ According to a media statement, the national executive sought the concurrence of the NCOP in respect of applying section 100(1)(a) in Limpopo Province.

Apparently the national executive set conditions which the Limpopo Province would fulfil as the pre-requisites for complete termination of intervention. It appears that the national executive has actually started with intervention by assumption of responsibilities for the relevant obligation in the Limpopo Province contrary to the Constitution which provides that a directive must be issued first before the assumption of responsibilities in a province.



Having discussed the end of the intervention and the involvement of the NCOP in the Limpopo Province, it becomes clearer that the NCOP therefore does not pro-actively end the intervention but deliberates on the progress reports in respect of the termination of the intervention. The NCOP cannot therefore tell the national executive to continue with the intervention if the national executive decides to end the intervention. The NCOP can give recommendations to the national executive in respect of termination of the intervention.

¹⁰⁶ *Department of Communications: Conditional hand over of the Limpopo Administration to the Provincial Executive, Media Statement 28 July 2014.*

Table 2: Timeline of the review process of the intervention in Limpopo Province

The table below will show the dates with respect to the decision to intervene by the national executive and the approval of intervention by the NCOP. The number of site visits of the Select Committee and intervals between site visits including the number of meetings of the NCOP will also be shown in this table.



Decision to intervene	Notice of intervention submitted to the NCOP	Briefings to the Select Committee for approval of intervention	Approval of intervention	Site Visits	Meetings of the NCOP	End of intervention
5 December 2011	7 December 2011	Referred 13 December 2011	Assumed approved after the submission of the report dated 23 May 2012	25-30 March 2012	9 February 2012	
		Briefing 12 February 2012		1-5 October 2012	11 September 2013.	
		Briefing 23 May 2012		22-26 April 2013	15 October 2013	
					16 October 2013	
					30 July 2014	

This table shows that the Select Committee held two briefings to enable it to consider the notice of intervention. The Select Committee conducted three site visits in the Limpopo Province for purposes of reviewing intervention in the Departments under intervention. The Select Committee stayed five days during each site visit. The NCOP held five meetings for purposes of being briefed on the progress of the intervention and for purposes of reviewing that intervention.

The Select Committee visited the Limpopo Province three times for purposes of reviewing the intervention. Three site visits to five Departments under intervention with the intervals of six months could not be enough for adequate review of the intervention. Moreover there were five meetings with the NCOP plenary on the progress of intervention. Furthermore the NCOP or Select Committees could not have proper information about what is happening on the ground with two site visits conducted.

4.9 Conclusion

Having dealt with the national executive intervention in the Limpopo Province and the review of that intervention by the NCOP, some conclusions should be addressed. A directive was not issued by the national executive to the Departments under intervention in Limpopo Province. The national executive therefore did not comply with section 100(1)(a) of the Constitution. The NCOP did not insist on issuing of a directive by national executive to Limpopo Province either. The NCOP therefore failed to exercise the power of ensuring that national executive met the requirement of issuing a directive first before intervening in Limpopo Province by assumption of responsibilities.

The notice of intervention was submitted two days after the decision to intervene in Limpopo Province and thus the time frame of 14 days as provided in the Constitution. The intervention in Limpopo Province was led by the National Department of Finance. The Minister and the Deputy Minister of the Department of Treasury, Higher Education, Basic Education, Transport, Public Service and Administration, and Health participated in a briefing to a joint sitting of the Select Committees on Finance, Public Services, Education, Appropriations and Social Services.

However it is not clear from the reports of the Select Committees and the briefings by the Minister of Finance whether the notice of intervention was accompanied a memorandum as required by the NCOP Rules.

The notice of intervention was referred to the Select Committee on Finance for consideration and report to the NCOP. The Select Committee on Finance consulted with and included Select Committees for Appropriations, Education, Social Services and Public Service. The “appropriate committee” as referred to in the NCOP Rules is was Select Committees on Finance, Appropriations, Education, Social Services and Public Services. However the Select Committee on Cooperative Governance which is mandated to deal with intergovernmental relations was not included.

The recommendation that the Minister of Cooperative Governance and Traditional Affairs should consider introducing national legislation to regulate the process of national interventions in provinces shows that the NCOP is not clear of the roles and responsibilities which regard to national executive intervention in a province.

The Select Committees did not consider whether the requirements of section 100(1)(b) has been met when they investigated the notice of intervention. Furthermore the Reports of the Select Committees did not address whether the discretionary power to intervene was exercised appropriately by the national executive. Questions on whether appropriate measures were in place to correct and remedy the problem were addressed by the NCOP during plenary meetings.

The intervention in Limpopo Province was approved within the Constitutional time frames of 180 days.

The Select Committee had conducted three site visits in Limpopo with intervals of six months between the site visits. The NCOP held five meetings during the intervention. Three site visits may not have been enough for the NCOP to review the intervention in Limpopo Province adequately.

The NCOP did not pro-actively end the intervention in the Limpopo Province. The intervention in the Limpopo Province was ended by the national executive. The date of the handing over of administration to the Limpopo Province by the national executive which was 31 March 2014 was not met by the national executive. This may be because the national executive ended the intervention by terminating section 100(1)(b) intervention and issued a directive in terms section 100(1)(a).

Section 100 requires that a directive must be issued first before the national executive intervenes by assumption of responsibilities in a province. In this case the national executive did not comply with section 100 in that the national executive first intervened by assumption of responsibilities in Limpopo Province and thereafter a directive was issued. Therefore the national executive did the opposite, they first assumed responsibilities in the Limpopo Province then they issued a directive with conditions.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It was submitted in chapter one that the NCOP plays a unique role in the promotion of the principles of cooperative government and intergovernmental relations. The NCOP ensures that the three spheres of government work together in performing their functions and that in doing so they do not encroach in each other's areas competence.

The national executive may intervene in a province and the intervention is not regarded as encroachment in the provincial sphere. The national executive is required to first issue a directive to a province before intervening by assumption of responsibilities in that province. The NCOP has a role to approve or disapprove a national executive intervention in a province. When the NCOP approves an intervention in a province, the NCOP must review that intervention regularly.

Section 100 of the Constitution and the NCOP Rules do not provide for a directive to be submitted to the NCOP when the national executive intervened in a province by issuing a directive.

The NCOP developed Rules which regulate the processes of the NCOP including review of national executive intervention in a province. However the NCOP Rules do not provide clear criteria for the review of national executive interventions by the NCOP. Most importantly it was submitted in chapter one that it is not known whether the exercise of the review power by the NCOP is working.

In both case studies in Eastern Cape and Limpopo Provinces, the national executive did not issue directives before intervening in those provinces by assumption of their responsibilities. The notices of intervention in both provinces were submitted by the national executive to the NCOP within the constitutional time frames. The NCOP approved both interventions within the constitutional time frames. In both provinces the relevant Select Committees investigated the notices of intervention and review the on-going intervention regularly. It is not clear from the Reports of the Select Committees what criteria were used to investigate the notices of intervention. It is further not clear from the Reports of the Select Committees and NCOP plenary meetings what criteria were used to review the on-going interventions regularly.

The NCOP did not pro-actively end the intervention in the Limpopo Province. The national executive gave the report to the NCOP on the readiness of the Province to take over the administration. The NCOP debated the report and made recommendations to the national executive.

5.2 RECOMMENDATIONS

In the proceeding sections, the gaps in the review process of national executive interventions and the criteria the NCOP should use in reviewing the intervention were discussed. It is recommended that the NCOP Rules should provide for clear criteria and process to be followed for approval of national executive interventions in provinces. It would therefore be recommended the NCOP Rules address the following:

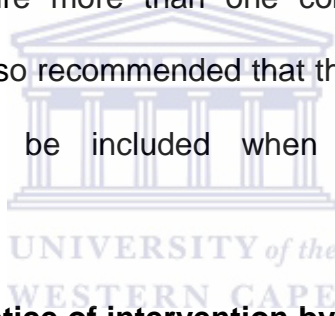
5.2.1 A directive

It was submitted that section 100 of the Constitution and the NCOP Rules do not require the national executive to submit a directive to the NCOP when an intervention by issuing a directive to a province has occurred. The submission of a directive to the NCOP would assist the NCOP in getting an insight in the intervention even before the intervention by assumption of responsibilities in a province occurs.

It is therefore important for the Constitution and the NCOP Rules to address the submission of a directive to the NCOP. A process similar to section 106 of the Municipal Systems Act should be inserted in section 100 of the Constitution and the NCOP Rules.

5.2.2 Referral and consideration of the notice of intervention by the select committee

The NCOP Rules should provide for clear criteria to establish the “appropriate committee” for purposes of investigating the notice of intervention adequately. Depending on the nature of the executive obligation which must be fulfilled by a province, more than one committee may be involved in the intervention. The non-fulfilment of the executive obligation may result from the non-compliance with different legislations which would require more than one committee to be included in the “appropriate committee”. It is also recommended that the Select Committee responsible for Cooperative Governance be included when establishing the “appropriate committee”.



5.2.3 Consideration of the notice of intervention by the Select Committee

In order for the NCOP to consider the notice of intervention objectively and adequately, a memorandum should accompany the notice of intervention. The memorandum should indicate that a directive was issued and that the province failed to fulfil the obligation after a directive was issued.

The memorandum should provide full details on the statutory obligation that the province has failed to fulfil. This would assist the NCOP in referring the notice of intervention to a relevant select committee. The memorandum should further provide for a description on the extent to which the obligation has been neglected.

Furthermore, the memorandum should describe the intervention in a province and goals to be achieved by the intervention. Time frames for the intervention should be indicated because it would assist the NCOP in setting up a plan for the review of intervention.

Section 69 of the Constitution can be used by the NCOP to obtain information with regard to the notice of intervention. However, the NCOP may not obtain all the information it needs using section 69. This section can be better used by the NCOP for seeking further information from any relevant person or institution. The NCOP Rules should therefore provide clearly what information on national government interventions should be submitted by the national executive.

5.2.4 Regular review of ongoing intervention

The NCOP should provide for clear criteria on how the review of the on-going intervention would be conducted. The memorandum is part of the tools that would assist the NCOP in reviewing the intervention regularly. The NCOP Rules should provide that the NCOP develop a plan on how the on-going intervention would be reviewed. The plan should provide in detail how the NCOP should review the on-going intervention.

Site visits should be addressed in the plan. It should be indicated in the plan how many site visits will be conducted for that particular intervention. The intervals between the site visits should be determined in the plan. Furthermore it should be indicated how the Select Committee and the NCOP should deal with the reports on the intervention in order to ensure that the challenges and problems are addressed by the national executive.

The plan should address who should report to the NCOP on the progress of the intervention. In the case studies, the Ministers, Deputy Ministers and administrators in the respective provinces reported on the progress of the intervention.

5.2.5 NCOP and the end of the intervention

The Constitution and the NCOP Rules provide that the NCOP must make recommendations to the national executive. For the NCOP to make meaningful recommendations to the national executive, the NCOP should insist that the report by the national executive on the termination of intervention should state the challenges that led to the intervention in a province. The report should further state how those challenges have been addressed by the intervention. The objective of the intervention should be contained in the report and whether those objectives have been achieved by the intervention. The report should further state what appropriate measures have been taken to ensure that the non-fulfilment of the executive obligation will not occur again in future.

The NCOP therefore make recommendations to the national executive. The Constitution does not give the NCOP the power to end an intervention. The NCOP has the power to approve or disapprove the intervention yet the NCOP does not have power to end the intervention. It is therefore recommended that the Constitution should provide for the NCOP to end the intervention after the executive obligation has been fulfilled.

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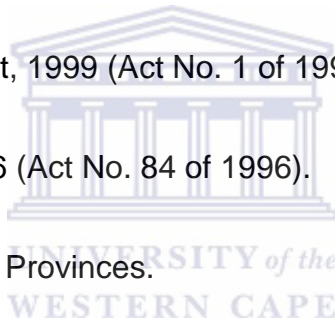
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