

PROCESS FLOW CHART

SUPPORT, MONITORING AND THE APPLICATION OF SECTION 139 OF THE CONSTITUTION AS WELL AS SECTION 105 AND 106 OF THE MUNICIPAL SYSTEMS ACT, 2000

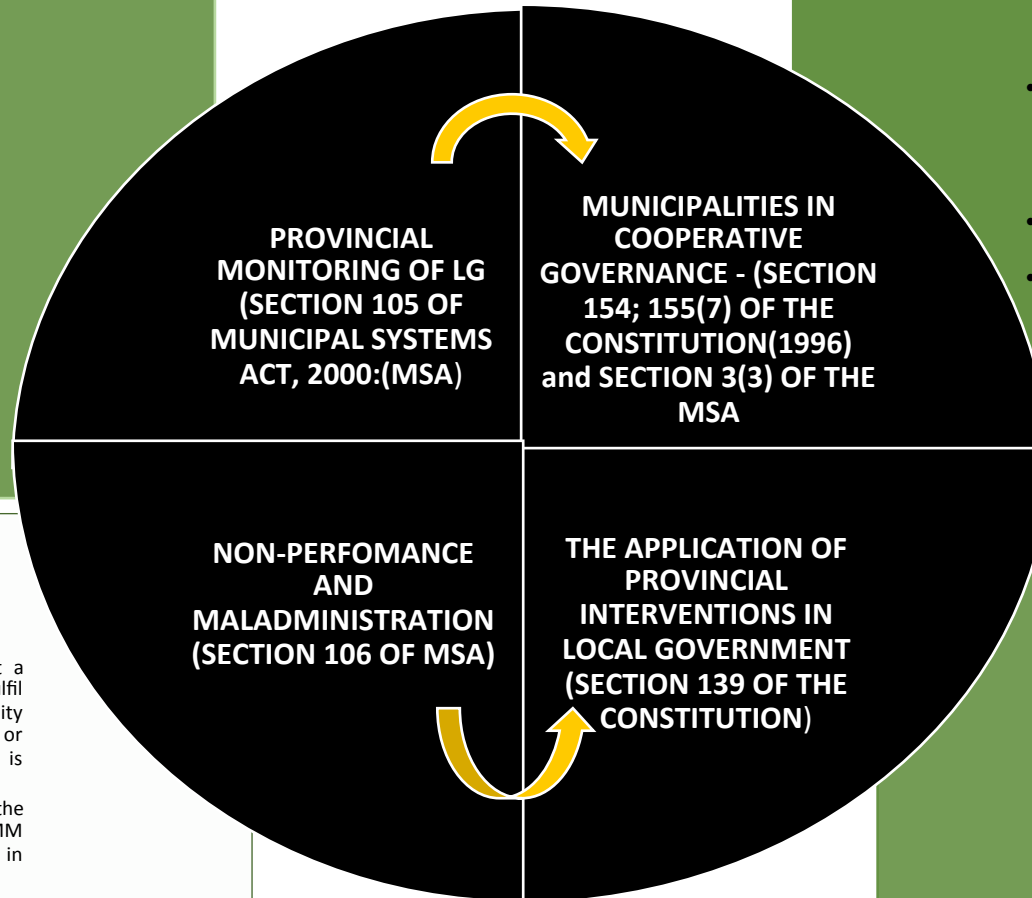


• Municipal Systems Act: section 105 of MSA

- MEC for LG to establish mechanisms processes and procedures in terms of section 155 (6) of the Constitution to:
- (a) monitor municipalities in managing their own affairs, exercising their powers and performing their functions
- (b) monitor the development of local government capacity in the province; and;
- (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions

•As part of the of the monitoring and support process.

- (1) If the MEC has reason to believe that a municipality in a province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or other serious malpractise has occured or is occurring in a municipality in the province:
- (a) the MEC must by written notice to the municipality, request the municipal council or MM to provide the MEC with information required in the notice, or
- (b) if the MEC considers it necessary, designate a person or persons to investigate the matter
- If an investigation is issued by the MEC in terms of subsection (1)(b), a written statement must be submitted to the NCOP motivating for such action /investigation



- 1. The National and provincial government, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs.
- 2. S155(7) National and Provincial Govt have a legislative & executive authority to oversee the effective performance of LG in matters listed in schedule 4 & 5, by regulating the sector (LG)
- 3. effective co-operative government and organised local government.
- NB not to be confused with the consitutional prescripts of the application of section 139 of the Constitution

- (1) When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation.
- (4) When a municipality fails to approve the budget or any revenue raising measures to give effect to the budget;
- (5) if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments.

GENERAL PROVISION OF MONITORING

S105 of MSA

- MEC for LG in a province must establish mechanisms processes & procedures in terms of s155(6) of the Constitution
- (a) monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions;
- (b) monitor the development of LG capacity in the province; and
- (c) assess the support needed by municipalities to strengthen their capacity to manage their own affairs, exercise their powers and perform their functions

S105 of MSA

- (3) When exercising their powers in terms of subsection (1) MEC's LG:
 - (a) rely as far as possible on annual reports in terms of section 46 & information submitted by municipalities in terms of subsection (2); and
 - (b) may make reasonable requests to municipalities for additional information after taking into account-
 - (i) the administrative burden on municipalities to furnish the information
 - (ii) the cost involved; and
 - (iii) existing performance monitoring mechanisms, systems and processes in the municipality

S106 Non-Performance and maladministration; if an MEC has reason to believe that a municipality cannot or does not fulfil statutory obligations binding on it or maladministration, fraud, corruption or any other serious malpractice has occurred

The MEC must

- (a) by a written notice to the municipality request the municipal council or MM to provide the MEC with information required in the notice; or
- (b) if the MEC considers necessary, designate a person or persons to investigate the matter

(2) In the absence of applicable provincial legislation, the provisions of section 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100 of the Commissions Act; and regulations made in terms of that act apply, with the necessary changes as the context may require, to an investigation conducted in terms of subsection (1)(b)

(3) (a) An MEC issuing a notice in terms of subsection (1)(a) or designating a person to conduct an investigation in terms of subsection (1)(b), must within 14 days submit a written statement to the NCOP motivating action

(b) a copy of statement contemplated in paragraph (a) must simultaneously be forwarded to the Minister (CoGTA) and to the Minister of Finance

(4)(a) The Minister of CoGTA may request the MEC to investigate maladministration, fraud, corruption or any other serious malpractice which, in the opinion of the Minister, has occurred, or is occurring in the municipality

(b) The MEC must table a report detailing the outcome of the investigation in the relevant provincial legislature within 90 days from the date which the Minister requested the investigation and must simultaneously send a copy of such report to the Minister (CoGTA), the Minister of Finance and the NCOP

(5) (a) Where an MEC fails to conduct an investigation within 90 days, notwithstanding a request from the Minister in terms of subsection (4)(a)

The Minister (CoGTA) may in terms of this section conduct such investigation

(b) The Minister must send a report detailing the outcome of the investigation referred to in paragraph (a) to the President.

GENERAL PROVISIONS OF SUPPORT

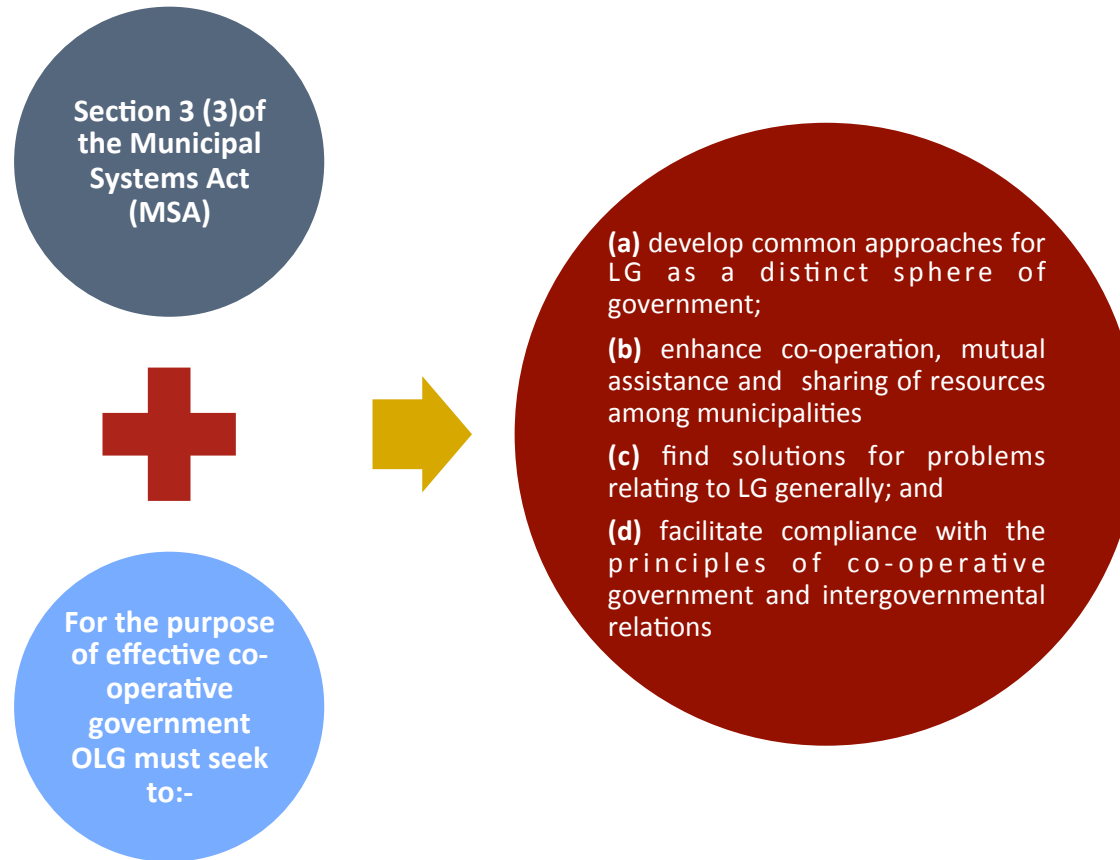
Section 154 of the Constitution

- (1) Calls for the National and Provincial Government, by legislative and other measures, to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions;
- (2) Draft national or provincial legislation that effects the status institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government (SALGA), municipalities and other interested persons an opportunity to make representations with regard to the draft legislation

Section 155(7)

- The national government, as per it responsibility and the provincial governments have the legislative authority to see to the effective performance by municipalities of their functions in respect of matters listed in schedules 4 & 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)

GENERAL PROVISION OF SUPPORT REQUIRED BY SALGA



THE PROCESS APPLICATION OF SECTION 139

CONSTITUTIONAL PROVISIONS:

Section 139 (1) provides for general interventions in instances where a municipality fails to fulfill an executive obligation

FINANCIAL INTERVENTIONS

Section 139 (4) provides for instances where a municipality fails to approve a budget or any revenue raising mechanisms as required by legislation; and

•SECTION 139 MFMA PRESCRIPTS

FINANCIAL INTERVENTIONS

Section 139 (5) provides for interventions instances where a municipality due to its financial affairs is unable to deliver services or meet its obligations

•SECTION 139 MFMA PRESCRIPTS

(c) Dissolution of the Municipal Council: The Provincial executive can dissolve the municipal council, "if exceptional circumstances warrants such a step". If the municipal council is dissolved in terms of section 139 (1) (c) the provincial executive must immediately submit a written notice of the dissolution to the Minister of CoGTA, to the relevant legislature and NCOP. The dissolution can only take effect 14 days from the date of the receipt of the notice by the NCOP and the Minister, however, if the NCOP and the Minister set that aside within 14 days than the intervention (dissolution) is invalid. This type of intervention allows for the appointment of an administrator only for a period until the new municipal council is declared elected.

APPLICATION FOR SECTION 139 INTERVENTIONS

- (a) **Issue a Directive:** The provincial Executive may issue a directive before it can assume responsibility, describing the extent of failure to fulfil its obligations and stating any steps required to fulfil its obligations; **the option of the directive is not obligatory** and is a **precondition for assumption of responsibility.**
- (b) **Assumption of responsibility:** The Provincial executive can assume the responsibility for the relevant obligation. The aim of assumption of responsibility is to lift the municipality to minimum standards, to prevent it from harming the interests of other municipalities/ the province or to maintain economic unity in the province. Before proceeding to assumption of responsibility the provincial executive (or the MEC) notifies the municipal council in writing of its intention to assume responsibility in terms of section 139 (1)(b) of the Constitution by submitting a written notice of the intervention to the Cabinet member responsible for government affairs (in this instance the Minister of Cooperative Governance and Traditional Affairs) (CoGTA) and; the relevant provincial legislature and the National Council of Provinces (NCOP) within the 14 days after the intervention had begun.

The intervention must end if the Minister of CoGTA disapproves the intervention within 28 days after the intervention began or by the end of that period the Minister has not responded. And also if the NCOP disapproves the intervention within 180 days after the intervention began or by the end of that period the NCOP has not responded.

For the approval of the intervention by the Minister, the Provincial executive need to ensure that a notice in terms of section 139(2) submitted to the minister requesting approval for the intervention contains the relevant information.

The NCOP must regularly review the intervention as it continues and make any appropriate recommendations to the provincial executive.

Note: The Constitution is silent on the appointment of an administrator when the provincial executive assumes the responsibility in terms of section 139(1)(b), however, in practice it's noted that with most of these interventions, the provincial executives opted for the appointment of an administrator.

FINANCIAL RELATED INTERVENTIONS

The application of section 139 (4) and (5) of the Constitution is further dealt with extensively in the Municipal Finance Management Act, 2003 (MFMA)



SALIENT INTERVENTIONS: 216 OF THE CONSTITUTION TREASURY CONTROL: Section (38) of the MFMA

“Stopping of funds to municipalities”

- (1) National Treasury may stop –
- (a) the transfer of funds due to a municipality a share of the local government’s equitable share referred to in section 214 (1)(a) of the Constitution, but only if the municipality committed a serious or persistent breach of the measures established in terms of section 216 (1) of the Constitution; or
 - (b) the transfer of funds due to a municipality a allocation referred to section 214 (1)(c) of the Constitution, but only if the municipality or the municipal entity for which the funds are destined
 - (i) commits a serious persistent breach of the measures established in terms of section 216 (1) of the Constitution;
 - (ii) breaches or fails to comply with any conditions subject to which the allocation is made.