THE POWER TO MONITOR LOCAL GOVERNMENT IS ANCILLARY TO THE DUTY TO SUPPORT LOCAL GOVERNMENT

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1 INTRODUCTION
The structure of government in the Republic of South Africa makes provision for the distribution of government powers between the national, provincial and local spheres of government. The simultaneous exercise of government powers by different spheres of government necessitates mechanisms for monitoring the exercise of government powers in order to provide a coherent and efficient government in the country. The national and provincial governments are therefore required to supervise local government in the exercise of its powers. Furthermore, provincial government, a sphere of government closer to local government, is required to provide for the monitoring and support of local government in a province.¹ The practice of provincial government supervision of local government may indicate that provincial government utilises monitoring as a standalone tool, that is, isolated from the support of local government. The failure to link monitoring and support of local government may have led to provincial government dissolving municipal councils under the guise of monitoring instead of supporting the municipalities.

This paper will investigate a link between the monitoring and support of local government. The investigation is aimed at establishing that the monitoring of local government is not a standalone tool in supervising local government, but is linked to the support of local government. The construction of the relevant provisions of the Constitution will be explained while determining the content and ambit of the power to monitor local government. The significance of the constitutional principle of co-operative government in establishing the relationship between the monitoring and support of local government will also be discussed. Moreover, guidance will be sought from case law on the interpretation of section 155(6) (a)

* This article forms part of my broad doctoral research.
¹ Section 155(6) (a) of the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution).
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of the Constitution which provides for the monitoring and support of local government. Finally, in drawing a conclusion about the linkage between the monitoring and support of local government, the enforceability of the duty of support will be discussed.

2 MONITORING OF LOCAL GOVERNMENT

The meaning of the verb “monitor”, as defined in the *Oxford South African Concise Dictionary*, is “to observe and check over a period of time; maintain regular surveillance over.”\(^2\) In searching for the meaning of the word “monitoring”, the Constitutional Court, in *In re: Certification of the Constitution of the Republic of South Africa*,\(^3\) held that the content and ambit of the power to monitor local government is limited to the power to observe or keep under review local government, but does not include the control of local government affairs.\(^4\) The court further construed the power of monitoring local government as limited to measuring or testing at intervals local government’s compliance with the Constitution and with national and provincial directives.\(^5\) Thus the power to monitor local government differs from the power to intervene in local government which comprises the most powerful form of supervision in local government.\(^6\) Intervention is the most intrusive tool of supervision of local government because when provincial government intervenes in a municipality, it may issue a directive to the municipal council to take steps to fulfil its obligations, assume responsibility of the municipal council or even dissolve the municipal council.\(^7\) The monitoring of local government may therefore be regarded as a watered-down form of the supervision of local government as the monitoring of local government is carried out within the framework of intergovernmental relations.\(^8\)

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\(^4\) See First Certification of the Constitution case para 372.

\(^5\) See First Certification of the Constitution case para 373.

\(^6\) In terms of section 139 of the Constitution, there are three instances in which a provincial government may intervene in a local government, namely, when a municipality either is not able to, or does not, fulfil an executive obligation in terms of either the Constitution or legislation, if a municipality either is not able to, or does not, fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget and if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations either to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments. Also see Steytler and De Visser *Local Government Law of South Africa* (2008) ch 22:118.

\(^7\) Section 139(1) (a)-(c) of the Constitution.

\(^8\) The view that the monitoring of local government is carried out within the framework of intergovernmental relations is reinforced by the short title of the Intergovernmental Relations Framework Act 13 of 2005 which states that the aim of the Act is to establish a framework for the national, provincial and local governments to promote and facilitate the intergovernmental relations; to provide for mechanisms and
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The power of provincial governments to monitor local government emanates directly from the Constitution in terms of which a provincial government is required firstly, to provide for the monitoring of local government by legislative and other measures, and secondly, to oversee the effective performance by municipalities of their powers in respect of the matters listed in Schedules 4 and 5 of the Constitution by regulating the exercise by municipalities of their executive authority, as referred to in section 156(1) of the Constitution. Apart from the Constitution, legislation elaborates further on the monitoring of local government. In this regard, the Local Government: Municipal Systems Act deals in detail with monitoring by providing as follows:

The MEC for local government in a province must establish mechanisms, processes and procedures in terms of section 155(6) of the Constitution to –

(a) monitor municipalities in the province 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.

This section of the Act reiterates the provisions of section 155(6) of the Constitution, although not in the same words. The Constitution stipulates that the provincial government must provide for the monitoring of local government. The Municipal Systems Act elaborates by providing that the MEC for local government in a province must provide for mechanisms, procedures and processes to monitor municipalities in the province, and also requires the monitoring of capacity development by local government.

The Local Government: Municipal Finance Management Act (hereinafter MFMA) is another source of provincial government powers to monitor local government. In terms of the MFMA, the provincial treasury is required to monitor municipalities’ compliance with the procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith. On the other hand, section 29 (1) (b) of the Act excludes interventions in local government from the framework of the Act by providing that the dispute mechanisms of the Intergovernmental Relations Framework Act do not apply to disputes concerning interventions in terms of section 139 of the Constitution.

9 Section 155 (6) (a) of the Constitution.
10 Section 155 (7) of the Constitution authorises both the national and provincial governments to oversee the exercise by municipalities of their powers and functions bestowed on them by the Constitution.
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Act,\textsuperscript{12} the preparation by municipalities of their budgets,\textsuperscript{13} and the submission of reports by municipalities in the province as required by the Act.\textsuperscript{14} The MFMA further provides for the monitoring of local government by the provincial government in terms of which it requires the accounting officer of a municipal council to submit to the provincial treasury particulars of a municipal bank account that has been opened, and to submit, on an annual basis, the name of each bank where the municipality holds a bank account, and the particulars of each account.\textsuperscript{15} The mayor of a municipality is also required to consult the provincial treasury when preparing a budget,\textsuperscript{16} while the municipal manager of a municipality is required to submit the state of the municipal budget to the provincial treasury on a monthly basis.\textsuperscript{17} It would appear from the provisions of the MFMA that the monitoring of local government under the Act is mainly concerned with financial matters. Having explained the provincial government’s power to monitor local government, the duty to support local government will be explained next.

3 SUPPORT OF LOCAL GOVERNMENT

Local government has a constitutional mandate to achieve its objectives, namely:

(a) to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government.\textsuperscript{18}

To ensure the realisation of the objectives of local government a duty is imposed on provincial government to support local government.

The duty to support local government derives, firstly, from the Constitution and, secondly, from national legislation. The Constitution requires provincial governments to provide, by legislative and other measures, for the monitoring and support of local government in a

\textsuperscript{12} Section 5(a) (ii) of the Local Government: Municipal Finance Management Act (hereinafter MFMA) 56 of 2003.
\textsuperscript{13} Section 5(a) (ii) of the MFMA.
\textsuperscript{14} Section 5(4) of the MFMA.
\textsuperscript{15} Section 9(a)-(b) of the MFMA.
\textsuperscript{16} Section 21(2) (d) of the MFMA.
\textsuperscript{17} Section 71(1) of the MFMA.
\textsuperscript{18} Section 152(1) of the Constitution.
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province,\(^{19}\) and to promote the development of local government capacity so as to enable municipalities to carry out their required functions and manage their own affairs.\(^{20}\) In addition, both the national and the provincial governments are required to support and strengthen, by legislative and other measures, the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.\(^{21}\)

The *Oxford South African Concise Dictionary* defines the word “support” as meaning to “give assistance, encouragement or approval to”.\(^{22}\) In explaining the meaning of the word “support” as regards the duty of the other spheres of government towards municipalities, the Constitutional Court held as follows:

> The term “support” derives much of its significance from NT 154(1), which compels national and provincial governments to support and strengthen the capacity building of municipalities to manage their own affairs, to exercise their powers and to perform their functions...

The court explained the meaning of support where a provincial government is required to provide for support of local government in the province. In explaining the meaning of the latter type of support to local government, the court held as follows:

> The meaning of the word “support” in NT 155(2) (b), although it appears without the word “strengthen”, is clearly no less extensive. Its general meaning is consistent with the use of the word “supporting” in its reciprocal sense in NT 41(1)(b)(ii).\(^{23}\)

It emerges from the provisions of the Constitution that there are at least three different kinds of support that provincial governments should provide to municipalities. Firstly, there is the general support which should be provided to municipalities. This type of support is aimed at building the capacity of municipalities to enable them to manage their own affairs. Secondly,

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\(^{19}\) Section 155(7) of the Constitution.
\(^{20}\) Section 154(1) of the Constitution.
\(^{21}\) Section 154(1) of the Constitution.
\(^{22}\) Oxford South African Concise Dictionary 1192.
\(^{23}\) See the *First Certification of the Constitution* case para 371.
\(^{24}\) *Ibid.* It should be pointed out that the court referred to the wrong section when stating that section 155(2) (b) of the Constitution deals with support of local government. In fact, section 155(2) (b) provides that “national legislation must define the different types of municipality that may be established within each category.” The court probably confused section 155(2) (b) with section 155(6) (b) which provides as follows: “Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subs (2) and (3) and, by legislative or other measures, must promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.”
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there is the support to municipalities which is specifically linked to the monitoring of municipalities. This type of support emanates from the constitutional provisions which compel a provincial government to provide for the monitoring and support of local government within the province, and is aimed at rectifying any shortcomings which may have been identified during the monitoring of that municipality, and the third type is the reciprocal duty of support among all the spheres of government. The latter type of support envisaged by the Constitution derives from section 41(1) (h) (ii) which arises from the constitutional principle of co-operative government.

In addition to the provisions of the Constitution, legislation elaborates further on the support of local government. The Municipal Systems Act expands on the duty of provincial government to support municipalities by obligating the MEC for local government in a province to monitor the development of local government capacity in that province; and to assess the support needed by municipalities both to strengthen their capacity and to fulfil their obligations. Whereas the Constitution obliges provincial government to promote the capacity building of local government, the Municipal Systems Act requires the MEC to provide for the mechanisms needed to monitor the development of local government capacity. This Act also elaborates on the duty of support by specifying that the MEC is the relevant functionary who should provide for the mechanisms to support local government.

Another piece of national legislation which unpacks the duty of the other spheres of government to support local government is the MFMA, which makes provision for support to municipalities by both the national and provincial governments, where it requires the other spheres of government to assist municipalities, by agreement, in building their capacity for efficient, effective and transparent financial management.

4 THE PRACTICE OF MONITORING OF LOCAL GOVERNMENT

Apart from the different meanings accorded to the concepts of “monitoring” and “intervention” in local government, the concepts are related to each other. This is especially true in instances when the provincial government may identify deficiencies in the functioning of local government which need remedial action when exercising its monitoring power in

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25 Section155 (6) (a) of the Constitution.
26 Section 105(1) (b)-(c) of the Municipal Systems Act.
27 Section 34(1) of the MFMA.
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terms of which local government is kept under review. Intervention in a municipality is one of the remedial actions that provincial government may take for the purposes of supporting a municipality. In this regard, intervention in local government is a continuous form of supervising local government that is informed by the process of monitoring local government. Accordingly, without conflating the meaning of monitoring of and intervention in local government, cases dealing with both monitoring and intervention in local government are analysed in this paragraph for the purpose of establishing the link between support and monitoring of local government.

The trends regarding the monitoring of local government can be determined by analysing case law. In Premier of the Western Cape v Overberg District Municipality,28 the municipal council failed to convene a council meeting and approve the budget in time because the speaker of the municipality had resigned, while the municipal manager had also failed to convene a council meeting for election of the speaker and adopt the budget. After failing to persuade the municipal manager to convene a council meeting, the majority of the councillors convened a meeting on 9 July 2010 where the speaker was elected and the budget approved. In the meantime, however, the municipal manager reported to the provincial minister of finance that the municipality had failed to approve the budget before the start of the new financial year. Subsequent to the municipal manager’s report, the provincial cabinet took a decision to intervene and dissolve the Overberg Municipal Council. This decision of the provincial cabinet was challenged in court by both the municipality and the councillors, who constituted a coalition government in the municipality, seeking an order setting aside the decision.

Regarding the appropriateness of the step to dissolve the municipal council, the court found that the provincial cabinet erred in assuming that it had no alternative but to dissolve the municipal council because it had failed to approve a budget before the start of the new financial year.29 It was also found that, by deciding to dissolve the municipal council without considering a more appropriate remedy, the cabinet offended section 41(1) (e)-(f) of the Constitution which requires all spheres of government to respect the constitutional status, powers and functions of government in another sphere, and not to assume any power or

28 Premier of the Western Cape v Overberg District Municipality 2011 (4) SA 44 (SCA).
29 Overberg District Municipality case para 36.
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function except those conferred on them in terms of the Constitution. The Overberg District Municipality case demonstrates that the Western Cape provincial government focused only on monitoring the municipality and neglected its duty of support. With regard to the prevailing conditions at the municipality, the provincial government could have assisted the municipality in convening a meeting and adopt a budget instead of dissolving the municipal council.

In Mnquma Local Municipality v Premier of the Eastern Cape, the MEC for Local Government in the Eastern Cape informed the municipality in a letter in December 2008 of his decision to launch an investigation into the affairs of the municipality in terms of section 106(1)(b) of the Municipal Systems Act. Furthermore, the MEC caused a notice to be published in the Provincial Gazette, dissolving the municipal council in January 2009. The municipality reacted to the notice of dissolution by launching a court application for an order interdicting the executive council of the Eastern Cape from interfering in and dissolving the municipal council. The order was granted by consent between the municipality and the provincial executive. However, on the same date as the court order, the provincial executive sent a letter to the mayor advising him that the municipal council was not fulfilling its executive obligations by failing to comply with certain provisions of the MFMA and, for this reason, the municipal council was dissolved with effect from 12 February 2009.

In reaction to the second notice of dissolution, the municipal council once again applied for a court order interdicting the provincial executive from interfering in and dissolving the municipal council. Once again the order was granted unopposed in favour of the municipality. Later in February 2009, the MEC wrote a letter advising the mayor that the provincial executive was considering whether to issue a notice dissolving the municipal council, based on a number of complaints, and solicited a response from the municipality. After the provincial executive had considered the representation made by the municipality, it decided to dissolve the municipal council and appointed an administrator in terms of section 139(1)(c) of the Constitution. In reaction to the decision to dissolve the municipal council, the municipality applied for a court order reviewing and setting aside the attempt of the

30 Overberg District Municipality case para 38.
32 Mnquma Local Municipality case para1.
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provincial executive to dissolve the municipal council. In respect of the third intervention, the court found that there were no jurisdictional facts justifying the provincial executive’s intervention in the municipality as the failure by the mayor either to table a budget process plan or to include an annual performance report in the annual report did not constitute a failure to fulfil an executive obligation.\textsuperscript{33} The court further found that the existence of exceptional circumstances was a prerequisite for the exercise of the power to dissolve a municipal council, which circumstances did not exist in this case.\textsuperscript{34} The judgment in the \textit{Mnquma} case indicates the challenges related to isolating the power to monitor from the duty to support local government. The action of the provincial government in dissolving the municipal council demonstrates that the provincial government’s purpose was to dissolve the municipal council at all costs, despite the provincial government invoking the intervention contrary to the purposes of the intervention clause in the Constitution, and losing three court applications in a row. The provincial government could have supported the municipality by other measures, including providing skills for tabling a budget process plan and compiling the annual report.

The following case, \textit{MEC of KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Amajuba District Municipality},\textsuperscript{35} arose from a decision taken by the provincial executive council to intervene and dissolve the municipal council of the Amajuba District Municipality based on the latter’s refusal to re-instate two councillors who had previously been removed by the municipal council from its executive committee. The decision of the executive council was based on its interpretation of section 43(2) of the Municipal Systems Act which requires that the executive committee of a council should be composed in such a manner that parties are substantially represented in accordance with the proportion that they are represented in the council. However, the decision to intervene and dissolve the municipal council was disapproved by the national Minister of Local Government.\textsuperscript{36} Subsequent to this decision of the Minister, the MEC for local government applied for a court order compelling

\textsuperscript{33} \textit{Mnquma Local Municipality} case para 65.

\textsuperscript{34} \textit{Mnquma Local Municipality} case para 76.

\textsuperscript{35} \textit{MEC of KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Amajuba District Municipality} 2011 (1) SA 401 (SCA).

\textsuperscript{36} When provincial government intervenes in a municipality by dissolving the municipal council, it must immediately submit written notice of the dissolution to the cabinet member responsible for local government in terms of section 139 (3) (a) of the Constitution. In terms of section 139(3) (b) of the Constitution, the cabinet member has the authority to approve or disapprove the intervention. The intervention can only take place if it is approved. Accordingly, the Minister for Local Government applied his powers in terms of section139 (3) (b) of the Constitution to disapprove the dissolution of Amajuba District Municipality.
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the Amajuba District Municipality to re-instate the two councillors to its executive committee. This application was dismissed by the KwaZulu-Natal Division of the High Court, upon which the MEC appealed to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the MEC’s appeal and held that the municipal council was not obliged to accept a decision by political parties on who should be a member of its executive committee.\(^\text{37}\)

In assessing the monitoring of the Amajuba District Municipality, it is necessary to explore certain issues beyond the court’s findings. The MEC’s conduct in launching the court application despite the national executive’s disapproval of the intervention raises questions about the proper motive for the monitoring of the Amajuba District Municipality. The issues are also clouded by the decision of the provincial government to enter into a dispute between political parties relating to their representation in the executive committee of the municipal council. The conclusion can therefore be drawn that the purpose in monitoring the municipality was not to support the municipality but that there was an ulterior motive. The provincial government could have supported the municipality by obtaining a legal opinion on the interpretation of section 43 of the Municipal Systems Act relating to the representation of political parties in the executive committee of a council and could have guided the municipality accordingly.

In *Nama Khoi Municipality v MEC for Local Government, Northern Cape Provincial Government*,\(^\text{38}\) the Northern Cape provincial government failed to support the municipality which had become dysfunctional. The Nama Khoi Municipality was governed by a coalition of the Democratic Alliance (DA) and the Congress of the People (COPE) after the 2011 local government elections. Subsequently, a DA councillor resigned, resulting in a by-election which was won by an African National Congress (ANC) councillor. As a result, the ANC gained the majority of the seats in the municipal council and the municipal council failed to adopt a budget. The ANC councillors absented themselves from council meetings on three consecutive occasions causing the council meetings to be aborted. The mayor wrote to the MEC for local government requesting the MEC to intervene in the stalemate, without any success. The DA-led coalition applied for a court order directing the MEC to apply his mind

\(^{37}\) *Amajuba District Municipality* case para 16.

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on whether the ANC councillors who were accused of abseintism should be removed from council. The court granted an interim order in favour of the applicants. Letters between the speaker and the MEC were exchanged regarding the situation in the council. The MEC directed the speaker to convene a council meeting on 20 June 2013 for the purpose of inaugurating the ANC councillor who had won the by-elections and to adopt the municipal budget. In the meantime, the DA-led coalition launched another court application seeking relief to maintain the status quo of the municipality and councillors until the finalisation of the proposed review proceedings, and to restrain and prohibit the MEC from interfering in the activities of the municipal council. In rejecting the coalition’s application, the court held that the applicant coalition was not bona fide. The court’s decision was based on the fact that the DA-led coalition feared that the ANC majority intended to take over the council, and held that that is how democracy works. The Nama Khoi Municipality case further demonstrates the need to monitor and provide support to local government. The failure of the municipality to adopt a budget could have affected the delivery of service to the community as a budget should have been in place before services could be delivered. The MEC could have assisted the municipality in adopting its budget or could even have appointed an administrator to prevent a decline in the municipality’s service delivery.

It is evident from the above analysis of case law that provincial government exercises its monitoring powers with no purpose of supporting local government. This in turn leads to the arbitrary monitoring of local government.

5 ANALYSIS OF THE LINKAGE BETWEEN THE MONITORING AND SUPPORT OF LOCAL GOVERNMENT

The monitoring of and support to local government should, firstly, be viewed with regard to the principles of co-operative government according to which all spheres of government are

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39 If the status quo of the DA–led coalition in the council was maintained, it would have prevented the inauguration of the ANC councillor, enabling the ANC to gain the majority of the seats and possibly to take over the municipality from the DA-led coalition.

40 Nama Khoi Municipality case para 26.

41 Nama Khoi Municipality case para 26.

42 Section 35(1) of the Local Government: Municipal Structures Act 117 of 1998 empowers the MEC for local government to appoint an administrator when a municipal council is dysfunctional to ensure the continued functioning of the municipality. The MEC could therefore have applied this provision of the Act to prevent a decline in the municipality’s service delivery.
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required to co-operate by assisting and supporting one another and, secondly, in the light of the provincial government’s duty to support local government in order to ensure that it performs its mandate as a fully-fledged partner in governing the country. The provisions of the Constitution that is pivotal in investigating the linkage between the provincial government power to monitor and the duty to support local government state the following:

Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must-

(a) provide for the monitoring and support of local government in the province…

In searching for the meaning of the provisions of the Constitution, the approach to the construction of the provisions of the Constitution has to be applied. The interpretation of the provisions of the Constitution has been the focus of various decisions of the Constitutional Court. In S v Mankwanyane, the court was called upon to consider the constitutionality of section 277(1)(a) of the Criminal Procedure Act of 1977, which prescribed the death sentence a competent sentence in contrast with section 11(2) of the 1993 Constitution, which prohibited cruel, inhuman or degrading treatment or punishment. In its interpretation of the content of section 11(2) of the Constitution, the court held that the provisions of the Constitution must not be construed in isolation, but in its context which includes the provisions of the Constitution itself. In Matatiele Municipality v President of the Republic of South Africa, the Constitutional Court was called upon to consider the constitutionality of the Constitution Twelfth Amendment Act of 2005, which affected the determination of provincial boundaries resulting in the alteration of the boundary between the provinces of KwaZulu-Natal and Eastern Cape Province. Consequently, the Matatiele Municipality was transferred from the province of KwaZulu-Natal to the province of the Eastern Cape. The residents of Matatiele Municipality and other stakeholders challenged the constitutionality of the Act on the basis that they had not been consulted, as required by section 118(1) (a) of the Constitution which provides that a provincial legislature should consult the public when considering a Bill altering its provincial boundaries. The court found that the Bill was

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43 Section 41(1) (h) (ii) of the Constitution.
44 Section 155(6) (a) of the Constitution.
45 S v Mankwanyane 1995 (6) BCLR 665.
47 Mankwanyane case para10.
48 Matatiele Municipality v President of the Republic of South Africa 2007 (1) BCLR (CC).
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adopted in a manner inconsistent with the Constitution because of a lack of public consultation. In interpreting the provisions of section 118(1) (a) of the Constitution, the court alluded to the interpretation of the Constitution, and held that the Constitution embodies the fundamental objectives of our constitutional democracy and the “constitutional provisions must be construed purposively and in the light of the Constitution as a whole.”

Furthermore, the minority the law when in force, shall be dealt with as if this constitution had been passed.

In judgment of Kentridge AJ in S v Mhlungu also sheds light on the interpretation of the provisions of the Constitution. In this judgment, the court considered the proper construction of the provisions of section 214(8) of the 1993 Constitution which reads as follows:

All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or under law, exercising jurisdiction in accordance with finding that the provisions of section 214(8) exclude the application of the provisions of the interim Constitution on all cases that had commenced when the Constitution was passed, Kentridge AJ held that the purposive construction of the Constitution which requires one to search for the specific purpose of the provision within its context of the Constitution was relevant in this case.

When applying the contextual approach of the Constitution, the provisions of the Constitution dealing with the monitoring and support of local government by provincial government should accordingly be interpreted within the context of chapter 3 of the Constitution which create the system of co-operative government in the Republic. This should be the case because the monitoring of local government involves the relationship between the spheres of government which is regulated by the principles of co-operative government.

5.1 The principles of co-operative government

The structure of government in the Republic provides for three spheres of government; the national, provincial and local spheres which constitute government in the Republic. These spheres are distinctive, interdependent and interrelated. Despite the distinctiveness of the

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49 Matatiele Municipality case para 30.
50 Matatiele Municipality case para 36.
51 S v Mhlungu 1995 (7) BCLR 793 (CC).
52 Mhlungu case para 63.
53 Section 40(1) of the Constitution.
spheres, they are required to commit themselves to the course of government in the Republic. In this regard, the spheres of government are directed to:

(a) preserve the peace, national unity and the indivisibility of the Republic;
(b) secure the well-being of the people of the Republic;
(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
(d) be loyal to the Constitution, the Republic and its people.

Woolman et al explain the need for the spheres to commit themselves to the course of the Republic where they argue that given the fact that South Africa is one sovereign state, and the fact that the different spheres of government have distinct responsibilities the phrase “distinctive and interrelated” explains that the spheres must work together to fulfil the constitutional mandate of the South African government. Accordingly, the commitment provisions bind the spheres of government to work for the good of the Republic.

Apart from being distinctive, all the spheres of government are required to embody mutual trust and good faith when co-operating with one another by:

(i) fostering friendly relations;
(ii) assisting and supporting one another;
(iii) informing one another of, and consulting one another on, matters of common interest;
(iv) co-ordinating their actions and legislation with one another;
(v) adhering to agreed procedures; and
(vi) avoiding legal proceedings against one another.

The part of the principles of co-operative government which requires the spheres to co-operate in mutual trust and good faith emphasises that a good relationship must exist between the spheres when dealing with one another. Relationship between the spheres of government is founded on mutual trust and mutual support. Klug echoes this view where he argues that

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54 It is argued in 5.1 that the Constitution demands commitment from the sphere of government to the Republic. They do this by preserving national unity, the indivisibility of the Republic, securing the well-being of the people of the Republic, providing coherent government for the Republic as a whole, and for being loyal to the Constitution, the Republic and its people.
55 Section 41(1) (a)-(d) of the Constitution.
57 Section 41(h) of the Constitution.
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“the principles seek to promote an ethos of co-operation based on mutual trust and good faith.”

The contextual approach to the interpretation of the Constitution entails that the monitoring of local government takes place within the context of co-operative government. The purposive construction of the provisions of the Constitution requires that the monitoring of local government must be undertaken purposively, with the aim of supporting local government to achieve its constitutional objectives.

5.2 Analysis of case law

Furthermore, in searching for the linkage between the monitoring and support of local government, guidance may be sought from the courts’ interpretation of the relevant provisions of the Constitution. In the First Certification of the Constitution case, the court shed light on the linkage between the monitoring and support of local government. In describing the ambit of provincial government’s powers in relation to local government, the court held as follows:

The monitoring power is more properly described as the antecedent, or underlying power from which the provincial power to support, promote and supervise [local government] emerges. Textually, the word “monitor” either appears alongside “support” or is made subject to provisions in which the support, promotional and supervisory roles are adumbrated. In its various textual forms “monitor” corresponds to “observe” “keep under review” and the like. In this sense it does not represent a substantial power itself, certainly not a power to control [local government] affairs, but has reference to other broader powers of supervision and control.

The First Certification of the Constitution case explains that monitoring power is used for the purpose of supporting local government. When monitoring local government, provincial government is able to assess the support local government needs. The court further explained that the monitoring power enables provincial government to intervene and support local government in cases where local government is functioning defectively.

59 First Certification of the Constitution case para 372.
60 First Certification of the Constitution case para 373.
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In *Macpherson v Stoffels*, a struggle for control of the Oudtshoorn Municipality between political parties had rendered the municipality dysfunctional. The case arose from infighting between the ANC councillors and the DA-led coalition in the municipality. After the 2011 local government elections, the Oudtshoorn Municipality was governed by an ANC-led coalition. Subsequently, five ANC councillors resigned, thereby forcing a by-election. The by-election was held and the ward was won by a DA councillor which resulted in the DA-led coalition obtaining the majority of seats in the council. The DA–led coalition gave notice of motion to pass a vote of no confidence in the speaker, mayor and deputy mayor of the council. After numerous attempts failed to convene a council meeting and discuss the vote of no confidence, a court settlement was reached for the meeting to be convened. The council meeting was convened, but the council resolved by majority vote that the vote of no confidence would not be discussed. Subsequent to the council’s failure to discuss the vote of no confidence, the MEC for local government applied for a court order directing a council meeting to be called at a date, time and place determined by him, an independent person to be appointed to chair the meeting and that the meeting should deal exclusively with the motion of no confidence. In finding that the MEC had no *locus standi* to compel the speaker to convene the meeting of a municipal council, the court interpreted section 155(6) of the Constitution which provides for the monitoring and support of local government and held that section 155(6) does not authorise the *ad hoc* monitoring of local government, but contemplates that measures must be in place “to provide for the monitoring and support of local government and to promote development of local government capacity, to enable municipalities to perform their functions and manage their own affairs.”

The court supported its construction of section 155(6) on the preamble of the Municipal Systems Act which states that it is passed, *inter alia*, “to establish a framework for support, monitoring and standard setting by the other spheres of government in order to progressively build local government in to an efficient, frontline development agency…”

This judgment further explains that the power to monitor local government is not an isolated power but exists within the broad scheme of the supervision of local government. The monitoring of local government should not be carried out on *ad hoc* basis but should be a standing programme of provincial government supervision of local government. Accordingly,

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61 *Macpherson v Stoffels* 2014 (1) All SA (WCC).
62 *Macpherson* case para 53.
63 *Macpherson* case para 54.
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the provincial government’s duty of support towards local government under section 155(6) (a) is linked to the supervisory powers of provincial government. The nature of the duty of support to local government imposed on provincial government by section 155(6) (a) is similar to the duty of support to provincial government imposed on national government by section 125(3): “The national government, by legislative and other measures, must assist provinces to develop the administrative capacity required for the effective exercise of their powers and performance of their functions referred to in subsection (2).”

If, despite the support rendered to it, provincial government continues to fail to perform its functions effectively, the national government may intervene in that provincial government to prevent the decline of good governance in the country.

5.3 Legal analysis of the legislation

The linkage between the monitoring and support of local government is further evident from the provisions of the legislation which elaborate on the provisions of the Constitution. The MFMA explains the link between the power to monitor and the duty to support local government in providing as follows in section 34(3):

When performing its monitoring function in terms of section 155(6) of the Constitution, a provincial government –

(a) must share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;

(b) must, upon detecting any emerging or impending financial problems in a municipality, alert the municipality to these problems; and

(c) may assist the municipality to avert or resolve financial problems.

This provision embodies the purpose of the monitoring of local government in that it obliges a provincial government to share the results of its monitoring if this has an impact on the financial management of the municipality, and to alert the municipality as to any impending problems identified during the monitoring process. The provision adheres to the reciprocal duty on organs of state to co-operate with each other by assisting and supporting one another. By sharing the results of monitoring with a municipality, the other spheres of

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64 Section 125(3) of the Constitution.
65 See section 100 of the Constitution on the intervention of the national executive in provincial government.
66 Section 34(3) of the MFMA.
67 Section 41(1) (h) (ii) of the Constitution.
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government display the mutual trust and good faith which is pivotal to co-operation between the spheres of government. The municipality therefore becomes a partner in its monitoring in that, once the results of the monitoring have been communicated, the municipality is in a position to participate in resolving the problem. The requirement to alert the municipality as to any emerging or impending financial problem, once detected, complies with the constitutional requirement for all organs of state to consult and inform one another as regards matters of common interest.68

The Municipal Systems Act further echoes the view that the monitoring of local government is linked to the duty to support local government. This is evident from the provision of the Act which requires that the mechanisms provided for the monitoring and support of local government must be used to assess the support needed by municipalities to strengthen their capacity to manage their own affairs and exercise their powers.69 This section accordingly confirms the purpose of the monitoring of local government to support municipalities.

5.4 Enforceability of the duty of support

The question arises whether the duty of the provincial government to support municipalities is enforceable or not. The enforceability of the duty on a provincial government to support local government is a relevant issue because if the duty to support local government is not enforceable, then such duty cannot be linked to the power to monitor local government.70 This question arose in MEC for Local Government Mpumalanga v IMATU.71 The matter before the Supreme Court of Appeal concerned the Transitional Local Council (TLC) of Leandra, a town in Mpumalanga, whose current expenditure had exceeded its income. The TLC had deducted statutory funds involving the unemployment insurance fund, a pension fund, and income revenue from its employees, but had failed to pay over the amounts deducted to the relevant funds. It had kept the monies because it was experiencing financial problems. TLC employees launched proceedings in the High Court seeking, inter alia, an order against the Mpumalanga provincial government for the payment of the deductions to

68 Section 41(1) (h) (iii) of the Constitution.
69 Section 105(1) (c) of the Municipal Structures Act.
70 This view is based on the fact that the power to monitor local government is an obligation as indicated by the word “must” in section 155 (6) (a) of the Constitution, and the fact that provincial government has no discretion to monitor local government, but is obligated to do so. It follows that if the duty to support local government belongs to the same supervisory scheme as monitoring, the duty of support should also be an obligation that is enforceable.
71 MEC for Local Government Mpumalanga v IMATU 2002 (1) SA 76.
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the relevant funds, or in the alternative by the Mpumalanga provincial government jointly with the TLC. The court a quo found that under section 154 of the Constitution, the provincial government was compelled to support the municipality, which decision was challenged in the Supreme Court of Appeal. The issue on the appeal was whether a provincial government has a constitutional duty towards a local authority and its employees to provide the funds that would enable the local authority to meet its financial obligations towards its employees. The Supreme Court of Appeal overturned the decision of the court a quo. In finding that courts may not order provinces to support and strengthen the capacity of municipalities to manage their own affairs by legislative and other measures, the court stated that “to the extent that the duty resting on higher levels of government is to introduce legislation to support and strengthen the capacity of municipalities, courts are not empowered to order any legislature to pass legislation.”

In its judgment, the Supreme Court of Appeal explained that municipal employees are creditors of a municipal council as regards payment of their full salaries, and that creditors of municipalities do not have a right to be paid by other spheres of government. Furthermore, in dismissing the claim of the TLC employees, the court held that even if it were assumed that the provincial government could be forced to support municipalities, it was doubtful that the creditors had locus standi under section 38 of the Constitution which relates to infringements, real or threatened, of entrenched rights. The court also held that section 154(1) of the Constitution regulates the relationship between spheres of government and has no vertical application.

In this decision, the court erred in its approach. The supremacy clause of the Constitution shed light on the enforceability of obligations of the Constitution by it stating that the Constitution is the supreme law of the Republic and the obligations imposed by it must be fulfilled. The duty to support local government is an obligation imposed on provincial government by the Constitution. The Constitution uses peremptory language with regard to the obligations of the Constitution by stating they “must” be fulfilled. This view is reinforced by Cloete in his discussion of the constitutional provisions obligating the national government to support provincial government, concluding that the current lack of service

72 MEC for Local Government Mpumalanga case 79.
73 MEC for Local Government Mpumalanga case 80.
74 Section 2 of the Constitution.
75 The use of the peremptory word “must” in section 155 (6) (a) of the Constitution demonstrate that the provincial government is obligated to provide for the monitoring and support of local government.
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delivery at all government levels can be attributed to inadequate implementation of the constitutional obligations. The implementation of the constitutional obligations by spheres of governments therefore strengthens good governance in the country. If provincial government does not implement these constitutional provisions, local government will not be able to fulfil its constitutional objectives.

Furthermore, the employees’ claim was rightfully entrenched in the Bill of Rights. This view is based on the nature of the claim for payment of pension funds, medical aid funds and the unemployment insurance fund which constitute social security. The rights to social security are entrenched in the Bill of Rights in terms of which the Constitution provides that “[e]veryone has the right to have access to ... social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.” Social security is defined as

the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings, resulting from sickness, maternity, employment, injury, unemployment invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children.

Olivier explains that social security is not a fixed concept, but comprises of social contingencies or core elements relating to health, unemployment, old age and employment injuries. Accordingly, if an employee is unable to obtain medical treatment because his or her medical aid contribution has not been paid to the relevant fund, the issue becomes a social security problem. Also, if an employee, after losing his or her job, does not receive payment

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76 Cloete “Service Delivery: Conceptual and Practical Issues and Challenges” in De Villiers B (eds) Review of Provinces and Local Government in South Africa: Constitutional Foundations and Practice (2008) 98-100 is of the opinion that the most important constitutional provisions relating to provincial and municipal service delivery are the following:

- Section 155(4): National legislation must take into account the need to provide municipal services in an equitable and sustainable manner.
- Section 155(6): Each provincial government must provide for the monitoring and support of local government in the province, and promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
- Section 227(1) and (2): Local government and each province are entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform functions allocated to it.

77 Section 27(1) (c) of the Constitution.

78 Midgley and Tracy Challenges to Social Security: An International Exploration (1961) 3 explain the definition of social security as clearly stated by the International Labour Organization (ILO) in Commission 102 of 1952 of the ILO Convention.

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from the unemployment insurance fund, or does not receive a pension because the municipality concerned failed to pay the statutory deductions over to the relevant funds, these issues become a social security problem. This view is supported by Jordaan, Kalula and Strydom who argue that social security does not concern only the curative, but also the preventative, and therefore the focus should be on the cause of social security rather than on the effect. Employees can accordingly, by contributing to the relevant funds, access their rights to social security, and it is their contributions to the relevant funds which realise their rights to social security. The court thus failed to appreciate the fact that any omission to pay employee contributions over to the relevant funds amounts to an infringement of the rights of the employees concerned to have access to social security.

In view of the broader principles at stake, and the clear wording of the relevant provisions, the provincial government was compelled to assist the municipality in order to enable it to manage its own affairs. Therefore, the duty of provincial government to support municipalities should be enforceable

6 CONCLUSION
The monitoring and support of local government are provincial government’s tools of supervision that are necessary for effective and coherent government in the country. The proper conceptualisation and application of the monitoring and support tools of supervising local government will prevent the collapse of municipalities in the country. However, the misconstruction of the content and ambit of monitoring local government will contribute to the decline of government in the Republic. The case law on the practice of the monitoring of local government revealed that the monitoring tool is utilised in isolation of the support of local government. The failure to link monitoring to the support of local government has led to the arbitrary monitoring of municipalities without a clear purpose of supporting these municipalities. This in turn has offended the constitutional principle of co-operative government which instructs spheres of government to support one another and contravenes the provisions of the Constitution which obligates provincial government to monitor municipalities with the purpose of supporting them. The conclusion reached on the interpretation of the constitutional provisions on the monitoring and support of local government in this article should guide provincial government in monitoring local

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government that the power to monitor local government should not be aimed at finding fault and dissolving municipalities, but at identifying gaps in the functioning of municipalities in order to intervene and support municipalities to be sustainable. The findings on the enforceability of the duty of support should assist the courts when called upon to compel provincial government to support local government in instances where it will be feasible for provincial government to provide the necessary support to local government.