

The role of the principle of legality in preserving municipal constitutional integrity

1 Introduction

The exercise of supervisory powers by provincial government over local government has seen municipalities resorting to court action to prevent provincial government from violating their municipal constitutional status. The status of municipalities is determined by the Constitution of the Republic of South Africa, 1996, in terms of which government comprises three spheres, namely the national, provincial and local spheres.¹ The local sphere of government comprises the various municipalities.² It is against this background that the main focus of this note is the discussion of the role of the principle of legality – as applied by courts – in protecting municipal integrity. The Constitution confirms the status and value of local government in the new constitutional order. It reinforces this sphere of government by making provision for the establishment of local government throughout the entire territory of the Republic.³ The status of local government is further enhanced by the conferral of certain constitutional powers and functions on local government,⁴ and by reference to it as a ‘sphere of government’. Provincial government’s supervisory powers over local government and the grounds for judicial review of provincial government’s actions in this regard are discussed in order to set the scene for the discussion of the role of the principle of legality in protecting municipal integrity.⁵ Finally, relevant case law is discussed

¹I wish to thank my colleague Prof Stephan Terblanche and my promoter Emeritus Prof EFJ Malherbe for their insightful comments on the draft of this note.

²Section 40(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter ‘the Constitution’).

³Section 151(1) of the Constitution provides that the local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.

⁴Section 151(1) of the Constitution provides that municipalities which constitute the local sphere of government must be established for the whole territory of the Republic.

⁵See s 156(1) of the Constitution.

⁶There are other constitutional grounds for reviewing government action such as the right to equality. For example, the Constitutional Court in *City of Pretoria v Walker* 1998 3 BCLR 257 (CC), reviewed the conduct of the City of Pretoria Council based on the constitutional ground of the right

and a conclusion is drawn about the role of the principle of legality in protecting municipal constitutional status.

2 Constitutional status of local government

The reference to local government as ‘a sphere of government’ indicates that, unlike in the past, where local government was established and abolished by provincial governments,⁶ currently local government enjoys constitutional status that cannot be undermined by other spheres of government. This status of relative autonomy in the order of things has some implications. Bekink argues that the deliberate reference to ‘sphere’, as opposed to ‘level or tier of government’ places local government on the same footing as the other two spheres of government as regards its status.⁷ In reinforcing the status of local government, the Constitution provides that these spheres of government, which constitute government in the Republic, are distinctive, interdependent and interrelated.⁸ The meanings of ‘distinctive’, ‘interdependent’ and ‘interrelated’ in terms of the status of local government are explained by Steytler and De Visser, who elucidate as follows:⁹

... the characteristics of “distinctiveness” reflects the autonomy that each sphere has in respect of its powers and functions. “Interrelatedness” in turn describes the hierarchy that underpins the relationship between the three spheres, which is manifested, in the context of local government, in the national and provincial governments’ supervisory powers of regulation, monitoring and intervention. The third characteristic of “interdependence” refers to the fact that given the dispersal

to equality.

⁶Section 85(iv) of the Union of South Africa Act of 1909 placed local government under the jurisdiction of the provincial councils; s 84(1)(f)(i) of the Republic of South Africa Constitution Act of 1961 placed local government under the jurisdiction of provincial government, and Schedule 1(6) of the Republic of South Africa Constitution Act of 1983 classified local government as the own affairs of a particular population group. It should be recognised that this Act made provision for matters of own affairs which were matters that affected a population group in relation to its own identity and the upholding and furtherance of its way of life, culture, traditions and customs. S 14(2) provided that the matters which were not own affairs of a population group were general affairs. Thus, while local government was no longer under the jurisdiction of provincial government it was still not a matter of general affairs. Also see Rautenbach and Malherbe *Constitutional Law* (2009) 298, who argue that under the 1996 Constitution local government enjoys constitutional recognition as a fully-fledged sphere of government, and this means that at the very least the other spheres of government may not abolish local government, or otherwise disregard the provisions of the Constitution on local government.

⁷Bekink *Principles of South African local government law* (2006) 64.

⁸Section 40(1) of the Constitution.

⁹Steytler and De Visser *Local government law of South Africa* (2007) 3.

of state power among three spheres of government, the spheres are dependent on one another “to secure the well-being of the people of the Republic”.

The authors explain that local government is an autonomous sphere of government that exercises its powers and functions on its own initiative. They further explain that notwithstanding the autonomy bestowed on local government, the other spheres of government supervise local government.

Explaining the nature of the powers of municipalities to impose rates and levies on property, the Constitutional Court held in *CDA Boerdery (Edms) Bpk Western Areas Property Resident Association v Nelson Mandela Metropolitan Municipality*,¹⁰ that municipalities are no longer merely creatures of statute that exercise only subordinate (delegated) legislative power, but they also exercise original powers sourced directly from the Constitution.¹¹ The autonomy entrusted to municipalities enables them to impose rates and levies on property without approval from the other spheres of government.¹² In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,¹³ the Constitutional Court considered the constitutionality of chapters 5 and 6 of the Development Facilitation Act,¹⁴ which conferred on the development tribunals established under the Act the power to determine applications for establishment of townships and rezoning of land. The City of Johannesburg Metropolitan Municipality challenged the granting of the powers to the development tribunals on the ground that the powers to determine applications for establishment of townships and zoning of land are part of municipal planning powers which are conferred on local government by the Constitution.¹⁵ The Court held that the contested provisions of the Act fell within the functional areas of local government, and were therefore inconsistent with the Constitution and invalid to that extent.¹⁶ The *Gauteng Development Tribunal* case demonstrates that the Constitution not only entrusts autonomy to municipalities, but it also protects the autonomy of municipalities from undue interference by either the national or the provincial spheres of government. Therefore, it becomes necessary to explain the specific circumstances under which the provincial government may use its authority to

¹⁰*CDA Boerdery (Edms) Bpk Western Areas Property and Resident Association v Nelson Mandela Metropolitan Municipality* 2007 4 SA 276 (SCA) (hereinafter the ‘CDA Boerdery case’).

¹¹*Id* para 38.

¹²*Id* para 44 where the Court held that the pre-constitutional requirement that the provincial government approved rates above 2 cents in the rand was impliedly repealed when the constitutional order was established.

¹³*City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 6 SA 182 (CC) (hereinafter the ‘Gauteng Development Tribunal case’).

¹⁴Act 67 of 1995.

¹⁵Part B of Schedule 4 of the Constitution confers municipal planning powers on local government.

¹⁶See *Gauteng Development Tribunal* case (n 13) paras 70-71.

intervene in the status of municipalities with a view to performing a supervisory function.

3 Judicial review of provincial government action

The classification of the nature of provincial government action in supervising a municipality becomes necessary for the purpose of understanding the judicial review of provincial government supervisory powers over municipalities. For this reason, the judicial review of government action is briefly considered. The relationship between public bodies is regulated by the principles of public law and, under the common law, the courts developed a body of principles to restrict the exercise of powers by public bodies; this took the form of judicial review of decisions of public bodies.¹⁷ Prior to the commencement of the interim Constitution of the Republic of South Africa, 1993¹⁸ and, thereafter, the final Constitution of the Republic of South Africa, 1996, administrative law via judicial review was virtually the only source for challenging government action.¹⁹ Government action could be challenged firstly on the grounds expressed in the principle of legality. The principle of legality requires a government action which affects persons to be authorised by law.²⁰ Secondly, it could be impugned on the grounds of procedural unfairness, which requires that persons who are affected by administrative action should be afforded a fair and unbiased hearing before a decision is taken;²¹ and thirdly, on the grounds of reasonableness in the case of what was called “purely judicial” administrative decisions.²² The court could set aside an administrative decision if no reasonable man could have come to that decision. With the dawn of the new constitutional order, common-law grounds of judicial review were constitutionalised. The review of administrative action was further entrenched in the Constitution,²³ and the Constitution also requires that national legislation gives effect to this right.²⁴

Hoexter explains this further when she argues that the new constitutional dispensation introduced constitutional grounds for reviewing government action, such as the right to equality and the right of access to court.²⁵ Thus, in the new constitutional dispensation, the Constitution itself also informs the relationship

¹⁷See *Mnquma Local Municipality v Premier of the Eastern Cape* 2009 ZACBHC 14 (5 August 2009) para 29 (hereinafter the *Mnquma Local Municipality* case).

¹⁸Constitution of the Republic of South Africa 200 of 1993 (the interim Constitution).

¹⁹See Hoexter ‘The principle of legality in South African administrative law’ 2004 *Macquarie LJ* 174.

²⁰See Baxter *Administrative Law* (1984) 299.

²¹See Baxter (n 20) 536.

²²See Baxter (n 20) 479.

²³Section 33(1) and (2) of the Constitution.

²⁴Section 33(3) of the Constitution.

²⁵Hoexter (n 19) 174.

between public bodies in that, as the supreme law in the Republic, it is binding on the conduct of all public bodies.²⁶ In line with the constitutional imperative²⁷ Parliament adopted the Promotion of Administrative Justice Act to give effect to the right to just administrative action that is, lawful, reasonable and procedurally fair.²⁸ However, the application of PAJA is limited to administrative action.²⁹ The exercise of provincial government supervisory powers over local government that constitute administrative action is reviewable under PAJA. However, provincial government action that is not administrative action is not reviewable under this Act. It should be noted that provincial government does not only exercise administrative power, but also legislative and executive powers.³⁰

The concept 'administrative action' is defined in PAJA as meaning:³¹

Any decision taken or failure to take a decision by-
 an organ of state, when-
 exercising a power in terms of the Constitution or a provincial constitution; or
 exercising a public power or performing a public function in terms of any
 legislation; or
 a natural or juristic person, other than an organ of state, when exercising a public
 power or performing a public function in terms of an empowering provision, and
 which adversely affects the rights of any person and which has a direct, external
 legal effect.

PAJA excludes from the definition of 'administrative action' the executive powers or functions of the national executive, provincial executive and a municipal council, and the legislative functions of Parliament, a provincial legislature or a municipal council.³² Furthermore, the exercise of provincial government powers in terms of section 139 of the Constitution is explicitly excluded from the definition of 'administrative action'.³³ It should be noted that section 139 of the Constitution accords the provincial government the power to intervene in a municipality.³⁴

²⁶Section 2 of the Constitution.

²⁷Section 33(3) of the Constitution.

²⁸Act 3 of 2000 (hereinafter PAJA).

²⁹Section (1) (b) of PAJA excludes other government actions from the definition of administrative action.

³⁰Section 104(1) of the Constitution vests the legislative authority of a province in the provincial legislature and section 125 of the Constitution vests the executive authority of a province in the provincial executive of the province.

³¹See s 1 of PAJA.

³²See s 1 (aa) - (dd) of PAJA.

³³See s 1 (bb) of PAJA.

³⁴See s 139 of the Constitution which sets out the ground for provincial government intervention in local government.

Accordingly, provincial government is not exercising administrative powers when intervening in local government and the exercise of such power is not reviewable under PAJA. PAJA is not exhaustive on action that constitutes any administrative action, on the one hand, and actions that do not constitute administrative action, on the other. In those border-line cases the Constitutional Court in *President of the Republic of South Africa v South African Rugby Football Union* formulated a test for determining whether the conduct constitutes 'administrative action', subsequent to which it was held that the fundamental question at stake is not whether the action is performed by a member of the executive, but whether the task itself is administrative.³⁵ Accordingly, the focus is on the nature of the powers, but not on the functionary that exercises such powers when determining whether a government action constitutes 'administrative action'. It was further held that the executive exercises administrative powers when implementing legislation or policy.³⁶ For example when an MEC, in exercising the powers bestowed on him or her by the Municipal Systems Act to monitor municipalities in a province,³⁷ issues a directive, directing the municipalities in the province not to terminate any employment of municipal managers without his or her consent, he or she would be implementing the legislation, and therefore exercising administrative powers. Accordingly the MEC's decision in issuing the directive would be reviewable under PAJA. However, a government action does not escape judicial review simply because it does not qualify as administrative action; the legality of such action can still be tested against the constitutional principle of legality, which is derived from the rule of law.³⁸ Accordingly, the role of the principle of legality in protecting the constitutional status of municipalities needs to be examined.

4 The principle of legality as a means of protecting the status of municipalities

For a better understanding of the role of the principle of legality in protecting the constitutional status of municipalities, the meaning and requirements of this principle will be briefly explained.

³⁵*President of the Republic of South Africa v South African Rugby Football Union* 2000(1) SA 1 (CC) para 141.

³⁶See the *South African Rugby Football Union* (n 35) paras 138-139.

³⁷Section 105(1)(b) of the Local Government: Municipal Systems Act 32 of 2000 requires the MEC for local government in a provincial to monitor municipalities in the province in managing their own affairs, exercising their powers and performing their functions.

³⁸See De Ville *Judicial Review of Administrative Action in South Africa* (2005) 6.

- In defining the principle of legality, Baxter states that the principle of legality implies the following 'more specific principles':³⁹
- the performer of the action in question must be legally empowered to perform the action;
- administrative action may only be taken by the lawfully constituted authority;
- the act must have been performed in accordance with the circumstantial and procedural prerequisites prescribed by the empowering legislation;
- the power to act must not be exercised unreasonably;
- the decision to act must be taken in a fair manner; and
- action taken without lawful authority generally attracts the same liability as would the acts of private persons.

Baxter's broad definition of the principle of legality means that the authority that exercises a power must be authorised to exercise such power; the powers should not be exercised arbitrarily; and the decision taken should not be clouded by ulterior motives. Further to entrench this point of view, Woolman also adds that the principle of legality demands that government officials were powerless to act without any authorisation from an Act of Parliament or rule of common law, and those who acted outside the restrictions laid down by the authorised law-makers were deemed to have acted unlawfully.⁴⁰ The requirements of the principle of legality were inferred from the restrictions placed upon the acts/action of the administrators.⁴¹ In this sense the content of the principle was narrowly defined and, as stated by Hoexter, in the new constitutional order legality 'is considerably more explicit than it was at common law'.⁴²

The role of the principle was considered by the court in various court judgments. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council*,⁴³ the Constitutional Court considered the constitutionality of the powers of the Johannesburg Transitional Metropolitan Council to increase rates and levies on property within its area. This decision of the Council was attacked on the basis that, amongst others, the Council acted *ultra vires* the power conferred upon it by the proclamation which defined the duties and powers of the Council.⁴⁴ In addition, the rates and levies imposed by the Council were not

³⁹See Baxter (n 20) 301.

⁴⁰Woolman *et al Constitutional law of South Africa* (2006) Chap 11:1.

⁴¹Baxter (n 20) 301 explained that the requirements of the principle of legality were expressed in the negative because it was inferred from what the administrators were not allowed to do, rather than what they had to do.

⁴²Hoexter *Administrative law in South Africa* (2007) 116.

⁴³1998 12 BCLR 1458 (CC).

⁴⁴The Premier of the province of Gauteng's Proclamation 35 of 1995 defined the powers and duties of the Johannesburg Transitional Metropolitan Council.

in accordance with the interim 1993 Constitution.⁴⁵ The Court held that in the exercise of its powers local government is restricted by the principle of legality which is a fundamental principle of constitutional law.⁴⁶ The principle constrains the legislature and executive in every sphere of government not to exercise any power and perform no function beyond that conferred upon them by law.⁴⁷ In this case, it is useful to consider the role of the principle of legality in restricting the exercise of government's power, as it is encapsulated by Baxter's typology of the principle that restricts public bodies from exercising any power, unless so empowered to exercise such power. Without exception, the court applies the principle of legality to review legislation and executive acts that do not constitute 'administrative action'.⁴⁸

Whenever warranted, the court duly applies the principle of legality as a safeguard against the possible misconstrual of powers by a public body. In the Constitutional Court judgment of *Masetlha v President of the Republic of South Africa*,⁴⁹ the Court explains further the role of the principle of legality in constraining government action:⁵⁰

Firstly, the President must act within the law and in a manner consistent with the Constitution. He or she therefore must not misconstrue the power conferred. Secondly, the decision must be rationally related to the purpose for which the power was conferred. If not, the exercise of the power would, in effect be arbitrary and at odds with the rule of law.

The *Masetlha* judgment explains that even when a public body purports to act within its powers, it misconstrues its powers whenever it offends the principle of legality. Therefore, the principle of legality restricts public bodies from wantonly exercising their powers unlawfully, even where the powers are exercised in the public interest.

The Supreme Court of Appeal in *The Head of Department: Department of Education, Free State Province v Welkom High School and Harmony High*

⁴⁵Section 178(2) of the interim Constitution of the Republic of South Africa 200 of 1993 gave local government powers to levy and recover such rates, levies, fees, taxis and tariffs as may be necessary to exercise its powers and perform its functions.

⁴⁶See *Fedsure Life Assurance* case (n 43) para 56.

⁴⁷*Id* para 58.

⁴⁸*Id* para 59.

⁴⁹2008 1 SA 566 (CC).

⁵⁰See *Masetlha* (n 49) para 31.

School,⁵¹ considered lawfulness of the action of the Head of Department of Education in the Free State province. The said Head of Department had instructed school principals to ignore the schools pregnancy policies that are in place because he believed that these policies were contrary to the Constitution. He accordingly instructed the school principals to ignore such policies and allow the learners who were suspended from schools in terms of the existing policies to return to school. The Court found that the Head of Department acted unlawfully by instructing the school principals to ignore the policies that were still in force⁵². Addressing the issue of good intentions on the part of the Head of Department to protect the interests of the learners who were suspended from schooling, the Court stated that 'the purest motives of the Head of Department cannot justify what amounts to self-help.'⁵³ In this case the principle of legality was applied to prevent a state of unlawfulness and chaos where the Head of Department took the law into his hands because he believed that he was acting in the public interest.⁵⁴

5 Analysis of case law relating to the role of the principle of legality in preserving the constitutional status of municipalities

Courts have applied the principle of legality to restrict provincial government powers to supervise local government. In the High Court judgment of *Democratic Alliance Western Cape v Minister of Local Government Western Cape*,⁵⁵ the Court applied the principle of legality to protect the integrity of the Langeberg Municipality. In this judgment, an investigation into the affairs of Langeberg Municipality was prompted by complaints from a Democratic Alliance (DA) councillor, who was requested by his political party (the DA) to resign before the commencement of the floor crossing that took place at that time. The DA subjected the councillor to an internal disciplinary inquiry after he refused to resign. The MEC for local government in the Western Cape Provincial Government viewed the DA's action of compelling its councillor to resign before

⁵¹ *The Head of Department: Department of Education, Free State Province v Welkom High School and Harmony High School* 2012 6 SA 525; [2012] 4 All SA 614 (SCA), (hereinafter *the Head of Department of Education, Free State Province case*).

⁵² *Id* para 25.

⁵³ *Id* para 24.

⁵⁴ It should be noted that the issue of the schools policies which allow school principals to suspend from school learners who are pregnant is currently before the Constitutional Court for consideration as to whether such policies are contrary to the Constitution or not.

⁵⁵ 2005 3 SA 576 (C).

commencement of the floor crossing as a serious malpractice committed at Langeberg Municipality, and therefore launched an investigation into the affairs of the municipality. In setting aside the investigation into the affairs of Langeberg Municipality, which had been commissioned by the Western Cape Provincial Government, the Court held that in order for the provisions of section 106(1)(b)⁵⁶ of the Municipal Systems Act to have been properly invoked, the respondent – as the MEC responsible for local government in the province – must have had reason to believe that a serious malpractice had occurred or was occurring in the Langeberg Municipality.⁵⁷ Although the belief should have been formed by the MEC, the Court – in protecting the integrity of the municipality – qualified the belief of the MEC by requiring that the test as to whether there was such a belief be objectively determined and be informed by facts that gave rise to such belief.⁵⁸

In setting aside the decision of the provincial government to launch an investigation into the affairs of Langeberg Municipality, the Court held that ‘the decision must be rationally related to the purpose for which the power was conferred. If not the exercise of the power would in effect be arbitrary and at odds with the rule of law.’⁵⁹

The principle of legality is part of the rule of law,⁶⁰ and in this judgment it required a rational connection between the decision to launch the investigation at Langeberg Municipality and the purpose for which the power of provincial government to commission investigation into the municipality was conferred. In finding that the investigation at Langeberg Municipality was commissioned for an ulterior purpose, contrary to the principle of legality, the Court held that the MEC used the power conferred by section 106(1)(b) of the Municipal Systems Act to launch an investigation into the internal conduct of an opposition political party, the DA. This was deemed an inappropriate intervention into the sphere of local government by the MEC, for which the section was not intended.⁶¹ The principle of legality thus served to preserve the integrity of the Langeberg Municipality. This judgment clearly demonstrates the role of this principle in protecting the constitutional status of municipalities when provincial government exercises its supervisory powers arbitrarily and for ulterior motives.

⁵⁶Section 106(1)(b) of the Municipal Systems Act provides that if an MEC has reason to believe that a municipality in the province cannot or does not fulfil a statutory obligation binding on that municipality or that maladministration, fraud, corruption or any other serious malpractice has occurred or is occurring in a municipality in the province, the MEC must if he or she considers it necessary, designate a person to investigate the matter.

⁵⁷See *Democratic Alliance Western Cape* case (n 55) para 24.

⁵⁸*Id* para 25.

⁵⁹*Ibid.*

⁶⁰Hoexter (n 42) 181 explains that the Court has described the principle of legality as part of the doctrine of the rule of law.

⁶¹See *Democratic Alliance Western Cape* case (n 55) para 40.

Similarly, in the High Court judgment of the *City of Cape Town v Premier of the Western Cape*,⁶² the Court was called upon to consider the validity of a commission of enquiry instituted by the Premier of the Western Cape and the investigation commissioned by the Provincial Minister of Local Government into the affairs of the Cape Town Metropolitan Municipality. The Court explained that, in terms of the principle of legality, when the Premier establishes a commission of inquiry to investigate the affairs of a municipality, the Court in giving proper weight to the constitutional autonomy of local government must determine whether there is a rational connection between the decision and envisaged action to be taken by the Premier in respect of the municipality.⁶³ With reference to the establishment of the commission of inquiry, the principle of legality demands that the matter of the investigation be of such a nature that the report of the commission could rationally result in the more serious form of supervision in local government, namely intervention, in that municipality as per the provisions of section 139 of the Constitution.⁶⁴ In finding that the Premier's decision violated the principle of legality, the Court held as follows: 'I am driven to the conclusion that his purpose was the improper one of embarrassing political opponents and more specifically the DA'.⁶⁵ This judgment demonstrates that the principle of legality was applied as a safeguard to preserve the integrity of the City of Cape Town Metropolitan Municipality against violation of such integrity by the Western Cape Provincial Government, under the guise of supervising local government.

While the cases discussed here have dealt with the judicial review of provincial government powers of monitoring local government, the courts have further applied the principle of legality to limit provincial government powers of intervention in a municipality. In the *Mnquma Local Municipality* case,⁶⁶ the Provincial Executive Council of the Eastern Cape took a decision to intervene by dissolving the Municipal Council of the Mnquma Local Municipality, in terms of section 139(1) of the Constitution of 1996.⁶⁷ The Court held that the authority of the provincial executive to intervene in a Municipal Council in terms of section 139(1) of the Constitution is subject to the existence of the jurisdictional fact that a municipality does not or cannot – fulfil an executive obligation in terms of the

⁶²2008 6 SA 345 (C).

⁶³*Id* para 88.

⁶⁴*Id* para 89.

⁶⁵*Id* para 162.

⁶⁶See (n 17) above.

⁶⁷It should be noted that s 139(1) of the Constitution allows the provincial government to intervene in a municipality if that municipality fails to fulfil an executive obligation in terms of the Constitution or legislation, s 139(4) allows the provincial government to intervene in a municipality if the Municipal Council of that municipality fails to adopt a budget and s 139(5) allows the provincial government to intervene in a municipality if the municipality, as a result of a crisis in its financial affairs, fails to provide basic services.

Constitution or legislation.⁶⁸ A jurisdictional fact in the context of provincial government supervisory power over local government is a fact that points to a violation or omission of a precondition, the existence of which is a necessary prerequisite for the exercise by provincial executive of its power to intervene in a Municipal Council.⁶⁹ Thus, the Court applied the principle of legality to set aside the decision of the Eastern Cape Provincial Government to dissolve the Municipal Council without the existence of jurisdictional facts.⁷⁰

For the afore-going reasons the jurisdictional facts applicable to the exercise of the provincial executive's power were absent and as a consequence it acted *ultra vires* in dissolving the Municipal Council. As the decision to intervene was based on a mistaken belief that the jurisdictional facts did exist, it was also irrational. Accordingly, the decision to dissolve the Council did not satisfy the requirements of the Constitutional principle of legality. In this judgment the Court tested the provincial government's action of intervening in the municipality against the requirements of the principle of legality. In protecting the constitutional status of the municipality, the Court held that, in intervening and dissolving the Municipal Council, the provincial government had acted *ultra vires* and had misconstrued its powers of supervising the municipality. Thus, this judgment also demonstrates the role of the principle of legality in preserving the constitutional status of municipalities.

In the judgment of the *Overberg District Municipality v Premier of the Western Cape*,⁷¹ the Provincial Executive Council of the Western Cape intervened in the Overberg District Municipality by dissolving its Council after it failed to approve its budget before the start of a new financial year. A failure by a municipality to adopt a budget before the start of a new financial year contravenes the provisions of the Municipal Finance Management Act (MFMA), which instructs municipalities to adopt their annual budget before the start of a new financial year.⁷² In dissolving the Municipal Council, the provincial government relied on the provisions of the Constitution, which obligates provincial government to intervene in a Municipal Council when it fails to approve a budget, by taking any appropriate steps, including dissolution of that Municipal Council.⁷³ In setting aside the provincial government decision to intervene by dissolving the Municipal Council, the Court held that by deciding to dissolve the Council, without considering a more appropriate remedy, the provincial government had violated the provisions

⁶⁸See *Mnquma Local Municipality* case (n 17) para 19.

⁶⁹*Id* para 19.

⁷⁰*Id* para 100.

⁷¹2011 4 SA 44 (SCA).

⁷²In terms of s 25(3) of the Local Government: Municipal Finance Management Act 56 of 2003, a Municipal Council is required to approve its budget before the start of a new financial year.

⁷³See s 139(4) of the Constitution.

of the Constitution that require all spheres of government to respect the constitutional status of other spheres.⁷⁴ The Court further held that, by assuming that there were no alternatives other than the dissolution of a Municipal Council that had failed to approve a budget before the start of the new financial year, the provincial government had misconstrued its powers in contravention of the constitutional principle of legality, which requires the holder of executive power not to misconstrue that power.⁷⁵ The *Overberg District Municipality* judgment further demonstrates the role of the principle of legality in preserving the integrity of a municipality where provincial government had decided to dissolve the municipality when jurisdictional facts for dissolution of such municipality did not exist.

Courts have applied the principle of legality, arriving at different but consistent judgments to restrict provincial government's supervisory powers over local government. In the *Democratic Alliance Western Cape* case the Court applied Baxter's fairness and reasonableness typology of the principle of legality to protect the integrity of Langeberg Municipality. This is inferred from the court's application of the requisite precondition that the MEC's belief should be informed by facts that gave rise to such belief. In the *City of Cape Town* case an addition of the reasonableness element of the principle of legality was assigned priority. Such application of the reasonableness test restricts the abuse of public power for ulterior motive. Hence it is that the Court additionally applied the rationality test of the principle of legality. The test demands that the decision must be rationally related to the purpose for which the power was conferred. In a similar context of application, in the *Mnquma Local Municipality* case the Court also applied Baxter's typology that the public body must be legally empowered to perform the act. The court found that the provincial government acted *ultra vires* in dissolving the Municipal Council when the jurisdictional facts applicable to the exercise of the provincial executive's power were absent. Consistent with the foregoing finding, in the *Overberg District Municipality* case the Court applied the misconstruing of public power aspect of the principle of legality. The said aspect requires the holder of executive power not to misconstrue that power to restrain the provincial government from dissolving the Municipal Council.

Therefore, the conclusion can be drawn from the above cases that the principle of legality is the most common and arguably the most appropriate ground for judicial review of provincial government supervisory powers over local government.

⁷⁴See *Overberg District Municipality* case (n 71) para 38.

⁷⁵*Ibid.*

6 Conclusion

The integrity of municipalities is firmly established by the status conferred on them by the Constitution. The status afforded local government is strengthened by the provision of the Constitution, to the extent that it prohibits the compromise of the autonomy of municipalities.⁷⁶ It is evident from the case law that provincial governments sometimes misconstrue their powers of supervising local government and thus violate the principle of legality. Despite the fact that there are other grounds on which the actions of public bodies are reviewable, the principle of legality has become the most appropriate and relevant ground of reviewing provincial government action in supervising municipalities. Consequently, the conclusion can be drawn that the principle of legality has become a safeguard for protecting municipal integrity when provincial government violates the autonomy of municipalities under the guise of supervising local government.

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⁷⁶See s 151(4) of the Constitution.