

# Constitutional Court affirms the status of local government

The Constitutional Court has affirmed that the new constitutional order confers on local government the status of an autonomous and distinct component of government. Local government is no longer merely exercising powers delegated to it by the national or provincial governments; instead municipal councils are legislative assemblies and their legislative acts, which include levying taxes and adopting budgets, are not subject to administrative review by the courts. Although decided under the interim Constitution, the decision in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) reinforces the new and increased status the 1996 Constitution accords local government.

## The facts

The four transitional metropolitan substructures in the Johannesburg metropolitan area resolved to levy a general property rate of 6,45 cent in the rand throughout the whole area. This would generate a surplus in income for the affluent Eastern (EMS) and Northern Metropolitan Substructures (NMS) while a deficit would occur in the disadvantaged Southern (SMS) and Western Metropolitan Substructures (WMS). The EMS and NMS would pay their surplus income to the Johannesburg Transitional Metropolitan Council (JTMC) in terms of a levy imposed by the JTMC on them, whereupon the JTMC would pay a subsidy to the SMS and WMS to cover their deficits.

Fedsure and other EMS rate payers objected to the rate of 6,45 cents in the rand the EMS levied, the levy imposed by the JTMC on the EMS and the payment of the subsidy to the SMS and WMS. They contended that all powers of a municipal substructure, including the making of by-laws and the imposition of rates and levies, were delegated powers received from the provincial or national government, rendering the exercise of those powers administrative actions.

Consequently, such actions could be reviewed in terms of administrative law, including the right to fair administrative action enshrined in section 24 of the interim Constitution. The crux of the argument was thus that the interim Constitution did not change the status of the local government as it was before April 1994. The focus of this note is restricted to the Court's view of the constitutional status of local government.

## Bylaws not administrative acts

The Constitutional Court held that under the interim Constitution, and the 1996 Constitution, a local government is no longer a public body exercising delegated powers. A municipal council is "a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself." The council is a deliberative body whose members are elected, and whose legislative decisions are influenced by political considerations for which the council is politically accountable to the electorate. While legislative decisions should be lawful, they are, unlike executive acts of

a municipality, not subject to the principles of administrative law, including the requirements of section 24 of the interim Constitution.

## Taxing and spending are legislative acts

The question is, then, whether the resolutions of a municipal council of imposing taxes or approving appropriations out of its funds, are legislative or executive acts. The Court held that, in terms of the Constitution, when a legislature, whether national, provincial or local, exercises the power to raise taxes or rates, or determines appropriations to be made out of public funds, it is exercising a power peculiar to elected legislative bodies. The power to tax and spend is exercised by democratically elected representatives after due deliberation. In this case, the Court concluded, the EMS exercised its taxing power by setting the rate. The resolution of the JTMC to raise the levy from two substructures, and to pay a subsidy to the other two, formed an integral part of the adoption of a budget and as such constituted the exercise of its spending power.

Resolutions to adopt a municipal budget are legislative acts, and are not subject to review in terms of the principles of administrative law.

## Constitutional control of municipal legislatures

The fact that by-laws, including the imposition of rates and levies, are proper legislative actions, and thus not subject to administrative review, does not make them immune from judicial review. The Court held that the principle of legality - that all legislative and executive actions should be taken within the four corners of the law, including the Constitution - is fundamental to the new constitutional dispensation. The principle of legality forms part of the rule of law which is now one of the founding values of the 1996 Constitution. Legislative and executive bodies created by the Constitution may thus not exercise

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powers or perform functions that are not given to them by law.

## **Outcome**

On the question whether the EMS in fixing the rates payable, acted lawfully, the Court was unanimous that it acted within its powers. However, on the question whether the JTMC in levying a contribution from the EMS and NMS, and paying a subsidy to the WMS and SMS, acted within the enabling legislation, the Court was evenly divided. Five judges held that the JTMC was acting within its powers while the other five disagreed. In the event of this even division, the decision of the High Court which upheld the lawfulness of the JTMC's actions, was thus not disturbed.

## **Significance**

Although the decision was taken under the interim Constitution, the decision establishes authoritatively the position of local government. First, local government is an autonomous sphere of government; its powers are derived from the Constitution and are no longer delegated from the national or provincial government. Second, although municipal councils' legislative acts are not administrative acts and are therefore not reviewable in terms of administrative law, they remain nevertheless subject to the principle of legality and can be reviewed for compliance with the Constitution and other legislation. Third, the exercise of municipal taxing and spending powers constitutes a legislative act.

**Nico Steytler  
and Jaap de Visser  
Local Government Project  
Community Law Centre,  
UWC**