Defining 'municipal health services'

Health services are essential to the well-being and sustainability of every community in South Africa. 'Municipal health services', in keeping with the developmental mandate of local government, are listed as a Schedule 4B function in the Constitution. It follows that local government has full executive and legislative authority over this function.

However, the manner in which functions are listed in the schedules to the Constitution sheds very little light on what these functions entail in practice. For example, what activities are municipalities entitled to undertake in fulfilling this function? What differentiates health services listed in Schedule 4A (as a concurrent national and provincial function) from municipal health services?

Overlapping powers and functions have in the past led to duplication, inefficiencies and, in certain instances, turf battles between provincial departments and municipalities. Given the importance of health care as an essential service and constitutionally entrenched right, confusion or unclear roles and responsibilities in respect of this function can be ill afforded. On 16 April 2008, the Transvaal Provincial Division of the High Court handed down an important judgment dealing with municipal health services. The case of *Independent Municipal and Allied Workers Union and Others versus President of the RSA and Others 3298/2006* highlighted some of the tensions associated with this function and the importance of obtaining legal certainty about the content of municipal health services.

Background

As was the case with virtually all systems inherited from the apartheid government, the health care system in South Africa was fragmented and characterised by inequitable service delivery. There was therefore a dire need to create a system that would enable all citizens to access health care services. The National Health Act (Act 61 of 2003) (the Act), which came into force in 2005, represents the efforts of the national government to "unite the various elements of the national health system in a common goal to actively promote and improve the national health system in South Africa". The restructuring of the health system to reflect the vision of the Act has not been without its challenges, however.

The National Health Act

The Act creates a single national health system with roles for national, provincial and local government. Importantly, Chapter 5 of the Act creates a district health system through which local government renders municipal health care services. The system consists of health districts whose boundaries coincide with district and metropolitan municipal boundaries. However, the MEC for health in the province, in consultation with the MEC for local government, is entitled to divide these districts into subdistricts, depending on the need in a particular area. He / she may furthermore conclude service level agreements with certain local municipalities to render municipal health care services. Each district has a district health council (DHC), which is appointed by the MEC for health in consultation with the MEC for local government. The DHC includes representatives of the district,

metropolitan and local municipalities. The council must "ensure co-ordination of planning, budgeting, provisioning and monitoring of all health services that affect residents of the health district".

This new district health system has direct consequences for personnel who render primary health care services in local municipalities. In the restructured system they have been forced to become employees of the provincial departments of health. To complicate matters, the process of transferring staff to provincial departments has taken place at a varying pace, with provincial departments using many different mechanisms and processes.

It was for this reason that the Independent Municipal and Allied Workers Union, as the main applicant in this case, brought an application on behalf of all of its members "involved in the rendering of primary health care services in South Africa".

Labour matters

It was argued that the "remuneration, benefits and conditions of service, which the primary health care personnel employed in the local government service enjoy, are not reconcilable with those of personnel employed in the Provincial Departments of Health".

Furthermore, the applicants contended that the migration of staff not only had a negative impact on their financial status, but also took a toll on morale. This ultimately affected the quality of services rendered and the well-being of the communities which they served.

Second, the fragmented manner in which the provinces were approaching the transfer of staff was unacceptable. The applicants argued that the migration of staff should be dealt with at a national level as the uncertainty of provincial processes only served to create anxiety and uncertainty about working conditions.

Localised service delivery

The applicants raised the argument that many of the municipal employees subject to transfer were inextricably rooted in the communities which they had served for years. Removing them from these communities and making their employment subject to the whims of provincial departments would arguably have the effect of removing their accountability to specific communities and municipalities.

They furthermore argued that "primary health care should be provided by local municipalities" in view of the fact that the services rendered by municipalities were of an acceptable quality and standard which met the unique demands of the communities served. Furthermore, there was no indication that the quality of services rendered by municipalities did not comply with national standards.

Constitutional challenges

The applicants also challenged certain provisions of the Act on the grounds that they were inconsistent with provisions of the Constitution relating to the status and powers of local government. Essentially, they argued that:

- the Act violated the Constitution by stripping municipalities of their functions in health care matters; and
- the Act overstepped its bounds by prescribing *how* local governments should fulfil these functions.

The applicants raised a number of arguments to support their assertions.

'Municipal health services' versus 'primary health care services'

The Act includes the following in its definition of 'municipal health services' (section 1):

(a) water quality monitoring;
(b) food control;
(c) waste management;
(d) health surveillance of premises;
(e) surveillance and prevention of communicable diseases, excluding immunisations;
(f) vector control;
(g) environmental pollution control;
(h) disposal of the dead; and
(i) chemical safety.

It was argued that this definition was unconstitutional because it did not include 'primary health care services', which had been an integral component of municipal health care prior to the Act.

'Replacing' local government

In support of their contention that the district health system in particular was unconstitutional, the applicants argued that instead of defining the functions and responsibilities of municipal health care, the Act simply replaced the existing system with a system based solely on district and metropolitan municipalities, to the complete exclusion of local municipalities. This, they argued, also

conflicted with section 84(1) and (2) of the Municipal Structures Act, which distinguishes between the services to be rendered by district and local municipalities.

Furthermore, the applicants argued that DHCs were not democratically elected. They were therefore not directly accountable to the members of the community they served, yet they performed functions constitutionally reserved for local authorities. The Act also required all local municipalities to contribute to the operation of the DHCs from their budgets.

The Court

The Court acknowledged, as a point of departure, the autonomy of local government and the fact that municipal health services were an original power derived from the Constitution itself. This power, however, was not an unfettered power. With reference to sections 155(6) and (7) of the Constitution, the Court held that both national and provincial government were fully entitled to monitor and supervise the delivery of municipal health services. These supervisory powers were, however, subject to the condition that they not be exercised in a manner that impeded the ability of a municipality to render its services.

In examining the preamble and objectives of the Act, the Court acknowledged that the Act was an "ambitious and forward-looking piece of legislation" which "contemplates that various and fragmented elements of the health system in the republic be united into a single health system …[which] requires cooperative governance".

Section 3(2) of the Act provides that the "national department [of health], every provincial department and every municipality must establish such health services as are required in terms of this Act". The Court held that it was therefore clear that municipalities were in no way relieved of this statutory obligation. In fact, other duties in the Act, such as information dissemination and the handling of complaints, were specifically directed to and located at the municipal level. Furthermore, the powers of DHCs did not usurp those of municipalities. The Court therefore concluded that the arguments regarding the unconstitutionality of the Act could not succeed.

The Court examined the definition of 'municipal health services' in the Act to determine whether it had the effect of limiting municipal health services to what the applicants considered to be the 'narrow' function of environmental health services. In its examination, the Court placed particular emphasis on the expansive use of the word 'includes' and found that the list of functions in the definition was by no means a closed one, but rather included primary health care services.

The Court also looked at the transitional arrangements contemplated by the Act. Section 34 provides that:

> Until a service agreement contemplated in section 32(3) is concluded, municipalities must continue to provide, within the resources available to them, the health services that they were providing in the year before this Act took effect.

On the basis of section 34 and the definition in the Act of 'municipal health services', the Court made the following declaratory order:

> It is declared that municipal health services within the meaning of section 1 of the National Health Act 61 of 2003 includes health services ordinarily provided by municipalities at the time the Act came into operation.

Comment

While this judgment confirms that the definition of 'municipal health services' in the Act includes 'primary health care', it appears to give with one hand and take with the other. Although the content of 'municipal health services' is now certain, the Court – strangely – continues to approve the removal of authority and resources related to primary health care from municipalities to provinces. The position of the Court is thus that:

- municipalities have authority over primary health care; and
- national and provincial health governments have the power to remove that authority from municipalities.

The judgment therefore sheds little light on the prominent questions pertaining to the division of functions and powers raised in this case.

In respect of the content of municipal health services, there were fears that limiting it to 'environmental health aspects' would 'water down' the importance of the function. There are, however, increasing indications that these environmental aspects are fast becoming vital to the delivery of health services. The submission by the Financial and Fiscal Commission on the 2008 / 09 Division of Revenue Act emphasises that it is the quality of health care that must improve and not necessarily the quantity. The World Health Report for 2008 indicates that constructive spending on the delivery of health care is often directly dependent on vital infrastructure such as water, sanitation and electricity. The environmental aspects of health care therefore incorporate the primary services of municipalities, a dimension that municipalities should not underestimate as integral to the delivery of quality, sustainable health care.

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