

HOLDING ON TO THE

Powers of MECs in respect of certain

Prior to the previous amalgamation process, some municipal councils engaged in measures designed to bind the succeeding councils into an array of long term agreements. Such measures included the entering into of long term employment contracts, granting of additional remuneration and allowances, leasing of council land and property for extended periods at minimal rates, and other similar schemes that had an adverse effect on the finances of municipalities. In the current transitional period, it will be of utmost importance to create conditions and to take appropriate measures to facilitate and ensure the smooth transition from the current system of local government to the next. It will therefore be important to take appropriate measures to prevent the recurrence of the events referred to above.

Powers of MEC in respect of financial matters

The question is whether a province has the power to intervene in a municipality when there is evidence that that municipality is engaging in asset stripping by some of the means mentioned above. It is suggested that an MEC responsible for local government in a province has the power to intervene effectively on the basis of section 10G of the Local Government Transition Act 209 of 1993 (LGTA) read with section 14(5) of the Municipal Structures Act 117 of 1998 (MSA). The powers of a member of a provincial executive council responsible for local government (MEC) in respect of certain financial matters are set out, in the main, in the LGTA. Section 10G of the LGTA regulates the exercise by a municipality of its executive authority in respect of financial matters. It also gives the MEC certain powers to ensure that the finances and financial planning of a municipality remain on a sound footing. The LGTA provides in section 10G(2)(m) that -

“(i) the MEC may, after consultation with the MEC responsible for Finance, whenever he or she is of the opinion that the finances of a municipality are or may become

unsound, instruct the council concerned to take such steps as he or she may specify in writing.”

Where the municipality fails to carry out and implement an instruction by the MEC, he or she may take such steps as may be deemed to be necessary to restore the finances of a council to a sound footing.

Unsound finances

The LGTA provides a very broad and open ended definition of “unsound” finances that “includes”, among others, any failure to collect income, or to control expenditure as well as failing to conduct municipal affairs in an effective, economical and efficient manner. The meaning of “unsound” is clearly not defined in any exhaustive manner in the LGTA. It is submitted that this must necessarily be the case so as to allow for the necessary flexibility to enable the MEC to deal with the broad range of issues that may constitute unsound finances. MECs have recognised that certain practices or acts of a financial nature by existing municipalities will adversely affect the establishment of new municipalities and have requested municipalities to desist from such acts or practices. Such acts or practices include, for the transitional period, the appointment of staff at particular levels, the re-evaluation of posts and the allocation of permanent functions, increases in salaries, wages and allowances, increases in operating budgets in excess of statutory limits, the procurement of new loan finance, the sale and purchase of immovable assets, the conclusion of new contracts and the renewal of contracts for periods longer than a year, the acquisition of major information technology systems including hard- and software and the use of reserves to balance operating budgets. These acts by municipalities would not normally have been done in the immediate past because it could have constituted, in some cases, unsound finances. It is being perpetrated now in this transitional

period with the intention to bind succeeding municipalities.

Measures to facilitate the transition

The MSA provides in section 14(5) for an MEC to take measures to facilitate the disestablishment and the establishment of municipalities. Broad powers are conferred onto the MEC such as the power to establish Facilitation Committees to perform specified tasks with a view to facilitate the disestablishment of the old municipalities and to establish new municipalities.

Enforcing the measures

The measures taken by the MEC may include, as referred to above, a moratorium on certain acts or practices for the duration of the transitional period. Although the current basis of moratoria on certain acts is that of an agreement between the relevant existing municipalities and the MEC through the relevant Facilitation Committee, it is argued here that the enforcement of such measures may occur within the context of a section 14(5) notice establishing the relevant Facilitation Committee. What is required, is that the MEC must specify in the notice that the failure of existing municipalities to observe a moratorium on certain specified acts or practices during the operational period of the relevant Facilitation Committee, will constitute unsound finances and may lead to an intervention by the Provincial Executive into the affairs of the particular existing municipality. Such an intervention may be in terms of section 10G of the LGTA. It must, however, be pointed out that the existence of a Facilitation Committee is not a prerequisite for the exercise of an MECs powers. The measures may be equally effectively exercised by means of a circular in terms of section 14(5) of the MSA that sets out the acts or practices that will constitute unsound finances in the transitional period. A Facilitation Committee may then become a monitoring tool of the MEC to gauge the compliance by municipalities of the circular.

FAMILY SILVER

financial matters

Amending the MSA

The enforcement measure outlined above is based on an interpretation of the LGTA and the MSA. The matter can be put beyond any dispute by an amendment to section 14(5) of the MSA. Such an amendment must clearly state the scope of the powers of the MEC to take measures to facilitate the disestablishment of existing municipalities and the establishment of new municipalities. It should also provide for an enforcement mechanism that allows for a speedy remedy to negate the possible effects of a municipality acting contrary to the law.

Enforcing the moratorium

The Free State

The MEC for Local Government and Housing in the province, Mr Lechesa Tsenoli, issued a circular on 1 February 2000. He requested transitional councils to co-operate in declaring a moratorium in respect of the matters listed in the circular. The declaration of the moratorium was placed within the context of the establishment of municipalities within the newly demarcated areas. An emphasis was placed on ensuring that those municipalities have sufficient capacity to perform their functions.

The matters listed in the circular included the appointment of staff, the alienation of assets and the incurring of non-essential liabilities. On the appointment of staff, the circular noted that prior to the previous amalgamation process, certain councils embarked upon ill-conceived appointments and the entering into of arrangements with employees to improve conditions of service or to secure employment beyond the transition. These practices placed an undue burden on the amalgamated councils. The circular urged municipalities to be careful in filling a vacant post and to consider a contract or temporary appointment when there is a

critical need to fill a post. The circular also requested municipalities not to alienate or dispose of assets that could be transferred to the new municipality, and to desist from attracting non-essential liabilities such as the purchase of expensive capital equipment as that may place an undue burden on the new municipality.

The circular stressed that it should not be construed as interference in a municipality's ability or right to exercise its powers or perform its functions.

The Eastern Cape

The MEC for Housing and Local Government in this province had a more robust approach towards the problem. Circular No. 4 dated 4 April 2000 was issued whereby a moratorium was declared on staff promotions, the filling and creation of posts, and the burdening or disposal of municipal assets. It was indicated further that municipal CEOs, mayors and councillors would be held personally liable if they failed to comply with the moratorium and if it was proved that their actions resulted in a financial burden to the newly demarcated municipality. The circular caused some consternation in local government circles and the MEC was compelled to issue an explanatory memorandum soon afterwards. The explanation took the sting out of the circular by stating that it was the intention all along for it to provide guidelines to municipalities as opposed to being prescriptive. The purpose of the moratorium was to facilitate an orderly and uniform transformation of local government so that the newly established municipalities must not be burdened with the consequences of ill-advised decisions of existing councils. The memorandum, accordingly, urged municipalities to adopt and abide by the processes set out in

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respect of staff matters and the alienation of assets.

The processes in relation to staff matters included a moratorium on the filling of vacancies or the appointment of staff. Where, however, it was essential for a municipality to fill vacancies or appoint staff, such municipality had to consult with other potentially affected municipalities through the medium of the Local Consultative Forums and Facilitation Committees and submit the outcome to the MEC for guidance and thereafter take the MEC's advice into account in taking a decision. It was clearly stated that this procedure would not apply to evaluations pursuant to collective agreements but would apply to all other adjustments to staff establishments, appointments and promotions.

The moratorium on the alienation of assets was intended for municipalities not to divest themselves of assets to the possible detriment of successor municipalities. The disposal of assets in the ordinary course of business would not be affected. Therefore, prior to finalising the disposal of any asset, there should be consultation with other potentially affected municipalities and the MEC's guidance would have to be sought in a similar manner as referred to above.

There is clearly a realisation that there is a need for a mechanism that will ensure municipalities act with due diligence in all financial matters, especially in staff related matters and in the alienation of assets. A reliance merely on good faith may not secure the preservation of the family silver for the next generation.