Guarding against disruption of local government

key points

- When a court interprets a statute, it should try to avoid an interpretation that could disrupt municipal structures and government.
- When a court declares a statute invalid, it must also control the effect of its declaration to prevent local government being disrupted.

Facts

An amendment to the Local Government Transition Act (LGTA) meant that from 1 July 1997, district councils had to be appointed on the basis of proportional representation. The Western Cape MEC for local government did not give effect to the amendment and was ordered to do so by the Cape High Court. In December 1998 the MEC changed the composition of the district councils.

The MEC also proclaimed that all their actions after 1 July 1997 were deemed to be lawful. However, when Wynland District Council sued Paarl Poultry Enterprises in 1998 for the payment of RSC levies, the company argued that this deeming provision conflicted with the LGTA, and was thus invalid. As a result, between 1 July 1997 and December 1998 the municipality could not have validly imposed an RSC levy or instituted legal proceedings to recover it.

The High Court agreed. This meant that all decisions taken by all district councils in the Western Cape over an 18-month period were made null and void, including all levies imposed and collected. The MEC appealed to the Constitutional Court.

Judgment

In *MEC for Local Government and Planning of the Western Cape v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (2) BCLR 133 (CC), the Constitutional Court ruled that the district councils did not become unlawful simply because the MEC did not give effect to the LGTA amendment. They could thus validly impose levies after 1 July 1997.

Comment

The relevant provisions of the LGTA have now fallen away. However, the decision illustrates how the Court approaches challenges that could be extremely disruptive for government. The Court showed an understanding of local government's transition and the MEC's role in it. The Court stressed how important it is for courts to consider the potentially disruptive effects of their decisions.

District municipalities entitled to equitable share

In *Uthukela, Zululand and Amajuba District Municipalities v The President of the Republic of South Africa* (2694/01, 3095/01, 3100/01 NPD unreported) three district municipalities claimed that section 5 of the Division of Revenue Act 1 of 2001 was unconstitutional.

Local government's equitable share of national revenue was allocated only to metropolitan and local municipalities. They argued that this denied district municipalities their part of the equitable share and asked for a substantial amount of money as interim relief.

The High Court said that section 214 of the Constitution, which grants local government an equitable share of national revenue, makes no distinction between categories of municipalities. There is no justification for excluding district municipalities from their part of the equitable share. Excluding them from this source of revenue may affect their ability to perform their functions effectively. It would especially affect residents living in district management areas.

Although section 5 was declared unconstitutional, the Court did not want to give the three district municipalities interim relief in the form of large sums of money. The Court held that it was not its function to determine the size of the equitable share; that is Parliament's task.

The decision awaits confirmation by the Constitutional Court. In the meantime, the right of district municipalities to a part of local government's equitable share has been recognised by this year's Division of Revenue Bill.

key points

The section in the Division of Revenue Act that excluded district municipalities from directly receiving a part of local government's equitable share of national revenue, was declared unconstitutional.

Definition of municipal services: Throwing fire-fighting to the lions?

When a municipality decides to upgrade or provide a new municipal service it must follow the procedures set out in section 77 and 78 of the Systems Act that require consultation with unions, public notice, assessment of impact and benefits, etc (see *LGL Bulletin 2001*(4) 3-6) . The Systems Act does not define 'municipal service'.

On 30 May 2001, the City of Cape Town decided to establish a municipal police service (see

key points

- The Cape High Court decided that a municipal police service is not a municipal service in terms of the Systems Act and therefore the consultation and assessment requirements of chapter 8 do not apply.
- The reason for the decision is that residents do not pay fees for law enforcement.
- This argument means that services funded through property rates can be privatised without the consultation and assessment requirements of the Systems Act.

LGL Bulletin 1999(2) 6-10 for the legal framework) but did not follow section 77 and 78 procedures and did not consult the unions.

SAMWU challenged this decision and argued that the City should have followed the procedures, which would have included consultation with the unions.

In *South African Municipal Workers Union v City of Cape Town* Case No. 7262/2001, the Cape High Court decided that a municipal police service is not a municipal service in terms of chapter 8 of the Systems Act. Chapter 8 speaks about tariff policies, credit control, provision for indigent households, differentiation between users, etc, all of which concern fees and levies. Thus, according to the Court, a municipal service is one for which fees are levied in accordance with a tariff policy. By this logic, as residents do not pay a fee for law enforcement it is not a municipal service.

This judgement says municipal services for which no fees are payable can be provided through partnerships without applying chapter 8 of the Systems Act.

The City of Cape Town did not have to follow the procedures of chapter 8 and SAMWU's application failed.

Comments

This judgement has very serious consequences. Although the Court's conclusion that "municipal police services are not 'municipal services'" appears correct, the Court's argument is very problematic.

There are many critical municipal services for which no individual fees are paid: fire fighting, environmental health care, cleansing, stormwater drainage are some. The Court itself said that:

> municipalities do many things for the benefit of the community at large for which no fees can be or [are] charged, and they fund the cost thereof by levying rates

However, the Court argued that services like these, for which no individual fees are charged, are excluded from the protection of chapter 8, and in particular the instruction of section 78 to go about privatisation and partnerships with utmost care.

This means that any municipal service for which no fees are payable can be provided through partnerships (whether public-public or public-private) without applying the checks and balances of chapter 8 of the Systems Act.

In effect, it means that services like fire-fighting, cleansing and others could be privatised without following the section 77 and section 78 procedures.

Although some aspects of the procedures are difficult to implement (see *LGL Bulletin 2001*(4) 5-6), they are there for good reason. They protect ratepayers and municipal employees against overzealous municipalities entering into ill-considered partnerships without consulting the public and the employees. This protection is important, regardless of whether the service is paid for through individual fees or through property rates.

The High Court missed the rationale of section 77 and section 78 completely. New legislation is necessary to include a proper definition of 'municipal services' in the Systems Act that will bring these services under the protection of chapter 8.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

Water privatisation contract cancelled

key points

- The Court cancelled a 6-year old service delivery agreement because the public was not notified of the municipality's intention to enter into the partnership.
- The contractor could not prevent the municipality from using its own non-compliance to ask for a cancellation of the contract.
- The public interest in the public notice outweighed the harm done to the contractor.

In February 1995 Fort Beaufort TLC issued a tender for managing and operating water and sanitation services. Water Services South Africa (WSSA) won the tender and signed a 10-year contract.

The partnership was entered into under section 173 of the old Municipal Ordinance 20 of 1974 (Cape). This section required the council to publish a notice of its intention to enter into a contract and to obtain approval from the MEC for local government.

In 1999, the municipality started defaulting on its payments to WSSA. In July 2001, WSSA sent a letter saying the municipality was in breach of the agreement. The municipality responded by saying that the contract was invalid because there had not been a public notice and the MEC had not approved the contract.

In *Nkonkobe v Water Services South Africa* Case No. 1277/2001 (unreported), WSSA argued that the tender notice constituted the required public notice of the intention to enter into a contract. It also pointed out that although the MEC might not have approved the contract, he certainly approved the municipality's budget, which made provision for the contract. Also, he had given financial assistance after the municipality started defaulting on the management fees. This meant that, implicitly, the contract had been approved.

The Court dismissed both arguments: the tender notice does not constitute the required public notice and the MEC's approval of the budget and his financial assistance did not qualify as approval in terms of the ordinance.

The Court said that because the law says a contract cannot be entered into before approval has been obtained, that was enough on its own to make this contract invalid.

It emphasised that the procedural requirements are there to ensure that the public has an opportunity to check that a contract is to their benefit, that the contractor is able to perform the functions and that the terms of the contract are not unreasonable. (In this case, apparently, the contract meant the municipality had to pay a crippling management fee of R400 000 monthly).

The importance of this public accountability was emphasised by the fact that the municipality had not been able to pay its dues to WSSA and WSSA had indicated that it would begin reducing water supply over the Christmas season.

It is clearly in the public interest that the municipality's failure to follow procedures is more important than WSSA's claim that the municipality had lost its right to raise that issue.

The municipality's claim succeeded and the Court nullified the contract. The Court said that, however regrettable the conduct of the municipality, WSSA still has a claim based on unjust enrichment for payment of its fair and reasonable charges.

Comments

Currently, partnerships must be entered into in terms of the Municipal Systems Act (see *LGL*

Bulletin 2001(4) 3-6). Approval by the MEC is no longer a requirement. Even though this judgement dealt with a partnership under old law, it confirms the importance of the procedural requirements of sections 77 and 78 of the Systems Act.

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The most important aspect of the case is that a municipality's failure to follow these procedures creates a defect in the contract that cannot be healed.

The Court must be commended for emphasising that public notice requirements are not just red tape that can be avoided by consent. In fact, the procedures are so important that WSSA could not prevent the municipality from using its own non-compliance to nullify the contract.

It must be noted that not only the municipality and the service provider, but also residents, can challenge the validity of service delivery agreements.

It is in the interest of service providers to ensure that the legal requirements are met when they enter into service agreements with municipalities in order to prevent future disappointment.

Jaap de Visser
Local Government Project
Community Law Centre, UWC