

Section 78 of the Systems Act and municipal policing

The view of the Supreme Court of Appeal

The Supreme Court of Appeal (SCA) has delivered a significant judgment in which it was required to interpret the provisions of section 78 of the Local Government: Municipal Systems Act, 2000 (the Systems Act).

The applicant was the South African Municipal Workers Union (SAMWU) and the respondents were the City of Cape Town (the City), the Provincial Government of the Western Cape and the Minister of Provincial and Local Government. The main issue was whether the City acted beyond its powers, and therefore unlawfully, when it resolved to establish a municipal police service as contemplated in the South African Police Service Act, 1995 (the Police Act).

The case was launched in the Cape Provincial Division of the High Court. On 14 December 2001, two judges of the High Court delivered their judgment, in which they dismissed SAMWU's application. SAMWU had contended that, when the City decided to establish a



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municipal police force, it ought to have followed the procedures set out in s 78 of the Systems Act. The High Court found that municipal policing was not a 'municipal service' and therefore s 78 of the Systems Act did not apply.

SAMWU subsequently applied for leave to appeal to the Constitutional Court, but their application was refused. Eventually their appeal was brought before the SCA and was heard in May 2003. On 3 October 2003, all five judges dismissed SAMWU's appeal with costs. However, although dismissing the appeal, they did not accept the line of reasoning of the High Court. In this regard, three aspects of their judgment are significant.

Firstly, they rejected the High Court's definition of 'municipal services'. It had found that municipal services meant "services provided by or on behalf of the municipality for which a fee payable by users is levied in accordance with a tariff policy". The SCA rejected this interpretation as being far too narrow. It acknowledged that there are many municipal services for which no charge is, or can notionally be, levied because those who benefit from the services are not specifically identifiable individuals, but members of the public generally. It should be noted that both courts were dealing with the law as it was prior to the amendment of the Systems Act at the end of 2002. In terms of the Local Government Laws Amendment Act, 2002, a municipal service was defined as "a service that a municipality in terms of its powers and functions provides or may provide...whether fees, charges or tariffs are levied...or not". The SCA's findings on this issue were therefore entirely academic.

Secondly, the SCA made an important finding on when the provisions of s 78 are invoked. It found that a municipality does not need to follow the provisions of s 78 before taking a decision to provide a new municipal service or to significantly upgrade, extend or improve an existing municipal service or to review an existing service delivery mechanism. It only has to follow the provisions of s 78 when it decides *how* these things are to be done, not when it decides *whether* they should be done. In this case, it found that the City was not obliged to follow the provisions



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of s 78 when deciding whether or not to establish a municipal police service.

Thirdly, two of the five judges commented on the establishment of a municipal police service. They ruled that in law there is only one way in which a municipal police service can be established or an existing traffic policing service extended so as to constitute a municipal police service, and that is by following the procedure set out in section 64A of the Police Act. They also ruled that municipalities may not consider providing municipal police services through external service providers. The other three judges did not make any finding on this issue.

The SAMWU case is an important one in that it has clarified at what stage the provisions of s 78 of the Systems Act need to be invoked and how a municipal police service must be established. However, disappointingly, the Court failed to deal with a fundamental issue regarding the interpretation of the entire Chapter 8 of the Systems Act. In both the High Court and in the SCA the City argued that Chapter 8 of the Systems Act does not govern the municipal functions listed in Part B of Schedule 5 to the Constitution, since Schedule 5 deals with functional areas of exclusive provincial legislative competence over which the National Assembly, which passed the Systems Act, has no jurisdiction. Accordingly, so the City argued, it is not necessary to follow the procedure set out in s 78 when decisions are taken regarding the wide range of functions listed in Part B of Schedule 5.

The Cape High Court did not make a ruling on this issue, but found that the argument was "not without merit". The SCA declined to deal with the issue at all. As a result, a crucial issue impacting on the correct interpretation of Chapter 8 of the Systems Act has not yet been resolved. It is hoped that another Court will be called on to resolve this issue in the not-too-distant future.

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