Who appoints the municipal manager?

key points

- Only a municipal council can appoint a municipal manager.
- A municipality is not bound by decisions that a mayor makes without having the relevant delegated authority.

In terms of section 82 of the Municipal Structures Act, only a municipal council can appoint a municipal manager. Furthermore, section 30(5) of the Structures Act states that, before a municipal council can decide on the appointment of a municipal manager or of the head of a municipal department, the executive mayor or the executive committee (Exco) must submit a report and recommendation concerning the appointment and conditions of employment.

Facts

A Mr. Mbana applied to the Mnquma Municipality for the position of municipal manager and was invited for an interview. He then received a letter of appointment to the position of municipal manager, signed by the executive mayor. According to the letter, the executive mayor entered into a 5-year employment contract with him on behalf of the municipality. A month after his appointment as manager, his contract was terminated on the grounds that the executive mayor did not have the authority to enter into the contract on behalf of the municipality.

Issue

The issue before the court in the case of *Mbana v Mnqunma Municipality* 2004(1) BCLR 83 (Tk) was whether the executive mayor bound the municipality to the employment contract with Mbana.

Mbana argued that the municipality was bound by the actions of the executive mayor and that he was entitled to damages for the premature cancellation of his contract. He based his argument on the established 'Turquand rule'. According to this rule, if an official acts outside of his or her authority on behalf of an institution on a particular matter, the act is not regarded as invalid, depending on his or her seniority in the institution. If the rule were applied in this case, the mayor would have bound the municipality to the contract as he occupied a senior position in the municipality.

However, the municipality argued that the Turquand rule was not applicable as the provisions of the Structures Act were not complied with when the mayor entered into the contract. They further argued that the mayor had no delegated authority to appoint the municipal manager.

Ruling

The Court referred to section 160 of the Constitution, which provides that a municipal council "may employ personnel that are necessary for the effective performance of its functions". Section 82 of the Structures Act must be read together with section 160 of the Constitution. The Court held that section 82 gives the municipal council, and no other person, the right to appoint the municipal manager. This interpretation is supported by section 57 of the Municipal Systems

Act, which provides that a person may only be appointed to the position of municipal manager in terms of a written contract with the *municipality*. The determination of the terms and conditions of employment of a municipal manager may, however, be delegated to an executive mayor in terms of section 60 of that Act.

The Court further held that the Turquand rule could never be used to bind a municipality to an act for which there was no authority. The Court said that the checks and balances in the Structures and the Systems Acts would amount to nothing if the municipality could be bound by an act for which the mayor had no authority.

What does this judgment mean for municipalities?

This judgment means that only the municipal council can appoint a municipal manager. Further, where a mayor acts without delegated authority, he or she will not necessarily bind the municipality, especially in cases where legislative requirements must be met.

Geraldine Mettler
Local Government Project
Community Law Centre, UWC

Opportunity missed

An opportunity was missed for a ruling by the Constitutional Court about whether a municipal official can bind a municipality when acting without authority. The Court ruled that it could not hear the case, because the municipality had not complied with a procedural rule requiring a certificate from the High Court before the case could be heard.

key points

- Courts may refuse to consider important questions facing local government if procedural rules are not respected.
- Are municipalities bound by the unauthorised actions of their officials? The question remains unanswered.

Facts

The High Court found that that the Municipality of Plettenberg Bay owed money to Van Dyk & Co. for services rendered under contract. The municipality did not dispute that the work had been done; rather, it argued that its employee had entered into the contract without authority, because Council had not passed a special resolution authorising him to conclude the contract. Consequently, the contract was null and void.

The High Court found in favour of the company. It based its decision on the Turquand rule, which states that a senior official acting outside her authority in a particular case may still bind the institution on the basis of 'ostensible authority'.

The municipality appealed to the Constitutional Court.

Issues and ruling

Unfortunately, the municipality did not comply with the requirements of Rule 18 of the Constitutional Court before taking the matter to the Court in *The Municipality of Plettenberg Bay v Van Dyk & Co. Inc.*, [2003] JOL 12130 (CC). According to this rule, before proceeding to the Constitutional Court a party must first apply to the High Court for a certificate stating that the matter is one of substance, concerning which a ruling from the Constitutional Court would be desirable; that there is sufficient evidence on record for the

Court to make a determination; and that the appeal has a reasonable prospect of success.

The municipality did not apply for such a certificate because, in its view, it would be a waste of time and money to request permission to appeal from the Court that ruled against it in the first place. It asked the Constitutional Court to condone its failure to apply for a certificate and to proceed with hearing the case.

The Constitutional Court refused the Municipality's request. It found that the questions that would have been addressed by the High Court in the context of an application for a certificate were significant.

Further, the High Court would have addressed squarely the relevant issues of constitutional law that were not addressed in the original judgment, including the changed status of local authorities under the new constitutional order. Without a certificate, the Constitutional Court would not have the benefit of the High Court's views on the constitutional questions. Finally, the municipality had no good reason for failing to comply with the rules.

The Constitutional Court found that this failure should not be condoned.

Comments

It is clear from this decision that the courts take procedural rules seriously. The issue at the heart of the *Plettenberg Bay* case – whether a municipal official can bind the municipality if the required authority has not been given – is a timely one for municipalities. A very similar issue was considered in *Mbana v. Mnqunma Municipality* (see p 9). These questions could benefit from a determination by the Constitutional Court. However, in this judgment, the Court has made it clear that procedural rules must be obeyed, notwithstanding the importance of the case.

Elizabeth Drent
Local Government Project
Community Law Centre, UWC

Settling intergovernmental disputes

Putting provincial posters on municipal poles

When there is an intergovernmental dispute between organs of state, including a province and a municipality, the principles of cooperative government require that the parties must seek to avoid litigation in settling the dispute. This principle came clearly to the fore in the recent case of *The Premier of the Western Cape Province v George Municipality* (case no 8030/2003 Cape High Court).

key points

- There is a constitutional duty on all organs of state to avoid litigating against one another.
- Great care should be taken before engaging in litigation because it entails the use of public funds.
- A court will only give an order instructing a public body to do something in exceptional circumstances.

Facts

The Premier of the Western Cape was due to open a new facility at a provincial hospital in George. Posters were printed showing the Premier's face and inviting the public to meet him at the event. Just over two weeks prior to the event the Province requested the George Municipality's permission to hang the posters in the town. As its policy was that political posters might not be displayed outside election periods, it turned down the application. The Premier made an urgent application to the Cape High Court to have the municipality's decision set aside and for an order instructing it to allow the posters to be hung.

Duty to avoid litigation

The Court decided the matter in terms of the principles of cooperative government. This was an intergovernmental dispute between two spheres of government and should therefore be settled in terms of the principles of cooperative government set out in section 41 of the Constitution. These principles require that all organs of state must cooperate with one another and must seek to resolve intergovernmental disputes by means other than litigation and exhausting all remedies before approaching a court to resolve the dispute.

There are good reasons for organs of state to avoid legal proceedings against one another, the Court said. They are public authorities and should act in the public interest. Public funds are used in litigation and before decisions are taken to litigate, great circumspection and care are required, particularly where litigation will entail the use of public funds by another organ of state.

The Court found that the Premier did not seek to avoid litigation. He gave no warning to the municipality that he was considering legal proceedings to review its decision. When the municpality gave reasons, at his request, for refusing his application, he did not point out his difficulties with the reasons but launched the court application. This, the Court found, was not in the spirit of cooperative government. The municipality should have been given warning of the Premier's views on the lawfulness of its decisions so it could reconsider them before getting involved in legal proceedings.

The Court concluded that by litigating on urgent grounds without trying to resolve the matter with the municipality in a manner that sought to avoid litigation and the expenditure of further public funds, the Premier failed in his constitutional duty.

Mandamus

The Court also rejected the relief that the Premier sought, namely a court order instructing the municipality to allow the posters to be hung. The Premier not only asked for the municipality's decision to be reviewed, but also for the Court to make the decision in place of the municipality – to give a *mandamus*. The Court said that the Premier had no right to have the posters displayed. He only had the right to have his application properly considered. A court will only give an order instructing a public body to do something in exceptional circumstances, particularly where it is required to exercise the discretion that is given to a public body. In this case there were no exceptional circumstances.

Comment

The Court's application of the important principle of cooperative government – the duty to avoid litigation – is to be welcomed.

The duty to avoid litigation is demanding, as section 41(3) of the Constitution requires that every organ of state "must make *every* reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust *all* other remedies before it approaches a court to resolve the dispute". The courts may enforce this duty by referring a dispute back to the parties if the requirements of section 41(3) have not been met. The Constitutional Court has taken compliance with this duty seriously in a number of cases. It has said that a court, including itself, would "rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level."

Intergovernmental Relations Bill

Section 41 of the Constitution states that an Act of Parliament must provide for appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes. Dispute resolution mechanisms have been included in the Intergovernmental Relations Bill, prepared by the Department of Provincial and Local Government. This Bill will be debated with all spheres of government during 2004, and municipalities must engage fully in this process.

Nico Steytler
Local Government Project
Community Law Centre, UWC