Notifying the IEC of a floor-crossing

key points

- It is sufficient to notify the IEC of a floor-crossing by means of a fax.

The Constitution of South Africa Amendment Act 18 of 2002 and the Local Government: Municipal Structures Amendment Act 20 of 2002 contain provisions designed to allow defection by an elected representative in the local sphere of government from one political party to another. Item 4(2) of Schedule 6A of the Constitution provides that a councillor may only once:

(i) change membership of a party; or

(ii) become a member of a party;

(iii) cease to be a member of the party by informing an officer designated by the Electoral Commission thereof in writing, and that councillor has changed membership of a party or has become a member of a party, by submitting to that officer written confirmation from the party in question that he or she has been accepted as a member of that party.

The Chief Electoral Officer (CEO) is a designated officer for the purpose of item 4(2)(a). Six councillors of the Mafikeng Municipal Council, who were members of the United Christian Democratic Party (UCDP), crossed the floor and joined the African National Congress (ANC).

Issue

In *United Christian Democratic Party v Independent Electoral Commission* 2004 (9) BCLR 995(B) the High Court had to decide whether the councillors had taken adequate steps to comply with the formalities prescribed in the legislation on crossing the floor. Had the affected councillors in fact informed the CEO of their floor-crossing by the end of the 'window period', the time within which it was permitted to cross the floor from one party to the other?

The six councillors argued that the ANC, on their behalf, faxed the relevant forms to one of the fax numbers provided by the Independent Electoral Commission (IEC). It was argued by the UCDP, on the other hand, that they were obliged to ensure not only that the faxes had been transmitted from Mafikeng, but also that they had in fact been received in Pretoria at the IEC offices.

Decision

In dismissing the appeal, the Court agreed with the trial judge's finding that:

- the affected councillors "had done everything that was required of them" in notifying the IEC of their floor-crossing;
- when taking into account the surrounding circumstances, including the fact that the very same forms had been handed in at the office of the municipal electoral officer on the same day, "the probabilities are beyond any doubt that these applications must have been faxed to the relevant authority"; and
- the only inference to be drawn from all the surrounding circumstances and all the facts of the case was that the regulations had been complied with and that the councillors did inform the relevant body, in writing, of their decision to cross the floor.

Once the IEC had elected to receive notification of floor-crossing by fax, the obligation to ensure that such information was correctly handled administratively rested on the IEC.

The six notifications had indeed reached the IEC on one of the fax numbers that the IEC had furnished. The fate of the faxed notification form, once it reached or had been received at the IEC's designated fax machine, lay in the hands of the employees of the IEC and not with the person(s) giving notification of floor-crossing.

The Court also held that the councillors need only prove on balance of probabilities that they had informed the designated officer of their floor-crossing by fax.

The Court concluded that in crossing the floor and in seeking to retain their status, the affected councillors had simply exercised their constitutional rights.

Comment

The importance of this judgment is that the Court will not readily bar councillors who have crossed the floor, provided they have proven that they have met all the statutory requirements.

Lehlohonolo Kennedy Mahlatsi
Municipal Manager
Metsimaholo Local Municipality, Sasolburg

Removing unauthorised billboards

Municipalities are constitutionally bound by the principles of good governance and sound administration. One of the most powerful – and potentially dangerous – actions any organ of state can exercise is that of dispossessing a person of their property.

It is therefore crucial that municipalities understand the extent of, and limitations to, this power and ensure it is exercised within the principles of good governance. The current case shows that it is not always sufficient for a municipality to rely on the fact that its by-laws authorise removal of property without a court order.

Facts

African Billboard Advertising (the company) erected certain advertising signs on Spoornet property in the Durban area. North and South Central local councils (the Municipality) objected to the signs on the basis that they contravened its by-laws, alternatively, that they had been put up without the necessary permission to do so. The Municipality ordered the company to remove the signs. When the company failed to do so, the Municipality got a contractor to remove them.

key points

- Municipalities are constitutionally bound by the principles of good governance and sound administration.
- They must therefore ensure their power is exercised within these principles.
- Courts will declare actions of municipalities and public bodies unlawful where the legislation does not expressly authorise them.

The company responded with a 'spoliation' application. This is an application seeking the immediate return of goods taken unlawfully by another party. The company argued that it was 'unlawful' for the municipality to remove the signs without a court order authorising it to do so. The company therefore wanted immediate return of its signs. The municipality responded that, in terms of

its by-laws, a court order had *not* been necessary and the removal of the signs was therefore lawful.

Issue

The issue in *African Billboard Advertising (Pty) Ltd v North and South Central Local Councils, Durban* 2004 (3) SA 223 was whether, despite the fact that its by-laws did not contain such an obligation, the municipality was in fact authorised to remove the signs without a court order.

Decision

The Court held that it was necessary to interpret the by-law in such a way that it interfered as little as possible with the principle that no person is allowed to take the law into their own hands.

In this regard, the Court noted that, in the normal course of events, the 'enforcement' of rights is carried out as a result of a court order. Likewise, in most democratic countries the same principle exists, namely that people are prohibited from enforcing their rights themselves.

The Court went on to say that this principle applied equally to the rights of public bodies such as municipalities or provincial governments or any similar bodies, including state departments.

The Court was not persuaded that the drafters of the by-laws had intended that the signs could be removed without a court order. It would have been a simple matter to have inserted a specific provision that no court order was required in the by-law. It is important to note that the rules of interpretation laid down by our courts require that a law authorising the dispossession of a person's property without a court order must do so in clear terms. The by-laws in question did not contain a clear provision authorising removal without a court order. The signs ought thus not to have been removed without a court order.

The Court noted that there may be urgent cases requiring immediate removal, such as a sign that is erected in such a way that it constitutes a danger to the public or causes an obstruction of visibility to traffic moving on a public road. However, the Court was not convinced that this was such a case and held accordingly that the municipality's removal of the signs was unlawful and that it therefore had to re-erect them. The Court requested the municipality to consider amending the by-law in question to provide for an approach to court in all situations, save those where the public interest would require immediate removal.

Comment

It is clear that the courts will not hesitate to declare actions of municipalities and public bodies *ultra vires* and unlawful where express authorisation for those actions is not contained in the applicable legislation. Municipalities and other public bodies should therefore take care to ensure that their actions are expressly authorised in the applicable legislation.

Reuben Baatjies
Local Government Project
Community Law Centre, UWC

Municipalities' right to levy property rates

A recent court case highlights the need for organs of state to consider carefully whether all procedural requirements have been fulfilled when passing legislation, including whether the public has had the opportunity to comment.

Failure to comply can render legislation invalid and unconstitutional.

Facts

The applicants were dissatisfied with what they considered an exorbitant increase in rates levied on their property in the 2002/3 financial year.

The City of Cape Town (the City) passed a resolution on 29 May 2002 to the effect that property rates would be levied in accordance with the 2000 general valuation roll. The applicants' legal challenge stemmed from the argument that the provisional valuation roll was invalid, or inoperative, when the City levied rates based on those valuation rolls.

The City relied on the provisions of the Property Valuation Ordinance, 1993 (Cape) in establishing the provisional valuation roll and levying rates. However, it was discovered that there were possible legal defects in this legislation. The problem was that it appeared the Ordinance had not in fact continued in force on the commencement of the Interim Constitution on 27 April 1994. The Interim Constitution provided for the survival of all legislation then in force. However, although the Ordinance was enacted in 1993, it only came into operation on 1 July 1994. This meant that it was technically not in force immediately before commencement as contemplated by section 229 of the Interim Constitution.

In addition, it was considered that the Ordinance's administration was not validly assigned by the President to the Eastern Cape, Northern Cape and Western Cape Provinces under section 235(6) and (8) of the Constitution. Hence, the City of Cape Town sought postponement of the matters to permit Parliament to rectify these defects.

On October 2002 Parliament passed the Local Government Laws Amendment Act, in which section 21 amended section 93 of the Municipal Structures Act 117 of 1998 by adding subsection (7), (8), (9) and (10). Section 93 dealt with application of the Act and transitional arrangements. These amendments were made in an attempt to rectify the legal problems.

Issue

The issue before the Court in *Robertson v City of Cape Town and another*, and *Truman Baker v City of Cape Town* 2004(9) BCLR 950(CC) was the validity of the provisional valuation roll in question and the validity of property rates based on those valuations levied by the City for the 2002/3 municipal financial year.

key points

- Observance of constitutional requirements is imperative.
- Failure to discharge the constitutional duty to consult before legislating could render a legislation invalid.

Applicants' argument

The applicants argued that the City was not a local authority as defined in section 1 of the Ordinance and therefore was not entitled to rely on its provisions. The Ordinance's administration was not validly assigned to the Western Cape Province as required by the Constitution. Further, there were no legislative provisions in existence that permitted the City to levy and recover property rates based upon valuations contained in a provisional valuation roll.

Lastly, the City was not entitled to levy or recover property rates on the basis of the valuations in the provisional valuation roll prior to the coming into effect of the aforementioned amending legislation. After the amendments were introduced, the applicants argued further, the newly introduced sections 93(7), (8), (9) and (10) were unconstitutional and invalid.

Decision

The Court held that section 229 and item 21 in Schedule 6 of the final Constitution provide for the perpetuation of laws in force and hence they have to be understood to perpetuate *all* laws in existence in the statute book, whether or not they had been put into operation. It followed that the Property Valuation Ordinance was a law in force at the relevant time. It also followed then that the introduction of subsection 93(7) of the Structures Act was not necessary and had no effect beyond confirming the existing position.

However, section 229 precludes a municipality from imposing rates on property unless it has been authorised to do so by national legislation. Furthermore, subsection (5) requires that such national legislation be enacted only after organised local government and the Financial and

Fiscal Commission have been consulted and after any recommendations of the Commission have been considered. This was not complied with. The new section 93(9) requires such consultation as it seeks to remedy the lack of a clear provision entitling municipalities to rely upon a provisional additional valuation roll when imposing rates. Section 93(9) was thus held unconstitutional and invalid.

The Court held that the amendments in section 93(8) and 93(10) were necessary but that the first is unconstitutional and invalid for want of compliance with the provisions of section 154(2) of the Constitution. The same can be said of section 93(9). The interested parties were entitled to an opportunity to comment on the provisions. But the same cannot be said of section 93(10), which is no more than a procedural adjunct to sections 93(7)-(9) and makes no lasting change to powers or functions of the local authority.

Section 21 of the Local Government Laws Amendment Act was thus held unconstitutional and invalid to that extent. The invalidated provision awaits confirmation by the Constitutional Court.

Comments

This decision emphasises the importance of consultation and participation in intergovernmental relations. It is clear that the municipal fiscal powers and functions may be regulated by national legislation, but only after consultation with organised local government and the Financial and Fiscal Commission and after consideration of any recommendations. Failure to observe these requirements may render the Act invalid.

Abdul-hakim Issa
Local Government Project
Community Law Centre, UWC

State-owned property and property rates

In the past state-owned land was usually exempt from local authority rates. This position was fundamentally changed by the enactment of the Rating of State Property Act, which came into force in 1988 and effectively made all state-owned land rateable, subject to certain exceptions.

In the current case, the KwaZulu/Natal MEC for Housing unsuccessfully attempted to rely on one of these exceptions to avoid a particular property being made subject to rates. The case clarifies the status of state-owned property previously held in trust by the South African Development Trust.

Facts

The KwaZulu/Natal Provincial Administrator was the registered owner of immovable property in the Msunduzi municipality's jurisdiction. The MEC for housing in the province was responsible for the administration of the property and for its development for low-income housing. The MEC argued that the property was exempt from municipal rates, relying on a provision in the Rating of State Property Act 79 of 1984.

Previously, various laws exempted the state from rates levied by local authorities but the Rating of State Property Act repealed these laws. Section 3(1) declares all State property susceptible to rating (subject to the discounts provided for under section 4), unless specifically exempted by ministerial notice in the *Government Gazette*. To this general declaration of rateability various exceptions were created under section 3(3). The exception relied upon by the MEC is subsection 3(a). It reads:

> *No rates shall by virtue of subsection (1) or otherwise be levied by a local authority on the value of State property – (a) held by the State in trust for the inhabitants of the area of jurisdiction of a local authority or a local authority to be established.*

A declaratory order to the effect that the property was not subject to rates was successfully sought in the lower court. The municipality appealed against the order.

Issue

The issue before the Court in *Msunduzi Municipality v MEC, KZN Province for Housing & another* [2004] JOL 12551 (SCA) was whether the property could be regarded as property held in trust as required by section 3(3)(a).

MEC's argument

The MEC argued that the property was formerly held in trust by the South African Development Trust (the SADT), which was established under section 4 of the Development Trust and Land Act 18 of 1936 for the benefit of the Black people of South Africa.

Although the SADT has since been abolished under the Abolition of Racially Based Land Measures Act 108 of 1991, ('the Abolition Act') there is nothing in that Act, or in the various legislative enactments following the demise of the SADT, that changed the property's status as trust property. Hence, it was argued, the MEC succeeded the SADT as trustee of the property. It was also suggested that the MEC was giving effect to that trusteeship by developing the property to provide housing for the homeless and poor inhabitants of the area, people who were essentially the same beneficiaries as those envisaged by the 1936 Act.

Municipality's argument

The Municipality conceded that the property was formerly held in trust by the SADT but denied that the notion of trusteeship survived the abolition of the SADT. They therefore argued that the property could not be considered as being held in trust within the meaning of subsection 3(3)(a) of the Rating of State Property Act. The Municipality also disputed that the whole of the property would be used for housing purposes, arguing that some parts would be used for other purposes such as schools, public buildings and commercial and community facilities.

Decision

The Court held that the MEC had not succeeded the SADT as trustee of the property. It held that the trusteeship regime was as racially based as the institution (the SADT) abolished by the Abolition Act and the Legislature's intention must have been to do away with both. The preamble to the Abolition Act declares its central objective to be not only the abolition of racially based institutions, but also of racially based statutory and regulatory systems. Hence, the trusteeship regime could not survive the transformation and the MEC could not rely on section 3(3).

The appeal was upheld, and the property in question is susceptible to rates imposed by the Municipality.

Key points

- State owned property is susceptible to rates imposed by municipality
- Any exemption, rebate, or reduction of property rates must be found in the municipality's rates policy and by-laws.

Comments

The decision of the Court in this matter clarifies the position that even State-owned property is subject to property rates. The Property Rates Act 6 of 2004 now deals with exemption from property rates in a uniform manner. The Act has repealed the Rating of State Property Act, 1984, hence exemptions will now depend on the rates policy of the municipality, which will determine which property will be exempt from rates or subject to reduced rates. Section 8 of the Property Rates Act provides that a municipality may, in terms of the criteria set out in its rates policy, levy different rates for different categories of rateable property. One of the categories is state-owned property. Further, section 15, which deals with exemptions, clearly stipulates that when a municipality grants exemptions, rebates or reductions in respect of owners of property, it may determine such categories in accordance with section 8(2). As far as state property rates are concerned, exemptions will now will be found in the policy and by-laws of the municipality.

Abdul-hakim Issa
Local Government Project
Community Law Centre, UWC