Powers of the Speaker?

Nala Local Municipality and Another v Lejweleputswa District Municipality and Others, Case No. 3228/2003

The Speaker of the Lejweleputswa District Municipality convened a council meeting on 15 July 2003 in which he purported to appoint a commission of enquiry to investigate alleged irregularities at that district municipality. The particular item on the agenda of the meeting read "Appointment of a Commission of Enquiry".

Issue

The issue before the Free State High Court in *Nala Local Municipality and Another v Lejweleputswa District Municipality and Others* (case no 3228/2003) was whether the speaker of a district municipality had the power to appoint a commission of enquiry.

Applicants' argument

Nala Local Municipality and one of the councillors representing Nala in the district council contended that a decision was unilaterally taken by the Speaker to appoint a commission of enquiry and that the district council endorsed or condoned this decision. They argued that the meeting itself was irregularly convened and therefore unlawful and that the resolution condoning the decision was null and void. They therefore sought an order reviewing and setting aside the decision of the Speaker and its alleged condonation by the Lejweleputswa District Council.

Administrative action not authorised by an empowering provision is unlawful and may be reviewed and set aside.

Speaker's argument

The Speaker contended that he had authority in terms of clause 13 of Schedule 1 to the Municipal Systems Act 32 of 2000 (the Systems Act) to investigate breaches of the Code of Conduct for Councillors by a councillor. He argued that he had used the wrong term in describing the intended investigation: it was not to be a commission of enquiry but rather an ordinary investigating committee and that the subject of investigation was to be the conduct of a councillor. He further contended that the meeting did not condone his decision, nor was a resolution passed for this purpose and that he had included the item on the agenda purely to be noted.

Decision

In line with the principle of legality embodied in the Constitution and built into the Promotion of Administrative Justice Act No 3 of 2000, administrative action not authorised by an empowering provision is unlawful and invalid and a person prejudiced by it may have it reviewed and set aside. The Court held that the decision in question was administrative action as defined and therefore subject to review.

The Court noted that the issue turned on what, precisely, the Speaker intended to investigate. The Free State Commissions Ordinance 5 of 1954 vests the powers to appoint such a commission only in the premier and the MEC for Local Government and Housing. The

key points

- **This case highlights the fact that the Courts will not be hesitant to declare acts *ultra vires* and unlawful where they have not expressly been authorised in legislation.**
- **Municipal functionaries should take care to ensure that their actions are expressly authorised by empowering legislation or other applicable laws.**

Speaker relied on clause 13 of Schedule 1 to the Systems Act, empowering a Speaker to investigate breaches of the Code of Conduct for Councillors. He further relied on section 37(e) of the Structures Act which provides that the Speaker must "ensure compliance in the council and council committees with the Code of Conduct [for councillors]". This section clearly refers to conduct of councillors only during meetings of the council and its committees and not to their conduct outside of those structures.

In the relevant report annexed to the agenda of the meeting, full details of what was to be investigated were given. The complaints were clearly directed at the activities of consultants who were engaged in connection with a sanitation project. The Court held that this had absolutely nothing to do with the conduct of councillors, nor was any mention made of the conduct of a councillor in the appointment of the investigating committee. The Court thus found that Speaker clearly acted *ultra vires* the powers conferred on him by clause 13 of Schedule 1 to the Systems Act.

The Court concluded that the Speaker's decision was prejudicial not only for the applicants but for the communities served by the two municipalities as well. First, the remuneration of the members of the investigating committee would have to be paid by Lejweleputswa District Municipality and no-one else. Second, the expenditure would unjustifiably diminish the coffers of the District Municipality and indirectly that of Nala Municipality, which is a contributor to the District Municipality's budget. The funds to be expended could fruitfully have been used for service delivery to the communities involved.

Comment

This case again illustrates that the courts will not be hesitant to declare acts *ultra vires* and unlawful where they have not expressly been authorised in legislation. Municipal functionaries should thus take care to ensure that when they act, their actions are expressly authorised by empowering legislation or other applicable laws.

The decision did not touch on the issue of intergovernmental relations with respect to dispute resolution.

While the decision is supported as correct, it did not touch on the issue of intergovernmental relations with regard to dispute resolution. In terms of the constitutionally enshrined principle of cooperative governance, all spheres of government and organs of state within each sphere must co-operate with each other in mutual trust and good faith, by avoiding legal proceedings against one another. This is a case that most certainly could have been resolved politically rather than through adversarial litigation.

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