Time limit on suing the municipality

Moise v Transitional Local Council of Greater Germiston

Mr Moise's daughter was injured when she tried to board a municipal bus. Although Mr Moise wanted to sue the municipality for damages, he only felt able to do so after first obtaining the bus's registration number, by which stage more than 90 days had lapsed since the incident.

However, in terms of section 2(1)(a) of the Limitation of Legal Proceedings (Provincial Local Authorities) Act 94 of 1970, no legal proceedings arising from a delict may be instituted against a local authority unless a written notice is served *within 90 days of an incident*. The Witwaters-rand High Court had to decide on the constitutionality of this provision. In *Moise v Transitional Local Council of Greater Germiston* (2001) JOL 8446 (W) it decided that the time period was too short and the provision was unconstitutional. Its reasoning was as follows:

First, the time limit is there to prevent unreasonable delays in litigation and to avoid prolonging uncertainty for the parties. The Court concluded that a local authority would not suffer any real prejudice if a longer period was allowed.

Second, a large portion of the population is unaware of the 90-day period and the Court found it hard to conceive that an uneducated rural person with a claim in delict against a municipality could be expected to know about the time limit. In this case, the father, through his diligence, prejudiced his daughter and her claim became time-barred as a result.

The Act allows for late notice when the municipality agrees to it or when the Court so authorises, but this does not make it constitutional.

The case has been referred to the Constitutional Court for confirmation.

Municipalities can therefore no longer raise the plea that a creditor's claim is time-barred because of non-compliance with section 2(1)(a) of the above Act.

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Storm in a teacup?

Van Wyk v Uys

The deputy mayor of Theewaterskloof municipality was alleged to have claimed for travel expenses that were not incurred. Opposition councillors raised the issue in council on 11 May 2001 and informed the MEC for local government. On 5 June, the MEC wrote to the mayor that he was appointing an investigator under item 14(4) of the Code of Conduct (item 14(4) provides that the MEC can appoint a person or committee to investigate an alleged breach of the Code of Conduct) (hereafter "the Code).

The municipal manager of Theewaterskloof municipality responded that the matter was already receiving attention from council in terms of section 14(1) of the Code (section 14(1) says that a council may investigate and make a finding on an alleged breach of the Code, and establish a special committee in this regard. This can be followed by a warning, a reprimand or a fine. Council cannot suspend or remove the councillor from office but can request the MEC take such action). The municipal manager indicated to the MEC that a special council meeting had been scheduled. At this meeting, on 13 June, council appointed a subcommittee, headed by the Speaker, to investigate the matter and make recommendations to council.

The MEC's view was that council's steps were too tardy and that the subcommittee consisted of members who were biased. He also took offence at the fact that the committee was appointed despite his already having instituted an investigation. The MEC therefore went ahead with the investigation. The investigator duly reported to the MEC, who decided on 28 June to suspend the deputy-mayor, using his power in terms of item 14(6)(a) of the Code. On 1 August the suspension was confirmed and extended.

In sum, the sequence of events shows that the MEC was first to institute an investigation in terms of the Code and subsequently ignored the fact that council had also instituted an internal investigation. The deputy mayor took the matter to court. Her main argument was that the MEC had no power to initiate the enquiry and suspend her before the council had completed its own enquiry.

CO-OPERATIVE GOVERNMENT

The deputy mayor argued that item 14 must be interpreted in the context of co-operative government. The various spheres of government need to co-ordinate and consult about their actions to enforce the Code. Judge Davis, in handing down the judgement in *VanWyk v Uys NO* (2001) JOL 8976 (C), Case No. 64846/01, agreed with the deputy mayor and also emphasised the principle of co-operative government. The Court understood item 14 to mean that, only *after* the council requests an MEC to dismiss or suspend a councillor, can the MEC use his or her powers of investigation to assess that request. The MEC does not

have the power to investigate and/or suspend on his or her own initiative.

The MEC's argument against this was that the province would be powerless if a council refuses to act against an alleged contravention. This is not an unlikely scenario if the councillor concerned occupies a high position in council and uses his or her influence to keep council from acting in terms of the Code. However, the Court agreed with the deputy mayor that section 106 of the Systems Act provides the MEC with the powers necessary to deal with such an event: it says that the MEC must request information or designate a person to investigate if he or she suspects maladministration, fraud, corruption or other serious malpractice.

In this case, the Court said, the MEC should have awaited the outcome of the council's investigation. If the outcome had been that council requested a suspension or removal (item 14(2)(c) or (e)), the MEC could have investigated the issue and decided on the matter. If the outcome of the council's investigation was unsatisfactory to him or if he had problems with the composition of the subcommittee, he could have instituted action under section 106 of the Systems Act.

ASSESSMENT

Apart from Judge Davis' remark that the country is entitled to better legislative drafting than that displayed in item 14, a number of interesting points were raised. The judgement celebrates two fundamental principles in local government law: local government's institutional integrity, and co-operative government. It puts beyond doubt that provincial government cannot ignore internal disciplinary proceedings within council to enforce the Code and persist with a provincial enquiry. On the other hand, if a municipal council's proceedings are inadequate or if they produce untenable results, the MEC can use the legal instruments (namely section 106 of the Systems Act, item 14(4) and item 14(6) of the Code) at his or her disposal to enforce the Code. The Court determined that the investigating power of the MEC under item 14(4) of the Code only exists *in conjunction with* the council's powers under item 14(6): in other words, the MEC can use these powers to *assess a request* for removal or suspension but *not on his or her own initiative*.

The rationale behind this scheme of powers is that a councillor's accountability exists primarily to the municipality (including its council and community) and not towards the MEC. Municipalities must be allowed to use internal procedures to deal with alleged contraventions of the Code before provincial government steps in. If local government is forever treated like an infant sphere of government and not given the latitude to govern, make mistakes and learn from its mistakes it will not rise to the occasion that the Constitution envisages.

Forcing the municipality to disconnect?

Kempton Park/Tembisa Metropolitan Substructure v Kelder

Electricity provision in Tembisa is haunted by non-payment and illegal connections. The Kempton Park/Tembisa Metropolitan Substructure adopted a business plan to normalise electricity provision in Tembisa. The municipality then adopted a resolution reconfirming its commitment to credit control measures referred to in the business plan. In *Kempton Park/Tembisa Metropolitan Substructure v Kelder* (2000) JOL 6344 (A), Mr Kelder wanted to force the municipality to cut off the supply of electricity to persons who failed to pay. He argued that the municipality had by resolution adopted a credit control procedure that compelled it to disconnect in cases of non-payment. He also asked the Court to instruct the municipality to initiate legal proceedings against defaulters, to prosecute those with unlawful connections and to remove such connections. Mr Kelder essentially wanted the municipality to put its resolutions into effect.

Mr Kelder was successful in the Witwatersrand High Court. The High Court derived a duty for the municipality to act against defaulters from the private law of trusts. On appeal the Supreme Court of Appeal (hereafter "the Court") disagreed with the High Court. The Court held that the municipality owes its existence and powers and duties to the Constitution, other statutes and public and administrative law. The imposition of additional duties on the basis of the principles of private law negates its function as an organ of state and a branch of government.

The Court held that the policy to cut off the supply of electricity to defaulters was part of the "normal credit control measures" of Kempton Park/Tembisa. The question was whether these measures could be enforced immediately against all defaulters. The Court did not wish to interpret the resolutions in that way. First, in its resolution the municipality simply *recommitted* itself to its business plan, which provided for a *phasing in* of credit control policies. Second, an instruction to implement the resolution would effectively deprive the municipality of its discretion as an organ of state in dealing with illegal connections and non-payment. The importance of this discretion was highlighted by the fact that the municipality would require 10 000 employees working day and night to remove all illegal disconnections (at their own peril). Further, an instruction to disconnect and prosecute blindly would ignore the legacy of the past.

The municipality's appeal succeeded.

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