

Bulletin 2001(4) 3-6). Approval by the MEC is no longer a requirement. Even though this judgment dealt with a partnership under old law, it confirms the importance of the procedural requirements of sections 77 and 78 of the Systems Act.

The most important aspect of the case is that a municipality's failure to follow these procedures creates a defect in the contract that cannot be healed.

The Court must be commended for emphasising that public notice requirements are not just red tape that can be avoided by consent. In fact, the

procedures are so important that WSSA could not prevent the municipality from using its own non-compliance to nullify the contract.

It must be noted that not only the municipality and the service provider, but also residents, can challenge the validity of service delivery agreements.

It is in the interest of service providers to ensure that the legal requirements are met when they enter into service agreements with municipalities in order to prevent future disappointment.

Jaap de Visser
Local Government Project
Community Law Centre, UWC

Province not liable for municipal debts

In *MEC for Local Government, Mpumalanga v IMATU* 2002 (1) SA 76 (SCA) the Supreme Court of Appeal held that the province does not have to pay the debts of a local transitional council in its area.

Facts

Leandra Transitional Local Council was in deep financial trouble. Its debts were more than R16 million and its monthly income was less than its expenses. As a result, the municipality did not pay the South African Revenue Services (SARS) the income tax it deducted from municipal workers' salaries. Nor were pension fund contributions paid to the pension funds, or medical aid contributions paid to the medical aid societies, or bond payments to the banks. SARS used its statutory power to take over the municipality's bank account until all taxes were paid, but for the pension, medical

aid and bond contributions the workers had to sue the municipality.

IMATU, acting on behalf of its members, wanted the court to order the municipality to pay the other amounts due. The High Court did give this order but, because of the municipality's desperate financial situation, it was unlikely that it would comply with the order. IMATU therefore sought an order against the Mpumalanga Provincial Government to pay the money. This was on the basis of section 139 of the Constitution (the province's power to intervene in a municipality) as well as section 154 (the province's duty to support municipalities). The High Court gave the order but Mpumalanga appealed to the Supreme Court of Appeal.

Judgment

The Supreme Court found that section 139 was not applicable. (For a discussion on s 139, see

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LGL Bulletin 1999(2) 11) First, the province has a discretionary power to intervene. This means a court cannot force it to do so. Second, the duty to pay over deducted amounts is not an 'executive obligation' in terms of legislation. This is also the case for bond payments; that duty arises from contract.

Second, section 154 also did not help IMATU. Section 154 imposes a duty on national and provincial government to support and strengthen the capacity of municipalities. The Court held that, even if a court can order a province to support and strengthen a municipality, it can not do so at the request of a municipality's creditor. This is because, first, the duty to support can only be invoked by the municipality, not by a citizen or a creditor.

Second, and most importantly, the province cannot simply be called on to pay creditors. The appropriate approach is to call on the province to defend its administrative actions (or lack thereof) in dealing with the municipality's financial crisis and then judge their reasonableness.

Comment

The outcome of the Court's decision is no doubt correct. A provincial government does not guarantee to pay any or all debts that municipalities in its area incur. Section 30 of the Municipal Finance Management Bill of 2002 prohibits national or provincial government from guaranteeing municipal debts.

Having said this, it does not imply that there is no enforceable duty to support municipalities. Provinces can be called on to show what steps they have taken to help a particular municipality. The test would be similar to the test that courts apply in judging whether a government has fulfilled its socio-economic rights. (See *Grootboom* case LGL Bulletin 2001(1) 14.) The test is not whether a province provided the *best assistance possible*, but whether its assistance was *reasonable*.

A province is not responsible for the debts of a municipality. While the constitutional duty of a province to strengthen and assist a municipality can be enforced by a court, it does not include paying a municipality's bad debts.

Some of the Court's statements should also be noted. First, the Court said though national and provincial government have a duty in terms of section 154 to support and strengthen the capacity of municipalities by passing legislation, no court has the power to order a legislature to do so. This is because passing legislation is in the sole domain of the legislatures.

Second, the Court said that section 154 has no horizontal operation – in other words, it does not apply between government and a citizen. A citizen cannot bring an action based on section 154. Also, the broad standing provisions of section 38 of the Constitution are not applicable as they relate to the Bill of Rights. Is this necessarily correct? The Constitutional Court has said in a number of judgments that the Constitution has ushered in a new

legal regime based on the rule of law. The Court is not only concerned about vindicating the rights of individual claimants, but also about ensuring that the Constitution as a whole is enforced. Citizens have a direct interest in the proper functioning of the institutions of democracy, which includes proper relationships between spheres of government.

**Section 154(1):
The national and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.**