

No safeguards for municipal property

The recent judgment in the appeal case of *Maties vs Plaaslike Munisipaliteit van Ngwathe & Vrystaat Munisipale Pesioenfonds 254/2002 AD* has attracted much attention and comment from local government practitioners. At issue is whether a municipality falls within the definition of 'state' as referred to in the State Liability Act 20 of 1957, in terms of which no warrant of execution can be issued against any state-owned property.

Facts

In July 2001 the Pension Fund obtained judgment against the municipality for the arrear payment of pension fund contributions in the amount of R4 267 320.96, plus interest. A sale of execution against the municipality's moveable assets was scheduled for 26 September 2001. The appellant, a resident within the municipality, appealed to the Free State High Court to have the warrant of execution set aside. The High Court upheld the decision and granted permission to appeal. Only the pension fund challenged the appeal.

Issue

The issue before the court was whether the municipality's property was state property, as referred to in section 3 of the State Liability Act, and whether a municipality falls within the ambit of the definition of the word 'state'.

The judgment

In answering this question the court applied the normal rules of interpretation. Section 2 of the State Liability Act determines whom must be summonsed in relation to a claim against the state. In terms of this section a claim should be instituted against a Minister of the relevant department or a member of the Provincial Executive. No mention is made of a municipality. Section 3 of the Act says that no warrant of execution can be obtained against state-owned property and that the claim should rather be paid from the National or Provincial Revenue fund. Again, there is no mention of a municipality.

The court held that the legislature did not make provision for a fund out of which a municipal liability should be paid. Furthermore, the court held that municipal employees are not regarded as public servants. These factors indicate that the legislature did not intend to include municipalities in the application of this Act. The court further said that not even the Constitution gives a definition of 'state'.

The appellant argued that the Act should be interpreted in relation to the provision of the Constitution dealing with human rights protection. However, the court held that this would mean an amendment to the Act rather than an interpretation of it. Where the constitutionality of legislation is not in question, a court does not have the authority to change it but only to interpret it.

Accordingly, the court held that state liability in terms of this Act is only applicable to provincial and national spheres of government.

What does this judgment mean for municipalities?

This judgment has grave implications for municipalities. It means that their assets can be attached and sold in execution to cover municipal debts

and they cannot use the State Liability Act as protection against this.

Assessment

We entered a new local government dispensation with the December 2000 elections, in terms of which local government is defined as a sphere of government. Before this municipalities were regarded as creatures of statute, but with the new dispensation their status has changed. The State Liability Act is from an era in which municipalities did not have any constitutional status and were therefore not included in the application of the Act. Although the court is correct in saying that the Constitution does not provide a definition of 'state', section 239 refers to any state department or administration in the national, provincial or local sphere of government as an 'organ of state'. If the Constitution regards a department or administration within local government as an organ of state, one can infer that the legislature did intend local government to form part of the state. This, coupled with section 40 of the Constitution, which states that national, provincial and local government are regarded as spheres of government, clearly indicates that the legislature's intention was to include local government in a definition of 'state'.

The court is right in saying that it can only interpret legislation and not amend it; however, one can argue that in terms of the new constitutional dispensation municipalities should be

key points

- Municipalities' moveable property can be sold in execution.
- The safeguards in the State Liability Act are not applicable to municipalities.
- Municipalities' property is not regarded as state property for the purposes of the State Liability Act.

included in the ambit of section 3 of the State Liability Act. In terms of the Constitution, laws that were in force before the 1996 Constitution came into effect remain in force, subject to inconsistencies with it. One can thus argue that the exclusion of local government from the application of the State Liability Act is inconsistent with the Constitution.

Until this thorny issue is resolved municipalities should be aware that a warrant of execution can be issued against their property for debt and their property can be sold in execution.

It is to be hoped that this piece of legislation is amended urgently to afford the necessary protection to local government.

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