THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 262/02

In the matter between :

SOUTH AFRICAN MUNICIPAL WORKERS UNION (SAMWU) **Appellant**

and

THE CITY OF CAPE TOWN **First Respondent**

THE PROVINCIAL GOVERNMENT OF THE PROVINCE OF THE WESTERN CAPE **Second Respondent**

THE MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT **Third Respondent**

Coram: **MARAIS, CAMERON, CONRADIE, CLOETE JJA *et* MLAMBO AJA**

Heard: **6 MAY 2003**

Delivered: **30 SEPTEMBER 2003**

Establishment of municipal police service in terms of Chapter 12 of South African Police Service Act 68 of 1995 – whether s 78 of Local Government: Municipal Systems Act 32 of 2000 obliges municipality to assess or take account of views of organised labour.

J U D G M E N T

MARAIS JA/

MARAIS JA:

[1] The issue here is whether the Municipality of Cape Town acted beyond its powers and therefore unlawfully when it resolved to establish a municipal police service as contemplated in chapter 12 of the South African Police Service Act 68 of 1995 ('the Police Act'). The court *a quo* (Comrie J and Emslie AJ) held that it did not but granted leave to appeal to this court. An unsuccessful attempt was made to obtain leave to appeal directly to the Constitutional Court. The judgment dismissing the application is reported at 2002 (4) SA 451 (CC).

[2] The appellant is a trade union which represents municipal employees. Its attack upon the lawfulness of the Municipality's decision was founded upon s 78 (1) (a) (v) and (3) (b) (v) of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') which obliges a municipality, in the circumstances described in those provisions, to 'assess' and 'take into account' – '(v) the views of organised labour'. Its case was this. The establishment of a municipal police service amounted to the provision of 'a new municipal service' or to 'an existing municipal service (being) significantly upgraded, extended or improved' within the meaning of s 77 (b) and (c) of the Systems Act. Those were circumstances which obliged the Municipality to assess and take account of the views of organised labour in terms of s 78 (1) (a) (v) and 3 (b) (v) of that Act before deciding upon the establishment of the municipal police service. The views of organised labour were not assessed and the decision to establish the municipal

police service and the steps taken to implement it were therefore beyond the powers of the municipality and accordingly unlawful.

[3] The court *a quo* dismissed the union's application for orders:

'2.1 declaring that before deciding to establish a municipal police service as contemplated in chapter 12 of the South African Police Service Act No 68 of 1995, the municipality is obliged:

2.1.1 to undertake the review contemplated in section 77 of the Local Government: Municipal Systems Act No 32 of 2000 ("the Systems Act");

2.1.2 to assess the matters specified in section 78 of the Systems Act;

2.1.3 to assess, in particular (but without derogating from paragraph 2.1.2 above), the views of organised labour, including the union;

2.2 reviewing and setting aside the first respondent's decision of 30 May 2001 as recorded in annexure "G" to the founding affidavit of Andre Adams;

2.3 reviewing and setting aside the municipality's decision to commence training candidates for the municipal police service contemplated by the decision referred to in paragraph 2.2 above;

2.4 granting the union further and/or alternative relief;

2.5 directing that the costs of this application be paid by the municipality jointly and severally with any other respondents that oppose the application;'

[4] The ground upon which the court *a quo* did so was that the establishment of a municipal police service did not constitute the provision of a municipal service within the meaning of that expression in s 78 of the Systems Act and that there was therefore no obligation upon the municipality to assess or take into account the views of organised labour. The court held that only a municipal

service for which a charge was levied or capable of being levied against an identifiable user was contemplated by s 78 and that law enforcement services rendered by a municipal police force do not constitute such a service.

[5] For reasons which follow I consider the finding that s 78 is applicable only to municipal services for which a charge is levied or notionally capable of being levied against an identifiable user of a service to be erroneous, but that the application was correctly dismissed for other reasons.

[6] Chapter 8 of the Systems Act is devoted to the subject of municipal services. The expression 'municipal service' was not defined in the Act at that time.[1] The expression 'basic municipal services' is defined in s 1 but it is designed to throw light upon the word 'basic' rather than upon the words 'municipal services'. It is unnecessary for the purposes of this case to attempt to delineate the entire ambit of the latter expression; the enquiry is a narrow one and is confined to whether only municipal services which are being charged for or which are notionally capable of being charged for and which have identifiable users are comprehended by the expression.

[7] A reading of the Act as a whole and Chapter 8 in particular shows, in my opinion, that that cannot be correct. There are numerous provisions which relate to municipal services. For example, the following (the list is not exhaustive):

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[1] It is now by virtue of s 35 (a) of Act 51 of 2002. The definition makes it clear that whether 'fees, charges or tariffs are levied in respect of such a service' is irrelevant. The interpretation which I place upon the expression in this judgment is based solely upon the considerations which emerge from the Systems Act as it then was.

7.1 s 4 (2) (d) – municipality has the duty to 'strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner';

7.2 s 4 (2) (e) (i) – municipality has the duty to consult the local community about 'the level, quality, range and impact of municipal services provided by the municipality';

7.3 s 11 (3) (f) – municipality exercises its legislative or executive authority by *inter alia* 'providing municipal services to the local community';

7.4 s 16 (1) (a) (v) – municipality must encourage, and create conditions for, the local community to participate in the affairs of the municipality, including participation in 'strategic decisions relating to the provision of municipal services in terms of Chapter 8';

7.5 s 55 (1) (o) – municipal manager responsible and accountable for 'developing and maintaining a system whereby community satisfaction with municipal services is assessed';

7.6 s 73 (2) (d) – municipal services must be 'environmentally sustainable';

7.7 s 73 (2) (e) – municipal services must 'be regularly reviewed with a view to upgrading, extension and improvement';

7.8 s 94 (1) (f) – Minister may make regulations or issue guidelines to provide for or regulate the 'criteria to be taken into account by municipalities when assessing options for the provision of a municipal service';

7.9 s 94 (1) (k) – Minister may make regulations or issue guidelines in regard to 'any other matter that may facilitate . . . the effective and efficient provision of municipal services'.

[8] There is no language anywhere in these provisions or elsewhere in the Act which expressly requires one to confine the ordinary meaning of the wide expression 'municipal services' in the manner for which the municipality contends. There are many municipal services provided for which no charge is or can notionally be levied because those who benefit from the services are not specifically identifiable individuals but members of the public generally. To mention but a few: there are gardening services provided for the mowing of grass verges adjoining roads and pavements and the maintenance of planted traffic islands; there are tree-pruning services provided where trees abut roads or have been planted by the municipality to beautify the city; there is decorative lighting provided during the festive season; there are street cleaning services and in coastal cities beach cleaning services are provided. Whatever the entire ambit of municipal services may be, there can be no doubt that these would be generally recognised as municipal services. Moreover, s 104 (1) (b) and (c) of the Systems Act, to my mind, recognises that there will be municipal services provided where the use of the service by a user cannot 'reasonably be determined, measured or estimated per quantity used or per frequency of such use'. It empowers the national Minister responsible for local government to 'make regulations or issue guidelines in accordance with section 120 to provide

for or regulate . . . (b) the identification of municipal services provided to users of services where the use of the service by the user can reasonably be determined, measured or estimated per quantity used or per frequency of such use' and '(c) the determination, measurement or estimate of the use of each user of each service so identified'. It seems to be implicit in this that there will be situations in which it will not be possible to do so. I am unable to accept that throughout the whole of the Systems Act any reference to municipal services must be taken to be confined to services which are chargeable to individual users.

[9] What of a narrower contention, namely, that the obligation cast upon a municipality by s 78 (1) (a) (v) and (3) (b) (v) of the Systems Act to assess or take account of the views of organised labour before deciding on a mechanism to provide a municipal service or to review any existing mechanism arises only where the service is one for which a charge is, or is to be, levied or is notionally capable of being levied, and also one the specific users of which are identifiable and individually chargeable?

[10] There are a number of obstacles to such a conclusion. First, it entails assigning two different meanings (one wide, one narrow) to the same expression in the same Act. It is of course so that contextual and other considerations may impel such a conclusion in a given case but here, in my view, there is nothing in the context of the provision or in any extra-contextual considerations which would justify it in this case. Secondly, such a reading would not promote the

values set forth in the Constitution nor the culture of participatory governance mandated by s 16 (1) (a) (v) of the Systems Act. Thirdly, the concerns of organised labour are not limited to services for which charges are to be or can be levied. It has an interest in the impact which the manner of instituting new services or extending existing ones may have upon workers in particular both within and outside of the municipality irrespective of whether there is to be a charge for them. No reason suggests itself why the legislature, once having decided to accord organised labour the right to have its views assessed and taken into account, would have wished to deny it that right in cases where the service was to be free.

[11] However, it does not follow that the views of organised labour had to be assessed in this particular case. While the provisions (sections 16-21) in the Systems Act which foster participation by the community as a whole in decision-making processes are cast in relatively wide and general terms, the provisions of s 78 are not. They are applicable only '(w)hen a municipality has in terms of s 77 to decide on a mechanism to provide a municipal service . . . or to review any existing mechanism . . .'. They are not applicable to the anterior decision to provide a municipal service or even to extend an existing service. While the making of such decisions is subject to the general provisions of the Systems Act which promote community participation, it is not subject to the specific provisions of s 78.

[12] Section 77 is specifically confined to the subject 'mechanisms to provide municipal services'. It provides:

'A municipality must review and decide on the appropriate mechanism to provide a municipal service when –

(a) . . .

(b) a new municipal service is to be provided;

(c) an existing municipal service is to be significantly upgraded, extended or improved;

(d) a performance evaluation in terms of chapter 6 requires a review of the delivery mechanism;

(e) . . .

(f) . . .

(g) . . ..'

[13] It is implicit in the plain language of the provision and, more specifically, in the tenses employed that it is not concerned with the anterior decision to provide a new municipal service or to significantly upgrade, extend or improve an existing municipal service or to review an existing delivering mechanism. It is concerned with the question of how these things are to be done and not with the question of whether they should be done. It is, no doubt, conceivable that a consideration of 'how' may lead in a particular case to a revisiting of the question of 'whether' but that would be fortuitous and not the purpose for which sections 77 and 78 were enacted. That purpose is to compel a municipality, in the stated circumstances, when considering 'how', to consider first how it could be done through an appropriate internal mechanism. Only after that has been

done may the provision of the service through an external mechanism be considered. It is in considering these questions that s 78 (1) (a) (v) and (3) (b) (v) oblige the municipality to assess or take into account 'the views of organised labour'.

[14] If s 77 is not plain enough, s 78 is. The opening words of the provision also postulate that a decision has already been made to provide a municipal service or to review an existing mechanism:

'(1) When a municipality has in terms of s 77 to decide on a mechanism to provide a municipal service . . . or to review any existing mechanism –

(a) it must first asses –

(i) . . .;

(ii) . . .;

(iii) . . .;

(iv) the likely impact on development; job creation and employment patterns in the municipality, and

(v) the views of organised labour; and

(b) . . ..'

[15] Having done that, in terms of ss (2), it may decide on an appropriate internal mechanism or it may defer its decision until it has explored 'the possibility of providing the service through an external mechanism'. If the latter, ss (3) obliges it to:

'(a) give notice to the local community of its intention to explore the provision of the service through an external mechanism; and

(c) assess the different service delivery options in terms of s 76 (b), taking into account –

(i) . . .;

(ii) . . .;

(iii) the views of the local community;

(iv) the likely impact on development and employment patterns in the municipality; and

(v) the views of organised labour.'

[16] It is worthy of note that the views of the local community have to be taken into account when an external mechanism is being considered but not when an internal mechanism is being considered. Furthermore, there is provision elsewhere in s 4 (2) (e) of the Systems Act for the local community (which by definition in s 1 means that body of persons comprising residents, ratepayers, civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality, and visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality, and includes, more specifically, the poor and other disadvantaged sections of such body of persons) to be consulted about

'(i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and

(ii) the available options for service delivery.'

Section 5 (1) (a) also provides: 'Members of the local community have the right –

(a) through mechanisms and in accordance with processes and procedures provided for in this Act or other applicable legislation to –

(i) contribute to the decision-making processes of the municipality; and

(ii) . . ..'

[17] It is these provisions which cater for the participation of the community in what I have called the anterior decision to provide a municipal service or extend one. It is not sections 77 and 78. The appellant's case was founded upon the municipality's alleged failure to comply with s 78. In my view, s 78 was not applicable.

[18] Even if it be assumed in favour of the appellant that the establishment of a municipal police service amounted to the provision of a new municipal service or a significant upgrading or extension of an existing municipal service (a question which I leave open), the implementation of the decision did not entail any of the choices which s 78 envisages and in respect of which the municipality would have been obliged to take account of the views of organised labour. There is in law only one way in which a municipal police service can be established or an existing traffic policing service extended so as to constitute a municipal police service: that is by following the procedure set out in s 64 A of the Police Act.

[19] That procedure fetters a municipality in important respects. It is not free to establish such a service without the approval of the member of the Executive Council, to whom an application must be made. The member may approve the application only after consultation with the National Commissioner; after consultation with the metropolitan council if the municipality falls in the area of

jurisdiction of such a council, and with the approval of the member or members of the Executive Council responsible for local government, finance, transport and traffic matters, or where no such member or members have been appointed, the Premier or the member or members of the Executive Council to whom those responsibilities have been assigned by the Premier. In my view, a municipality may not consider providing a municipal police service through an external service provider. I say this because the provisions of Chapter 12 of the Police Act which is devoted to municipal and metropolitan police services are not reconcilable with any such possibility.

[20] Section 76 (b) of the Systems Act provides that the only manner in which a municipal service may be provided through an external mechanism is by the municipality entering into a service delivery agreement with a service provider. Although the terms 'service delivery agreement' and 'service provider' are widely defined in s 1 of that Act and the latter term includes an organ of state, there is no provision in the Police Act which would empower the South African Police Services to enter into a service delivery agreement with a municipality[2] the object of which is to provide the municipality with a municipal police force. On the contrary. the Police Act provides only for the **establishment** of a municipal police **service** and not for the **provision** by the South African Police Service of municipal policing services. There is a clear linguistic distinction

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[2] Section 63 is plainly not applicable to such a situation.

between the use of the word ‘service’ in the Police Act to denote a force and its use in the Systems Act to denote that which is provided by the service provider.

[21] The concept of a municipal police service or a number of municipal police services being established within the existing South African Police Service is quite foreign to the Police Act. Simultaneous membership of both the South African Police Service and a municipal police service is not possible. Section 236 (7) (b) of the previous Constitution (Act 200 of 1993) was not repealed when the new Constitution of 1996 was enacted. It reads: ‘Any reference in any law to the South African Police or any other police force (excluding a municipal police service) shall, unless the context indicates otherwise, be construed as a reference to the South African Police Service.’ That appears to amount to a recognition of the fact that a municipal police service is separate and distinct from the South African Police Service despite the many provisions in the Police Act which give the Minister of Safety and Security and the National Commissioner of the South African Police Service considerable control over the powers which members of a municipal police service are to have and the standards to which they must adhere.

[22] Section 64 C (2) (b) of the Police Act provides that the executive head of the municipal police service shall ‘be responsible for the recruitment, appointment, promotion and transfer of members of the municipal police service’. It is the municipal council which appoints the executive head who is responsible to the municipal council for the functioning of the municipal police

service.[3] Again, a provision such as this cannot be reconciled with the concept of the South African Police Service acting as a mere service provider to the municipality pursuant to a service delivery agreement. There are other formidable obstacles to the entering into of such an agreement but I do not think it is necessary to spell them out. Those that I have mentioned should suffice.

[23] The hypothesis of a municipal police service being established by entering into a service delivery agreement with an organisation in the private sector, such as a company which provides security services, is even more obviously incapable of implementation. Its employees cannot be both employees of the security company and members of a municipal police service and an employee of the security company could hardly be the executive head of a municipal police service.

[24] What seems abundantly clear is that the provision made in the Police Act for the establishment of a municipal police service is peculiarly *sui generis* and far removed from such parochial municipal concerns as whether street cleaning or refuse collection or other services which a municipality might provide should be provided through an internal mechanism or an external mechanism. The Police Act had been in operation since 15 October 1995 by the time the Systems Act was enacted on 14 November 2000. The absence of any reference in sections 76, 77 and 78 of the Systems Act to the establishment of a municipal police service is, in my view, significant. The establishment was a step of so

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[3] s 64 B; 64 C (1): 64 D

significantly different a character, and with consequences so markedly different from those which attend the provision of what would commonly be regarded as municipal services, that I would have expected it to be expressly included in those sections of the Systems Act if it was indeed intended to be included. I cannot accept that the Legislature would have thought that the language in which it chose to reflect its intention would make it plain enough that the establishment of a municipal police service would be covered by it.

[25] I appreciate that it may be argued that, even if it be so that no possibility of an external mechanism being employed can arise, the questions relevant to the use of an internal mechanism requiring assessment in terms of s 78 (1) of the Systems Act will remain to be considered and that ss (1) (a) (v) entitles organised labour to have its views taken into account. The answer, I think, is that it is at best a pointer to the conclusion that the establishment of a municipal police service was intended to be governed by s 78. But if the countervailing pointers are more persuasive (as I consider them to be), the point cannot be accorded sufficient weight to result in a reversal of the conclusion that it was not intended to be so governed.

[26] There is another reason why the appellant cannot succeed. Its attack is fundamentally upon the lawfulness of the municipality's decision of 30 May 2001 to establish a municipal police service. Its contention is that **before** that decision was taken the municipality was obliged to carry out the steps set forth in sections 77 and 78 of the Systems Act and that it did not. Earlier in this

judgment, in paragraphs [11] to [17], I concluded that these provisions do not have to be complied with before a decision to provide a new service or significantly upgrade, extend or improve an existing service is reached. It is not open to the appellant to shift the focus of its attack to alleged deficiencies in the manner in which the municipality **thereafter** dealt with the matter. Nor is it open to it to fall back upon alleged shortcomings by the municipality in complying with other provisions of the Systems Act prior to deciding to establish a municipal police service. Neither of these was the case the respondents were called upon to meet.

[27] These conclusions render it unnecessary to decide a number of other questions raised by counsel for the parties. It was common cause that whatever the outcome of the appeal the costs of two counsel should be allowed.

[28] To provide some sense of perspective it should be recorded that within six days of the resolution of 30 May 2001 the appellant's representatives at a South African Local Government Bargaining Council meeting on 6 June 2001 stated that they did not deny that a municipal police service was needed and that its establishment was therefore not disputed. However, the manner in which it was to be done and the reasons for it, should be worked out by the parties. The appellant did not seek to interdict the establishment of the service and it is and has been a *fait accompli* for some years. That does not mean of course that the Court should deny the appellant relief if its rights have been disregarded but, as I have said, I do not consider that it has been established that they were. In so far

as there may have been implications for workers there is a substantial body of labour legislation available to be invoked in need.

[29] It is ordered:

(a) that the appeal be, and is hereby, dismissed;

(b) that the appellant pay the costs of the respondents, such costs in each instance to include the costs of two counsel.

R M MARAIS
JUDGE OF APPEAL

CONRADIE JA) CONCURS

CLOETE JA *et* MLAMBO AJA:

We have had the advantage of reading the judgment of Marais JA. Whilst we respectfully agree with the reasons given in paras [1] to [17] and [26] to [28], we would prefer to express no opinion on the correctness of the approach followed in paras [18] to [25]. We concur in the order made.

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T D CLOETE
JUDGE OF APPEAL

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E CAMERON
JUDGE OF APPEAL

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D MLAMBO
ACTING JUDGE OF APPEAL