REPORTABLE

Case No: 86/2000

In the matter between:

DIE LID VAN DIE UITVOERENDE RAAD VIR PLAASLIKE BESTUUR: MPUMALANGA, CNM PADAYACHEE NO **Appellant**

and

INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION ("IMATU") and OTHERS **Respondents**

Coram: HEFER ACJ, HARMS, SCOTT & MTHIYANE JJA, and CONRADIE AJA
Heard: 13 SEPTEMBER 2001

Delivered: 25 SEPTEMBER 2001

Subject: A provincial government has no constitutional duty towards a local authority to provide it with funds to enable the local authority to pay its debts.

JUDGMENT

HARMS JA/

HARMS JA:

[1] Moses in his wisdom ordained that “thou shalt not oppress a hired servant” and “at his day thou shalt give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it”(Deuteronomy 24:14-15). The Transitional Local Council of Leandra, a town in the province Mpumalanga, did not heed this command, pleading the lack of funds. The question in this appeal is whether a provincial government has a constitutional duty towards a local authority and its employees to provide it with funds to enable the local authority to fulfil its financial obligations towards those employees.

[2] It is common knowledge that a number of local authorities have grave financial difficulties and, as explained in the papers, this is in part due to an inability or an unwillingness of many of their inhabitants to pay for basic municipal services. As a result, these local authorities are unable to fulfil their financial obligations. Leandra, for instance, had outstanding debts in excess of R 16 million on 30 June 1999. On a monthly basis current expenses exceeded current income. In order to manage the crisis, the Council decided to take from its employees to pay the proverbial Paul.

[3] Each employee received monthly his or her net salary, accompanied by a pay slip indicating its computation with reference to the gross salary and the necessary

statutory and other agreed deductions. The deductions did not find their way to their respective destinations and instead remained in the Council's pocket. Deductions for income tax were not paid to the South African Revenue Service as required by the Income Tax Act 58 of 1962; pension contributions, in contravention of the Pension Funds Act 24 of 1956, were not paid to the relevant pension fund; medical scheme contributions were retained contrary to the provisions of the Medical Schemes Act 131 of 1998; unemployment contributions were not transmitted to the Fund in breach of the Unemployment Insurance Act 30 of 1966. Bond payments, for example, were withheld from both the employee and the bondholder. And so the list continues.

[4] The Revenue Service had recourse to a simple expedient: it took over the Council's bank account and managed it until what was due had been paid. The other entities involved do not have similar powers and it was left to the present respondents (a trade union – who has no role to play in the proceedings – and some of its members, herein referred to as "the employees") to apply to the Transvaal Provincial Division for relief. They firstly sought an order directing the Council to pay the amounts in question on their behalf. In spite of the Council's faint opposition, the court *a quo* made an order against it substantially as requested. There is understandably no appeal by the Council but, given its precarious financial position, it is unlikely that the order will be complied with, at least within the foreseeable future.

[5] In addition, the employees sought an order against the Mpumalanga Provincial Government, represented by the appellant. They asked primarily for payment by the Province of these amounts, jointly with the Council or in the alternative. Their second prayer, in substance although not in form an alternative, was for a mandamus ordering the Province to pay the sums, either under s 139 of the Constitution as part of its obligation to take appropriate steps to ensure the fulfilment of the Council's obligations, or under s 154 by supporting or strengthening the capacity of the Council. The court below (De Vos AJ), conscious of the fact that the Province could not in law be ordered to pay the Council's debts, nevertheless granted an order against the Province, purportedly under s 154, in the following terms:

> "Die Tweede Respondent word gelas om die Eerste Respondent te steun en te versterk soos bedoel in artikel 154 van die Grondwet van die Republiek van Suid-Afrika, Nr 108 van 1996 met inbegrip van maatreëls wat sal lei tot die betaling van bogemelde bedrae aan bogemelde instellings . . .."

The appeal is with the leave of the court below.

[6] The Council was a local authority in the interim phase of the local government transition. That stage has come to an end but the case must still be decided against the backdrop of the Local Government Transition Act 209 of 1993 (read with par 26 of Sch 6 to the Constitution). As explained in *Fedsure Life Assurance Ltd and Others*

v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) par 4, the Act contemplated that the transformation of local government would take place in three distinct stages. During the "pre-interim" phase, negotiating forums were established and charged with appointing temporary councils to discharge local government responsibilities. This period extended from the commencement of the Act, on 2 February 1994, until the first democratic local government elections. The "interim" phase commenced on the date of these elections and introduced a series of transitional local government structures. The third phase was to be initiated and regulated by new legislation, since enacted as the Local Government: Municipal Structures Act 117 of 1998 with commencement date 1 February 1999.

[7] Government in the Republic is constituted on three levels, namely as national, provincial and local spheres of government. They are distinctive, interdependent and interrelated (Constitution s 40(1)). All spheres are obliged to respect the constitutional status, institutions, powers and functions of government in the other spheres (s 41(1)(e)) and to exercise their powers and perform their functions in a manner that does not encroach on their functional or institutional integrity (s 41(1)(g)). Each has its own budget (s 215(1)) and the division and allocation of revenue between the different levels is a matter for national legislation (s 214(1), presently the Division of Revenue Act 28 of 1998. Financial matters relating to municipalities were, at the

relevant time, regulated by s 10G of the Local Government Transition Act.

[8] Section 139(1) of the Constitution reads:

> "When a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
>
> (a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; and
>
> (b) assuming responsibility for the relevant obligation in that municipality to the extent necessary-
>
> (i) to maintain essential national standards or meet established minimum standards for the rendering of a service;
>
> (ii) to prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
>
> (iii) to maintain economic unity."

[9] The court below held that this sub-section gave a provincial government the discretion, without imposing an obligation, to intervene in the affairs of a local authority. For this reason it refused to grant the relief sought in its terms. There is another reason why the employees could not rely upon the provision: it is concerned

with a failure to fulfil "an executive obligation in terms of legislation". The obligation resting upon all employers to pay, for example, an employee's deducted tax to the Revenue Services is statutory but it is not "executive" in any sense of the word. The contractual obligation to pay bond instalments and the like is neither "executive" nor "in terms of legislation".

[10] Section 154(1) of the Constitution forms the cornerstone of De Vos AJ's order and it provides as follows:

> "The national government 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."

To the extent that the duty resting on the higher levels of government is to introduce legislation to support and strengthen the capacity of municipalities, courts are not empowered to order any legislature to pass legislation. That is a matter falling within the sole domain of the different legislatures. This leaves for consideration the "other measures".

[11] In answering the application for payment by the Province, the deponent pointed out that the Province has a limited budget for local government purposes; money had not been budgeted for paying the debts of local authorities; the Province had, insofar as its resources permitted, assisted the Council by making various amounts available

to it; and that the Province, well aware of the financial difficulties of the Council, had taken various steps under s 10G(2)(m)[1] of the Local Government Transition Act. Creditors of municipalities do not have a right to be paid by other spheres of government (s 10G(12)).[2] I am aware that the court below held that the employees are not "creditors" but I cannot subscribe to that finding. The employees were creditors for their full salaries. Payment to another party had to be done because that party had been appointed as a *solutionis causa adjectus* (De Wet & Van Wyk *Kontraktereg & Handelsreg* 5 ed vol 1 p261-262) or by reason of a mandate. This did not destroy the creditor-debtor relationship between the parties.

[12] Assuming that a court is entitled to order a provincial government to support or strengthen a municipality, it is doubtful whether that can be done at the behest of a creditor of the municipality. The extended standing afforded to persons and associations under s 38 of the Constitution relates to infringements, real or threatened, of rights entrenched in the Bill of Rights and not to everything else in the Constitution.

---

1 It read: "(m) (i) The MEC may after consultation with the MEC responsible for Finance, whenever he or she is of the opinion that the finances of a municipality are or may become unsound, instruct the council concerned to take such steps as he or she may specify in writing.

(ii) For the purposes of subparagraph (i), the term 'unsound' includes any failure to claim or to collect income or to control expenditure or to compile and approve an operating budget, or to comply with subsections (1), (2), (3), (4), (6) and (7).

(iii) In the event of a council failing to carry out and implement an instruction referred to in subparagraph (i), the MEC may take such steps or cause such steps to be taken as he or she may deem necessary in order to restore the finances of a council to a sound footing."

2 It read: "(12) No claim of any creditor of any municipality may attach to or be paid out of the national revenue fund, or attach to or be paid by the national or any provincial government, unless specifically and duly authorised by such government."

Further, at first sight it seems that s 154(1) has no vertical operation (i. e., between government and citizen) but that it regulates the relationship between different spheres of government. In any event, if a court does make an order under s 154(1), it cannot do so by simply restating the wording of the section. The Province was entitled to know what it had to do. On the papers it was called upon to pay and it responded to that case as made out in the founding affidavit; the Province was not called upon to defend its administrative decisions (or lack thereof) in dealing with the crisis. De Vos AJ suggested that the Province could assist the Council in collecting its debts of about R 12 million; how or why she did not say and counsel quite properly did not attempt to justify that idea. Another suggestion she made was that the Province could advance a loan to the Council. One can immediately ask: for what amount (having regard to the fact that funds were not available) and for which creditors? Are the employees some or other class of creditors with special rights? Once again, counsel was not prepared to support the proposal.

[13] Unable to suggest any order that would be capable of enforcement, counsel sought refuge in s 41(3) and (4) of the Constitution and requested that the Province and the Council be ordered to settle the dispute. They read:

> "(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

> (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

These provisions provide no comfort for the employees because they are concerned with "intergovernmental disputes"; the dispute before us concerns the Province and the employees.

[14] During argument the Court raised the question whether this would not be a proper case for the grant of a declaratory order. Cf *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another intervening)* 2001 (3) SA 893 (CC) par 69-70. Counsel had no considered response available. The reason the issue was mentioned is that the Province disputed, for reasons that are difficult to fathom, the application of ss 139(1) and 154(1) of the Constitution to the interim phase of local government. But since that phase has passed and because there is no dispute about its present applicability, it will have no practical value to issue a declarator at this stage of our constitutional development; simply to recite a provision of the Constitution in a court order would be to state the obvious and is unnecessary.

[15] That leaves the question of costs. Counsel informed us that the application in the court below had been postponed twice, each time at the behest of the Province. Costs were reserved for no apparent reason. Courts should not reserve costs of

postponements and the like unless there are special circumstances because courts that deal with the merits later, especially courts of appeal, are not really in a position to decide the costs of interlocutory matters. In the absence of further information it has to be assumed that the Province is liable for those costs. As far as the other costs between the present parties are concerned, it seems to me that they are covered by the approach generally adopted in connection with constitutional claims, namely that if the claim is genuine and of broad concern and is not vexatious or spurious the unsuccessful party should not be mulcted in costs. (E g *African National Congress and Another v Minister of Local Government and Housing, Kwazulu-Natal, and Others* 1998 (3) SA 1 (CC) par 34 and cases there cited.) The financial viability of local authorities is a matter of grave public concern. If one leg of our democracy sinks away in a quagmire of debt, the whole is endangered. This is the level where the ordinary citizen interacts primarily with government and receives basic services. For this, municipalities require employees who are paid, not by way of an entry on a pay slip but in money. To have raised by way of a constitutional challenge this genuine issue was proper and the fact that the court below upheld the claim indicates that it was not vexatious or spurious.

[16] In the result the following order is made:

(a) The appeal is upheld.

(b) Par 2 of the order of the court below is replaced with an order: “Die aansoek teen die tweede respondent word van die hand gewys.”

(c) Par 3 of that order is replaced with an order:

“Die tweede respondent word gelas on die applikante se koste ten aansien van die twee uitstelle te betaal.

Die eerste respondent word gelas om die applikante se orige koste van die aansoek te betaal.”

_____

L T C HARMS

JUDGE OF APPEAL

AGREE:

HEFER ACJ
SCOTT JA
MTHIYANE JA
CONRADIE AJA