

COURT REJECTS

'Traditional' method of intervention

IN MUNICIPALITIES

As the local government turnaround strategy gains momentum (see page 7 and the editorial) and energy is focused on assessing the state of local government, the role of provincial oversight in respect of municipalities, including interventions, is critical. The *Mnquma* case revisited what is required of provinces in the context of an intervention. The judgment, while contributing to the debate, may, however, have raised more questions than it provided answers.

Mnquma Local Municipality and Another v The Premier of the Eastern Cape and Others Case No. 231/2009 (unreported)

Section 139 (1) of the Constitution provides:

When a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfillment of that obligation, including –

- (a) issuing a directive...;
- (b) assuming responsibility for the relevant obligation...; or
- (c) dissolving the ...Council...

Facts

The MEC for Local Government in the province of the Eastern Cape advised the Mnquma Local Municipality in writing of possible maladministration in the municipality and the fact that a Special Investigating Unit (established in terms of section 106 of the Systems Act 32 of 2000) was appointed to investigate the allegations. The municipality was therefore requested to halt all activities with financial implications. The municipality, however, sent a written request to the MEC to identify the maladministration at issue and advised that halting all

activities with financial implications would cause service delivery to grind to a standstill. The provincial executive had made two prior attempts at dissolving the council, but was unsuccessful due to procedural irregularities. The province eventually dissolved the council in terms of section 139(1)(c) of the Constitution. The municipality, in response, applied for a court order preventing the province from intervening and interfering with its right to exercise its constitutional powers and to perform its functions.

High Court decision

The issue before the Court was the interpretation of section 139(1) of the Constitution. The municipality argued that for the intervention to be valid there must have been an ongoing failure, not a past failure, to fulfill an executive obligation. It argued further that the phrase 'executive obligation' in section 139 must be limited to matters concerning the formulation of policy and initiation of by-laws and may not concern service delivery issues, which are administrative actions. It furthermore argued that the meaning to be attributed to executive obligation

key points

- A province can only intervene when a municipality 'cannot or does not' fulfill an executive obligation.
- An executive obligation relates to formulating policy, initiating legislation, as well as rendering services to communities.
- An executive obligation at the local level is thus narrower than any statutory obligations.
- The MEC for local government in the province has discretion as to whether to intervene in a municipality.
- Provinces can now choose between issuing a directive, assuming responsibility or dissolving the council.
- The intervention, as a corrective measure, has therefore lost the last resort principle.

must be consistent with what is understood to constitute executive action, as opposed to legislative and administrative action. The municipality also argued that dissolution should be resorted to as the last step of an intervention only if the first two steps, namely the issuing of a directive and the assumption of responsibility, do not achieve the desired outcomes.

The counterargument by the province was that a failure to comply with constitutional and statutory obligations constitutes a failure to fulfill an executive obligation. It further argued that the province has a choice between issuing a directive, assuming responsibilities and dissolving the municipal council.

What is an executive obligation?

In interpreting the words 'cannot or does not' fulfill an executive obligation, the Court held that this relates to the inability or failure to fulfill an executive obligation in terms of the Constitution. Regarding the meaning of 'executive obligation', the Court made a distinction between executive obligations and statutory obligations and concluded that a failure to fulfill a statutory obligation would not necessarily result in a failure to fulfill an executive obligation. These two

obligations should not be equated. The Court highlighted the fact that, as opposed to other spheres of government, there is no separation of executive and legislative functions at local government level; they both vest in the municipal council.

This however, did not impact on how the Court defined an executive obligation at the local level. Much the same as when interpreting provincial and national executive obligations, the Court held that an executive obligation at the local level is limited by the functional areas of local government and includes the development of policy, initiation of legislation as well as rendering basic services and facilities to communities.

In applying this definition to the case of *Mnquma*, the Court held that the alleged failures, such as, for example, the failure to appoint a performance audit committee, were each linked to specific statutory provisions, which, the province argued, constituted executive obligations. The Court held that these failures related to statutory obligations or duties as opposed to executive obligations. The Court accordingly held that the provincial executive clearly misconstrued the meaning of the term 'executive obligation' in section 1(c) of the Constitution.

Dissolution as a measure of last resort

Regarding the issue of whether dissolution should be resorted to as the last step of an intervention, the Court turned away from the method that respects and protects the enhanced status of local government. The Court rejected the interpretation of 'appropriate steps' as meaning a process consisting of a set of successive steps. The Court held that the word 'or' means that the 'appropriate steps' can be taken in the alternative. This approach means that the province may choose between the steps outlined in sub-section (1), namely issuing a directive, assuming responsibility and dissolving the municipal council.

In essence, the provincial executive acted lawfully in choosing dissolution as a method of intervention in the case of *Mnquma*. However, the Court found that the conditions under which an intervention can take place were absent in *Mnquma* in that the decision to intervene was based on a mistaken belief that the municipality was unable or unwilling to fulfill its executive obligations. The court therefore declared the decision to intervene invalid.

Assessment

The judgment is disappointing in the following respects. First, the distinction it makes between executive and statutory

obligations is artificial. An intervention in the case of failure to fulfill an obligation means that there must have been a binding legal obligation. When read together with the phrase 'in terms of legislation', it follows that it should be possible to trace the obligation back to a statute. The objectives of local government, as laid down in the Constitution, are too broad and too vague. It would be very difficult to decide whether a municipality has failed to fulfill its executive obligations by looking at the objectives of local government laid down in the Constitution. The use of the term 'obligation' in section 139(1) indicates that the intervention must be triggered by a failure to adhere to compulsory or essential norms in legislation. Consequently, before the provincial executive can intervene, it must be able to identify a statutory provision that places a duty on local government to fulfil a certain executive obligation. A general reference to the municipality's failure to fulfil its executive obligations will not suffice.

In its correspondence relating to the intervention, the provincial executive must identify which executive obligation(s) is not being fulfilled and state its legislative origin.

Second, the High Court lost a rare opportunity to reinforce the enhanced status of local government by failing to limit

instances in which its institutional integrity is undermined by the provincial executive. The intervention, as a corrective measure, has lost the 'last resort principle' and the province can now implement more drastic and disruptive measures in a municipality before less intrusive measures.

This threatens the important element of local government autonomy in that its ability or right to exercise its constitutional and statutory powers and to perform its functions without improper interference is at the dictates of provincial government.

It can be interfered with or impeded by the provincial government by implementing more drastic steps even though the problem would possibly have been resolved by less intrusive steps.



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