From the
COURTS

The end of administrative autonomy over individual staff appointments

Manana v King Sabata Dalindyebo Municipality (345/09) [2010] ZASCA 144 (25 November 2010)

Factual background

Mputumi Manana was employed by the King Sabata Dalindyebo Municipality. The municipal council took a resolution to appoint him manager of the legal services department and adjust his salary accordingly. He was notified of this appointment in a letter addressed to him by the acting director: corporate services. He signed the letter of appointment. However, his salary was not adjusted to reflect the new position. After unsuccessful attempts to get his salary adjusted, Mr Manana went to court, asking for an order directing the municipality to make the appropriate adjustments to his salary and to pay the monies due to him as a result of his appointment. The Eastern Cape High Court dismissed the claim on the basis that it was a labour issue over which it had no jurisdiction. Mr Manana then appealed to the Supreme Court.

In the Supreme Court, the municipality was represented by Ms Zitumane, a caretaker municipal manager appointed to investigate allegations of irregularities in the municipality. She contended, firstly, that the resolution appointing Mr Manana had been passed irregularly and was thus not binding on the municipality, and that it was in conflict with the municipality's employment policy. Secondly, she argued that the power to appoint employees was not vested in the municipal council but in the municipal manager. She relied particularly on section 55(1)(e) of the Local Government: Municipal Systems Act (Act 32 of 2000).

Decision

The Court held that the resolution appointing Mr Manana as manager of legal services was valid, as the executive power to hire staff for a municipality is vested in the municipal council in terms of section 151(2) of the Constitution. It stated that section 55(1) of the Systems Act is no more than a statutory means of conferring on the municipal manager the power to attend to the affairs of the municipality on behalf of the council. It cannot divest a municipal council of the powers vested in it by the Constitution. The Constitution vests all executive authority – including the authority to appoint staff – in the municipal council, and legislation is not capable of lawfully divesting it of that power. Any ambiguity in a statute in that respect must be construed to avoid that result.

On the issue of the invalidity of the resolution, the Court stated that no authority had been offered for the submission that a duly adopted resolution of a local authority might be ignored by its officials if they believed it to be invalid, even if that belief was well founded. It would be conducive to disorderly public administration if officials were entitled to choose whether or not to execute a duly adopted Council resolution, depending upon their belief as to its validity, whether or not that belief was well founded.

Analysis

The Court judgment had to contend with two issues. First, the question of whether officials can ignore council resolutions. The Court was correct in holding that they cannot. The Court could not condone officials second-guessing council resolutions. Officials who doubt the validity of a resolution should ask the council to rescind its resolution, but may not simply ignore it. Alternatively, they should ask a court to declare it invalid.

The second issue is whether section 55 of the Systems Act limits a council's executive powers in favour of the municipal manager. The Court appeared to suggest that no statute really limits the council's executive powers in favour of other organs within the municipality. We would argue differently, namely that section 155(7) of the Constitution actually permits national government to regulate the exercise by municipal councils of their executive functions. If this means certain tasks are performed by the municipal manager, this limitation is based on the Constitution and is thus valid. Section 55 of the Systems Act is such a piece of legislation, which regulates the executive powers of a municipal council relating to the appointment of personnel. Similarly, section 117 of the Municipal Finance Management Act excludes the council and councillors from procurement decisions.

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The 'emergency housing' obligations of municipalities

SCA holds the City of Johannesburg to account

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (338/10) [2011] ZASCA 47 (30 March 2011)

The facts

On 30 March 2011, the Supreme Court of Appeal (SCA), in a far-reaching judgment, declared certain aspects of the City of Johannesburg's housing policy unconstitutional. As reported on previously in the *Bulletin* (*LGB* 12(2), June 2010, pp 17–20), the case of *Blue Moonlight Properties* started as a High Court application to evict a community of approximately 86 occupiers from a building in the inner city.

Despite the deplorable conditions in which the occupiers lived, the building was the only home they knew. An eviction order would render them homeless and put those few employment opportunities that living in the inner city afforded them virtually out of their reach. Consequently the occupiers successfully argued that the City of Johannesburg should be joined to the proceedings in order to fulfil its constitutional duty to provide them with temporary emergency shelter upon eviction.

The City argued that in terms of its housing programme and limited budget, it had no duty to provide alternative emergency housing to occupiers who had been evicted by private landowners. It opted rather to reserve 'emergency housing' funding for occupiers whom the City itself evicted from 'bad buildings' in terms of the safety and health regulations set out in the National Building Regulations and Building Standards Act. Furthermore, the City argued that it was the duty of the provincial government to approve and fund the type of emergency housing that the occupiers sought. In the absence of provincial approval, the City argued that it had no authority to commit funds to such a programme.

The High Court rejected the City's arguments and held that in as far as the housing programme differentiated between equally vulnerable occupiers who were evicted from private buildings and are left homeless as a result of such an eviction, the housing programme of the City was unconstitutional. The Court ordered the City to either provide the occupiers with temporary shelter or pay each household a stipend of R850 per month to secure their own accommodation. The court also ordered the City to pay Blue Moonlight Properties constitutional damages for the deprivation of the use of their property. The City appealed this judgment to the Supreme Court of Appeal (SCA).

The SCA judgment

The SCA judgment puts to rest the long-standing debate about the nature of the housing obligations which bind local government in view of the fact that housing is a concurrent national and provincial function. The Court, in examining the constitutional, legislative and policy scheme for housing, correctly held that the duty to provide 'emergency housing' in particular was a direct and binding duty on municipalities. As such, the Court, significantly, held that nothing prevented the City from initiating housing schemes or providing accommodation and using its *own* revenue, including ratepayer contributions, to fulfil this function. Municipalities could therefore not rely on their failure to proactively plan and budget for the needs of vulnerable occupiers (in conjunction with provincial government) as a justification for failing to fulfil its duties to vulnerable occupiers. The Court also confirmed the unconstitutionality of the City's housing programme, describing it as arbitrary, inflexible and 'unequal in operation and effect' on the grounds that it differentiated between different categories of equally vulnerable occupiers evicted from private land.

Lastly, the Court held that granting a stipend to the occupiers was not appropriate relief in that it had 'the potential to serve as a precedent for abuse by unscrupulous landlords who might see the State as a default source of rental income'. The court also held that the award of constitutional damages to Blue Moonlight Properties was inappropriate in that it differed from the circumstances in the earlier case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, the first in which constitutional damages were awarded. One such difference related to the fact that whereas Modderklip Boerdery was an innocent victim of a land invasion and took all necessary steps to safeguard its interests, Blue Moonlight Properties bought the property in the full knowledge that it was occupied by a number of people.

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