

CAN THE COURT JUDICIALLY PLACE A MUNICIPALITY UNDER ADMINISTRATION

Article written by candidate attorney – Brett Smith from J Leslie Smith and Company Inc

INTRODUCTION

The case of *Unemployed People's Movement v Makana Municipality* [2020] ZAECGHC 1 has revolutionized what was the traditional approach to judicial intervention across the spheres of government. The Court ruled in favour of the applicants to dissolve the municipal council and appoint an administrator on the basis that sections 152(1) and 153(a) of the Constitution had been breached. Sections 152(1) and 153 (a) set out the objects of local government and the developmental duties of municipalities. They include objects such as ensuring provision of basic services in a sustainable manner and duties to budget and plan in a manner that prioritizes basic needs. Despite two previous attempts at administrative oversight, the provincial executive and local government structures had persistently failed to achieve its objects and uphold its duties. The Judge reasoned that judicial authority and judicial independence vested in the courts, as per s165 of the Constitution. The declaratory orders were upheld on the basis that it was just and equitable to allow for judicial intervention to provide relief by promoting a co-operative system of checks and balances and good governance practices.

IN WHAT CIRCUMSTANCES WILL THE COURT ORDER JUDICIAL INTERVENTION

Section 139 of the Constitution has made provision for Local Government structures that are unable to deliver basic services. The Section is to be read with s139 and s140 of the Municipal Finance Management Act 56 of 2003 ('MFMA'). Section 139 of MFMA sets out situations for mandatory intervention arising from financial crisis while section 140 provides criteria for determining serious or persistent material breach of financial commitments. Section 139(1) of the Constitution provides that 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 fulfilment of that obligation. On the other hand, s139(5) is mandatory and states:

"If a municipality, as result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive **must-**

- b. dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and
 - i. appoint an administrator until a newly elected Municipal Council has been declared elected; and
 - ii. approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or



J Leslie Smith & Company Inc.

ATTORNEYS, CONVEYANCERS AND NOTARIES PUBLIC

c. if the Municipal Council is not dissolved in terms of paragraph (b) , assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

It is clear from the reading of the relevant sections in the MFMA and the Constitution that the drafters have placed emphasis on the need for the municipality to be financially fit. This of course should be common sense as, in order to meet all of its objects and duties, finance is essential. It is therefore safe to assume that financial fitness and stability can be considered as a “threshold test” for determining whether administrative oversight is necessary.

In *Makana Municipality* it was pointed out that the respondents did not dispute the facts provided by the applicants regarding the financial state of the municipality, thus resulting in a mandatory intervention.

CONCLUSION

Upon consideration of the relevant legislation, it is clear that the court is required to intervene in certain statutorily prescribed instances. Further, that within these instances, finance is the true determinant of the decision to place a municipality under judicial administration. Lastly, *Makana Municipality* confirms that judicial intervention is not an infringement on the separation of powers.



J Leslie Smith & Company Inc.

ATTORNEYS, CONVEYANCERS AND NOTARIES PUBLIC