/SG

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 16/04/2008
CASE NO: 3298/2006

REPORTABLE

In the matter between:

INDEPENDENT MUNICIPAL AND ALLIED WORKERS UNION	1ST APPLICANT
ME BEUKES	2ND APPLICANT
UC RIFFEL	3RD APPLICANT

And

PRESIDENT OF THE RSA	1ST RESPONDENT
SPEAKER OF PARLIAMENT	2ND RESPONDENT
MINISTER OF HEALTH	3RD RESPONDENT
MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT	4TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCE	5TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, MPUMALANGA PROVINCE	6TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, LIMPOPO PROVINCE	7TH RESPONDENT

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTH WEST PROVINCE	8TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, FREE STATE PROVINCE	9TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWA ZULU NATAL PROVINCE	10TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE PROVINCE	11TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE PROVINCE	12TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, WESTERN CAPE PROVINCE	13TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, GAUTENG PROVINCE	14TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, MPUMALANGA PROVINCE	15TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, LIMPOPO PROVINCE	16TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, NORTH WEST PROVINCE	17TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, FREE STATE PROVINCE	18TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, KWA ZULU NATAL PROVINCE	19TH RESPONDENT
THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, NORTHERN CAPE PROVINCE	20TH RESPONDENT

THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, EASTERN CAPE PROVINCE — 21ST RESPONDENT

THE MEMBER OF THE EXECUTIVE COUNCIL FOR PROVINCIAL AND LOCAL GOVERNMENT, WESTERN CAPE PROVINCE — 22ND RESPONDENT

THE SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION — 23RD RESPONDENT

JUDGMENT

MAKGOBA, J

[1] This is an application in terms whereby the applicants challenge various provisions of the National Health Act 61 of 2003 ("the Act") on the grounds that they are inconsistent with various provisions of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution") relating to the status and powers of local government.

[2] The constitutional challenge is premised on the contention that the act creates a single exhaustive national health system in which local government is obliged to participate, and which leaves no other space for municipalities to perform their functions as public providers of health services.

[3] In their amended notice of motion, the applicants have sought *inter alia* the following declaratory relief:

3.1 It is declared that the definition of "municipal health services" as

defined section 1 of the National Health Act, 61 of 2003 (hereinafter "the Act") is unconstitutional having regard to the provisions of section 27(1)(a) read with section 41(1)(e), (f) and (g), section 152(1)(b), section 153 and section 156(1)(a) and 156(4) of the constitution, inasmuch as it does not refer to or include "health care services", including "primary health care services";

3.2 Declaring that the definition of "municipal health services" in section 1 of the Act is unconstitutional in that it conflicts with the provisions of section 84(1) of the Local Government: Municipal Structures Act, 117 of 1998 ("the Municipal Structures Act") and section 155(3)(c) of the constitution, inasmuch as section 32(1) of the Act stipulates that the "municipal health services" as defined be provided by every metropolitan and district municipality, whilst section 84(1) and 84(2) of the Municipal Structures Act portrays "municipal health services" differently and distinguishes between the functions and powers of a district municipality and local municipality as defined in that Act;

3.3 Declaring that the definition of "primary health care services" as defined in section 1 of the Act, is unconstitutional, inasmuch as it is so broad and vague that the minister of health is unable to

determine the nature and the scope of the powers conferred;

3.4 Declaring that section 25(2)(k) and (l) of the Act are unconstitutional, inasmuch as they deprive a local government of the executive authority in respect of, and the right to administer municipal health services, referred to in Part B of schedule 4 of the constitution, and read with the provisions of section 40(1) and 41(1)(e), (f) and (g) thereof;

3.5 Declaring that the district health system provided for in chapter 5 of the Act is unconstitutional in that:

(a) it provides for a fourth sphere of government contrary to the provisions of section 40(1) of the constitution read with chapter 3, 5, 6 and 7 thereof;

(b) it lacks rationality, having regard to the principles underlying a district health system and its purpose not being in accordance with its stated purpose in terms of the Act;

3.6 Declaring that section 31 of the Act is unconstitutional inasmuch as it deprives local government of the executive authority in

respect of, and the right to administer municipal health services, referred to in Part B of schedule 4 to the constitution and read with the provisions of section 40(1) and 41(1)(e), (f) and (g) thereof;

3.7 Declaring that section 29(2) of the Act is unconstitutional in that it conflicts with, and takes no account of, the provisions of sections 24 and 25 of the Local Government: Municipal Demarcation Act, 27 of 1998 ("the Municipal Demarcation Act") thus in turn conflicting with the provisions of section 40(1) and 41(1)(e), (f) and (g) of the constitution;

3.8 Declaring that section 31(1) and (2) of the Act are unconstitutional according to the provisions of section 152(1), 160, 195(1) (preamble), 195(1)(e), (f) and (i), read with section 195(2) of the constitution in that the district health council is not democratically elected, nor accountable to the members of the community whilst performing functions constitutionally reserved for a local authority;

3.9 Declaring that:

(a) Section 33(1) of the Act is irrational, does not promote the stated government purpose, and is unconstitutional

inasmuch as it provides for the preparation of the health plan with due regard (amongst other) to the integrated development plan referred to in section 25 of the Local Government: Municipal Systems Act, 32 of 2000 ("the Municipal Systems Act");

(b) Section 25 of the Municipal Systems Act, read with sections 26 to 32 thereof, is unconstitutional, inasmuch as it presupposes the rendering of services in terms of the integrated development plan by a municipality, which, in terms of section 33(1) of the Act, read in the context of chapter 5 of the Act, has been deprived of this function. This is unconstitutional;

3.10 Declaring that section 31(5)(b) of the Act is unconstitutional in that it provides for a budget to which municipal spheres of government must contribute, which stipulation is contrary to the provisions of section 160(2)(b) and 160(3)(b), read with section 153(a) of the constitution;

3.11 Declaring that section 41(1) of the Act is unconstitutional inasmuch as it deprives local government of the authority to administer municipal health services constitutionally entrusted to

it in respect of the topics referred to in section 41(a) to (d) thereof.

The Parties

[4] The first applicant is a trade union duly registered in terms of the Labour Relations Act 66 of 1995. It lodges this application both in its own interests and, in terms of the provisions of section 38(e) of the constitution, in the interests of its members involved in the rendering of primary health care services in the Republic of South Africa. The second applicant is a major female nursing sister employed by the Free State Department of Health and was previously employed by the Matjhabeng Local Municipality before her transfer into the employment of the Free State Department of Health. The third applicant is a major female nursing sister employed by the Drakenstein Local Municipality.

[5] In the present proceedings the abovementioned applicants are represented by Mr Wim Trengove SC assisted by Mr M Chaskalson.

[6] Of the twenty three respondents cited in this application only two respondents, viz third respondent (the Minister of Health) and thirteenth respondent (the MEC for Health, Western Cape) oppose the application and have filed the necessary opposing papers. The third respondent is represented by Mr I V Maleka SC assisted by Mr T B

Hutamo while Mr D B Ntsebeza SC with Ms K Pillay act for the thirteenth respondent.

Purpose of Application

[7] The purpose of this application as can be deduced from the notice of motion is to declare certain provisions of the National Health Act 61 of 2003 (the definitions of “municipal health services” and “primary health care services”, section 25(2)(k) and (l), the district health system provided for in chapter 5 of the Act, section 29, 31(1) and (2), 33(1), 31(5)(b) and 41(1) unconstitutional and invalid. The applicants contend that the health services rendered by the municipalities under the Act as well as the district health system and primary health care controlled by provincial governments, in terms of the Act are unconstitutional and invalid.

[8] During the course of argument and in their heads of argument the applicants have now seemingly abandoned substantial aspects of the relief originally sought in their notice of motion. They now seek relief that only the following provisions of the National Health Act are inconsistent with the constitution:

8.1 Chapter 5 of the National Health Act in its entirety (ie sections 29 to 34)

8.2 Alternatively:

8.2.1 The definition of municipal health services in section 1;

8.2.2 Section 29(2) of the Act;

8.2.3 Section 30 of the Act;

8.2.4 Section 31(5)(b) of the Act;

8.2.5 Section 41(1) of the Act.

Relevant Occurrences

[9] I set out hereunder some relevant occurrences that might have caused the applicants to initiate the present court proceedings to challenge the constitutionality of certain provisions of the Act. The factual position regarding the occurrences seems to be common cause between the parties.

[10] In the Free State Province the ninth respondent transferred municipal employees involved in the rendering of primary health care in the areas of jurisdiction of three of the five district municipalities, namely the Xhariep District Municipality (with effect from 1 November 2004), the Motheo District Municipality (with effect from 1 January 2005), into the employment of the Free State Provincial Department of Health. The first applicant launched proceedings on behalf of its members so transferred in the Labour Court under case number JS77/2005,

requesting relief in respect of non-compliance with the provisions of section 197 of the LRA and a declaration on *inter alia* such transfer being contrary to the provisions of section 152(1), 151(4) and 156(1)(a) of the constitution.

[11] On 16 November 2004 the first applicant addressed correspondence to the third respondent, stating that it is of the opinion that primary health care should be provided by local municipalities, due to the fact that the services rendered by municipalities are of an acceptable quality and standard, and due to the employees rendering the services being equipped to meet the unique demands of communities. In said letter the first applicant informed the third respondent that the provision of primary health care services rendered by local municipalities are of an efficient nature and meet the service delivery requirements of national government. The first applicant furthermore stated that there is no requirement that the provision of primary health care services should be tampered with and that this function be removed from municipalities. The third respondent was informed that the problem regarding the migration and transfer of staff involving primary health care into the employment of provinces needs to be resolved on a national level and not on the fragmented basis various provinces approached the matter.

No reaction has been forthcoming from the third respondent in respect of this correspondence.

[12] During June 2005 the seventh respondent propagated an intention in transfer municipal employees involved in primary health care services in the Limpopo Province, into the employment of the Provincial Department of Health. Pursuant thereto the first applicant instructed its attorneys of record to address correspondence *inter alia* to the third respondent and the head of the Department of Health, Limpopo Province. In such correspondence it was pointed out that such transfer would be unconstitutional *inter alia* as municipalities would not be complying with their obligations in terms of section 152(1) of the constitution. No reaction has been forthcoming in respect of such correspondence. Although no undertaking was given the seventh respondent did not implement such transfer.

[13] In the light of these occurrences involving its members, the first applicant makes the following submissions as contained in paragraphs 48 and 49 of the founding affidavit:

[14]

> "48. It is imperative for the First Applicant, its members, and the other Applicants, to obtain clarity on the

constitutionality of the Act and the implementation of its provisions. The migration of personnel involved in the rendering of primary health care services from municipalities into the employment of provincial departments of health, causes a high level of anxiety amongst the First Applicant's members involved in the rendering of primary health care services. It impacts negatively on their morale. Remuneration, benefits and conditions of service, which the primary health care personnel employed in the local government service enjoy, are not reconcilable with those of personnel employed in the Provincial Departments of Health. The migration and transfer of such personnel impact negatively on service delivery requirements and are to the detriment of the communities that rely on such necessary and vital service. The unconstitutionality of the Act, as submitted *infra*, disempowers municipalities to perform their constitutional functions. This uproots and unsettles the members of the First Applicant and other municipal health care personnel to the prejudice of the communities served by them.

49. Municipal employees rendering primary health care

> services have been active in their respective communities for a number of years and are therefore qualified to meet the requirements of the community they serve. Employment by provincial governments entails transferability of personnel and impending their accountability to a specific community. An employee who can be uprooted at the whim of an employer is not as entrenched in a community as an employee that builds a career and a life in the community that he or she serves. Such an employee knows he or she has less at stake and owes the community less of an allegiance as a transfer can be enforced or demanded tergiversatorily."

[15] In a nutshell the submission is to the effect that the National Health Act violates the constitution in that it strips the municipalities of their functions in health care matters. That it further prescribes to the local governments how to operate their functions.

[16] In response to the submissions made by the applicants as set out above the respondents' main submissions are to the effect that:

The local government derives its original powers and assigned powers from the constitution and as such the National Health Act does not

infringe on those powers. The constitution does not define municipal health services and as a result the definition thereof is left to the legislature. The municipal health services as defined in the Act is not exhaustive and would still include those primary health services practised by the municipalities in the past.

The respondents submit further that the powers and functions of the district health council as established in terms of the Act are not as wide as they are made to be.

Point *In Limine*: *Locus Standi* of the Applicants

[17] The first applicant has instituted these proceedings both in its own interests and in the interests of its members involved in the rendering of primary health care services. The first applicant has specifically stated that it acts in terms of section 38(e) of the constitution.

The submission on behalf of the thirteenth respondent is that in order for the applicants to rely on section 38 of the constitution, they must allege that a right in the Bill of Rights has been infringed or threatened. It is argued that the applicants have failed to demonstrate that a right in the Bill of Rights has been infringed or threatened, and to that extent, the argument goes, they have no standing in terms of section 38 of the constitution.

[18] In my view the point *in limine* raised herein has no merit. It was held in *Ferreira v Levin NO* 1996 1 SA 984 (CC) that as long as a court has jurisdiction to grant the required relief, the applicants will have standing if:

1. There is an allegation that a right in the Bill of Rights has been infringed or threatened; and

2. The applicants can demonstrate with reference to the categories listed in section 38(a) to (e) that there is sufficient interest (not necessarily their own interest) in obtaining the remedy they seek.

The applicants do not need to allege that a fundamental right of the persons listed in the categories has been infringed or threatened. The allegation need merely be that, objectively speaking, a right in the Bill of Rights is infringed or threatened. It does not have to be any particular person's fundamental right. See: Currie De Waal: *The Bill of Rights Handbook* 5th ed, page 91.

[19] It is trite law that associations acting in the interest of their members have *locus standi* to act. In *Transvaal Agricultural Union v Minister of*

Land Affairs 1997 2 SA 621 (CC) and *South African National Defence Force Union v Minister of Defence* 1999 (3) BCLR 321 (T) 323H the applicant in both cases (respectively, an association acting on behalf of farmers affected by land reform legislation and a trade union) appeared to have qualified for these categories [section 38(e)] without any difficulty.

Point *in limine*: Ripeness

[20] It has been suggested in the hearing that the applicants' application is premature because the new scheme of the Act sought to be challenged and declared unconstitutional has not yet been implemented. That the implementation of the new scheme is some hypothetical threat that will take place only at an undisclosed time in the future. In response counsel for the applicants correctly pointed out that the papers show that the scheme is already underway and that the provinces have been implementing the Act. Reference was made to the Free State Province who has transferred primary health care workers from various district municipalities to the province in November 2004, December 2004 and January 2005. In June 2005 the Limpopo Province indicated its intention to transfer primary health care workers from municipalities to its own administration.

[21] The fact that certain provisions of the National Health Act 61 of 2003

have not yet come into operation cannot be a bar to their constitutional challenge section 81 of the constitution provides:

> "A Bill assented to and signed by the President becomes an Act of Parliament, must be published promptly, and takes effect when published or on a date determined in terms of the Act."

[22] In *Khosa and Others v Minister of Social Development and Others*; *Mahlaule and Others v Minister of Social Development and Others* 2004 6 SA 505 (CC) the Constitutional Court held as follows:

> "The Welfare Laws Amendment Act has been signed by the President and is therefore an Act of Parliament within the meaning of s 81 of the Constitution. In terms of s 172(2)(a) a Court may make an order concerning the constitutional validity of an Act of Parliament. Thus the fact that s 4B(b)(ii) has not yet been brought into force should not remove it from the jurisdiction of this Court to determine its constitutionality."

[23] I accordingly rule that the two points *in limine* regarding *locus standi* of applicants and ripeness of these proceedings raised by the thirteenth respondent are dismissed.

The Constitutional Autonomy of Local Government

[24] Under our previous order, which embraced parliamentary sovereignty, municipalities were creatures of statute and enjoyed only delegated or subordinate legislative powers derived exclusively from ordinances or Act of Parliament. It followed that municipal regulations or bylaws that went beyond the powers conferred, expressly or impliedly, by the enabling superior legislation, were *ultra vires* and invalid.

In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 1 SA 374 (CC) the Constitutional Court observed that, when Parliament was supreme, the existence and powers of local government were entirely dependent upon superior legislation. The institution of local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial government.

[25] Matters, however, became different under the present constitutional dispensation. Local government now derives powers, functions and duties directly from the constitution. A municipality enjoys “original” and constitutionally entrenched powers, functions, rights and duties that may be qualified or constrained by law and only to the extent the constitution permits. Its powers may derive from the constitution or from legislation of a competent authority or from its own laws.

[26] In *City of Cape Town and Another v Robertson and Another* 2005 2 SA 323 (CC) at para 59 the Constitutional Court commented as follows on the constitutional relationship between local government and other spheres of government:

> "Subsection 40(1) of the Constitution entrenches the institutions of local government as a sphere of government and pronounces all spheres of government to be distinctive, interdependent and interrelated. Subsection 41(e) and (g) articulate and preserve the geographical, functional and institutional integrity of local government. In turn ss 43(c) and 151(2) confer original legislative and executive authority on municipal councils. The constitution expressly precludes the national or a provincial government from impending the proper exercise of powers and functions of municipalities. Thus a municipality has a right to govern the local government affairs of its area and community. However, the duties, powers and rights of municipalities have to be exercised subject to national or provincial legislation as provided for in the Constitution."

The Powers of Municipalities over Health Services

[27] In regard to the provision of health services, section 156 of the

constitution provides that a municipality has the executive authority in respect of, and also the right to administer, local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the constitution. It also provides that a municipality has executive authority to administer any other matter which may be assigned to it by national or provincial legislation.

Part B of Schedule 4 of the constitution makes it clear that municipal health services constitute one of the matters on which a municipality is entitled to exercise executive authority.

[28] Whilst a municipality has executive powers over health services aforesaid, it should be borne in mind that section 155(6) and (7) of the constitution make it clear that both national and provincial levels of government have the power to ensure that municipalities effectively fulfil their functions in regard to, amongst others, the provisions of municipal health services. To this extent, section 155(7) empowers national and provincial governments to regulate the exercise by municipalities of their executive authority, in respect of, amongst others, the provision of municipal health services.

[29] Reconciling these provisions in paragraphs [27] and [28] above one may come to a conclusion that the national and provincial levels of

government are entitled, by legislation or other means, to monitor and supervise the provision of municipal services by municipalities but must do so in a way which does not compromise or impede the ability of municipalities to render municipal services.

[30] The following dictum in the Constitutional Court case of *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another* ; *Executive Council, Kwa Zulu Natal v President of the Republic of South Africa and Others* 2000 1 SA 661 (CC) para 29, is appropriate:

> "Municipalities have the fiscal and budgetary powers vested in them by Chap 13 of the Constitution and a general power to 'govern' local government affairs. This general power is 'subject to national and provincial legislation'. The power and functions of municipalities are set out in s 156 but it is clear from ss 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by national and provincial governments which may not use their powers to compromise or impede a municipality's ability or right to exercise its powers or perform its

functions. There is also a duty on national and provincial governments … to support and strengthen the capacity of municipalities to manage their own affairs …"

Constitutional Attack on Chapter 5 of the National Health Act 61 of 2003

[31] The applicants have launched a constitutional attack directed at Chapter 5 of the Act in so far as it establishes a district health system that includes the establishment of health districts administered by the district councils. The specific sections sought to be declared unconstitutional are sections 29 to 34 of the Act.

[32] The applicants take issue with the fact that Chapter 5 of the Act does not set out the responsibilities and functions of local government but in its place establishes a district health system which is based on districts which follow the territorial limits of metropolitan and district municipalities and district health councils which are vested with health care functions which the constitution vests in local government by section 156(1)(a) of the constitution read with Schedule 4B.

According to applicant the functions of the district health council will effectively usurp the health care functions vested in local government.

[33] Further issues taken by the applicants are to the effect that:

33.1 Although a district health council will perform local government health functions and will have jurisdiction over exactly the same area as a metropolitan or district municipality, its members are not elected by the municipal electorate nor are they appointed by a metropolitan or district municipality. Instead they are appointed by a provincial MEC responsible for health after consultation with the provincial MEC for local government and the metropolitan or district council;

33.2 The Act obliges municipalities to perform functions through health councils and thus requires municipalities to contribute to the budget and health performance targets of the district health council.

[34] Based on the aforesaid, the applicants asset that the role assigned to the district health councils is unconstitutional and invalid because it is subversive of the constitutional status of local government.

[35] To address the issue raised by the applicants regarding the constitutionality of the provisions of the Act one must have regard to the overarching objective of the Act.

[36] The long title of the Act makes it clear that it is an ambitious and forward-looking piece of legislation, designed to provide a framework for a new national health system which takes into account constitutional obligation imposed upon the state, in regard to the provision of health services, and also other laws on the national, provincial and local spheres of government, regarding health services. The Act seeks to redress the historical imbalances and legacies of the past relating to the provision of health services in the republic.

[37] The preamble is more definite than the long title in the expression of the fundamental purpose of the Act. It makes clear that, through the Act, the state seeks to fulfil its obligation to respect, protects, promote and fulfil fundamental rights of persons in the country, including the right of access to health care services, the rights of children and other vulnerable groups of persons to basic health care services and the right of all persons to emergency medical treatment.

[38] Through the preamble the Act contemplates that various and fragmented elements of health system in the republic must be united into a single national health system. It also requires cooperative governance on the management of health services, within national guidelines, and also provides norms and standards in which provincial and local spheres of government, and health districts, are required to

follow in addressing questions of health policy and delivery of health care services.

[39] This court is entitled to have regard to the terms of the preamble of the Act as it constitutes an important tool in the interpretation of its provisions.

See *National Director of Public Prosecutions and Another v Mahomed NO and Others* 2002 4 SA 843 (CC) para 14; *Mogajane v Chairperson, North West Gambling Board and Others* 2006 5 SA 520 (CC) para 81.

[40] Section 3(2) of the Act makes it clear that the national department of health, every provincial department and every municipality is required to establish such health services as are required in terms of the Act. Therefore, a municipality has the statutory responsibility to provide health services that are required in terms of the Act. There is nothing in any other provision of the Act which relieves a municipality of this statutory obligation imposed upon it in terms of section 3(2) of the Act.

[41] Flowing from the obligation imposed upon a municipality in section 3(2) the Act imposes further obligations on a municipality in terms of section 12, 18(2), 32(1) and 33 of the Act.

[42] In my view the Act expressly provides that municipalities must play an important role in providing health services in their jurisdictions as part of the new health system brought about by it.

Irrespective of its composition and the appointment of its membership the powers and functions of the district health council clearly do not support the assertion that it "usurps" the powers and functions of local government.

[43] In the circumstances there is no basis upon which the impugned legislative provisions of the Act fall to be declared unconstitutional.

Definition of Municipal Health Services

[44] In paragraph (a) of the amended notice of motion the applicants rely upon the following provisions of the constitution in their attack on the definition of municipal health services: section 27(1)(a) of the constitution, read with sections 41(1)(e)(f) and (g), 152(1)(b), 153, 156(1)(a) and 156(4) of the constitution.

The basis upon which the applicants claim that the definition of municipal health services in section 1 of the Act is inconsistent with these provisions is that that definition does not refer to or include

"health care services" including "primary health care services". They content that the current definition of municipal health services in section 1 of the Act is narrow and cannot be interpreted in a way which includes "health care services" and "primary health care services". They claim that the definition of municipal health services is confined to "environmental health services" and that that has the effect of disempowering municipalities from rendering services that normally reposes within their powers.

[46] Section 1 of the Act defines municipal health services in the following way:

> "For the purpose of this Act, [municipal health services] includes –
>
> (a) water quality monitoring;
>
> (b) food control;
>
> (c) waste management;
>
> (d) health surveillance of premises;
>
> (e) surveillance and prevention of communicable diseases, excluding immunizations;
>
> (f) vector control
>
> (g) environmental pollution control;
>
> (h) disposal of the dead; and

(i) chemical safety;

But excludes port health, malaria control and control of hazardous of substances."

[47] The applicants say that the items of health safety identified in paragraphs (a) to (i) of the definition constitute "environmental health services". Relying on that description, they then say that the definition excludes health services such as primary health care services which municipalities provided before the Act came into force. They then argue that the municipalities are therefore disempowered from providing, amongst others, primary health care services within their area of jurisdictions because of the definition of municipal health services in section 1 of the Act.

[48] Is the applicants' interpretation of the definition in section 1 of the Act correct? In my view the answer is in the negative. The specific elements of the definition are preceded by a transitive verb, "includes" which is expansive in its ordinary meaning. The following dicta of the Constitutional Court case of *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and Others* 2004 1 SA 406 (CC) para 17 and 18 is instructive:

"The question is whether the word 'includes' in this context has

> the effect that the list of images in the definition is exhaustive of what constitutes child pornography for the purpose of the Act. The most common sense of 'includes' is non-exhaustive, signifying that the list extends the meaning of the term being defined. In *R v Debele* the Court recognized that the word may also signify that the list provides an exhaustive explanation of the term being defined.
>
> The correct sense of 'includes' in a statute must be ascertained from the context in which it is used. Debele provides useful guidelines for this determination. If the primary meaning of the term is well-known and not in need of definition and the items in the list introduced by 'includes' go beyond the primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that 'includes' is non-exhaustive. If, as in this case, the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case 'includes' is used exhaustively."

See also *R v Debele* 1956 4 SA 570 (A) 575B-575H.

[49] The constitution does not define the concept of "municipal health

services". The use of the verb "includes" in the definition of municipal health services is understandable, having regard to the fact that the concept of "municipal health services" does not have a well-known primary meaning. The definition of municipal health services is thus more expansive and not limited as is suggested by the applicants.

[50] Section 34 of the Act provides as follows:

> "Until a service level agreement contemplated in section 32(3) is concluded, municipalities must continue to provide, within the resources available to them, the health services that they were providing in the year before this Act took effect."

The definition of "health services" in the Act means, amongst others, municipal health services. The provisions of section 34 of the Act expressly provide that municipalities are requires to provide "the health services" that they were providing in the year before the Act came into force. The provisions of section 34 thus constitute the necessary transitional arrangements which guarantee the continued provision of health services by municipalities when the Act took effect.

[51] I accordingly came to a conclusion that read in the context of section 34, and the definition of health services, the definition of municipal

health services is capable of a construction that incorporates such primary health care services as municipalities provided before the Act came into force.

The definition, far form being narrow or restrictive as suggested by the applicants, is, in fact, broad and extensive and includes within it a range of health services that were ordinarily provided by municipalities as the time the Act came into force.

Declaratory Relief

[52] Counsel for the applicants suggested that even in the event of dismissing the application regarding the constitutionality of the impugned provision of the National Health Act I should grant an alternative relief in the form of a declaration as to the definition of the concept, “municipal health services”.

I am inclined to agree to the suggestion and I accordingly give the following declarator:

It is declared that municipal health services within the meaning of section 1 of the National Health Act 61 of 2003 includes health services ordinarily provided by municipalities at the time the Act came into operation.

Costs

[53] The applicants are unsuccessful in this case but I am minded not to make costs to follow the event. The respondents sought to persuade me that the applicants ought to pay costs having regard to the nature of the constitutional complaint lodged by the applicants. In the present case there seems to me to be important considerations which militate against the award of costs. The issues at stake are important matters of public interest affecting local government structures throughout the Republic.

The applicants sought to vindicate a constitutional protection. Nothing before me suggests that they ought to be mulcted for costs for doing so. On the contrary an order as to costs against the applicants would be inappropriate. I plan to make none. I consider that an appropriate order is for each party to pay their own costs.

Order

The application is dismissed. Each party is to pay its own costs.

E M MAKGOBA
JUDGE OF THE HIGH COURT

3298/2006

Heard on: 25, 26, 27, 28 March 2008

For the Applicants:	Adv Wim Trengove SC & M Chaskalson
Instructed by:	Messrs Savage Jooste & Adams Inc, Pretoria
For the Respondents:	Adv I V Maleka SC, T B Hutamo, D B Htsebeza SC & K Pillay
Instructed by:	The State Attorney, Pretoria
Date of Judgment:	16 April 2008