

There is a duty on the NA and the NCOP to facilitate public participation in their legislative processes, including the section 73 process which precedes section 75 in deliberating over NT's decision. Parliament may renew the decision to withhold the transfer but not for longer than 120 days at a time.

3 Findings on the application to the facts

The defaulting municipalities had failed to make payment to creditors Eskom and the Water boards. This fact evidences that the defaulting municipalities did not take the reasonable steps to make payment within the 30 days as the norm requires. Therefore, there was a breach of the payment norm in terms of section 216(1)(c) thus giving meeting the first substantive requirement of the intervention.

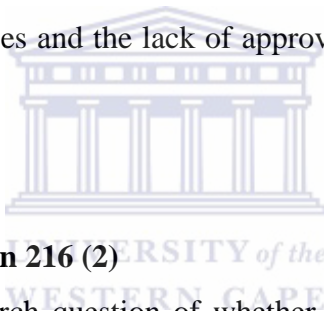
In testing the seriousness of the material breach, it was found that the amounts owed by all of the 59 municipalities were substantial in value and therefore serious. Further, the material breach was also persistent because the debt owed by the 59 defaulting municipalities had been occurring consistently over time, leading up to the accumulation of the substantial amounts referred to above. The findings showed that there was a serious and persistent material breach of the NT norms and standards. Therefore, the latter did meet the substantive grounds as required by section 216(2) to invoke the financial intervention in respect of the 59 municipalities.

In terms of the MFMA, the NT must engage in consultation with the relevant municipalities prior to invoking the intervention. The findings show that there was no such consultation with the 59 municipalities prior to the withholding of the LES. While the NT submitted records of meetings that had taken place since 2009 in Parliament, the meetings implied, did not meet the requirement of consultation. The findings made in the application in Chapter 3 shows that these meetings could not amount to consultation on the withholding of the LES because in none of these meetings, did the issue of withholding the LES from the municipalities become the main point of discussion. In addition, consultation with every single one of the 59 defaulting municipalities had to have occurred, this was not the case. When consultation becomes a validity requirement for the legislation in question, as in this case, the effect is that the actions of the NT in not consulting with the affected 59 municipalities prior to withholding the LES as prescribed in the legislation, amounts to a breach of the procedural requirements for section 216. The NT's actions of withholding the LES cannot be legal based

on this lack of consultation with the 59 affected municipalities even though the NT may have had substantial grounds for invoking the intervention, the procedural requirements need to be complied with in order to be constitutional.

It was required that Parliament approves the decision taken by the NT within 30 days of it being made. However, this did not occur in the prescribed time limit of 30 days. The failure of Parliament to approve Treasury's decision within the prescribed 30 days means that the decision to withhold the transfer should have lapsed retrospectively.

The findings in relation to answering the first research question shows that the NT failed to comply with the procedural requirements for invoking section 216(2) of the Constitution. Therefore, it can be concluded that while the NT may have had substantive grounds for invoking the intervention, it did not fully meet the procedural requirements. The NT thus withheld the transfer of the LES illegally from the 59 municipalities because of its lack of consultation with the municipalities and the lack of approval from Parliament of its decision to withhold the transfer.



4 Findings on the value of section 216 (2)

In dealing with the second research question of whether there was any value in using the intervention against defaulting municipalities, the effectiveness of the intervention in terms of receiving payment from non-paying municipalities' has been looked at. Further, the case-study on Ventersdorp Local Municipality gives insight into the impact the intervention has had on affected municipalities, its residents and its other creditors.

On the point of effectiveness, the findings are that the intervention has been ineffective in bringing forth payment from the defaulting municipalities. Initially it looked as if the intervention was working because the municipalities signed payment agreements with the two creditors Eskom and the water Boards when their LES was withheld. Once they had signed, their LES was released. Unfortunately, more than half of the municipalities that had signed the payment agreements soon reneged on their commitments to pay Eskom. This is evidence of the fact the intervention has been ineffective in bringing forth payment and affecting the behaviour of non-paying municipalities.

The municipalities are still struggling with the same issues it had since the first time the intervention was imposed. The intervention has not done anything to address the underlying issues of the non-payment itself. One of the underlying causes leading to non-payment by the municipalities was that they were failing to collect revenue from residents. The municipalities who are struggling to pay have been identified as poor-rural municipalities, poor in the sense that they cannot raise their own revenue as do most urban based metropolitan municipalities. The aim of the intervention was essentially a threat for the municipality to change its behaviour in the way it dealt with its revenue collections. By placing pressure on municipalities through the use of the intervention, the desire was that the municipalities would in turn place more pressure on residents to pay. The defaulting municipalities are in areas where the residents are poor and many are indigent, meaning that they are dependent on the municipality for delivery of free basic services. Big business that owes on outstanding bills to the municipality is also in a similar situation of having a low income consumer base.

The case study of Ventersdorp Local Municipality has been used to give insight into the impact the intervention has had on the municipality and its residents as well as other creditors. The findings are that the intervention has had a negative impact on the municipality. The reason for this is that the municipality has been over 90 percent dependent on its LES transfer over the years. Once its LES was withheld, the municipality had to use whatever funds it had available to pay its staff salaries in order to remain viable. To remain viable was crucial for its residents (paying residents and indigent alike), who are dependent on the small town municipality for delivery of basic services.

Although none of the services were cut by Eskom and the water boards, the municipality was left in a very vulnerable position while being responsible for service delivery to indigent residents. This means that for four months¹⁹⁵ the municipality focused on salaries and the other creditors received no payment from the municipality while providing services. It had negotiated with other smaller creditors that they would receive payment as soon as the LES was released.

Therefore, one can conclude that based on these findings from the case-study, there has in effect been limited value of using section 216(2) to address the issue of defaulting municipalities. It was not particularly effective in getting the 59 defaulting municipalities to pay off their debt in arrears to Eskom and the water boards. The withholding of the LES

¹⁹⁵ LES was withheld on 20 March 2015 and released to Ventersdorp Local Municipality on 18 July 2015.

transfer from these municipalities were not effective as a first resort in addressing non-payment and it has had a negative impact on the affected municipalities' viability and risked service delivery to paying and non-paying residents alike.

Another finding, which falls out of the main research questions of this paper but finds relevance to the application of the intervention in terms of section 216(2), is the debt owed to municipalities from other arms of government. The NT initially committed to ensuring it would enforce the same intervention on national and provincial spheres of government to collect the debt owed to municipalities, it has not done so.¹⁹⁶ Findings since July 2015, shows that the NT has gone contrary to its commitment, having expressed the fact that the amounts owed to municipalities by other spheres of government is merely a drop in the ocean compared to the debt owed by private households and business.¹⁹⁷ However, the amount owed to municipalities is only one of the considerations, the main point is that all spheres of government should be treated equally and if the intervention was applied to local government, then it should also be applied to the other two spheres of government to deal with their non-payment of services provided.

5 Recommendations

Section 216(2) of the Constitution does not give the NT a 'free hand', "steps" can only be "appropriate" to the extent that they also comply with the constitutional scheme governing the "interrelatedness"¹⁹⁸ between the national and local government. Therefore the NT expects that municipalities should comply with former norms and standards. Therefore, it should also apply the law itself in the manner prescribed in terms of the Constitution and legislation. Any intervention powers that the NT may draw from section 216(2) of the Constitution must comply with the requirements, both substantively and procedurally because of the vast effect the intervention has not only on the municipality who derives the majority of its income from the LES transfer but also the impact the withholding will have on residents should the intervention cripple a municipality's viability and functioning.

¹⁹⁶ FFC presentation to Standing Committee on Appropriations on withholding of LES allocations, 29 July 2015.

¹⁹⁷ National government departments owe municipalities R4.8-billion in unpaid services according to the department of co-operative governance and traditional affairs. The money owed by private households and businesses is R104-billion. (See article in *Mail & Guardian* 27 Sep 2015, available at <http://mg.co.za/> (accessed 8/12/15).

¹⁹⁸ See para 2.4 for interpretation on 'interrelatedness'.

Further, complying with the consultation process is a necessary tool for better decision making. It is submitted that the NT should not understate or overlook the importance of consultation with local government. The NT needs to engage in sufficient consultation with affected municipalities before it withholds the LES transfer as is prescribed under the procedural requirements for invoking section 216(2). Apart from fulfilling legal requirements, this process would be highly beneficial to both parties as the NT can address the correct municipalities and hear the views of the municipality in order to adequately provide the financial guidance and support the municipality is clearly in need of. Furthermore, municipalities will have the time to respond and to prepare for this interruption of its income. The needs of the residents can also be dealt with in a manner that will ensure there are no public protests as a result of a breakdown in service delivery.

Parliament, as the lawmaker, must itself comply with the law (MFMA) as these are the safeguards placed in the system to prevent an abuse of power from national government over local government.

Lastly, because section 216(2) has limited value, the NT must seek to use other methods to correct the systemic problem of non-payment amongst municipalities. The more appropriate measure against defaulting municipalities, who are in a debt crisis, would have been the use of section 139(5)(a) financial recovery plan. This intervention is specifically aimed at municipalities who are experiencing a financial crisis and as a result of its financial crisis it is in serious or persistent material breach of its obligations to meet its financial commitments. Certain challenges in the implementation of the financial recovery plan may arise if the municipal council refuses to implement the recovery plan either wholly or in part but this is a challenge that needs to be addressed going forward by legislatures and policy-makers.

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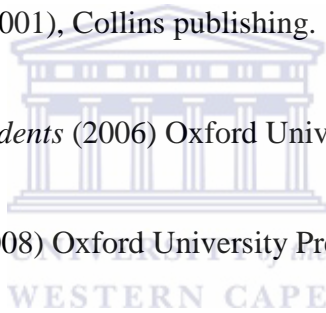
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