

Avoiding financial perils in
medium sized municipalities-
Staying judicial execution and
probable consequences
thereof.

Current status of municipalities

- **Ratings Africa published latest Municipal Financial Sustainability Index, focussing on the best/ worst municipalities in South Africa.**
- **The latest 2018 index; a “shocking” revelation, large portion of South Africa’s biggest municipalities are in serious financial trouble – need R22.4 billion government bailout to become financially stable again.**
- ***“Given that the financial sustainability of the key local municipalities in South Africa is weak, our expectation is that the quality of service delivery is likely to deteriorate over the short to medium term,”*** Ratings Africa

Financial constraints facing municipalities

- Poor liquidity ratios
- Non-payment of creditors (non-payment; overextended age analysis; non adherence MFMA)
- Delictual Liability relating to failing infrastructure (Capex/Opex)
- Decreased capital expenditure due to insufficient budget/ poor/inadequate maintenance; Aging infrastructure

Financial constraints facing municipalities

- Failing and decreasing rates collection
- Increased community activism due to lack of service delivery
- Increasing expenditure based on bulk services (water, electricity)

Financial constraints in municipality

Cascading legal consequences → Judgment obtained

Writ/ warrant execution → Attachment/ removal →

Legal consequences in relation to financial distress

- Civil litigation against municipalities differentiating between action and application proceedings
- Section 3 notices Institution of Legal Proceedings against Organs of State Act
- Delictual liability
- Non-payment of creditors
- Defective Credit Control Procedure (audi alteram partem rule)
- Rule nisi applications ex parte (mandament of spolie) (costs awarded; contribution towards costs)
- Administrative justice remedies PAIA and PAJA
- Property Rates section 53(2) and 78(1)(e) objections appeals Valuation Appeal Board
- Section 62 procedure
- Judicial execution/ attachment; obtaining writ of execution; warrant of execution
- Payment of practitioners obo municipality; effect of overreaching (taxation, relevant scales applicable MOU Law Society; taxation master)

Legislation resisting stay in execution

- Section 3 of the State Liability Act 20, of 1957 affords protection of applicant's goods from attachment.
- Section 239 of the Constitution; a municipality is a state organ in the sense that it is a department or administration in the local sphere of government.
- *Mateis v Ngwathe Plaaslike Munisipaliteit en Andere* 2003 (4) SA 361 (SCA)
- The meaning of the word 'State' thus depended on every specific piece of legislation in which it occurred.
- Liability of the central or provincial government.
- *"The liability of municipalities, which were indeed also a form of government, was not mentioned, neither with regard to cause of action, nor as possible defendant, nor as possible paying party, and was therefore excluded by implication."*

Financial perils caused by litigation (legal costs; punitive costs; interests ordered attachment and removal costs)

- **AWARD OF COSTS IN COURTS DISCRETION, NORMALLY FOLLOWS THE SUCCESSFUL PARTY**
- General rule is that the successful party is entitled to his costs.
- The court can WITH good reason ORDER costs, in whole or in part, e.g. excessive demands, taking unnecessary steps, vexatious proceedings.
- The court can, for good reason, order the successful party to pay all or part of the other parties costs.
- The court can, in special circumstances, order one party to pay the costs of the opponent on an attorney and client scale and or order the unsuccessful party to pay costs de bonis propriis, (mala fide acts)
- Common cause that interest awarded, costs and/or punitive costs; Sheriff costs, writ/ warrant of execution constitute **Unauthorised, irregular or fruitless and wasteful expenditure**

Mitigation of financial perils caused by judicial execution (classification of costs; individual liability)

32. Unauthorised, irregular or fruitless and wasteful expenditure

Without limiting liability in terms of the common law or other legislation –

- any political office bearer or official of a municipality who **deliberately or negligently** committed, made or authorised an **irregular expenditure**, is liable for that expenditure
- any political office bearer or official of a municipality who **deliberately or negligently** made or authorised a **fruitless and wasteful expenditure** is liable for that expenditure
- **A municipality must recover unauthorised, irregular or fruitless and wasteful expenditure** person liable unless the expenditure it is –
 - authorised in an **adjustment budget**; or
 - certified by the **municipal council**, after **investigation by a council committee**, as irrecoverable and written off by the council; and

Mitigation of financial perils caused by litigation (Criminal liability)

- The accounting officer **must** promptly inform the mayor, the MEC for local government in the province and the Auditor-General, in writing, of-
- any **unauthorised, irregular or fruitless and wasteful expenditure** incurred by the municipality;
- **Writing off** any unauthorised, irregular or fruitless and wasteful expenditure as irrecoverable, no excuse in **criminal or disciplinary proceedings against a person charged with the commission of an offence or a breach of this Act** relating to such unauthorised, irregular or fruitless and wasteful expenditure
- The accounting officer must report to the South African Police Service all cases of **alleged FINANCIAL OFFENCES**; in the case of the AO the municipal council is obligated to report the offence to South African Police Services. (MFMA Regulations on Financial Misconduct and Criminal Proceedings)

Statutory financial obligation to stay judicial execution

Senior managers and other officials of municipalities

- exercising financial management responsibilities **must take all reasonable steps** to ensure
- financial and other resources of the municipality are **utilised effectively, efficiently**, economically and transparently;
- that **any unauthorised, irregular or fruitless and wasteful expenditure** and any other losses are prevented;
- that the **assets and liabilities of the municipality are managed effectively and that assets are safe guarded and maintained to the extent necessary**;
- *Department of Co-Operative Governance, Human Settlements and Traditional Affairs, Limpopo Province v Daniel Seopela N.O.* **reasonable care** when dealing with considerations of “**fruitless and wasteful expenditure**”, **complete failure to take proper care**
- *Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another 2003 (2) SA 473 (SCA)* confirming the distinguishing characteristics between **gross negligence** and **ordinary negligence**

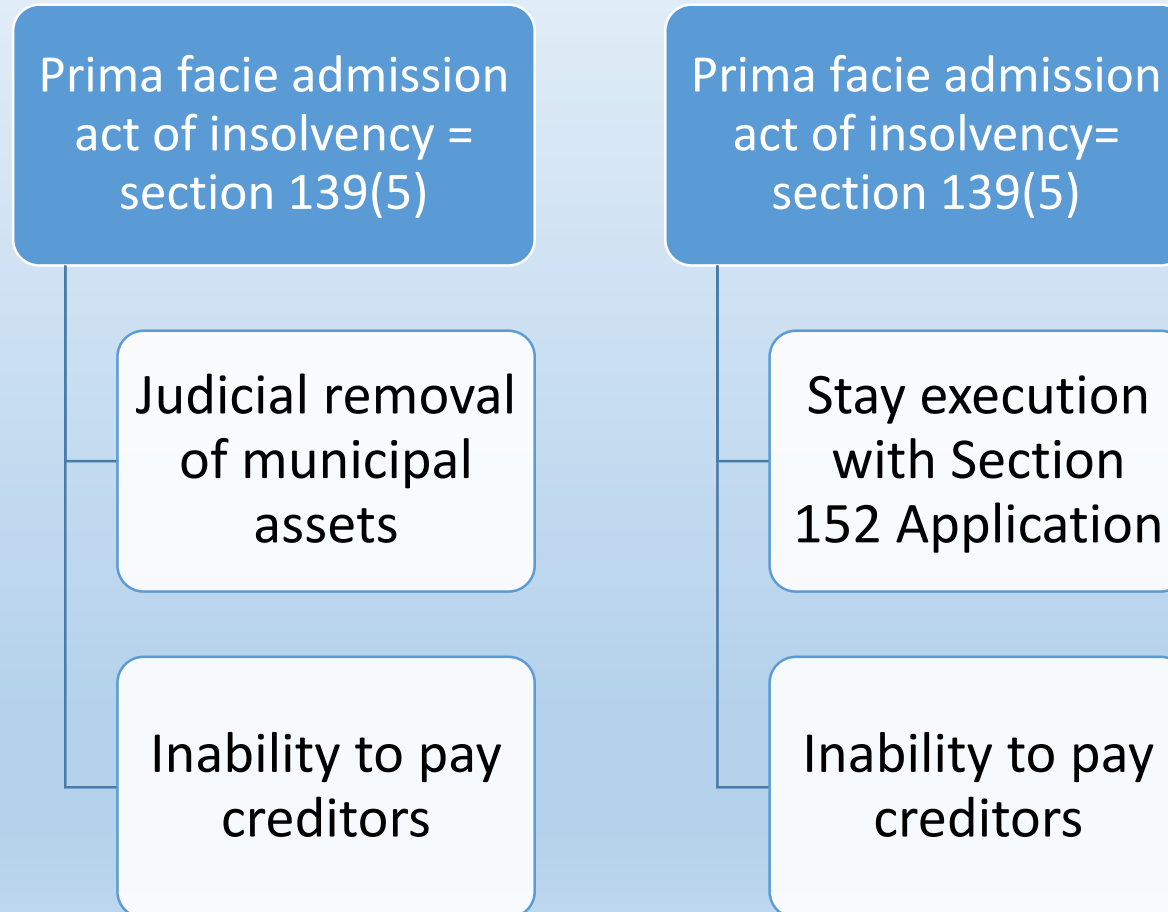
Liability of role-players in terms of judicial execution

- Executive Mayor (MFMA; DoA) section 29 (oversight; unforeseen; unavoidable)
- Accounting Officer (MFMA; DoA) offence fails to take reasonable steps to prevent unauthorised; irregular or fruitless and wasteful expenditure; section 173
- Council (MFMA; DoA) The **council** of a municipality **must take all reasonable steps** to ensure that all cases referred are reported to the South African Police Service if **the charge is against the accounting officer**; or the **accounting officer fails to comply**; section 32(7)
- Senior Manager (MFMA; DoA); **duty of care**; section 78; 79 MFMA

Stay judicial execution by means of section 152 Application

- If a municipality is unable to meet its financial commitments it may apply to the High Court for an order to stay. For a period not exceeding 90 days all legal proceedings, including the execution of legal process, by persons claiming money from the municipality or a municipal entity under the sole control of the municipality.
- Inability to meet financial commitments; prima facie admission that local authority for purposes of section 139(5) cannot meet its financial commitments

Judicial execution//Section 152 application= 139(5) administration



Traditional creditor stay execution applications

- Rule 42; Rule 31 High Court (within 20 days; after knowledge of judgement taken against municipality, apply to court; notice to the Respondent (Creditor) to set aside default judgement. (late application; condonation application first)
- Good cause shown; reasonable explanation default; was not willful; existence of a *bona fide* defence; application must be brought *bona fide*
- Rule 49(1) of the Magistrates' Court Rules determines that if a Defendant (Debtor) is seeking to rescind a default judgement he has 20 court days

Labour Court/SALGBC stay execution applications

- Labour Court Order; currently under review; section 145 LRA security provided; execution premature
- Stay execution, enforcement notice section 143 LRA

Conclusion