

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 1425/17

In the matter between:

**THE MEC FOR CO-OPERATIVE GOVERNANCE
& TRADITIONAL AFFAIRS, KWAZULU-NATAL APPLICANT**

and

ENDUMENI MUNICIPALITY	1ST RESPONDENT
DESIGA PADAYACHEE	2ND RESPONDENT
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	3RD RESPONDENT

J U D G M E N T

Delivered on : FRIDAY, 24 MARCH 2017

OLSEN J

[1] The Local Government : Municipal Systems Amendment Act No. 7 of 2011 (the “Amendment Act”) was promulgated on 5 July 2011. It introduced, inter alia, s54A of the Local Government : Municipal Systems Act, No. 32 of 2000 (the “Systems Act”).

[2] Section 54A (2A) (a) of the Systems Act provides that an appointment of an acting municipal manager cannot be for a period which exceeds three months. Sub-section 54A (2A) (b) of the Systems Act goes on to provide as follows.

“A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for Local Government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.”

[3] In January 2013 the South African Municipal Workers Union instituted proceedings in the High Court, Gauteng Division, Pretoria inter alia for an order declaring the entire Amendment Act inconsistent with the Constitution and invalid. In February 2016 the high court upheld SAMWU’s contention, made a declaration of constitutional invalidity, and referred the matter to the Constitutional Court for confirmation.

[4] That is how matters stood on 4 October 2016 when the first respondent in these proceedings, the Endumeni Municipality, appointed the second respondent as its acting municipal manager.

[5] That appointment generated an application by the applicant in these proceedings, the MEC for Co-Operative Governance and Traditional Affairs, KwaZulu-Natal, for an order setting aside the appointment upon the basis that the second respondent was not qualified as required by s54A(2) of the Systems Act (as amended) with the result that, as sub-section (3) of the section provides, the decision was null and void. That application has not yet been finalised.

[6] The second respondent’s acting appointment made in October 2016 was due to lapse either on 23rd or 31st December 2016, or on 3rd January 2017. (The papers are not clear on this; but nothing turns on it.) Presumably with that prospect in mind, on 23rd December 2016 the first respondent’s council passed a resolution extending the appointment to 6th January 2017. On 6th January the council passed a further resolution extending the acting appointment, on this occasion indefinitely in the sense that the acting appointment would last until the finalisation of disciplinary proceedings underway in respect of the existing municipal manager who was and still is

under suspension. The first respondent did this without applying in terms of s54A (2A) (b) to the applicant (the MEC contemplated by the section) for permission to extend the period of appointment of the second respondent.

[7] That generated the present application in which the applicant seeks an order declaring the second respondent's current acting appointment illegal, ultra vires and null and void upon the basis that s54A (3) (b) is to the effect that, questions of the qualifications of an appointee aside, if an appointment is made in contravention of the Act the decision to make the appointment is null and void. Further ancillary orders are sought restraining the second respondent from continuing in office and from performing the duties or acting in the position of an acting municipal manager in any manner whatsoever.

[8] In its affidavit delivered in opposition to the present application the first respondent sought to justify its conduct in extending the acting appointment without permission on the following bases.

- (a) As a matter of fact the first respondent needs to have the second respondent in office as its acting municipal manager. The suspended municipal manager has been away for a considerable period. Until the first appointment of the second respondent the position of acting municipal manager was filled by employees of the applicant. They could not do the job properly. The second respondent, who was already an employee of the first respondent and familiar with its affairs, was therefore appointed. He proved to be capable. That is why he was re-appointed.
- (b) It was wrong of the applicant to enforce the provisions of s54A of the Systems Act as the High Court had declared it constitutionally invalid. It amounts to the MEC ignoring a court order merely on the pretext that it has no force until the Constitutional Court confirms it. Respect for the High Court order required the applicant to defer to the High Court decision. (This argument was not advanced before me.)

- (c) The first respondent claimed that the principal that “the law does not compel a person to perform that which is impossible” in any event excused it from compliance with s54A (2A) (b) of the Systems Act. Explaining the argument in his answering affidavit the first respondent’s mayor said that “it was impossible for the first respondent’s municipal council to expect an impartial and unbiased decision from the applicant” on an application for permission to extend the period of appointment of the second respondent because the applicant had already made her stance clear in the earlier application in which she sought to have the second respondent removed because he was not qualified. For that reason, the mayor explained, instead of applying for permission, the first respondent addressed a letter to the National Minister (who is cited in this application as third respondent), saying that because the provincial department could not be objective in the matter the first respondent appealed to the National Minister’s “good office to note the council’s decision to appoint [the second respondent]...and support the institution and the people of Endumeni in accommodating such decision”.
- (d) Finally the first respondent answered the applicant’s case with reference to s41 of the Constitution. The first respondent contended that this case evidences the existence of an inter-governmental dispute and that, no effort having been made to settle it or exhaust other remedies, this court should refer the dispute back as contemplated by s41 (4) of the Constitution.

[9] When the papers in the present application were complete, and five days prior to the hearing before me, the Constitutional Court handed down its judgment confirming the declaration of invalidity made by the High Court in Gauteng. However the declaration of invalidity was suspended for a period of 24 months to allow the legislature an opportunity to correct matters. (See *South African Municipal Workers’ Union v Minister of Co-Operative Governance and Traditional Affairs* (CCT54/16) [2017] ZACC 7 (9 March 2017).)

[10] Before me counsel for the first respondent has taken the stance that, given the judgment of the Constitutional Court, he cannot oppose the grant of an order declaring the extended appointment of the second respondent for an indefinite period illegal, ultra vires and null and void. I find this concession somewhat inconsistent with counsel's argument that the maxim *lex non cogit ad impossibilia* excused the first respondent's failure to seek the applicant's permission to extend the second respondent's appointment. I will accordingly deal with that argument. However counsel pressed as his main argument the proposition that notwithstanding the judgment of the Constitutional Court, this case continues to reflect an inter-governmental dispute which justifies the refusal of the ancillary orders sought by the applicant which have as their target the immediate vacation by the second respondent of his acting office.

[11] The first respondent's reliance on the maxim *lex non cogit ad impossibilia* may be disposed of without further ado. As pointed out in *Rex v Canestra* 1951 (2) SA 317 (A) at 324D the maxim describes a defence to a failure to carry out a positive obligation imposed by law. Sub-section 54A (2A) (b) of the Systems Act imposes a positive legal obligation on a municipal council to apply in writing to the MEC to extend the period of appointment of an acting municipal manager. The fact of the matter is that the first respondent has not contended that it was impossible for it to make such an application. That disposes of the issue. The first respondent's contention is in fact that, in its view, it would be "impossible" for its application to succeed. Besides the fact that its view of the matter may very well be wrong, the first respondent's argument rests on an untenable proposition that where the law prohibits a course of conduct without prior permission, and one believes that a request for prior permission will incorrectly but inevitably be refused, one may simply disregard the legal requirement that permission should be obtained and proceed with the course of conduct. No other objection having been raised by or on behalf of the first respondent to the proposition that the current appointment should be declared invalid, that part of the relief must be granted.

[12] The two further orders sought by the applicant (and reflected in the rule nisi already issued in this matter) are orders restraining and interdicting the first respondent from allowing the second respondent to continue as acting municipal manager; and restraining and interdicting the second respondent from performing those duties. The first respondent contends that there is a dispute between the applicant and the first respondent over the question as to whether it is right and proper that the second respondent should hold and continue to hold the position of acting municipal manager. As I understand the argument for the first respondent it is that, despite the illegality of his current appointment as acting municipal manager, this court should decline to make orders preventing the performance by the second respondent of the duties of an acting municipal manager and refer that dispute back to be dealt with under the Intergovernmental Relations Framework Act No. 13 of 2005.

[13] Counsel for the applicant argues that the present proceedings have nothing to do with any dispute between government bodies. He argues that the first respondent has acted in breach of the law and the applicant seeks no more nor any less than an order compelling rectification of that breach; i.e. the cessation of the current unlawful state of affairs.

[14] It seems to me that there cannot be a genuine intergovernmental dispute, of the kind contemplated by the Framework Act or by s41 of the Constitution, over the question as to whether a government or organ of State should be permitted to act illegally. In this case it is now accepted that the extension of the second respondent's appointment was unlawful. The council purported to exercise a power (unilaterally to determine an extension of the acting appointment of a municipal manager) which it did not have. The observations of Goldstone J in paragraph 58 of the judgment in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) are apposite.

“It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the

principle that they may exercise no power and perform no function beyond that conferred upon them by law.”

[15] The Framework Act is the legislation required by s41 (2) of the Constitution to facilitate the resolution of intergovernmental disputes. Such an “intergovernmental dispute” is defined in that Act as one arising from a statutory power or function assigned to any of the parties to a dispute, or from an agreement between the parties regarding the implementation of any statutory power or function. The current disagreement between the applicant and the first respondent has not yet attained the status of an intergovernmental dispute. If the first respondent had applied to the applicant for the extension of the second respondent’s acting appointment, and the applicant had refused to sanction it, that might very well have constituted a dispute arising out of the applicant’s statutory power to determine extensions to the appointments of acting municipal managers. But that dispute could never arise – that state of disagreement could never be reached – unless and until the first respondent sought the applicant’s sanction of the proposal, and it was refused. There is accordingly at present no dispute to be referred back to the parties to be dealt with in terms of the Framework Act.

[16] I would add the observation that if such a dispute had arisen, it is difficult to see how the existence of it would have justified or rendered legal a unilateral decision by the first respondent to extend the second respondent’s appointment as acting municipal manager.

[17] I accordingly conclude that both the declaratory and interdictory relief sought by the applicant must be granted.

[18] The applicant has asked that the first respondent pay the costs of these proceedings. (The second respondent abides the decision of the court and the third respondent took no part in these proceedings, no relief having been sought against him.) In considering the question of costs I must ignore the fact that this is the second piece of litigation which has arisen out of the first respondent’s conduct with regard to the acting appointment of the second

respondent. The first of the applications is not before me. On the information before me in this case that application turns principally on the issue as to whether the second respondent is qualified to be appointed. That issue remains unresolved.

[19] A brief consideration of the Amendment Act illustrates that, certainly in relation to the provisions it introduced such as s54A, the amendments sought to remedy and put a stop to certain abuses taking place at local government level. The particular provisions of s54A which feature in this case are aimed at seeing qualified persons appointed as municipal managers, and at preventing the abuse of circumventing lawful selection processes through the use of open ended or repeatedly extended acting appointments to the office of municipal manager. As to this latter consideration, I am not satisfied on the papers before me in this case that the purported extension to the second respondent's period of appointment falls within the category of abuse at which the provision is aimed; this notwithstanding the fact that the extension was nevertheless unlawful. The issue of costs arises only as between governments. I conclude that each party should pay its own costs.

The following order is made.

- (1) Paragraphs 1.1, 1.2 and 1.3 of the Rule Nisi issued on 13 February 2017 are confirmed.**
- (2) Each of the applicant and first respondent will pay its own costs.**

OLSEN J

Date of Hearing: TUESDAY, 14 MARCH 2017

Date of Judgment: FRIDAY, 24 MARCH 2017

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with Ms M MAZIBUKO

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