



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Appeal court case no: JA 44/14

Labour Court case no: J1021/12

In the matter between:

MERAFONG CITY LOCAL MUNICIPALITY

Appellant

(First Respondent *a quo*)

and

SOUTH AFRICAN MUNICIPAL WORKERS UNION

("SAMWU")

First Respondent

(First Applicant *a quo*)

VUYISILE PATRICK NQABA

Second Respondent

(Second Applicant *a quo*)

Heard: 22 September 2015

Delivered: 20 April 2016

Summary: Appointment of Municipal Manager in terms of the Local Government Municipal Systems Act No 32 of 2000– Employee of municipality who also resides in municipal area, assisted by trade union applying to Labour Court for the setting aside of appointment on basis appointee not suitable-

Jurisdiction and standing in issue-Appeal against order setting aside appointment upheld

Municipality objecting to jurisdiction of the Labour Court – Labour Court having powers to entertain disputes falling within its jurisdiction – overlap between sections 158 dealing with powers and section 157 regarding jurisdiction so that some provisions dealing with powers may also be construed as sources of jurisdiction and *vice versa* - section 158(1)(h) empowering the Labour Court to hear and determine applications to review any decisions taken or acts performed by the State in its capacity as employer – However Labour Court should not have entertained the matter in circumstances where the Minister's intervention was not first sought and the Minister was not joined in the proceedings before the Labour Court

Locus standi – broader approach applicable as developed by the Constitutional Court in public law matters– The determination of the *locus standi* should take into account among others the provisions of section 200 of the LRA; the provisions of sections 54A(8) and (9) of the Municipal Systems Act; and the nature of the relief sought- Sections 54A(8) and (9) oblige the MEC to take steps to enforce compliance with the Act if there has been no compliance and the Minister having a similar obligation if the MEC fails to take appropriate steps - evidence showing that Minister neither cited as party nor afforded opportunity to address the alleged irregular appointment - relief sought and granted by the Labour Court could only have been granted if the Minister refused or failed to act and only if the Minister was made aware of the non-compliance with the Systems Act. Requirements to exhaust internal remedies by applicant not followed – unsuccessful candidates not having *locus standi* to set aside the appointment. Appeal upheld.

Minority judgment (Makgoka AJA): Appeal to be dismissed, despite the Minister's non-joinder, because the Minister will be obliged to apply for the setting aside of the appointment and the Court approached by the Minister would be obliged to grant such an order given the irregularity in making the appointment. In order to save costs and time the appeal ought to be dismissed and the order of the Labour Court should be allowed to stand.

Coram: Tlaletsi DJP, Coppin JA and Makgoka AJA

JUDGMENT

COPPIN JA

- [1] This is an appeal, with the necessary leave, against the judgment of the Labour Court (Lallie J) in favour of the respondents, and in terms of which the appellant's appointment of Mr Nhlanla Mabaso ("*Mr Mabaso*")¹ as its Municipal Manager, was declared null and void and reviewed and set aside on the basis that Mr Mabaso was not suitable for such appointment. The appellant was ordered to pay the costs of the application in the court *a quo*.
- [2] There are three major issues for determination in this appeal. Firstly, the power and jurisdiction of the Labour Court to entertain and determine the matter, secondly, the *locus standi* (i.e. standing) of respondents in this appeal, i.e. the applicants in that court, and lastly, whether the Labour Court was correct in its finding on the merits.
- [3] The following facts are not disputed and are essentially common cause. From about the year 2000 until he applied for the position of Municipal Manager at the appellant, Mr Mabaso was the Municipal Manager of Sisonkhe District Municipality ("*Sisonkhe*").
- [4] Immediately before his appointment to Sisonkhe, Mr Mabaso was employed in the Department of Local Government and Traditional Affairs. He holds a Bachelors Degree in Administration which he obtained in 1984 and an Honours Degree in Administration which he obtained in 1989.
- [5] Mr Mabaso applied for the position of Municipal Manager at the appellant and was interviewed for the position by a selection panel of the appellant on 15 March 2012 and appointed to that position by the appellant on the recommendation of the panel.

¹ Who had been cited as the second respondent in the court *a quo*.

- [6] Mr Mabaso was one of five candidates interviewed for the position of Municipal Manager and the panel used the same list of prepared questions for each of the candidates, allocating scores in respect of each one. Mr Mabaso was given the highest score and was thus selected as the candidate for appointment as Municipal Manager.
- [7] On 20 March 2012, the respondents brought an urgent application in the Labour Court to interdict the appellant from appointing Mr Mabaso as Municipal Manager pending the review and setting aside of its decision to appoint him to that position.
- [8] On 30 April 2012, the Labour Court granted an order interdicting Mr Mabaso from assuming the position of Municipal Manager of the appellant.
- [9] In their review application in the court *a quo*, the respondents not only cited the appellant as a respondent, but also cited Mr Mabaso and the MEC for Local Government: Gauteng, as the second and third respondents, respectively. The respondents sought an order in the following terms in the court *a quo*:
- 9.1 Reviewing the decision of the appellant to appoint Mr Mabaso as Municipal Manager;
 - 9.2 Declaring that Mr Mabaso is not suitable for appointment and that he does not meet the prescribed requirements for appointment as Municipal Manager in terms of section 54A(4) of the Local Government: Municipal Systems Act² ("the Systems Act");
 - 9.3 Declaring that the conduct of the appellant in employing Mr Mabaso, as aforesaid, "*is invalid, irrational and unconstitutional*";
 - 9.4 Setting aside Mr Mabaso's appointment;
 - 9.5 Alternatively to the relief in subparagraph 9.4, directing the appellant to reconsider the appointment of Mr Mabaso "*with due regard to the*

² Act No 32 of 2000.

report of the Auditor-General in relation to the Sisonkhe Municipality for the period ending 30 June 2011”;

9.6 Ordering the appellant (as well as Mr Mabaso and the MEC) to pay the costs of the application in the event of opposition.

[10] The second respondent deposed to the founding affidavit on behalf of the applicants in the court *a quo* (i.e. the respondents on appeal). The first respondent (i.e. SAMWU), is a registered trade union. It is not disputed that, at all relevant times, the second respondent was an employee of the appellant and a member and shop steward of SAMWU. He was further resident at all material times within the municipal boundaries of the appellant, a local authority established in terms of the Constitution of the Republic of South Africa, 1996 (Constitution), read with the Local Government: Municipal Structures Act.³

[11] It was also not disputed that in 2010 and 2011, while Mr Mabaso was the Municipal Manager of Sisonkhe, the Auditor-General submitted reports to the Provincial Legislature of KwaZulu-Natal concerning Sisonkhe, and which also dealt with the role, duties and responsibilities of the accounting officer of that municipality, who, at the time, by virtue of his position as Municipal Manager, was Mr Mabaso.

[12] In the audit report dated 30 November 2011, *inter alia*, the following opinions regarding the shortcomings of the municipality and specifically of the accounting officer are expressed:⁴

12.1 Generally the financial statements present fairly, in all material respects, the financial position of Sisonkhe as at 30 June 2011 and its financial performance and its cash flows for that year, in accordance with the South African standards of Generally Recognised Accounting

³ Act No 117 of 1998.

⁴ In the audit report, it is recorded that the accounting officer is responsible for the preparation and presentation of financial statements in accordance with the South African Standard of Generally Recognised Accounting Practice (SA Standards of GRAP) and the requirements of the Local Government: Municipal Finance Management Act of South Africa, 2003 (Act No 56 of 2003) (“MFMA”), the Division of Revenue Act of South Africa, 2010 (Act No 1 of 2010) (“Dora”) and for such internal controls as management determines necessary to enable the preparation of financial statements that are free from misstatement, whether due to fraud or error.

Practice ("GRAP"), the requirements of the Local Government: Municipal Finance Management Act ("MFMA") and the Division of Revenue Act ("DORA");

- 12.2 (In respect of the procurement and contract management) that the accounting officer did not enter into formal written contracts with suppliers as required in terms of section 116(1) of the MFMA;
- 12.3 (In respect of the annual financial statements) that the financial statements submitted for auditing were not prepared in all material respects in accordance with the requirements of section 122(1)(a) of the MFMA. That material misstatements to property, plant and equipment, general expenditure, liabilities and other disclosure items were identified by the auditors and subsequently corrected;
- 12.4 (Re expenditure management) that the accounting officer did not take reasonable steps to prevent irregular expenditure as required by section 62(1)(d) of the MFMA;
- 12.5 (Re budgets) that the municipality incurred expenditure that was not budgeted for and in excess of the limits of the amounts provided for in the votes in the approved budget and in contravention of section 15 of the MFMA;
- 12.6 That the accounting officer did not meet the requirements of section 46(3) of the MFMA before committing the municipality to long-term debt;
- 12.7 (Re leadership) that the municipality and the accounting officer did not exercise adequate oversight over the compliance with relevant laws and regulations;
- 12.8 (Re financial and performance management) that the accounting officer and Chief Financial Officer had not developed and implemented a compliance check-list;

12.9 That the accounting officer did not implement controls to ensure that documents and records such as schedules and reconciliations, supporting the performance report, were properly filed and easily retrievable and were available for audit purposes.

- [13] In general, the report of 2011 of the Auditor-General mentions that at the time there was “*significant pressure on the municipality's liquidity ratio and financial sustainability*” and that those factors contributed to significant doubt about the municipality's ability to operate as a going concern. Under the heading “Irregular Expenditure”, it was, for example, recorded that irregular expenditure amounting to R351,9 million was incurred due to contracts being awarded to suppliers who contravened the municipal supply chain management regulations. Under the heading “*Unauthorised Expenditure*”, it is, *inter alia*, recorded that unauthorised expenditure amounting to R65,1 million was incurred as the municipality had acceded (exceeded) the limits of the amounts provided in the approved budget.
- [14] In a previous report dated 30 November 2010, the Auditor-General, made similar comments. In that report, the unauthorised expenditure amounted to R9,172 million; fruitless and wasteful expenditure amounted to R1 594 million and irregular expenditure amounted to R5,725 million. Regarding the accounting officer, the following is specifically recorded, namely, that the accounting officer did not exercise adequate oversight responsibility in respect of compliance with the MFMA and reporting regarding supply chain management and predetermined objectives.
- [15] It is common cause that the selection panel did not canvass the aforementioned Auditor-General's reports with Mr Mabaso prior to his selection, and neither did they take them into account in determining whether Mr Mabaso was a suitable candidate for appointment to the position.
- [16] The Labour Court heard the review application and handed down judgment in the respondents' favour on 10 May 2013.
- [17] The Labour Court, in essence, held that section 54A(2), read with section 55(2) and section 54A(4)(b) of the Systems Act, makes it clear that for

appointment as Municipal Manager, the appointee must possess adequate knowledge and ability to perform the statutory duties of Municipal Manager; that the only inference to be drawn from the Auditor-General's reports for 2010 and 2011 was that Mr Mabaso was not "*suitable*" to be appointed as Municipal Manager of the appellant. The court held that section 54A(3) of the Systems Act plainly, rendered void the appointment of an unsuitable person to that position and that the respondents had shown that Mr Mabaso was not suitable for the position; that the appellant's process in making the appointment was defective, because it, in essence, omitted the canvassing of the said Auditor-General's reports with Mr Mabaso. Further, that the appellant did not act rationally in making the appointment, because it disregarded "*material, reliable and available information*" which was relevant to the suitability of Mr Mabaso and that the appointment of Mr Mabaso in those circumstances was unreasonable and irrational.

[18] Against that background, I shall now deal with the issues in turn.

The jurisdiction of the Labour Court

[19] The appellant challenged the Labour Court's jurisdiction. I shall traverse the arguments raised in this Court in that regard briefly, because counsel for the appellant, in my view, correctly conceded that the Labour Court had jurisdiction.

[20] In brief, the Labour Court held that it had jurisdiction to determine the review application in terms of section 158(1)(h) of the Labour Relations Act⁵ ("*the LRA*") which provides that the Labour Court has the power to "*review any decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law*".

[21] In this Court, the respondents submitted that the Labour Court was correct. Furthermore, that this Court in *Hendricks v Overstrand Municipality*,⁶ held that the Labour Court has the power to review any decision taken by the State in its capacity as employer on any grounds that are permissible in law in terms of

⁵ No 66 of 1995.

⁶ [2014] 12 BLLR 1170 (LAC) paras 9-29.

section 158(1)(h) of the LRA if there is no other remedy available. Elaborating on the point, it was submitted on behalf of the respondents that the appellant's decision to appoint Mr Mabaso as its Municipal Manager was "*clearly a decision taken by an organ of state in its capacity as employer*" and that if a peremptory statutory requirement was not complied with, the decision could be set aside on review, even if the decision did not amount to "*administrative action*" as envisaged in the Promotion of Administrative Justice Act⁷("PAJA"), on the basis of the legality principle in the Constitution.

- [22] For the latter submission, the respondents relied on the Constitutional Court's decision in *Fedsure Life Insurance Ltd v Greater Johannesburg Transitional Metropolitan Council*.⁸ According to the respondents, there is no other legislative remedy available to them in which case the Labour Court has the necessary jurisdiction in terms of section 158(1)(h) of the LRA.
- [23] Before conceding that the Labour Court had jurisdiction, counsel for the appellant submitted that the Labour Court's finding that it had jurisdiction in terms of section 158(1)(h) of the LRA was erroneous, because the provisions of that section were "*not designed to confer jurisdiction, but simply to delineate the relief that can be granted in circumstances where jurisdiction is pre-existing*". According to the appellant, section 157(1) of the LRA gives the Labour Court exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA, or any other law, are to be determined by the Labour Court and that the only court that has jurisdiction to determine infringements of the operative section of the Systems Act, is the High Court. In support of the latter submission, the appellant's counsel relied on the Labour Court's decisions in *Natal Sharks Board v SACCAWU (Natal Sharks Board)*⁹ and *Moropane v Gilbeys Distillers and Vintners Ltd (Moropane)*,¹⁰ as well as the Supreme Court of Appeal's decision in *Legal Aid Board v Jordaan*.¹¹

⁷ Act No 3 of 2000.

⁸ 1999 (1) SA 374 (CC) paras 56-59.

⁹ [1997] 8 BLLR 1032 (LC) at 1035.

¹⁰ [1997] 10 BLLR 1320 (LC) at 1323.

¹¹ (2007) 28 ILJ 825 (SCA) para 8.

- [24] As far as the first argument of the appellant is concerned, there is indeed a subtle distinction between jurisdiction and a mere power. In sections 157 and 158 of the LRA, these concepts are apparently also dealt with separately. The subject of section 157 appears *prima facie* to be about the “*jurisdiction of the Labour Court*”, while the subject of section 158 appears to be, as the section reads, about “*the [p]owers of the Labour Court*”.
- [25] However, it is clear from case authority that the word “*jurisdiction*” has a number of meanings and has been used in different contexts to describe the competence of a body or person to act in a particular instance. In relation to courts, it primarily means “*the power or competence of a court to hear and determine an issue between the parties*”.¹²
- [26] The Labour Court is a superior court similar and equal in status to the High Court in respect of matters falling within its jurisdiction. It is also a specialist court.¹³
- [27] Section 151 of the LRA provides that the Labour Court “is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that of a provincial division of the Supreme Court (now the High Court). The “inherent powers” are the powers equal and similar to those of the High Court to do anything in respect of matters under its jurisdiction which the law does not forbid.”¹⁴
- [28] There are a number of provisions in the LRA which deals with the jurisdiction of the Labour Court.¹⁵ Section 157 is, however, regarded as the primary provision in the LRA which deals with the Labour Court’s jurisdiction.
- [29] Section 157(1) is more of a confirmatory and reference section. It is not itself a primary source of jurisdiction. Instead, it confirms that the Labour Court has

¹² See *inter alia* *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) and *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) at 263 para 74.

¹³ See *Langeveldt v Vryburg Transitional Local Council and Others* [2001] 5 BLLR 501 (LAC) at 505 B-F para 8.

¹⁴ For the meaning of “inherent powers” of the Supreme Court, now the High Court- see Herbstein & Van Winsen’s *The Civil Practice of the Supreme Court of South Africa* (4th edit) Van Winsen, Cilliers, Loots (edit. M Dendy) pp 37-40.

¹⁵ See for eg. Sections 9(4); 56(5) and (6); 59-61 (inclusive); 66(3),(4),(5),(6); 67(3); 69(11); 77(2), 103; 104; 105; 191(5)(b)(i)-(iv); 191(6) and item 2(1)(a) of Schedule 7 of the LRA.

jurisdiction in matters where the Labour Court has exclusive jurisdiction in terms of the LRA. It also confirms that the Labour Court has jurisdiction where other legislation provides that a matter has to be determined by the Labour Court. Its main purpose, as derived from its wording within the context of the entire section 157, appears to be to delineate those instances in which the Labour Court would have exclusive jurisdiction. Section 157(2), on the other hand, delineates those instances where the Labour Court would have concurrent jurisdiction with the High Court.

- [30] Section 157(1) directs the reader of that section to the sources of the Labour Court's exclusive jurisdiction, albeit in very vague and general terms. It does not refer to specific sections in the LRA, but suggests that they are to be found elsewhere in that Act. As a result, the interpreter is saddled with the difficult task of having to, for example, distinguish purely jurisdictional provisions from general empowerment provisions. This difficulty is exacerbated by sections which purport to contain mere empowerment provisions, whereas they, on proper construction, also actually contain provisions which are sources of the Labour Court's jurisdiction.

- [31] Section 158 is such a section. Its introductory wording specifically states that it deals with the powers of the Labour Court. Because the introductory words of the previous section, that is section 157, states that it deals with the jurisdiction of the Labour Court, the immediate expectation is that section 158 is not a source of jurisdiction, but merely contains provisions defining the powers of the Labour Court in respect of matters, which, in terms of some other provision in that Act, falls under the jurisdiction of the Labour Court. However, a close reading of the entire section 158 dispels that initial notion. It does deal with powers (post jurisdiction), but also with powers, which cannot but be construed and understood as sources of jurisdiction.

- [32] This is abundantly clear if, for example, section 158(1)(a), which deals with the kind of relief the Labour Court may order in respect of a matter under its jurisdiction, is compared and contrasted with section 158(1)(i), which provides that the Labour Court may "hear and determine any appeal in terms of section 35 of the Health and Safety Act, 1993 (Act No. 85 of 1993)".

- [33] Section 158(1)(a) is clearly an example of the powers the Labour Court may exercise in respect of a matter falling within its jurisdiction, and it does not purport to grant the Labour Court jurisdiction, in the sense of the power to hear and determine the matter in the first place. On the other hand, section 158(1)(i) clearly bestows on the Labour Court jurisdiction in the latter sense.
- [34] Some Courts still seem to treat all the disparate provisions of the section as if they were the same, namely, as powers the Labour Court may exercise in respect of matters which are under its jurisdiction, while section 157 is regarded as the source of jurisdiction.¹⁶ This Court has construed the provisions of section 158, for example, section 158(1)(h), as a source of jurisdiction, empowering the Labour Court to hear and determine applications to review any decisions taken or acts performed by the State in its capacity as employer, and to do so on such grounds as are permissible in law.¹⁷
- [35] A proper reading¹⁸ of section 157 makes it clear that other provisions of the LRA are sources of jurisdiction of the Labour Court and section 158 is not excluded as a possible source.
- [36] Section 158(1)(h) of the LRA refers to a jurisdictional power of the Labour Court. It specifically provides that the Labour Court “*may review any decision taken or any act performed by the State*”. The only way the Labour Court is able to review is by hearing and determining an application for review of the acts and/or decisions contemplated in section 158(1)(h). That section should be read as not only conferring a power, but also jurisdiction upon the Labour Court.

¹⁶ See for example the recent decision of the Supreme Court of Appeal in *Motor Industry Staff Association v Macun No and others* [2015] ZASCA 190 (30 November 2015).

¹⁷ See for eg. *Public Servants Association of South Africa obo De Bruin v Minister of Safety and Security and another* (2012) 33 ILJ 822 (LAC) paras 30- 32; *MEC, Department of Health: Western Cape v Weder* (2014) 35 ILJ 2131 (LAC) para27. In *SACCAWU v Speciality Stores Ltd* [1998] 4 BLLR 352 (LAC) para30 the court (per Froneman DJP, Myburgh JP and Kroon JA concurring) described sections 157 and 158 of the LRA as jurisdictional provisions which granted the Labour Court general jurisdictional powers and were designed to give the Labour Court the necessary jurisdiction to deal with residual matters not specifically dealt with in the LRA.

¹⁸ This also means that the provisions being considered must be interpreted in accordance with section 3 of the Labour Relations Act, No. 66 of 1995,, and more particularly so as to give effect to the primary objects of that Act, in compliance with the Constitution,1996 and in compliance with the Republic's public international law obligations.

- [37] In my view, decisions in matters such as the *Natal Sharks Board*, in so far as they suggest the contrary, are clearly wrong. The view expressed in *Moropane*, that the mere fact that a body or forum has the power does not mean it has jurisdiction, is correct, but the appellant's reliance on that decision is misplaced. So is its reliance on the decision in *Legal Aid Board v Jordaan*. Those matters are clearly distinguishable.
- [38] The Labour Court is not precluded by the LRA from reviewing the decisions and acts contemplated in section 158(1)(h). It has the power (and jurisdiction) to review them on any grounds "*permissible in law*". Permissible grounds in law would include the constitutional grounds of legality and rationality¹⁹ and, if they constitute "administrative action", on the grounds that are stipulated in PAJA, which is the legislation giving effect to the rights contained in section 33 of the Constitution. The appellant is an "organ of state" as defined in section 239 of the Constitution and its powers and duties are of a public nature. The appointment of a Municipal Manager involves the exercise of public powers derived from the Systems Act and constitutes a decision, or decisions, or conduct, by the State in its capacity as employer.
- [39] In the circumstances, the Labour Court had jurisdiction to hear and determine the application for the review and setting aside of the appointment of Mr Mabaso as a Municipal Manager. However, because the respondents did not petition and involve the Minister and furnish no reasons for not doing so, the Labour Court ought to have exercised its discretion not to entertain the matter in those circumstances. The respondents arguably had a duty, which is implied in section 54A of the Systems Act to seek the Minister's involvement, akin to a duty to exhaust domestic remedies. The duty has the effect of delaying the respondents' access to curial remedies.²⁰ This aspect is discussed further below.

Standing of the respondents²¹

¹⁹ See and compare *Hendricks v Overstrand Municipality (supra)* at para 21.

²⁰ For a discussion of the duty to exhaust internal remedies, see Cora Hoexter *Administrative Law in South Africa* (Juta 2012) pp478-482 and the authorities cited there.

²¹ The terms "standing" and "*locus standi*" are used interchangeably in the judgment.

- [40] The appellant also submitted that the respondents did not have the necessary *locus standi* to bring the review proceedings in the Labour Court.
- [41] The court *a quo* held that a purposive interpretation of section 200 of the LRA “allows” the respondent union (“SAMWU”) to bring the review on behalf of its members. Furthermore, the court *a quo* held that on a proper reading of the LRA, it is clear that the role of a trade union is “wide”. As an example, the court *a quo* cited section 77 of the LRA which grants trade unions the right to call for and engage in protest action to promote or defend the socio-economic interests of employees (i.e., its members). The court *a quo* thus concluded on this point, “*it is in the same spirit that they should be allowed to approach this Court to stop the government as an employer from acting illegally*”.
- [42] Counsel for the appellant submitted that section 200 of the LRA was not applicable because it permits a trade union to enforce its rights in terms of the LRA, to act as a representative of its members and to enforce their rights and justiciable interests in terms of the LRA. Counsel relied on a *dictum* in *Financial Services Board and Others v De Wet and Others*,²² that “*the sufficiency of a claimant’s interest for the purposes of locus standi is generally gauged with reference to the purpose of the prohibition*” and further, that if a claimant is unable to show “*some special damage or peculiar injury beyond that which he may be supposed to sustain and common with all other members of the public ...*” he or she or it does not have the necessary *locus standi*. Counsel for the appellant submitted further that the respondents, i.e. SAMWU and its members, do not have any interest beyond the interest of the general public and as a result lacked the necessary *locus standi*.
- [43] Counsel for the appellant further relied on the judgment in *Kwanobuhle Town Council v Andries and Others*,²³ for the contention that the existence of *locus standi* depends on the scope of the remedies that are envisaged by the enactment itself, and submitted that sections 54A(8) and 54A(9) of the Systems Act provided the necessary remedies where a person was appointed as Municipal Manager in contravention of section 54A.

²² 2002 (3) SA 525 (C) at para 144.

²³ 1988 (2) SA 796 (SEC) at 800-801.

- [44] In terms of section 54A(8), the MEC for Local Government is obliged to take appropriate steps to enforce compliance with section 54A, which may include bringing an application to court for a declaratory order concerning the validity of the appointment, or the taking of any other legal action against the Municipal Council. In terms of section 54A(9), if the MEC fails to take such appropriate steps, the Minister is empowered to do so. Accordingly, so appellant's counsel submitted, in terms of section 54A itself, the respondents had no *locus standi* to challenge the validity of the appointment of Mr Mabaso, since the section empowered the MEC, failing which the Minister, to mount such a challenge regarding the appointment.
- [45] The respondents' counsel submitted that the second respondent, Mr Nqaba, like many other members of the first respondent (i.e. SAMWU), lived within the area that is served by the appellant municipality. Further, that it could not be argued that residents of that area did not have "*an actual, direct interest*" in the appointment of the Municipal Manager and in particular in the fact that the person appointed to that position, was a suitable person as required by the Systems Act.
- [46] Counsel for the respondents further submitted that it could not be contended that the residents of the area served by the appellant had the same interest as that of the general public. As residents (and employees), they would be directly affected if an unsuitable person was appointed as a Municipal Manager.
- [47] According to the respondents' counsel – subsections 54A(8) and (9) do not deprive or deny any other persons with an interest in the matter "*from exercising the right to review*" with regard to the appointment of the Municipal Manager. The respondents, in conclusion, submitted that the court *a quo's* finding that they did have *locus standi* was unassailable.

Discussion

- [48] In terms of the common law, particularly in the private law context, a plaintiff or applicant was required to have a direct interest in the remedy sought and could not challenge the legality of administrative action in the absence of such

a direct (or substantial) interest.²⁴ The same principle was also applied in the public law context. However, the common law approach is regarded as too technical, formalistic and narrow for application, particularly, in the public law context.²⁵

[49] In the Interim Constitution (1993) and the final Constitution (1996), standing is specifically dealt with. The approach to standing adopted by the Constitutional Court has been less formalistic and technical and more emphasis was placed on the court's discretion to determine whether there was sufficient interest in light of the circumstances of every particular case. In *Ferreira v Levine NO and Others: Vryenhoek v Powell and Others (Ferreira)*,²⁶ Chaskalson P preferred a broader approach as opposed to the more technical approach. Chaskalson P held that it was for the court to decide what a sufficient interest was in light of the circumstances of the matter. O'Regan J in that same matter mentions some factors and circumstances that would have to be considered in determining whether an applicant was genuinely acting in the public interest in bringing a constitutional challenge. Amongst such factors are "*whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application, and the range of persons or groups who may be directly or indirectly affected by an order made by the court and the opportunity that those persons or groups have had to present evidence and argument to the court*"²⁷.

[50] In *Vulindlela Furniture Manufacturers (Pty) Ltd v MEC, Department of Education and Culture, Eastern Cape and Others*,²⁸ the court held that a broad flexible approach should be assumed in establishing whether an applicant who challenges administrative action (alleging it is unlawful), has sufficient interest. The court, in determining whether the applicant had *locus standi*, also took into account (*inter alia*) the provisions of the statutes and

²⁴ See *inter alia* *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534B-C; and *Cabinet of the Transitional Government for the Territory of South West Africa v Eims* 1988 (3) SA 369 (A).

²⁵ For a discussion of the issue, see, *inter alia*, JR De Ville *Judicial Review of Administrative Action in South Africa* (Revised First Edition) (Lexis Nexis-Butterworths 2005) pp399 et seq.

²⁶ 1996 (1) BCLR (1) (CC); 1996 (1) SA 984 (CC) para 163.

²⁷ See at 234.

²⁸ 1998 (4) SA 908 (Tk).

directives at issue and the question whether they create any rights and duties for the applicant, the applicant's source of prejudice, the importance of the issue to be decided, and the nature of the relief applied for.

- [51] The “*narrow, formalistic approach*” is inappropriate in matters with a public interest element or in matters of a constitutional (including administrative law) nature. In *Ferreira O'Regan J* explained why this was the case:

*'Existing common law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases the plaintiff is both a victim of the harm and the beneficiary of the relief. In litigation of a public character, however that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people. In addition the harm alleged may often be quite diffuse or amorphous.'*²⁹

- [52] The present case is not private litigation. It clearly has a public law character. The respondents (applicants in the court *a quo*) effectively averred that the application was brought in the public interest. It is for the setting aside of the appointment, by a State Organ, of a public office-bearer. The second respondent, deposing to the founding affidavit in the court *a quo*, states, *inter alia*, that Mr Mabaso's appointment would place “stakeholders served by the Municipality, including external service providers, the community and employees at great risk”. The approach to standing therefore should not be too technical or formalistic. The question whether the respondents had sufficient interest in the matter should be left to the discretion of the court taking into account all relevant factors and circumstances.
- [53] The respondents alleged that the appointment of an unsuitable person holds negative (unconstitutional) consequences, not only for the second respondent, but for all residents of the area served by the appellant, for its employees, and, ultimately, for the public at large.

²⁹ See at para 229.

- [54] The court *a quo*'s consideration of standing appears to have been limited to a consideration of section 200 of the LRA. The provision cannot be decisive of the question of the standing of the respondents. The approach adopted by both sides, as is apparent from their arguments, which I referred to earlier, is also not appropriate. The fact that sections 54A(8) and (9) empower the MEC and the Minister, respectively, to take steps to address an appointment which is not in compliance with the Systems Act, is not decisive of the *locus standi* of the respondents, but it is merely a factor to be considered amongst others. Similarly, the respondents' argument, in terms of which they buttress the court *a quo*'s "*narrow*" approach with an argument that the second respondent has sufficient interest because of his residence and employment, is reminiscent of the narrow common law approach to the question of standing in matters of this nature.
- [55] In determining the question of the standing of the respondents, the court *a quo* ought to have taken into account at least the following factors: the provisions of section 200 of the LRA (particularly in considering the question of the first respondent's *locus standi*); the provisions of section 54A of the Systems Act and particularly of sections 54A(8) and (9); the nature of the relief sought by the respondents; the interest of the second respondent; the interests of others; whether there was any other "*reasonable and effective manner*" in which the challenge to the appointment could have been brought; the range of persons (entities) or groups who may be directly or indirectly affected by an order made by the Labour Court and the opportunity that those persons, or groups, or entities had to make representations to the Labour Court and the importance of the issues raised.
- [56] The provisions of section 54A, including of sections 54A(8) and (9), even if not decisive on their own, seem to me to be pivotal in determining the issue of standing in this matter. I shall therefore briefly consider these provisions before discussing the other relevant factors.
- [57] The appellant's counsel has argued, in effect, that the provisions of sections 54A(8) and (9) oust the respondents' standing. I shall for convenience quote the whole of section 54A here. It reads:

'54A. Appointment of municipal managers and acting municipal managers.– (1) *The municipal council must appoint –*

(a) *a municipal manager as head of the administration of the municipal council; or*

(b) *an acting municipal manager under circumstances and for a period as prescribed.*

(2) *A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.*

2A(a) *A person appointed in terms of subsection (1)(b) may not be appointed to act for a period that exceeds three months.*

(b) *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) *A decision to appoint a person as municipal manager, and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if -*

(a) *the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or*

(b) *the appointment was otherwise made in contravention of this Act.*

(4) *If the post of municipal manager becomes vacant, the municipal council must -*

(a) *advertise the post nationally to attract a pool of candidates nationwide; and*

(b) *select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.*

(5) *The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.*

(6)

(a) *The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.*

(b) *If the MEC for local government has not seconded a suitable person within a period of sixty days after receipt of the request referred to in paragraph (a), the municipal council may request the Minister to second a suitable person, on such conditions as prescribed, until such time as a suitable candidate has been appointed.*

(7)

(a) *The municipal council must, within fourteen days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.*

(b)...

(c) *The MEC for local government must, within fourteen days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.*

(8) *If a person is appointed as municipal manager in contravention of the section, the MEC for local government must, within fourteen days of receiving the information provided for in subsection (7) take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.*

(9) *Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection.*

(10) *A municipal council may, in special circumstances and on good cause shown, apply in writing to the minister to waive any of the requirements listed in subsection (2) if it is unable to attract suitable candidates.*

(11) *A person who has been appointed as acting municipal manager before the section took effect, must be regarded as having been appointed in accordance with the section for the period of the acting appointment.*

(12) *Any pending legal or disciplinary action in connection with an appointment made before this section took effect, will not be affected by this section after it took effect.”*

- [58] The section makes it plain that the person whom the Municipal Council appoints to the position of Municipal Manager must have the skills, expertise, competence and qualifications as prescribed. If the appointed person does not possess the same, or if the appointment is otherwise in contravention of the Systems Act, the decision appointing the person and any contract concluded as a consequence of that decision, is null and void in terms of the Systems Act.
- [59] Whether a particular person fulfils the requirements for appointment as Municipal Manager appears to be a matter of objective fact.
- [60] The section *inter alia* requires the Municipal Council to inform the MEC for Local Government of the appointment process and of the outcome (as prescribed). The MEC, in turn, is obliged to provide the Minister responsible for Local Government with that information.
- [61] It is clearly implied in section 54A(8) that the MEC has a duty to satisfy himself/herself that the appointment process and outcome is in compliance with the Systems Act. That the Minister has the same duty is clearly implied in subsections 54A(7)(b) and 54(9). The MEC and the Minister’s determination of compliance is not confined to a consideration of information provided by the Municipal Council, because the information may not disclose, for example, that certain information, such as in the present case, had not been taken into account, or that the information was not canvassed with the appointee and

investigated and properly taken into account when the appointment was made.

- [62] Therefore, in deciding whether there has been compliance, the MEC and the Minister would have to take all relevant information into account, including information provided by third parties, such as the respondents in this matter, in deciding whether the appointment process and the outcome were in compliance with the Systems Act. The decision must be rational and reasonable having taken all information and the provisions of the Systems Act into account.
- [63] Section 54A(8) obliges the MEC to take steps to enforce compliance with the Act if there has been no compliance. The steps to be taken include approaching the court for an appropriate remedy. In terms of section 54(9), the Minister has a similar obligation if the MEC fails to take appropriate steps.
- [64] Section 54A contains various checks and balances to ensure compliance by the Municipal Council with the Systems Act in appointing a Municipal Manager. Subsections 54A(8) and (9) are ultimately internal controls.
- [65] Section 54A of the Systems Act does not expressly deal with standing, nor does it preclude, or oust the standing of persons/entities, or groups, whose interests are directly affected by the appointment. However, sections 54A(8) and (9), arguably, imply, that the appointment of a municipal manager is subject to confirmation by the MEC and the Minister, or implies remedies which such individuals or groups may be obliged to pursue before approaching the court. In this regard, the fact that the appropriate steps that have to be taken by the MEC, (and failing him or her, the Minister), does not have to result in litigation, is informative.
- [66] The provisions of sections 54A(8) and (9) are measures that also have as their purpose the prevention, or limitation, of a proliferation of litigation, or multiple litigation, or unnecessary litigation, with its attendant consequences, least of which, is the delay that ensues with all of its ramifications. The provisions also seem to maintain and retain the hierarchical responsibility for appointments to be made in compliance with the Systems Act. Even if the

employees have an interest in who their manager is, it is not their function or duty to “hire or fire” the manager. The same may be said about ratepayers or residents of the area served by the municipality. That duty still rests with the employer. In the case of an employment of a municipal manager, in terms of the Systems Act, the responsibility for the appointment is shared between the Municipal Council (the employer), the MEC for Local Government and the National Minister responsible for local government.

[67] In keeping with the established precedent, where an internal remedy has not been pursued before a party approaches a court, a case would have to be made out in that regard, which may also be a factor, not only in determining whether the court should exercise its jurisdiction in the particular case, but also in determining whether the litigant has sufficient interest to be accorded standing, in light of all the other relevant circumstances in the particular matter. Each case will have to be determined on its own facts or merits.

[68] In its application to the court *a quo*, the respondents seemingly accepted that they had to bring the defect in the appointment process and the consequent appointment of an unsuitable candidate (i.e. the outcome), to the attention of the MEC. In the founding affidavit, the second respondent, who also deposed to that affidavit on behalf of the first respondent in the court *a quo*, states, *inter alia*:

‘The concerns expressed in this affidavit concerning the illegality of this appointment were conveyed to the MEC in the letter dated 12 April 2012. Despite this, the MEC has failed to take the steps envisaged by section 54(8). For this reason, the applicant has been left with no choice but to approach this court for relief.’

[69] The MEC was cited as the third respondent in the application in the court *a quo*. It does not appear from the initial papers filed that the application had been served on the MEC. However, on the assumption that they were, there is nothing on record to indicate what the MEC’s position was in respect of the application and the relief sought by the respondents (applicants in those proceedings), other than for what is stated in a letter, which the appellant averred had come from the MEC. Mr Mabaso, seemingly, initially abided by

the decision of the Labour Court, but then went on to file a bulky “*opposing affidavit*” in which he, *inter alia*, explained the audit reports and sought to justify his appointment.

- [70] In a supplementary answering affidavit filed in the court *a quo*, Mr Mogale-Letsie, the Mayor of the appellant and deponent to that affidavit, averred that the MEC was by letter dated 2 April 2012 informed of Mr Mabaso’s appointment as Municipal Manager and that the MEC was satisfied with the appointment. A copy of the letter is attached to the supplementary affidavit.
- [71] Mr Mogale-Letsie, in fact, elaborates that the MEC had expressed such view in a letter dated 13 April 2012, after having considered the first respondent’s, that is SAMWU’s, submissions regarding their concerns and that he had found them to be without merit.
- [72] It is apparent from the appellant’s letter dated 2 April 2012 and written by Mr Mogale-Letsie to the MEC that he did not inform the MEC of the respondents’ concerns about the appointment, neither did he inform the MEC about the Auditor-General’s reports concerning Mr Mabaso’s functioning in his previous position at Sisonkhe, nor of the fact that those reports had not been considered by the panel or the Council before their respective decisions to appoint Mr Mabaso as municipal manager of the appellant.
- [73] It appears from a letter dated 13 April 2012 purporting to be authored by the MEC,³⁰ a copy of which is attached to Mr Mogale-Letsie’s affidavit, that a dispute by SAMWU regarding their dissatisfaction with not being part of the appointment process was considered and found to be without substance. But no reference is made in the letter to SAMWU’s (or the respondents’) complaint about the appointment of Mr Mabaso, and in particular about the suitability of his appointment and the failure by the appellant and its interviewing panel to canvas and take into account the contents of the Auditor-General’s reports of 2010 and 2011 before making the appointment.

³⁰ There is no confirmatory affidavit attached so its provenance and contents is mere hearsay.

- [74] The absence of an answering affidavit from the MEC on this matter does not assist the appellant, instead it lends credence to the contention by the respondents that their complaints to the MEC, in that regard, were ignored.
- [75] Having said that, what is clearly lacking from the respondents' papers in the court *a quo* is a reference to the Minister. The Minister was not cited as a party in the application in the court *a quo* and there is no explanation at all why the respondents did not submit their concerns to the Minister in circumstances where the MEC, according to them, failed to act. On their own version, when the MEC failed to take steps in the matter they turned to the Labour Court.
- [76] This is a case where the Minister's intervention ought to have been sought first, and where the Minister ought to have been joined as a party, since the Minister shares responsibility for the appointment of the municipal manager and is obliged to perform a reviewing function in respect of such an appointment. Ultimately, it is the Minister's action or inaction that is to be reviewed, if it is established that the appointment was not in compliance with the Systems Act.
- [77] Nevertheless, this failure to involve the Minister is also crucial to the respondents' standing, particularly also in light of the relief they sought in the Labour Court. The relief excludes the Minister and precludes the Minister from exercising his or her power in terms of section 54A(9) of the Systems Act. There is nothing to indicate that the Minister was aware of the respondents' concerns and/or refused to take appropriate steps, in those circumstances, to enforce compliance with the Systems Act.
- [78] Regarding the first respondent's power to represent the second respondent, the provisions of section 200 of the LRA are clear and —consistent with the principles entitling a voluntary and statutory association, which is a *universitas personarum*,³¹ to act in the interests of its members.

³¹ To qualify as a *universitas personarum*, the following requirements must be met: the association must be a legal entity apart from its members; it must have the capacity to acquire rights and obligations and also be able to own property independently of its members; it also must have the

- [79] However, as I pointed out earlier, section 200 of the LRA is not the only factor. Having considered and balanced all the other factors, the fact that the Minister was not approached or cited, is in my view decisive of the standing of both of the respondents. In this matter the court *a quo* ought to have found that in the circumstances the respondents' interests was not sufficient to accord them *locus standi*.
- [80] The court *a quo* should, in those circumstances, have made no order in respect of the application and, at best, should have postponed the application with an order that the Minister be joined as a party to the proceedings. In any event, the relief that the respondents would have been entitled to in the first place, even if it was established that the Minister had failed to act, despite knowledge of non-compliance with the Systems Act, is in all probability an order in the form of a *mandamus*, compelling the Minister to take appropriate steps as contemplated in section 54A(9) of the Systems Act to enforce compliance with that Act.
- [81] The kind of relief sought and granted by the court *a quo* could only have been granted in circumstances where the Minister refused or failed to act and in circumstances where the Minister was made aware of the position and non-compliance with the Systems Act was shown. The court *a quo* could not in the circumstances that pertained in this case have reasonably found that the respondents had the necessary standing.

The merits

- [82] I am going to say very little about the merits of the challenge, particularly in circumstances where the Minister was not given an opportunity to address the issues raised by the respondents.
- [83] While the Auditor-General's reports do reflect negatively on Mr Mabaso's skills, expertise and, accordingly, his suitability for the position, it is not conclusive in that regard. Mr Mabaso made an elaborate affidavit explaining the findings and the steps taken to address those issues raised by the

capacity to sue and be sued and they have perpetual succession. See *inter alia S v Coetzee and Others* 1997 (4) BCLR 437 (CC); 1997 (3) SA 527 (CC) at para 104.

Auditor-General in the 2010/2011 reports. At best, Mr Mabaso's suitability for the position remains in contention on the papers.

- [84] However, the concession by the Mayor of the appellant, Mr Mogale-Letsie that the panel did not canvass the reports with Mr Mabaso at the interview and did not consider and take them, or any representation made by Mr Mabaso in connection with them, into account when making their decision on the suitability of Mr Mabaso, seems to be a material irregularity or defect in the appointment process, because it may have influenced the outcome. However, I make no definitive finding in that regard.
- [85] Section 54A(9) of the Systems Act obliges the Minister to determine whether there was compliance and to take appropriate steps to enforce non-compliance.
- [86] In my view, in the circumstances the appeal also ought to succeed for lack of standing, and, particularly, because the Minister had not been known in the matter and had not been given an opportunity to deal with the issue. The respondents are not left without remedy if the appointment is not in compliance with the Systems Act. They may take such further steps as they might be advised to take in light of this judgment. I have read the judgment prepared by my colleague, Makgoka AJA, and I do not agree with it insofar as it differs with the reasoning and conclusion in this judgment. The essential difference turns around the interpretation of sections 54A(8) and (9) of the Systems Act. Makgoka AJA is of the view that the only steps the Minister can take in terms of those provisions is court action. In my view, with respect, that is not a correct interpretation of those provisions and it is too narrow. Section 54A(9) read with 54A(8) does not confine the Minister to any particular appropriate step. The Minister has a discretion as to which step(s) to take in a particular instance, but it must be appropriate in the circumstances. If the legislature had intended to confine the Minister to court action (as a step) the section would not have referred to "appropriate steps", but to "appropriate court action". The wording of the sections is clear – the steps to be taken "may" include legal action in the form of a declaratory order against the

municipal council concerning the validity of the appointment or any other (appropriate) legal action against that body.

[87] The facts and circumstances would determine what step(s) ought to be taken. Court action for a declaratory order may be inappropriate and constitute unnecessary and wasteful expenditure depending on the attitude of the municipality to the Minister's intervention and the non-compliance may be capable of being remedied or corrected without recourse to court action. This is consistent with the principles of co-operative government in the Constitution, including the principle contained in section 41(3) of the Constitution that "[a]n organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provide for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute." Further, in my view it is, with respect, not appropriate at this stage and in the circumstances of this case to assume how the Minister has or may exercise the discretion conferred upon him in terms of sections 54A(9) read with section 54A(8) of the Systems Act, and to decide the matter in anticipation of the actual steps the Minister would, in our view, have to take.

[87] Regarding costs, I am of the view that taking all factors into account, there should be no order as to costs, which effectively means that each party would bear its own costs.

[88] In the result:

88.1 The appeal is upheld.

88.2 The order of the court *a quo* is set aside and is replaced with the following order:

"The application is dismissed."

P Coppin

Judge of the Labour Appeal Court

Tlaletsi DJP concurs in the judgment of Coppin JA. (Makgoka AJA prepared a separate dissenting judgment).

MAKGOKA AJA

[89] I have read the judgment of my colleague, Coppin JA, in which the Deputy Judge President concurs (the majority judgment). I agree with most of the conclusions reached there - with regard to the *locus standi* of the respondents, especially that a broader approach should be adopted in that regard; as well as the jurisdiction of the Labour Court to determine the issue between the parties. Regrettably, I disagree with the conclusion reached by the majority that the appeal should be upheld. In my view the appeal should be dismissed.

[90] The facts have been set out extensively in the majority judgment, and therefore need not be repeated here. The *gravamen* of the respondents' case before the Labour Court was that Mr Mabaso was not a suitable person to be appointed a municipal manager of the appellant municipality, regard being had to the provisions of the Local Government: Municipal Systems Act 32 of 2000 (the Act). In particular, the respondents relied on s 54A(2) of the Act, which provides the basic requirements an incumbent should meet for the office of municipal manager. Such a person must at least have the skills, expertise, competencies and the prescribed qualifications.

[91] The respondents contended that Mr Mabaso lacked the requirements demanded in the section. For this contention, they relied mainly on the report of the auditor-general issued in November 2011, in respect of the management and financial affairs of Sisonke district municipality in the

province of KwaZulu-Natal, for the period ending 30 June 2011. Mr Mabaso was the municipal manager during the relevant period covered by the report. In the report, the auditor-general expressed the following opinions:

1. There were significant pressures on the municipality's liquidity ratio and financial sustainability and this could cast doubt as to the ability of the municipality to operate as a going concern;
2. The municipality had incurred 'irregular expenditure amounting to R351,9 million as a result of contract awarded to suppliers which contravened Municipal Supply Chain Management Regulations. Among others, it was pointed out that Mr Mabaso had failed to enter into formal contracts with suppliers, and that he did not take reasonable steps to prevent irregular expenditure;
3. Mr Mabaso did not meet the requirements of s 46(3) of the Municipal Financial Management Act before committing the municipality to long term debt. He also failed to investigate unauthorized and irregular expenditure which was incurred in the previous year;
4. Mr Mabaso and the municipal council did not exercise adequate oversight over the compliance with relevant laws and regulations. Mr Mabaso, in particular, as municipal manager, had failed to implement controls to ensure that documents and records are filed properly and easily retrievable and available for audit purposes.

[92] The auditor-general noted that some of the problem areas had been identified during the previous year, 2010, and had been brought to the attention of the municipality when the 2010 report was finalised. The only conclusion would be that Mr Mabaso failed to address the concerns highlighted by the auditor-general.

[93] The respondents argued that the appellant municipality acted irrationally by not considering the past performance of Mr Mabaso in his capacity as the municipal manager of the Sisonke municipality, and in particular, the report of the auditor-general. Any consideration of the suitability of Mr Mabaso could

not rationally take place without taking into account the contents of that report. Although the report was not before the selection panel, the respondents argue that Mr Mabaso was duty bound to bring the `contents of the report to the committee. By failing to do so, Mr Mabaso, according to the respondents, acted without integrity, which is further evidence of his lack of suitability for the job.

- [94] My colleague concludes that because only the MEC of Local Government, and not the Minister of Local Government and Co-operative Governance (the Minister) was involved in the process after the appointment of Mr Mabaso, the respondents should have been non-suited in the Labour Court. That process is set out in ss 7, 8 and 9 of the Act, which provide:

‘(7)(a) The municipal council must, within fourteen days (after the appointment of the municipal manager) inform the MEC for local government of the appointment process and outcome, as may be prescribed.

(b) The MEC for local government must, within fourteen days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.

(8) If a person is appointed as municipal manager in contravention of the section, the MEC for local government must, within fourteen days of receiving the information provided for in subsection (7) take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.

(9) Where an MEC for local government fails to take appropriate steps referred to subsection (8), the Minister may take the steps contemplated in that subsection.’

- [95] The majority judgment does not seriously join issue with the contentions by the respondents that it was irrational and irregular for the appellant municipality to consider the appointment of Mr Mabaso without regard to his past performance as a municipal manager of Sisonke municipality. The only basis on which the respondents are non-suited is the fact that the Minister was not informed of the appointment, and therefore, he or she had not had the

opportunity to exercise the powers as set out in s 54A(8) read with s 54A(9) of the Act, as set out above.

[96] But with respect to my colleague, those sub-sections do not say that no other person may approach the court for the necessary relief if a municipal manager has been appointed in contravention of the Act. It is instructive that s 54A(8) specifically makes mention of only legal action as a remedy available to either the MEC or the Minister to reverse an appointment and enforce compliance with the Act. That much is clear from the use of 'application to court' and 'any other legal action'. One is therefore left in no doubt as to the fact that only judicial intervention is envisaged to remedy an irregular appointment.

[97] There is no room for any other form of remedy. Indeed, I fail to see what other option could conceivably be available, other than legal action, to reverse an appointment in contravention of the law. The MEC or the Minister has no residual discretion to condone such an appointment under any circumstances. He or she must approach the court for the setting aside of the appointment. On the acceptance of that proposition, if the MEC or the Minister approaches the court for that purpose, the same purpose would be served if interested parties, like the respondents, take the initiative. What is important is that an illegality should be reversed. For that reason, it does not really matter if it is at the instance of the MEC or the Minister, or an interested party. There is nothing in the text of the section to suggest that an interested party is barred from approaching the court before the MEC or the Minister exercise the powers envisaged in s 54A(8). This is a totally different situation from where a party is required to exhaust internal remedies before approaching the court.

[98] It is clear from the facts that the appointment of Mr Mabaso was in contravention of the Act, for all the reasons the respondents have placed before the Labour Court. It does not assist the appellant municipality that Mr Mabaso, in these proceedings, deposed to a lengthy affidavit seeking to deal with the contents of the auditor-general's report. This is not the time, nor the forum. If he was candid, he should have done so before the selection panel that interviewed, and appointed, him as the municipal manager. To seek to do it here is all in vain.

[99] My colleague concludes that the appeal should be dismissed to allow the Minister to investigate the issue of non-compliance, and to decide what to do in the event of non-compliance. In the unlikely event of the Minister endorsing the appointment, the respondents are likely to approach the court, on the same papers, for the same relief. If the Minister shares the respondents' concerns, he or she has to take legal action to set aside the appointment. Either way, the Labour Court or the High Court would be seized of the matter. As I indicated earlier, the contravention of s 54A is plain from the facts, and has been overwhelmingly established. As a result, the outcome of the legal action by the Minister is a foregone conclusion, with the result that, whichever court hears the application, would set aside the appointment of Mr Mabaso, just as the Labour Court did. That would amount to a proliferation of legal proceedings and a waste of judicial resources. For these reasons, I conclude that the Labour Court was correct in upholding the respondents' contentions. Accordingly, I would dismiss the appeal with costs.

TM Makgoka AJA

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