

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1396/2025

In the matter between: -

**MEC: DEPARTMENT OF COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS**

First Applicant

**DEPARTMENT OF COOPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL AFFAIRS**

Second Applicant

and

**NAMA KHOI LOCAL MUNICIPALITY
COUNCIL OF THE NAMA KHOI LOCAL MUNICIPALITY
RODNEY KRITZINGER
JAN IZAK SWARTZ**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

Heard: 06 June 2025

Delivered: 27 June 2025

Summary: Urgent application. The Municipal Council appointing Acting Municipal Manager post his retirement age of 65 years pending an application for a waiver of the age requirement in terms of Regulation 41 by the Minister of COGHSTA. Whether the MEC has *locus standi* in terms of s 54A(8) of the Local Government: Municipal Systems Act 32 of 2000 to bring the application challenging the appointment.

ORDER

In the result, the following order is made:

1. The application is dismissed.
2. There is no order as to costs.

JUDGMENT

MAMOSEBO, J

- [1] The first applicant, Mr Bentley Ivan Vass is a Member of the Executive Council (MEC) for the Department of Co-operative Governance, Human Settlements and Traditional Affairs (COGHSTA) and the second applicant, the Department of Co-operative Governance, Human Settlements and Traditional Affairs (the Department) jointly referred to as the applicants, brought this application on an urgent basis seeking a declarator that the appointment of the fourth respondent as acting Municipal Manager of the first respondent be declared unlawful and invalid and accordingly set aside.
- [2] The first respondent is Nama Khoi Local Municipality. The second respondent is the Council of the Nama Khoi Local Municipality. The third respondent is the Mayor of Nama Khoi Local Municipality, Mr Rodney Kritzinger. The fourth respondent, Mr Jan Izak Swartz is the acting Municipal Manager whose impugned appointment is the subject of these proceedings. The third and fourth respondents filed Notices to Abide the court's decision. This application is therefore only opposed by the first and second respondents jointly referred to as the respondents.
- [3] The basis for the MEC seeking the relief is premised on the appointment of Mr Swartz beyond the stipulated retirement age of 65 in contravention of Regulation 41 (1) of the Local Government:

Regulations on Appointment and Conditions of Employment of Senior Managers (the regulations).

- [4] Both parties have not addressed the court on the effect, if any, of the validity of s 54A of the Systems Act by virtue of the Constitutional Court decision in *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs (SAMWU)*¹. The Constitutional Court pronounced:

'The period of suspension ended on 8 March 2019. Until 8 March 2019, there could be reliance on section 54A because the suspension had the effect of keeping it enforceable despite the order of invalidity. Once the suspension period had expired, the order of invalidity kicked in. After this there could no longer be any reliance by the MEC on the section to seek an order to declare the appointments null and void because it was invalid and therefore unenforceable.'

Despite the expiry of the suspension period and the legislature's failure to cure the defect in this regard to amend s 54A there is no impediment in dealing with this application.

Factual background

- [5] On 17 April 2022 the Municipality advertised the position of a Municipal Manager in the City Press Newspaper. Of significance in that advertisement was the clause that the position was for a five-year fixed term contract. Only six applicants responded to the advertisement. Of those, three met the requirements and were shortlisted for interview. Before the interview, one of them withdrew his candidacy leaving the fourth respondent and one other. Pursuant to the interview process the already 62-year-old fourth

¹ [2017] ZACC 7; 2017 (5) BCLR 641 (CC) para 19

respondent was the successful candidate. The panel resolved to recommend him for the appointment as the Municipal Manager, and he was appointed by the Municipal Council on 30 August 2022. Contrary to the advertised fixed contract period of five years, he was appointed for three years commencing on 03 October 2022 to 31 March 2025.

- [6] On 11 December 2024 the Executive Committee of the Municipality held a meeting chaired by the mayor and resolved to extend the fourth respondent's contract to 31 September 2027. It was further resolved that the Municipal Council would apply for exemption or waiver as contemplated in Regulation 41(1) of the regulations.² On 22 January 2025 the respondents directed a letter under signature of the mayor to the MEC requesting him to support the application to the Minister to waive the requirement of regulation 41 (1) thereby allowing the Municipal Council to extend Mr Swartz's contract for the remainder of the advertised term of five years as contemplated by regulation 41(2). The MEC did not support the request and in his letter dated 05 February 2025 reminded the mayor that he had advised against Swartz's appointment on the basis that he was already 62 years of age whereas the contract required him to be employed for five years which would necessitate him working beyond the stipulated retirement age. He was also not convinced that Swartz had the scarce skills warranting the extension of his contract. The letter ends with advice to council to advertise the post as soon as possible to ensure a smooth transition by 01 April 2025.

² **Regulation 41** of the regulations stipulates:

'(1) A senior manager has the right to retire, and must retire, on the first calendar day of the month following the day on which he or she turns 65 years of age.

(2) Notwithstanding subregulation (1), a municipal council, after consultation with the MEC for local government, and upon good cause shown, apply in writing to the Minister, for a waiver of the requirement in subregulation (1) in the case of a person with scarce skills for effective service delivery by the municipality.

- [7] The Municipal Council held a meeting on 27 March 2025 cognisant of the fact that Swartz's contract would end on 31 March 2025 and resolved to appoint him as the acting Municipal Manager for a period of three months pending the outcome of the waiver application. Council further resolved that should the waiver application be unsuccessful, the fourth respondent is authorised to advertise the position and continue to act in that same position until the process of filling that position was finalised. The MEC was shocked to learn of Swartz's appointment when the information was furnished to him by the office of the State Attorney on 23 May 2025.
- [8] These are the reasons furnished by the MEC to substantiate the matter being heard on an urgent basis. The acting manager's acting appointment came to an end on 31 March 2025 and has been given an acting stint for a period of three months which will end on 30 June 2025. Should this court find the application not urgent and direct that it should be heard in the normal course, the horse would have bolted and the Municipality would have been prejudiced financially by his unlawful appointment.
- [9] The principles pertaining to urgency are trite. The applicants bear the duty and the responsibility to state the reasons why they maintain that the matter is urgent and must be heard outside the normal timeframes as failing to do so may deprive them of substantial redress in due course.

Locus standi of the MEC

- [10] The respondents raised the preliminary point of *locus standi* (legal standing) contending that because the application in terms of regulation 41 falls squarely within the purview of the Minister, it was the Minister and not the MEC who had the *locus standi* to challenge

the appointment of the acting Municipal Manager. This matter concerns the exercise of a public power by the MEC, as well as the interpretation of sections 54A(3) and 54A(8) of the Systems Act. The challenge by the respondents that the MEC lacks the legal standing to bring this application is without merit. Since the MEC's challenge was confined to the lawfulness of the decision by the municipality to appoint the fourth respondent as the Municipal Manager it was competent for the MEC to bring such challenge in terms of s 54A of the Local Government: Municipal Systems Act, 32 of 2000 (the Systems Act)³.

³ 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 or acting 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 60 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 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.

(b) The MEC for local government must, within 14 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 this section, the MEC for local government must, within 14 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 a 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) If the MEC for local government fails to respond to the appointment process and outcome within the timeframes, as contemplated in subsection (8), or the Minister fails to respond as contemplated in

- [11] In terms of s54A(7)(a), the municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as prescribed. The MEC must satisfy him/herself that the appointment complies with the Systems Act. Should the MEC not be satisfied the Act empowers him/her to take appropriate steps within 14 days to ensure compliance. According to the MEC, he advised against the appointment of the fourth respondent as already stated. His advice was ignored.
- [12] It is clear from the MEC's affidavit that his office, as can be seen from the email by Ms Tessa Alexander, dated 04 April 2025, directed to Ms Thilibe Maimane, Municipal HR Systems, aimed at establishing whether the department has received a request for the Minister to waive the said Regulation 41 age requirement. The email response by Ms Maimane on the same day, 03 April 2025, was that their office had no such record.
- [13] What is perturbing is the inaction by the MEC between 03 April 2025 and 22 May 2025 until the enquiry by the State Attorney on the MEC's instructions directed to the mayor (third respondent) on whether the fourth respondent was further appointed after his term came to an end on 31 March 2025. If not, to furnish information on the incumbent acting in the position. The office of the mayor responded on the same day, 22 May 2025 confirming the fourth

subsection (9), the appointment of the municipal manager or acting municipal manager will be deemed to be in compliance with this Act: Provided the municipal council submitted all relevant documents, as prescribed.

(11) 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.

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

(13) 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.

respondent's acting stint. This resulted in the MEC bringing this application by serving and filing the notice of motion on 29 May 2025. The matter was heard on 06 June 2025. As at the date of hearing the application, the Minister of COGHSTA had not waived the age requirement.

- [14] Clearly and more striking is that more than a period of one month has lapsed without a full explanation by the applicants of what was happening during that period. The respondents contend that it was an unreasonable delay and self-created urgency. I consider this aspect against the backdrop of the interests of justice and the fact that there must be certainty and finality in this matter. I therefore find that there will not be any prejudice, and none has been argued, if the merits of the matter are traversed, and were.
- [15] The Speaker of the Municipality, Mr Gustav Matthew Shannon Bock, deposed to the answering affidavit. According to him Council has only extended the fourth respondent's term for three months which is permissible in law and in view thereof that the period has not lapsed and that the MEC has acted prematurely by bringing this application. This submission ignores the fact that it takes time and effort to identify suitable candidates to fill the vacancy of a Municipal Manager. It is unquestionable that the position of the Municipal Manager is the most senior position in the Municipality. The municipalities are experiencing a challenge of a limited pool from which to attract suitable candidates, it was contended. The limitation in this particular municipality is further compounded by their salary scale and location, compared to bigger municipalities, which does not attract suitable candidates.

- [16] In *Nkandla Municipality*⁴ the SCA stated that a purposive interpretation of s 54A reveals a clear objective of acting with expedition in order to avoid an illegality from taking root. Whereas the Municipality has complied with the requirement to notify the MEC of the appointment as contemplated by s 54A(7) and the MEC had expressed his concerns pertaining to the fourth respondent's appointment, which were ignored, the MEC cannot be faulted for not having bent the rules when the initial appointment was made. There is a clear distinction between the three-year fixed term appointment and the three-month acting stint appointment. The former did not offend against the law adverted to, whereas the latter is debatable.
- [17] The SCA warned in *Nkandla Local Municipality*⁵ that what cannot be disregarded is that s54A gives both the MEC and the Minister a supervisory role in relation to the appointment of Municipal Managers. The relief sought by the MEC is to seek a declarator.
- [18] What is concerning in the applicant's replying affidavit is that the MEC has failed to refute the assertions made by the respondents in the background information at paragraphs 22 to 30 of the answering affidavit which I have considered in the paragraphs below. The trite principle enunciated in *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*⁶ is that an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version by the respondent unless the

⁴ *Nkandla Local Municipality and Others v MEC for the Department of Co-Operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-Operative Governance and Traditional Affairs* (Case No 485/2019) [2020] ZASCA 153 (26 November 2020)

⁵ *Ibid* para 37

⁶ 1984 (3) SA 623 (A) at 634E -635C

respondent's allegations do not raise a real, genuine or bona fide dispute of fact.

- [19] Since the fourth respondent assumed his duty on 30 August 2022 neither the MEC nor the Council of the Municipality nor the Minister have raised complaints pertaining to his competence and performance. The uncontroverted evidence is that he brought about the turnaround that resulted in unqualified audits. This attribute strongly militates against setting aside the fourth respondent's appointment, at least until the Minister's decision, as that would otherwise leave a lacuna in the municipal administration. The ConCourt pronounced in *Notyawa v Makana Municipality and Others*⁷:

'The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal managers are vital to the proper administrative functioning of municipalities.'

- [20] Section 54A(10) stipulates that:

'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.'

In this case, the issue does not pertain to skills, expertise, competencies and qualifications in as far as the fourth respondent is concerned, but to his age and the fact that the Minister has been informed of the need for a waiver as far back as February 2025.

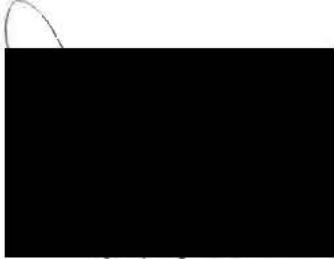
⁷ [2019] ZACC 43; 2020 (2) BCLR 136 (CC) para 11

[21] In the application to the Minister of COGHSTA on 04 February 2025 for a waiver of the retirement age of the fourth respondent, the Minister was informed that for the past fifteen years the Municipality received qualified audits, and its administration was not effective. However, since the appointment of the fourth respondent in 2022 the Municipality received its first unqualified audit for the 2023/24 financial year. The fourth respondent has developed a five-year strategy for the Integrated Development Plan (IDP) and should his term be allowed to end in March 2025 the implementation and monitoring of the IDP would be adversely affected. Since the appointment of the fourth respondent many vacant positions have been filled with permanent, competent and suitable individuals. Despite a reminder to the Minister on 19 March 2025, the Minister has remained tight-lipped. It is for the foregoing reasons that declaratory or interdictory relief sought would not be appropriate. It follows that the application must fail.

[22] On the question of costs. The litigants, namely, the MEC, the Department of COGHSTA, the Municipal Council are all organs of state. It would not be in the interests of justice to make any adverse cost order against any of the parties. It would be prudent for each party to carry its own costs.

[23] In the result, the following order is made:

1. The application is dismissed.
2. There is no order as to costs.



MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Obo the Applicant:
On instruction of:

Mr C.C Davis
Office of the State Attorney

Obo 1st & 2nd Respondents:
On instruction of:

Adv. A. Nacerodien
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