



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

REPORTABLE

Appeal Case Number: A27/2025

Court a *quo* Case No: 4913/2024

In the matter between:

MZINGISI GRATITUDE NKUNGWANA

APPELLANT

and

MNYAMEZELI JACKSON PENXA

RESPONDENT

In Re: [Proceedings before the court a quo]

MNYAMEZELI JACKSON PENXA

APPLICANT

and

**THE CENTRAL KAROO DISTRICT
MUNICIPALITY**

1st RESPONDENT

**THE EXECUTIVE MAYOR OF THE
CENTRAL KAROO DISTRICT
MUNICIPALITY**

2nd RESPONDENT

**THE SPEAKER OF THE CENTRAL
KAROO DISTRICT MUNICIPALITY**

3rd RESPONDENT

MZINGISI GRATITUDE NKUNGWANA

4th RESPONDENT

RUDOLPH ROLAND LINKS

5th RESPONDENT

**ANTON BREDELL: THE WESTERN CAPE
PROVINCIAL GOVERNMENT: MINISTER OF
LOCAL GOVERNMENT, ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING**

6th RESPONDENT

Neutral citation: *Mzingisi Nkungwana v Mnyamezeli Jackson Penxa*
(Appeal Case no: A27/2025) [2025] ZAWCHC (1 September 2025)

Coram: MANTAME J, NUKU J, AND MAYOSI AJ

Heard: 25 July 2025

Delivered: 1 September 2025

Summary: Local government – municipal law – Local Government: Municipal Systems Act 32 of 2000 – in terms of s 54A(2) a person appointed as a municipal manager must at least have the prescribed skills, expertise, competencies and qualifications as prescribed in the Regulations on Appointment and Conditions of Employment of Senior Managers and Annexures A and B thereof - Regulation 9(1) in terms of which a person appointed as a municipal manager must have the competencies set out in Annexure A - s 54A(11) which stipulates the special circumstances in which a municipal council may waive the requirements listed in subsection (2).

ORDER

- 1 **On appeal from:** The judgment and orders of Thulare J, sitting as a court of first instance.
 - 2 The appeal is dismissed with costs, including the costs of counsel, on scale B.
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JUDGMENT

Mayosi AJ:

Introduction and relevant background

[1] The factual genesis of this appeal is a decision by the Central Karoo District Municipality (**the Municipality**) to appoint the appellant as its

municipal manager after a recruitment process initiated by the Municipality on 6 June 2023, when it published an advertisement calling for applications for the position. Applications closed on 26 June 2023, and the three candidates shortlisted for the position were the respondent, the appellant and a Mr Ralph Links (**Mr Links**).

[2] As shortlisted candidates, they each underwent a Municipal Leadership Competency Assessment (**the competency assessment**) under the auspices of the South African Local Government Association (**SALGA**), which evaluated their proficiency across a range of senior managerial competencies.

[3] The respondent was rated “competent” in the eight competencies evaluated by SALGA, and obtained an overall achievement level of “competent”. The significance of, and meanings attached to, the various achievement levels is addressed in more detail further on in this judgment.

[4] The appellant was rated competent in three of the eight competencies evaluated, and he was rated basic in the remaining five that were assessed. He achieved an overall achievement level of “basic”, as did Mr Links. Moreover, the assessors characterised the appellant’s profile as “moderate risk”, indicating some risk factors in his competency and behavioural profile.

[5] Following the interviews and competency assessments, the appellant was selected as the preferred candidate for appointment to the position, having attained the highest overall score in the interview process. On 10 January 2024, the Municipality’s Council resolved to appoint the appellant as its municipal manager, notwithstanding him having obtained a basic level of

achievement in the proficiencies assessed, as opposed to the respondent's competent level of achievement.

[6] Aggrieved by the Municipality's decision to appoint the appellant, the respondent instituted review proceedings seeking an order reviewing and setting aside the Municipality's decision to appoint the appellant. The appellant and Mr Links were the fourth and fifth respondents, respectively, in the review proceedings.

[7] The core of the respondent's challenge was that the appointment of the appellant as municipal manager was unlawful on account of his having obtained only an overall "basic" level of achievement in his competency assessment. The respondent contended that on a proper interpretation of section 54A(2) of the Local Government: Municipal Systems Act 32 of 2000 (**the Systems Act**, alternatively, **the Act**), read with the Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers published under GN 21 in GG 37245 of 17 January 2014 (**the Regulations**), only a candidate with an achievement level of "competent" as he had, or higher, satisfies the prescribed competency requirements for appointment as a municipal manager. On this basis, the respondent contended that the appellant lacked the prescribed competencies, rendering his appointment null and void in terms of section 54A(3)(a) of the Systems Act.

[8] The Municipality, along with its Executive Mayor and Speaker were also respondents in the review application. Their opposition to the application was premised on a different interpretation of the applicable legislation, arguing that the appellant met the requirements for appointment to the position

despite his “basic” rating. They contended that his “basic” achievement level was sufficient for appointment and that the appellant, as municipal manager, could be supervised and developed by the Mayor, given his “basic” rating.

[9] On 5 June 2024, the court *a quo* reviewed and set aside the Municipality’s decision to appoint the appellant, and remitted the matter back to the Municipal Council. It is against this judgment and order that the appellant appeals.

[10] Leave to appeal was refused on 13 August 2024, but was granted to the Full Court by the Supreme Court of Appeal on 30 October 2024.

[11] Even though in the court *a quo* the Municipality opposed the proceedings to review its decision to appoint the appellant as its municipal manager, it adopted a different position after the judgment of Thulare J. After the matter was remitted back to its Council, the Municipality removed the appellant as a result of his appointment having been found to be unlawful, and appointed the respondent to the position of municipal manager.

[12] The Municipality opposes this appeal, explaining that upon reflection after the judgment of the court *a quo*, it now accepts and endorses the findings of Thulare J and asserts that section 54A of the Systems Act and its Regulations require a municipal manager to possess at least a “competent” rating, save for exceptional circumstances. Moreover, so the Municipality submits, it participates in this appeal for the additional reason that, going forward, it and other municipalities require certainty on the correct legal

interpretation of the competency framework applicable to municipal managers, as outlined in the Systems Act.

[13] The respondent has made no submissions to this Court, and accordingly does not participate in the appeal. In the result, legal arguments were presented, in the main, by the appellant and the Municipality. The Minister of Local Government, Environmental Affairs and Planning in the Western Cape Provincial Government (**the MEC**) was the sixth respondent in the review application and, on appeal, he abides the decision of this Court. Nevertheless, on the eve of the hearing, the MEC sought to make submissions regarding what in his view was the correct interpretation to be given to section 54A and the Regulations in the context of the facts of this case. These written submissions were allowed, and additionally oral submissions in support of them were entertained at the hearing.

[14] Before proceeding to consider the merits of the appeal, this Court had to deal with three procedural issues raised by the parties. The Court's role in dealing with these preliminary issues became no more than cursory at the hearing, due mainly to cooperation between the parties. This is because there was general agreement between the parties as to how to proceed regarding the procedural issues raised; which were:

- a) The appellant's application to reinstate the appeal. The Municipality's initial opposition to the appellant's reinstatement was withdrawn.

- b) Whether or not the Municipality can take part in the appeal in light of the appellant's challenge to the authority of its attorney of record.
- c) The condonation application for the late filing of the Municipality's heads of argument, to which there was no opposition.

[15] Condonation for the appellant's application to re-instate the appeal and late filing of the Municipality's heads of argument was granted on the day of the hearing. The parties were therefore *ad idem* that the appeal could proceed as the appellant did not persist with the challenge to the authority of the Municipality's attorneys of record. The Municipality at this juncture had filed an explanatory affidavit as proof of the requisite authority of its new attorneys of record. As a consequence, the hearing proceeded without the need for this Court to delve into the merits of these procedural issues.

[16] The central question for determination in this appeal is whether, upon a proper interpretation of sections 54A(2) and (3) of the Systems Act, read with Regulation 9(1) of the Regulations and Annexure A thereto, a candidate who obtains a basic level of achievement in the statutory competency framework for senior managers may lawfully be appointed as a municipal manager.

[17] An analysis of the appellant's submissions in support of this appeal necessitates first setting out the statutory scheme in which the competency assessment framework that is at issue, is located.

The Systems Act

[18] The objects of the Systems Act are relevant to the purposes sought to be achieved by it in, *inter alia*, the appointment of municipal managers for municipalities. One of the objects of the Act is to provide for the mechanisms that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable to all. To my mind, given the strategic and operational functions that must be performed by a municipal manager, the requirement that a municipal manager must possess at least a competent level of proficiency in the competencies that are prescribed is but one of the cogs in the arsenal of mechanisms that the Act creates towards the achievement of this and its other objectives in relation to municipalities.

[19] This is because a municipal manager heads the administration of a municipality's municipal council. Section 55(1) of the Systems Act imposes no less than seventeen functions for which a municipal manager is responsible and accountable. Five of these functions, in no particular order of importance, are the formation and development of an economical, effective, efficient and accountable administration; the management of the provision of services to the local community in a sustainable and equitable manner; the management, effective utilisation and training of staff; the administration and implementation of the municipality's by-laws and other legislation; and

developing and maintaining a system whereby community satisfaction with municipal services is assessed.

[20] In addition, a municipal manager is the accounting officer of the municipality, in which capacity he is responsible and accountable for: (a) all the income and expenditure of the municipality; (b) all its assets and the discharge of all of its liabilities; and (c) proper and diligent compliance with the Municipal Finance Management Act.

[21] A municipal manager's position is therefore akin to that of a chief executive officer in a corporate entity. I venture to say that it is no exaggeration to posit the view that the effectiveness of a municipality is often highly dependent on the competence and proficiencies possessed by its municipal manager. In **Notyawa**,¹ the Constitutional Court entrenched the importance of municipal managers when it said that the role they play is crucial to the delivery of services to local communities and the proper functioning of municipalities, whose main function is to provide services to local communities.²

[22] The Act provides for procedures and competency criteria for municipal manager appointments, and for the consequences of appointments made otherwise than in accordance with such procedure and criteria. As the Supreme Court of Appeal stated in **Mawonga**,³ what this illustrates is that the legislature was alive to the need to prevent irregular appointments of

¹ *Notyawa v Makana Municipality and Others* 2020 (2) BCLR 136 (CC)

² Para [4]

³ *Mawonga and Another v Walter Sisulu Municipality and Others* (Case no574/19) [2020] ZASCA 125 (7 October 2020)

inadequately skilled persons, and to ensure that the person appointed as municipal manager is suitably qualified with the necessary expertise and competence.⁴

[23] Section 54A sets out a very specific procedure for the appointment of a municipal manager. In **Mawonga**⁵ the SCA explained that the section was introduced into the Systems Act in order to curb the prevailing mismanagement of municipalities, and confirmed that this much had been stated by the Constitutional Court in **South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs**⁶ which characterised the purpose of the Amendment Act (that introduced section 54A) as being to:

‘...address what was perceived to be the alarming increase in the instances of maladministration within municipalities. The Amendment Act introduced means to ensure that professional qualifications, experience and competence were the overarching criteria governing the appointment of municipal managers or managers directly accountable to municipal managers in local government, as opposed to party political affiliation.’

[24] In terms of section 54A (2), the interpretation of which is at issue in this appeal together with the Regulations promulgated under the Act, a person appointed as a municipal manager must at least have the skills, expertise, competencies and qualifications as prescribed. The language used is peremptory; and the phrase “*at least*” means “*not less than*”; or “*at the*

⁴ Mawonga, para [22]

⁵ Mawonga, para [21]

⁶ [2017] ZACC 7; 2017 (5) BCLR 641 (CC) para 4 and fn 7 where reference is made to the debates in the National Assembly on 24 March 2011, as reflected in Hansard at 2006-2010.

minimum”. The section envisages that candidates who are best qualified for the job must be recruited for the position.⁷

[25] The educational experience, work-related experience and knowledge required of a municipal manager are outlined in Annexure B of the Regulations. It is uncontentious on the papers that the appellant possessed the formal qualifications and work experience prescribed for a municipal manager, in that he met the requirements set out in Annexure B, which include appropriate higher education qualifications and a minimum of 5 years’ relevant experience.

[26] The section nullifies any appointment made in contravention of the Systems Act, including the appointment of a person who does not possess the prescribed skills, expertise, competencies and qualifications. This is in terms of section 54A(3), which stipulates that a decision to appoint a person as municipal manager, and any resultant contract with them are null and void if the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or the appointment was otherwise made in contravention of the Systems Act. In **Speaker of the Knysna Municipal Council**⁸ Pangarker AJ, as she then was, asserted the import of this section when she held: ‘To be clear, if the appointed person did not have the prescribed skills, expertise, competencies or qualifications, then the decision

⁷ Notyawa supra, para [4]

⁸ *Democratic Alliance v Speaker of the Knysna Municipal Council and others* (4247/2023) [2024] ZAWCHC 130 (10 May 2024)

to appoint him/her [is] null and void; or,⁹ if the appointment was made in contravention of the Act, then too, it [is] null and void.’¹⁰

[27] What has been referred to by the parties as a safety-valve provision for a municipality is set out in section 54A(11), in terms of which a municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister (responsible for local government) to waive any of the requirements listed in subsection (2) if it is unable to attract suitable candidates. The interpretation of this provision, on the facts of this appeal, is addressed later in this judgment.

The Regulations

[28] For the definition of “competence”, and the competency framework that has been put in place to assess and arrive at what is a suitably qualified candidate for the position of municipal manager, one must have regard to the Regulations together with Annexure A. It is in the Regulations and Annexure A that the prescribed competencies of which section 54A(2) speaks, and the required proficiencies linked to those competencies (the so-called levels of achievement) in order to qualify for appointment as municipal manager, are set out.

[29] In the Regulations, “competence” is defined to mean having the necessary higher education qualification, work experience and knowledge to

⁹ Pangarker AJ’s emphasis

¹⁰ Para [151]

*obtain at least a competent level of achievement.*¹¹ The ordinary dictionary meaning of the word “competence” is “*the ability to do something well*”; whereas “competent” means “*having the necessary skill or knowledge to do something successfully.*”¹² I explain the different levels of achievement later in this judgment.

[30] The provisions of Regulation 9(1) are important. It stipulates that a person appointed as a senior manager (which includes a municipal manager) must¹³ have the competencies set out in Annexure A, which also outlines the levels of achievement, which essentially denotes the proficiencies in the prescribed competencies.

Annexure A

[31] The competency framework in Annexure A outlines a mechanism for assessing the competence and proficiencies of potential appointees to the position of municipal manager, with reference to what are called core competencies on the one hand, and leading competencies on the other, underpinned by the benchmark of what are referred to as levels of achievement.

[32] Core competencies are said to cut across all levels of work in a municipality and enhance contextualised leadership that guarantees the impact of service delivery; whilst leading competencies are competencies that

¹¹ Emphasis added.

¹² The Oxford Dictionary & Thesaurus 2nd ed

¹³ Emphasis added

are required to develop clear institutional strategy, initiative, drive and implement programs to achieve long-term sustainable and measurable service delivery results.

[33] According to Item 2.2 of Annexure A, a person appointed as a municipal manager *must*¹⁴ have the competencies as set out in the competency framework contained in Annexure A, with particular focus to be placed on the following key factors, *inter alia*:

- a) Critical leading competencies that drive the strategic intent and direction of local government; and
- b) Core competencies which senior managers are expected to possess, and which drive the execution of the leading competencies.

[34] There are six leading competencies, i.e.; strategic direction and leadership; people management; program and project management; financial management; change leadership and governance leadership.

[35] The shortlisted candidates in the appeal that is before us were assessed in three of these six leading competencies; i.e., strategic leadership;¹⁵ people

¹⁴ Emphasis added

¹⁵ A “basic” rating for strategic leadership means that the candidate: (1) understands institutional and departmental strategic objectives, but lacks the ability to inspire others to achieve the set mandate; (2) can describe how specific tasks link to institutional strategies but has limited influence in directing strategy; (3) has a basic understanding of institutional performance, management, but lacks the ability to integrate systems into a collective whole; and (4) demonstrates a basic understanding of key decision-makers. This is in terms of Item 5 of Annexure A.

management¹⁶ and change management.¹⁷ The appellant was rated basic in all three of the six leading competencies that were assessed. Therefore, when regard is had to the definition of leading competencies in Annexure A, these results can only have meant that he was assessed as possessing an elementary ability to develop clear institutional strategy, initiative, drive and to implement programs to achieve long-term sustainable and measurable service delivery results.

[36] The respondent, on the other hand, received a competent rating in all of the leading competencies that were assessed,¹⁸¹⁹²⁰ meaning that he was

¹⁶ Item 5 of Annexure A states that a “basic” rating for people management means that the candidate: (1) participates in team goal-setting and problem solving; (2) interacts and collaborates with people of diverse backgrounds; (3) is aware of guidelines for employee development, but requires support in implementing development initiatives.

¹⁷ In terms of Item 5, a “basic” rating in change management means the candidate: (1) displays an awareness of change interventions, and the benefits of transformation initiatives; (2) is able to identify basic needs for change; (3) identifies gaps between the current and desired state; (4) identifies potential risks and challenges to transformation, including resistance to change interventions; (5) participates in change programs and piloting change interventions; and (6) understands the impact of change interventions on the institution within the broader scope of Local Government.

¹⁸ A “competent” rating for strategic leadership is obtained by a candidate who: (1) can give direction to a team in realising the institution’s strategic mandate and set objectives; (2) has a positive impact and influence on the morale, engagement and participation of team members; (3) develops action plans to execute and guide strategy; (4) assist in defining performance measures to monitor the progress and effectiveness of the institution; (5) displays an awareness of institutional structures and political factors; (6) effectively communicates barriers to execution to relevant parties; (7) provides guidance to all stakeholders in the achievement of the strategic mandate; and (8) understands the aim and objectives of the institution and relates it to their own work.. This is in terms of Item 5 of Annexure A.

¹⁹ In terms of Item 5, a “competent” rating in people management means that the candidate: (1) seeks opportunities to increase team contribution and responsibility; (2) respects and supports the diverse nature of others and is aware of the benefits of a diverse approach; (3) effectively delegates tasks and empowers others to increase contribution and execute functions optimally; (4) applies relevant employee legislation fairly and consistently; (5) facilitates team goal-setting and problem-solving; and (6) effectively identifies capacity requirements to fulfil the strategic mandate.

²⁰ A “competent” rating for change management is obtained by a candidate who: (1) performs an analysis of the change impact on the social, political and economic environment; (2) maintain calm focus during change; (3) is bale to assist team members during change and keep them focused on the deliverables; (4) volunteers to lead change efforts outside of own work team; (5) is able to gain buy-in and approval for change from relevant stakeholders; (6) identifies change readiness levels and assist in resolving resistance to change; and (7) designs change interventions that are aligned with the institution’s strategic objectives and goals.

assessed as a candidate who could successfully and effectively deliver in those leading competencies.

[37] The framework further involves six core competencies which are moral competence; planning and organising; analysis and innovation; knowledge and information management; communication and results and quality focus. These core competencies are said to act as drivers to ensure that the leading competencies are executed at an optimal level.

[38] The competency assessors assessed the shortlisted candidates in five of the six core competencies; i.e.; moral competence;²¹ planning and organising;^{22,23} analysis and innovation;²⁴ communication,²⁵ as well as results

²¹ Under Item 5, a “competent” rating for moral competence means the candidate: (1) conducts themselves in alignment with the values of Local Government and the institution; (2) is able to openly admit own mistakes and weaknesses and seek assistance from others when unable to deliver; (3) actively reports fraudulent activity and corruption within local government; (4) understands and honours the confidential nature of matters without seeking personal gain; and (5) is able to deal with situations of conflict of interest promptly and in the best interest of local government. This is in terms of Item 5 of Annexure A.

²² In terms of Item 5 of Annexure A, a “basic” rating for planning and organising means that the candidate: (1) is able to follow basic plans and organise tasks around set objectives; (2) understands the process of planning and organising but requires guidance and development in providing detailed and comprehensive plans; (3) is able to follow existing plans and ensure that objectives are met; (4) focuses on short-term objectives in developing plans and actions; and (5) arranges information and resources required for a task, but requires further structure and organisation.

²³ The “competent” rating obtained by the respondent for planning and organising meant that he demonstrated that he could: (1) actively and appropriately organise information and resources required for a task; (2) recognise the urgency and importance of tasks; (3) balance short and long-term plans and goals and incorporate into the team’s performance objectives; (4) schedule tasks to ensure they are performed within budget and with efficient use of time and resources; and (5) measures progress and monitors performance results.

²⁴ For which, in terms of Item 5, a “competent” rating means that the candidate: (1) demonstrates logical problem solving techniques and approaches and provides rationale for recommendations; (2) demonstrates objectivity, insight, and thoroughness when analysing problems; (3) is able to break down complex problems into manageable parts and identify solutions; (4) consults internal and external stakeholders on opportunities to improve processes and service delivery; (5) clearly communicates the benefits of new opportunities and innovative solutions to stakeholders; (6) continuously identifies opportunities to enhance internal processes; and (7) identifies and analyses opportunities conducive to innovative approaches and proposes remedial intervention.

²⁵ A “competent” candidate in the communication core competency is one who: (1) expresses ideas to individuals and groups in formal and informal settings in a manner that is interesting and motivating; (2) is able to understand, tolerate and appreciate diverse perspectives, attitudes and beliefs; (3) adapts

and quality focus.²⁶²⁷ The appellant received a basic rating for two of these; and a competent rating for the remaining three core competencies assessed. The respondent was assessed to be competent in all five of them.²⁸

[39] The prescribed competencies are underpinned by four achievement levels that act as a benchmark for, *inter alia*, appointments and development interventions. These achievement levels are classified as: basic; competent; advanced and superior. They are set out in Item 6 of Annexure A where the proficiencies associated with each achievement level also appear.

[40] Candidates who are assessed to have a basic level of achievement have the following proficiencies: they are able to apply basic concepts, methods, and understanding of local government operations, *but require supervision and development*.²⁹ The appellant obtained a basic level of achievement.

communication content and style to suit the audience and facilitate optimal information transfer; (4) delivers content in a manner that gains support, commitment and agreement from relevant stakeholders; and (5) compiles clear, focused, concise and well-structured written documents. Again, as per item 5 of Annexure A.

²⁶ As per Item 5 of Annexure A, a “basic” rating under the core competency of results and quality focus means that the candidate: (1) understands quality of work but requires guidance in attending to important matters; (2) shows a basic commitment to achieving the correct results; (3) produces the minimum level of results required in the role; (4) produces outcomes that are of a good standard; (5) focuses on the quantity of output but requires development in incorporating the quality of work; and (6) produces quality work in general circumstances; but fails to meet expectations when under pressure.

²⁷ Whereas the “competent” rating obtained by the respondent under this core competency means that he: (1) demonstrated an ability to focus on high-priority actions and would not become distracted by lower-priority activities; (2) displayed firm commitment and pride in achieving the correct results; (3) could set quality standards and design processes and tasks around achieving set standards; (4) could produce output of high quality; (5) demonstrated that he was able to balance to quantity and quality of results in order to achieve objectives; and (6) demonstrated an ability to monitor progress, quality of work, and use of resources; provide status updates, and make adjustments as needed.

²⁸ A “competent” rating for planning and organising means that the candidate: (1) actively and appropriately organises information and resources required for a task; (2) recognises the urgency and importance of tasks; (3) balances short-terms and long-term plans and goals and incorporates into the team’s performance objectives; (4) schedules tasks to ensure they are performed within budget and with efficient use of time and resources; and (5) measures progress and monitors performance results. This is in terms of Item 5 of Annexure A.

²⁹ My emphasis.

[41] A competent level of achievement is obtained by a candidate assessed as capable of developing and applying more progressive concepts, methods and understanding; one who plans and guides the work of others and executes progressive analyses. This is the level of achievement that was obtained by the respondent.

[42] A candidate with an advanced achievement level is proficient in developing and applying complex concepts, methods and understanding; effectively directs and leads a group and executes in-depth analyses. A candidate with a superior level of achievement has a comprehensive understanding of local government operations; is or is able to be critical in shaping strategic direction and change; and develops and applies comprehensive concepts and methods.

[43] The provisions of Item 6.1 of Annexure A are instructive and important in order to give effect to the purpose of the legislative scheme, i.e.; to appoint the most suitable candidate for municipal manager. Item 6.1, which resorts under the heading “*Achievement Levels*”, stipulates that individuals falling within the basic range are deemed unsuitable for the role of municipal manager, and caution should be applied in promoting and appointing such persons. The ordinary dictionary meaning of the adjective “basic” is: “*consisting of the minimum required or offered*”; also synonymous with the word “*elementary*”.

[44] Having set out the statutory and regulatory scheme thus, I now turn to the questions posited by the appellant as framing this appeal.

The grounds of appeal with reference to the proper interpretive approach

[45] As stated above, the central question in this appeal is whether or not, upon a proper interpretation of section 54A(2) and (3) of the Systems Act, read with Regulation 9(1) and Annexure A, a candidate who receives an overall achievement level of “basic” in the statutory competency assessment may lawfully be appointed as a municipal manager.

[46] The lodestar in the proper approach to statutory interpretation has become Wallis JA’s judgment in **Endumeni**³⁰ when, writing for the Court in the SCA, he held as follows:

‘The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words

³⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 ; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para [18]

actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation... The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[47] As if it had not been made clear enough by the SCA in *Endumeni*, this interpretive approach was further entrenched by the Constitutional Court some two years later in **Cool Ideas**³¹ at para [28] when Majiedt AJ (as he then was) wrote:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised;
- and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’

[48] What this means is that all indications from the legislative intent, the wording used, the structure of the Systems Act, related provisions in the Regulations and its annexures, and the apparent purpose of the scheme must be considered together to arrive at a sensible interpretation. Interpretation is not a mechanical process of looking at text or purpose alone, but rather a

³¹ *Cool Ideas 1188 CC v Hubbard and Another* 2014 (4) SA 474 (CC)

unitary exercise that seeks to reconcile the ordinary meaning of words with their context and the statute's objectives.

[49] Against the backdrop of this interpretive approach, I turn now to address the central question the inquiry into which, according to the appellant, entails asking this further question: whether or not the prescribed competencies in section 54A(2) are to be understood as referring only to candidates assessed at a "competent" or above; or whether it includes those assessed at the "basic" level within the Annexure A framework.

[50] My answer to this question, for the reasons set out more fully below, is that the prescribed competencies referred in section 54A(2) for appointment as a municipal manager refer to a candidate who has achieved a minimum level of achievement of competent or higher. A candidate who has achieved a level of achievement of basic is deemed not suitable for appointment, in the first instance. More must be done in order to render that candidate, who is deemed unsuitable for appointment, capable of being lawfully appointed under the strictures of the Act. This is dealt with further in this judgment, in the section dealing with section 54A (11).

[51] In terms of section 54A (2), a person appointed as municipal manager must, as a minimum have, *inter alia*, the prescribed skills and competencies. The language used in section 54A (2) is peremptory. After the Act, we look to the Regulations where the prescribed skills and competencies are found.

[52] According to the Regulations, competence is having the necessary higher education qualification, work experience, and knowledge to obtain at least (meaning as a minimum) a competent level of achievement.

[53] A plain reading of this provision is that in order to be classified as a candidate that is competent, and therefore able to perform successfully and effectively in the position of municipal manager, the minimum that is required is that the combination of your higher education qualification, work experience and knowledge must be such as to enable you to obtain an achievement level of competent. In other words, the candidate's Annexure B criteria combined with their Annexure A competencies, when benchmarked against the levels of achievement, must result in a level of achievement of competent, as a minimum, as per the definition of "competence" in the Regulations.

[54] The way I see it, the levels of achievement speak to the proficiencies attached to the core and leading competencies required. In short, in the core and leading competencies assessed, the candidate must have a proficiency level of competent, as a minimum, for appointment to the position of municipal manager.

[55] In the heads of argument filed on behalf of the appellant, there is no mention made whatsoever of the definition of "competence" that is in the Regulations. This is no surprise, for that definition, amongst other difficulties, is destructive of the appellant's argument that a candidate with an achievement level of basic is as appointable as a candidate with an achievement level of competent and higher, to the position of municipal

manager. The appellant's proposition is clearly unsustainable, from this definition alone. But there are other reasons why the submission cannot be sustained.

[56] In my view, what is apparent from the statutory scheme, which includes the competency assessment framework in the Regulations and Annexure A, is that the legislature requires municipalities and their councils to eschew mediocrity in the appointment of municipal managers, in favour of competence, as a minimum requirement.

[57] The interpretation for which the appellant contends seeks to entrench mediocrity in municipal appointments. In fact, it does more than that - it seeks to elevate mediocrity even in instances where a candidate which the competency framework has found to possess a basic level of proficiency stands side-by-side with a candidate that the framework has assessed to have a competent, advanced or superior level of proficiency. This interpretation produces an absurd result, in that a candidate with a basic level of achievement (which Annexure A says is deemed unsuitable for appointment) is as equally appointable as a candidate with a competent, advanced or superior level of achievement. This is simply unsustainable, once again when regard is had to the purpose of the entire statutory scheme, which is to appoint the most suitable candidate for the position of municipal manager in order to achieve the purposes of the Act.

[58] And then there is Item 6.1 of Annexure A, which states that candidates falling within the basic range are deemed unsuitable for the role of municipal manager, and caution should be applied in their appointment.

[59] The appellant's argument is that a candidate assessed as possessing a basic level of achievement can be appointed as municipal manager, even (as happened in this case) over a competent one because, so the argument goes, Item 6.1 *'does not flat-out forbid appointing a basic-range individual. It does not say "a person with a basic rating may not be appointed'.* This cannot be correct, and needs only be said in order for its absurdity to become apparent given what I have said previously in this judgment. This interpretation flies in the face of the contextual and purposive approach that must be applied to statutory interpretation.³²

[60] I am of the view that there is no ambiguity in the language of the Act and the Regulations insofar as it evinces the legislative intent regarding the minimum standards applicable for the appointment of municipal managers. To the extent that the appellant seeks to impute some kind of ambiguity from the language of Item 6.1 of Annexure A by advancing the argument that it does not forbid appointing a basic rated individual in circumstances such as those presented by this case, and does not say that a basic rated person may not be appointed even when there is one assessed as competent, the interpretation that best furthers the purpose of the provision – appointing the most suitably qualified and competent candidate to the position of municipal manager for effective local governance and service delivery - should be preferred, so long as the text can reasonably accommodate that meaning. In my view, the text accommodates this meaning beyond any doubt.

³² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18

[61] As I see it, the competency assessment framework outlined in Annexure A is a tool for assessing how proficient candidates are in the leading and core competencies prescribed in Annexure A, in circumstances where those candidates have met the minimum requirements prescribed in Annexure B. The Annexure B requirements are the first stage of the inquiry, in what may in all probability involve a desk top exercise.³³ The prescribed competencies (core and leading) and the proficiency matrix (the achievement levels) in Annexure A therefore seek to distinguish between candidates who, on the face of it, stand on the same footing after assessment of the Annexure B criteria, in that they all possess the educational qualifications, work experience and the basic³⁴ knowledge required to operate in the local government space.

[62] However, the inquiry does not end there for the purposes of appointment to the position of municipal manager. This is because the statutory framework requires a demonstration of more than just basic knowledge and proficiencies in order to be appointed as a municipal manager. It requires, at the very least, the demonstration of competence, i.e., having the necessary knowledge and skill to perform the functions of municipal manager effectively and successfully. A candidate with a basic level of achievement cannot do this, and if they are appointed, caution must be exercised and they need assistance to close the various gaps inherent in their proficiency profile.

³³ Item 4. Minimum Requirements: The minimum requirements that accompany the competency framework, but do not govern the selected competencies, as set out in annexure B to these regulations, refer to the level of higher education qualification, work experience and knowledge that are needed to operate effectively in the local government environment.

³⁴ My emphasis.

[63] The regulatory framework clearly reflects an intention to ensure the appointment of municipal managers who have more than an elementary proficiency in the prescribed competencies. They are expected to possess a higher than basic level of competence in order to fulfil the demands of the post and achieve the objects and purpose of the Systems Act after their appointment.

[64] It follows therefore that a basic level of achievement does not meet the minimum requirements, and a candidate with this level of achievement is not competent for appointment to the position without more, as the Regulations are structured, and only if special circumstances exist necessitating the appointment of such an individual (after successful invocation of section 54A(11)) can the appointment of such an individual be made, and caution must then be exercised. No such caution is required when appointing a candidate with a competent or higher level of proficiency, quite simply because they can do the job successfully and effectively, which the candidate with elementary proficiencies cannot do. Logic dictates that this is why that candidate is deemed unsuitable for appointment. Not without more. In the statutory scheme that individual requires supervision and development intervention, which none of the competent and higher proficiency levels do.

[65] So whilst the basic rating or level of achievement does indeed form part of the competency assessment framework, in my view it is there purely for the purposes of assessing who meets the minimum prescribed requirements for competence and proficiency to qualify for appointment as a municipal manager; and to set out what is to happen if no candidates with a competent level of achievement are obtained, when only basic rated ones are produced

by the recruitment process. It is clear from the wording of Item 6.1. that the basic level of achievement does not meet the minimum requirements for the prescribed competencies for appointment as municipal manager.

[66] This interpretation is not a stretch. It is evident from the statutory scheme.

[67] The position was stated in no clearer terms than by Gura J in the judgment of **Dilotsothe**³⁵ whose facts were similar in material respects to those in this appeal, in that the municipality there had made the decision to appoint as municipal manager a candidate who had obtained a basic overall rating, overlooking two candidates who had been rated as competent. The main issue in that application, as is the case in this appeal, was whether or not by virtue of Item 6.1 the municipality was empowered, in those circumstances, to appoint a candidate that had been assessed as basic in the competency assessment.³⁶

[68] Gura J held as follows:

‘[16] Item 6.1 in my view was never intended to empower the municipality to overlook the basic requirements for filling a post of senior manager as set out in Annexure A and B, as well as Regulation 9(1) and 16(5). It was submitted that Mr Mokgwamme³⁷ met the basic requirements for appointment to a senior manager position. I disagree. Once he is assessed as basic in the competency assessment, it means he has not lived up to the prescribed minimum requirements of the post of

³⁵ *Dilotsothe v Mahikeng Local Municipality and Others North West (Mahikeng)* Case No UM130/2020, 25 October 2021

³⁶ Para [10]

³⁷ The appointee who had obtained a basic rating.

senior manager, and because of that, whoever wants to appoint him must exercise caution. That is why there is no need for caution where a candidate has satisfied all the requirements for the post.

[17] What has happened in this case is that the employer has used Item 6.1 to exclude two candidates who were better than Mr Mokgwamme. These two candidates...passed the competency assessment. In my view, the municipality has no power to overlook a candidate who has met all the requirements of the senior manager's post (including being successful in the competency assessment) in favour of the one who was assessed as Basic in the competency assessment. It therefore follows that if candidate A scores Basic and his/her two opponents (B and C) are successful in the competency assessment, candidate A automatically drops from the race at that stage, even before reaching the finishing line in the race track. He/She cannot be considered for appointment because there are two best candidates above him/her.'

[69] This is sound reasoning of which this Court approves. It aligns with the purposive interpretation to be given to section 54A (2), the Regulations and Annexure A.

[70] For all of the reasons set out above, the answer to the appellant's central question is that, upon a proper interpretation of section 54A(2) of the Act, read with Regulation 9(1) and Annexure A, a candidate who received an overall level of achievement of basic in the statutory competency assessment may not lawfully be appointed as a municipal manager over a candidate who received a competent level of achievement and above. This is the question that this appeal presents.

[71] This position is not changed by the fact that the competency framework includes in it basic ratings and the basic level of achievement. The latter level of achievement does not meet the minimum standards for appointment to the position of municipal manager. Not without more. Which brings us to the provisions of section 54A(11) of the Act.

Section 54A (11)

[72] Another question posed by the appellant in this appeal, said to be the second interlocking question to the primary question, is whether or not the appointment of a basic rated candidate, in the absence of a Ministerial waiver under section 54A (11), renders such appointment null and void under section 54A(3).

[73] Item 6.1 of Annexure A states in terms that a basic rated candidate is unsuitable for the role of municipal manager. This is logical, given the fact that this candidate only has a basic understanding of local government operations and the minimum requirements for competence and competencies in order to be appointed as a municipal manager sets a minimum standard higher than that (i.e.; competent, with the proficiencies attaching thereto), as expounded upon above.

[74] Another demonstration of why a basic rated candidate is not competent for appointment as municipal manager, according to the minimum prescribed requirements, is that a candidate who is basic rated and therefore not

competent must, if appointed, perform the municipal manager function under supervision and development interventions, in order to be effective and successful in that role. That says it all as far as meeting the minimum standard is concerned. That, together with the fact that caution is to be exercised in the appointment of this candidate to the position of municipal manager.

[75] The appointment of an unsuitable candidate is the appointment of a candidate who does not possess the minimum prescribed competencies, *inter alia*, required in terms of section 54A(2) of the Act. Such an appointment therefore contravenes the Act, and the appointment is null and void in terms of section 54A (3). Without more, and here we are led to section 54A(11).

[76] The only way that a basic rated, and therefore unsuitable, candidate for appointment as municipal manager can lawfully be appointed is if section 54A(11) is invoked, which specifically caters for the instance when a municipality has been unable to attract a suitable candidate, which must include when the municipality has succeeded in attracting an unsuitable candidate. I repeat, lest we lose sight of the point for the purposes of answering this question posed by the appellant, that Item 6.1 deems a basic rated candidate as unsuitable for appointment, and the entire legislative scheme is aimed at recruiting the most suitable person for the position.

[77] The potential conundrum was captured well by Gura J in **Dilotsothe**³⁸ in the following dictum:

³⁸ Supra, at para [18]

‘It will be a totally different picture, for instance, if all three candidates are assessed as Basic in the competency assessment. It is here that the employer (municipal council) should exercise caution when it considers appointing one of them. It is common cause that the competitive process of appointing a municipal manager clearly goes to the appointment of the best possible candidate, amongst those who applied and have the requisite skill, experience and qualification.’³⁹

[78] It bears mentioning that this was not such a case on the facts of this particular matter. The Municipality had in fact succeeded in attracting a candidate that was assessed as having obtained a competent level of achievement but nevertheless proceeded to appoint one with a basic level of achievement, notwithstanding the fact that a competent level of achievement is the minimum proficiency level that is required for appointment to the position of municipal manager. In the present case a competent candidate was found in the recruitment process, and accordingly section 54A(11) was not triggered. The municipal council was not faced with a situation where they were unable to find a suitable candidate.

[79] A recruitment process that produces only a candidate or candidates with a basic level of achievement is one in which the municipality concerned has failed to attract a suitable candidate. A candidate with a basic level of proficiency is not appointable without more, and the more that must be done to ensure a lawful appointment is set out in section 54A(11) of the Act.

[80] In terms of section 54A(3) a decision to appoint a person as municipal manager is null and void if the person appointed does not have the prescribed

³⁹ Para [18]

skills, expertise, competencies or qualification or the appointment was otherwise made in contravention of the Act. A person who is unsuitable for appointment because he has a basic level of achievement when the minimum required is a competent level of achievement falls into this category.

[81] In my view, a candidate who has obtained a basic level of achievement is unsuitable for appointment to the position of municipal manager, and this is clearly stated in Item 6.1 of Annexure A. However, the fact that caution is advised in the appointment of such a candidate means that there are circumstances when they may be appointed. In other words, whilst this candidate is unsuitable for appointment and may not lawfully be appointed to the position of municipal manager when there are candidates whose level of achievement is competent and higher, the basic rated candidate is nevertheless appointable in the absence of all else. Under the strictures of section 54A(11), because in those circumstances the municipality has been unable to recruit a suitable candidate.

[82] Given that such a candidate is deemed unsuitable for appointment to the position in the first instance, their appointment to the position can only be lawful in the circumstances envisaged in section 54A(11) of the Systems Act, i.e., these are special circumstances and good cause must be shown upon written application to the Minister in order to permit such an appointment.

[83] If all that the municipality has been able to attract from a recruitment process are basic rated candidates, who are deemed unsuitable under Item 6.1 (together with a reading of the entire statutory scheme), then it follows that in that instance the municipality has not been able to attract suitable candidates

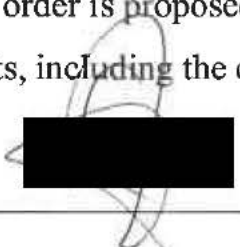
for the position. And if it wants to appoint one of those unsuitable candidates, then in that case section 54A(11) is triggered. This serves as an additional check and balance to achieve the purposes of the Act.

Conclusion

[84] For all the reasons set out in this judgment this appeal must fail. The phrase “prescribed competencies” in section 54A (2) of the Act should be understood as referring only to candidates assessed at a competent level of achievement, and the appointment of a basic-rated candidate, in the absence of a Ministerial waiver under section 54A (11), renders such appointment null and void under section 54A (3) of the Act.

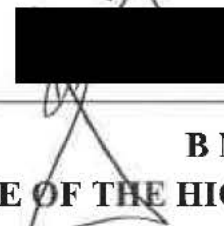
[85] In the circumstances, the following order is proposed:

- a) The appeal is dismissed with costs, including the costs of counsel on scale B.



N MAYOSI
ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.



B MANTAME
JUDGE OF THE HIGH COURT

I agree.



L NUKU
JUDGE OF THE HIGH COURT

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