

SOUTH AFRICA / JUDGMENT

Mawonga and Another v Walter Sisulu Local Municipality and Others (633/2019) [2018] ZAECGHC 142; [2019] 2 BLLR 196 (ECG); (2019) 40 ILJ 974 (ECG) (8 November 2018) [2018] ZAECGHC 142

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M J Lowe

CASE / FILE NUMBER

633/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

CASE

NO: 633/2019

Date

heard: 23 August 2018

Date

delivered: 08 November 2018

In

the matter between:

THEMBINKOSI
MAWONGA Applicant
INSTITUTE
FOR LOCAL GOVERNMENT MANAGEMENT
OF
SOUTH
AFRICA Intervening
Party
and
WALTER
SISULU LOCAL
MUNICIPALITY First
Respondent
THE

MEMBER OF EXECUTIVE COUNCIL FOR
COOPERATIVE
GOVERNANCE AND TRADITIONAL Second
Respondent
AFFAIRS
N.O.
THE
ADMINISTRATOR OF WALTER SISULU LOCAL
MUNICIPALITY Third
Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

[1] The issues in this Application can be concisely summarized as can the. relevant facts. The Resolution of same, however, is more difficult.

[2] [2.1] The Application is firstly a review and attempted setting aside of the First Respondent's Council's decision of 8 January 2018, rescinding its Resolution of 20 July 2017,. which decision appointed Applicant (by a purported extension or renewal of an existing employment contract) as its Municipal Manager.

[2.2] Second Respondent seeks an order, in a Declarator Counter Application (admitted although out of time), reviewing and setting aside First Respondent's earlier decision (20 July 2017) to renew the Applicant's contract, that was later purportedly rescinded on 8 January 2018.

[2.3] The dispute in effect centres around to what extent Section 54A of the Municipal Systems Act 32 of 2000 (MSA) applies to the July 2017 decision, and if so the decisions to renew and later rescind that same decision, are null and void.

[2.4] Applicant raises various procedural issues as being such as to invalidate the January 2010 decision to rescind as an issue.

[2.5] First and Third Respondents argue that the July 2017 decision to renew was null and void by virtue of Section 54A(3) of MSA (not having been advertised) but first take a point in limine as to jurisdiction arguing that this Court has no jurisdiction to entertain the Application as, so it is argued, the letter terminating Applicant's contract (with immediate effect) was a dismissal as defined in Section 186(1)(a) of the Labour Relations Act 66 of 1995 (LRA) - the real attack, so it is argued being simply an attack on the legal basis of the decision to dismiss - hence Applicant being required to utilise LRA remedies, firstly the CCMA for conciliation, and thereafter arbitration or the Labour Court.

[2.6] In summary then the issues are:

[2.6.1] The jurisdiction of this Court to hear the Application and Counter Application.

[2.6.2] If jurisdiction is established then:

[2.6.2.1] Whether the 20 July 2017 decision to renew the Applicant's employment contract is null and void for breach of Section 54A of the MSA;

[2.6.2.2] Whether the later decision of 8 January 2018 to rescind its earlier decision to renew is unlawful as being procedurally defective and/or being in breach of Section 54A of the MSA.

[3] In short if jurisdiction is established the main dispute (apart from the procedure relevant to the January 2018 decision) is the extent to which Section 54A of the MSA applies and impacts on both decisions.

[4] I have been assisted in this matter particularly on the Section 54A issue by the argument of Ms Drake for the Intervening Party. She makes it clear that the Section 54A issue is fundamental to Municipal Manager Appointments throughout the country.

[5] Further the issue was addressed in *Xuma v Engcobo Municipality and 4 Others* (unreported) [1] in this Division in a judgment by Jolwana AJ (as he then was) which is highly relevant to this matter and substantively on all fours. It is argued, by at least the Intervening Party, that this judgment is incorrect. Plainly unless I find the said judgment to be "clearly wrong" I am bound to follow same. To clarify, Ms Drake's argument goes to issues which she suggests may not have been canvassed before Jolwana AJ in argument.

THE

FACTS

[6] I set out the facts briefly as are relevant to the three issues for decision. Apart from procedure and jurisdiction the central issues is whether a Municipality (First Respondent) may lawfully renew and extend the employment contract of the existing Municipal Manager in terms of Section 57(6)(c). of the MSA (without advertising same), before the appointment post becomes "vacant", or whether a Municipal Manager may not serve a term of more than five years, after which the Municipal Manager must compete for his position again, in a competitive appointment process, regardless of his prior performance, suitability and fulfilment of his then contract. Put otherwise whether every Municipal Manager's renewal of appointment is a fresh appointment, subject to the provisions of Section 54A of the MSA, and thus subject to competitive process. Applicant and the Intervening Party argue for the former view whilst Respondents contend for the latter. The judgment of *Xuma* finds for the latter argument.

[7] Applicant was appointed Municipal Manager of the Gariep Local Municipality on a 5 year contract on 1 August 2007 this terminating

"without further notice" on 31 July 2012. It was agreed that "[t]here is no expectation that his contract will be renewed or extended beyond" 5 years, effectively abandoning a legitimate expectation argument. The agreement provided for automatic lapse on 31 July 2012 "subject to any extension or renewal":

- [8] On 24 April 2012 the said Municipality resolved to renew Applicant's contract for a further 5 years from 1 August 2012 to 31 July 2017. It was renewed by agreement before termination date as resolved by the Municipal Council. The terms of the contract were similar to the previous contract with automatic termination on 31 July 2017 subject to "any extension or renewal".
- [9] The said Municipality was disestablished and merged with the Maletswai Local Municipality to establish First Respondent. Applicant's contract was transferred to First Respondent.
- [10] On 20 July 2017 (before expiry) the Municipal Council extended Applicant's contract for a further 5 years resolving that "after serving four years his performance will be assessed, and if satisfactory he will be allowed to serve the fifth year".
- [11] In terms hereof and on 28 July 2017 the Municipality (First Respondent) extended Applicant's appointment by way of the 2017

agreement (in line with the Resolution) from 1 August 2017 to 31 July 2021, with an option of a further one year extension "by mutual agreement". Again this was "subject to any extension or renewal": The agreement was signed on 28 July 2017.

- [12] On 29 December 2017 First Respondent's Council sought to unsuccessfully rescind Applicant's appointment, reacting to a Circular from the Second Respondent and the Xuma judgment. The rescission decision was carried on 8 January 2018 - he being informed of this on 10 January 2018.
- [13] The rescission followed also upon Second Respondent's letter to First Respondent's Mayor, alleging that Applicant's appointment did not comply with Section 54A of the MSA, read with Regulation 7, 9 and 10 of the Regulations on Appointments and Conditions of Employment of Senior Managers 2014 (The Regulations).
- [14] Prior to the termination Applicant informed First Respondent's Council that the Motion to Rescind was unprocedural and in violation

of Regulation 60(4) of the First Respondent's Standing Rules and Orders (the Rules), as it was required that a motion must be submitted to the Municipal Manager 10 days before the meeting relevant - this motion having not been so submitted at any stage; and that this was in conflict with Section 30(5)(c) of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) requirement in respect of a decision relating to the Appointment and Conditions of Service of the Municipal Manager, that the Council must first require the Executive Committee or Executive Mayor (if it has same) to submit to it a report and recommendation. It is also argued

that there was insufficient compliance with Section 54 of the Cape Municipal Ordinance Act 20 of 1974.

[15] The letter of termination reads as follows:

"Cnr Church & Greyling Street

BURGERSDORP

9750

Tel: (051) 653 1777

www.waltersisulu.gov.za

Date: 10 January 2018

No. 57 Olympus Drive

Pentagon Park

BLOEMFONTEIN

9301

Dear Mr Thembinkosi Mawonga Employee No: 9513

ID No: [...]086

TERMINATION OF YOUR CONTRACT AS MUNICIPAL MANAGER OF WALTER SISULU LOCAL MUNICIPALITY

The purposed (sic) of this letter is inform you of the termination of your contract of employment.

On the 20 July 2017 we had resolved as Municipal Council to extend your contract of employment for a period of four years. On the 08 January 2018 we as Council rescinded the resolution extending your contract.

Therefore, I formally inform you that your contract of employment has been terminated with immediate effect.

The position will be advertised and you are welcome to apply.

We hope that you take this in good faith.

Yours faithfully

(Signed)

10th January 2018

B. Khweyiya

Date

Mayor: Walter Sisulu Local Municipality."

- [16] Whilst First and Third Respondent attempt to justify the rescission resolution procedure there would appear to be no dispute that Section 54 of the Cape Municipal Ordinance 20 of 1974; Section 30(5)(c) of the Municipal Structures Act and Regulation 60(c) of the Rules were not complied with - the result of which is disputed.
- [17] First and Third Respondents argue in any event that the July 2017 decision/resolution by Council to extend the Applicant's appointment failed to comply with Section 54(A) and 56 of the MSA. Second Respondent takes the same point (and seeks an order) contending that since the extension in 2017 was invalid a decision to rescind need not comply with Statutory and Regulatory procedures.

JURISDICTION

- [18] It is convenient to commence with the jurisdictional argument by First and Third Respondents as this is central to the ability to pronounce upon the remaining merit issue.
- [19] In considering this it is worth explaining that Applicant's claim is not one for reinstatement but rather an attempt to review and set aside the 2018 decision for want of legality (and the assertion that the July 2017 decision and renewal was in any event valid). Second Respondent in turn brings a legality review in effect.
- [20] It is Applicant's case that the Rescission decision of 2018 was unlawful (not unfair as per Section 191 of the LRA).
- [21] The basis of the relief sought is clearly premised upon allegations that the rescission decision was "unlawful" and "ultra vires", and in contravention of Section 54 of the Municipal Ordinance, Section 50(5)(c) of the Structures Act and in conflict with Regulation 60(4) of the Standing Rules (Procedure) and is null and void. Applicant alleges that his July 2017 appointment was lawful and in compliance with the MSA. There is no hint of reference to any unfair labour practice.
- [22] Put shortly this is a legality review and brought as such. The counter application in respect of Section 54A of the MSA is opposed simply on the basis that the procedure and January resolution (2018) did not comply with all Statutory and Regulatory prescripts.
- [23] It is true that Applicant contends, in passing, that his 2017 appointment was valid but relies essentially on the issue that the rescission resolution is procedurally flawed as the basis for the setting aside the 2018 Resolution. In fact the contention of a valid July 2017 appointment was raised first by Second Respondent and defended by Applicant. Whatever the position Section 54A of the MSA becomes central to the issue.
- [24] If the counter application is good, and this Court has jurisdiction, that is effectively the end of the matter - if not I must consider the procedural argument.

- [25] The jurisdiction argument is based on the suggestion that the "dismissal letter" constituted a dismissal as per Section 186(a) of the LRA and is an attack on the legal basis of the decision to dismiss - he being obliged to use the LRA, that is the CCMA and then Arbitration or the Labour Court. It is argued that he had not pleaded a breach of contract or repudiation and does not rely on his contract. It is argued that the definition of dismissal is wide enough to include a wrongful termination in violation of statutory or contractual notice periods.
- [26] In my view this argument entirely misses the fundamental point that what Applicant seeks to do is to challenge a decision which he contends was statutory and procedurally flawed - a legality issue. Then there is the Section 54A legality argument in response.
- [27] *Gcaba v Minister of Safety and Security and Others*[2] states:
- "[T]he LRA does not intend to destroy causes of action or remedies and section 157 should not be interpreted to do so. Where a remedy lies in the High Court, section 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour.. and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common law or other statutory remedies."
- [28] I am of the view that Applicant in fact relies fairly and squarely on the terms of his contract (the Renewal Clause), the procedural unlawfulness of the rescission and, fundamentally in answer to the counter application, Section 54A compliance, alternatively that this was not required.
- [29] There is also Section 77(3) of the Basic Conditions of Employment Act 75 of 1997 there being concurrent jurisdiction in any matter concerning a contract of employment.
- [30] In my view the jurisdictional point must fail and is entirely without merit - it cannot impact on the two legality reviews upon which this matter is premised.
- [31] In amplification of this it seems to me that the jurisdiction argument surely overlooks that the essence of this matter, as pleaded, is a legality (procedural) review which stands on its own regardless that this led to a dismissal. Secondly the counter application stands on legality review issues and cannot be seen in any sense as a matter excluded from this Court's jurisdiction simply because the consequence would be an end to Applicant's employment. The suggestion that the matter of *Zungu v Premier of the Province of KwaZulu-Natal*[3] determines the jurisdictional argument in favour of First and Third Respondents is in my view unfounded. In that matter the claim

adjudicated fell fairly and squarely within the LRA definition of dismissal in Section 186(1)(b) that she had a reasonable expectation of renewal, although her claim was premised on the fact that the Premier's decision was flawed as he did not have the discretion to ignore the panels' recommendation. The matter is entirely distinguishable on the crucial issue raised in the Application and Counter Application being legality issues arising from statutory provisions and regulations governing appointments of Municipal Managers and procedural issues relevant to municipal resolutions.

[32] It seems to me further that it cannot be that the MEC cannot approach the High Court in terms of Section 54A(8) of the MSA if the consequence would be to force a "dismissal" as defined in the LRA. As to *Mpele v Municipality Council of the Lesedi & Others*[4] and as pointed out by Ms Drake:

[32.1] The key question before the Johannesburg Labour Court was whether the Applicant was correct to approach the Labour Court directly as he did, or whether he should have first approached the CCMA. It is 'entirely confined to the LRA dispute resolution process and did not consider the jurisdiction of the High Court at all.

[32.2] The ratio was that the employee's challenge fits into dismissal law because "the character of his challenge to his employer's actions is about its soundness of reason and fairness of procedure" and that no exceptional circumstances existed or were pleaded to justify the Labour Court exercising its discretion to hear the dispute.

[32.3] *Mpele* is further distinguishable from the present facts in that:

[32.3.1] The Labour Court in *Mpele* found that the Applicant did not rely on any specific contractual provisions as to breach.

[32.3.2] Mr *Mpele*'s complaint was primarily about procedural fairness.

[32.3.3] In *Mpele*, the Municipality agreed with the MEC's view in terms of Section 54A(8) of the MSA. The Labour Court found that there was no need for a counter application by the MEC in the Labour Court (and therefore did not consider the effect of a High Court having being seized with a counter application by the MEC on the same issue).

[32.3.4] *Mpele* does not involve a dispute on which sections of the MSA applies. Instead, the parties appeared to agree on the applicable sections of the MSA and proceeded on the basis that section 54A of the MSA applied.

[32.3.5] *Mpele* does not concern a contract renewal at all.

[32.4] Mpele is not authority for the argument that only the Labour Court (and not the High Court) has legality review authority on the facts relevant in this case. Mpele simply implied that the Labour Court may only hear a review application in terms of Section 158(1)(h) of the LRA if the employee does not have another remedy under the LRA. This is limited to the LRA regime, which the Applicant does not assert at all, and in my view does not apply to a High Court legality review application.

[32.5] This cannot, for example, as Ms Drake argues, override the SCA's post-Chirwa finding in *Makahanya v University of Zululani*[5] that:

"the claim is for the enforcement of the common-law right of a contracting party to exact performance of the contract. We know this because that is what it says in the particulars of claim. Whether the claim is good is a good one or a bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law. A claim of that kind clearly falls within the ordinary power of the High Court that is derived from the Constitution and the jurisdictional objection should have failed".

THE SECTION 54A MSA ISSUE

[33] This issue considers the relevant statutory framework to the appointment of Municipal Manager, inter alia:

[33.1] Sections 54 and 57 of the MSA.

[33.2] The 2006 Performance Regulations GNR805, 1 August 2006: Local Government Municipal Performance Regulations for Municipal Managers

[33.3] The 2014 Remuneration Notice: GN225, 29 March 2014.

[33.4] The 2014 Appointment Regulations: GN 21 of 17 January 2014: Local Government Regulations on Appointment and Conditions of Employment of Senior Managers GG37245.

[34] The relevant portions of the above are:

[34.1] Section 57(6)(c):

"(6) The employment contract for municipal manager must-[...]

(c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties."

[34.2] Regulation 4(3):

"Subject to sub-regulation 2(3)(c) [compulsory renewal provisions], there should be no expectation that the employment contract will be renewed or extended beyond the term referred to in sub-regulation (2) [the term of the contract]"

[34.3] Regulation 17:

"17. Termination of contract-

- (1) The employment contract will terminate-
- (a) automatically on expiry of the term referred to in the contract, subject to any extension or renewal [...]"

[34.4] Section 54A(3):

"(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."

[34.5] Section 54A(4)

"(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."

[35] The first question is whether Section 54A applies to the renewal of Municipal Managers' contracts as also whether Applicant is entitled in 2017/2018 to rely on the saving provision contained in Section 16 of the MSA Amendment Act.

INTERPRETATION

[36] The approach to statutory interpretation has been set out in the Constitutional Court, and the position is as follows:

[36.1] 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 above[6].

[36.2] In interpreting statutory provisions purposively, generous rather than legalistic interpretation is required, the aim being to fulfil the purpose of the legislation[7].

[36.3] As to the requirement of contextualization, the Constitutional Court has emphasized that "context" does not mean only the parts of legislative provision which immediately precede and follow the particular passage under examination but includes the entire enactment in which the words or words in contention appear[8].

[36.4] The Court must consider the context even where the words to be construed are clear and unambiguous. The principle underlying this requirement is that a Court must not be blinkered by peering at a word or provision in isolation[9].

[36.5] The Constitutional Court has endorsed the following passage from Edumeni Municipality:

"...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 provisions appears; their apparent purposes to which it is directed, and the material known to those responsible for its production 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 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, businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual

context is to make a contract for the parties other the one they in fact made. The evitable point of departure is the language of the provision itself read in context and having the regard to the purpose 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.[10]

DOES SECTION 54A OF THE MSA APPLY TO RENEWALS?

[37] Firstly in this matter the issue arises as to whether having regard to Section 57(6)(c) of the MSA, and Section 54A thereof (which came into operation by promulgation on 5 July 2011 in the MSA Amendment Act 7 of 2011 (Section 2)), Section 16 of the Amendment Act is such as to constitute a saving provision for Applicant, whatever the meaning of Section 54A. The 2014 Appointment Regulations of 2014, referred to above, post dated the MSA Amendment Act of 2011.

[38] The argument is that Section 54A does not apply to the decision to renew on the facts of this matter, whatever its interpretation, and particularly if it is found to be of application to renewals of Municipal Managers' posts.

[39] The argument goes further and suggests that the ordinary language of Section 16 of the MSA Amendment Act (5 July 2011) protects existing contracts - which, so it is argued, includes Applicants series of subsequent contracts each being an extension of the first, being valid as at 5 July 2011 - until its final lapse or termination.

[40] Section 16 of the Local Government Municipal Systems Amendment Act 7 of 2011 (5 July 2011) provides that:

"16 Transitional arrangements

This Act does not affect the employment contract of a municipal manager or a manager directly accountable to the municipal manager entered into before this Act took effect, and such contract continues until it lapses or is terminated."

[41] This saving was introduced in the amendment to the MSA, which brought, inter alia, Section 54(A) into operation. The provisions of Section 54(A)(4) contemplate advertising a Municipal Manager's post if it becomes "vacant" and that the Municipality "must" select a suitable, compliant person from the pool of candidates to the vacant post. The Section 16 saving provision clearly provides for the exemption of an existing contract concluded prior to 5 July 2011 which then continues until it "lapses or is terminated":

[42] The argument is simply that regardless of the impact of Section 54A, in this case, there were a series of extensions of the original contract which keep the transitional arrangement of the MSA Amendment Act (July 2011) of application, and which exclude the operation of Section 54A (if applicable) to this particular contract.

[43] This argument depends on the issue of whether or not it is correct that the 2007 Contract which was renewed (or extended) on 24 April 2012 and again on 20/28 July 2017, was one falling within the provisions of Section 16 of the MSA Amendment Act.

[44] The 2007 Contract as set out above "terminated without further notice" on 31 July 2012. There was contractually no expectation of renewal or extension. The automatic lapse was however "subject to any extension or renewal". The 2012 contract had similar provisions terminating after five years without notice automatically, but "subject to any extension or renewal". The July 2017 contract was for a four year term, plus one on mutual agreement, lapsing automatically on 31 July 2021, subject to any extension or renewal.

[45] The terms of Section 57 of the MSA regulates the content of Municipal Managers' employment contracts. In terms of Section 57(1)(a) there must be a written contract complying with Section 57(6) of the MSA.

[46] Section 57(6) provides:

"(6) The employment contract for a municipal manager must-

- (a) be for a fixed term of employment up to a maximum of five years, not exceeding a period ending one year after the election of the next council of the municipality;

- (b) include a provision for cancellation of the contract, in the case of non-compliance with the employment contract or, where applicable, the performance agreement;
- (c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties; and
- (d) reflect the values and principles referred to in section 50, the Code of Conduct set out in Schedule 2, and the management standards and practices contained in section 51."

[47] Thus a "fixed term" is contemplated limited to five years and must "stipulate" the terms of renewal, but only by agreement. This section was in place in 2007.

[48] There can be no doubt, in context, that at least prior to the introduction of Section 54A in 2011 whilst the Municipal Manager's

contract was limited to a maximum period of five years this certainly was subject to a conceptual possibility of "renewal" by agreement on terms (as to renewal) contained in the original contract - but only renewed with the consent/agreement of the Municipality at the time of renewal.

[48] Clearly then in 2011, prior to Section 54A being introduced, it was required of a Municipality to provide in a contract of employment "terms of the renewal" of the contract, that renewal by agreement. This then clearly and unsurprisingly allows for a "renewal" by agreement.

[49] What is meant by "...terms of renewal..." is perhaps obscure and I will revert hereto.

[51] In 2011 Section 54A came into operation (with its saving provisions) and provided for the circumstance that "If the post of Municipal Manager becomes vacant" the advertising of the post was required.

[52] The 2007 Contract terminated without notice on 31 July 2012, subject to extension or "renewal". The contract most certainly failed to "stipulate the terms of renewal" as provided by Section 57(6)(c) in any way. The term of the contract (as stipulated in contract paragraph 2.4) terminating automatically. The issue of "terminating" is dealt with further in the contract at paragraph 15 "Lapse ... automatically on 31 July 2012, subject to any extension or renewal". Not a further word is said as to a stipulation of the terms of the renewal, whatever this may mean or entail. The effect of this, relevant to this matter, and in the context of the contract and statutory prescripts properly interpreted in the manner set out above, is such as to put paid to the argument that the 2012 and 2017 extension on renewals flowed from the 2007 contract. Failing the stipulation of the terms of renewal in the 2007 contract any further contract concluded was a new contract de novo. The result is that the saving provision in the Local Government Municipal Systems Amendment Act 2011 (Section 16) cannot apply to the subsequent contracts.

[53] In any event if I were incorrect in the above there are further reasons as to why Section 16 does not save the 2012 and 2017

contracts from the provisions of Section 54A (if applicable at all).

[54] Firstly, in my view, it could not have been the intention of the Legislature, nor does Section 16 stipulate anything more, than that the protection applied to existing contracts (concluded prior to the Amendment Act) and most certainly not those "extended or renewed". This would fly in the face of ordinary grammatical meaning, in context, being clearly a reference to a specific contract ("such contract"? and not applicable to a renewal thereof, Section 57(6) (a) clearly providing for a maximum fixed term of five years. Secondly it would contradict the entire purpose of Section 54A - controlled competitive appointments.

[55] The result is that the argument that Section 54(A) is excluded by the saving provision and does not apply to Applicant's 2012 and

2017 contracts fails.

DOES SECTION 54(A) OF THE MSA APPLY TO RENEWAL CONTRACTS?

[56] The next issue is whether Section 54(A) in fact applies to "renewals" notwithstanding the rejection of the Section 16 saving provision argument.

[57] The real issue is whether the MSA (as amended) is such as to require a competitive employment process upon "renewal" of an existing contract with a Municipal Manager.

[58] This issue was dealt with in Xuma (supra) which found in essence that Section 54A indeed applies to a renewal in this context. I am bound hereby unless I find Xuma to be "clearly wrong".[11]

[59] Applicant and the Intervening Party argue that Xuma is indeed clearly wrong and suggest that a number of arguments may well not have been drawn to the attention of Jolwana AJ (as he then was).

[60] The Intervening Party argues in the Heads that:

"40.1 A 'renewal' of a contract is not an 'appointment'. This is the key proposition for deciding how these two sections interrelate.

40.1.1. A 'renewal' of a contract necessarily presupposes an existing contract.

40.1.2. The act of renewal extends the term of the contract before it ends by operation of law.

40.1.3. In order to keep the contract live, the contract must be renewed before its expiry, otherwise the contract ends, the position becomes vacant and a new appointment must be made.

40.1.4. Only once the contract term ends, does a fixed term contract of employment expire as an automatic termination by operation by law and not as a dismissal.

40.1.5. It does not matter that the renewal is in a new document. What matters is that the terms are the same or substantially the same.

40.1.6. In contrast, an appointment presupposes a vacancy which presupposes that the contract has lapsed or terminated, as Regulation 45, for example, above provides.

40.1.7. The ordinary language of Mr Mawonga's contract, which states that the term expires on a specific date "subject to" extension or renewal, supports this interpretation."

[61] In essence then this hinges on the argument that a new contract comes into operation (on being renewed) prior to expiry of the existing contract and therefore the post does not then become "vacant"

- failing which renewal, the position is or becomes vacant and a new appointment must be made competitively as per Section 54A. It is envisaged that the "new contract" (by renewal) must be on substantially the same terms and that the language of Section 54A(4) supports this argument.

[62] Section 54(A) reads as follows:

"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 municipality; 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 municipality 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 municipality 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 municipality must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.
- (6) (a) The municipality 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 municipality 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 municipality 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 municipality 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 municipality.
- (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 municipality 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 this section took effect, must be regarded as having been appointed in accordance with this 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."
- [63] Clearly this must be interpreted in context (in the manner referred to above) and having regard to inter alia Section 57 of the MSA.

[64] Section 57(1) provides for the appointment of a Municipal Manager in terms of a written contract, with stipulated inclusions. The Regulations or Guidelines that relate to remuneration, duties and benefits and other terms and conditions of employment form part thereof (Section 57(3A)). As already pointed out this contract must be for a maximum period of five years and "must... stipulate the terms of renewal of the employment contract, but only by agreement between the parties."

[65] Section 54A provides for a particular skill set and qualifications and requires (Section 54A(4)) that if the Municipal Manager post "becomes vacant" the post must be advertised and filled competitively.

[66] The crux that appears to be the issue is whether a Municipal Manager's contract being renewed and agreed prior to expiry, escapes

a competitive process as per Section 54(A3)(4), or whether this applies to all subsequent contracts whether renewals or otherwise.

[67] The argument put forward for Applicant is that if there is a "renewal" concluded prior to expiry this saves the position from being "vacant", and that this is the case in casu, the term expiring on a stipulated date subject to extension as supported by Section 54A(4).

[68] In my view the wording of a particular contract is not relevant or fundamental to the issue. The first step is a contextual interpretation of Section 54A. Only then does the factual issue require application.

[69] Every Municipal Manager's contract can be for no longer than five years. Such contract must stipulate the terms of renewal of the

employment contract (Section 57(6)), presumably if applicable. The Municipal Manager must have the prescribed qualifications and skill set and if this is a "vacant" post it must first be advertised and then filled competitively.

[70] The requirement of a skill set and specific qualification were first introduced into the MSA in 2011 by Section 54A, after the 2007

contract was concluded, but prior to its renewal. Fundamentally however then there was no change in the statutory requirements as to qualification requirements this having previously been provided for in the Structures Act (Section 82). This qualification prescript operates in any event whether an appointment "renewal" or new competitive appointment.

[71] It is the issue of advertising and competitive process that requires consideration. Put otherwise, due to Section 54A(3), even if

a renewal, the Municipal Manager must have the prescribed skills, expertise, competitiveness and qualification - it is simply the issue as to whether this notwithstanding, the post it to be considered "vacant" if a renewal of the existing incumbent's post has been considered and then effected, prior to the automatic termination of the prior (existing) contract.

- [72] The Intervening Party argues that the words "If the post of Municipal Manager becomes vacant..." supports this. Vacancy is, so it goes, a condition precedent to the need to advertise. It is argued that the principle of the extension of the term of a contract by renewal is established in procurement authorities.[12]
- [73] In 3P (supra) the Court held that the renewal of a service agreement with increased price and term was not a "new" agreement but the extension of the existing agreement.
- [74] However it must be noted that in 3P (supra) the original agreement provided for a renewal, for a period of two years, on the same terms as before, subject to amendment as negotiated and agreed. The negotiation raised the term to three years with increased contract value the Appeal Court finding that this all flowed from the renewal provision and was not a "new" service agreement.
- [75] In this matter, as pointed out, the 2007 agreement contemplated renewal or extension but did not stipulate any detail in this regard as to content or method. The 2012 agreement was substantially identical. The 2017 agreement, also for a fixed term with an option, again substantially identical.
- [76] It can hardly be argued in my view that 3P (supra) is analogous.
- [77] Does the purpose of Section 54A and 57(6)(c) of the MSA alter this position? The skills and qualification of the Municipal Manager were stipulated and in effect at all times relevant albeit initially as provided for in the Structures Act. Thus regardless of advertising and a competitive process, had the Applicant not had such skills and qualification he/she would not qualify and any contract concluded with him/her would be null and void (Section 54A(3)).
- [78] The issue of advertising and competitive process clearly goes to the appointment of the best possible candidate, amongst all those who apply, and have the requisite skill, experience and qualification.
- [79] This the Intervening Party accepts. It is argued however that renewal, outside a competitive process, permits retention of an existing Municipal Manager with historical institutional knowledge - who would then know that he/she would not need to compete every five years. The rational for this argument escapes me. Such existing Municipal Manager can in any event apply competitively and have the benefit of the previous five years performance and knowledge in the competitive process. There is no bar to his/her appointment only the opportunity of the Municipality to appoint a perhaps "better" candidate if appropriate. That the existing Manager may feel some discomfort at the need to apply every 5 years for the post competitively can hardly trump the fundamental objective of Section 54A to ensure that the best candidate be appointed competitively in the interests of the rate payers.
- [80] In this scenario Section 54A does not prohibit renewals but same must be made in a competitive process. This allows a Council to reconsider every five years, but in the context of a competitive process. Such an interpretation seems to me consistent with Section 195(h)

of the Constitution and not inconsistent with Section 54A and 57 of the MSA. Further to hold otherwise would importantly exclude the application of Section 57(8) oversight by the MEC from "renewal" contracts which in my view strongly militates against a contrary interpretation. Why would the legislature have had such an intention?

It would make no sense at all. Indeed it seems to me that the clear legislative intention in Section 54A was to clearly provide that all Municipal Manager appointments were to be advertised and competitive, and such as to in fact exclude non-competitive renewals

- and for good reason.

[81] The final question is whether the remaining provisions in the MSA and its Regulations and Notices relevant to regulate appointments and renewals, impact on the above either way.

[82] It was argued for the Intervening Party that the legislation was cognisant of the distinction between vacant posts and renewals. It is argued that had the legislature wanted a competitive process every five years, or less, this could have easily been said in clear language. The weakness in the argument is that Section 54A read with Section 57(6), in my view, contemplates a renewal by agreement (on stipulated terms) but this does not necessarily mean this should not be part of a competitive process.

[83] The appointment of Municipal Managers was previously governed by Section 82 of the Local Government: Municipals Structures Act 117 of 1998 until 2011 (Section 15 of the Local Government Municipal Systems Amendment Act) which provided that:

"(1) A municipal council must appoint –

- (a) A municipal manager who is the head of administration and also the accounting officer for the municipality
- (2) A person appointed as municipal manager must have the relevant skills and expertise to perform the duties associated with that post."

[84] This stood alongside Section 57(6)(c) of the MSA but did not stipulate the competitive process envisaged in the 2011 Section 54A. It is argued that Section 54A does not make an "appointment" conceptually or legally the same as "renewal". Especially for those validly appointed originally under earlier provision. This ignores the very purpose of Section 54A - being to

introduce. by necessity a competitive process in the interests of employing the most suitable candidate advertised and judged competitively - an open market process.

[85] Finally it was argued that Sections 54A and 57(6)(c) must be interpreted in the context of the Bill of Rights, the right to fair labour practices, just administrative action and Section 151(4) of the Constitution. Again I do not agree with the conclusion drawn implicitly that such an approach (which is clearly correct) is of any assistance to Applicant. On the contrary I can see no unconstitutionality, or that Applicant is in any way constitutionally prejudiced by the

interpretation that a competitive process is mandated as explained above. To find otherwise would be to protect Applicant from being subject to a competitive process, and deny the Municipality and Rate Payers from having a free choice from all qualified applicants, including but not limited to, Applicant.

[86] Indeed is there in reality any conflict between Section 54A and Section 57(6) as has been suggested?

[87] Whilst Section 54A was brought into the MSA in 2011 the prescribed skills and qualification requirements had long been the position (since 1998) by virtue of Section 82 of the Structures Act 117 of

1998. Effectively there was no material variation in this regard save to bring this requirement sensibly into the MSA.

[88] Section 54A also inserted however the new requirement of advertising all "vacant" posts of Municipal Managers and a competitive employment process. This it seems to me recognised the desirability of ensuring that Municipalities had the freedom to choose a Municipal Manager from a national pool of qualified persons, and is in fact obliged to do so for good reason. As I have already said this does not exclude the former incumbent from applying and being chosen competitively

- indeed that incumbent may well have a significant advantage if having created a good performance record thus far.

[89] "Vacant" means "not occupied; empty" : Concise Oxford English Dictionary. "Renewal" means "the act of renewing; or the state of being renewed" : Shorter Oxford English Dictionary. "Renew" means inter alia "to replace by some means or fresh thing of the same kind; to revive; to grant anew" - Shorter Oxford Dictionary.

[90] It seems to me that read together, a "renewal" contemplates the replacement of a previous contract with a new contract - which applies in certain instances to the same incumbent in the old and new contract.

[91] Against this background Section 57(6) of the MSA contemplates and stipulates a maximum five year period (for good reason) but provides that the contract "must" stipulate the terms of renewal (of the employment contract), but only by agreement between the parties.

[92] It seems to me once again that Section 57(6)(c), by referring to the concept of renewal (the replacement of one contract with a new contract) in no way simply entitles the parties to agree on a new contract absent compliance with Section 54A(4). The "terms of renewal" must be consistent with Section 54A(4) and cannot be used to avoid same - advertisement and competitive process are peremptory. I see no inconsistency as contended for or at all. As I pointed out, in any event, the 2007, 2012 and 2017 contracts failed to address or stipulate the "terms of renewal" in any way. This may even be said to be in contravention of the MSA and if so the contract would in any event be null and void (Section

54(a)(3)(b). The Applicant cannot have his cake and eat it. Supportive of this argument in context is the provisions of Section

54A(7)(a) of the MSA which obliges the Municipal Council to inform the MEC of the Appointment process and outcome within 14 days. In effect the structure of Section 54A is to provide effectively that the MEC plays a supervisory role in all Municipal Manager

appointments and may even apply to Court for a declarator as to the validity of the appointment. Procedure, competition and skills/qualifications are central to all this and it would be absurd to hold that this can be simply circumvented by a "renewal", without a competitive process. The Regulations in GG36223 2 March 2013 in turn require a competitive process be followed.

[93] As to Xuma, Jolwana AJ {as he then was) came to the same conclusion as have I, although commendably by a shorter route. I am unable to conclude that he was "clearly wrong" - on the contrary.

[94] In my view the argument advanced that a "nuanced approach" must be taken r on a case by case basis to Section 54A and Section 57(6) consequently has no merit. The interpretation is clear in context - what is required is an application thereof to the facts of each case.

[95] In my view there is also no merit in Respondent's argument that there is an implied repeal of Section 57(6)(c). This is untenable on the authorities.[13]

[96] It follows further that the July 2017 decision to "renew" without publication and competitive process is unlawful in public law and ultra vires the MSA. In this regard no one suggested that the counterclaim which was brought after the Constitutional Court Decision State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd[14] was an application relying on the Promotion of Administration of Justice Act 3 of 2000, which would have been impermissible. However

the Court held that an Organ of State could bring a legality review of its own decision - this is just such a case.

[97]

CONCLUSION

[97.1] In the result the counter application must succeed, the 2017 decision to renew Applicant's contract being null and void for want of compliance with Section 54A of the MSA.

[97.2] This being so and although the January 2018 decision was clearly procedurally unsound and flawed and falls to be set aside

- the result is irrelevant to the final position.

[98] As to costs it seems to me that the main application itself should carry with it no costs order although technically successful, as the counter-application cuts across this having any impact on the result and must in turn carry a cost order in favour of Second Respondent.

[99] The following order issues:

1. The main application succeeds, the First Respondent's decision of 8 January 2018 to set aside the decision appointing Applicant, of 20 July 2017, is set aside for want of procedural compliance.
2. However this notwithstanding the Second Respondent's counter application succeeds the appointment of Applicant as First Respondent's Municipal Manager on 20 July 2017 (and subsequent contract) is set aside as being null and void for want of compliance with Section 54(A)4 of the Local Government: Municipal Systems Act 32 of 2000.
3. As to costs there is no order in respect of the main application (paragraph 1 above) whilst Applicant is to pay Second Respondent's cost in the counter application (paragraph 2 above).
4. There is no order as to costs in respect of First and Second Respondents.

M.J. LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant: Adv I J Smuts SC

Instructed by: Netteltons Attorneys, Grahamstown

Obo the Intervening Party: Adv H Drake

Instructed by: McCallum Attorneys, Grahamstown

Obo the First and Third Respondents: Adv A Beyleveld SC and Adv JG Grogan Instructed by: Wheeldon, Rushmere & Cole, Grahamstown

Obo the Second Respondent: Adv N Gqamana SC

Instructed by: Mkontowesizwe Godolozzi Attorneys, Grahamstown

[1] (383/2017) [2017] ZAECMHC 35 (8 August 2017)

[2] 2010 (1) SA 238 CC [73]

[3]

[2018] 4 BLLR 323 (CC)

[4] J2497/18 (13 August 2018)

[5] 2010 (1) SA 62 (SCA) paras 11 -13 and 95

- [6] Cool Ideas 1186 CC v Hubbard and Another 2014 (4} SA 474 (CC) [28]
- [7] Department of Land Affairs v Goedgelegen Tropical Fruits [2007] ZACC 12; 2007 (6) SA 199 (CC) at 218A para , 51 citing with approval from the judgment of Dickson J in R v Big M Drug Mart Limited (1985) 18DLR (4th) 321 at 395-360
- [8] Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 487 (CC) [27]
- [9] Department of Land Affairs v Goedgelegen Tropical Fruits (above) (citing with approval the judgment of Ncobo J in Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004] ZACC 15; 2004 (4) SA 490 (CC) [90]
- [10] Democratic Alliance v African National Congress and Another 2015 (2) SA 232 (CC) [136] citing Natal Joint Municipal Pensions Fund v Endumeni Municipality 2012 (4) SA593 (SCA) [17]-[19]
- [11] Camps Bay Ratepayer's and Residential Association v Harrison 2011 (4) SA 42 (CC) [28].
- [12] Joubert Galpin & Searle v RAF 2014 (4) SA 148 (ECP) [66] - [70]; [74]; MEC for Health, Gauteng v 3P Consulting (Pty) Ltd 2012 (2) SA 542 (SCA) [25].
- [13] The Trustees for the time being of the Norwegian Settlers Church v The Minister of Public Works 2009 JDR 0125(N).
- [14] 2018 (2) SA 23 CC

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