

SOUTH AFRICA / JUDGMENT

Mawonga and Another v Walter Sisulu Municipality and Others (574/2019) [2020] ZASCA 125; 2021 (1) SA 377 (SCA) (7 October 2020) [2020] ZASCA 125

COURT

Supreme Court of Appeal

BEFORE

Petse, Mbha, Nicholls, Eksteen, Unterhalter

CASE / FILE NUMBER

574/2019

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 574/2019

In the matter between:

THEMBINKOSI MAWONGA

FIRST APPELLANT

INSTITUTE FOR LOCAL

GOVERNMENT

INTERVENING

PARTY

and

WALTER SISULU LOCAL MUNICIPALITY FIRST

RESPONDENT

THE EXECUTIVE COUNCIL FOR CO-OPERATIVE

GOVERNANCE AND TRADITIONAL

AFFAIRS N.O

SECOND RESPONDENT

THE ADMINITRATOR OF THE WALTER

SISULU LOCAL MUNICIPALITY THIRD

RESPONDENT

Neutral citation: Mawonga and Another v Walter Sisulu Municipality and Others (Case no 574/19)
[2020] ZASCA 125 (7 October 2020)

Coram: PETSE DP, MBHA, NICHOLLS JJA, EKSTEEN and UNTERHALTER AJJA

Heard: 2 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 7 October 2020.

Summary: Local Government – municipal law – Local Government: Municipal Systems Act 32 of 2000 – in terms of s 57(6)(a) the employment contract of a municipal manager has a maximum fixed term of five years which cannot be renewed or extended – once the five years have elapsed the position of a municipal manager becomes vacant as contemplated in s 54A(4) and thus subject to the nationally competitive procedures prescribed in s 54A – any renewal thereafter is null and void ab initio – this is irrespective of whether the provisions of the employment contract as municipal manager stipulated the terms of its renewal within the meaning of that expression in s 57(6)(c).

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Lowe J sitting as court of first instance):

The appeal is dismissed with costs.

Nicholls JA (Petse DP, Mbha JA, Eksteen and Unterhalter AJJA concurring):

- [1] Can a municipal manager's five-year term of employment be extended before the expiry date of the contract of employment or does the position have to be advertised afresh? The answer to this question has implications for the appointment of senior managers in the various municipal councils, in particular, the length of their employment and the procedure to be followed when they are appointed.
- [2] The appellant, Mr Thembinkosi Mawonga, is a former municipal manager of the Walter Sisulu Local Municipality, the first respondent (the municipality). The second respondent is the Member of the Executive Council for Co-operative Governance and Traditional Affairs (the MEC) and the third respondent is the administrator of the municipality. No relief was

sought against either the second or the third respondent. However, the MEC has actively participated in the proceedings. The Institute for Local Government Management in South Africa is the intervening party. It has placed on record through its attorneys that owing to financial constraints it has not taken part in the appeal proceedings but requests this Court to consider its detailed

submissions made before the court a quo.

[3] In the high court, Mr Mawonga sought to set aside a decision of the council of the municipality which effectively terminated his employment as municipal manager, after he had occupied the position for more than ten years. His contract had recently been renewed for four years, with the potential of another year being added. In effect, Mr Mawonga's employment as municipal manager would have lasted for 15 years. The court dismissed Mr Mawonga's application and granted the MEC's counter application to set aside the appointment of Mr Mawonga on the basis that such appointment was null and void. The court a quo refused leave to appeal.

[4] On petition to this Court leave to appeal was granted on the following three issues:

'3.1 Where the employment contract of a Municipal Manager contains the terms for its renewal in terms of s 57(6)(c) of the Municipal Systems Act 32 of 2000, (the MSA) and it has been renewed prior to the expiry of the fixed term of five years, does the post of Municipal Manager nonetheless become vacant in terms of s 54A(4) of the MSA on the expiry of the fixed term requiring the post to be advertised nationally.

3.2 Whether the provisions of the appellant's employment contract as Municipal Manager of the respondent stipulated the terms of its renewal within the meaning of that expression in s 57(6)(c) of the MSA.

3.3 Whether the appellant's employment contract was validly renewed by way of the resolution of the respondent on 28 July 2017 to renew it.'

[5] These three issues necessitate the interpretation and application of s 57(6)(c) of the Municipal Systems Act 32 of 2000 (the MSA) and s 54A of the Municipal Systems Amendment Act 7 of 2011 (the Amendment Act) which came into operation on 5 July 2011. Before discussing the legislative regime governing the appointment of municipal managers, it is necessary to briefly set out the facts.

[6] Mr Mawonga was appointed as municipal manager of the Gariep Local Municipality commencing on 1 August 2007. At that time, his appointment was governed by s 82 of the Municipal Structures Act 117 of 1998 which did not require a competitive process.[1] The first contract of employment (the original contract) was for a five-year period terminating 'without further notice' on 31 July 2012. It was recorded that there was no legitimate expectation that the contract would be renewed or extended beyond the five-year period. The contract would lapse automatically on 31 July 2012 'subject to any extension or renewal.' No terms of renewal were stipulated in the original contract.

[7] Before the termination date of Mr Mawonga's original contract, on 24 April 2012, the Gariep Local Municipality resolved to renew the appellant's contract for a further five-year period on the same terms and conditions. An agreement extending the appointment until 31 July 2017 (the first renewal) was subsequently concluded which again

recorded that the appellant's employment would terminate without further notice, and 'automatically on 31 July 2017,

subject to any extension or renewal'. The terms of the first renewal, signed on 31 July 2012, were substantially the same as the original contract.

[8] During the term of the first renewal, on 18 August 2016, the Gariep Local Municipality was disestablished and merged with Maletswai Local Municipality to form the Walter Sisulu Municipality, the first respondent. Mr Mawonga's contract was duly transferred to the first respondent.

[9] The contract, which is the subject matter of this appeal, is the second extension to the original contract (the second renewal). On 20 July 2017, the council of the first respondent resolved to extend Mr Mawonga's contract of employment for a further four years and that 'after serving four years his performance [would] be assessed, and if satisfactory he [would] be allowed to serve the fifth year.' In line with the resolution, on 28 July 2017, three days before the expiry of the first renewal, an agreement was signed extending the employment contract from 1 August 2017 to 31 July 2021 with the option of a further extension for one year 'by mutual agreement . . . subject to any extension or renewal'

(the second renewal). Again, the terms largely mirrored those in the original contract.

[10] Soon after the first renewal, on 5 July 2012, s 54A was promulgated by the Amendment Act. This repealed s 82 and introduced a nationally competitive process to appoint municipal managers if the post were to become 'vacant'.

[11] A judgment dealing with this section, *Xuma v Engcobo Local Municipality*,^[2] was handed down by the Eastern Cape High Court on 8 August 2017. In that matter the court rejected the municipality's argument that s 54A did not apply where a contract was renewed. It ordered strict compliance with the provisions of the section irrespective of whether a new contract was being concluded or an existing contract was being extended or renewed.

[12] In response to the *Xuma* judgment, the MEC issued a circular in which it instructed all municipal councils to rescind the contracts of renewal and follow the steps set out in s 54A, in line with the judgment. This required the post to be advertised nationally to procure a suitably skilled and qualified candidate. Although the municipality did not receive the circular, the contents were brought to its attention and on 8 January 2018, by special resolution, the council resolved to rescind Mr Mawonga's appointment. He was informed of the decision by a letter dated 10 January 2018, in which it was stated that his contract of employment had been terminated with immediate effect. What triggered Mr Mawonga's application to the high court in February 2018, was the appearance of an advertisement for

the position of municipal manager. On enquiry, Mr Mawonga was advised by the council on 17 January 2018 that he was at liberty to re-apply for the position, which would be dealt with in terms of the applicable legislation.

- [13] There is no dispute that Mr Mawonga's original contract of 2007, and the two subsequent renewals in 2012 and 2017, were subject to s 57 of the MSA which came into operation in November 2000. Section 57(6) provides that:

'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 . . .
- (c) stipulate the terms of the renewal of the employment contract, but only by agreement between the parties;
- (d) ...'

- [14] The defining issue is the impact of the Amendment Act on Mr Mawonga's contract of employment. Of particular significance is s 54A, which in relevant part provides:

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

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
 - (b) the appointment was otherwise made in contravention of this Act.
- (4) If the post of municipal manager becomes vacant, the 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 municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.
- (6) (a) The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.
- (b) If the MEC for local government has not seconded a suitable person within a period of 60 days after receipt of the request referred to in paragraph (a), the municipal council may request the Minister to second a suitable person, on such conditions as prescribed, until such time as a suitable candidate has been appointed.

- (7) (a) The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
- (b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.
- (8) If a person is appointed as municipal manager in contravention of this section, the MEC for local government must, within 14 days of receiving the information provided for in subsection (7), take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.
- (9) Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection.'
- [15] Section 54A(4) introduced the requirement of a suitably skilled person to be appointed as municipal manager after the position had become 'vacant'. In addition, the selection process compelled the municipality to advertise the post nationally. Thus, the first question to be determined is whether the post becomes vacant within the meaning of s 54A where the employment contract is renewed prior the expiry of the fixed five-year period in terms of s 57(6)(a) and where it contains the terms of its renewal as stipulated in s 57(6)(c). There is no disagreement that where the terms of renewal are not stated, the post will become vacant after the expiry of the fixed term which will trigger the application of s 54A(4). This gives rise to the second question, which is whether the provisions of Mr Mawonga's contract stipulated the terms of its renewal as contemplated in s 57(6)(c).
- [16] The argument of the appellant, reduced to its essentials, is as follows. Renewals or extensions of a contract concluded before the expiry of the contract period, do not give rise to a vacancy as contemplated in s 54A(4). Instead, the municipality is required to reconsider the employment of the municipal manager, at most, every five years and decide whether it wishes to renew the term or not. Such renewals or extensions continue to be valid in terms of s 57(6)(c), a section unchanged by the Amendment Act. A renewal is not an 'appointment' and s 54A and s 57(6)(c) are applicable to different situations. If one reviews the Amendment Act in context, together with its subordinate legislation, a distinction is drawn between renewals or extensions which are provided for in the original contract. These are valid until the contract lapses or is renewed, prior to its expiry. A post can only become 'vacant' within the meaning of s 54A, absent a renewal. Therefore, an appointment presupposes a vacancy which only arises when the contract lapses or is terminated. The Amendment Act did not change any aspect of the renewal regime and its preamble makes no mention of renewals or a compulsory and competitive five-year fixed term. Nor does it seek to include renewals as a form of appointment which would render all statutory provisions regulating renewals meaningless.

[17] The appellant contends that support for its stance is to be found in the transitional arrangements set out in s 16 of the Amendment Act which expressly protects existing contracts and provides:

‘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’.

[18] The intervening party supported Mr Mawonga in the high court, arguing that a ‘renewal’ of a contract is not an ‘appointment’. Therefore, if the contract is renewed before the expiry of the current employment contract, then the position does not become ‘vacant’ and s 54A(4) is not of application. As vacancy is a condition precedent for the need to advertise, it was not necessary to advertise the position on a national basis, or at all.

[19] The high court held that renewals and extensions were not saved by s 16 and that the section applied only to existing contracts concluded before the amendment, not those which had been renewed or extended after s 54A was introduced. The court found that the original 2007 contract failed to stipulate terms of renewal as required by s 57(6)(c), and for that reason, too, it was not saved by s 16. The first and second renewals, in 2012 and 2017 respectively, flowed from the original contract which did not stipulate any terms of renewal and therefore, any subsequent contract was a contract de novo. Further, it was held that s 54A does not prohibit renewals but any renewal must be in terms of a competitive process and s 57(6)(c) does not entitle the parties to agree to a new contract, absent compliance with 54A(4).

[20] For these reasons, the high court dismissed Mr Mawonga’s application and granted the MEC’s counter application to declare the appointment of Mr Mawonga null and void. The 2017 decision of the municipality to renew the contract of employment was also found to be null void for want of compliance with s 54A. On this basis the high court found it unnecessary to deal with the January 2018 decision which it said was clearly flawed.

[21] The first point to be made is that s 54A was introduced to curb the prevailing mismanagement of municipalities. This much was stated by the Constitutional Court in *South African Municipal Workers’ Union v Minister of Co-Operative Governance and Traditional Affairs* which characterised the purpose of the Amendment Act to:

‘...address what was perceived to be an alarming increase in the instances of maladministration within municipalities. The Amendment Act introduced measures 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.’[3]

[22] The preamble of the MSA states that its purpose is, inter alia:

‘. . .to provide for procedures and competency criteria for such appointments, and for the consequences of appointments made otherwise than in accordance with such procedures and criteria.’

What this illustrates is that the legislature was alive to the need to prevent irregular appointments of inadequately skilled persons for extended periods and to ensure that the person appointed as a municipal manager is suitably qualified with the necessary expertise and competencies.

[23] Section 57(6)(a) makes it clear that the employment contract of a municipal manager is limited to a maximum fixed term of five years, not exceeding a period ending one year after the election of the next municipal council. The 2006 regulations are to like effect.[4] Insofar as the section has been interpreted by the high court to mean that until the promulgation of the Amendment Act, it was permissible to extend contracts for more than five years where the terms of renewal were stipulated, this is, in my view, incorrect. A renewal in terms of s 57(6)(c) can only occur if the maximum period of five years has not run its course (and if the terms of the renewal are stipulated). In other words, if the term of the contract does not run for the maximum five years permissible, then, and only then, would an extension be lawful, subject to compliance with s 57(6)(c), in that the terms of renewal would have to have been stipulated in the contract and agreed between the parties.

[24] The relevant provisions in s 57(6) may appear to be in conflict: the employment contract is for a fixed term up to a maximum of five years, yet the contract may stipulate the terms of its renewal. The high court read these provisions to mean that the contract is for a maximum period of five years, but subject to renewal as stipulated in the contract. That resolution of the apparent conflict is unpersuasive. First, the legislature has determined that the contract must be for a fixed term that cannot exceed five years. These are cumulative requirements. Second, can s 57(6)(c) be interpreted to permit the parties an unbounded power of renewal? So, for example, if the parties agreed to a renewal that was of indeterminate duration, subject only to termination for breach or retirement, would that fall within the permissible bounds of contractual competence? Such a permissive construction would allow the significance of s 57(6)(a) to lose its limiting force because the contract would de facto be neither of a fixed term, nor of five years duration. Third, if the competence to agree a renewal is to be read subject to the

stipulations of s 57(6)(a), a coherent interpretation can be achieved. That is so because the parties may conclude a fixed term

agreement for a period of less than five years, with an option to renew that does not violate the five-year maximum. Such an interpretation reconciles s 57(6)(a) and (c) whereas the contrary position renders s 57(6)(a) subject to circumvention in ways that would undermine its central purpose.

- [25] The competitive process introduced by s 54A of the Amendment Act should be understood in this context. First, s 54A does not determine when a vacancy occurs, that is a function of the fixed term agreed under the discipline of s 57(6). Second, as s 54A also does not determine the regime of permissible renewal of an existing contract, that too is determined by s 57(6). Third, s 54A(4) introduced further requirements as to how a vacancy must be filled, and the consequences of a failure to do so. Therefore, s 57(6) determines the limits of the contract that may be concluded, and hence when a vacancy arises, while s 54A(4) stipulates how an appointment is to take place to fill that vacancy.
- [26] It is indeed correct, as Mr Mawonga argued, that the Amendment Act did not seek to change the renewal regime. But the reason is not, as he would have us accept, so that the employment contract of a municipal manger could continue indefinitely as long as the renewal occurred before the expiry of the contract, but because a fixed term contract could not, in any event, be longer than five years. Any appointment made thereafter would be subject to the procedural constraints of s 54A(4) requiring a nationally competitive process.
- [27] Take for example, Mr Mawonga's second renewal signed in July
2017. The parties entered into a four-year contract, with an option of a further extension for one year. If this had been his original contract, and if the terms of his renewal were stipulated, once the four-year period had lapsed, there would be no need for the extension to be advertised nationally. This requirement would only occur after the five-year period expired. Thereafter, the provisions of s 54A would be triggered. Of course, this would not prevent an incumbent from applying for the position, but under the competitive conditions brought about by advertising the vacancy.
- [28] As pointed out in Xuma, the legislature requires stringent compliance with s 54A in all circumstances, including renewals and extensions of contracts. This is evident in s 54A, which gives the MEC and the Minister for Local Government and Traditional Affairs a supervisory role in relation to the appointment of municipal managers.[5] In terms of s 54(6), the municipality must inform the MEC of the appointment process and in terms of s 54(7), the MEC is obliged to enforce compliance, even approaching a court for a declaratory order if necessary. If the MEC fails to act appropriately, then s 54(9) entitles the Minister to intervene. Were this not the case, then an employment contract of under-skilled and unqualified municipal manager could be extended in perpetuity, by employing a simple stratagem of renewing the contract before the expiry date, with the MEC and Minister being powerless to intervene.
- [29] Mr Mawonga's contract commenced on 1 August 2007 and lapsed on 31 July 2012, a fixed period of five years. Once the maximum five years permissible in terms of s 57(6)(a) had lapsed, it was not an option open to the municipality to extend or renew the contract. This means that on the harmonious interpretation of s 57(6)(a) and (c) and s 54A set out herein, not only was the second renewal void ab initio, but also the first renewal. Therefore, my finding on the first question is that where an employment contract of a municipal manager

has been renewed prior to the expiry of the fixed term of five years, the post becomes vacant as contemplated in s 54A (4) of the MSA upon the expiry of the fixed term of five years, requiring the post to be

advertised nationally. This finding makes it unnecessary to deal with the second question as to whether the employment contract stipulated the terms of its renewal within the meaning of s 56(7)(c).

[30] With regard to the third question, once it is found that any five year contract which has run its course is subject to the procedural requirements of s 54A, it follows that the resolution of the council of 20 July 2017 renewing Mr Mawonga's contract, was invalid for want of compliance with the section.

[31] The application brought by Mr Mawonga in the high court was to review and set aside the decision taken by the council on 8 January 2018, rescinding its resolution of 20 July 2017 where it resolved to extend and renew Mr Mawonga's contract for a second time. In a counter application, the MEC sought to review and set aside the council's

decision of 20 July 2017. The high court granted the order as sought by Mr Mawonga that the decision of 8 January 2018 was set aside. However, that order was of no practical consequence because the court below also held that the counter application succeeded, and hence Mr Mawonga's appointment as the municipal manager on 20 July 2017 was also set aside. No appeal was brought in respect of the order made in favour of Mr Mawonga, no doubt because its efficacy was overtaken by the order granted in favour of the second respondent. As a result, there is no reason to interfere with the order made by the court below. The appeal before this court fails, and the costs must follow the result.

[32] In the result I make the following order:

NICHOLLS CH

JUDGE OF APPEAL

Appearances

For appellant: H Drake

Instructed by: Honey Attorneys, Bloemfontein

For first and third respondents: A Byleveld SC

Instructed by: Wheeldon Rushmere & Cole Inc, Grahamstown

Symington & De Kock, Bloemfontein

For second respondent: A Bodlani (with him V Madokwe and L Ntikinca)

Instructed by: State Attorneys, Port Elizabeth

State Attorney, Bloemfontein

[1] Section 82 of the Local Government: Municipal Structures Act was repealed by the s 15 of the Local Government: Municipal Systems

Amendment Act 7 of 2011.

[2] Xuma v Engcobo Local Municipality

[2017] ZAECHMHC 35; 2017 JDR 1522 (ECM).

[3] South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs

[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.

[4] GNR 805 of 1 August 2006- regulation 2(3) mirrors s 57(6) and regulation 17 (a) states the contract of employment will automatically terminate on the expiry of the term referred to in the contract, subject to any extension or renewal.

[5] Xuma fn 3 above paras 12 and 13.

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