

SOUTH AFRICA / JUDGMENT

Penxa v Central Karoo District and Others (4913/24) [2024] ZAWCHC 151 (5 June 2024)

[2024] ZAWCHC 151

COURT

Western Cape High Court, Cape Town

BEFORE

DM Thulare

CASE / FILE NUMBER

4913/24

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: 4913/24

In the matter between

MNYAMEZELI

JACKSON PENXA

APPLICANT

AND

THE

CENTRAL KAROO DISTRICT

1st

RESPONDENT

THE EXECUTIVE MAYOR OF

THE CENTRAL KAROO

DISTRICT

MUNICIPALITY

2nd

RESPONDENT

THE

SPEAKER OF THE CENTRAL KAROO DISTRICT

3rd

RESPONDENT

MUNICIPALITY

COUNCIL

MZUNGISI

GRATITUDE NKUNGWANA

4th

RESPONDENT

RALPH

ROLAND

LINKS

5th

RESPONDENT

ANTON

BREDELL, MINISTER OF LOCAL GOVERNMENT,

6th

RESPONDENT

ENVIRONMENTAL AFFAIRS

AND DEVELOPMENT PLANNING

Date of Hearing: 17 & 21 May 2024

Date of Judgment: 05 June 2024 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

- [1] This is an urgent opposed application to review and set aside the decision taken by the first respondent (the Municipality) to appoint the fourth respondent (Nkungwana) as the Municipal Manager (the position) in January 2024. The applicant brought the application in terms of section 54A(2) and
- (3) of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) (the LGMSA) and premised it on the principle of legality. In the alternative the applicant sought a declaratory order that the appointment of Nkungwana was unlawful. In the further alternative, the application was brought in terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (the PAJA). The sixth respondent (the MEC) filed a notice to abide. The fifth respondent (Links), who was also interviewed for the position together with the applicant (Penxa) and Nkungwana, did not oppose the application but filed an affidavit in which he expressed some concerns around the recruitment process. The Municipality, the second respondent (the Mayor) and the third respondent (the Speaker) and Nkungwana opposed the application.
- [2] The applicant, Links and Nkungwana applied for the position and were subjected to a municipal leadership competency assessment done by the South Africa Local Government Association in partnership with Encapsulate Consulting (the Assessors), who provided a

competency report in respect of each of the three candidates. The applicant made the achievement level “competent” in all of the eight competency proficiency matrix assessed, and obtained an overall achievement level of “competent”. Both Links and Nkungwana made the achievement level of “competent” in only four and made the achievement level of “basic” in the other four of the competency proficiency matrix, and as a result both made the overall achievement level of “basic”.

It is the consequence of these results on which the parties differ. The applicant’s case was that with his overall achievement

level, he met the requirements for appointment to the position whilst the other two did not. The respondents interpret the applicable

legislation differently and their case was that Nkungwana also met the requirements for appointment to the position.

[3] The crisp question is the interpretation of section 54A (2) and (3)(a) and (b) of the LGMSA. The section reads:

“54A Appointment of municipal managers and acting municipal managers

(1) The municipal council must appoint-

- (a) a municipal manager as head of the administration of the municipal council; or
- (b) an acting municipal manager under circumstances and for a period as prescribed.

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

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

(b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.

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

- (a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or
- (b) the appointment was otherwise made in contravention of this Act.”

The position is regulated by 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). Chapter 3 of the Regulations deals with the recruitment, selection and appointment

of senior managers. The Regulations define ‘senior manager’ as meaning a municipal manager or acting municipal manager, appointed in terms of section 54A of the Act, and included a manager directly accountable to a municipal manager appointed in terms of section 56 of the Act.

Regulation 9 provides as follows:

“9 Competence requirements for senior managers

- (1) A person appointed as a senior manager in terms of these Regulations must have the competencies as set out in Annexure A.
- (2) A person appointed as a senior manager in terms of these Regulations must comply with the minimum requirements for higher education qualification, work experience and knowledge as set out in Annexure B.”
- [4] In dealing with Annexure A, which sets out competencies, it is best to start at the end, with section 6 thereof. It reads:

“6 Achievement Levels

The achievement levels indicated in the table below serve as a benchmark for appointments, succession planning and development interventions.

6.1 Individuals falling within the Basic range are deemed unsuitable for the role of senior manager, and caution should be applied in promoting and appointing such persons.

6.2 Individuals that operate in the Superior range are deemed highly competent and demonstrate an exceptional level of practical knowledge, attitude and quality. These individuals should be considered for higher positions, and should be earmarked for leadership programs and succession planning.

Achievement Levels

Description

Basic

Applies basic concepts, methods, and understanding of local government operations, but requires supervision and development intervention

Competent

Develops and applies more progressive concepts, methods and understanding. Plans and guides the work of others and executes progressive analyses

Advanced

Develops and applies complex concepts, methods and understanding. Effectively directs and leads a group and executes in-depth analyses

Superior

Has a comprehensive understanding of local government operations, critical in shaping strategic direction and change, develops and

applies comprehensive concepts and methods”

[5] Before dealing with the competency structure in section 3, Annexure A reads:

“ANNEXURE A

LOCAL GOVERNMENT: COMPETENCY FRAMEWORK FOR SENIOR MANAGERS

1 Definitions

In this framework-

'core competencies' are competencies that cut across all levels of work in a municipality and enhance contextualised leadership that guarantees service delivery impact; and

'leading competencies' means competencies that are required to develop clear institutional strategy, initiate, drive and implement programs to achieve long-term sustainable and measurable service delivery performance results.

2 Competency Framework

2.1 This competency framework replaces regulation 26(8) of the Local Government: Municipal Performance Regulations for Municipal Managers and Managers directly accountable to Municipal Managers, (Government Notice 805) as published in Government Gazette 29089 of 1 August 2006.

2.2 A person appointed as a senior manager must have the competencies as set out in this framework. Focus must also be placed on the following key factors:

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

2.3 The competency framework consists of six leading competencies which comprise of twenty (20) driving competencies that communicate what is expected for effective performance in local government.

2.4 The competency framework further involves six (6) core competencies that act as drivers to ensure that the leading competencies are executed at an optimal level.

2.5 There is no hierarchical connotation to the structure and all competencies are essential to the role of a senior manager to influence high performance. All competencies must therefore be considered as measurable and critical in assessing the level of a senior manager's performance.

2.6 The competency framework is underscored by four (4) achievement levels that act as benchmark and minimum requirements for other human capital interventions, which are, recruitment and selection, learning and development, succession planning, and promotion.”

[6] It is against this background that the competency framework should be measured in respect of Nkungwana. There are six leading competencies in the competency framework as set out in section 3 of the Annexure A. The leading competencies are (1) Strategic Direction and Leadership which includes Impact and Influence, Institutional Performance Management, Strategic Planning and Management and Organisational Awareness; (2) People Management which includes Human Capital Planning and Development, Diversity Management, Employee Relations Management and Negotiation and Dispute Management; (3) Program and Project Management which includes Program and Project Planning and Implementation; Service Delivery Management and Program and Project Monitoring and Evaluation; (4) Financial Management which includes Budget Planning and Execution, Financial Strategy and Delivery and Financial Reporting and Monitoring; (5) Change Leadership which includes Change Vision and Strategy, Process Design and Improvement and Change Impact Monitoring and Evaluation as well as (6) Governance Leadership which includes Policy Formulation, Risk and Compliance Management and Cooperative Governance. It would be very helpful if the applications to the position were assessed in respect of all six leading competencies. Be it as it may, they were only assessed in respect of leading competencies 1, 2 and 5 above. Nkungwana scored “basic” in all three. The applicant scored “competent” in all three. The scoring criteria and proficiency levels was explained as follows by the Assessors: Achievement level “basic” description was “marginal/basic demonstration of competency; basic understanding of concepts and methodology; identified as potential development area”. Achievement level “competent” description was “sufficient demonstration of competency;

sufficient understanding of concepts and methodologies.”

[7] There are six core competencies in terms of section 3 of Annexure A and these are (1) Moral Competence; (2) Planning and Organising;

(3) Analysis and Innovation; (4) Knowledge and Information Management; (5) Communication and (6) Results and Quality Focus. Nkungwana scored “competent” in three to wit (1), (3) and (5) and “basic” in (2) and (6). The candidates were not assessed on (4) Knowledge and Information Management. On selection risk level, Nkungwana was found to be at selection risk level “Moderate Risk”, which was described as “Some risk factors in both the competency and behavioural profile and these may impact on the person’s capacity to perform optimally within the role. The impact of these should be considered within the context/environment of the Municipality when making a selection decision and careful consideration of this risk should be taken into account.” The competency descriptions are provided in section 5 of Annexure A.

- [8] A careful reading of the Act and the Regulations, including Annexure A, left me with the impression that for the post of Municipal Manager, South Africa committed itself to select, recruit and appoint a candidate as a Municipal Manager, who is not an average manager. The deliberate choice is a candidate who was out of the ordinary. There is no doubt that Nkungwana has the essential facts and know the foundation principles of local government operations as well as its concepts and methods. It comes as no surprise that he scored overall achievement level “basic”. Nkungwana is not out of the ordinary. He is midway between two extremes of ‘incompetent’ and ‘competent’. The Assessors captured these concerns in the Executive Summary of their report on him in the following terms:

“... He may be inclined to adapt well to situations where he is required to take a back-seat. Mzingisi seems comfortable smoothing over interpersonal conflicts but due to his lowered assertiveness levels, he may be inclined to give way too readily in the face of opposition, being swayed by more influential individuals, especially when they are higher ranked than himself.”

In the highly charged terrain of the t-junction where public interest, political and ideological as well as Constitutional Democratic State Administration contest for hegemony, a Municipal Manager who cannot stand their ground would simply be a disaster and part of the problem for the Municipality to function properly. This is fortified when the Executive Summary continues:

“... He seems to have a strong sense of duty but may dislike working under pressure. He may also tend to make a pessimistic view of the future, especially when things go repeatedly wrong. He has a tendency to worry about how others see him and this may rattle a shaky self-confidence. He tend to feel things deeply and may sometimes struggle with constructive or negative feedback.

...Mzingisi is likely to be careful that tasks are completed to a high standard and on time. To achieve this, he is likely to carry out jobs in a methodical fashion and with considerable energy. However, he could appear to be somewhat reluctant to set objectives himself and he may prefer to involve others in decision-making process. He will generally prefer to be given direction and then be left to follow through on a job.”

In simple terms, Nkungwana runs the risk of being a useful tool for politicians. Nature leaves no vacuum for leadership and this will result in the Municipality having no State Administration, with the Mayor making administrative decisions on behalf of the State. Nkungwana will be a driver who concentrates on his mirrors and not the where the vehicle is being directed to, and surely the Municipality’s Administration would crash. The closing paragraph of the Executive Summary reads:

“Mzungisi seems to be best suited to work settings where he can capitalize on his knowledge and experience in performing routine and hands-on tasks, focusing on tangible elements in a structured environment, where clear guidelines and performance feedback are available. He shows the potential to work with more specialist work that ensures smooth operational functioning and client service. However, he seems to value speed and/or closure over accuracy and therefore he may work fast (but not necessarily), but can also be superficial and inaccurate when working with information. This approach was mixed with somewhat of an unsystematic, random and unplanned approach to problem-solving.

As such, he may improve his problem-solving performance significantly by learning more effective strategies and techniques to solve problems. Mzingisi could possibly be confused by unusual, unfamiliar and unstructured environments, and some degree of structure, guidance or exposure may improve his performance in unstructured situations.”

In other words, Nkungwana performs best under supervision. He cannot produce practical ideas on his own to take the Municipality forward.

[9] A brief comparative analysis of the competency descriptions as set out in section 5 of Annexure A in comparison to Nkungwana reveals a few concerns. Under strategic direction and leadership as a leading competency, someone who scored ‘basic’ lacks the ability to inspire others to achieve the Municipality’s mandate, has limited influence in directing strategy and lacks the ability to integrate systems into a collective whole. At “competent”, such candidate was able to develop action plans to execute and guide strategy implementation, was able to display awareness of institutional structures and political factors, effectively communicate barriers to execution to relevant parties, provide guidance to all stakeholders in the achievement of the strategic mandate, understand the aim and objectives of the institution and relate it to his own work, to give direction to a team realizing the strategic mandate and to set objectives and to have a positive impact and influence on the morale, engagement and participation of team members. On people management, Nkungwana at ‘basic’ required support in implementing development initiatives. A person who scored ‘competent’ would seek opportunities to increase team contribution and responsibility, respect and support the diverse nature of others and be aware of benefits of a diverse approach, effectively delegate tasks and empower others to increase contribution and execute functions optimally, apply relevant employee legislation fairly and consistently, facilitate team goal-setting and problem solving and effectively identify capacity requirements to fulfil the strategic mandate. In change leadership, at ‘competent’ the candidate would be able to perform an analysis of the change impact on the social, political and economic environment, maintain calm and focus during change, able to assist team members during change and

keep them focused on the deliverables, volunteer to lead change efforts outside of own work team, able to gain buy-in and approval

for change from relevant stakeholders, identify change readiness levels and assist in resolving resistance to change factors and to design change interventions that are aligned with the institution’s strategic objectives and goals. Nkungwana is not competent in these leading competencies on which he was assessed. I deem it not necessary to do the same comparative analysis as regards core competencies as I think the point has been made that Nkungwana does not meet what the Act, read with the Regulations including Annexure A envisaged as a suitable candidate for appointment as Municipal Manager.

[10] I am not persuaded by the submissions of the respondents which suggests that because the Assessors have an achievement level “not competent” below basic, therefore “basic” was sufficient and acceptable for appointment to Municipal Manager at first instance. Section 6.1 dealing with achievement levels clearly indicated that individuals falling within ‘basic’ are deemed unsuitable for the role of Municipal Manager as a starting point. Read with the description of ‘basic’, the motivation is that such persons require supervision and development intervention. The Municipality may consider a person with ‘basic’ achievement levels when there are special circumstances and there was good cause to show why this should be the case. This will be in instances where the Municipality is unable to attract persons with the achievement level of ‘competent’ or above. Section 54A (11) provides:

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

The submission that a Municipality may appoint a Municipal Manager with an achievement level of ‘basic’ at first instance and then rely on the Mayor for their supervision and development is an emaciated argument which suffers from “separation of constitutional obligations deficiency” at Municipal level. It simply swims against the national tide which flows to why section 54A was in our statute books, which was, simply put, to ward off political take-over of state administration. It must be borne in mind that the definition of ‘senior manager’ is not exclusive to the position of Municipal Manager or Acting Municipal Manager. It includes a manager directly accountable to a Municipal Manager, appointed in terms of section 56 of the LGMSA. It follows that supervision and development intervention as envisaged in the description of achievement level ‘basic’ in section 6.2 of Annexure A refers to such managers, who may still be promoted and appointed as envisaged in section 6.1. It will be odd for Council to appoint a Manager as envisaged in section 56 for the purpose of or to supervise and develop the Municipal Manager, when such Manager was accountable to the Municipal Manager. A mentor (Municipal Manager) cannot be required or expected to justify their actions or decisions to a mentee (Manager directly accountable to the Municipal Manager). A mentee cannot take responsibility for the mentor. It simply defies logic.

[11] A consideration of the competency descriptions as set out in section 5 of Annexure A, more specifically the achievement levels ‘competent’ and higher to wit, “advanced’ and ‘superior”, leaves no doubt that here we are talking of persons who do not only show the understanding to recite concepts, methods and operations of a Municipality and under command of others apply their recitations. The achievement levels ‘competent’ and higher provide a demonstrable capacity to research, consider available data and produce new knowledge to help the Municipality attend to its unique challenges within its own context, available resources, relationships, timeframes and circumstances. Nkungwana was not competent as envisaged in section 8(1)(b) and 9(1) of the Regulations. His appointment did not meet the competencies as set out in Annexure A. His appointment is not in accordance with section 54A(2) and (3)(a) of the LGMSA. It is also not in accordance with section 6(3) of the

Regulations which provide:

“6. Principles of recruitment

- (3) Selection must be competence-based to enhance the quality of appointment decisions and to ensure the effective performance by municipalities of their functions.”

In *Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs* (Case no 485/2019) [2020] ZASCA 153 (26 November 2020) it was said at para 16:

“[16] The role of the Municipal Manager as set out in s 55 of the Systems Act also provides context. In terms of that provision, the Municipal Manager is both the head of administration for the municipality and its accounting officer. As head of administration, the Municipal Manager is responsible and accountable for the formation, development and management of an economical, effective, efficient and accountable administration; the management of the provision of services to the community in a sustainable and equitable manner; the appointment, management, training and discipline of staff; and advising the political structures and office bearers in the municipality.”

A Municipal Manager should be someone who has the theoretical training and the ability to understand the underlying circumstances of the Municipality and to produce practical solutions that address the lived reality of the community informed by his training and the

facts.

- [12] Grisselle Sauline Viviers Simpson (Simpson) represented a trade Union, South African Municipal Workers Union (SAMWU) as an observer at the interviews of the candidates for the position. At the interviews after the candidates were interviewed, she placed on record and informed the panel that her observation was that Nkungwana answered the questions posed to him in a manner that gave an impression to her that Nkungwana either had sight of the questions or they were given to him in advance. In answer to this allegations, the first, second and third respondents gave a bare denial and averred that the applicant and Simpson did not produce any evidence to support her assertions. Nkungwana said this was mere speculation and not the truth. This application was heard on a Friday 17 May and could not be completed and was postponed to the next Tuesday 21 May for further hearing. At the commencement of the hearing on Tuesday, Nkungwana brought an interlocutory application. The salient contents of his founding affidavit therein reads:

“12. ... What has now emerged in documents which I have since received, on 18 May 2024 and subsequently on 20 May 2024 has direct

bearing on the Applicant’s viewpoint and demonstrates that he is not bona fide or sincere in his aforesaid contentions.

13. As I have already indicated, this application has attracted wide attention, so much so that there have been rumblings on social media platforms and the controversy thereof has been reported in various media releases. I assume that persons in senior positions in Local Government, in general, have an interest in the outcome of this application and (most probably prefer) that the court adjudicating the matter on all relevant facts. For this reason, further facts and documents have emerged, and someone – in the manner stated hereunder – provided me with extremely relevant documents and information.
14. I attended the court proceedings on Friday, 17 May 2024 till late in the afternoon (after 17H00). I travelled back to my home in Beaufort West on Saturday, 18 May 2024 and on my arrival found that some unknown person had left documents at my home, amongst others:
- 14.1 The long list of candidates (July 2021) for the selection process for the Municipal Manager of the Beaufort West Municipality;
- 14.2 A report on the screening of shortlisted candidates (July 2021) of the selection process for the Municipal Manager for the Beaufort West Municipality;
- 14.3 A shortlist (July 2021) for the Applicants for the appointment of Municipal Manager of Beaufort West District Municipality;
- 14.4 A report on the screening of shortlisted candidates (July 2021) for the position of Municipal Manager for Beaufort West Municipality;
- 14.5 The selection report on the selection process for the Municipal Manager (July 2021) for the Beaufort West Municipality.”
- [13] Simpson’s observation may have been doubtful before Friday 17 May 2024. It was susceptible to being seen as oblique and as dependent on speculative inferences and therefore unreliable. However, Nkungwana’s affidavit in his interlocutory application admitted to a compelling reason for the direct interference of persons in senior positions in the Central Karoo District Municipality, who are clearly not only benevolent to him, but are prepared to leak confidential information held by the Municipality to advance his case for appointment as Municipal Manager. This weigh in favour of the significance of Simpson’s observation. Moreover, one is not favoured with evidence, for example, that the panelists formulated the questions after they convened in a closed room and that none of them had access to any communication devices with which they could have transmitted the questions to Nkungwana between the formulation and the posing to Nkungwana, thus placing objective evidential material before the court which countervailed that Nkungwana may have had sight of the questions or they were given to him in advance. The respondents did not provide a motive, if any existed, for Simpson to simply fabricate falsehoods. Nothing suggested that Simpson did not have the ability to notice, especially significant details. She raised her objections based on what she had heard and seen during the interviews. When regard is had to the concerns by Links to the Executive Mayor, albeit in respect of the previous recruitment process of Municipal Manager,

which was in September 2023, in that Nkungwana was allowed by the Municipality, the Mayor and the Council to be involved in the

recruitment process in which he was a candidate, the conclusion that the recruitment process was tainted by persons in senior positions in the Central Karoo District Municipality was inescapable. Under the circumstances, I am unable to reject Simpson's observations as far-fetched, unlikely, unconvincing and implausible.

[14] The appointment of a Municipal Manager is of an administrative character. In para 34 to 38 of Nkandla the court continued:

"[34] In Minister of Defence and Military Veterans v Motau and Others (Motau) the Constitutional Court provides a helpful guidance on whether a decision or conduct constitutes 'administrative action.' It distilled the definition of 'administrative

action' into seven components: There must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision;

(e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[35] As stated before, the crux of the case brought by the MEC is that the Municipal Managers (Mr Jili and Mr Sibiya) should not have been employed in the first place because they are not qualified as required by the legislative instruments that apply. The question is whether, juxtaposed with the criteria set out in Motau, the impugned decisions of the two municipalities (i.e. the appointment of Mr Jili and Mr Sibiya, respectively) constituted administrative action to which PAJA applied. It is to that exercise

that I now turn my attention.

[36] That a municipality's decision to appoint a Municipal Manager is quintessentially of an administrative character warrants no debate, in my view. A municipality is an 'organ of state' as defined in s 239 of the Constitution and its powers are of a public nature. The power related to the appointment of a Municipal Manager is derived from the Systems Act and constitutes a decision or conduct by the State. Given the crucial role of Municipal Managers as delineated in s 55 of the Systems Act, it is indisputable that an irregularity in the appointment of Municipal Managers can adversely affect the rights of members of the public or ratepayers to whom the Municipality owes the duty to lawfully execute its duties and thus had an external effect. Lastly, the decision to appoint Municipal Managers does not fall within the limited exclusions under the definition of 'administrative

action' in PAJA.

[37] It is evident from the above that the impugned decisions meet the elements of the definition of 'administrative action' enunciated in PAJA and expounded in Motau and would thus meet the threshold for a review grounded on PAJA. However, the matter is not as simple as all

that. What cannot be disregarded is that s 54A gives both the MEC and the Minister a supervisory role in relation to the appointment of Municipal Managers. Khampepe J in Motau insightfully warned that the distinction between executive and administrative action is often not easily made; that the determination needs to be made on a case by case basis, and that there is ‘no ready-made panacea or solve-all panacea’.

[38] It is abundantly clear from a plethora of judgments that the yardstick of reasonableness is applicable regardless of whether the application for review is grounded on PAJA or the principle of legality. The circumstances of this case do not warrant that a firm finding be made on whether the review was grounded on PAJA or the principle of legality, as that determination has no bearing on the outcome.”

I have considered *Raliphada v Makhado Municipality and Others* [2024] 2 All SA 490 (LP). At para 23 the court said:

“[23] The ninth respondent was found not to be appointable after failing the competency assessment test and also performing poorly in the oral/written interview in person. The proper context of the competency assessment was not to disqualify a candidate who otherwise passed all earlier phases of the selection process. The context indicates that the competency assessment was actually intended to confirm the competency of the suitable candidate, as opposed to excluding him or her from the process or to create a super stand-alone stage of the process.”

Similar comments are made in para 29. I am unable to agree. Regulation 9 sets out competency requirements. I understand a requirement to be what was officially compulsory, considered essential and was indispensable, as opposed to a wish or desire. The word ‘must’ in Regulation 9(1) envisaged that the provision would be obliged and should not be overlooked. Regulation 9(1) was a stand-alone requirement, which together with other requirements in Regulation 9(2) determined the competence of the candidate. It seems to me that the learned AJ may have lost the path of reasoning in the terminology employed. The word “competence” used in the title to Regulation 9 is the total sum of all the constituent parts, whilst the word “competencies” envisaged in Annexure A are parts of the whole. The word in the title is all-encompassing whilst in Annexure A the word is subject specific. As part of meeting the competence requirements, a candidate for Municipal Manager must be competent in the competencies as a point of departure. The departure from this principle is when the Municipality was unable to attract suitable candidates.

At para 30 of *Nkandla*, the court said:

“[30] In MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd

[2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) at para 82 the Constitutional Court made the following insightful observation:

‘There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’

Municipal Managers are vital to the proper administrative functioning of municipalities. At para 39 in *Nkandla* the court continued:

“[39] The requirement to institute review proceedings without undue delay is intended to achieve both certainty and finality. In Merafong City Local Municipality v AngloGold Ashanti Limited

[2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) it was held that the rationale for the rule against delay in instituting reviews was to curb the potential prejudice that would ensue if the lawfulness of the decision remained uncertain. It was also observed that protracted delays could give rise to calamitous consequences not just for those who rely upon the decision, but also for the efficient functioning of the decisionmakings.”

In *Apleni v The President of the Republic of South Africa and Another* 2018 (1) All SA 728 (GP) at para 10 it was said:

“Where allegations are made relating to abuse of power by a Minister or other public officials, which may impact upon the rule of law, and may have a detrimental impact upon the public purse, the relevant relief sought ought normally to be urgently considered.”

The applicant cannot be faulted for approaching the court on an urgent basis.

[15] I am not persuaded that this court should usurp the function of the municipal council as envisaged in Regulation 12 to appoint a selection panel to make recommendations for the appointment of candidates for the vacant position of Municipal Manager or its function as envisaged in Regulation 17 to decide on an appointment, even in circumstances like the present where the council failed in its duty to satisfy itself that Nkungwana met the relevant competency requirements for the position as set out in Annexure A specifically. For these reasons I make the following order:

(a) The application was heard as a matter of urgency and the applicant’s failure to comply with time limits, forms and procedures in the Uniform Rules of Court was condoned.

(b) The decision of the Central Karoo District Municipality Council to appoint Mzingisi Gratitude Nkungwana as Municipal Manager on 10 January 2024, when he did not have the prescribed competencies, in contravention of section 54A(2) and (3)(a) of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) 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, is reviewed and set aside.

- (c) The process of the selection leading up to and including the decision to appoint a Municipal Manager is remitted back to the Central Karoo District Municipality Council.
- (d) The first, second, third and fourth respondent to pay the costs, jointly and severally, the one paying the other to be absolved.
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DM THULARE

JUDGE OF THE HIGH COURT

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Prepared on 10 October 2026 · Esheria