

SOUTH AFRICA / JUDGMENT

Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning v Central Karoo District Municipality and Others (4835/2023) [2023] ZAWCHC 66; [2023] 7 BLLR 717 (WCC); (2023) 44 ILJ 1832 (WCC) (3 April 2023)
[2023] ZAWCHC 66

COURT

Western Cape High Court, Cape Town

BEFORE

P.A.L. Gamble

CASE / FILE NUMBER

4835/2023

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FLYNOTES:

EXPERIENCE NEEDED FOR MUNICIPAL POSITION
MUNICIPALITY

– Municipal manager – Appointment – Acting
municipal manager – Requirements – Relevant
experience

at senior management level – De facto experience not
counting for required period – Systems Act amended
to

expressly ensure that persons appointed to senior management
positions are duly qualified – Local Government: Municipal
Systems Act 32 of 2000, 54A.

IN THE HIGH COURT OF

SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

REPORTABLE

CASE NO: 4835/2023

In the matter between: WESTERN CAPE
PROVINCIAL MINISTER
OF LOCAL GOVERNMENT,
ENVIRONMENTAL
AFFAIRS
AND DEVELOPMENT PLANNING
Applicant
and
CENTRAL
KAROO DISTRICT MUNICIPALITY
First Respondent
SPEAKER OF THE COUNCIL
OF THE
CENTRAL
KAROO DISTRICT MUNICIPALITY
Second Respondent
ACTING MUNICIPAL
MANAGER,
CENTRAL
KAROO DISTRICT MUNICIPALITY
Third Respondent
HENDRIK
TRUMAN PRINCE
Fourth Respondent

Bench: P.A.L. Gamble, J

Heard: 29 March 2023

Delivered: 3 April 2023
This
judgment was handed down electronically by circulation to the
parties' representatives via email and release to SAFLII. The
date
and time for hand-down is deemed to be 10h30 on Monday 3 April 2023

JUDGMENT

GAMBLE, J:

INTRODUCTION

1. On 29 March 2023 the applicant (“the MEC”) approached this Court urgently for declaratory relief relating to the recent appointment of the fourth respondent (“Prince”) as the acting municipal manager of the first respondent (“the Municipality”). The matter was genuinely urgent and was heard in the Fast Lane of the Motion Court during recess. This judgment has been prepared in light of the urgency of the matter and the Court reserves the right to amplify its reasons later if the need arises.

2. The appointment of a municipal manager (which includes the position of acting municipal manager) is governed by section 54A of the Local Government: Municipal Systems Act, 32 of 2000 (“the Systems Act”) and, as will be seen more fully hereunder, is governed by specific criteria in respect of qualifications. The MEC has approached the court because he contends that Prince is not suitably qualified to hold the position of acting municipal manager of the Municipality. Prince, who has deposed to the answering affidavit, and the Municipality contend otherwise.
3. It is not in dispute that if the Court finds that Prince is not suitably qualified for the position of acting municipal manager, his appointment was null and void.[1] That is the relief which the MEC seeks in this matter.

BRIEF FACTUAL

BACKGROUND

4. For the month of January 2023, the Municipality was served by an acting municipal manager, Mr. Nyathi, who resigned at the end of that month. A special meeting of the Council of the Municipality was convened on Thursday 2 February 2023 at which the resignation of Mr. Nyathi was tabled. The resignation was accepted and the Council immediately resolved to appoint an acting municipal manager pending the finalization of a recruitment process to appoint a permanent municipal manager.
5. Two names were put forward and the Council voted in favor of Prince by a majority of votes. The Council resolved that “due to the urgency of the matter”, Prince would assume the position with immediate effect.
6. Prior to this meeting, and on Wednesday, 1 February 2023, the MEC had received an email from the Executive Mayor of the Municipality informing him of the unexpected resignation of Mr. Nyathi and of the Council’s intention to fill the vacancy the following day by appointing Prince as the acting municipal manager.
7. On Friday 3 February 2023 the MEC responded to this email and requested the CVs of all the candidates for the position, including Prince’s. The latter’s CV was promptly furnished to the MEC on Monday 6 February 2023. The following Monday, 13 February 2023, the office of the MEC directed inquiries to the Municipality regarding the status of the position in the Municipality previously occupied by Prince: it wanted to know whether that post (Senior Manager: Community Services) was a so-called “section 56 post”[2]. The Municipality replied immediately that Prince had not previously occupied such a post.
8. On Friday, 17 February 2023 the MEC wrote to the Executive Mayor informing him that, in his view, Prince did not meet the criteria for appointment as acting municipal manager in that he did not have the requisite five years’ experience in a position reporting to the municipal manager. The MEC furnished the Executive Mayor with the legislative basis for his contention and advised the Executive Mayor that he accordingly held the view that the

appointment of Prince was unlawful. He called upon the Municipality to terminate the appointment forthwith.

9. A week later, on Friday, 24 February 2023, the Executive Mayor wrote to the MEC and recorded his disagreement with the position adopted by the MEC. Nevertheless, he asked for seven working days (i.e. until Tuesday 7 March 2023) to enable him to clarify the issue of Prince's previous work experience with him and undertook to revert thereafter. He never reverted.
10. In the result, the MEC issued papers on Tuesday, 14 March 2023 giving notice of an urgent application to be moved on Wednesday, 22 March 2023 wherein the appointment of Prince was declared null and void. The notice of motion fixed certain time limits, requiring those parties opposing the relief to file their answering papers by Friday 17 March 2023.
11. When the matter came before the Court on 22 March 2023, no opposing papers had been filed and the Municipality and Prince agreed to a postponement of the matter until Wednesday, 29 March 2023, undertaking to file their opposing papers by close of business the following day. They also undertook to file heads of argument by noon on Tuesday, 28 March 2023.
12. In the result, the answering affidavit deposed to by Prince was only filed during the afternoon of Friday, 24 March 2023 and his heads of argument were only handed up by counsel when the matter was called in open court on Wednesday, 29 March 2023. The answering affidavit contained a request for condonation of the late filing thereof in light of the fact that Prince's legal representatives were delayed by problems associated with load shedding and the preparation of the papers. Mr. van der Schyff, for the Municipality and Prince, apologized from the Bar for the late heads explaining that he too had experienced capacity problems in finalizing them.
13. The Court accepts that all the parties were under considerable time constraints in preparing for this matter and the non-compliance with the order of 22 March 2023 is accordingly condoned. However, the delays occasioned by the lackadaisical attitude adopted by the opposing parties will be addressed in relation to the costs order contemplated herein.

CRITERIA FOR APPOINTMENT AS ACTING MUNICIPAL MANAGER

14. Mr. de Waal SC, who appeared on behalf of the MEC, took the Court through the relevant provisions of the Systems Act and the applicable

regulations, noting that the Systems Act had been amended in 2011. In SAMWU[3] the Constitutional Court, when dealing with attacks on the constitutionality of the 2011 amendments, noted that they were promulgated, inter alia, to address maladministration at the level of local government.

“[4] On 5 July 2011, the Amendment Act was promulgated. It amended the Systems Act to, inter alia, 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 political party affiliation.”

For that reason, said counsel, as a point of departure, strict compliance with the appointment criteria in respect of the position of municipal manager (which includes the appointment of an acting municipal manager) was required. I agree: that is the import of section 54A(3).

15. Section 54A of the Systems Act deals with the appointment of 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 in the circumstances and for a period 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.”*
16. Importantly, if an appointment of a municipal manager (or acting municipal manager) is made in contravention of section 54A, the MEC is enjoined to act accordingly.

“54A

- (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 principal counsel.”*

Hence the application by the MEC in this case and its manifest urgency.

17. On 17 January 2014 regulations were issued relating to the appointment and conditions of employment of senior managers under the Systems Act. It is common cause that the relevant regulation applicable to this matter reads as follows:-

“8 General requirements for appointment of senior managers

(1) No person may be appointed as a senior manager on a fixed term contract, on a permanent basis or on probation, to any post on the approved staff establishment of the municipality, unless he or she-

(a) is a South African citizen or permanent resident; and

(b) possesses the relevant competencies, qualifications, experience, and knowledge set out in annexures A and B to these Regulations.” (Emphasis added)

18. Annexure B to the regulations sets out the “Minimum Competency Requirements for Senior Managers” and contains an internal definitions clause in respect of that annexure. That clause provides that -

“The terms defined below must be used to interpret the higher education qualification, the level of experience and the work-related

experience when appointing senior managers...”

19. In the relevant block in Annexure B, under the heading Municipal Manager, it is recorded that the requisite higher education qualification is

“Bachelor Degree in Public Administration/Political Sciences/Social Sciences/Law; or equivalent;”

while the work-related experience and knowledge is divided into two categories –

“(i) Years of the Experience –

· 5 years

(ii) Type of Experience –

· Relevant experience at a senior management level; and

· Have proven successful institutional transformation within public or private sector.”

20. The definition of “senior management level” as contemplated in the “Type of Experience” category is -

“a management level associated with persons in senior management positions responsible for supervising staff in middle management

positions responsible for supervising staff in middle management positions, [sic] and includes –

(a) the municipal manager of the municipality or the chief executive officer of a municipal entity;

(b) any manager directly accountable to –

(i) the municipal manager, in the case of a municipality...”

PRINCE’S “RELEVANT EXPERIENCE”

21. Prince's assertion that he has both a Bachelor's and a Master's Degree in Public Administration was not disputed by the MEC. He is accordingly duly qualified to hold the position of municipal manager. The dispute between the parties relates rather to Prince's "relevant experience at senior management level".
22. It is common cause that Prince served as municipal manager at the Municipality during the period 20 December 2004 - 27 August 2007. That constitutes continuous service at that level for 2 years and 8 months. But that period of time is not enough to permit Prince to be considered now for the position of acting municipal manager: he needs another two years and four months' experience at the level of senior management i.e. reporting to a person at senior management level.
23. Mr. de Waal accepted that a further five months might be added to that level of experience in respect of Prince's position as Acting Director: Community Services from May to November 2019. This concession was made without accepting that Prince's appointment during that period was lawful. The concession was made purely for purposes of argument, in light of the fact that the MEC questioned whether that position was a "Senior Management Position" as defined. In the circumstances, it was submitted by counsel that Prince had an aggregate of 3 years and 3 months relevant experience and fell short of the requirement of 5 years by 1 year and 9 months.
24. Mr. van der Schyff submitted that the Court should have regard to the fact that Prince had served in a de facto position at senior management level during the period November 2019 to July 2021, notwithstanding the fact that he had never been appointed into that position. It transpires that Prince was demoted to a middle management position in November 2019, namely Senior Manager: Community Services, after there had been objections to his appointment to the position Director: Community Services by the MEC who contended that Prince was not duly qualified for that position. The MEC says that the Municipality accepted his contentions and demoted Prince.
25. Prince says that with his demotion as aforesaid, a certain Ms. Moora Phosoko was appointed as the Acting Director: Community Services with effect from November 2019. He says that Phosoko was clearly unqualified to hold the position and as a consequence of her
"patent inability to execute her mandate and the lack of experience I was placed as the de facto head in charge of the Directorate: Community Services on the instruction of the Municipal Manager at the time and with the explicit instructions that I by-pass Phosoko and report directly to him. I consequently continued to draft all the reports ordinarily compiled by the Director: Community Services together with assuming all de facto control and responsibility for the functioning of the Directorate: Community Services. As a result, I liaised directly with the

Municipal Council and the Municipal Manager and was directly answerable to the Municipal Manager in spite of Phosoko's position. Phosoko resigned from the employ of the Municipality in or about February 2020 literally a few months after her appointment."

26. Prince points out that after Phosoko's departure

"the Directorate: Community Services was lumped with (sic) Directorate: Engineering Services by the Municipal Council for form (sic) sake."

He goes on to contend that –

"Over and above the purported amalgamation the Council also lumped the Directorate: Electrical Services together with Directorate:

Engineering and Infrastructure. The net result was that it appeared as if the Directorate: Engineering and Infrastructure oversaw the other two aforementioned Directorates whereas in fact Dons Le Roux in his capacity as Senior Manager: Electrical Services and I in my capacity as Senior Manager: Community Services de facto managed the aforementioned respective Directorates without intervention and oversight from the Directorate: Engineering and Infrastructure whilst being directly answerable to the Municipal Manager."

27. Prince then seeks to draw the following conclusions from these allegations.

"It follows that since Phosoko joined the Municipality in May 2019 up until July 2021 (a period of 2 years and 2 months) I was the de facto Director: Community Services, did the work of one and gained further experience specifically associated with the Director: Community Services... Consequently, on the Applicant's version I have 3 years and 7 months senior management experience, however if regard is had to the nature of my duties from November 2019 up until July 2019 (sic) as set out above, it is clear that that constitutes an additional two years and two months experience at the level of a Section 56 manager."

DOES DE FACTO SERVICE COUNT?

28. Mr. van der Schyff urged the Court to find that the regulations must be interpreted so as to include a senior manager's stints in a caretaker capacity. Mr. de Waal pointed to s54A (10) which permits a municipal council to bypass the statutory requirements but then only after it has approached the National minister for a waiver in that regard. That did not happen in this case.

29. I agree with Mr. de Waal's submission that the regulations do not countenance "de facto" experience in any form. The wording of regulation 8 set out above is clear: to qualify for an acting appointment as a municipal manager a candidate must have been duly appointed to a senior management level post. The fact that someone may have rendered yeoman like assistance to fill a vacancy without having been appointed into that position does not meet the experience requirement stipulated in the regulations. Prince was never in a senior management position and could not supervise staff in middle management positions as this would lead to the untenable situation where he would have to supervise himself.

30. As the Constitutional Court has made plain in SAMWU, the Systems Act was amended to expressly ensure that persons appointed to senior management positions are duly qualified. This

promotes responsibility and integrity in officials who are charged with the management of municipalities and their funds. Such a person must ensure that the municipality is properly run for the benefit of its citizens and that any form of maladministration is avoided.

31. To now read into the regulations an undefined category of “de facto experience” would permit an unqualified person to insidiously creep into a position (as happened here when Phosoko was effectively sidelined) and then claim “experience” as defined. This situation was manifestly not contemplated by the drafter of the regulations, and for good reason. Such an unregulated process could lead to endless disputes about what the nature of the work was that an applicant had performed and thus render the work-related experience requirement unworkable.

CONCLUSION

32. In the result I conclude that the de facto experience that Prince lays claim to is irrelevant for the purposes of calculating the 5 year period of service required for an appointment as acting municipal manager. In light of the fact that it is common cause that Prince does not have the requisite experience if the de facto period is excluded, it follows that his appointment on 2 February 2023 as acting municipal manager of the Municipality is null and void. The MEC is thus entitled to the relief sought.

COSTS

33. In the notice of motion the MEC sought a punitive costs order on the scale as between attorney and client. The approach was predicated on the fact that, firstly, Prince had misrepresented his experience in his CV by overstating the period he had previously served as municipal manager. Then there was a complaint that the Executive Mayor had taken issue with the MEC on a case which was clear cut and had thereafter prevaricated with the purpose of stretching out the period during which Prince continued to hold the position unlawfully.
34. Lastly, it was said that the Municipality and Prince had unnecessarily dragged their feet by failing to adhere to the fair timetable set up by the MEC in the notice of motion prior to the matter being called on 22 March 2023 and not filing any papers at all, and thereafter, when a timetable had been set by agreement, failing to adhere to those dates as well.
35. Condonation for the failure to adhere to the agreed timetable is sought in the answering affidavit with reference to the fact that Prince and the Municipality is located in Beaufort West, its local legal representative is some distance away in Oudtshoorn and counsel is in Cape Town where a correspondent attorney was seemingly appointed.[4]

36. The delay in filing the answering affidavit is no more than 24 hours and in the circumstances it should be granted, particularly because the MEC was still able to prepare his case in reply without apparent inconvenience. That having been said, it remains a cause for concern that the Municipality and its Acting Municipal Manager have behaved in a somewhat cavalier manner, failing to respond to the MEC in circumstances where an answer was required. When an affidavit was eventually filed, a host of in limine points were raised only to be unceremoniously abandoned at the hearing when the folly thereof was obvious to all.
37. This certainly is the sort of case where an attorney client costs order would have been warranted on the basis of Alluvial Creek[5] given that the MEC, utilizing public funds, has been put to unnecessary expense by Prince and the Municipality to advance a case

which was sorely lacking in merit. However, after considering the matter, and particularly in light of the fact that the various arms of government should be encouraged to co-operate with each other rather than to litigate, I am persuaded that a punitive costs order should not be made in this application.

38. As far as the liability for costs is concerned, the notice of motion makes it clear that costs will be sought, jointly and severally, against such respondents as oppose the application. In the result, I consider it just and equitable that costs should follow the result and that the first, second and fourth respondents, who all elected to oppose, must jointly bear the costs.

ORDER OF COURT

39. Accordingly, an order is issued -

A. Granting the applicant permission to bring this application on an urgent basis in terms of Rule 6(12);

B. Declaring as null and void the decision of the first respondent's Council, taken on 2 February 2023, to appoint the fourth respondent as Acting Municipal Manager in terms of section 54A(1)(b) of the Local Government: Municipal Systems Act, 32 of 2000;

C. Directing the first, second and fourth respondents to pay the costs of this application jointly and severally, the one paying the others to be absolved. For the sake of clarity, it is recorded that the fourth respondent's liability for costs as aforesaid shall be in his personal capacity.

GAMBLE, J

APPEARANCES

For the applicant: Mr. H.J. De Waal SC

Instructed by State Attorney

Cape Town.

For the respondent: Mr J Van der Schyff

Metembo at Law

c/o Brasington Macris Inc.

- [1] S54A(3)(a) expressly provides that the appointment of a person who does not meet the requisite criteria is null and void.
- [2] This is a reference to section 56 of the Systems Act which governs the appointment of managers directly accountable to a municipal manager.
- [3] South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs 2017 (5) BCLR 641 (CC) at [4]
- [4] None of the documents filed by the respondents who opposed the matter contain any reference to a local firm of attorneys who

briefed Mr. van der Schyff.

- [5] In Re Alluvial Creek 1929 CPD 532 at 535

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