Annexure "C"

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

Case No: A231/2020

Before: The Hon. Ms Justice Goliath (Deputy Judge President) The Hon. Ms Justice Fortuin
The Hon. Ms Justice Slingers

Hearing: 23 July 2021
Judgment: 21 September 2021

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL LOCAL GOVERNMENT ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING, WESTERN CAPE	Applicant
and	
PRINCE ALBERT MUNICIPALITY	First Respondent
GEORGE CHARLES VAN DER WESTHUIZEN	Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 21 SEPTEMBER 2021

GOLIATH DJP

[1]This is an appeal against the whole of the Judgment and Order granted by Vos AJ on 13 May 2020, dismissing the application in which the Appellant, the MEC for Local Government: Environmental Affairs and Development Planning ("the MEC") sought to review and set aside:

1.1 The appointment of a selection panel purportedly done pursuant to Regulation 12(4) of the Regulations on Appointment and Conditions of Employment of Senior Management as promulgated by the National Minister of Co-Operative Governance and Traditional Affairs ("the Minister") in 2014, ("the Appointment Regulations") to recruit and select an Operational Manager for the Prince Albert Municipality ("the First Respondent"); and

1.2 The appointment of the Mr George Charles Van der Westhuizen ("the Second Respondent"), as the Operational Manager of the First Respondent.

[2] The Respondents did not participate in the proceedings in the court a quo and the matter was heard on an unopposed basis. This appeal was also not opposed and the Respondents elected to abide by the decision of the court. The court a quo found that an order aimed at setting aside the appointment of members of the selection panel, would constitute a court order that was adverse to their individual interests. The court therefore concluded that it was not competent to grant such order in their absence due to their non-joinder in these proceedings. Consequently, the Court only considered the relief relating to the setting aside of the appointment of Mr Van der Westhuizen.

[3] It is common cause that at the time of the hearing of this matter, the Second Respondent was no longer in the employ of First Respondent, and the order of Vos AJ no longer has any practical effect between the parties and has become academic. The

appellant asserted that notwithstanding the mootness of the alleged irregular appointment, the relief is persisted with because there are discrete legal issues and ramifications of public importance that would affect the functioning of municipalities and operations of local governments across the country in relation to future appointments of senior managers in the municipality. The Appellant argued that there is an imperative and dire need for legal certainty in relation to the correct interpretation of Regulation 12(4). The Appellant identified three main legal issues, which arise in this appeal. Firstly, the issue of the invalidity of the Appointment Regulations; Secondly the proper interpretation of Regulation 12(4) of the Appointment Regulations; and Third, the non-joinder of members of the selection panel.

[4] Section 16(2)(a)(i) of the Superior Court Act 10 of 2013 provides that where the issues in an appeal are of such a nature that the decision sought will have no practice effect or result, the appeal may be dismissed on this ground alone. The question of mootness was repeatedly dealt with by the Supreme Court of Appeal as well as the Constitutional Court. These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues, which are of such a nature that the decision sought, will have no practical effect or result. In National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs 2000(2) SAI, 2000(1) BCLR 39 the Court stated that "a case is moot and therefore not justiciab/e, if it no longer presents an existing or live controversy, which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. "

[5] However, it is well established that the court has the discretionary power to entertain a matter considered to be moot. This discretion was applied in a limited number

of cases where the appeal, though moot, raised a discreet legal point, which required no merits or factual matrix to resolve. In Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) at paragraph 9 the Constitutional Court reaffirmed the discretionary powers of the Court to decide on issues on appeal even if they no longer present existing or live controversies. In paragraph 11, the Court stated that:

> "...That discretion must be exercised according to what the interests ofjustice require. A prerequisite for the exercise of the discretion is that any order which this court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced. „

[6] In South African Reserve Bank and Another v Shuttleworth and Another 2015 (8) BCLR 959 (CC) at paragraph 27 the Court stated:

> "to the extent that it may be argued that this dispute is moot the court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this court from hearing this dispute. Instead, it is the interests of justice that dictates whether we should hear the matter.„

[7] The interpretation of Regulation 12 (4) is a central feature of the dispute in this matter, more particularly, the composition of the selection panel for the appointment of a manager who is accountable to the municipal manager. The appellant essentially argued that this matter should be heard for the purposes of a litmus test case to set a precedent, and provide guidance and direction on a clearer interpretation of Regulation 12(4). I am in agreement with the Appellant that a discrete legal issue of public importance arose,

and the outcome of the case will have significance not only for the appellant, but will be useful to establish legal rights and principles for similar cases in the future. Furthermore, I am satisfied that this case has a significant wider public interest beyond those directly involved. Consequently, the question then arises as to whether it is in the interests of justice for this court, in the exercise of its discretion, to entertain the appeal against the admittedly moot order of Vos AJ.

[8] The appointment of Mr Van der Westhuizen as Operational Manager of the Municipality is governed by the provisions of the Local Government: Municipal Systems Act, No. 32 of 2000 ("the Systems Act"). The Systems Act was assented to on 14 November 2000, and the date of commencement is 1 March 2001. The First Respondent's appointment as Operational Manager fell within the ambit of "a manager directly accountable to its Municipal Manager". The court a quo considered section 56 of the Systems Act as the starting point, because it deals with the appointment of managers, and provided that:

> "56(a) a municipal council, after consultation with the Municipal Manager, appoints a manager directly accountable to the Municipal Manager; and
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> (b) a person appointed as a manager in terms of paragraph (a), must have the relevant skills, and expertise to pefform the duties associated with the post in question, taking into account the protection or advancement

of persons or categories of persons disadvantaged by unfair discrimination.„

[9] The Court pointed out that section 56 of the Systems Act did not provide for any selection panel to advise the Municipality on the appointment of an Operational Manager. The Court identified the provisions of Section 72 and 120 of the Systems Act to be relevant to the appointment of Second Respondent. Section 72(1) of the Systems Act provides inter alia, as follows:

"(1) The Minister may, subject to applicable labour legislation and after consultation with the bargaining council established for municipalities and the Minister for the Public Service and Administration, for the purposes of this Chapter make regulations or issue guidelines in accordance with section 120 to regulate or provide for the following matters:

(a) The setting of uniform standards for-

(i) Municipal staff establishments;

(ii) Municipal staff systems and procedures and the matters that must be dealt with in such systems and procedures; and

(iii) Any other matter concerning municipal personnel administration.„

[10] Section 120 (1) of the Systems Act empowers the Minister of Co-Operative Governance and Traditional Affairs to make regulations or issue guidelines concerning:

(a) The matters listed in sections 22, 37, 49, 72, 86A and 104;

(b) Any matter that may be prescribed in terms of [the Systems Act];

(c) Any matter that may facilitate the application of [the Systems Act].

[11] On 5 July 2011, the Local Government Municipal Systems Amendment Act 7 of 2011 ("the Amendment Act") was promulgated. The Amendment Act impacted on provisions of the Systems Act. Section 3 of the Amendment Act substituted section 56 of the Systems Act with, inter alia, the following:

"(l)(a) A municipal council, after consultation with the Municipal Manager, must appoint-

(i) A manager directly accountable to the Municipal Manager; or

(ii) An acting manager directly accountable to the municipal manager under circumstances and for a period as prescribed.„

(b) A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as prescribed."

[12] Sub-section (4A) (a) of the amended section 56 also permitted the Minister to prescribe the process by which a municipal council was required to inform an MEC for local government of any appointments made under the section. Section 28 of the Amendment Act amended section 120(1)(a) expanding the number of sections to which it applied and now read as follows: "The matters listed in sections 22, 37, 49,

54A, 56, 72, 86A and 104.„

[13] On 17 January 2014, the Minister, exercising his powers under section 120, read with section 72 of the Systems Act, published the Local Government:

Regulations of Appointment and Conditions of Employment of Senior Managers, 2014. ("Appointment Regulations"). Regulation 1 of the Appointment Regulations defines "senior manage/' to include "a manager directly accountable to a Municipal Manager appointed in terms of section 56 of the [Systems Act]. Regulation 2(2)(a) of the Appointment Regulations deals with the "Scope of application" of the Regulations and states the following:

> "(2) These regulations must be read in conjunction with-
>
> (a) Any regulations or guidelines issued in terms of section 120 of the Act concerning matters listed in section 544, 56, 57A and 72. "

[14] Regulation 12, which forms part of Chapter 3 of the Appointment Regulations, prescribes the procedure for the appointment of managers directly accountable to Municipal Managers. Regulation 12 (4) of the Appointment Regulations provides that:

> "The selection panel for the appointment of a manager directly accountable to the municipal manager must consist of at least three and not more than five members, constituted as follows:
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> (a) The municipal manager, who will be the chairperson;
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> (b) A member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and
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> (c) At least one other person, who is not a councillor or a staff member of the municipality, and who has expertise, expertise, or experience in the area of the advertised post. «

[15] On 9 March 2017, the Constitutional Court in SAMWU v Minister of CoOperative Governance and Traditional Affairs 2017 (5) BCLR 641 (CC) declared the

Amendment Act unconstitutional and invalid in its entirety. The Court found that the Amendment Act was incorrectly promulgated in terms of section 75 of the Constitution, which regulates ordinary Bills not affecting provinces, instead of a section 76. Consequently, the failure to comply with procedures as set out in section 76 of the Constitution, the Bill was rendered invalid. The Court held that the declaration of invalidity would operate prospectively and the declaration of invalidity was suspended for a period of 24 months to allow the legislature an opportunity to cure the defect.

[16] The period of suspension ended on 9 March 2019, without any new legislation being introduced, or any other regulations being published in its stead. An Amendment Bill was tabled 6 February 2019, but Parliament has not yet passed legislation to correct the defect. The Minister requested the Constitutional Court to extend the 24month period with an additional 12 months, which was dismissed by the Constitutional Court. Resultantly, the Amendment Act has been declared unconstitutional and invalid, and cannot be enforced.

[17] Significantly, the Constitutional Court in South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs (supra) at paragraph 4 recognised the purpose of the Amendment Act as being to:

> "inter alia, 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 political affiliation.„

[18] The court a quo had regard to the purpose of the Amendment Act and found that prior to the amendment of the Systems Act in 2011 (by the Amendment Act), there were no regulations in existence that dealt specifically with the appointment of senior managers pursuant to the constitution of a selection panel. The court further found that prior to the Amendment Act, section 120 of the Systems Act did not authorise the Minister to make regulations regarding matters listed in section 56. The court held that the Amendment Act amended section 120 of the Systems Act by stipulating that the Minister may henceforth make regulations, or issue guidelines concerning all matters listed in the new section 56. The court expressed the view that if the legislature was of the opinion that prior to the Amendment Act, the Minister did have the power in terms of section 72 and 120 of the Systems Act to make such regulations regarding the appointment of managers pursuant to the establishment of a selection panel, it would not again have given those specific powers to the Minister in terms of the Amendment Act.

[19] The court a quo found that the Appointment Regulations, including Regulation 12(4) of the Appointment Regulations was made under an invalid part of section 120 of the Systems Act. The invalid part is section 120(1) (a) that authorises the Minister to make regulations in respect of matters listed in section 56. Consequently, when the Minister made the Appointment Regulations on 17 January 2014, he made the

Regulations in terms of an invalid section of the Amendment Act. It therefore follows that, as the Amendment Act was invalid, Regulation 12(4) of the Appointment Regulations is also invalid. The court therefore concluded that Regulation 12(4) of the Appointment Regulations did not survive the Constitutional Court's declaration of invalidity of the Amendment Act. Therefore, in the absence of the Appointment Regulations, the municipality did not act unlawfully when it appointed Mr Van der Westhuizen.

[20] The Court a quo reasoned that even if Regulation 12(4) survived and is valid, the composition of the selection panel had complied with the prescripts of the Regulation. The court analysed Regulation 12(4) and interpreted its purpose to be to ensure that insofar as the composition of the selection panel is concerned, there should at least be the persons identified in the Regulation. The court found that Regulation 12(4) does not state clearly that the selection panel may not have more than one Councillor. The court found that the composition of the selection panel complied with the requirements of regulation 12(4). The court also found that the selection panel was properly constituted in terms of regulation 12(4) of the Appointment Regulations. Consequently, the court dismissed the application.

[21] The Appellant argued that the Appointment Regulations remained valid and of full force and effect despite the invalidity of the Amendment Act for the following reasons:

21.1 First, the Appointment Regulations were published when the amendments effected by the Amendment Act to the Systems Act were

in force, i.e. the Regulations emanated from a legally valid source, which would not be disturbed by the subsequent declaration of invalidity, operating prospectively.

21.2 Second, section 72 of the Systems Act empowers the Minister to make regulations, or issue guidelines in accordance with section 120 of the Systems Act to regulate and provide for any matter dealt with in Chapter 5 of the System Act, including municipal personnel administration.

21.3 Third, and in any event, section 120 of the Systems Act, in its unamended form, is wide enough to provide the requisite authority for the promulgation of regulations.

[22] The Appellant therefore contended that the Minister had the power in terms of section 72(1) (c) (iii) to make the relevant Appointment Regulations. The Appellant stated that one of the purposes of Regulation 12(4) of the Appointment Regulations is to prevent undue political influence over the recruitment of, and the selection process utilized in respect of senior managers. The inclusion of additional councillors onto the selection panel would result in the selection panel being dominated by councillors from the relevant municipality. The Appellant therefore submitted that having regard to the purpose of the Amendment Act and to the wording of Regulation 12(4), it is evident that, regardless of whether the selection panel consists of three, four or five members, there can only be one Councillor on the panel. The Applicant therefore argued that Regulation 12(4) governs not only the peremptory or obligatory third member, but also the optional fourth and fifth members of the selection panel. The Appellant expressed the view that Regulation 12(4) must be interpreted to mean that a selection panel may never consist of more than one Councillor. The Appellant therefore contended that there was more than one Councillor on the selection panel in the appointment of the Second Respondent, which invalidated the proceedings.

[23] The Appellant argued that the invalidity of the Amendment Act did not affect Regulation 12 because section 56 was not the source of the Minister's power to make Regulation 12. The fact that the legislature contemplated the amendment of section 56 in order to grant specific powers in prescribing how certain appointments were to be dealt with did not necessarily mean that the general power under section 72 and 120 did not exist. Appellant therefore argued that the Minister would still have been able to proclaim the Appointment Regulations in terms of broad and general powers given to the Minister to regulate "any other matter concerning municipal administration". Accordingly, the current version of section 72 of the Systems Act, read with the current version of section 120 thereof, permitted the Minister to make the Appointment Regulations, including Rule 12(4) thereof.

[24] South Africa is a constitutional democracy with three tiers of government comprising of national, provincial and local government. The three tiers of government are distinctive, interdependent and interrelated. Consequently, each sphere of government must collaborate in order to attain commons goals such as effective, transparent accountable and coherent governance. Municipalities are organs of State and are part of a system of co-operative government, which allows the three spheres of government to work together effectively. National and Provincial government may assign functions and powers to local government, when those powers are best exercised at local level.

[25] Section 151(1) of the Constitution of the Republic of South Africa, 1996 provides that a municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution. Section 154 provides that the "national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers to perform and to

perform their functions." Section 155(6) provides that National and Provincial government have a constitutional obligation to monitor and support local government.

[26] The Systems Act appears to be national legislation enacted pursuant to the provisions of sections 154 and 155 of the Constitution of the Republic to support and strengthen the capacity of municipalities to manage their own affairs and to oversee the effective performance by municipalities of their functional areas of responsibilities. The Systems Act regulates the process of assigning powers and functions to local government and is part of a series of legislation, the purpose of which is to empower local government to fulfil its constitutional mandate and obligations. The Act sets out the core principles, mechanisms and processes that are necessary for municipalities to function. It defines the legal nature of a municipality and the manner in which municipal powers and functions are to be exercised. Municipalities must operate within the framework prescribed for them, has all the powers, and functions as assigned to them in terms of the Constitution. The Systems Act provides the legal framework for the appointment and functions of the most senior levels of municipal administration, namely the municipal manager and managers directly accountable to him or her.

Section 54 of the Systems Act provides a role for the Appellant to intervene in relation to the appointment of section 56 managers, which are alleged to be in contravention of the Act.

[27] Significantly, the court a quo referred to a circular dated 11 April 2019, published by the Minister of Co-Operative Governance and Traditional Affairs, styled 'Implications of the Constitutional Court Judgment declaring the Local Government: Municipal Systems Amendment Act, 2011 (Act No. 7 of 2011) invalid", which the Appellant annexed to his founding papers. The purpose of the circular was to inform municipalities and provincial departments responsible for local government about the

status of the Amendment Act after the SAMWU ruling, to provide progress on measures taken towards complying with the Constitutional Court order, and to provide guidelines and transitional measures to be applied by municipalities until the Amendment Act is approved by Parliament and assented to by the President.

[28] In the circular, the Minister acknowledged that the Amendment Act was declared invalid. The Minister referred to the status of the regulations made in terms of sections 72 and 120 of the Systems Act affecting municipal managers and managers directly accountable to municipal managers, and summarized his conclusions. The Minister expressed the view that the invalidation of the Amendment Act does not apply to the Local Government: Municipal Systems Act 32 of 2000, including all amendments made prior to 2011 (the principal Act). The Minister indicated that this means that the Principal Act and all amendments made before 2011 remain operative and enforceable.

[29] The Court a quo deemed it necessary to analyse the circular and embarked on an analysis of the views of the Minister, thereby recognising that the views of the Minister are important in this matter. The Court criticized the Minister's view that some of the Appointment Regulations are invalid, while others are valid. However, the circular did not explicitly deal with the interpretation of Regulation 12(4). The Appellant made extensive submissions insofar as it relates to the powers of the Minister to promulgate Regulations or issue guidelines in accordance with section 72 read with section 120 of the Systems Act. Section 72 (1)(c)(iii) of the Systems Act empowers the Minister of Co-Operative Governance and Traditional Affairs to make regulations or issue guidelines in accordance with section 120 of the Systems Act to regulate and provide for any matter [other than those matters specifically stipulated in section 72(1)] concerning municipal personnel administration.

[30] Sections 72 and 120 is aimed at providing the Minister with the necessary regulatory powers to make regulations where required, to ensure the efficient functioning of municipalities. The promulgation of the Regulations constitutes an exercise of the regulation-making discretion vested in the Minister in the national sphere of government. It is inappropriate for courts to make orders interpreting statutory provisions and policy directives without joining the national or executive authority responsible for such enactments or provisions.

[31] In my view, it is undesirable for a court to make orders affecting regulations promulgated by the Minister without affording him an opportunity to respond to the legal challenge. The Minister has a direct abiding and crucial interest in the interpretation of Regulation 12(4) and should, at the very least, have been given an opportunity to respond and express a view on the issues that arise in this matter. I am accordingly of the view that the Minister ought to have been joined as a party to the proceedings. The non-joinder of the Minister of Co-Operative Government and Traditional Affairs is fatal to the relief sought by the Appellant.

[32] The Municipal Systems Act defines a Municipality as the political structures, office bearers, administration, as well as the community who live in the area. It is therefore evident that the governance of Municipalities consists of various role players. In my view, it would be unwise for this court to opine on the interpretation of the rule in the absence of the participation of other interested parties. The Supreme Court of Appeal had cautioned against deciding a matter without the benefit of tested argument from both sides on questions that are necessary for the decision of the case. The Respondents did not participate in the proceedings and a decision on the correct interpretation of Regulation 12(4), would be based on the argument of only one party.

(See: Western Cape Education Department and Another v George 1998 (3) SA 77 (SCA) AT 84E; Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SA) at paragraph 11).

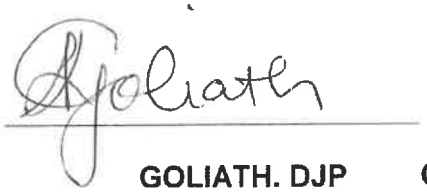
[33] The Court would derive many benefits from a thorough and discrete engagement with all interested parties in relation to the correct interpretation of Rule 12(4). All interested parties are necessary to participate for a fair and exhaustive adjudication of the matter, to facilitate a just determination. The appellant alluded to the political significance of an interpretation of Rule 12(4), which renders it imperative that political structures and civil society be engaged in any court challenge of this nature.

[34] Essentially the Appellant contended that this court should exercise its discretion and hear this matter as a litmus test case to determine the correct interpretation of Rule 12(4). Test cases are useful because they establish legal rights and principles, and thereby serve as precedent for future similar cases. In my view, it is not in the interests of justice to convert a dispute relating to an alleged irregular appointment into a precedent setting interpretation of Rule 12(4). I am satisfied that the interests of justice dictate that the legal question regarding the proper interpretation of Rule 12(4) would best be ventilated when a proper challenge involving all interested parties should arise. It is precisely because of the importance of the matter, the political undertones of Regulation (12)4, its impact on future appointments and the wider public interest, that a hearing of this matter should not be entertained on the basis of an unopposed review.

[35] In the result, I would have made the following order:

35.1 The appeal is dismissed.

35.2 The Chief Registrar is directed to furnish a copy of this judgment to the Office of the Minister of Co-operative Governance and Traditional Affairs as well as the Municipal Manager of the Municipality of Prince Albert.



GOLIATH. DJP GOLIATH, DJP
DEPUTY JUDGE PRESIDENT

SLINGERS J (FORTUIN J concurring) : Majority Judgment

INTRODUCTION

[1] I have read the judgment of the Deputy Judge President, Justice Goliath. Unfortunately, I disagree with the conclusions and order made therein and consequently set out my reasons therefore below.

[2] During 2019, the appellant brought an application wherein it sought the following substantive relief:

(i) reviewing and setting aside the appointment of the selection panel, purportedly done pursuant to regulation 12(4) of the regulations and conditions of employment of senior managers to recruit and select an operational manager for the first respondent; and

(ii) reviewing and setting aside the appointment of the second respondent as operational manager for the first respondent.

[3] Neither the first nor the second respondent opposed the application in the court a quo. On the contrary, the first respondent filed a notice to abide by the court's decision, which was to dismiss the application on 13 May 2020. As with the application in the court a quo, the appeal is not opposed.

[4] The appellant raises three legal issues in this appeal. These are:

(i) the validity of the appointment regulations;

(ii) the proper interpretation of regulation 12(4) of the appointment regulations and;

(iii) the non-joinder of the members of the selection panel to the proceedings.

[5] It is recorded in the appellant's heads of argument that the second respondent is no longer employed as the operational manager for the first respondent. Notwithstanding this fact, the appellant argued that the issues raised on appeal not only remained live between the appellant and the first respondent, but that it also raised discrete issues of public importance. However, the relief pertaining to the appointment of the second respondent as operational manager for the first respondent no longer had to be determined.

[6] The validity and /or interpretation of regulation 12(4) will directly impact on the appointment of managers directly accountable to municipal managers throughout the country. Therefore, the issues raised in the appeal not only remain between the first respondent and the appellant but it will also have a direct practical effect on the manner in which managers directly accountable to municipal managers are appointed. [1] Therefore, both Justice Goliath and I agree with the appellant that the appeal involves a discrete legal issue of public importance which may require the adjudication of the court as it will affect matters in the future. [2] Consequently, even if the appeal no longer presented a live controversy, I would have exercised my discretion in favour of entertaining the appeal as the outcome thereof would have a practical effect on the appointments made by the country's municipalities. [3]

JOINDER ISSUE

[7] At the outset I deal with the issue of joinder.

[8] The law in respect of non-joinder is trite. In Absa Bank Ltd v Naude N0[4] the court held that the question to be posed is whether or not the party to be joined has a

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[1] Minister ofJustice and others v Estate Stransham- Ford 2017 (3) SA 152 (SCA) at para 22

[2] Child Law v Hoäskool Fochville and another 2016 (2) SA 121 (SCA); AB and Another v Pridwin Preparatory School and Others 2020 (5) SA 327 (CC)

[3] Legal Aid South Africa v Magidiwna 2015 (6) SA 494 (CC)

substantial interest in the subject matter of the litigation and in Matjhabeng Local Municipality v Eskom Holdings Ltd[5] the Constitutional Court stated that:

'The law on joinder is well settled. No court can make finding adverse to any person's interests, without that person first being a party to the proceedings before. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences — including a penalty of committal — for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security are, in the end, not arbitrarily deprived.'

[9] In determining whether or not the members of the selection panel had to be joined to the proceedings, the question must be posed whether or not they had a direct and substantial interest in the subject-matter of the litigation. In determining this issue, it may be asked whether or not any order or judgment

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[4] 2016 (6) SA 540 (SCAO
[5] 2018 (1) SA 1 (CC)

which the court handed down could be sustained without necessarily prejudicing the interests of the members of the selection panel. [4]

[10] The papers do not evidence any interest the members of the selection panel had in the subject matter of the litigation and did not sustain a finding that the relief being sought would prejudice their interests. Furthermore, the appellant sought to review

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[4] Absa Bank Ltd v Naude NO 2016 (6) SA 540 (SCA)

the decision of the first respondent and not any action or decision of the selection panel.

[11] This issue of joinder was raised for the first time in the judgment of the court a quo. To mero motu raise and determine the issue of non-joiner without affording the appellant an opportunity of addressing the court thereon infringed the appellant's right a fair hearing and the court a quo's decision, for this reason alone, cannot stand. [5]

[12] Furthermore, having regard to the nature of the relief sought and the papers filed in the application, I am of the view that the members of the selection committee had no direct and substantial interest in the litigation subject and that it was not necessary for them to be joined as parties to the proceedings.

THE APPOINTMENT REGULATIONS

THE SYSTEMS ACT

[13] The Local Government: Municipal Systems Act, Act 32 of 2000 ('the Systems Act') came into operation on 1 March 2001. It was enacted to inter alia provide for 'a framework for local public administration and human resource

development. '8 At the outset I set out the sections relevant to the determination of this appeal.

[14] Section 1 of Systems Act defines staff in relation to a municipality as the employees of the municipality, including the municipal manager. An operational manager is a manager who is directly accountable to the municipal manager.

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[5] Knoop NO and Another v Gupta (Execution) 2021 (3) SA 135 (SCA)

Therefore, it follows that an operational manager, as an employee of the municipality, would also be considered staff.

[15] Section 56(1) of the Systems Act provided that:

'(a) a municipal council, after consultation with the Municipal Manager, appoints a manager directly accountable to the Municipal Manager; and

(b) a person appointed as a manger in terms of paragraph (a), must have the relevant skills, and expertise to pefform the duties associated with the post in question, taking into account the protection or advancement of persons or categories of person disadvantaged by unfair discrimination.'

[16] Section 67(1) of the Systems Act states that:

'A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72(1)(c), to ensure fair, efficient, effective and transparent personnel administration, including-

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[8] Preamble to the Systems Act.

(a) the recruitment, selection and appointment of persons as staff members;

(b) service conditions of staff;

(c) the supervision and management of staff;

(d) the monitoring, measuring and evaluating of performance of staff;

(e) the promotion and demotion of staff;

(f) the transfer of staff;

(g) grievance procedures;

(h) disciplinary procedures,.

(i) the investigation of allegations of misconduct and complaints against staff;

(j) the dismissal and retrenchment of staff; and

(k) any other matter prescribed by regulation in terms of section 72.,

[17] Section 72(1)(c) of the Systems Act authorises the national Minister responsible for local government ('the Minister') to make regulations or to issue guidelines in accordance with section 120 to regulate or provide for the setting of uniform standards for:

(i)municipal staff establishments;

(ii) municipal staff systems and procedures referred to in section 67(1) and the matters that must be dealt with in such systems and procedures, including transfers and termination of service; and

(iii) any other matter concerning municipal personnel administration.

[18] Section 120 of the Systems Act authorised the Minister to make regulations or issue guidelines not inconsistent with the Systems Act concerning any manners listed in sections 22, 37, 49, 72, 86A and 104; any matter that may be prescribed by the Systems Act and any matter that may facilitate the application of the Systems Act.

THE AMENDMENT ACT

[19] On 5 July 2011, the Local Government Municipal Systems Amendment Act, Act 7 of 2011 ('the Amendment Act') commenced operation. Section 3 of the Amendment Act amended section 56 of the Systems Act to read as follows:

'(1)(a)A municipal council, after consultation with the Municipal Manager, must appoint-

(i) a manager directly accountable to the municipal manager; or

(ii) an acting manager directly accountable to the municipal manager under the circumstances and for a period as prescribed.

(b)A person appointed in terms of paragraph (a)(i) must at least have the skills, expertise, competencies and qualifications as ' prescribed.

[20] Sub-section (4A)(a) of section 56 of the Systems Act (as amended by the Amendment Act) also permitted the Minister to prescribe the process by which a municipal council was required to inform the MEC for local government of any appointments made under the section.

[21] Prior to the Amendment Act section 120(1)(a) applied to sections 22, 37, 49, 72, 86A and 104. After the Amendment Act, section 120(1)(a) was expanded to include sections 54A and 56. Thus, as amended, section 120(1)(a) applied to sections 22, 37, 49, 54A, 56, 72, 86A and 104 .

[22] Pursuant to his powers set out in section 120 read with section 72 of the Systems Act, the Minister published the Local Government: Regulations of Appointment and Conditions of Employment of Senior Managers in Government Gazette 37245 ('the appointment regulations') on 17 January 2014. In the preamble to the regulations, the Minister clearly states that he

makes the appointment regulations under section 120, read with section 72 of the Systems Act.

[23] Regulation 1 of the appointment regulations defines 'senior manager' to include 'a manager directly accountable to a Municipal Manager appointed in terms of section 56 of the Systems Act.

[24] Regulation 2a states that the appointment regulations must be read in conjunction with any regulations or guidelines issued in terms of section 120 of the Systems Act concerning matters listed in section 54A, 56, 57A and 72.

[25] Regulation 6(1) of the appointment regulations states that the recruitment, selection and appointment of senior managers must take place in accordance with the municipal systems and procedures contemplated in section 67 of the Systems Act that are consistent with sections 54A, 56, 57A and 72 thereof.

[26] Regulation 12 provided as follows:

(1) A municipal council must appoint a selection panel to make recommendations for the appointment of candidates to vacant senior manager posts.

(2) In deciding who to appoint to a selection panel, the following considerations must inform the decision:

(a) the nature of the post;

(b) the gender balance of the panel; and

(c) the skills, expertise, experience and availability of the persons to be involved.

(3) The selection panel for the appointment of a municipal manager must consist of at least three and not more than five members, constituted as follows:

(a) the mayor, who will be the chairperson, or his or her delegate;

(b) a councillor designated by the municipal council; and

(c) at least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.

(4) The selection panel for the appointment of a manager directly accountable to a municipal manager must consist of at least three and not more than five members, constituted as follows:

(a) the municipal manager, who will be the chairperson;

(b) a member of the mayoral committee or councillor who is the portfolio head of the relevant portfolio; and

(c) at least one other person, who is not a councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post.

CONSTITUTIONAL INVALIDITY

[27] On 9 March 2017, the Constitutional Court declared the Amendment Act unconstitutional and invalid but suspended the constitutional invalidity for a period of 24 months i.e. coming to an end on 9 March 2019. [6] No new legislation was introduced nor were any other regulations published in its stead.

[28] The court a quo found that the appointment regulations, more particularly regulation 12(4) did not survive the declaration of constitutional invalidity of the Amendment Act and that it was also rendered constitutionally invalid.

[29] The court a quo determined that regulation 12(4) was made in terms of section 56, duly amended by the Amendment Act and as the Amendment Act was declared constitutionally invalid, section 56 (as amended) was also rendered constitutionally invalid. The court a quo rejected the notion that regulation 12(4) could have been made in terms of the Minister's broad powers set out in section 72 read together with section 120 of the Systems Act and reasoned that if the legislature thought the Minister had the powers, prior to the Amendment Act, to

make regulation 12(4) it would not have given him those specific powers in the Amendment Act.

[30] This finding fails to consider the general power of the Minister in terms of section 120 read with section 67(1)(a) and (k) and 72(1)(c)(iii) which would have empowered the Minister to make any regulations or issue guidelines to regulate

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[6] SAMWU v Minister of Co-Operative Governance and Traditional Affairs 2017 (5) BCLR 641 (CC); [2017] ZACC 7 (9 March 2017)

matters relating to municipal personnel administration, and thus to make regulation 12(4).

[31] Furthermore, the reasoning of the court a quo is not consistent with the approach to interpretation prescribed in Natal Joint Municipal Pension Fund v Endumeni Municipality. [10] The interpretative exercise required an objective approach, unrelated to the intention with which the words may have been selected. The starting point was to consider the language of the provision, read in context and having regard to the purpose thereof and the background to the preparation and production of the document or regulation.

[32] The approach that words must be given their ordinary grammatical meaning in statutory interpretation, unless to do so would result in an absurdity was also endorsed by the Constitutional Court who went on to hold that (i) statutory provisions must always be interpreted purposively, (ii) the relevant statutory provision must be properly contextualised and (iii) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validityll.

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[10] 2012 (4) SA 593 (SCA) (see paras 18 and 23)
[11] Cool Ideas v Hubbard 2014 (4) SA 474 (CC)

[33] After applying the approach set out in Natal Joint Municipal Penson Fund v Endumeni Municipality and Coo/ Ideas v Hubbard by objectively considering the ordinary grammatical meaning of section 72 read together with section 120 of the Systems Act, it is clear that the Minister was clothed with the authority to make the appointment regulations independent of the Systems Amendment Act and therefore, that the validity of the Appointment Regulations remained intact notwithstanding the declaration of invalidity of the Systems Amendment Act.

THE INTERPRETATION OF APPOINTMENT REGULATION 12(4)

[34] I turn now to the interpretation of regulation 12(4) of the appointment regulations.

[35] The appellant submitted that irrespective of whether or not the selection panel consisted of three, four or five members, it could only contain two councillors, namely the municipal manager and the member of the mayoral committee or councillor who is the portfolio head of a relevant portfolio. This reasoning was rejected by the court a quo which found that regulation 12(4) does not state in clear words that the selection panel may not have more than one councillor and that regulation 12(4) had to be interpreted to mean that insofar as the composition of the selection panel was concerned, that there should at least be the persons identified in that regulation.

[36] It is clear from the wording of regulation 12(4) that the only category of persons to whom a minimum of representation applies is that of (c) which states that 'at least one other person who is not a councillor or staff member of the municipality, and who has expertise or experience in the area of the advertised

post.' Therefore, it may be accepted that the only category of persons which could be increased on the selection panel would be the persons represented by category (c).

[37] Therefore, I agree with the appellant that the only sensible manner to read regulation 12(4)(c) is to interpret it not only as dealing with the mandatory third member, but also the optional fourth and fifth members of the selection panel. The constitution of the selection panel which appointed the second respondent consisted of four councillors and was therefore not in accordance with the prescripts of regulation 12(4).

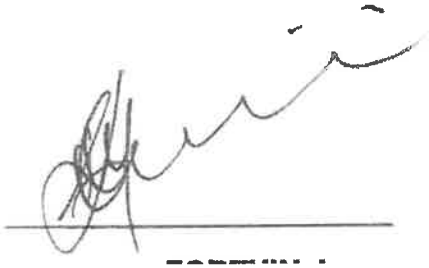
CONCLUSION

[38] In the circumstances, I would propose the following order:
The appeal is upheld and the court a quo's order is set aside and replaced with the following:

The appointment of the selection panel, purportedly done pursuant to regulation 12(4) of the Regulations on Appointment and Conditions of Employment of Senior Managers (GNR. 21 published under GG 37245, dated 17 January 2014), to recruit and select an Operational Manager for the first respondent is reviewed and set aside.

SLINGERS J
LINGERS
Judge of the High Court

I agree and it is so ordered.



FORTUIN J
Judge of the High Court

Annexure "C"

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **611/2017**

Date heard: **02 November 2017**

Date delivered: **05 December 2017**

In the matter between:

NEO MOERANE	First Applicant
VUYANI LWANA	Second Applicant
and	
BUFFALO CITY METROPOLITAN MUNICIPALITY	First Respondent
THE ACTING MUNICIPAL MANAGER BUFFALO CITY METROPOLITAN MUNICIPALITY	Second Respondent
THE EXECUTIVE MAYOR, BUFFALO CITY METROPOLITAN MUNICIPALITY	Third Respondent
THE SPEAKER OF THE MUNICIPAL COUNCIL, BUFFALO CITY METROPOLITAN MUNICIPALITY	Fourth Respondent
THE MEMBER OF EXECUTIVE COMMITTEE (MEC) FOR CO-OPERATIVE GOVERNMENT AND TRADITIONAL AFFAIRS, EASTERN CAPE PROVINCE	Fifth Respondent

JUDGMENT

LOWE, J

Introduction:

[1] In this matter First Applicant (Second Applicant having withdrawn from the application) seeks an order that First, Second and Third Respondents be ordered to implement the Council Resolution of the First Respondent (29 February 2016) to confirm the permanent appointment of First Applicant as Head of Directorate: Municipal Services, with effect 1 March 2016.

[2] Fifth Respondent has filed no opposing papers but argues through Counsel that the application should be dismissed.

[3] The Acting Municipal Manager of First Respondent opposes the application on behalf of First, Third and Fourth Respondents and has instituted a Conditional Counter Application, based upon the possibility that First Respondent's resolution of 29 February 2016 is found not to be null and void in terms of the provisions of Section 56 (2) of the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act). That conditional relief is that condonation be granted for the late filing of the counter application and that the impugned decision be reviewed and set aside, with Applicants to pay the costs.

[4] In short apart from advancing her own application, First Applicant contends that the Acting Municipal Manager has no authority to oppose the main application or to bring the Conditional Counter-Claim *("Counter-Claim")*.

[5] In reply First Respondent contends that the decision relied upon by First Applicant constitutes *"administrative action"* as defined in section 1 of the Promotion of Administrative Justice Act (PAJA).

[6] In the alternative First Respondent contends that the resolution of its Council relied upon by First Applicant has been *"implicitly revoked"* by a subsequent Council decision to re-advertise certain positions.

[7] Respondents contend that the Municipal Council's decision impugned, was either: null and void, or unlawful, and falls to be reviewed and set aside.

[8] It is clear that the conditional counterclaim is brought on a PAJA basis.

[9] In summary as to the *locus standi* of the Acting City Manager and City Manager, First Applicant contends that the first issue is whether the resolution constitutes *"administrative action"*, the second issue is whether a Municipal or City Manager is entitled to seek to set aside a resolution of Council, or to oppose an application based upon a resolution of Council, without the express will and specific authority of the Council itself. It is contended that the resolution itself is not *"administrative action"*, and that PAJA is not applicable, and that consequently the Counter-Claim must fail being PAJA based; and in any event absent a resolution of Council setting aside its prior

decision authorizing the bringing of this Counter-Claim and to oppose the relief sought, that this is incompetent.

[10] Opposing this, Respondents contend that fundamentally there is no need to address the Counter-Claim as the Council resolution was null and void on a number of bases, and that this being so the application to compel First Respondent to implement same must simply fail with costs.

[11] Respondents contend that only if the resolution is found to be valid (i.e. not null and void) does the Conditional Counter-Claim come into play; that condonation should be granted and that there are three principal grounds upon which the resolution falls to be reviewed and set aside. Firstly the improper composition of the selection panel; secondly that in taking the resolution, Council did not have before it all relevant information with the result that not all relevant considerations were taken into account; and thirdly that the First Applicant did not pass an essential competency assessment.

[12] In the result, I consider that it would be sensible to first consider the *locus standi* issue; it following that absent authorization the opposition is not properly before me, this is linked however to a consideration of the issue of *"administrative action"*.

[13] If I find there to be *locus standi*, the question of *"administrative action"* again only arises if on Respondents' argument the resolution is found not to be null and void.

[14] In that event it would be necessary to again consider the *"administrative action"* issue and consider what effect this may have on the counter-claim, though obviously intricately associated with *locus standi*. The point is, and this seems to be common

cause between the parties in argument, that if indeed the Council decision constitutes *"administrative action"* properly construed, it is clear that the Municipal Manager or Acting City Manager has delegated authority to pursue not only the defence but the counter-claim.

[15] It seems essential, accordingly, to first consider the *locus standi* and *"administrative action"* issues which will potentially be dispositive of the *locus standi* objection, and essential to the Counter-Claim, if I were to find that the resolution was not null and void.

Administrative Action:

[16] The PAJA, section 1:

> **"administrative action"** means any decision taken, or any failure to take a decision, by-
>
> *(a)* an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> *(b)* a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) *(a), (b), (c), (d), (f), (g), (h), (i)* and *(k),* 85 (2) *(b), (c), (d)* and *(e),* 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution;

(bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections 121 (1) and (2), 125 (2) *(d), (e)* and *(f),* 126, 127 (2), 132 (2), 133 (3) (b), 137, 138, 139 and 145 (1) of the Constitution;

(cc) the executive powers or functions of a municipal council;

(dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

(ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

(ff) a decision to institute or continue a prosecution;

(gg) a decision relating to any aspect regarding the nomination, selection or appointment of a judicial officer or any other person, by the Judicial Service Commission in terms of any law;

(hh) any decision taken, or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act, 2000; or

(ii) any decision taken, or failure to take a decision, in terms of section 4 (1)"

[17] The Court in *President of the Republic of South Africa & Others v South African Rugby Football Union & Others*[1] held:

[1] 2000 (1) SA 1 (CC) paras 141-143

"[141] In s 33 the adjective "administrative" not "executive" is used to qualify "action". This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not. It may well be, as contemplated in *Fedsure*, that some acts of a legislature may constitute "administrative action". Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

[142] As we have seen, one of the constitutional responsibilities of the President and cabinet members in the national sphere (and premiers and members of executive councils in the provincial sphere) is to ensure the implementation of legislation. This responsibility is an administrative one, which is justiciable, and will ordinarily constitute "administrative action" within the meaning of s 33. Cabinet members have other constitutional responsibilities as well. In particular, they have constitutional responsibilities to develop policy and to initiate legislation. Action taken in carrying out these responsibilities cannot be construed as being administrative action for the purposes of s 33. It follows that some acts of members of the executive, in both the national and provincial spheres of government will constitute "administrative action" as contemplated by s 33, but not all acts by such members will do so.

[143] Determining whether an action should be characterised as the implementation of legislation or the formulation of policy may be difficult. It will, as we have said above, depend primarily upon the nature of the power. A series of considerations may be relevant to deciding on which side of the line a particular action falls. The source of the power, though not necessarily decisive, is a relevant factor. So too is the nature of the power, its subject matter, whether it involves the exercise of a public duty, and how closely it is related on the one hand to policy matters, which are not administrative, and on the other to the implementation of legislation, which is. While the subject matter of a power is not relevant to determine whether constitutional review is appropriate, it is relevant to determine whether the exercise of the power constitutes administrative action for the purposes of s 33. Difficult boundaries may have to be drawn in deciding what should and what should not be characterised as administrative action for the purposes of s 33. These will need to be drawn carefully in the light of the provisions of

the Constitution and the overall constitutional purpose of an efficient, equitable and ethical public administration. This can best be done on a case by case basis."

[18] Wallis J in *Sokhela & Others v MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) & Others* [2] held:

"[60] The lineaments of the enquiry that must now be undertaken are fairly clearly established. The question whether action taken by a public official or authority is administrative is central to the enquiry. The focus of the enquiry is primarily upon the nature of the power being exercised, rather than the identity of the person or body exercising the power. With the enactment of PAJA the grounds of judicial review of administrative action have been codified and the cause of action for judicial review of administrative action now ordinarily arises from PAJA. That requires a consideration of the action in question, against the requirements of the definition of 'administrative action' in PAJA. There are seven requirements, namely that there must be (i) a decision, (ii) by an organ of State, (iii) exercising a public power or performing a public function, (iv) in terms of any legislation, (v) that adversely affects someone's rights, (vi) which has a direct, external, legal effect, and (vii) that does not fall under any of the exclusions listed in s 1 of PAJA. As the judgment in *Grey's Marine* makes clear it is a requirement flowing from the definition of 'decision' in PAJA that the decision be one of an administrative nature. In deciding whether a decision is one of an administrative nature the appropriate starting point is to determine whether it would constitute administrative action within the meaning of s 33 of the Constitution. The boundaries between administrative action and other forms of conduct by organs of State will often be difficult to draw and this must be done carefully on a case by case basis, having regard to the provisions of the Constitution and the need for an efficient, equitable and ethical public administration.

[61] The requirement that the decision should be of an administrative nature has been described as 'something of a puzzle'. In my view it serves two important purposes. Firstly it focuses attention on the need for the court to determine whether the particular exercise of public power or performance of a public function under consideration is properly to be classified as administrative action. As the Constitutional Court recognised in *Fedsure*, that task of classification is mandated by the provisions of the

[2] 2010 (5) SA 574 (KZP) paras 60-61

Constitution itself. That does not mean that the former classification of administrative powers and functions, that was largely discredited and abandoned in our administrative law even before the advent of the interim Constitution, has now been revived. The present situation is that the Constitution draws an ostensibly simple distinction between acts that constitute administrative action and acts that do not, and the courts must draw that distinction or essay that process of constitutional classification. The court is required to make a positive decision in each case, whether a particular exercise of public power or performance of a public function is of an administrative character. Thus the determination of what constitutes administrative action does not occur by default, on the basis that, if it does not fit some other juristic pigeonhole, it is administrative action. There needs to be a positive finding that particular conduct is administrative action, in order for the power of judicial review under PAJA to be engaged. That approach ties in closely with the second purpose, which is to make it clear that the mere fact, that an exercise of public power or the performance of a public function does not fall within one of the exclusions in subparas (aa) - (ii) of the definition of "administrative action", does not necessarily mean that the exercise of public power or performance of a public function in question constitutes administrative action. It precludes the determination of what constitutes administrative action from becoming a mechanical exercise in which the court merely asks itself whether a public power is being exercised or a public function is being performed, and then considers whether it falls within one or other of the exceptions. The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list, nor are cases falling outside those exceptions to be looked at on the basis that, if they are not *eiusdem generis* with the exceptions, they are automatically to be treated as constituting administrative action. There is accordingly no mechanical process by which to determine whether a particular exercise of public power or performance of a public function will constitute administrative action. That will have to be determined in each instance by a close analysis of the nature of the power or function and its source or purpose."

[19] Insofar as executive powers and functions of the Municipality are concerned, in terms of section 156 of the Constitution, a Municipality has *"executive authority"* over the matters listed in Part B of Schedules 4 and 5 to the Constitution. Section 11 of

the Systems Act provides for the various ways in which a Municipality exercises its executive and legislative authority.

[20] PAJA simply excludes the executive's powers and functions of the Municipal Council, and its legislative functions, from the operation of PAJA. This means effectively that only non-executive functions of the Municipal Council are subject to PAJA. Whilst it has been suggested that this may exclude any Municipal action qualifying as *"administrative action"*, this seems to me to be clearly wrong and the better view is that *"executive"* should be read in accordance with its meaning in section 1*(aa)* and *(bb)* of PAJA so as to exclude only distinctively political decisions and not characteristically administrative tasks such as implementing legislation.[3]

[21] As the Constitutional Court has pointed out in *President of Republic of South Africa and Others v South African Rugby Football Union and Others*[4] in determining what constitutes *"administrative action"*, the question is not answered by identifying that person or entity who took the decision but whether the task itself is administrative or not.

[22] First Applicant argued that *Democratic Alliance v Ethekwini Municipality*[5] demonstrate the above two decisions to be incorrectly decided. This matter related to a decision by a Local Authorities Council to change names of streets under its control. It did not, in my view, lay down a rule that all decisions by a Municipal Council, in all circumstances, do not constitute *"administrative action"*. On the contrary, it seems to

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[3] See *Steele and Others v South Peninsula Municipal Council and Others* 2001 (3) SA 640 (C). See also Administrative Law: 2nd edition Hoexter at 238.

[4] 2000 (1) SA 1(CC) at para 141

[5] 2011 ZASCA 221

me that the result clearly relied on the political nature of the decision, to rename streets and places, a decision clearly influenced by political considerations for which the elected members were politically accountable to the electorate, and thus the decision dependent on this crucial factor. This does not seem to me to be dispositive of the true issues relevant to a matter such as this, as I set out hereafter.

[23] In this court, Pickering J in *Mlokoti v Amathole District Municipality and Another*[6] and Roberson J in *Notyawa v Makana Municipality*[7] came to the conclusion, that decisions by Municipal Councils concerning the appointments of Municipal Managers were *"administrative action"*. In the context of those matters, it seems to me that the decisions are clearly correct.

[24] I am fully in agreement with *Mr Rorke SC* that in so finding, the learned judges were applying the principles laid down in *President of the Republic of South Africa* decided some 17 years ago. I agree that the same reasoning applies in respect of so-called *"Section 56 Managers"* such as First Applicant. That the decision was taken by First Respondent's Council does not change the argument in my view. Essentially First Respondent's decision of 29 February 2016, to appoint the First Applicant as head of Department, ahead of other prospective candidates for the position, clearly fell within the meaning ascribed to *"administrative action"* in PAJA, the Council exercising a public power which adversely affected the rights of other prospective applicants and which had direct, external legal effect, and which constitutes an executive function.

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[6] 2009 (6) SA 354 [C] at 376B to 377 I
[7] unreported case number 683/2017 ECD

[25] I further agree that whilst the distinction between administrative action and political or executive action is sometimes difficult to draw, that is most certainly not the case in this matter.

[26] There was in this matter a public recruitment process, only one applicant appointed thereafter to the relevant position, being the first applicant. The other prospective applicants failed and their rights were clearly affected by the decision, falling in my view squarely within the definition of administrative action in PAJA[8].

[27] It must be said, that I further agree with Respondents' argument that had the decision been taken by the City Manager, and had he had the power to do so, the decision would surely have been *"administrative action"* – that the decision was taken by Council cannot in my view distinguish the matter.

[28] That being so, in my view, and applying the authorities referred to above, and particularly those referred to in Eastern Cape Division, I cannot but conclude that both in opposing the relief sought and in the counter-claim First Respondent (represented by Second Respondent) had the necessary authority so to do.

[29] There is also in my view merit in the submission that the Constitutional Court's decision in *Department of Transport and Others v Tasima (Pty) Limited*[9] recognizes that it is permissible for Organs of State to launch reactive challenges, of the kind brought in this matter, relevant to litigation brought against them.

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[8] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer SASSA and Others* 2014 (1) SA 604 (CC) para 60.
[9] 2017 (2) SA 622 paras 138 – 140

[30] That being so, I turn to consider the next issue and that is whether the decision is itself one which was null and void, alternatively was unlawful, falling to be reviewed and set aside.

[31] It was, as I understand, common cause between the parties that on a proper construction of Section 56 of the Systems Act the appointment Managers directly accountable to Municipal Managers *("section 56 managers")* are statutorily null and void in certain circumstances. It was indeed common cause that a reading of Section 56 (2) (a) in the context of Section 56 confirms that it is the appointment of a permanent section 56 Manager, without the requisite skill set, which is visited with nullity. This can only be so in public interest being the appointment of a permanent appointee who would satisfactorily be able to carry out the duties and obligations of a senior position within the Municipality. As was common cause this requires a reading into Section 56 (2) of a reference to Section 56 (1) (a) (i), being a reference to Senior Section 56 Managers.

[32] In the result, if it is demonstrated on the papers that First Applicant did not have the requisite skill set, as she failed competency assessment carried out on behalf of First Respondent by The Assessment Toolbox, the decision to appoint her must be null and void.

[33] In my view, Applicants demonstrate, on a proper analysis of the papers, that there is considerable merit in the submission that the competency test failed to render a result that First Applicant had the requisite skill set. First Applicant contends that the

competency assessment tool must be capable of being applied fairly and must be objectively sustainable. It is alleged that Respondents made no attempt to support the objective reliability of the test applied, nor that such tests were correctly and fairly applied. It seems to me on a proper analysis of the papers, the latter argument cannot be sustained and that there can be no doubt that, objectively viewed, First Applicant failed the test. It is my view more than sufficiently demonstrated that these tests were fairly applied by professionals and there can be no suspicion or suggestion that they were not correctly or fairly applied. It was argued that competency is a broader concept than simply a single test – an argument which misses the point that if that single test is failed it can hardly be argued that whatever may follow there can be a competency approval. The very purpose of the test was to demonstrate whether or not the relevant skill sets were available.

[34] Section 56 (1) (b) makes it perfectly clear that one cannot ignore competency. Indeed the Regulations to the Systems Act and which form part thereof, and particularly Regulation 16 (1) make it perfectly clear that candidates recommended for appointment to the post of a Senior Manager *"must undergo a competency assessment"*. There is no suggestion, which carries any weight, that the competency assessment tool utilized was not capable of being applied fairly or was biased against any person or group of persons as per the Regulations, or that this was not decisive of the issue.

[35] If this is so, then and in that event the Council resolution was *ultra vires* the Systems Act and its Regulations, and can in no circumstances then be enforced nor was there, properly viewed, any *"decision"* taken.

[36] This it seems to me is the complete answer to the application, it being unnecessary then to rely upon the remaining arguments.

[37] There seems to me, in any event, to be a second reason why the resolution of council was null and void. Regulation 12 (4) required the selection panel to have a particular composition. Apart from the Municipal Manager and a member of the Municipal Committee or Councillor who is the portfolio ahead of the portfolio, there had to be *"at least one other person, who is not a Councillor or a staff member of the municipality, and who has expertise or experience in the area of the advertised post".* There seems to me to be considerable merit in the argument that whatever else, the subsection required the appointment of at least one other person who was not a political affiliate, but one appropriate to the filling of an administrative post. Again on *Mr Rorke's* argument and on a proper analysis of the papers applying an appropriate test it is clear that there was no *"other person"* on the selection panel who was not a Councillor or staff member of the Municipality and who had the required expertise. If this is so, then similarly the decision must be null and void.

[38] Insofar as the Conditional Counter-Claim is concerned, there was a necessary application for condonation for the late filing thereof. In my view a proper case for condonation was made out in the Answering Affidavit and there is most certainly no prejudice occasioned by the delay. In any event similar to the issue of whether or not the decision was null and void, the application must succeed if the selection panel was improperly constituted, and it is inevitable that it must be concluded that this was the case. Further, it must be mentioned that when it took its resolution, Council relied on

a report submitted to it by First Respondent's then Acting City Manager. That report made no mention that First Applicant had failed her competency assessment, referred to above, and furthermore suggested that this was a *"psychometric test"*, whereas it was not, but out and out a competency assessment as required by Regulation 16. It must follow that the resolution taken appointing First Applicant was unlawful, in that a mandatory and material procedure or condition prescribed by Regulation was not complied with.

[39] I have carefully considered the counter arguments advanced by *Mr Buchanan SC* for First Applicant, but can find no merit therein.

[40] In the result, the application falls to be dismissed with costs whilst First Respondent's conditional counter-claim consequently falls to be granted insofar as is necessary, also with costs.

[41] In the result:

1. The application is dismissed.
2. The counter-application succeeds.

3. 3.1 Condonation is granted to the First Respondent for the late filing of its conditional counter-application to the extent that this may be necessary;

3.2 First Respondent's Council's decision on 29 February 2016 to appoint the First Applicant as Head of Department: Municipal Services is hereby reviewed and set aside.

4. First Applicant is to pay the Respondents' costs.

M.J. LOWE
JUDGE OF THE HIGH COURT

Obo the Applicant: Adv RG Buchanan SC
Instructed by: Neville Borman & Botha
22 Hill Street
GRAHAMSTOWN

Obo First, Second and Thrid Respondents: Adv Rorke SC
Instructed by: Netteltons Attorneys
118A High Street
GRAHAMSTOWN

Obo the Applicant: Adv Beningfield SC
Instructed by: Enzo Meyer Attorneys
100 High Street
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Annexure "D"

cooperative governance
Department:
Cooperative Governance
REPUBLIC OF SOUTH AFRICA

Private Bag X804, Pretoria, 0001 Tel: (012) 334 0600, Fax: (012) 334 0603 cnr Hamilton and Johannes Ramokhoase Street, Arcadia, Pretoria

CIRCULAR NO. 24 OF 2022: IMPLEMENTATION OF THE LOCAL GOVERNMENT: MUNICIPAL SYSTEMS AMENDMENT ACT, 2022 (ACT NO. 3 OF 2022)

TO ALL: **HEADS OF DEPARTMENT RESPONSIBLE FOR LOCAL GOVERNMENT IN THE PROVINCES; AND**

MUNICIPAL MANAGERS

FROM: **DIRECTOR-GENERAL**
DEPARTMENT OF COOPERATIVE GOVERNANCE

1. PURPOSE OF THE CIRCULAR

The purpose of this Circular is to—

1.1 provide a contextual background to amendments brought about by the *Local Government: Municipal Systems Amendment Act,* 2022 (Act No. 3 of 2022)[1];

1.2 summarise the objects of the Amendment Act;

1.3 highlight some of the provisions of the Amendment Act aimed at improving local public administration and human resource governance; and

1.4 ensure common interpretation and application of the Amendment Act across all provinces and municipalities.

2. INTRODUCTION AND BACKGROUND

2.1 The *Local Government: Municipal Systems Act,* 2000 (Act No. 32 of 2000)[2] was amended by the *Local Government: Municipal Systems Amendment*, 2011 (Act No. 7 of 2011)[3] and assented-to by the President on 5 July 2011.

[1] Hereafter referred to as the "Amendment Act".
[2] Hereinafter referred to as the "principal Act".
[3] Hereinafter referred to as the "Amendment Act, 2011".

2.2 In the matter between the *South African Municipal Workers' Union v Minister of Co-operative Governance and Traditional Affairs*[4], the Constitutional Court declared the Amendment Act, 2011 invalid and unconstitutional effectively from 9 March 2019, on grounds that the Bill was incorrectly classified as a section 75 Bill rather than as a section 76 Bill[5].

2.3 A new Bill[6] with the corresponding provisions as the invalidated Amendment Act, 2011 was re-introduced into Parliament on 6 February 2019, and was tagged by Parliament as a Section 76 Bill.

2.4 Following comprehensive public participation processes at both national and provincial legislatures, the Bill was approved by Parliament on 3 May 2022, with further amendments. The Amendment Act was assented-to by the President and published in *Government Gazette* No. 46740 of 17 August 2022.[7]

3. OBJECTS OF THE AMENDMENT ACT

3.1 The main objects of the Amendment Act are to—

(a) amend the principal Act, so as to introduce and amend certain definitions;
(b) make further provisions for the appointment of municipal managers and managers directly accountable to municipal managers[8];
(c) provide for procedures and competency criteria for appointments of senior managers, including consequences for appointments made in contravention of such procedures and criteria;
(d) determine timeframes within which performance agreements of senior managers must be concluded;
(e) make further provisions for evaluation of performance of senior managers;
(f) ensure alignment between the employment contracts and performance agreements of senior managers with the Amendment Act and any regulations made by the Minister;
(g) foster alignment between the staff systems and procedures of a municipality with the uniform standards determined by the Minister by regulation;
(h) limit the political rights of municipal staff members from holding political office in a political party as defined in the Amendment Act;
(i) empower the Minister to regulate the employment of dismissed municipal employees, including maintenance of a record of dismissed staff;

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[4] South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs (CCT54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017).
[5] Section 75 of the Constitution of the Republic of South Africa, 1996, deals with the procedures to be followed in Parliament in respect of ordinary Bills that do not affect provinces, and section 76 deals with the procedures to be followed by Parliament in respect of ordinary Bills that affect provinces. Section 76(3) of the Constitution provides that a Bill must be dealt with in terms of either sections 76(1) or 76(2), if it provides for legislation envisaged in, *inter alia*, section 195(3) and (4) or section 197 of the Constitution.
[6] Introduced as the Local Government: Municipal Systems Amendment Bill [B2-2019] – hereinafter referred to as "the Bill".
[7] Copy of the Amendment Act attached as Annexure A to the Circular.
[8] Hereinafter referred to as "Senior Managers".

(j) empower the Minister to –
  (i) regulate the duties, remuneration, benefits and other terms and conditions of employment of senior managers;
  (ii) prescribe frameworks for local government human resource management systems, including mandating structures for organised local government;
  (iii) make regulations relating to municipal staff matters;
(k) empower the municipal council to approve the staff establishments of a municipality and prohibit municipalities from employing personnel against unfunded posts that are not on the approved staff establishment of that municipality; and
(l) amend the Municipal Structures Act[9] by deleting the provision dealing with the appointment of municipal managers.

4. COMMENCEMENT DATE

Except for section 13[10], the Amendment Act came into operation with effect from 1 November 2022.

5. SCOPE OF APPLICATION

5.1 The Amendment Act applies to all municipalities in the Republic, including municipal managers and managers directly accountable to municipal managers.

5.2 A municipal council may pass a bylaw to extend the application of the Amendment Act to a municipal entity in terms of section 86H(2) of the principal Act.

5.3 In addition to the legislation referred to above, this Circular must be read in conjunction with the–

(a) Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers;[11]
(b) Local Government: Municipal Regulations on Minimum Competency Levels;[12]
(c) Amendment to Municipal Regulations on Minimum Competency Levels;[13]
(d) Local Government: Disciplinary Regulations for Senior Managers;[14]
(e) Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers;[15] and
(f) Local Government: Municipal Staff Regulations, 2021[16].

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[9] *Local Government: Municipal Structures Act,* 1998 (Act No. 117 of 1998), as amended.
[10] Section 13 is provided for under item 3 of Schedule 7 of the Municipal Structures Act.
[11] Government Notice No. R805 as published in Government Gazette No. 29089 of 1 August 2006 – hereinafter referred to as the "Performance Regulations".
[12] Government Notice No. R493 as published in Government Gazette No. 29967 of 15 June 2007 – hereinafter referred to as the Regulations on Minimum Competency Levels.
[13] Government Notice No. 1146 as published in Government Gazette No. 41996 of 26 October 2018 – hereinafter referred to as the "Amendment Regulations on Minimum Competency Levels".
[14] Government Notice No. 344 as published in Government Gazette No. 34213. of 21 April 2011.
[15] Government Notice No. 21 as published in Government Gazette No. 37245 of 17 January 2014 – hereinafter referred to as the "Appointment Regulations".
[16] Government Notice No. R890 as published in Government Gazette No. 45181 of 20 September 2021 – hereinafter referred to as "the Staff Regulations".

6. IMPLEMENTATION OF THE AMENDMENT ACT

6.1 Interpretation and application

Section 1 of the principal Act has been amended by introducing revised definitions for "municipal manager", "political office", and a new definition for "secondment".

6.2 Appointment of municipal managers and acting municipal managers

(a) The responsibility to appoint municipal managers or acting municipal managers vests in the municipal council.

(b) If the position of a municipal manager becomes vacant due to natural attrition (termination of service as a result of resignation, retirement, death, etc) or the municipal manager is on leave, suspension, unavailable or incapacitated to perform his/ her duties for any reason permissible under law, the municipal council must—

(i) appoint from amongst its managers directly accountable to the municipal manager a manager directly accountable to the municipal manager to act in the vacant municipal manager post (Acting appointment refers to a situation where a suitably qualified manager directly accountable to the municipal manager is appointed to act in a higher position of municipal manager, by written approval of council); and

(ii) expeditiously advertise the post in a newspaper circulating nationally in an endeavour to reach a wide pool of candidates from across the country. The advertisement must, *inter alia*, stipulate the prescribed upper limits for remuneration of the municipal manager as well as the skills, expertise, competencies, qualifications and experience required for the post as prescribed in the Appointment Regulations. Applications for advertised posts must be made on the standard Application for Employment Form.

(c) The Amendment Act, read together with regulation 12(4) of the Appointment Regulations, oblige council to appoint a selection panel for appointment of a municipal manager consisting of **at least three** and **not more than five members**, constituted as follows-

(i) the executive mayor / mayor or delegate from the council, who will serve as the chairperson;
(ii) **one councillor designated by the municipal council** (preferably the mayoral committee member or relevant portfolio head);

(iii) **at least one other person who is not a councillor or a staff member of the municipality, with expertise or experience in the role of the municipal manager[17]; and**

(iv) If a selection panel consisting of more than three members is preferred, **the fourth and fifth members shall not be councillors**. The only category of persons that can be increased on the selection panel is the persons in mentioned in 6.2(c)(iii) above, and not by persons mentioned in 6.2(c)(i) and (ii) above.

(d) Shortlisting conducted by members of the selection panel must take place within 30 days of the closing date of the advertisement. Shortlisted candidates must comply with the prescribed competency criteria as outlined in the Amendment Act and the Appointment Regulations.

(e) If the recruitment, selection and appointment process cannot be finalised before the prescribed three months acting period, **the municipal council must apply in writing to the MEC before the acting period lapses for extension of the acting period for a further period of three months, which is the maximum period**. The latter period cannot be extended. If a municipal council is still unable to fill the vacant municipal manager post after the maximum period of six months has elapsed, such municipal council must request the MEC in writing to second a suitable candidate to act as the municipal manager until the vacant post has been successfully filled. The application requesting extension of the acting period must outline the exceptional circumstances and show good cause why the post could not be filled within the stipulated period of three months. .

(f) The Amendment Act requires all candidates recommended for appointment to municipal manager posts to undergo a competency assessment. Item 6.1 of Annexure B of the Appointment Regulations provides that a candidate, who scores a basic achievement outcome as measured against the competency levels, is deemed unsuitable for a municipal manager position. For more information on dealing with basic achievement outcomes, your attention is drawn to the provisions of paragraph 6.6 below, which apply *mutatis mutandis* to the waiver of competency assessment outcomes.

6.3 Appointment of managers or acting managers directly accountable to municipal managers

(a) The provisions applicable to the municipal manager in paragraph 6.2 above apply to a manager directly accountable to the municipal manager.

(b) An acting appointment in relation to the appointment of a manager or acting manager directly accountable to municipal manager refers to a situation where a suitably qualified divisional manager is appointed to act in a higher position of

[17] Moerane and another v Buffalo City Metropolitan Municipality and others (611/2017) [2017] (05 December 2017).

manager directly accountable to the municipal manager, by written approval of council.

(c) An acting appointment of a manager directly accountable to a municipal manager must be considered in accordance with the applicable municipal policy if the position of a manager directly accountable to a municipal manager becomes vacant due to natural attrition (termination of service because of resignation, retirement, death, etc) or the said manager is on leave, suspension, unavailable or incapacitated to perform his/ her duties for any reason permissible under law.

(d) A divisional manager may act in a higher post for a maximum period of three months, which period can be extended by a further three months, subject to concurrence by the MEC. An acting appointment does not guarantee a permanent appointment by the incumbent acting in such position.

(e) Only serving divisional managers (third level managers) who meet the prescribed minimum requirements for acting in a vacant post of manager directly accountable to the municipal manager may be considered for acting appointment. A municipal council shall not permit a divisional manager to act for a consecutive period longer than six months in the higher post of manager directly accountable to a municipal manager. Once the position becomes vacant, it must be expeditiously advertised and filled on a competitive basis in terms of the applicable prescripts.

6.4 Secondment

(a) If the position of a municipal manager becomes vacant or the municipal manager is unavailable to perform his/ her duties for any reason permissible under law or the municipal council is unable to fill the vacant post after exhausting the procedures as outlined in paragraphs 6.2 and 6.3 above, the municipal council may request the MEC responsible for local government in the province[18] in writing to second a suitable person to act in the advertised post on such conditions as prescribed in the Appointment Regulations and until such time that a suitable candidate has been appointed. If the MEC fails to second a suitable person within a period of 60 days after receipt of the request from the municipality, the municipal council may request the Minister in writing to second a suitable person on such conditions and terms as prescribed, until such time that a suitable candidate has been appointed.

(b) Notwithstanding the above, if the position of a senior manager of a municipality placed under intervention in terms of section 139 of the Constitution becomes vacant or the incumbent is unable to perform his/ her duties for any reason permissible under law, the relevant MEC or provincial executive may second a person with the necessary skills and expertise to act in such a position until such time that the incumbent is able to perform his or her duties or the post has been filled. If the MEC or provincial executive cannot or does not fulfil this obligation,

[18] Hereinafter referred to as "the MEC".

the Minister or the national executive may intervene by seconding a person with the necessary skills and expertise to act in such post.

6.5 Acting allowance

(a) For reasons specified under paragraph 6.2(b) and 6.3(c) above, an acting allowance shall be paid to a manager directly accountable to a municipal manager or divisional manager acting in a vacant higher position of municipal manager or manager directly accountable to the municipal manager, subject to the following:

(i) A written confirmation of acting appointment by the municipal council prior to commencement of the acting appointment.
(ii) A written acceptance of the acting appointment by the manager directly accountable to a municipal manager or divisional manager acting in the respective higher post.

(b) A non-pensionable acting allowance, equal to the difference between the current salary of the manager directly accountable to the municipal manager or divisional manager and the minimum notch of the salary scale of the relevant higher post to which the manager is acting in, is payable.

6.6 Waiver of prescribed skills, competencies, experience and qualifications

A municipal council may, in exceptional circumstances and on good cause, apply in writing to the Minister to waive any of the prescribed appointment requirements (minimum prescribed skills, expertise, competencies and qualifications) as set out in Annexure A and B of the Appointment Regulations[19]. These provisions also apply to candidates who have achieved basic achievement level. Precautionary measures or exceptional circumstances referred to herein include amongst others proof that the vacant post was advertised more than once, and that no single competent candidate was found in all instances. Waiver applications must be accompanied by the appointment report as prescribed in Regulation 17 of the Appointment Regulations. No *ex post facto* approval will be considered by the Minister.

6.7 Submission of appointment process and outcome

(a) Upon conclusion of the recruitment, selection and appointment processes, the municipal council must, within 14 days of the date of appointment of a municipal manager furnish a report to the MEC. The report contemplated herein must include the following information:

(i) Details of the advertisement, including date of issue and the name of newspapers in which the advert was published, including a copy of the advertisement;
(ii) Council resolution approving the short-listing and interview panels;

[19] Section 2(11) of the Amendment Act.

(iii) Minutes of short-listing meeting;
(iv) Minutes of interviews, including scoring;
(v) Recommendation of the executive committee or equivalent political structure of the municipal council in terms of section 30(5)(c) of the Municipal Structures Act;
(vi) Council resolution appointing successful candidate;
(vii) Curriculum vita of successful candidate, including qualifications;
(viii) Confirmation by the candidate that he/she does not hold political office as defined in terms of the Systems Act, as at the date of appointment; and
(ix) Any other information relevant to the appointment.

(b) The MEC must within 14 days of receipt of such report satisfy himself/ herself that the appointee meets the prescribed requirement for the relevant post and that the procedures as outlined in the Amendment Act and Appointment Regulations have been complied with. The MEC must submit a report to the Minister indicating whether the appointment substantively and procedurally comply with the Amendment Act and Appointment Regulations, including corrective actions taken, where necessary.

6.8 Appointment made in contravention of the Amendment Act and Appointment Regulations

(a) A decision to appoint a senior manager and any contract concluded between the municipal council and the appointee in consequence of that decision, is *null* and *void*, if —

(i) the appointee does not meet the prescribed skills, expertise, competencies and qualifications unless prior approval was obtained to waive the prescribed skills, expertise, competencies and qualifications; or
(ii) the appointment was made in contravention of the Amendment Act and Appointment Regulations.

(b) The Amendment Act empowers the MEC to, within 14 days of receiving the appointment report contemplated in section 2(7) of the Amendment Act and regulation 17 of the Appointment Regulations, take appropriate steps to enforce compliance by the municipal council with the Amendment Act. These steps 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. If the MEC fails to respond to the appointment process and outcome within the timeframes or the Minister fails to respond, the appointment of senior manager will be deemed to be in compliance with the Amendment Act: Provided that the municipal council submitted all relevant documents, as prescribed. Provinces are encouraged to build adequate human resource capacity to ensure that the appointment process and outcomes are expeditiously responded to, and within the prescribed timeframes.

(c) Item 3 of the Code of Conduct for Councillors provides that a councillor may not vote in favour of or agree to a resolution, which is before the council or a

committee of council, which conflicts with any legislation applicable to local government. **A councillor voting in favour of or agreeing to a resolution of council, which is in conflict with local government legislation, is in breach of the Code of Conduct and may be dealt with in terms of the procedures as outlined in the Code of Conduct.**

6.9 Employment contracts of municipal managers and managers directly accountable to municipal managers

(a) Municipal Managers

(i) A person appointed as municipal manager must **sign an employment contract before commencement of duty** and a performance agreement entered into with the municipality represented by the executive mayor/ mayor within 60 days of assumption of duty, and thereafter thirty days annually after commencement of the financial year of a municipality (until the termination of the employment contract), complying with the provisions of the Amendment Act.

(ii) The employment contract of a municipal manager must be for a **fixed term of employment up to a maximum of five (5) years, not exceeding a period ending one year after the election of the next council** of the municipality.

(iii) The employment contract of a municipal manager is not renewable. If the contract of a municipal manager terminates for any reason in law, the municipal council must follow the processes to fill the vacant post. The prescribed competency requirements must be adhered to.

(iv) Regulation 2(3)(a) and (b) of the Performance Regulations are thereby rendered inoperative inconsequent of the repeal thereof.

(b) Managers Directly Accountable to Municipal Manager

(i) The employment **contract for a manager directly accountable to the municipal manager within the core business of a municipality shall be on permanent basis**.

(ii) The spirit of the Amendment Act is aimed at bringing about the much-vaunted stability in municipal administration, to preserve institutional memory and ensure continuity in municipalities. For these reasons, all vacant posts of managers directly accountable to municipal managers in the core business of a municipality must be filled on a permanent basis.

(c) A successful candidate for the position(s) of senior manager may not commence duty prior to the conclusion of an employment contract.

6.10 Performance agreements of senior managers

The employment contract is subject to signing of a performance agreement, and the performance agreement must be concluded within 60 days after assumption of duty, and thereafter annually within 30 days of the beginning of each financial year of the municipality (i.e. by 30 July). As a result, the 90 calendar days referred to in sub-regulation 4(4)(a) of the Performance Regulations is rendered inoperative inconsequent of the amendment thereof. Failure to sign a performance agreement within the prescribed timeframe constitute a breach of the Code of Conduct of Staff Members and upon good cause shown, may be dealt with in terms of the Disciplinary Procedures for Senior Managers.

6.11 Employment of dismissed staff and record of disciplinary proceedings

To further improve ethical conduct and probity, all staff members, including senior managers who has been dismissed for misconduct, may only be re-employed in any municipality after the expiry of a period as prescribed in the Appointment Regulations, and the Staff Regulations. The periods that must expire before such staff member may be re-employed ranges between two and ten years. Municipalities are obliged to maintain a record of dismissed staff members and to provide regular reports to the Minister. The Minister has established a national record of disciplinary proceedings of staff members dismissed for misconduct and those who resigned prior to finalisation of the disciplinary proceedings to avert sanction. Municipalities are obliged to verify whether candidates considered to fill vacant positions do not appear in this record, before concluding recruitment and selection processes.

6.12 Staff establishments

(a) Every municipality must organise its administration within its administrative and financial capacity and in such a manner as to be performance orientated, responsive to the needs of local communities and facilitate a culture of public service amongst its staff and political structures. Section 66 of the principal Act has been amended to prevent the bloating of municipal administrations in non-core business units. The staff establishment of a municipality must be approved by the relevant municipal council after consultation with the MEC.

(b) The Staff Regulations provide a framework for organisational design metrics, norms and standards that must be adhered to by municipalities in organising their administration.

(c) The Staff Regulations oblige all municipalities to review and align their staff establishments to the integrated development plans by not later than 30 June 2023. To support municipalities, the Department has embarked on a three-year project (2022 – 2025) to pilot and validate prototype staff establishments targeting a sample of one hundred and one (101) municipalities consisting of metropolitan, district and local municipalities across all provinces.

6.13 Human resource development

In terms of section 67 of the principal Act, municipalities are tasked to develop and adopt systems and procedures to ensure fair, efficient, effective and transparent personnel administration consistent with the uniform standards as set out by the Minister in terms of sections 72 and 120 of the principal Act.

6.14 Bargaining council agreements

The Amendment Act obligates organised local government to consult the Minister, t the Financial and Fiscal Commission and any other parties as may be prescribed before embarking on any salary and wage negotiations in the bargaining council designated for municipalities. Before concluding any collective agreement, organised local government is required to take into consideration the—

(a) budgets of municipalities;
(b) fiscal capacity and efficiency of municipalities; and
(c) national economic policies.

6.15 Limitation of political rights of staff members

To further professionalise local public administration, a new section 71B has been introduced in the principal Act, which **prohibits all staff members** from holding political office in a political party, whether in a permanent, temporary or acting capacity. The definition of political office is limited to the position of chairperson, deputy chairperson, secretary, deputy secretary, treasurer or an elected or appointed decision-making position of a political party nationally or in any province, region or other area in which the party operates or any position in the party equivalent to a position referred to above, irrespective of the title designated to the position.

A municipal staff member holding political office before the commencement of the Amendment Act has until 31 October 2023 (twelve months since commencement) to comply with the limitation clause. This limitation does not take away the freedoms of municipal staff to belong to a political party(ies) of their choice, so long as they do not occupy any of the positions mentioned above.

7. REMUNERATION OF SENIOR MANAGERS

7.1 Remuneration of senior managers is governed in terms of the Notice on upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers.

7.2 The Minister may on good cause shown approve deviation from the Notice on upper limits for municipal managers and managers directly accountable to municipal managers. Each waiver application must be made after consultation between the municipal council and the relevant MEC, and will be considered by the Minister on a

case-by-case basis. Municipalities are reminded to utilise Circular 15 of 2017[20] when applying for a waiver referred to herein.

7.3 Non-compliance with the provisions of the Notice on upper limits for senior managers or any remuneration paid to a senior manager otherwise than in accordance with the Notice constitute an irregular expenditure and must be recovered.

8. CODE OF CONDUCT FOR STAFF MEMBERS

All municipal staff members, including the senior managers, are obliged to comply with the Code of Conduct for Staff Members. Breaches of the Code of Conduct shall be dealt with in terms of the Disciplinary Procedures for Senior Managers.

9. TRANSITIONAL PROVISIONS

9.1 All employment contracts of municipal managers entered into before the election of new councils in 2021 terminated on or before 8 November 2022 (i.e. twelve months after the election of a new council of the municipality) by application of law.

9.2 A contract of a manager directly accountable to a municipal manager entered into before the commencement of the Amendment Act remains in force until the contract lapses or is terminated.

9.3 Once the position of a senior manager becomes vacant or the municipal council becomes aware that a vacancy will occur, the municipal council must judiciously and expeditiously embark on a process to fill the vacant post without delay.

9.4 A position of a manager directly accountable to municipal manager that was approved by council for advertisement or that was advertised prior to 1 November 2022 (i.e. before the commencement of the Amendment Act) was validly made at the time of publication. Therefore, any affected municipality is at liberty to continue with recruitment, selection and appointment processes. The amendment of section 57(7) of the principal Act to appoint managers directly accountable to municipal managers does not apply retrospectively. A fixed term advertisement cannot be converted into a permanent contract. Upon conclusion, the successful candidate must enter five years fixed term contract of employment with the municipality.

In other words, all recruitment and selection processes of a manager directly accountable to a municipal manager embarked upon by a municipal council before the commencement of the Amendment Act, must be concluded in terms of the provisions of the principal Act, irrespective of the stage at where the process was when the Amendment Act came into operation, unless the process is restarted afresh by council. If a permanent appointment is preferred over the fixed term contract, council resolution must be obtained to start the recruitment and selection process afresh.

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[20]Guidelines for dealing with applications for waivers: Notice on upper limits of total remuneration package payable to municipal managers and managers directly accountable to municipal managers, 2017

10. REPEAL OF LAWS

The Amendment Act repeals the following laws:

(a) Local Government: Municipal Systems Amendment Act, 2011 (Act No. 7 of 2011); and
(b) Section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998).

11. ROLL-OUT AND SUPPORT FROM THE DEPARTMENT

11.1 The Department, in collaboration with the provincial departments responsible for local government, will embark on capacity building workshops to roll-out the implementation of the Amendment Act to municipalities. The first round of workshops are as per the attached programme (**Annexure A**). The workshops will target executive mayors/ mayors, councillors heading portfolios responsible for Governance and HR, municipal managers, managers directly accountable to municipal managers, as well as municipal human resource functionaries.

11.2 Provinces are kindly requested to coordinate arrangements to ensure that the planned workshops are a success and to schedule other capacity building workshops if necessary.

12. ENQUIRIES

Enquiries relating to the implementation of the Amendment Act may be directed to the following officials in the Department:

Name of Official	Contact Details
Mr Jackey Maepa, Director: Municipal HR Systems	Tel: 012 334 4915/ 0920 Email: JackeyM@cogta.gov.za
Ms Nakedi Monyela, Deputy Director: Municipal HR Systems	Tel: 012 334 0754 Email: NakediM@cogta.gov.za

Yours Sincerely,

MS AVRIL WILLIAMSON
DIRECTOR-GENERAL
DATE: 30 NOVEMBER 2022