



**THE REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: **3488/2023**

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL  
GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE** Applicant

and

**KNYSNA MUNICIPALITY** First Respondent  
**COUNCIL OF KNYSNA MUNICIPALITY** Second Respondent  
**MUNICIPAL MANAGER OF KNYSNA MUNICIPALITY** Third Respondent  
**LONDIWE SOTSHEDA** Fourth Respondent

In the counter- application:

**KNYSNA MUNICIPALITY** First Applicant  
**COUNCIL OF KNYSNA MUNICIPALITY** Second Applicant  
**MUNICIPAL MANAGER OF KNYSNA MUNICIPALITY** Third Applicant  
**LONDIWE SOTSHEDA** Fourth Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL  
GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE** First Respondent  
**THE MINISTER OF COOPERATIVE GOVERNMENT  
AND TRADITIONAL AFFAIRS** Second Respondent

And in

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL  
GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE** Applicant

and

**KNYSNA MUNICIPALITY** First Respondent  
**COUNCIL OF KNYSNA MUNICIPALITY** Second Respondent  
**MUNICIPAL MANAGER OF KNYSNA MUNICIPALITY** Third Respondent  
**LUVUYO LOLIWE** Fourth Respondent

In the counter- application:

**KNYSNA MUNICIPALITY** First Applicant  
**COUNCIL OF KNYSNA MUNICIPALITY** Second Applicant  
**MUNICIPAL MANAGER OF KNYSNA MUNICIPALITY** Third Applicant  
**LUVUYO LOLIWE** Fourth Applicant

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL  
GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT  
AND DEVELOPMENT PLANNING, WESTERN CAPE PROVINCE** First Respondent  
**THE MINISTER OF COOPERATIVE GOVERNMENT  
AND TRADITIONAL AFFAIRS** Second Respondent

This judgment is handed down electronically by email circulation to the parties' legal representatives' email addresses.

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## JUDGMENT

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### ***SLINGERS J***

#### **Introduction**

[1] In the application instituted under WCHC: 3488/2023, the Member of The Executive Council For Local Government, Environmental Affairs And Development And Development Planning, Western Cape Province (**'the MEC'**) seeks following substantive relief:

- (a) that the resolution taken by the Council of Knysna Municipality on 14 February 2023 to appoint Londiwe Sotshede (**'Sotshede'**) as the acting chief financial officer (**'CFO'**) of the Knysna Municipality is:
- (b)(i) declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(c) of Local Government Municipal Systems Act, Act 32 of 2000 (**'the Systems Act'**);
- (b)(ii) declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(b) of the Systems Act; and
- (b)(iii) reviewed and set aside;
- (c) that the Knysna Municipality (**'the Municipality'**) is directed to pay the costs of the application which costs are to include the costs of two counsel.

[2] In the counter-application, the respondents<sup>1</sup> sought the following substantive relief:

- (a) that the Minister of Co-operative Government and Traditional Affairs (**'the Minister'**) be included as a necessary party to the counter-application in accordance with Rule 10A;
- (b) that to the extent necessary, declaring that:
- (b)(i) section 56(1)(c) of the Systems Act is unconstitutional, unlawful and invalid;

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<sup>1</sup> The Municipality, the Council of Knysna Municipality, the Municipal Manager of Knysna Municipality and Sotshede

- (b)(ii) the Council of Knysna Municipality (**‘the Council’**) was entitled, at its meeting held on 14 February 2023, to appoint Sotshede as its acting CFO; and
- (b)(iii) the Municipality, the Council and the Municipal Manager of Knysna Municipality (**‘the Municipal Manager’**) did not require the authorisation of the MEC to appoint Sotshede;
- (c) that to the extent necessary:
- (c)(i) declaring that the Local Government: Regulations on the Appointment and Conditions of Employment of Senior Managers, 2014, promulgated by the Minister in Government Gazette number 37245 on 17 January 2014 (**‘the Appointment Regulations’**), became unlawful, invalid and ineffective with effect from 9 March 2019;
- (c)(ii) setting aside the 2014 Appointment Regulations with effect from 9 March 2019;
- (c)(iii) declaring that the 2014 Appointment Regulations did not apply in respect of the appointment of Sotshede as the CFO;
- (c)(iv) in the alternative to (c)(i) to (iii)
- (c)(iv)(1) declaring that Regulation 9 of the 2014 Appointment Regulations, and annexures A and/or B thereto, became unlawful, invalid and ineffective with effect from 9 March 2019;

- (c)(iv)(2) setting aside Regulation 9 of the 2014 Appointment Regulations, and annexures A and/or B thereto, on the basis that they became unlawful, invalid and ineffective from 9 March 2019; and
    - (c)(iv)(3) declaring Regulation 9 of the 2014 Appointment Regulations, and annexures A and/or B thereto, did not apply to the appointment of the Sotshede as the CFO;
  - (d) insofar as may be necessary, granting condonation for the relief in paragraph (c) in accordance with section 9 of the Promotion of Administrative Justice Act, Act 3 of 2000 (**'PAJA'**);
  - (e) in the event of opposition, that such opposing party be liable for the costs of the counter-application, the costs whereof are to be determined by the court.
- [3] On 14 April 2023, the parties took an order by agreement in terms whereof the Minister was included as a necessary party in the counter-application in accordance with Rule 10A. Furthermore, it was agreed that both the main and counter-applications would be postponed to 5 May 2023 for hearing.
- [4] In the application instituted under WCHC: 4884/2023, the MEC seeks the following substantive relief:
  - (a) that the resolution taken by the Council on 15 March 2023 to appoint Luvuyo Loliwe (**'Loliwe'**) as the Acting Director: Corporate Services (**'DCS'**) of the Knysna Municipality-
    - (b)(i) be declared unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(c) of the Systems Act;

(b)(ii) be declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of regulation 7 of the Municipal Regulations on Minimum Competency Levels, 2007, promulgated under the Local Government: Municipal Finance Management Act, Act 56 of 2003; and

(b)(iii) is reviewed and set aside.

(c) the first respondent is directed to pay the costs of the application, including the costs of two counsel.

[5] The following substantive relief is sought in the counter-application:

(a) that the Minister be joined as a necessary party to the counter-application in accordance with Rule 10A;

(b) that to the extent necessary, declaring that:

(b)(i) section 56(1)(c) of the Systems Act is unconstitutional, unlawful and invalid;

(b)(ii) the Council was entitled, at its meeting held on 15 March 2023, to appoint the Loliwe as it Acting DCS; and

(b)(iii) the Municipality, the Council and the Municipal Manager did not require the authorisation of the MEC to appoint Loliwe; and

(c) in the event of opposition, that such opposing party be liable for the costs of the counter-application, the costs whereof are to be determined by the court.

- [6] As with the application instituted under WCHC:3488/2023, an order was taken by agreement in terms whereof the Minister was included as a necessary party in the counter-application in accordance with the provisions of Rule 10A, and both the main and counter-applications were postponed for hearing to 5 May 2023.
- [7] Prior to the hearing on 5 May 2023, the MEC brought a formal application to have the applications instituted under WCHC: 4884/2023 and WCHC: 3488/2023 consolidated. The consolidation was sought as both matters pertained primarily to the proper interpretation and application of section 56(1)(c) of the Systems Act. The only substantive issue not common to both applications was the Municipality's contention in the Sotshede application<sup>2</sup> that the Appointment Regulations fell away, alternatively was rendered invalid on 9 March 2019 following the Constitutional Court's judgment in *SAMWU v Minister of Cooperative Governance and Traditional Affairs*.<sup>3</sup>
- [8] It was argued that the consolidation of the applications would serve to avoid a multiplicity of applications and costs, would contribute to the efficient use of judicial time and resources and would avoid the risk of disparate outcomes in the applications if they were heard separately.
- [9] The application for consolidation was not opposed and was accordingly granted by the court. It is these consolidated applications which serve before me.
- [10] At the stage of filing his replying papers in the Sotshede application, the MEC sought leave to amend paragraph 2.2 of his Notice of Motion by including an alternative ground on which it attacked the lawfulness of Sotshede's appointment.

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<sup>2</sup> The application instituted under WCHC: 3488/2023

<sup>3</sup> 2017 (5) BCLR 641 (CC)

[11] In its unamended form the MEC sought to have Sotshede's appointment declared unlawful, *ultra vires*, and null and void by virtue of the appointment's contravention of section 56(1)(b) of the Systems. In its amended form, the MEC sought to have Sotshede's appointment declared unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(b) of the Systems, *alternatively (b) its contraventions of Regulation 5 of the Municipal Regulations on Minimum Competency Levels, 2007, published under GN R 493 in GG 29967 of 15 June 2007, as amended by GN 1146 in GG 41996 of 26 October 2018.*<sup>4</sup>

[12] The parties have filed papers and have presented both written and oral submissions in this amendment application. I return to this amendment application later in the judgment.<sup>5</sup>

### **Background to the Sotshede application**

[13] Sotshede was first appointed as the acting CFO from 15 August 2022 for a three month period. Thereafter, she was re-appointed from 16 November 2022 for another three month period. On 14 February 2023, the Council took a resolution to appoint Sotshede as acting CFO for a further period from *'16 February 2023 or until such time as the vacant position of Chief Financial Officer is filled, whichever period comes first.*<sup>6</sup>

[14] On 12 October 2022, the MEC was furnished with a copy of the minutes of a special meeting of Council of 12 August 2022. At this meeting the first acting appointment of Sotshede was approved by Council.

[15] The MEC wrote to the Executive Mayor of the Municipality wherein he advised that it did not appear that Sotshede met the requirements prescribed under

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<sup>4</sup> The requested amendment is in italics.

<sup>5</sup> This is the one of three amendment applications brought by the MEC.

<sup>6</sup> Paragraph 10 of the founding affidavit in application instituted under WCHC: 3488/2023



Regulation 5 of the Competency Regulations made under the Municipal Finance Management Act. In response hereto, the Executive Mayor advised the MEC that the Council was satisfied with Sotshede's performance and intended to extend her employment contract until such time that the vacancy had been filled satisfactorily.

- [16] On 31 January 2023, the MEC was furnished with an excerpt from the minutes of an ordinary meeting of the Council held on 27 October 2022. The said minutes recorded that the Council had unanimously resolved to appoint Sotshede from 16 November 2022 in the position of acting CFO for a further three month period.
- [17] On 8 February 2023, the MEC addressed letters to *inter alia* the Executive Mayor and the Municipal Manager in which he noted the alleged unlawful resolutions to appoint Sotshede. The MEC also requested urgent undertakings from the Executive Mayor, the Speaker and the Municipal Manager that pending the finalisation of an application which was due to be instituted, the Council would not make any further resolutions to further extend the acting appointment of Sotshede, that no further acting appointment of Sotshede would be implemented, and that no further employment contract would be concluded in terms whereof Sotshede was appointed as an acting CFO. No undertakings were furnished.
- [18] On 9 February 2023, the MEC instituted urgent application proceedings wherein he sought an interim interdict preventing the Municipality from appointing Sotshede as acting CFO after 15 February. This application was heard on 14 February 2023 when it was struck from the roll for lack of urgency.
- [19] Subsequently, Sotshede's appointment as acting CFO has twice been extended.

[20] The MEC also seeks to set aside the appointment of Sotshede for non-compliance with the provisions of section 56(1)(b) of the Systems Act. The MEC argues that an acting CFO is subject to the requirements prescribed in regulation 5 of the Competency Regulations which provides that:

*'The chief financial officer of a municipality or municipal entity must comply with the minimum competency levels required for higher education qualification, work related experience, core managerial and occupational competencies and be competent in the unit standards prescribed for financial and supply chain management competency areas as set out [ in the table ] below.'*

[21] Therefore, the MEC argues, Sotshede as the acting CFO of a municipality which has an annual budget of a value equal to or above R1 billion must have at least a post graduate degree or qualification in the fields of accounting, finance or economics registered on the National Qualifications Framework at NQF level 8 with a minimum of 120 credits or chartered accountant. These minimum competency requirements have not been waived by the Minister responsible for local government and therefore remain applicable to Sotshede's appointment.

[22] It is not disputed that Sotshede does not meet the minimum competency requirements prescribed for an acting CFO. The Municipality argues, however, that the prescribed minimum competency requirements are not applicable to the position of an acting CFO.

### **Background to the Loliwe application**

[23] Loliwe was appointed as the Municipality's acting DCS from 16 September 2022 for a three month period. On 12 October 2022 the MEC was furnished with a copy of the minutes of a special meeting of the Council held on 16 September 2022 where it resolved to appoint Loliwe as the acting DCS.

- [24] In a letter dated 8 November 2022, the MEC advised the Executive Mayor of the Municipality that it appeared as if Loliwe failed to meet the requirements prescribed under regulation 7 of the Competency Regulations. The Executive Mayor was requested to advise the MEC within 7 days of the steps taken to remedy the situation. In a letter dated 23 November 2022, the Executive Mayor advised the MEC that the Council was satisfied with Loliwe's performance and that it intended to extend his contract until the vacancy has been filled satisfactorily. Furthermore, the MEC was advised that the Municipality was in the process of finalising the permanent recruitment process for the position which would in all likelihood be conducted at the end of February 2023.
- [25] In accordance with regulation 7 of the Competency Regulations, the MEC avers that Loliwe must have:
- (a) at least a post graduate degree or relevant qualification registered on the National Qualifications Framework at NQF level 8 with a minimum of 120 credits in a field relevant to the senior management position; and
  - (b) a minimum of seven years' experience at senior and middle management levels, of which a minimum of two years must be at senior management level.
- [26] It is not disputed that Loliwe does not have the required minimum seven years' experience. However, the Municipality disputes that regulation 7 of the Competency Regulations are applicable to Loliwe. The MEC also challenges Loliwe's appointment on the basis that it is *ultra vires*, unlawful, and null and void in terms of section 56(2)(b) of the Systems Act.
- [27] On 7 February 2023, the MEC received an excerpt from the minutes of an ordinary meeting of the Council held on 13 December 2022. These minutes

recorded that the Council unanimously resolved to appoint Loliwe as acting CFO for a further three month period.

[28] On 8 February 2023, the MEC addressed letters to *inter alia* the Executive Mayor and the Municipal Manager in which he noted the unlawful resolutions to appoint Loliwe. The MEC also requested urgent undertakings from the Executive Mayor, the Speaker and the Municipal Manager that pending the finalisation of an application which was due to be instituted that the Council would not make any further resolutions to further extend the acting appointment of Loliwe, that no further acting appointment of Loliwe would be implemented, and that no further employment contract would be concluded in terms whereof Loliwe was appointed as an acting DCS.

[29] In response to the letter of 8 February 2023, the Executive Mayor advised that the Council has referred the matter for a legal opinion, which would be shared with the MEC. Neither the legal opinion or the requested undertakings were furnished.

[30] The MEC sought urgent interdictory relief wherein he sought to prevent the Municipality from appointing Loliwe as acting DCS after 15 February 2023. This application was heard on 14 February 2023 when it was struck from the roll for lack of urgency.

[31] The interpretation of sections 56(1)(c) of the Systems Act is central to determining the validity of the appointments of both Sotshede and Loliwe. On the interpretation favoured by the MEC, the appointments are invalid, whilst on the interpretation favoured by the Municipality, the appointments are valid. In the event that the MEC's interpretation is accepted, the Municipality brought counter

applications wherein it challenges the constitutionality of section 56(1)(c) of the Systems Act.

[32] I turn now to the interpretation of section 56(1)(c).

### **Section 56(1)**

[33] Section 56 reads as:

***'56 Appointment of managers directly accountable to municipal managers***

*(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 circumstances and for a period as prescribed.*

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

*(c) A person appointed in terms of paragraph(a)(ii) may not be appointed to act for a period that exceeds three months: Provided that a municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph(a), for a further period that does not exceed three months.*

*(2) A decision to appoint a person referred to in subsection (1)(a)(i) or (ii), and any contract concluded between the municipal council and that person in consequence of the decision, is null and void if-*

*(a) the person appointed does not have the prescribed skills, expertise, competencies or qualifications; or*

*(b) the appointment was otherwise made in contravention of this Act,*

*unless the Minister, in terms of subsection (6), has waived any of the requirements listed in subsection (1)(b).*

- (3) If a post referred to in subsection (1)(a)(i) becomes vacant, the municipal council must-*

  - (a) advertise the post nationally to attract a pool of candidates nationwide; and*
  - (b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.*
- (4) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.*
- (5)(a) The municipal council must, within 14 days of the date of appointment, inform the MEC for local government of the appointment process and outcome, as may be prescribed.*

*(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph(a), submit a copy thereof to the Minister.*
- (6) If a person is appointed to a post referred to in subsection (1)(a) in contravention of this Act, the MEC for local government must, within 14 days of becoming aware of such appointment, take appropriate steps to enforce compliance by the municipal council with this Act, which 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.*
- (7) A municipal council may, in special circumstances and on good cause shown, apply in writing to the Minister to waive any of the requirements listed in subsection (1)(b) if it is unable to attract suitable candidates.*

- (8) *A person appointed in a permanent capacity as a manager directly accountable to the municipal manager when this section takes effect, must be regarded as having been appointed in accordance with this section.*
- (9) *A person appointed as an acting manager directly accountable to the municipal manager when this section takes effect, must be regarded as having been appointed in accordance with this section only for the period of the acting appointment.*
- (10) *Any pending legal or disciplinary action in connection with an appointment made before this section took effect, will not be affected by this section after it took effect.*

[34] The approach to be adopted to interpretation is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>7</sup>. The starting point to interpreting section 56 would be the plain words thereof, giving them their ordinary meaning, while cognizant of the fact that statutory provisions must always be interpreted purposively, be properly contextualized and must be interpreted consistently with the Constitution. In ascertaining the meaning of section 56, regard may be had to sections and/or chapters thereof in which the key word, provision, or expression to be interpreted is located.<sup>8</sup>

[35] The MEC interprets section 56(1)(c) to mean that a person appointed in accordance with section 56(1)(a)(ii) may only be appointed for a single period of three months. This single period of three months may be extended on a single occasion for a limited period of three months. This extension may only occur after the Council, in special circumstances and on good cause shown, applied in writing to the MEC for such extension.

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<sup>7</sup> 2012 (4) SA 593 (SCA)

<sup>8</sup> *Amabhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* 2023 (2) SA 1 (CC)

- [36] The Municipality interprets section 56(1)(c) to mean that a person appointed in terms of section 56(1)(a)(ii) may be appointed and re-appointed without any limitation or restriction as long as each such appointment is for a period of three months or less. It is only when an acting appointment exceeds three months, that it is required to apply in writing to the MEC for an extension.
- [37] Therefore, the Municipality argues, as both Loliwe and Sotshede were appointed in three month tranches, there was no need to apply in writing for an extension to the MEC.
- [38] The Municipality argues that its interpretation is constitutionally compliant as it enables compliance with section 160(1)(d) of the Constitution.<sup>9</sup> However, in its view, a limitation of a three-month period would not impede on a Municipality's authority to employ personnel which are necessary for the effective performance of its functions, nor would it undermine sections 41, 160(1)(d), 154(1) and 156(5) of the Constitution. It would simply limit the period of such appointment. No cogent argument has been presented to show that by limiting the appointment in terms of section 56(1)(c) to a minimum three month period (or a maximum of six months), the Municipality's ability to appoint personnel necessary for the effective performance of its functions are impeded.
- [39] Furthermore, the Municipality argued that on the MEC's interpretation, the vacant posts for senior managers had to be filled within a three to six month period. This could not have been the intention if regard is had to the lengthy appointment procedures prescribed by the Appointment Regulations.
- [40] Regulation 7 of the Appointment Regulations provides that as soon as the municipal manager received official notification that the post of senior manager

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<sup>9</sup> A Municipal Council may employ personnel that are necessary for the effective performance of its functions.



has become vacant, he/ she must obtain approval from the municipal council to fill that post at its next meeting or as soon as possible.

[41] Regulation 10(1) of the Appointment Regulations obliges the municipal manager to, within 14 days of receipt of the notification that the post of senior manager has become vacant, to ensure that the vacant post is advertised. Regulation 10(5) further obliges the municipal manager to provide the executive committee with monthly progress reports on the filling of the vacant senior manager post.

[42] In *Notyawa v Makana Municipality*, the following was stated:

*‘[11] ... The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal managers are vital to the proper administrative functioning of municipalities.’*

[43] The appointment of senior managers is similarly vital to the proper administrative functioning of municipalities.

[44] A reading of sections 56 and 54A of the Systems Act indicates that the two sections very closely resemble each other.

[45] Therefore, having regard to Regulations 7 and 10(1) of the Appointment Regulations, the above quoted excerpt of *Notyawa v Makana Municipality* and the similarity between sections 56 and 54A of the Systems Act, I am of the view that the appointment of senior managers, similarly to that of municipal managers, has to be made within a short span of time.

- [46] In any event, the Appointment Regulations should not contextualise the interpretation of the Systems Act, rather the Systems Act should contextualise the interpretation of the Appointment Regulations.<sup>10</sup>
- [47] In support of its interpretation of section 56(1)(a)(c), the Municipality argues that section 56(1)(a)(ii) provides that an acting appointment is under such circumstances and for the period as prescribed. The definitions section of the Systems Act defines ‘*prescribe*’ as ‘*by regulation or guidelines in terms of section 120*’. Therefore, the Municipality argues, the limits permissible for a continuing acting appointment must be dealt with in terms of section 120 of the Systems Act as it would create an impossible situation if section 56(1)(c) was interpreted to grant the very same power to the MEC as what is granted to the Minister in terms of section 120 of the Systems Act. In my view, this argument fails to consider the interpretation section fully which explicitly states that ‘*In this Act, unless inconsistent with the context<sup>11</sup>...*’. For the sake of completeness I set out the full definition of ‘*prescribe*.’

### **‘1. Definitions**

*In this Act, unless inconsistent with the context-*

**“prescribe”** means *prescribe by regulation or guidelines in terms of section 120, and “prescribed” has a corresponding meaning’.*

- [48] Therefore, if the definition of *prescribe* is inconsistent with the context of section 56(1)(c), it should not be sustained, and the provisions of section 56(1)(c) should prevail.

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<sup>10</sup> *National Commissioner of Police and Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA)

<sup>11</sup> Own reference

[49] On the Municipality's interpretation, section 56(1)(c) would serve no purpose and its application could be avoided by simply limiting each acting appointment to a period of three months or less. To adopt and apply such an approach would, in my view, lead to an insensible result as it would render section 56(1)(c) superfluous. As was stated in *Wellworths Bazaars Ltd v Chandler's Ltd and Another*,<sup>12a</sup> a Court should be slow to come to the conclusion that words are tautologous or superfluous and as was quoted by the Privy Council in *Dither v Denison* (11 Moore P.C. 325, at p.357):

*'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe – should not, without necessity or some sound reason, impute- to its language tautology or superfluity, and should rather at the outset be inclined to suppose every word intended to have some effect or be some use.'*

[50] It is clear from section 56(5)(a) of the Systems Act that the Municipal Council has a statutory duty to inform the MEC of the appointment process and outcome in respect of an appointment in terms of section 56(1)(a). The MEC is in turn statutorily obliged to inform the Minister in accordance with the provisions of section 56(5)(b). This accords with the monitoring role accorded to the MEC.

[51] Section 56(6) statutorily obliges the MEC to take appropriate steps to enforce compliance with the Systems Act upon learning that a permanent appointment in terms of section 56(1)(a) was made in contravention of the Systems Act.

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<sup>12</sup> 1947 (2) SA 37 (AD); See also *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC) and *Florence vs Government of The Republic of South Africa* 2014 (6) SA 456 (CC)

- [52] Therefore, in terms of sections 56(5) and 56(6), the MEC has a supervisory and enforcement role in respect of permanent appointments made in terms of section 156(1)(a) and is not a passive observer to the appointment process.
- [53] On the Municipality's interpretation and application of section 56(1)(c), the MEC has no supervisory and enforcement role in respect of acting appointments made in terms of section 56(1)(a)(ii). However, the MEC's interpretation of section 56(1)(c) affords him a similar role to what he has in respect of permanent appointments in respect of acting appointments as he would determine whether or not the period of an acting appointment should be extended beyond a three month period.
- [54] This supervisory and enforcement role aligns with the purpose of the Systems Act to establish a framework for monitoring and standard setting by other spheres of government to build an efficient, effective, accountable and transparent local public administration.
- [55] The MEC's interpretation of section 56(1)(c) of the Systems Act is also consistent with the objective of the Systems Act to give effect to the principle of co-operative government, with the objective of achieving an accountable public administration with employment and personnel management practices based on *inter alia* ability and fairness and is consistent with the provisions of section 3 and 7 of the Systems Act
- [56] Section 3 of the Systems Act provides as:
- '(1) Municipalities must exercise their executive and legislative authority within the constitutional system of co-operative government envisaged in section 41 of the Constitution.*

*(2) The national and provincial spheres of government must, within the constitutional system of co-operative government envisaged in section 41 of the Constitution, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality's ability or right to exercise its executive and legislative authority.'*

[57] Section 7 of the Systems Act explicitly provides that the rights and duties of the municipal councils are subject to the Constitution. Section 50 provides that:

*'(1) Local public administration is governed by the democratic values and principles embodied in section 195 (1) of the Constitution<sup>13</sup>.*

*(2) In administering its affairs, a municipality must strive to achieve the objects of local government set out in section 152 (1)<sup>14</sup> of the Constitution, and comply with the duties set out in sections 4 (2) and 6.'*

[58] This supervisory and enforcement role of the MEC does not undermine the ability of the Municipality to regulate its own affairs, which includes the appointment of its staff.<sup>15</sup> On the contrary, it is consistent with the provisions of section 151(3) of the Constitution, which provides that:

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<sup>13</sup> Section 195(1) of the Constitution provides that:

*'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- (a) A high standard of professional ethics must be promoted and maintained.*
- (b) Efficient, economic and effective use of resources must be promoted.*
- (c) Public administration must be development-oriented.*
- (d) Services must be provided impartially, fairly, equitably and without bias.*
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
- (f) Public administration must be accountable.*
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'*

<sup>14</sup> Section 152(1) of the Constitution provides that:

*'The objects of local government are –*

- (a) to provide democratic and accountable government for local communities;*
- (b) to ensure the provisions of service to communities in a sustainable manner;*
- (c) to promote social and economic development;*
- (d) to promote a safe and healthy environment; and*
- (e) to encourage the involvement of communities and community organizations in the matter of local government.*

<sup>15</sup> *Notyawa v Makana Municipality and Others* (CCT115/2019) ZACC 43

*'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.'*

[59] In *Notyawa v Makana Municipality and Others* the Constitutional Court addressed the interpretation of section 54A. The following are important excerpts from *Notyawa v Makana Municipality and Others* which are relevant to the matter at hand:

*'A municipal manager is the head of the administration of each council.'*<sup>16</sup>

*'...section lays emphasis on the appointment of suitably qualified municipal managers owing to the position they hold in the administration of a municipality. The role played by the managers is crucial to the delivery of services to local communities. The section envisages that candidates who are best qualified for the job must be recruited.'*<sup>17</sup>

*'The MEC must satisfy herself that the appointment complies with the Systems Act. If she is not satisfied that the Act was followed, the MEC is empowered to take appropriate steps to enforce compliance by the municipal council.'*<sup>18</sup>

*'It is quite apparent that Parliament has entrusted the MEC to monitor compliance with the Systems Act.'*<sup>19</sup>

*'Section 54A...prescribes short periods within which certain steps are to be taken in the process of filling in a vacancy for the post of a municipal manager. This is the position even in the case of a stop-gap. The section precludes the appointment of acting municipal managers for a period in excess of three months. And where an extension is granted by the MEC, it may not exceed a*

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<sup>16</sup> Paragraph 2

<sup>17</sup> Paragraph 4

<sup>18</sup> Paragraph 6

<sup>19</sup> Paragraph 8

*further three months. This indicated that the section envisages that the appointment of permanent municipal manager must be done within six months.*<sup>20</sup>

*'Where it is not possible, the section affords two options. The first is to solicit a secondment of a suitably qualified official from the MEC.'*<sup>21</sup>

*'The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal managers are vital to the proper administrative functioning of municipalities.'*<sup>22</sup>

[60] As seen from the above excerpts, the Constitutional Court determined that section 54A(2A)(a) and (b) prescribes that a person may be appointed for one three month period, which may be extended on a single occasion, upon written application to the MEC in special circumstances and on good cause shown.<sup>23</sup>

[61] Section 56 speaks to the appointment of managers and acting managers directly accountable to municipal managers and section 54A speaks to the appointment of municipal managers and acting municipal managers. The two sections are worded almost identically. A notable exception is section 54A(6) which provides that the Municipal Council may request the MEC to second a suitable person, on such circumstances as prescribed, to act in the advertised position until such time as a suitable candidate is appointed. Section 56 does not have a similar provision.

[62] As a result of the similarity of the wording between section 56 and section 54A, the MEC argues that it follows that the interpretation attributed to section 54A(2A)

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<sup>20</sup> Paragraph 9

<sup>21</sup> Paragraph 10

<sup>22</sup> Paragraph 11

<sup>23</sup> Section 54A(2A)(a) and (b) provides that:

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

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

should similarly be attributed to section 56(1)(c). The Municipality argues that section 56(1)(c) cannot have the same interpretation as section 54A(2A). This follows from the fact that section 54A allows for the municipal council to request that the MEC second a suitable person to the position. This provision acts as a pressure release mechanism which is absent in section 56.

[63] As provided for in section 55 of the Systems Act, a municipal manager is the head of the administration and the accounting officer of the municipality. Therefore, in my view, if the vacancy pertaining to the position of municipal manager is not filled within 6 months, a municipality would be without a head of administration and without accounting officer with no-one responsible and accountable for all municipal income and expenditure, all municipal assets and liabilities. These factors would necessitate the need for pressure release system provided for in section 54A(2A).

[64] In *Amabhugane Centre for Investigative Journalism NPC v President of the Republic of South Africa*<sup>24</sup> the Constitutional Court stated that when engaged in an interpretative exercise, statutory provisions should always be interpreted purposively and properly contextualised. The context may be determined by considering other subsections, sections or chapter in which the key word, provision or expression interpreted is located.

[65] Both section 54A and section 56 are located in chapter 7 of the Systems Act which is headed '*Local Public Administration and Human Resources*'. Further, both section 54A and section 56 are located in part 2 of chapter 7, which is headed '*political structures, political office bearers and roles*'.

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<sup>24</sup> 2023 (2) SA 1 (CC)



[66] Therefore, given the similarity of the wording of section 56 and section 54A together with the fact that both provisions are located within the same part of the same chapter of the Systems Act, it can be accepted that the same considerations applicable to the interpretation of section 54A would be applicable to section 56. Consequently, the Constitutional Court's interpretation of section 54A(2A) provides support for the interpretation of section 56(1)(c) advanced by the MEC.

[67] If section 54A(2A) and section 56(1)(c), which are worded in almost identical terms, were construed differently it would offend against the legal principle which provides that every part of a statute should be so construed as to be consistent with every other part of the statute.<sup>25</sup>

[68] After applying the approach to interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* and having regard to the the ordinary meaning of section 56(1)(c), I am in agreement with the interpretation advanced by the MEC.

[69] Therefore, in my view, acting appointments made in terms of section 56(1)(a)(ii) is limited to a single three month period which may, by application in writing to the MEC and in special circumstances and on good cause shown be extended for a further once off period of three months. This interpretation affords the wording of section 56(1)(c) its ordinary meaning, allows for a purposive interpretation thereof, properly contextualises it, and is consistent with the Constitution.

[70] In the circumstances:

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<sup>25</sup> *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at [24] and cited in *National Commissioner of Correctional Services and Another v Democratic Alliance and Others* 2023 (2) SA 530 (SCA)

- (i) the decision of the Council on 14 February 2023 to appoint Sotshede as the acting CFO contravened section 56(1)(c) of the Systems Act; and
- (ii) the decision of the Council on 15 March 2023 to appoint Loliwe as the acting DCS contravened section 56(1)(c) of the Systems Act.

### **The Constitutional Challenge**

[71] In its counter-applications the Municipality sought an order *inter alia* declaring section 56(1)(c) of the Systems Act unconstitutional, unlawful and invalid.

[72] The Municipality alleges that the MEC's interpretation of section 56(1)(c) improperly purports to grant to him the power to dictate to the Municipality how it may exercise its exclusive functional competence to appoint members of its administrative staff.

[73] Implicit in the Municipality challenge to the MEC's interpretation of section 56(1)(c) is that it is not constitutionally compliant and that it does not respect the principles of co-operative governance, intergovernmental relations and the constitutional autonomy of local government to regulate its own affairs, including its staff. The Municipality argues that its appointment of members of staff establishments is an exclusive functional competence which is Constitutionally granted to municipalities.

[74] Therefore, the MEC does not have, and cannot be statutorily granted the powers to interfere in the Municipality's function to appoint members of its staff establishment, including senior managers whether it be in an acting or permanent capacity.

[75] The MEC's interpretation of section 56(1)(c), the Municipality argues, effectively usurps its power to appoint an acting director of corporate services as it sees fit.

On the MEC's interpretation, the Systems Act is effectively given a power to override the municipality's own determination, which amounts to a usurpation of the municipality's function to appoint its own acting senior managers for the period it deems fit. This would be a contravention of section 160(1)(d) of the Constitution.<sup>26</sup>

[76] Therefore, it is argued that section 56(1)(c) is unlawful to the extent that it curtails the ability of the municipality to appoint an acting director of corporate services for more than two to three month periods.

[77] As the Constitutional Court found in *Notyawa v Makana Municipality and Others*<sup>27</sup>, Parliament entrusted the MEC to monitor compliance with the Systems Act. This monitoring power is a necessary component of the relationship between local government and other levels of government and is an acknowledgment that higher levels of government have a duty to intervene when local government functions in a defective or deficient manner which compromises its autonomy and integrity.<sup>28</sup>

[78] Although municipal councils have original legislative and executive authority, such authority has to be exercised subject to the national and provincial legislation as provided for in the Constitution.<sup>29</sup>

[79] Section 139(1) of the Constitution provides that if a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking appropriate steps to ensure the discharge of that obligation.

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<sup>26</sup> Section 160(1)(d) reads as: 'A Municipal Council may employ personnel that are necessary for the effective performance of its functions.'

<sup>27</sup> (CCT115/18) [2019] ZACC 43; 2020(2) BCLR 136 (CC)

<sup>28</sup> *Ex Parte Chairperson of The Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996(4) SA 744 (CC) at para 373

<sup>29</sup> Section 151(3) of the Constitution. See also *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at para 59.

- [80] Sections 155(6)(b) and 155(7) of the Constitution authorises and mandates the provincial government to promote the development of local government capacity to perform their functions and to manager its own affairs and to ensure the effective performance by municipalities of their functions by regulating the exercise by municipalities of their executive authority.
- [81] It is undeniable that there is an alarming increase in the instances of maladministration within municipalities. The Local Government: Municipal Systems Amendment Act, Act 7 of 2011, which included section 56(1)(c), was introduced to address this situation and to ensure that the appointment of municipal managers and managers directly accountable to municipal managers be governed by professional qualifications, experience and competence and not by political party affiliation.<sup>30</sup>
- [82] The MEC is not prescribing requirements or criteria for the appointment of acting senior managers. Furthermore, the MEC is not limiting or restricting the Municipality's power to identify, shortlist and interview candidates for the acting appointment of senior managers. The MEC is simply discharging his monitoring role by ensuring that persons appointed as acting senior managers do not act for a longer period than prescribed by section 56(1)(c) and that permanent appointments are promptly and efficiently made. This would further the achievement of the Municipality's objects set out in section 152(1)(a) to (c) of the Constitution.<sup>31</sup>
- [83] The discharge of the MEC's monitoring role to ensure compliance with the provisions of section 56(1)(c) does not amount to an encroachment on the

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<sup>30</sup>*SAMWU v Minister of Co-Operative Governance & Traditional Affairs and Others* (CCT 54/16) [2017] ZACC 7; 2017 (5) BCLR 641 (CC) (9 March 2017) at para [4]

<sup>31</sup> Section 152(1) of the Constitution provides that: *'The objects of local government are-*  
(a) *to provide democratic and accountable government for local communities;*  
(b) *to ensure the provision of services to communities in a sustainable manner;*  
(c) *to promote social and economic development.'*

Municipality's sphere of influence and is consistent with its Constitutional duties owed to local government and the principles of co-operative governance and intergovernmental relations.

[84] Therefore, the Municipality's constitutional challenge to section 56(1)(c) must fail.

### **The Appointment Regulations of 2014**

[85] Competence-based appointments are necessary to enhance the quality of appointment decisions and ensure that municipalities perform and discharge their functions responsibly, competently, and effectively. The commitment to competence based appointments is encapsulated in regulation 6 of the Appointment Regulations which affirms that that one of the principles of recruitment, selection and appointment is that *'selection must be competence-based to enhance the quality of appointment decisions and to ensure the effective performance by municipalities of their functions.'*

[86] In accordance with the provisions of section 56(1)(b) of the Systems Act, a person appointed in terms of section 56(1)(a)(ii) must have the prescribed skills, expertise, competencies and qualifications. As shown above, prescribe means prescribed by regulation or guidelines in terms of section 120 of the Systems Act, unless inconsistent with the context. The Local Government: Regulations on Appointments and Conditions of Employment of Senior Managers, 2014 were made in terms of section 120 of the Systems Act (***'The 2014 Appointment Regulations'***). Regulation 9(2) of the 2014 Appointment Regulations provides that (a) a person appointed as a senior manager in terms of the regulations must have the competencies set out in annexure A and (b) must comply with the minimum requirements for higher education qualification, work experience and knowledge set out in annexure B.

- [87] Item 5 of annexure B, states that a person appointed as a CFO must have the higher education qualification, work-related experience and other requirements as prescribed under the Local Government: Municipal Regulations on Minimum Competency Levels, 2007 (**'the Competency Regulations'**). In terms hereof a person appointed as the CFO must have at a post graduate degree or qualification in the fields of accounting, finance or economics registered on the national qualifications framework at NQF level 8 with a minimum of 120 credits or chartered accountant. The Municipality does not dispute that Sotshede does not have these requirements.
- [88] Item 7 of annexure B provides that the DCS must have a bachelor degree in Public Administration/Management Sciences/Law; or equivalent and must have 5 years' experience at middle management level and have proven management experience in administration.
- [89] The Municipality contends that the Local Government: Municipal Systems Amendment Act 7 of 2011 came into force on 5 July 2011 (**'the Amendment Act'**). Section 11 hereof sought to introduce section 72(1)(gB) into the Systems Act and that the Appointment Regulations were promulgated in accordance with section 72(1)(gB) and 120(1)(a) of the Systems Act. On 9 March 2017, the Constitutional Court confirmed the declaration of invalidity of the Amendment Act by the Gauteng High Court Division (sitting at Pretoria).<sup>32</sup> This declaration of invalidity was suspended for 24 months. On 9 March 2019, the Amendment Act was not valid, and the provisions it inserted into the Systems Act, including section 72(1)(gB) fell away. The Municipality argues that as the Appointment Regulations were dependent on the validity of section 72(1)(gB) read with section

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<sup>32</sup> *SAMWU v Minister of Co-Operative Governance and Traditional Affairs* 2017 (5) BCLR 641 (CC); [2017] ZACC 7 (9 March 2017)

120(1)(a), it too fell away on 9 March 2019 and could not be relied thereon anytime thereafter.

[90] In *Member of the Executive Council Local Government Environmental Affairs and Development Planning, Western Cape v Prince Albert Municipality and Another*<sup>33</sup> (***MEC v Prince Albert***), a full bench of this Division found that:

*'[33] After applying the approach set out in Natal Joint Municipal Pension Fund v Endumeni Municipality and Cool 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.'*

[91] As can be seen from the above paragraph, a Full Bench determined that the invalidity of the Amendment Act did not affect the validity of the appointment regulations.

[92] In addressing the decision of the court in *MEC v Prince Albert*, the Municipality argues that that Full Bench was not asked to perform an audit of the Regulations *in toto* and that the statements in paragraph 33 of the judgment (quoted above) cannot be taken as judicial imprimatur that all other provisions in the Regulations are also valid.

[93] There is no merit in this argument. A proper reading of the judgment in *MEC v Prince Albert* indicates that the court determined whether or not the appointment regulations remained valid after the declaration of constitutional invalidity of the

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<sup>33</sup> WCC: A231/2020. The matter was heard on 23 July 2021 and judgment was handed down on 21 September 2021.

Amendment Act. This is the same argument presented by the Municipality in this case, namely that the appointment regulations did not survive the declaration of invalidity of the Systems Amendment Act. The decision of in *MEC v Prince Albert* is dispositive of this argument.

[94] As *MEC v Prince Albert* was a decision of the Full Bench, it is binding on this court.<sup>34</sup>

### **The condonation application: the challenge to the appointment regulations**

[95] The Municipality submits that the promulgation of the Appointment Regulations was not merely the detailing of practical issues but was in fact an exercise of executive power by the Minister. Consequently, PAJA would not be applicable in respect of the Municipality's challenge to the Appointment Regulations. The Municipality relies on the principle of legality to challenge the Appointment Regulations.

[96] In the event that PAJA does apply to its challenge, the Municipality acting with an abundance of caution, sought condonation in terms of section 9(1) of PAJA.

[97] In accordance with PAJA, the challenge to the Appointment Regulations had to have been brought within a reasonable time and no later than 180 days after the Municipality became aware of the promulgation of the Appointment Regulations and the reasons therefor or after it might reasonably have been expected to have become aware thereof and the reasons.

[98] As the Municipality argues that the Appointment Regulations were invalidated since 9 March 2019, it should have instituted its challenge 180 days after 9

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<sup>34</sup> *Turnbull-Jackson v Hibiscus Court Municipality and Others* 2014 (6) SA 592 (CC)



March 2019. It is common cause that it did not do so and that the counter-application was instituted during April 2023.

[99] In support of its condonation application, the Municipality states that the MEC has not previously relied upon the Appointment Regulations to question or to challenge the acting appointment of senior managers since 9 March 2019. The MEC relied upon the 2014 Regulations for the first time in the Sotshede application.

[100] Consequently, the Municipality states that in the circumstances, it could not have reasonably have been expected to bring a challenge to the Appointment Regulations at a previous time as such a challenge would have been entirely abstract and would not have related to any live dispute.

[101] The Municipality also argues that if it is not permitted to bring a challenge to the Appointment Regulations, it would result in the Appointment Regulations being insulated from judicial scrutiny and that this would not be in the interests of justice. Furthermore, it would be contrary to the principle that unlawful action must be set aside when the source of that unlawfulness is clear.

[102] The Minister does not oppose the Municipality's condonation application.

[103] The MEC disputes that these proceedings provided the Municipality with the earliest occasion to challenge the Appointment Regulations. In support of this opposition the MEC states that the validity of the Appointment Regulations was the very issue which had to be determined in *MEC v Prince Albert*. However, the MEC's reliance on *Prince Albert* is misplaced as the Municipality was not involved in that case.

[104] The MEC alleges that the Municipality was afforded an opportunity to challenge the validity of the Appointment Regulations when its efforts to introduce a Scarce Skills and Retention Policy was resisted and culminated in litigation in 2019 with the Council passing a resolution not to oppose such litigation in February 2020. However, this decision to abide arose from concerns that the underlying resolution pertaining to the Scarce Skills and Retention Policy was defective.

[105] It cannot be disputed that the challenge to the Appointment Regulations raises issues of public importance and could have wide-ranging consequences. The issues surrounding this challenge have been fully ventilated.

[106] The MEC does not allege any particular prejudice should the condonation application be granted.

[107] In the circumstances, I am of the view that it would be in the interests of justice to grant the condonation application for the late challenge to the validity of the Appointment Regulations.

[108] In its affidavit<sup>35</sup> addressing the relief sought in the counter-application pertaining to the Appointment Regulations, the Municipality stated that it sought the declaratory relief as a collateral, or defensive, challenge to the MEC's attempt to exercise coercive powers relying on the Appointment Regulations.

[109] The basis on which it sought the relief was that the Appointment Regulations became unlawful as the empowering provision (section 72(1)(gB)) fell away. Consequently, the Appointment Regulations became untethered to any provision in the Systems Act and are ultra vires.

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<sup>35</sup>The affidavit served as the answering affidavit in the main application as the founding affidavit in the counter-application.

[110] As shown above, a Full Bench of this Division found that the Appointment Regulations remained valid after the Systems Amendment Act was declared invalid. Furthermore, the Full Bench determined that the Appointment Regulations were validly made in terms of section 72 read with section 120 of the Systems Act. This is dispositive of the declaratory relief sought by the Municipality in its counter-application.

### **Does the Regulations apply to acting appointments?**

[111] The Municipality argues that the Appointment Regulations do not apply to acting appointments and that it only applies to permanent appointments.

[112] In support of its argument, the Municipality argues that the Appointment Regulations (which references and renders the Competency Regulations applicable) are not applicable to acting appointments. If it were, then the provisions of chapter 3 of the Appointment Regulations would have to apply to acting appointments and this cannot as it would entail that an acting appointment could only be made after the procedure prescribed in chapter 3 of the Appointment Regulations have been complied with. Included in this procedure is the advertising of the post in a national and provincial newspaper, the compilation of a selection committee and an interview process. It could not have been intended for this detailed procedure to be applicable to stop gap acting appointments.

[113] Furthermore, the Municipality references the Municipal Finance Management Act (**'MFMA'**). In the MFMA, it is only the position of an *accounting officer* which is expressly defined to include an acting appointment. No other designation or position includes an acting appointment as in the case of an accounting officer.

Therefore, the Municipality argues that the Competency Regulations do not apply to acting appointments, other than to that of an accounting officer.

[114] The Appointment Regulations define '*senior manager*' as '*a municipal manager or acting manager appointed in terms of section 54A of the Act, and includes a manager directly accountable to a municipal manager appointed in terms of section 56 of the Act.*'

[115] Section 56(1) pertains to the appointment of (i) managers directly accountable to the municipal manager or (ii) an acting manager who is directly accountable to the municipal manager.

[116] Regulation 2 of the Appointment Regulations, which is headed '*scope of application*' states that it applies to municipalities, municipal entities and senior managers. Regulation 2(2) states that the Appointment Regulations must be read in conjunction with any regulations or guidelines issued in terms of section 120 of the Act concerning matters listed in section(s) 54A, 56, 57A and 72. Further, the Appointment Regulations must also be read in conjunction with the Competency Regulations.

[117] Regulations 6 of the Appointment Regulations which set out the principles for recruitment provides that the recruitment, selection and appointment of senior managers must take place in accordance with the procedures provided for in section 67 of the Systems Act and must be consistent with sections 54A, 56, 57A and 72 of the Act.

[118] Therefore, in light of:

- (i) the definition of *senior managers* contained in the Appointment Regulations;

- (ii) the directive that the Appointment Regulations must be read in conjunction with the Competency Regulations;
- (iii) the appointment principles set out in regulation 6 that the recruitment, selection and appointment of senior managers must take place in accordance with the procedures provided for in section 67 of the Systems Act and must be consistent with sections 54A, 56, 57A and 72 of the Act; and
- (iv) the direct incorporation of the Competency Regulations in respect of the position of CFO,

I am of the view that the Appointment Regulations, which includes reference to and incorporation of the Competency Regulations, are applicable to the position of acting senior managers appointed in terms of section 56 of the Systems Act.

[119] Paragraph 5 of annexure B of the Appointment Regulations directly incorporates the Competency Regulations in respect of the position of a CFO by providing that: *'The higher education qualification, work-related experience and other requirements for the position of chief financial officer are as prescribed under the Local Government: Municipal Regulations on Minimum Competency Levels, 2007, issued in terms of the Municipal Finance Management Act, as published under Government Notice 493 in Government Gazette 29967 of 15 June 2007.'*

[120] Therefore, Sotshede had to have had the higher education qualification and work-related experience prescribed by the Competency Regulations in order to lawfully have been appointed as the acting CFO. As Sotshede does not have the prescribed minimum higher education qualification, her appointment as the acting CFO contravenes section 56(1)(b) of the Systems Act.

[121] The MEC invoked regulation 7 of the Competency Regulations to challenge the acting appointment of Loliwe. However, regulation 7 of the Competency

Regulations do not set out the prescribed minimum competencies applicable to Loliwe. The applicable regulation is regulation 9 of the Appointment Regulations read with item 7 of annexure B, which sets out the prescribed minimum higher education qualification and work-related experience required for an appointment as the acting DCS.

[122] As the MEC has failed to show that Loliwe does not meet these prescribed minimum competency requirements, it cannot be found that Loliwe's appointment contravenes section 56(1)(b) of the Systems Act.

### **Does The MEC Have Standing To Enforce The MFMA Competency Regulations?**

[123] The Municipality argues that the MEC lacks standing to rely on the MFMA for the relief sought as he expressly brought the application by relying on *inter alia* sections 56(6) and 105 of the Systems Act.

[124] Section 105 provides for the provincial monitoring of municipalities.

[125] As seen from section 56(6), the MEC is obliged to take appropriate steps to enforce compliance with the Systems Act. He has no discretion in this regard. This much is clear from the use of the word '*must*' in section 56(6).

[126] As set out above, the Competency Regulations are applicable to the appointment of acting CFOs in terms of section 56 of the Systems Act. Therefore, if the appointment of an acting CFO in terms of section 56 does not comply with the provisions of the Systems Act by virtue of its non-compliance with the Competency Regulations, the MEC is statutorily obligated to take steps to enforce compliance with the Systems Act, and this may include approaching the courts for declaratory orders.

[127] Section 139(1) of the Constitution provides that:

*'When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation...'*

[128] Section 139(1) of the Constitution clothes the MEC with the standing to take **any** appropriate steps to ensure compliance with its Constitutional duties and legislative obligations such as complying with the Systems Act.

[129] Therefore, I am of the view that the MEC does have standing to enforce the competency regulations insofar as it is necessary to enforce compliance with the Systems Act.

### **The applications to amend**

[130] Amendments are governed by Rule 28 of the Uniform Rules of Court. Rule 28(10) provides that the court may, notwithstanding anything to the contrary in Rule 28, at any stage before judgement grant leave to amend.

[131] In *Affordable Medicines Trust and Others v Minister of Health and Others*<sup>36</sup> the Constitutional Court held that amendments to pleadings and notices of motion will generally be allowed if to do so would be in the interests of justice. It held that amendments will always be allowed unless the amendment is brought in bad faith or unless the amendment will result in an injustice to the other side which cannot be cured by an appropriate cost's order, or unless the parties cannot be put back for the purposes of justice in same position as they were when the pleading it sought to amend was filed.<sup>37</sup>

[132] The MEC has brought three applications seeking leave to amend the relief sought pertaining to Sotshede. In the first application the MEC seeks leave to

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<sup>36</sup> 2006 (3) SA 247 (CC)

<sup>37</sup> At para [9].

include an alternative ground on which to have Sotshede's acting appointment declared invalid and unlawful. In terms of this alternative ground, the MEC seeks to have the appointment set aside for contravening the competency regulations.

[133] This application is opposed by the Municipality, which argues that the application to amend was brought in an effort to '*relieve the pinch of the shoe*'. The MEC argues that the first application to amend was necessitated by the relief sought in counter-application brought by the Municipality.

[134] In opposing the first application for leave to amend, the Municipality has made a general averment that it would be prejudiced if the amendment was granted. However, it has not set out nor identified any specific prejudice which it would suffer and which could not be cured by an appropriate costs order if the application was to be granted.

[135] The applicability and impact of regulation 5 of the Competency Regulations on Sotshede's appointment as acting CFO have been fully canvassed by the parties and no prejudice would result from this amendment.

[136] Further, as the papers filed on record addressed the issue of regulation 5 of the Competency Regulations, it cannot be said the application to amend was brought in bad faith.

[137] The second application to amend was brought after the hearing on 5 May 2023. In this application the MEC seeks to amend its Notice of Motion by inserting new paragraphs 2A and 2B which provide that:

'2A     *It is declared that section 56(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 precludes a municipal council from –*



2A.1 *appointing a person as an acting manager directly accountable to the municipal manager for a period that exceed three months; and*

2a. *re-appointing a person as an acting manager directly accountable to the municipal manager when that person has acted in the relevant position for three months, save where the MEC for local government has extended the appointment for a further period that does not exceed three months on written application by the municipal council, on the basis of special circumstances and good cause.*

2B *It is declared that a person appointed as the acting chief financial officer of a municipality must comply with the minimum competency levels prescribed by regulation 5 of the Municipal Regulations on Minimum Competency Levels, 2007, published under GN R493 in GG 29967 of 15 June 2007, as amended by GN 1146 in GG 41996 of 26 October 2018.'*

[138] At the conclusion of the hearing on 5 May 2023, the MEC's legal representative requested that judgment be handed down by the 15 May 2023. However, the parties were advised that judgement would be reserved and that it could not be guaranteed that judgment would be handed down by 15 May 2023.

[139] This resulted in the MEC bringing the second amendment application as the impugned acting appointment of Sotshede was due to come to an end on 15 May 2023. In light hereof, the second amendment application was brought to address the contingency that the relief sought may have become moot and therefore not capable of determination at the time the court delivered its judgment.

[140] The MEC avers that the amended relief it seeks will not prejudice the respondents as it is sought on the same basis on which the current relief was

sought and it was fully canvassed on the papers. As Sotshede has been appointed for a further term, the Municipality argues that there is no longer a basis on which to seek the second amendment.

[141] In the third application to amend, the MEC seeks leave to broaden the relief sought in paragraph 2 of its notice of motion to include the resolution taken on 11 May 2023.

[142] The proposed amended relief would read as:

*'that the resolution taken by the Council of Knysna Municipality on 14 February 2023 and for 11 May 2023 to appoint the fourth respondent as as the acting chief financial officer of the first respondent is<sup>38</sup>:*

*(b)(i) declared to be unlawful, ultra vires, and null and void by virtue of its contravention of section 56(1)(c) of Local Government Municipal Systems Act, Act 32 of 2000 (**'the Systems Act'**);*

*(b)(ii) declared to be unlawful, ultra vires, and null and void by virtue of it contravention of section 56(1)(b) of the Systems Act, [alternatively (b) their contravention of Regulation 5 of the Municipal Regulations on Minimum Competency Levels, 2007, published under GN r493 in GG 29967 of 15 June 2007, as amended by GN 1146 in GG 41996 of 26 October 2018]<sup>39</sup>; and*

*(b)(iii) reviewed and set aside...'*

[143] The Municipality argues that the third amendment application renders the second amendment application superfluous.

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<sup>38</sup> The proposed amendment sought in the third amendment application is in bold.

<sup>39</sup> The alternative relief in [ ] is the proposed amended relief sought in the first amendment application.

[144] A study of the amendment sought in the second amendment application will show that no new issues are raised thereby. On the contrary, the relief sought flow from the interpretation of section 56(1)(c) and from a finding that the Competency Regulations are applicable to the appointment of an acting CFO. These issues were fully ventilated and canvassed by the parties.

[145] Furthermore, it is not alleged that the second amendment application is brought in bad faith or that it would cause an injustice to the Municipality which cannot be cured by a costs order.

[146] Therefore, the second amendment application is granted.

[147] The third amendment application is not opposed by the Municipality who argued that it made the second amendment application superfluous. The third application to amend seeks to include the resolution taken by the Council to appoint Sotshede on 11 May 2023 as the acting CFO in the declaratory relief it seeks. It does not give effect to the consequences which flow from the interpretation of section 56(1)(c) and from the finding that the Competency Regulations are applicable to the acting appointments of senior managers made in terms of section 56 of the Systems Act.

[148] The Municipality argues that the proposed third amendment renders the second amendment application superfluous.

[149] This is not so. The third amendment pertains specifically to the resolution taken by the Council on a specific date to re-appoint Sotshede, whereas the second amendment pertains to consequences from the interpretation of section 56(1)(c) and from the finding that the Competency Regulations are applicable to the appointment of an acting CFO. There may be an overlap between the effect of

the second and third amendment applications but it cannot be said that the third amendment application renders the second amendment application superfluous.

[150] As it cannot be said that the third amendment application runs afoul of the legal principles applicable to amendments, and as it is unopposed, there is no reason not to grant same.

[151] Both the main and counter-applications were brought as urgent applications. When the matter was argued on 5 May 2023 none of the parties took issue with characterising the applications as urgent.

[152] Furthermore, in accordance with the provisions of section 56(6) of the Systems Act, the MEC is statutorily obliged to take appropriate steps to challenge an acting appointment made in contravention of the Systems Act within 14 days after becoming aware thereof. This speaks to the inherent urgency of such applications which was recognised in *Western Cape Provincial Minister of Local Government, Environmental Affairs and Development Planning v Central Karoo District Municipality and Others*.<sup>40</sup>

[153] Therefore, it is accepted that the bringing of both the main and counter-applications were urgent.

[154] In the circumstances, I make the following order:

- (i) the applications instituted under WCHC: 3488/2023 and WCHC: 4884/2023 are consolidated;
- (ii) the non-compliance with the forms and services provided for in Uniform Rules of Court are condoned in respect of the main and

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<sup>40</sup> (4835/2023)[2023] ZAWCHC 66 (3 April 2023) at para [1]

counter-applications instituted under WCHC: 3488/2023 and WCHC: 4884/2023;

(iii) that the resolution taken by the Council of Knysna Municipality on 14 February 2023 and on 11 May 2023 to appoint Londiwe Sotshede as the acting chief financial officer of the Knysna Municipality is:

(iii)(a) declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(c) of Local Government Municipal Systems Act, Act 32 of 2000;

(iii)(b) declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(b) of the Systems Act;

(iii)(c) declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of Regulation 5 of the Municipal Regulations on Minimum Competency Levels, 2007, published under GN R493 in GG 29967 of 15 June 2007, as amended by GN 1146 in GG41996 of 26 October 2018;

is reviewed and set aside;

(iv) it is declared that section 56(1)(c) of the Local Government: Municipal Systems Act 32 of 2000 precludes a municipal council from –

(a) appointing a person as an acting manager directly accountable to the municipal manager for a period that exceeds three months; and

- (b) re-appointing a person as an acting manager directly accountable to the municipal manager when that person has acted in the relevant position for three months, save where the MEC for local government has extended the appointment for a further period that does not exceed three months on written application by the municipal council, on the basis of special circumstances and good cause;
- (v) It is declared that a person appointed as the acting chief financial officer of a municipality must comply with the minimum competency levels prescribed by regulation 5 of the Municipal Regulations on Minimum Competency Levels, 2007, published under GN R493 in GG 29967 of 15 June 2007, as amended by GN 1146 in GG 41996 of 26 October 2018;
- (vi) the Knysna Municipality is directed to pay the costs of the main application instituted under WCHC: 3488/2023 , which costs are to include the costs of two counsel;
- (vii) the MEC's application to amend paragraph 2.2 of his notice of motion in WCHC: 3488/2023 to include the alternative relief of contravening regulation 5 of the Competency Regulations is granted;
- (viii) the MEC shall pay the costs occasioned by the amendment application set out in paragraph (vii) above;
- (ix) the MEC's application to amend his notice of motion in WCHC: 3488/2023 by adding paragraphs 2A and 2B is granted;
- (x) the MEC shall pay the costs occasioned by the amendment application set out in paragraph (ix) above;

- (xi) the MEC's application to amend his notice of motion in WCHC: 3488/2023 by adding the date of 11 May 2023 to paragraph 2 thereof is granted;
- (xii) the MEC shall pay the costs occasioned by the amendment application set out in paragraph (xi) above<sup>41</sup>;
- (xiii) in the counterclaim instituted under WCHC: 3488/2023 condonation is granted for the late bringing of the challenge to the Appointment Regulations;
- (xiv) the counterclaim is dismissed with costs;
- (xv) the resolution taken by taken by the Council of Knysna Municipality on 15 March 2023 to appoint Luvuyo Loliwe as the acting director: corporate services of the Knysna Municipality is declared to be unlawful, *ultra vires*, and null and void by virtue of its contravention of section 56(1)(c) of Local Government Municipal Systems Act, Act 32 of 2000 and is reviewed and set aside;
- (xvi) the Knysna Municipality is directed to pay the costs of the main application instituted under WCHC: 4884/2023 , which costs are to include the costs of two counsel where so employed; and
- (xvii) the counterclaim instituted under WCHC: 4884/2023 is dismissed with costs.

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**Slingers J**

**7 June 2023**

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<sup>41</sup> A copy of the amended notice of motion is attached hereto as "A".