IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 5369/18P

In the matter between:

THE MEC FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**APPLICANT**

and

THE NKANDLA LOCAL MUNICIPALITY	**FIRST RESPONDENT**
THE COUNCIL OF NKANDLA MUNICIPALITY	**SECOND RESPONDENT**
PHILEMON PHILANI SIBIYA	**THIRD RESPONDENT**

CASE NO. 5370/18P

In the matter between:

THE MEC FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**APPLICANT**

and

THE MTHONJANENI MUNICIPALITY	**FIRST RESPONDENT**
THE COUNCIL OF MTHONJANENI MUNICIPALITY	**SECOND RESPONDENT**
LANGELIHLE SIPHIWOKUHLE JILI	**THIRD RESPONDENT**

Coram: Koen J

Heard: 26 November 2018 and 7 February 2019.

Delivered: 21 February 2019.

O R D E R

The following order is granted in each of the above applications:

(a) The appointment of the third respondent as municipal manager of the first respondent by second respondent is declared to be invalid and null and void for not being in compliance with the provisions of s 54A(3) of the Local Government: Municipal Systems Act 32 of 2000 and the regulations issued thereunder.

(b) The setting aside of the third respondent's appointment pursuant to the order in sub-paragraph (a) above shall not operate retrospectively to the date the third respondent was appointed but shall take effect from the date of this order.

(c) The respondents jointly and severally, one or more paying the others to be absolved, are directed to pay the costs of the application, such costs to include that consequent upon the employment of senior counsel.

J U D G M E N T

Koen J

Introduction

[1] The applicant claims identical relief in the two applications referred to in the heading to this judgment, in respect of the appointment of the municipal managers to the Nkandla and Mthonjaneni municipalities respectively. The relief is:

'(a) That the appointment of Third Respondent as the Municipal Manager of the First Respondent[1] by the Second Respondent[2] is declared to be invalid and is hereby set aside as null and void *ab initio.*

(b) That First Respondent (together with any Respondent who opposes this application) pays the costs of the application.

(c) Further or alternative relief'.

It is convenient to deal with both applications in one judgment as the issues arising in the two applications are in many respects similar. Where the factual circumstances differ it will be indicated.

[2] In each instance the applicant relies on the provisions of s 54(A)(8)[3] of the Local Government: Municipal Systems Act 32 of 2000 ('the Systems Act') in applying to have the third respondent's appointment declared invalid and set aside as null and void *ab initio.* The legal basis for such relief is that the first respondent does not have the power and authority to appoint a municipal manager in contravention of s 54A(3) of the Systems Act. It is alleged in each application that the first respondent exceeded its powers[4] in appointing the third respondent as the third respondent as a matter of fact does not have the prescribed five years relevant experience at senior management level specified by item 2 of Annexure B to the 2014 regulations to the Systems Act.[5]

Legislative framework

[3] The provisions of s 54A of the Systems Act must be viewed in the greater constitutional and legislative context.

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[1] The respective municipalities.

[2] The respective municipal councils.

[3] The provisions of s 54A were declared to be unconstitutional in *South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs* [2017] ZACC 7: 2017 (5) BCLR 641 (CC). That declaration was however suspended for a period of 24 months, which period runs from 9 March 2017. The provisions of s 54A accordingly still apply and more importantly applied at the time of the appointment of the third respondents.

[4] *Pharmaceutical Manufacturers' Association of SA and another: In re Ex parte President of the RSA and others* 2000 (2) SA 674 (CC) confirmed that any exercise of public power, as in the present instance, must be within the confines of the law and that a court is entitled, relying on the principle of legality, to review the exercise by a functionary of public power. This principle applies to the exercise of all public power and is not limited to the narrow realm of administrative action only –see *Judicial Service Commission v Cape Bar Council* [2012] ZASCA 115; 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA).

[5] 'Local Government Regulations on Appointment and Conditions of Employment of Senior Managers', GN R21, *GG* 37245, 17 January 2014.

[4] Section 151 of the Constitution of the Republic of South Africa, 1996, ('the Constitution') provides that local government is autonomous and has executive and legislative power to govern local government affairs, subject to national and provincial monitoring and support legislation as provided in the Constitution.[6] *In re: Certification of the Constitution of the Republic of South Africa 1996*[7] confirmed that provincial government must supervise, monitor and support local government.

[5] The Systems Act provides for municipal managers to head the administration of municipalities.[8] Section 54A provides for the appointment of these municipal managers. Section 54A(1) requires that every municipal council must appoint a municipal manager as head of the administration of that municipal council.

[6] Section 54A(2) provides that a person appointed as a municipal manager 'must at least have the skills, expertise, competence and qualifications as prescribed'. The skills, expertise, competence and qualifications as prescribed pursuant to s 54A(2) are contained in the 'Regulations on Appointment and Conditions of Employment of Senior Managers 2014'. They include *inter alia* five years of relevant experience for a municipal manager (as specified in item 2[9] of Annexure B to the regulations).

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[6] See also s 151(3), 154, 155(6) and 155(6) and (7) of the Constitution.
[7] 1996 (4) SA 744 (CC) para 366 to 374.
[8] See s 54A(1).
[9] Item 2 (which is set out in a table format in the regulations) may be summarized as follows: An individual applying for the post of Municipal Manager needs to have the following in order to qualify for the position:
(a) A 'Bachelor Degree in Public Administration / Political Sciences / Social Sciences / Law; or equivalent';
(b) the following work related experience, 5 years' relevant 'experience at a senior management level and have proven successful institutional transformation within public or private sector';
(c) the successful candidate must possess the following knowledge or skills: 'advanced knowledge and understanding of relevant policy and legislation; advanced understanding of institutional governance systems and performance management; advanced understanding of council operations and delegation of powers; good governance; audit and risk management establishment and functionality; and budget and finance management.'
'Senior management level' is defined in annexure B dealing with the MINIMUM COMPETENCY REQUIREMENTS FOR SENIOR MANAGERS as ' … a management level associated with persons in senior management positions responsible for supervising staff in middle management positions, and includes –
(a) the municipal manager of a municipality or the chief executive officer of a municipal entity;
(b) any manager directly accountable to -
  (i) the municipal manager, in the case of a municipality; or
  (ii) the chief executive officer, in the case of a municipality; or
(c) a person that occupied a position in a management level substantially similar to senior management level, outside the local government sphere;
'work-related experience' means the expertise of a person or skills attained by a person whether in the course of formal or informal employment'.

[7] Provision is however made in s 54A(10) of the Systems Act that a municipality may in special circumstances and on good cause shown apply to the Minister[10] to waive any of the requirements contained in subsection (2) if it is unable to attract a suitable candidate. The section reads:[11]

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

[8] Section 54A(3) provides that:

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

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

(b) The appointment was otherwise made in contravention of this Act.'

[9] The applicant's constitutionally mandated role of supervision in regard to the appointment of municipal managers is expressly provided for in s 54A(8) which provides:

'If a person is appointed as municipal manager in contravention of this section, the MEC for local government must, within 14 days of receiving the information provided for in subsection (7),[12] take appropriate steps to enforce compliance by the municipal council with this section, which may include an application to a court for a declaratory order on the validity of the appointment, or any other legal action against the municipal council.'

[10] Section 54A(9) provides that where an MEC for local government fails to take appropriate steps as contemplated in subsection (8) then the Minister may take the steps contemplated in that subsection.[13]

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[10] The Minister designated in the Systems Act is the Minister of Local Government and Traditional Affairs.

[11] The wording of this subsection would suggest that such a waiver must be sought before an appointment is made. In both matters an application for a waiver was only suggested and sought after the appointment was made. For the purposes of this judgement I shall assume without deciding the issue that a subsequent application for a waiver as part of 'the appropriate steps that may be taken' would be competent.

[12] Section 54A(7) requires that a municipal council must within fourteen days inform the MEC for local government of the appointment process and outcome, as may be prescribed and that the MEC for local government must, within fourteen days of receipt of the information aforesaid submit a copy thereof to the Minister responsible for local government.

[13] Henriques J in *MEC for Co-operative Government and Traditional Affairs v Imbabazane Municipality and Others* (Case No 5238/12, unreported, KwaZulu-Natal High Court, Pietermaritzburg, dated 24 March 2017) and *MEC for Co-operative Government and Traditional Affairs v Ntambanana*

The basis of the applicant's claims

[11] In respect of the appointment of each municipal manager the applicant alleges in the respective founding affidavits, with reference to relevant correspondence annexed thereto, that the third respondent as a matter of fact does not have the required five years' senior management experience; specifically in the case of:

(a) the Nkandla municipality, that the third respondent only had one year and one month's relevant experience;

(b) the Mthonjaneni municipality, that the third respondent only had some two years and four months' relevant experience.

[12] The applicant's claim in each application is firmly founded in s 54A(8) read with s 54A(2) and (3), to give effect to the principle of legality. The principle of legality is of course not a self-standing discreet ground for review but a founding principle of our Constitution.[14] The applicant seeks to ensure that the respective first respondents act within their powers and that they do not exercise their powers unconstitutionally.

The third respondents' lack of experience

[13] In regard to the Nkandla municipality, the third respondent's lack of experience was not disputed. If anything the lack of such experience was admitted, at least impliedly, by the conduct of the respondents. When confronted with the lack of experience on the part of the third respondent, application was made to the

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Municipality and Another (unreported, Case No 8793/13, KwaZulu-Natal High Court, Pietermaritzburg dated 30 May 2014) reiterated that this is a specie of the power of intervention provided for in s139 of the Constitution. This is necessarily so because of s 155 of the Constitution and s 139 being the only means of intervention - see also *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) at paras 44 and 64 to 66 and N Steytler and J De Visser *Local Government Law of South Africa* (October 2018 – Issue 11).

[14] Chaskalson CJ in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and others* 2005 (3) SA 280 (CC) said that the legality principle infuses all our law and does not mean that it is a right enforceable on its own. At para 21 it was held that: 'The values enunciated in s 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of s 1 itself, but also from the way the Constitution is structured and in particular the provisions of ch 2 which contains the Bill of Rights.'

Minister[15] for a relaxation of the requirement.[16] The attitude taken was not that such an application was not required, as the third respondent indeed has the required experience. In the communication from the Minister dated 14 July 2017 refusing to relax the experience requirement, the Minister recorded that there were 23 applicants for the position of municipal manager, and that 8 of those met the required qualifications and experience.

[14] In regard to the Mthonjaneni municipality, the third respondent's lack of relevant experience was not disputed seriously either. Instead the gravamen of the matter was said to be whether the requirement of 5 years relevant experience was peremptory or merely directory. This argument was formulated in the founding affidavit by posing a number of rhetorical questions. It was rightly not persisted with in oral argument. The requirement of five years' relevant experience is plainly peremptory. Any experience less than that prescribed will be inadequate unless specifically waived on application to the Minister in exceptional circumstances. The fact that there is a provision providing that the Minister may grant a specific waiver in exceptional circumstances does not make the requirement, insofar as it concerns municipalities and the applicant directory only. The municipalities and the applicant have no discretion in the matter. That is clear from the wording of s 54A and the relevant regulations. Absent the relevant experience, or a waiver thereof (or a successful court challenge to the refusal to grant such a waiver by the Minister), 5 years' senior management level experience is required. Apart from this challenge that the requirement was not peremptory, no serious challenge was raised in the papers that the third respondent did not have the required experience. That disqualified him from appointment. The third respondent's lack of prescribed experience is accordingly established.

The jurisdiction of this Court[17]

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[15] In this case, 'Minister' is defined in s 1 of the Systems Act as the 'Minister responsible for local government'; this position is currently held by the Hon Dr Zweli Mkhize (previously and at the relevant time the Hon Mr D van Rooyen) as the Minister for the Department of Cooperative Governance and Traditional Affairs (CoGTA).

[16] In terms of s 54A(10) quoted earlier in this judgment.

[17] This was the primary ground of objection pursued in argument. As in *Mawonga and another v Walter Sisulu Local Municipality and others* [2018] ZAECGHC 142; [2019] 2 BLLR 196 Lowe J held at para 18 that this issue 'is central to the ability to pronounce upon the remaining merit issue'.

[15] In each application, the primary defence raised is that the High Court has no jurisdiction to entertain the applications because the issue raised is 'quintessentially' a labour matter in respect of which the Labour Court exercises exclusive jurisdiction. The applicant's response thereto is that the application is one in terms of s 54A(8), that the issue is not an employment matter but a matter of whether the first respondent has exercised its powers legally, and accordingly that the High Court does have the requisite jurisdiction.

[16] The High Court would generally have jurisdiction to enforce a right such as that contained in s 54A(8) expressly accorded to the applicant in the exercise of her constitutional functions. The issue more specifically is whether the High Court has been deprived of that jurisdiction, which it would be if the Labour Court has been vested with exclusive jurisdiction to adjudicate the exercise of that right.

[17] The jurisdiction of the Labour Court is dealt with in the Labour Relations Act 66 of 1995 (the 'LRA').

[18] Section 157 of the LRA provides:

'(1) Subject to the Constitution and section 173, and except where *this Act* provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of *this Act* or in terms of any other law are to be determined by the Labour Court. (my underlining)

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from—

(*a*) employment and from labour relations;

(*b*) any *dispute* over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and

(*c*) the application of any law for the administration of which the *Minister* is responsible..[18]

[19] Section 158 of the LRA provides:

'(1) The Labour Court may—

(*a*) make any appropriate order, including—

[18] In *Chirwa v Transnet Limited and others* 2008 (3) BCLR 251 (CC); 2008 (4) SA 367 (CC) it was held that s 157(2) does not confer concurrent jurisdiction on the High Court, but confers concurrent jurisdiction on the Labour Court where the High Court has jurisdiction, i.e. those matters that arise out of the Bill of Rights with respect to employment and labour relations. See also *Grootboom v National Prosecuting Authority and another* 2014 (1) BCLR 65 (CC); 2014 (2) SA 68 (CC).

(i) the grant of urgent interim relief;

(ii) an interdict;

(iii) an order directing the performance of any particular act which order, when implemented, will remedy a wrong and give effect to the primary objects of *this Act*;

(iv) a declaratory order;

……

(*h*) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;

(*i*) …

(*j*) deal with all matters necessary or incidental to performing its functions in terms of *this Act* or any other law.'

[20] In considering the jurisdiction of this Court, I am mindful of the comments in *Chirwa v Transnet Ltd and others*[19] that the objective in the LRA was to 'establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA'. In *Motor Industries Staff Association v Macun NO*[20] Navsa J elaborated as follows:

'The Labour Court and Labour Appeal Court were designed as specialist courts that would be steeped in workplace issues and be best able to deal with complaints relating to labour practices and collective bargaining. Put differently, the Labour and Labour Appeal Courts are best placed to deal with matters arising out of the LRA. Forum shopping is to be discouraged. When the Constitution prescribes legislation in promotion of specific constitutional values and objectives then, in general terms, that legislation is the point of entry rather than the Constitutional provision itself.'

[21] As a statement of general principle the dicta in the preceding paragraph are no doubt correct. But ultimately every case must be assessed on its own facts.

[22] Apart from contending that the relief claimed by the applicant will, as a consequence of the grant thereof, impact on the third respondent's employment and hence is 'quintessentially' a 'labour matter'[21] the respondents have relied on s 158(1)(*h*), as being a provision 'elsewhere in terms of this Act' as contemplated in s

[19] 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC) para 123.

[20] [2015] ZASCA 190; 2016 (5) SA 76 (SCA); [2016] 3 BLLR 284 (SCA) para 20.

[21] This was the language used in *Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC) which concerned the review of a failure to promote a police official to a promotion post. On that basis it was held not to be administrative action. Generally employment and labour relationship issues do not amount to administrative action within the meaning of PAJA – see *Minister of Defence and others v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA).

157(1) of the LRA which, it is argued, confers exclusive jurisdiction on the Labour Court.[22]

[23] In *Gcaba v Minister for Safety and Security*[23] it was held that where a court's jurisdiction is challenged *in limine* at the outset, the pleadings and, in motion proceedings, also the contents of the supporting affidavits, must be interpreted 'to establish what the legal basis of the applicant's claim is.' If, 'properly interpreted', that enquiry establishes that the applicant is asserting a claim within the exclusive jurisdiction of the Labour Court, then the High Court would lack jurisdiction.

[24] Since *Gcaba*, my judgment in *Valuline CC and others v Minister of Labour and others*[24] was subjected to scrutiny[25] in *Macun*, which in turn was followed in *South African Municipal Workers Union and others v Mokgatla and others*.[26]

[25] In *Macun* Navsa JA commented that

'[18] … The Constitutional court has put it beyond doubt that the primary objective of [the Labour Relations] Act was to establish a comprehensive legislative framework regulating labour relations. An allied objective expressly stated in the preamble to the LRA was to "Establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to *decide matters arising from the [LRA]."* [emphasis in original text]

[Accordingly] in *Chirwa*, Ngcobo J indicated that in the light of what is set out above, section 157(2) has to be narrowly construed and that it should be confined to issues where a party relies directly on the provisions of the Bill of Rights.

[23] … The powers and functions of the Labour Court set out in section 158 of the LRA may, depending on the power, be exercised both in respect of its exclusive jurisdiction, as provided for in section 157(1), or in respect of its concurrent jurisdiction with the high court, as provided for in section 157(2). So, for example, an interdict as provided for in section 158(1) or a declaratory order, may issue in respect of a purely labour related matter or in respect of a case brought before the labour court premised on the alleged or threatened violation of a right entrenched in Chapter 2 of the Constitution. <u>The provisions of section 158(1)(*g*) on their own are not decisive. In the present case the question that should rightly be asked is whether the basis of the challenge to the decision</u> to extend the collective agreement <u>is one that arises out of the LRA. The obvious answer is that it does.'</u>

(my emphasis)

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[22] I shall return to the provisions of s 158(1)(h) below.
[23] 2010 (1) SA 238 (CC) para 75.
[24] [2013] ZAKZPHC 9; 2013 (5) BCLR 589 (KZP); 2013 (4) SA 326 (KZP).
[25] My judgment in *Valuline* n24 was not subjected to an appeal.
[26] [2016] ZASCA 24; [2016] 2 All SA 451 (SCA); 2016 (5) SA 89 (SCA).

[26] It is against that background that s 54A(8) of the Systems Act is significant. It firstly vests the applicant with the required *locus standi* to take appropriate steps where a municipal manager is appointed in contravention of s 54A. The applicant accordingly need not establish some interest in the litigation, such as a rate payer in that municipality, or a non-governmental interest group would have to establish.[27] The applicant can simply invoke s 54A(8). Secondly, s 54A(8) provides for the legal process that the applicant ultimately[28] may wish to pursue as part of the steps considered 'appropriate', if other interventions fail, namely an application to court. Thirdly, it prescribes the remedy the applicant may claim, namely a declaratory order as to the validity of the municipal manager's appointment, which will entail reviewing[29] the decision of the municipal council. But most importantly s 54A provides the legal right and hence the basis of the challenge to the decision to appoint the third respondent, which, if established, gives rise to the remedy. It provides the basis for a challenge to a municipal manager's appointment, namely whether the second respondent had acted within its constitutional powers.

[27] The present challenge therefore does not arise out of the LRA, but from the provisions of the Systems Act. All that the applicant seeks to do, in carrying out her supervisory role, is to prevent unlawful conduct by the municipalities, specifically the appointment of persons as municipal managers if they do not have the required experience. It is a right not arising from the LRA. The issue raised is not one where specific remedies provided for in the LRA, such as conciliation and the like, or the rights flowing from an unfair labour practice might arise and should be available to the respective third respondents. The basis of the challenge is found squarely within the provisions of s 54A of the Systems Act and it is confined to the lawfulness of the respective first respondent's decisions, taken by their respective councils, to select the respective third respondents as their municipal managers.

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[27] The requirements to establish own interest standing in a legality challenge was dealt with in the judgment of Cameron J in *Giant Concerts CC v Rinaldo Investments (Pty) Limited and others* 2013 (3) BCLR 251 (CC) where he said "hence, where a litigant acts slowly in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown."

[28] I say 'ultimately' having regard to the provisions of s 41 of the Constitution and the provisions of the Intergovernmental Relations Framework Act 13 of 2005.

[29] Mr Dickson SC for the applicant preferred to avoid the use of the word 'review' and argued that it was simply an application for a declaratory order. In my view nothing turns on the use of the word 'review', which I believe it is.

[28] As was stated by Lowe J in *Mawonga and another v Walter Sisulu Local Municipality and others*[30] in regard to a similar jurisdictional challenge in an application to impeach the appointment of a municipal manager, the argument that the High Court lacks jurisdiction '…misses the fundamental point that what Applicant seeks to do is challenge a decision which he contends was statutory and procedurally flawed – a legality issue… it seems to me that the jurisdiction argument surely overlooks that the essence of this matter, as pleaded, is a legality (procedural) review which stands on its own regardless that this led to a dismissal.'

[29] In *Gcaba supra*[31] it was held that:

'[T]he LRA does not intend to destroy causes of action or remedies and s 157 should not be interpreted to do so. Where a remedy lies in the High Court, s 157(2) cannot be read to mean that it no longer lies there and should not be read to mean as much. Where the judgment of Ngcobo J in *Chirwa* speaks of a court for labour and employment disputes, it refers to labour- and employment-related disputes for which the LRA creates specific remedies. It does not mean that all other remedies which might lie in other courts, like the High Court and Equality Court, can no longer be adjudicated by those courts. If only the Labour Court could deal with disputes arising out of all employment relations, remedies would be wiped out, because the Labour Court (being a creature of statute with only selected remedies and powers) does not have the power to deal with the common-law or other statutory remedies.'

[30] Subsequent to *Chirwa* the SCA, in slightly different circumstances, but nevertheless significantly found in *Makhanya v University of Zululand*[32] that:

'.. the claim is for the enforcement of the common law right of a contracting party to exact performance of the contract. We know this because that is what it says in the particulars of claim. Whether the claim is a good one or bad one is immaterial. Nor may a court thwart the pursuit of the claim by denying access to a forum that has been provided by law. A claim of that kind clearly falls within the ordinary power of the High Court that is derived from the Constitution and the jurisdictional objection should have failed'.

[31] Post the above decisions, this issue received further attention in *Macun*, which in turn was considered in *Mokgatla*. The issue for determination in that appeal was whether the High Court and the Labour Courts have concurrent jurisdiction in

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[30] *Mawonga* n17 paras 26 and 31. The learned judge considered and for reasons given in his judgment correctly, with respect, concluded that the decision in *Mpele v Municipality Council of the Lesedi and Others* [2018] ZALCJHB 383; [2018] 12 BLLR 1192 (LC) was distinguishable.

[31] *Gcaba* n21 para 73.

[32] 2010 (1) SA 62 (SCA) para 95, see also paras 11 to 13.

respect of disputes emanating from s 158(1)(*e*) of the LRA. The judgment of the court *a quo* had declared unlawful and consequently set aside the suspension and expulsion of the respondents from their membership and employment with the first appellant, the court *a quo* having dismissed a special plea that it lacked jurisdiction to consider the application by the respondents for their reinstatement to SAMWU.

[32] Dambuza JA held (references omitted):[33]

'[14] In *Macun* this court lamented the persistent attempts by practitioners to fashion cases to suit their clients' choice of forum. Navsa JA emphasised that s 157(2) must be narrowly construed in the light of the primary objectives of the LRA to establish a comprehensive framework regulating labour relations. In relation to s 158(1)*(g)* the learned judge found that the relevant question in determining whether the Labour Court's jurisdiction was exclusive depended on whether it was a review of the exercise of a power under the LRA. In other words, did the case fall within s 158(1)*(g)*? If so, the Labour Court's jurisdiction was exclusive. The same principle is applicable here. If the case falls within s 158(1)*(e)*(i), as it does, then the jurisdiction of the Labour Court is exclusive. The decision in *Macun* is therefore decisive of the outcome of this appeal. There is no reason to differentiate between one ground of jurisdiction under s 158(1) and another.

[15] In this case the respondents specifically pleaded in their application before the court a quo that the appellants should have complied with the relevant clauses of SAMWU's constitution. Therefore, the basis upon which the High Court's jurisdiction was challenged is expressly provided for in s 158(1)*(e)*(i) of the LRA. The disavowal by the respondents, during argument, of any reliance on the LRA is irrelevant. As the Constitutional Court held in *Gcaba*, jurisdiction is determined on the basis of the pleadings. Consequently the appeal must succeed.'

[33] I would obviously be bound by the *ratio* in *Mokgatla*. The statement that there is no reason to differentiate between one ground of jurisdiction under s 158(1) and another insofar as it results in the jurisdiction of the Labour Court being exclusive, is relied upon by the respondents in support of their argument, that having regard to the provisions of s 158(1)(*h*), this Court in the present matter, as it involves a review of a 'decision taken or any act performed by the State in its capacity as employer on such grounds as are permissible in law', also does not have jurisdiction. They contend that the issue is whether the present applications fall within s 158(1)(*h*) because if they do, then there 'is no reason to differentiate between one ground of jurisdiction under s 158(1) and another' for 'then the jurisdiction of the Labour Court

[33] *Mokgatla* n26.

is exclusive.' They argue that s 158(1)(*h*) must not be confined only to a review by an employer which the Labour Appeal Court endorsed in *Merafong City Council v SAMWU*[34] and that an application for an order that the third respondent's appointment be declared invalid and set aside as null and void *ab initio* does not fall outside the parameters of subparagraph (*h*).

[34] I however respectfully do not understand the reason for the decision in *Macun* to be that if a case falls within one of the grounds in s 158 of the LRA (s 158(1)*(g)* in the case of *Macun*) in respect of which the Labours Court's jurisdiction is found to be exclusive, that the same principle would always necessarily apply in respect of all other 'grounds' in s 158 of the LRA (s 158(1)*(e)*(i) in *Mokgatla*) simply because there is 'no reason to differentiate between one ground of jurisdiction under s 158(1) and another'. If that was so then the question would simply be whether the remedy claimed is one falling within the wording of one of the subcategories of s 158(1) of the LRA, in the present applications, s 158(1)*(h)*.

[35] On the facts in *Mokgatla*, having regard to the basis for the challenge, the statement by Dambuza JA was no doubt correct in drawing an analogy with the *ratio decidendi* in *Macun*. In both instances the basis for the challenge arose from the provisions of the LRA. But insofar as what the learned judge said is sought to be extended further to a situation catered for by s 158(1)*(h)* but not arising from the provisions of the LRA, although it might result in the termination of appointment as municipal manager, her *dictum* is with respect sought to be taken too far by the respondents. The statement of the learned judge of appeal would further, in any event, be *obiter* and not binding on this Court.

[36] As said by Navsa JA in *Macun* '(the) provisions of s 158(1)(*g*) on their own are not decisive... the question that should rightly be asked is whether the basis of the challenge[35] … is one that arises out of the LRA. In *Macun* and *Mokgatla* the basis of the challenge did arise from the LRA. On the facts in *Mokgatla* it was correct that '[there was] no reason to differentiate between one ground of jurisdiction under s 158(1) and another' in respect of the 'ground' in s 158(1)(*e*)(i) discussed by that Court and which it compared to the 'ground' in s 158(1)(*g*) in the case of *Macun*. The statement by Dambuza JA must with respect, be seen in the factual context that

[34] 2016 (37) (ILJ) 1857 (LAC); [2016] 8 BLLR 758 (LAC) para 39.
[35] In that matter to the decision to extend the collective agreement.

presented itself in *Mokgotla* when compared to *Macun*. But that is not the position in the present applications.

[37] In *Macun* Navsa JA correctly, with respect, pointed out that the 'provisions of s 158(1)(*g*) on their own are not decisive'.[36] Similarly in the present matter the provisions of s 158(1)(*h*) 'on their own are not decisive'. The important consideration is that the basis of the challenge does not arise from the LRA, but from the Systems Act in regard to alleged unlawful conduct by the first and second respondents in appointing the third respondents as municipal managers. To adopt the language in *Macun,* adapted to this judgment, 'to answer the question', i.e. whether the challenge arises from the provisions of the LRA, 'the obvious answer is that it does' not.

[38] But even if it was to be construed that the exclusive jurisdiction conferred on the Labour Court in s 157(1) in respect of 'all matters that elsewhere in terms of this Act…are to be determined by the Labour Court' would include all the types of disputes as set out in s 158(1)(*b*) to (*j*), especially subsection (*h*), 'regardless of the basis for the challenge', then it appears on a strict construction that the present dispute does not fall within subsection (*h*).

[39] Section 158(1)(*h*) deals with the review of any decision of the State 'in its capacity as employer'. It presupposes a proper lawful employment of the employee. If lawfully employed, some decision arising thereafter in its 'capacity' as employer relating to decisions taken in that capacity, might have to be reviewed in the Labour Court. A challenge to the lawfulness or constitutionality of the actual employment is something else. One can understand that once there is a proper and lawful employment that matters arising thereafter would arise in the context of the capacity of the State as employer of the particular employee. Matters such as the termination of that contract of employment, which are quintessentially labour matters, affect issues arising from the LRA, or to which mechanisms provided for in the LRA, such as, for example, arbitration and conciliation and considerations of fairness[37] would apply.[38] In those instances the jurisdiction of the Labour Court will be exclusive. But

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[36] *Macun* n19 para 23.

[37] *Steenkamp v Edcon* 2016 (3) SA 251 (CC) para 49. The case concerned the retrenchment of employees and the LRA not expressly conferring a right to be dismissed lawfully, with Cameron J commenting that the absence of such an express provision 'must be understood to have been absorbed into the statute's fairness protections'.

[38] In *Kweyama v National Commissioner, Correctional Services,* unreported, Case No. 13535/16, KwaZulu-Natal Local Division, Durban, dated 24 August 2017, the 'act performed by the State' was the dismissal of the applicant. There can be no doubt that disputes arising *stante* employment or in

where the challenge is a constitutional one concerning whether minimum legal pre-requisites determined by the Systems Act,[39] and the regulations thereunder, for a valid employment to arise were adhered to, the challenge to the decision to employ does not concern a decision of the State in its capacity as employer of the employee.

[40] This Court accordingly has jurisdiction, because the 'basis of the challenge to the decision' is not founded on the provisions of the LRA.

The further grounds of opposition

[41] Further defences raised include that s 54A(8) required the present application to be brought 'within fourteen days of receiving the information about the third respondent's appointment as municipal manager' and that this was not done. Further it was contended that PAJA[40] applied to the review and hence that the applications had to have been '… instituted without unreasonable delay and not later than 180 days …',[41] and further, in the alternative, that being a legality challenge outside PAJA it had to be brought within a reasonable time, although no specific period has been set by the Constitutional Court,[42] and that this did not happen. These challenges must be viewed against the principle that organs of state have a higher duty to pursue legal remedies expeditiously due to s 237 of the Constitution that '[all] constitutional obligations must be performed diligently and without delay'.[43] Specifically underlying the notion of delay is the jurisprudence that applications for review should be instituted timeously to promote certainty.[44]

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respect of the dismissal of an employee by the State, arise in the context of the 'State in its capacity as employer'. Olsen J commented as follows: '[37] This case falls directly under s 158(1)(h) of the Labour Relations Act. This court is being asked to review a decision taken or an act performed by the State in its capacity as employer. The action is the dismissal of the applicant. Applying the test set out immediately above, the answer must be that this court is being asked to exercise a power with respect to a matter within the exclusive jurisdiction of the Labour Court; unless, because the case is about a right entrenched in Chapter 2 of the Constitution, the High and Labour courts would both have jurisdiction under s 157(2) of the LRA. The only non-labour Chapter 2 rights asserted by the applicant are those protected by PAJA. I have already found that her case does not concern PAJA.' Similarly where the issue is whether a policeman claims he should have been promoted, but he was unsuccessful with his application, as in *Gcaba v Minister for Safety and Security* n21.

[39] Section 1 of the Systems Act, as common with statutes, defines 'this Act' as including 'any regulations made in terms of section 120'.

[40] The Promotion of Administrative Justice Act 3 of 2000.

[41] Section 7 of PAJA.

[42] *City of Cape Town v Aurecon South Africa (Pty) Ltd 2017 (4) SA 223 (CC)* note 30; M de Beer 'A New Role for the principle of Legality in Administrative Law: *State Information Technology Agency Ltd v Gijima Holdings (Pty) Ltd*' by M de Beer (2018) 135(4) *SALJ* 613 at 625.

[43] *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal* 2014 (5) SA 579 (CC) paras 46 to 48.

[44] *Merafong City Municipality v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) para 73.

[42] In conclusion the respondents submitted that if I found the applications meritorious, a just and equitable remedy in terms of s 172 of the Constitution should be granted suspending the declaration of invalidity and preserving the status *quo* for a period of time until each municipality has devised an appropriate manner in which it will rectify the illegality.

[43] I deal with the arguments relating to the aforesaid *seriatim*.

Delay

The fourteen day time period in s 54A(8)

[44] The unreported judgment of Ntshangase J in *Inkatha Freedom Party v Mthembu Abaqulusi Municipal Council* para 19[45] is advanced by the respondents as authority for the proposition that the fourteen day time frame referred to in s 54A(8) requires that any court application must be brought within fourteen days after the MEC receives the information in subsection 54A(7).

[45] That judgment and a follow up thereto by Lopes J in *MEC for KwaZulu-Natal of The Department of Co-operative Governance and Traditional Affairs v The Inkatha Freedom Party and Vusumuzi Joseph Mthembu and eight others*[46] were considered by Henriques J in *The MEC for KwaZulu-Natal for Co-operative Governance and Traditional Affairs v The Ntambanana Municipality and another*.[47] She commented on the fact that the judgment by Ntshangase J, which was the subject matter of a petition to the SCA, referred to the provisions of s 54A(8) requiring the applicant to 'take appropriate steps to enforce compliance by the Municipal Council' which 'may include an application to a court for a declaratory order', and concluded that the words 'appropriate steps' must be interpreted broadly. She concluded that 'the appropriate steps' are not restricted to an application to court for a declaratory order. She furthermore concluded, in the light of the provisions of Chapter 3 of the Constitution especially s 40 and s 41 which promote the spirit of co-operative governance between the various levels of government, that an interpretation which would require an application to be made within fourteen days of receipt of the

[45] Unreported, Case No. 4539/2013, KwaZulu-Natal High Court, Pietermaritzburg, dated 30 August 2013.
[46] *MEC for KwaZulu-Natal of the Department of Co-operative Governance and Traditional Affairs v Inkatha Freedom Party and others* [2013] ZAKZPHC 62, which is dated on 13 November 2017.
[47] Unreported, Case No. 8793/2013P, KwaZulu-Natal High Court, Pietermaritzburg, dated 30 May 2014.

information in s 54A(7) without exhausting alternative means to resolve the issues, would fly in the face of those constitutional provisions.

[46] Henriques J also referred to s 139 of the Constitution which provides for provincial intervention in local government in 'extreme cases'[48] and to the obligation provincial government has to supervise the affairs of local government and to intervene when things go awry.[49]

[47] I concur with the conclusion of Henriques J and her reasoning. The applications are not time barred by the provisions of s 54A(8) of the Systems Act.

Is it a PAJA review?

[48] A preliminary issue to consider is the principle of subsidiarity. This principle, based inter alia on *SANDU v Minister of Defence*[50] requires that the PAJA with its time limit of 180 days 'must be applied where it is applicable'[51] before reliance can be placed on the safety net function of the principle of legality as a ground of review.[52] The decision in *My Vote Counts*[53] has resoundingly endorsed the subsidiarity theory, the difference between the majority and minority judgments lying only in whether on the facts in that case it found application. It is therefore beyond doubt that

'…where a litigant seeks to enforce the rights to administrative justice, resort must first be had to the PAJA. Only where the validity of the PAJA (or other original legislation) is challenged may the s 33 rights be invoked directly. Moreover, only in circumstances where the conduct does not amount to administrative action, and provided the PAJA is not found to be inconsistent with s 33 of the Constitution, may resort be had to the principle of legality as a safety net to ensure that the conduct does not escape constitutional scrutiny.'[54]

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[48] *MEC for Local Government, Housing and Traditional Affairs v Utrecht Municipal Council and others* 2007 (3) SA 436 (N).
[49] *Premier, Western Cape and others v Oefferberg District Municipality and others* 2011 (4) SA 441 (SCA) para 1.
[50] *South African National Defence Union v Minister of Defence and others* [2007] ZACC 10, 2007 (5) SA 400 (CC).
[51] C Hoexter *Administrative Law in South Africa* 2ed (2012) at 134. See the comment on that statement in M Murcott and W Van der Westhuizen 'The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts* (2015) 7 *Constitutional Court Review* 43 at 49. This is in line with the decision in *Minister of Health and another NO v New Clicks South Africa (Pty) Ltd South Africa (Pty) Ltd and others* 2006 (2) SA 311 (CC).
[52] *New Clicks* n46 para 97.
[53] *My Vote Counts NPC v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC).
[54] Murcott and Van der Westhuizen n46 at 49.

[49] What is set forth in paragraph 48 above represents the present state of our law. The subsidiarity theory apparently originates from a Roman Catholic social doctrine.[55] A detailed discussion thereof falls beyond the scope of this judgement. It has however been discussed extensively by AJ van der Walt in his article titled 'Normative Pluralism and Anarchy: Reflections on the 2007 Term.'[56] He articulated the first subsidiary principle, based on *SANDU v Minister of Defence,* as requiring a litigant to rely on the actual legislation when confronting a constitutional right, rather than circumventing the legislation in favour of a direct application of a constitutional provision, with the proviso that the constitutional provision may be invoked where such legislation is challenged for inconsistency in terms of the Constitution.[57] The principle also seeks to give effect to s 39(2) of the Constitution which requires the Courts to give effect to legislation enacted by the legislature pursuant to, and within the limits of, constitutional responsibilities. That flows from the founding value of legality as a norm in paragraph 1*(c)* of the Constitution. That is probably what I had in mind but might not have articulated sufficiently carefully when I stated in *Valuline (supra)* that it was irrelevant to determine whether PAJA was applicable. Mr Dickson SC for the applicants might also have had that notion in mind when preferring not to describe the present applications as reviews but rather as applications for declaratory orders – because the applications are based on legislation, i.e. the express provisions of s 54A(8) of the Systems Act. It is that legislation which is sought to be given effect to.[58] In what follows I shall nevertheless first proceed on the basis that the relief pursued in the applications is aimed at administrative justice, and consider whether PAJA would apply.

[50] Whether the PAJA applies depends on whether the action sought to be reviewed amounts to 'administrative action' as defined in the PAJA. That definition is not without problems. The appointment of each of the third respondents arises from a decision of the council of each municipality pursuant to s 54A(1) of the Systems

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[55] See generally Murcott and Van der Westhuizen n46.

[56] (2008) 1 *Constitutional Court Review* 77.

[57] 'Murcott and Van der Westhuizen n46 at 47 to 48. See also *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 73.

[58] In *Minister of Defence and another v Xulu (supra)* Wallis JA referred to there possibly being a specie of review that falls under neither PAJA nor the principle of legality but brought on the basis of unconscionable state conduct. I venture no further than to suggest that it might be that a claim based on s 54A(8) falls into the third category, just as presumably instances such as that in *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal and others* 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) ('KZN JLC') does.

Act. This must be contrasted to for example the appointment of other employees of municipalities who are appointed by the municipal manager in the exercise of his duties, which would amount to administrative action. The appointment of a municipal manager involves the exercise of executive powers or functions of the municipal councils. The exercise of 'executive powers or functions of the municipal council' is expressly excluded in terms of paragraph (cc) from the definition of 'administrative action'.[59] The PAJA accordingly does not apply.[60] I am in any event not persuaded that an 'administrative action' as defined is involved.[61] Accordingly, the 180 day limitation in s 7 of PAJA does not apply. The applicant correctly had not pursued any application for condonation.

Were the applications brought within a reasonable time?

[51] In *Khumalo*[62] Skweyiya J explained the principle as follows:

'[It] is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.'

[52] Traditionally our courts have followed a two stage approach:
(a) Is the delay unreasonable and undue; and
(b) Are there reasons to overlook the delay and exercise its discretion in entering the review.[63] The enquiry in this respect should not be 'evaluated in a vacuum but must be assessed with its potential to prejudice the affected parties and having regard to the possible consequences of setting aside the impugned decision.'[64]

[53] The decision of the Constitutional Court in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*[65] not only has significance insofar as it determined that a review by an organ of its own decisions is to be founded on the

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[59] Section 1 of PAJA.
[60] The facts in *Notyawa v Makana Municipality* [2017] All SA 533 (ECG) is distinguishable. Alternatively I respectfully disagree with the conclusion reached in that judgment.
[61] *Gcaba* at para 64. No administrative action was involved in the present matter. See the abbreviated definition and consolidated definition provided by Nugent JA in *Grey's Marine Hout Bay (Pty) Limited and others v Minister of Public Works and others* [2005] ZASCA 43; 2005 (6) SA 313 (SCA) para 21.
[62] *Khumalo* n43 para 47.
[63] See for example *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA); [2006] 3 All SA 245 (SCA) paras 24 and 31.
[64] *Khumalo* n43 para 52, see also *Wolgroeiers Afslaers (Edms) (Bpk) v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A) and *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2016] ZASCA 143; [2016] 4 All SA 842 (SCA); 2017 (2) SA 63 (SCA) para 22ffg.
[65] *Gijima* n66.

principle of legality and not in terms of the PAJA. It also contains materially important comments in regard to what constitutes reasonable delay.[66] In that matter a contract, which had been awarded without a competitive bidding process, was sought to be set aside many years later. The court concluded that the case was brought late and that there was no reason to overlook the delay in terms of the merits of the case. Nevertheless it was prepared to decide the merits in finding that the contract was awarded illegally, and fashioned an appropriate remedy in terms of s 172(1)(b) of the Constitution.

[54] It has been cautioned that such an approach holds the risk of 'collapsing the inquiry of delay into the merits of the case.'[67] One obviously always has to be alive to the danger of collapsing the inquiry of delay into the merits of the case, but the enquiry into delay cannot be divorced from the right involved, the relief claimed and sought to be achieved, and the extent to which that relief can be modified to ensure that it is just and equitable, as s 172(1)(b) requires.

[55] In the present applications the right invoked is a very important one, namely to ensure that municipalities act lawfully. That is a right at the very foundation of our Constitution. The relief claimed is that the appointment of the third respondents be '…declared to be invalid and … set aside as null and void *ab initio*.' During argument, and following submissions by the respondents aimed at ensuring administrative certainty in relation to past administrative acts that have been performed by the third respondents should their appointment be set aside, as in *AllPay*,[68] the applicant accepted that pursuant to s 172(1)(b) of the Constitution, the retrospective effect of any declaration of invalidity of the third respondents' appointment should be limited to the date of this judgment (the respondents indeed contended for an even later date to give them time to make arrangements relating to the termination of the third respondent's services). In my view the terms of such modified relief, recognising the nature of the right to be protected but also reflecting what is just and equitable, are important to keep in mind when considering the effect of any delay.

[56] The facts relevant to considering the question of delays are as set out below.

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[66] De Beer n42 at 626ff.
[67] De Beer n42 at 627.
[68] *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer of the South African Social Security Agency and others (Corruption Watch and another as* amici curiae*)* 2014 (4) SA 179 (CC); 2014 (1) BCLR 1 (CC).

[57] In the Nkandla municipality matter the relevant chronology is as follows:

(a) The third respondent was appointed on 24 January 2017;

(b) The applicant was informed of the decision to appoint the third respondent on 26 January 2017;

(c) On 13 February 2017 a letter was addressed to the mayor of the first respondent requesting certain information and documentation regarding the appointment of the third respondent;

(d) On 7 March 2017 a letter was addressed to the mayor informing the first respondent that the appointment of the third respondent was not in compliance with the regulations as he lacked five years' experience at senior management level, as he only had one year and one months' experience as Director Community Services at local municipality level. It was also pointed out that his remuneration was above the permissible pay package;

(e) On 23 May 2017 the first respondent applied to the Minister for a waiver of the relevant experience requirement stating that the third respondent meets all the other requirements for the position 'except for the number of years in senior management'.

(f) On 14 September 2017 the Minister informed the first respondent that the application for waiver was declined. The Minister pointed out that there were 23 applicants and 8 met the required minimum experience;

(g) On 10 November 2017 the acting deputy director general of the applicant's department addressed a letter to the first respondent demanding that the respondents take remedial action;

(h) On 21 November 2017 the mayor of the first respondent advised that they were awaiting a legal opinion;

(i) On 4 January 2018 the acting DDG of the applicant again wrote to the first respondent requesting an update on what remedial action was taken. No response was received;

(j) The present application was launched on 11 May 2018.

(k) The third respondent had in the interim assumed and continued in office as municipal manager performing the functions as a municipal manager.

[58] In the Mthonjaneni municipality matter the relevant chronology is as follows:

(a) The third respondent was appointed on 19 December 2016;

(b) The applicant was informed of the decision to appoint the third respondent on 20 December 2016;

(c) In an internal departmental submission to the applicant, annexed to the founding affidavit as an annexure, dated 20 January 2017, it was pointed out that:

'Mr P.P. Sibiya's [third respondent's] work experience is as follows:

Senior Manager: SCM at Umlalazi Municipality for a period of 9 months

Chief Financial Officer at Nkandla Municipality for a period of 2 years; and

Deputy Chief Financial Officer at Ulundi Municipality for a period of 2 years and 8 months.

He therefore does **not** meet the experience criteria stipulated in the Regulations';

(d) Pursuant to that submission the applicant on 20 January 2017 addressed a letter to the mayor of the first respondent pointing out the third respondent's lack of five years' relevant experience at senior management level and requesting to be advised of the remedial action to be taken in order to rectify the matter. A letter to similar effect was also addressed to the minister on that day;

(e) The first respondent then advised the applicant that it would be engaging the Minister in terms of s 54A(10) of the Systems Act in order to waive the experience requirement. Although this was not formally admitted in the answering affidavit, it is the more probable in the light of the contents of various letters sent and annexed to the replying affidavit;[69]

(f) On 9 July 2017 the acting head of the applicant's department addressed a letter to the mayor of the first respondent referring to letters written on numerous occasions to the municipality that remedial action be taken to which no response had been received. It was further pointed out that all decisions by the third respondent would be *ultra vires*;

(g) On 19 July 2017 the mayor replied advising that a legal opinion was sought and was awaited regarding the issue of the third respondent's lack of experience disqualifying him from appointment and indicating that the opinion would be tabled at the next council meeting on 29 August 2017 where after he would revert;

(h) On 21 November 2017 a further letter was addressed to the municipality advising that the matter remains outstanding, that it was understood that application had been made to the Minister for a waiver, and requesting a copy of that application;

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[69] The respondents complain that the applicant cannot make out a case in reply, which is of course trite law. However, the allegation that the respondents had advised that the Minister would be engaged pursuant to s 54A(10) was not challenged in a manner to give rise to a *bona fide* dispute of fact. The content of the answer is also more probable with such an interpretation.

(i) On 29 November 2017 a copy of Circular 15 of 2017 guiding how an application for a waiver to the Minister must be submitted, was sent by the applicant's department to the first respondent;
(j) On 24 January 2018 a letter was addressed by the acting DDG of the applicant's department to the first respondent's mayor advising that the first respondent would be required to take steps to regularise the matter;
(k) On 26 January 2018 officials of the applicant met with officials of the municipality at the latter's offices and again the appointment of the third respondent in contravention of the legislation was discussed and the municipality was advised to apply for a waiver to rectify the situation;
(l) The application was brought on 11 May 2018 after no further action had been taken by the respondents.

[59] What is reasonable will depend on the facts of each case. Apart from simply complaining that the application was brought 'late' and that the respondents have conducted themselves on the basis that the third respondent has occupied the position of municipal manager in the meantime, the respondents have not pointed to any further prejudice. Although there were some delays, allowance should be made for administrative bureaucracy not always proceeding with lightning alacrity. Although there were delays they were not unreasonable. The correspondence and time frames rather suggest that the applicant in a spirit of co-operation allowed considerable latitude to the respondents to address the lack of the third respondent's relevant experience, and when they eventually failed to do so despite reminders, the applicant ultimately had to resort to court applications as a last resort. The applicant might be well advised to offer less latitude in future where the conduct complained of is unlawful conduct. However I am not persuaded that the applicant should be non-suited for the indulgences she did extend. Having regard to the injunction to promote a spirit of co-operative governance, the delays were not unreasonable.
[60] Effect should be given to the important constitutional right of lawful administrative action at local government level in the terms to be granted below.

A just and equitable remedy

[61] This aspect has already been touched on briefly above.

[62] The finding that the third respondent in each instance did not satisfy the minimum requirements relating to experience, accordingly that their appointment was not in accordance with the provisions of the Systems Act, unauthorised and unlawful because it exceeded the authority of that Act, makes it a constitutional matter as contemplated in s 172 of the Constitution. Section 172(1)(b) of the Constitution requires in relation to such conduct that a court

'may make any order that is just and equitable, including -

(i) an order limiting the retrospective effect of the declaration of invalidity and;

(ii) an order suspending the declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.'

[63] The respondents asked, if I found that that the applications were meritorious, to suspend the declaration of invalidity and preserve the status *quo* for a period of time until the first respondents have devised appropriate manners in which to rectify the illegality.

[64] The respondents submitted that there are no interests of third parties which will be effected if the status *quo* was preserved and no identifiable prejudice to the applicant or the public at large.[70] I am not persuaded that no interests of third parties might be affected. I would expect that the third respondent in each instance might have taken many decisions on behalf of the respective municipalities including, as alleged, the appointment of some senior officials. This would also no doubt include contracts and other dealings with outside third parties. Such third parties have not been identified. If so advised these third parties can mount whatever challenge they may wish to raise in respect of their dealings with the respective municipalities in subsequent proceedings. There are however various administrative decisions taken by the third respondents which if set aside ab initio from the date of their appointment will throw the administration of the respective first respondents into disarray. It is important that those, in the interest of administrative certainty, not be disturbed and that they remain intact.

[65] As the appointments were unlawful when they were made I am not disposed to direct that the declaration of invalidity be suspended. The appointments were

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[70] *Bengwenyama Minerals (Pty) Limited and others v Genorah Resources (Pty) Limited and others* 2011 (4) SA 113 (CC) paras 84 – 87 and *My Vote Counts v Minister of Justice and Correctional Services and another* [2018] ZACC 17; 2018 (5) SA 380 (CC); 2018 (8) BCLR 893 (CC) paras 83 – 84 and 89.

unlawful when made. The setting aside of the third respondents' appointments pursuant to such finding of invalidity should however not operate retrospectively to the date the appointments were made. I am however also not disposed to considering allowing any further time beyond the date of this judgment 'until the municipality has devised an appropriate manner in which it will rectify the illegality'.[71] The third respondents' appointment is unlawful and there is no cogent reason why the setting aside of the third respondents' appointment should not apply from the date that this order is issued. An acting municipal manager can be appointed to fill any void arising from the operation of the orders I grant.

Costs

[66] There is no reason why the costs of the applications should not follow the result. Both sides employed senior counsel, which was reasonable.

Order

[67] The order I grant in each application is as follows:

(a) The appointment of the third respondent as municipal manager of the first respondent by second respondent is declared to be invalid and null and void for not being in compliance with the provisions of S 54A(3) of the Local Government: Municipal Systems Act No 32 of 2000 and the regulations issued thereunder.

(b) The setting aside of the third respondent's appointment pursuant to the order in sub-paragraph (a) above shall not operate retrospectively to the date the third respondent was appointed but shall take effect from the date of this order.

(c) The respondents jointly and severally, one or more paying the others to be absolved, are directed to pay the costs of the application, such costs to include that consequent upon the employment of senior counsel.

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[71] This is what the respondents contended for relying on *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeals Tribunal* 2016 (3) SA 160 (CC); 2016 (4) BCLR 469 (CC) and *Johannesburg Metropolitan Municipality v Gauteng Tribunal and others* 2010 (6) SA 182 (CC).

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Koen J

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