

# Testing the metal

## OF THE MUNICIPAL SYSTEMS AMENDMENT ACT OF 2011

*Paulse vs Oudtshoorn Local Municipality and others*

The Local Government: Municipal Systems Amendment Act, 7 of 2011 (the amended Systems Act) sought to put a halt to the phenomenon of staffing municipalities with unqualified people, thereby ensuring that skilled people are appointed. Its provisions were put to the test in a recent judgment by the Western Cape High Court.

The Court had to review the appointment of a municipal manager against the new section 54A, which provides that the appointment of a senior manager is null and void if the incumbent does not possess the prescribed skills, expertise, competencies or qualifications. This is the first case in which the Act's provisions concerning competency criteria for the appointment of municipal managers has been tested.

The amended Systems Act provides that candidates for the post of municipal manager must possess specific skills, experience and qualifications as prescribed in the Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to the Municipal Manager of 2006 (Performance Regulations). These regulations predate the 2011 amendment to the Systems Act. The prescribed competencies include experience of at least five years at senior management level and a recognised Bachelor's degree in public administration or a relevant field.

The dispute in this matter is about whether experience at 'senior management level' refers only to the second echelon of management or whether other management experience may also be taken into account. The Court had to decide on the role of the interview process and the competency assessment, and the meaning of 'senior management level'.

### Facts

Mr Allen Paulse applied for the positions of municipal manager and director of corporate services of Oudtshoorn Local Municipality. He was unsuccessful in his application

and approached the Western Cape High Court for the review and setting aside of the appointment of the municipal manager, alternatively the director of corporate services, by the Municipal Council.

In terms of the interview results, Mr Mnyimba was the top candidate with 485 points while Mr Paulse was the second highest with 402 points. On the individual competency assessment, Mr Mnyimba scored less: he obtained a 'competent' or a higher rating on only 4 of the 13 competencies. According to the selection panel, this suggested that he displayed a lack of managerial experience, although he demonstrated potential. Mr Paulse, on the other hand, obtained 'competent' or a higher rating on 8 of the 13 competencies assessed. The selection panel said that Mr Paulse's results demonstrated that he is an experienced, client-orientated manager with sound judgment.

Regarding experience, Mr Mnyimba first worked at Volkswagen. He worked at Eden District Municipality, from March to December 2007 but the level of his position there is in dispute. From 2008 he served as a municipal manager at Ikhwezi Local Municipality. He also has three years' experience as a manager of his own consultancy business. Mr Paulse, in turn, is an admitted attorney and served as both mayor and deputy mayor of the now disestablished Paarl Municipality. He was the deputy town clerk of the George Local Municipality from 1999–2002 and the municipal manager of the Breede Valley Municipality from 2002–2011.

The Provincial Minister responsible for local government, Mr Anton Bredell, was joined to the application by virtue of the supervisory function vested in him in terms of section 54A of the amended Systems Act. Minister Bredell argued against the appointment of Mr Mnyimba and provided important information that clarified the disputed facts.

### The role of the interview process and the competency assessment

Mr Paulse argued that the competency tests showed that Mr Mnyimba did not possess the competencies and the experience

required in terms of regulation 38 of the Performance Regulations and that he could not be saved by an interview. In support, Mr Bredell argued that an interview should not be the primary deciding factor for making appointments as it is far less determinative than objective factors, such as a candidate's curriculum vitae and competency scores.

Mr Bredell further argued, in relation to the experience of Mr Mnyimba, that the highest level he attained at Eden District Municipality was level three (assistant director of performance management), which is below senior management. In that post, he was accountable to the compliance manager, who in turn is accountable to the municipal manager.

### *The meaning of senior management level*

Mr Paulse argued further that Mr Mnyimba did not have the requisite five years' experience at 'senior management level', as required by regulation 38.2. Mr Bredell further argued that the Executive Mayor's reliance on Mr Mnyimba's experience as the manager of his own business was absurd because the drafters of the regulations must have intended only 'relevant' experience. The fact that the Executive Mayor relied on experience that was not relevant showed a lack of understanding of the meaning and import of the regulations.

## Oudtshoorn Municipality

### *Role of the interview process and the competency assessment*

Oudtshoorn Municipality argued that the competency test was done merely to establish whether shortlisted applicants met the minimum competency levels. Once that had been established, the interview was the deciding factor in the appointment. They also argued that Mr Mnyimba had the requisite experience since he had five years' experience at senior management level within local government, and three years experience at senior management level outside local government. They argued that besides Mr Mnyimba's four years' experience as municipal manager of Ikhwezi Local Municipality, he had an additional year as the manager of performance management at Eden District Municipality and was the chief executive officer of his own consultancy from 2005 to 2008.

## The decision

### *Role of the interview process and the competency assessment*

The Court held that the results of the competency tests speak for themselves: Mr Mnyimba could lay claim to only 4 of the 13 tested competencies.

Referring to the Executive Mayor's statement that the purpose of the competency tests was to establish whether the shortlisted applicants met the minimum competency levels, the Court then said Mr Mnyimba clearly did not meet these minimums.

With regard to Mr Mnyimba's experience, the Court said that it was absurd for the municipality to suggest that experience in a small consultancy on a part-time basis could be regarded as experience at a senior management level. The Court further said that Mr Mnyimba's post at Eden District Municipality was not as the manager of performance management but as assistant director, which is below senior management level. Accordingly, he did not have the required experience.

### *The meaning of senior management level*

On the meaning of 'senior management level' in regulation 38, the Court combined the references in the MFMA and in the Municipal Systems Act to define the concept and held that 'senior management level' can be equated to a level at which the following categories of persons are employed:

- a manager directly accountable to the municipal manager; or
- a person who occupies a substantially similar position outside the local government sphere.

The Court was not convinced that running a small consultancy on a part-time basis could be equated with senior management level. Accordingly, it nullified the decision to appoint Mr Mnyimba as the municipal manager and any contract concluded with him in consequence of such decision.

The Court was also asked to appoint Mr Paulse on behalf of the municipality but refused to do so.

The ruling in this case is an indication that the courts show appetite in reversing appointments contrary to the competency framework and will thus give effect to the professionalisation of the local sphere of government. Municipalities are warned not to make irregular appointments and in so doing, waste taxpayers money.

It is interesting to note that, in the context of the dispute over the facts, the Court relied on the information provided by the MEC for local government. The Court acknowledged the office held by the MEC and said that he is better qualified to express relevant opinions on the topic. The Court also agreed with some of the opinions expressed by the MEC. This points to the seriousness of the MEC's oversight role.



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