

Court condemns political interference

IN MUNICIPAL MANAGER'S APPOINTMENT

This judgment deals with the appointment of a municipal manager in a district municipality. It contains the strongest signal yet that the law condemns the practice of appointing municipal managers on the basis of political affiliation rather than suitability for the post.

Amathole District Municipality, a municipality controlled by the African National Congress (ANC), advertised the position of municipal manager. The recruitment process was subject to the municipality's *Recruitment Policy*, in which the municipality binds itself to fair and transparent recruitment procedures. It states:

The Municipality encourages the policy of open recruitment of individuals to positions on the basis of qualifications and suitability and with due regard to the provisions of the pertinent employment legislations.

It goes on to state that the municipality "is determined to fill vacant position(s) with the best qualified and best suited candidates".

Of the more than 20 people that applied, two candidates were shortlisted after an intensive selection process involving psychometric testing and interviews. A selection panel, including councillors and representatives of the Department of Provincial and Local Government and the local chamber of commerce, conducted the interviews. The two candidates that were shortlisted in the final stages of the selection process were Dr Vuyo Mlokoti and Adv Mlamli Zenzile. Both names were submitted to the municipal council for a decision. During the selection process, Dr Mlokoti performed considerably better. All the interview panelists rated him higher than his contender by, on average, a difference of 16%. The panel concluded with regard to Adv Zenzile:

His lack of managerial experience is evident and this sent discomfoting concerns from the majority of the panel members. His abilities and command of local

government issues were far outweighed by those of his contender (Dr Mlokoti).

This did not prevent the council from appointing Adv Zenzile. The judgment reveals "that the Regional Executive Committee of the ANC instructed the caucus to appoint Mr Zenzile and the caucus carried out this instruction". The judgment also details that the Executive Mayor was uncomfortable enough with this instruction to obtain two legal opinions on whether Mr Zenzile could be appointed. Both opinions advised the municipality that appointing Mr Zenzile would be illegal in

Vuyo Mlokoti v Amathole District Municipality and Mlamli Zenzile, unreported judgment, Case No: 1428/2008, 6 November 2008

- A council resolution is valid only if it has been voted on, unless there is no opposition to the proposal.
- The appointment of a municipal manager by the council is an administrative action and can be reviewed by a court.
- The appointment of a municipal manager is illegal if it is taken as a result of unauthorised or unwarranted dictates of outside party structures.

key points

view of the obvious differences in skills, experience and qualifications. During the ANC caucus meeting prior to the council meeting where the decision was to be made, the legal opinions were discussed. The caucus resolved to withhold the opinions from the council and go into the meeting with the mandate to appoint Mr Zenzile. At the meeting, Mr Zenzile was indeed appointed as municipal manager. The council minutes reflect as a motivation that “he was still young and knew the institution well and it was believed that he would take the institution to greater heights with his level of education and expertise”. Dr Mlokoti requested the municipality to furnish reasons for his not being appointed. When he did not receive any feedback, he took the matter to court. The Court, in assessing Dr Mlokoti’s arguments, dealt with a number of issues.

Deciding without a vote

At the relevant council meeting, the ANC, supported by the United Democratic Movement, moved for the appointment of Mr Zenzile. The Democratic Alliance and the Pan Africanist Congress moved for the appointment of Dr Mlokoti. The council did not conduct a vote but merely recorded its majority party’s nomination. The Court found this to be procedurally flawed. Some form of voting is required in order for a valid decision to be taken. The only exception to this rule is when there is no opposition to a proposal. According to the Court, the failure to conduct a vote “falls woefully short of the requirements of the enabling legislation” and “the resolution ... was therefore a nullity”.

Decision out of the Court’s reach?

The municipality argued that the Court had no right to review the resolution because it had been taken by a legislative assembly. It argued that the post of municipal manager had a political dimension and that the decision was therefore a “political” one which fell outside of the reach of judicial review. The Court disagreed. The decision to appoint a municipal manager was an administrative act, despite the council being a body that also exercised legislative and executive powers. The council could not, the Court said, evade the law by merely labelling its decision “political”.

Political interference

The Promotion of Administrative Justice Act (section 6(2)(e)(iv)) provides that an administrative action is illegal “if



the action was taken because of the unauthorised or unwarranted dictates of another person or body”. Dr Mlokoti argued that the political interference by the ANC’s Eastern Cape Regional Executive made the council’s decision unlawful. The evidence to support this contention was damning. Much of it was derived from communication between the Executive Mayor and the ANC Eastern Cape Chairperson, detailed in a letter that was accepted as evidence. The letter reveals a command-and-control relationship between the ANC’s Regional Executive and the municipal council of Amathole District Municipality, through its majority on that council. The Executive Mayor wrote to the Chairperson:

The above matter was discussed within the ANC caucus in ADM in presence of the Regional Secretary and the legal opinions were disclosed. After considerable debate the caucus decided to withhold the opinions from council although they were primarily obtained to advise the council. The REC’s instruction, to appoint Adv. Zenzile was then accepted by caucus.

In language that reveals the switching of roles, the Executive Mayor goes on to say that “the ANC erred by not resolving to appoint Dr Mlokoti as he was clearly the most suitable candidate” and “I would urge that you reconsider the matter and advise the writer on the further conduct of the matter”.

In assessing this scenario, the Court did little to save the council and the party from embarrassment. Firstly, the Court



council for a new decision. The Court looked at the outcomes of the selection process and concluded that “[t]here is, quite simply, no objectively justifiable basis on which applicant can be rejected in favour of second respondent. He was and is therefore entitled to be appointed”.

Assessment

It is clear from the judgment that the Court wanted to send out a signal strongly condemning outside interference in the appointment of municipal managers.

Firstly, after the Court had found that the decision was procedurally flawed, it could have safely ignored the arguments surrounding the outside political interference; it could have decided the matter on those grounds. However, it decided not to leave it at the procedural issue but devoted considerable attention to the outside political interference argument.

Secondly, it is unusual for a court to make appointments on behalf of organs of state. Normally, courts will show restraint and invalidate a decision when necessary, but rather leave it to the organ of state concerned to rectify its decision. In this case, the Court proceeded to appoint Dr Mlokoti.

Thirdly, the language used by the Court is unusually forthright and condemnatory of the behaviour of the council. For example, in explaining why it did not want to refer the matter back to the council for a fresh decision, the Court stated that this council had “demonstrated a lamentable abdication of its responsibilities by succumbing to a political directive from an external body, regardless of the merits of the matter”. In other words, the Court felt it could not trust the council to take a proper decision even after its judgment. The Court was clearly irritated by the municipality’s argument that this was “democracy in action”. It deplored the municipality’s argument that this was normal politics, saying:

[Amathole] continues, with an equally lamentable lack of insight into its conduct, to contend that it was proper for it to have done so.

made it clear that, in deciding to withhold the legal opinions from the full council, the ANC caucus had acted improperly. Secondly, the Court characterised the instruction from the ANC Regional Executive as

an usurpation of the powers of [Amathole]’s council by a political body which, on the papers, does not appear even to have had sight of the documents relevant to the selection process including the findings of the interview panel. In my view, the involvement of the Regional Executive Council of the ANC in the circumstances described in [the letter] constituted an unauthorised and unwarranted intervention in the affairs of [Amathole]’s council.

As regards the behaviour of the councillors, the Court said that they had deliberately abdicated to their political party their responsibility to fill the position with a suitable candidate. The responsibility they had passed on to the party “was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters”.

The Court thus concluded that, indeed, the council’s decision was illegal because of the unauthorised and unwarranted interference by the ANC Regional Executive.

The Court appointing municipal managers?

The question then arose whether the Court should order the appointment of Dr Mlokoti or refer the matter back to the



Jaap de Visser
Associate Professor
Local Government Project
Community Law Centre, UWC



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COPE

While by-elections are seldom a useful indicator of political trends, the emergence of the Congress of the People (COPE) and the political circumstances in which it fought a round of by-elections in December and January did offer an early opportunity to assess the fledgling party's electoral prospects.

In the Western and Northern Cape in particular, by-elections were occasioned by the expulsion or resignation of African National Congress (ANC) councillors.

In the Western Cape, the significance of the December 2008 by-elections was greatly reduced by the extraordinary failure on the part of the ANC to meet the Independent Electoral Commission's deadline for the nomination of candidates in any of the wards contested in the Cape Town and Cederberg municipalities. In the 12 by-elections in which the ANC was consequently absent from the ballot, COPE won six, the Democratic Alliance (DA) five, and the Independent Democrats (ID) one.

Of interest was the pitifully low voter turnout in those Cape Town wards won by COPE, where the percentage poll ranged between 8.45% and 13.3%. Even allowing for normal by-election standards and the fact that COPE candidates had to stand as

independents because their party's registration with the IEC had not yet been finalised, this does not suggest any groundswell of popular enthusiasm for a new party which, at the time, was enjoying high levels of media coverage.

Of the 15 wards where there was a contest between the ANC and COPE (all of which were previously held by the ANC), the ANC won three, COPE four, the ID four and the DA four. The ANC gathered more votes than COPE in eight of the wards and fewer than COPE in seven. The ANC won 32.3% of all votes cast in these wards, COPE 27.3%, the ID 20.1% and the DA 17.6%. The split between the ANC and COPE – excluding the numerous other candidates – was 54% to 46%.

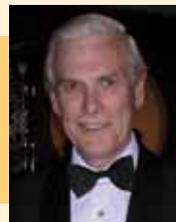
The round of by-elections held on 28 January offered a more reliable measure of trends than those held in December, as the percentage polls were markedly higher, averaging some 44.6%.

In all, 27 by-elections were conducted in the Northern Cape, the Free State, the Eastern Cape, Gauteng, KwaZulu-Natal, Limpopo and the North West. Again, most were necessitated by councillors abandoning the ANC to join COPE, which was the case in all 15 Northern Cape elections. The ANC won 23 of the 27 wards, while COPE won only two of those it contested – both in the Northern Cape. In that province, COPE won, on average, a respectable 30% of the vote, while the ANC's share declined from 73.3% to 54.1%.

An interesting result was in the Eastern Cape's Nkonkobe municipality (Alice), where ward 15 was vacant after the death of its councillor. The ANC retained the seat with a significantly reduced majority, winning 1 322 (73.3%) of the 1 803 votes cast in a 55% poll. COPE won 466 votes (25.9%) and the PAC one vote. In the 2006 municipal election, the ANC won almost 98% of the vote.

Of course, as a new party, COPE has been unable to match the organisational and financial strength of the ANC and has been impelled into by-elections earlier than it might have chosen. What should be of concern to COPE, however, is the extent to which it has lost the momentum that characterised its first months. There are increasing indicators of internal leadership conflict, and its inability to attract the "big names" it has so often promised may be a sign of things to come.

While it may be tempting to believe, in the light of its by-election performance, that COPE's best days are behind it, South African politics has become so fluid as a result of the party's emergence that any attempt to predict its prospects on 22 April can only be speculative at best.



Clive Keegan is the director of the SA Local Government Researcher Centre, which publishes the *SA Local Government Briefing*. He can be contacted at keegan@iafrica.com