

INSULATING ADMINISTRATIVE DECISION-MAKING
RELATING TO INDIVIDUAL STAFF APPOINTMENTS FROM
POLITICAL MEDDLING: *MANANA v KING SABATA*
DALINDYEBO MUNICIPALITY

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INTRODUCTION

‘In my view s 55(1) is no more than a statutory means of conferring such power upon municipal managers to attend to the affairs of the municipality on behalf of the municipal council. There is no basis for construing the section as simultaneously divesting the municipal council of any of its executive powers. Indeed, as I have already pointed out, the Constitution vests all executive

authority — which includes the authority to appoint staff — in the municipal council and legislation is not capable of lawfully divesting it of that power.’ (*Manana v King Sabata Dalindyebo Municipality* [2011] 3 All SA 140 (SCA) para 17 (hereafter *Manana*).

The Local Government: Municipal Systems Act 32 of 2000 (hereafter ‘the Municipal Systems Act’) provides that the municipal manager is responsible for the appointment of staff, other than managers that report directly to the municipal manager (the so-called section 56 managers), in a municipality (s 55(1)(e) of the Municipal Systems Act). This is significant given that the municipal manager is the head of the municipal administration and also the accounting officer for the municipality (s 82(1)(a) of the Local Government: Municipal Structures Act 117 of 1998 (hereafter ‘the Municipal Structures Act’), s 55(1) and (2) of the Municipal Systems Act and s 60 of the Local Government: Municipal Finance Management Act 56 of 2003 (hereafter ‘the MFMA’)). Political interference in the recruitment and appointment processes undermines this framework and has been cited as one of the reasons for the dysfunction at local government (Department of Co-operative Governance *State of Local Government Report* (2009) 67).

As the *State of Local Government Report* reveals, councillors of the Mngquma Local Municipality in the Eastern Cape had recruited the majority of the workforce in a manner that flouted the procedures and policies of sound human resource practices (ibid). The *Report* reveals yet another instance of political interference in the recruitment and appointment process. In one municipality, a former tea-lady was promoted to become its Chief Financial Officer (ibid at 39).

The decision of the Supreme Court of Appeal in *Manana* seems to suggest that the power to appoint staff, other than section 56 managers, vests in the municipal council. This means that the municipal manager is simply an agent of the municipal council when it comes to the appointment of staff and that the municipal council can, at any time, decide to recruit and appoint staff itself. In this case note I argue that the Supreme Court of Appeal was wrong in its interpretation.

FACTUAL BACKGROUND

The facts that gave rise to the issue under discussion are as follows. Mr Manana was formerly employed by Umtata Transitional Council as a legal advisor before the council merged with the Mqanduli Transitional Council to form the King Sabata Dalindyebo Municipality in 2000. The new municipal council (King Sabata Dalindyebo) resolved to appoint Mr Manana as manager of the legal services department and to adjust his salary accordingly. He was notified of this appointment in a letter addressed to him by the acting director of corporate services. He signed the letter of appointment the following day, signifying his acceptance. However, his salary was not adjusted to reflect his new position. He addressed a letter to the acting director of corporate services communicating this fact, but no action

was taken to resolve the matter. He then, through his attorney, wrote to the municipality demanding the adjustment of his salary in line with his promotion.

The municipal manager responded and referred Mr Manana to an intervention by the MEC for Housing, Local Government and Traditional Affairs, which sought to investigate acts of maladministration and irregularities in the municipality. The municipal manager advised him that his purported appointment was the subject of review and therefore appealed for his patience while this review was carried out. However, when the municipality failed, after three months, to adjust his salary in accordance with the resolution that promoted him, Mr Manana initiated proceedings in the Eastern Cape High Court, Mthatha, asking for an order directing the municipality to make the appropriate adjustments to his salary and to pay the moneys due to him as a result of his appointment. The court dismissed the claim on the basis that it was a labour issue over which it had no jurisdiction. Mr Manana then appealed to the Supreme Court of Appeal.

The respondent municipality's evidence on appeal was provided by Ms Zitumane, a caretaker municipal manager appointed to investigate the allegations of irregularities in the municipality. In opposing the appeal, she contended, first, that effect should not be given to the resolution to promote Mr Manana as it was passed irregularly, in 'that the "ruling" referred to in the resolution — which purported to "rule" that Mr Manana be appointed to the post — was "concocted" to induce the municipal council to make the appointment' (*Manana* para 19). She further contended that the resolution was in conflict with the municipality's employment policy. Essentially, the municipality argued that the resolution to promote Mr Manana was invalid and not binding upon it.

Secondly, she argued that the power to appoint employees was not vested in the municipal council but in the municipal manager and cited s 55(1)(a)–(e) of the Municipal Systems Act. Counsel for the municipality specifically relied on subsec (e), which provides: 'As head of administration the municipal manager of a municipality is, subject to the policy direction of the municipal council, responsible and accountable for [. . .] the appointment of staff . . .'

 (*Manana* para 15).

DECISION

The court in *Manana* held that the municipal council resolution that employed Mr Manana as manager of legal services was valid, as the executive power to hire staff for a municipality is vested in the municipal council in terms of s 151(2) of the Constitution of the Republic of South Africa, 1996 (*Manana* para 13). It stated that s 55(1) of the Municipal Systems Act is no more than a statutory means of conferring on the municipal manager the power to attend to the affairs of the municipality on behalf of the council. The Act does not, and cannot, divest a municipal council of the powers vested in it by the Constitution (*Manana* paras 14 and 17).

The court went on to say that the Constitution vests all executive authority — which includes the authority to appoint staff — in the municipal council, and legislation is not capable of lawfully divesting it of that power. To the extent that there might be any ambiguity in a statute in that respect, it must be construed to avoid that result (*Manana* para 17). The court further noted that the fact that the letter was written by the acting director of corporate services and not the municipal manager did not invalidate it, as it is the municipal council itself that made the appointment, and the acting director of corporate services did no more than execute the resolution administratively (*Manana* para 18).

On the issue of invalidity of the resolution — the argument raised by the caretaker municipal manager — the court stated that no authority had been offered for the submission that a duly adopted resolution of a local authority might be ignored by its officials if they believe it to be invalid, even if that belief was well-founded. The court added that it would be high problematic if public administration officials were entitled to choose between executing or not executing a duly adopted resolution of the council, depending upon their belief as to its validity, and whether or not the belief was well-founded.

LEGISLATIVE FRAMEWORK

A municipality's autonomy over personnel affairs sets it apart from the other spheres of government that are part of the single public service 'which must function and be structured in terms of the national legislation' (s 197(1) of the Constitution). In the provincial and national spheres of government, the terms and conditions of employment for all employees are governed by national legislation. This means that the recruitment, appointment, promotion, transfer and dismissal of provincial and national staff must occur within a uniform national framework (s 197(4) of the Constitution). As for municipalities, the Constitution stipulates that a municipal council makes decisions concerning the exercise of all powers and functions of the municipality (s 160(1)(a)). In the same vein, it provides that the municipal council may employ the personnel it needs for the effective performance of its functions (s 160(1)(d)).

The Constitution does not separate municipal legislative and executive authority (s 151(2)(c)). In essence, there is an absence of classical separation of powers in the structure of municipalities. Much is left to the municipal council in terms of its right to structure and organise its internal functioning (N Steytler & J de Visser *Local Government Law of South Africa* (2007) 8–10).

However, s 155(7) of the Constitution enjoins the national and provincial governments to regulate the exercise by municipalities of their executive authority in order to ensure that municipalities perform their functions effectively. To this end, the national government, through the Municipal Systems Act, the Municipal Structures Act and the MFMA, sets out the parameters within which municipalities can exercise the right to regulate their internal affairs, particularly by allocating powers to the various compo-

nents or functionaries of the municipality. The question that arises is whether national legislation may regulate the administration of a municipality by excluding the municipal council's power to effect certain appointments. In this regard, the Municipal Systems Act, the interpretation of which was at issue in *Manana*, will be analysed in this note.

POWERS OF SUPERVISION

The Constitution empowers the upper spheres of government to play the important role of supervising local government in the performance of its functions. The supervision of local government takes different forms, namely regulation (s 155(7) of the Constitution), monitoring and support (s 155(6) of the Constitution), and intervention (s 139 of the Constitution). The Constitutional Court in *The Executive Council of the Province of the Western Cape v The Minister for Provincial Affairs and Constitutional Development & another; The Executive Council of KwaZulu-Natal v The President of the Republic of South Africa & another* 2001 (1) SA 661 (CC) held that the autonomy of local government to regulate its internal affairs is subject to, and therefore its ambit is constrained by, the provisions of the Constitution, which

'include section 154(1) (national and provincial governments must support and strengthen the capacity of municipalities to manage their own affairs), section 155(7) (national and provincial governments have the power to ensure that municipalities perform their executive functions effectively), section 155(6)(a) (power of provincial government to monitor and support local governments and to promote their development to enhance their ability to manage their own affairs), section 160(1)(c) (power of municipalities to appoint committees is subject to national legislation) and section 160(8) (right of members of a municipal council to participate in its proceedings and those of its committees may be regulated by national legislation)' (para 98).

In this case, the Constitutional Court was concerned with the constitutional challenge to a number of provisions of the Municipal Structures Act by the provincial governments of the Western Cape and KwaZulu-Natal respectively. In particular, the two provinces contended that the Municipal Structures Act encroached on the constitutional powers of municipalities. This challenge related specifically to a municipal council's power to elect executive committees or other committees in violation of s 160(1)(c) of the Constitution and its power to regulate its internal affairs in terms of s 160(6) of the Constitution. In relation to the latter, the court held that the Constitution places substantial constraints on municipal autonomy in respect of internal arrangements (*Executive Council Western Cape* (supra) para 98), as reflected in the extract quoted above.

Of importance for present purposes is the constitutional limit on the autonomy of local government to regulate its internal affairs, and in the power of the national government to 'regulate' the exercise by municipalities of their executive authority (in terms of s 155(7) of the Constitution). Regulation is a form of supervision by the upper spheres of government that sets the necessary framework within which local government functions can

responsibly be exercised. In the *First Certification* judgment, the Constitutional Court held the term 'regulate' to mean 'a broad managing or controlling rather than a direct authorisation function' (*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) para 377). In essence, it is impermissible for the national government to prescribe detail when exercising its power to regulate. Its role is limited to setting the framework and leaving the details to the municipal councils.

THE MUNICIPAL SYSTEMS ACT

The municipal council must appoint the municipal manager who, as stated earlier, is the head of the municipal administration and is also the accounting officer for the municipality (s 82(1)(a) and (b) of the Municipal Structures Act, s 55(1) of the Municipal Systems Act and s 60 of the MFMA). The pivotal role of the municipal manager in the functioning of the municipality was highlighted by the Constitutional Court in *Executive Council Western Cape* as 'a key structure of a municipality and not merely a personnel appointment as contemplated in s 160(1)(d) of the Constitution' (*Executive Council Western Cape* (supra) para 109). The municipal manager is the primary interface between political structures and office-bearers, on the one hand, and the municipal administration, on the other hand (Steytler & De Visser op cit at 8-22(1)). He or she is the custodian of all records and documents of a municipality (s 117 of the Municipal Systems Act).

The municipal manager as head of administration

Section 55 of the Municipal Systems Act provides a framework for the duties of the municipal manager, subject to the policy directions of the municipal council. In this regard, the municipal council's role is to formulate and enforce the policy for the municipality to guide the implementation of these duties by the municipal manager. In essence, the municipal council is not completely excluded from the exercise of s 55 powers. In fact, the municipal manager exercises these powers under the supervision of the municipal council as the municipal manager is subject to the policy directions of the council.

In terms of this framework, the municipal manager is responsible for the formation and development of an administration that is economical, effective, efficient and accountable (s 55(1)(a) of the Municipal Systems Act). This administration must be managed by the municipal manager in accordance with the Municipal Systems Act and other legislation applicable to the municipality (s 55(1)(b) of the Municipal Systems Act). Most importantly, the municipal manager is responsible for ensuring that the staff, other than the managers directly accountable to him, are appointed to the municipal administration subject to the Employment Equity Act 55 of 1998 (s 55(1)(e) of the Municipal Systems Act).

Section 66(1) of the Municipal Systems Act, in turn, enjoins the municipal council to determine a policy framework to enable the municipal manager to

exercise certain duties relating to the staff establishment, such as: (a) the approval of a staff establishment for the municipality; (b) the provision of a job description for each post on the staff establishment; (c) the attachment of remuneration and any conditions of employment to each post in accordance with any applicable labour legislation; and (d) the establishment of a process or mechanism to evaluate regularly the staff establishment and, if necessary, to review it (s 16(1)(a)–(d) of the Municipal Systems Act).

The powers of the municipal manager contained in ss 55 and 66 are derived directly from the statute and are not delegated by the municipal council. Municipal councils normally delegate powers and functions to the municipal manager, and he or she generally performs such delegated functions or exercises such delegated powers (s 55(1)(m) and (q) of the Municipal Systems Act). It is important to note that such delegation does not divest the council of the responsibility for the exercise of the power or the performance of the duty (s 59(1)(b) of the Municipal Systems Act). Therefore, the municipal council, as the delegating authority, can revoke or withdraw delegated powers in accordance with its system of delegation (s 59(1)(c) of the Municipal Systems Act). However, this is not the case with ss 55 and 66 powers. These are not delegated powers and, as a result, the municipal council cannot divest the municipal manager of these powers. The council does not have claims in respect of these powers. Its role is limited to overseeing and supervising the exercise thereof.

The municipal manager as the accounting officer

Section 55(2) of the Municipal Systems Act contains the duties of the municipal manager in his or her role as the accounting officer of a municipality. The municipal manager is responsible and accountable for all the income and expenditure of the municipality, all its assets and the discharge of all its liabilities, as well as for the proper and diligent compliance with the MFMA (s 55(2)(a)–(c) of the Municipal Systems Act). Similarly, the MFMA confers certain duties on the municipal manager as the accounting officer. These relate to general financial management functions, assets and liability management, revenue management, expenditure management in general, expenditure on staff benefits, and so forth (ss 60–75 of the MFMA). Similarly, these duties are not delegated by the municipal council. They are derived directly from the statute, and as such cannot be revoked or withdrawn by the municipal council. However, these powers must be exercised subject to the policy directions of the municipal council.

ANALYSIS

The Supreme Court of Appeal in *Manana* had to contend with two issues. The first was whether or not officials can ignore council resolutions whenever they believe such resolutions to be invalid. The Supreme Court of Appeal was correct in holding that officials cannot do so. The court could not condone officials second-guessing council resolutions. Officials who doubt

the validity of a resolution should query the matter, or ask the council to rescind its resolution, but may not simply ignore it. Alternatively, they should ask a court to declare the resolution invalid.

The second issue was whether s 55 of the Municipal Systems Act constrains the council's executive powers in favour of the municipal manager. The court appeared to suggest that no statute can really limit the council's powers in favour of other organs within the municipality. I find this view problematic for the reasons that are discussed below.

National regulation

As noted above, s 155(7) of the Constitution permits the national government to regulate the exercise by municipal councils of their executive functions. If such regulation states that certain tasks are to be performed by the municipal manager, this limitation is based on the Constitution and is valid. Section 55 of the Municipal Systems Act is legislation of this kind, which regulates the exercise of the executive powers of a municipal council relating to the appointment of the personnel it needs for the effective performance of its functions. This, therefore, gives rise to the question whether or not s 55 exceeds the boundaries of regulation. My view is that it does not. As noted earlier, the power to appoint remains vested in the municipality. The council provides the policy framework, while the municipal manager makes the actual decisions. Moreover, the council exercises control over the municipal manager's exercise of his or her s 55 duties, and thus failure to comply with its policies can be sanctioned. Furthermore, only less important positions are at stake; all s 56 appointments fall squarely within the control of the council.

The practical implication of the court's view

The practical consequence of the court's finding might compromise sound and stable municipal governance. First, it causes confusion regarding the powers of the municipal council to appoint personnel. This is the case in so far as it gives the municipal council the right to claim a specific authority to make individual appointments. Some councils might want to claim the powers conferred on the municipal manager by the Municipal Systems Act. Armed with this judgment of the Supreme Court of Appeal, some councils might even adopt a resolution purporting to revoke the powers of the municipal manager relating to the appointment of staff, and may decide to appoint all staff by council resolution.

This has the potential to compromise the position of the municipal manager. As the head of the administration, the municipal manager is answerable for his or her administration. As such, the municipal manager should have the task of appointing, dismissing and disciplining his or her staff. Should councillors arrogate the power to themselves, the municipal manager would be exposed to increasing insubordination on the part of his or her staff since they had not been appointed by him or her, and would feel that they were responsible to the council alone.

Secondly, individual councillors may use this interpretation to justify their interference in the appointment of staff. As noted earlier, this would create fertile ground for corruption. Some councillors would appoint their acquaintances irrespective of whether they have the requisite qualifications, experience and competence.

Comparative provisions

Local government legislation is replete with provisions that constrain a council's executive powers. Some of them have even been sanctioned by the Constitutional Court. In this regard, the Constitutional Court judgment in *Executive Council Western Cape* made it clear that the Constitution places substantial constraints on municipal autonomy over internal arrangements (see Steytler & De Visser op cit at 3–30). The municipality's legislative power to regulate internal affairs was interpreted as a power with a relatively narrow scope (*Executive Council Western Cape* (supra) para 101).

Another example of a regulation that constrains a council's executive powers is s 117 of the MFMA, which excludes the council and councillors from procurement decisions. The MFMA draws a clear distinction between the policy aspects of supply chain management and the implementation of the system (National Treasury *Supply Chain Management: A Guide for Accounting Officers of Municipalities and Municipal Entities* (2005) 16). The development and adoption of the supply chain management policy is the responsibility of the council. Once adopted, the implementation of the policy is the prerogative of the municipal manager. This much was made clear in the case of *Ortlieb and Associates vs Camdeboo Local Municipal Council* 2005 JDR 0408 (E), where the court set aside the award of a bid because a councillor chaired the bid committee. In this case, the court was concerned with an application by a disgruntled bidder for an order setting aside the award of a tender, on the basis that a councillor acted as the chairman of the bid committee in contravention of section 117 of the MFMA. After disposing of the preliminary points, Pickering J held (ibid at 13): '[T]he provisions of section 117 of the MFMA were violated by the presence of seventh respondent as chairman of the committee dealing with the tender bids.' He went on to declare the proceedings of the bid committee a nullity, and set aside the award.

Similarly, the role of the council and councillors in the appointment of staff should be limited to the development and adoption of a recruitment policy. They should not be involved in staff appointments, which is the implementation of policies. There are contextual similarities between supply chain management and human resource management and they both have a propensity to attract political interference. The *State of Local Government Report* (op cit at 72), for example, mentions the problem of political interference in staff appointments and procurement decisions as the root cause of the dysfunction at local government level. The principle laid down in *Ortlieb and Associates* (supra) must therefore also be followed with regard to individual staff appointments.

CONCLUSION

The decision in *Manana* is based on the notion of the absence of separation of powers in the municipal council set-up. The Supreme Court of Appeal found s 55(1)(e) of the Municipal Systems Act of little import in that it does not compel the municipality to ensure that the municipal manager makes individual staff appointments with respect to staff other than s 56 staff. The Supreme Court of Appeal did not see s 55(1)(e) of the Municipal Systems Act as placing a barrier between the council and the administration when it comes to individual staff appointments.

What the Systems Act seeks to do in s 55 is not to prescribe the details of what municipalities should do, but rather to provide a framework within which municipal councils must operate. The comments of the court to the effect that an Act of Parliament cannot change the fact that the council has both legislative and executive authority should not be interpreted to constrain Parliament in this matter. National government is permitted by the Constitution to regulate the exercise by a municipality of its executive authority, and s 55 falls squarely within the concept of 'regulation'.