THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 485/2019

In the matter between:

NKANDLA LOCAL MUNICIPALITY	**First Appellant**
THE COUNCIL OF NKANDLA MUNICIPALITY	**Second Appellant**
LANGELIHLE SIPHIWOKUHLE JILI	**Third Appellant**

and

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

AND

In the matter between:

THE MTHONJANENI MUNICIPALITY	**First Appellant**
THE COUNCIL OF MTHONJANENI MUNICIPALITY	**Second Appellant**
PHILANI PHILEMON SIBIYA	**Third Appellant**

and

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

Neutral citation: *Nkandla Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs and Mthonjaneni Local Municipality and Others v MEC for the Department of Co-operative Governance and Traditional Affairs* (Case no 485/2019) [2020] ZASCA 153 (26 November 2020)

Coram: PONNAN, ZONDI, MOLEMELA and MAKGOKA JJA and POYO-DLWATI AJA

Heard: 2 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 November 2020.

Summary: Section 54(A)(8) of the Local Government: Municipal Systems Act 32 of 2000 – whether review of appointment of municipal managers falls within exclusive jurisdiction of Labour Court - whether review application launched by respondent brought in terms of Promotion of Administrative Justice Act 3 of 2000 or principle of legality – whether delay in launching review unreasonable – whether setting aside of impugned decision was just and equitable.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Koen J sitting as court of first instance): judgment reported as *sub nom*: *The MEC for The Department of Co-Operative Governance and Traditional Affairs v The Nkandla Local Municipality and Others, The MEC for The Department of Co-operative Governance and Traditional Affairs v The Mthonjaneni Municipality and Others* [2019] ZAKZPHC 4; (2019) 40 ILJ 996 (KZP); [2019] 3 All SA 772 (KZP):

1 The appeals are upheld with no order as to costs.

2 The orders of the court a quo in respect of each application are set aside and replaced with the following:

'(a) The application is dismissed.

(b) There is no order as to costs.'

JUDGMENT

Molemela JA (Poyo-Dlwati AJA concurring)

Introduction

[1] These appeals emanate from two applications launched in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court) by the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs (the MEC), seeking to set aside the appointment of the third respondents in each matter, Mr Langelihle Jili and Philani Sibiya, respectively as Municipal Managers of Nkandla Municipality and Mthonjaneni Municipality. In each application[1], the relevant municipality was cited as the first respondent, its Municipal Council as the second respondent and the appointed Municipal Manager

[1] In each application, the relief sought was couched as follows:
'(a) That the appointment of Third Respondent as the Municipal Manager of the First Respondent by the Second Respondent is declared to be invalid and is hereby set aside as null and void *ab initio*.

as the third respondent. The MEC's basis for seeking the invalidation of the appointments of Mr Jili and Mr Sibiya was that they did not possess the required minimum experience in a senior management post as stipulated in Reg 17 of the Regulations promulgated under s 54A(8) of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act). The two applications came before Koen J, (the court a quo) and were heard simultaneously on account of the fact that the issues raised were largely similar and that identical relief was sought. On that basis, the court a quo considered it convenient to deal with both applications in one judgment.

Factual background

Nkandla (the first application)

[2] In respect of Nkandla Municipality, the relevant factual matrix is as follows. Pursuant to a valid interview process, Mr Jili was recommended for appointment to the position of Municipal Manager on the basis of interview scores. The recommendation was subject to him passing a competency assessment[2], which he subsequently passed. On 24 January 2017, the Nkandla Municipal Council resolved to appoint Mr Jili as the Municipal Manager of Nkandla Municipality. On 26 January 2017, the Municipality notified the MEC about its resolution to appoint Mr Jili.

[3] On 13 February 2017, the MEC wrote to the Mayor of Nkandla Municipality requesting certain information and documentation pertaining to Mr Jili's experience. On 7 March 2017, the MEC wrote to the Mayor and advised that according to her preliminary assessment, Mr Jili's appointment was not in compliance with the legislative requirements as he appeared not to have a

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

(c) Further or alternative relief'.

[2] 'Competence' is defined in the regulations as 'having the necessary higher education qualification, work experience and knowledge to obtain at least a competent level of achievement'.

minimum of five years' experience at senior management level. She called upon the Municipality to take 'remedial action' to address the issue. No further steps were taken by the MEC. In the intervening period, Mr Jili assumed his position as Municipal Manager in February 2017.

[4] On 23 May 2017, the municipality wrote a letter to the Minister of Co-operative Governance and Traditional Affairs (the Minister) requesting him to waive the relevant experience requirement related to the post of Municipal Manager, as contemplated in s 54A(10) of the Systems Act. Although the municipality stated in the letter that Mr Jili met all the requirements 'except for the number of years in senior management', the same letter stated that Mr Jili had ten years' experience in the Municipality, 'most of which' was served in a senior management position. On 14 September 2017, the Minister informed the Municipality that its application for waiver had been declined. On 10 November 2017, an official in the MEC's department wrote to the municipality demanding that it take 'remedial action'. On 21 November 2017, the mayor wrote back to the MEC advising that the Municipal Council was awaiting a legal opinion on the matter. On 4 January 2018, the MEC again addressed correspondence to Nkandla Municipality requesting an update. The Municipality did not respond to that letter. On 11 May 2018, the MEC launched the application for review, seeking the setting aside of Mr Jili's appointment as a Municipal Manager.

Mthonjaneni (the second application)

[5] On 19 December 2016, the Municipal Council of Mthonjaneni Municipality resolved to appoint Mr Sibiya as its Municipal Manager. On 20 December 2016, Mthonjaneni informed the MEC of its decision. On 20 January 2017, the MEC informed the Mayor and the Minister that she was of the view that Mr Sibiya did not meet the requisite experience criteria and requested the Municipality to take 'remedial action in order to 'regularise the matter'. Mr Sibiya assumed the position of Municipal Manager in the same month. In July 2017 correspondence was

exchanged and the Mayor informed the MEC that the Council has sought legal opinion on the validity of Mr Sibiya's appointment.

[6] On 24 January 2018, the MEC wrote a letter to the Mayor expressing disappointment in the fact that an application to the Minister for waiver of the minimum experience requirement had not yet been made. I interpose to mention that the appellants deny that they ever indicated any intention to apply for waiver of the minimum experience requirement. On 28 June 2018, the MEC launched an application seeking the review and setting aside of Mr Sibiya's appointment.

[7] Before the court a quo, a preliminary point of jurisdiction was raised, in terms of which it was asserted that the nature of the dispute did not fall within the jurisdiction of the high court. It was contended that since the dispute was employment-related, it was governed by the Labour Relations Act 66 of 1995 and accordingly fell within the exclusive jurisdiction of the Labour Court as envisaged in s 157(1) of that Act. As regards jurisdiction, the court a quo found that the MEC's challenge was confined to the lawfulness of the respective municipalities' decisions to appoint the respective third appellants as Municipal Managers. It concluded the basis of the challenge to fall squarely within the provisions of s 54A of the Systems Act and accordingly found that it was competent to entertain the applications.

[8] As regards the merits, the court a quo found that the review application was not grounded on the Promotion of Administrative Justice Act 3 of 2000 (PAJA) on the basis that the appointment of Municipal Managers did not constitute administrative action within the PAJA definition. It held that there was no unreasonable delay in launching the review applications. It further found that the requirement of performance at a senior management level for a minimum of five years was peremptory, that the lack of experience by the two Municipal Managers was not seriously disputed, and that their lack of the relevant experience rendered their appointment unlawful. It set aside the appointment of the two Municipal

Managers with effect from the date of its order. This appeal is with the leave of the court a quo.

Issues for determination

[9] Four questions arise for determination in this appeal. First, whether the high court had the jurisdiction to entertain the applications or whether the dispute resorts within the exclusive jurisdiction of the Labour Court. Second, the effect, if any, of the order suspending the order of constitutional invalidity made by the Constitutional Court in *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs (SAMWU).*[3] Third, whether the applications for review were launched after an unreasonable delay. Allied to this is whether the review was brought in terms of (PAJA) or the principle of legality. Fourth, whether the two Municipal Managers met the relevant experience requirement.

Discussion

[10] The gravamen of the appellants' case is that the delay by the MEC in launching the review application is so manifestly unreasonable that it cannot be overlooked or condoned. As an alternative argument, the appellants contended that even if it were to be accepted that the unreasonable delay fell to be condoned, this ought not to have led to the setting aside of the two Municipal Managers' appointments, as it was not just and equitable to do so. Thus, so it was contended, this court should, in the exercise of its remedial discretion, decline to set aside the decisions of the two municipalities to appoint Mr Jili and Mr Sibiya as Municipal Managers.[4]

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[3] In *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* [2017] ZACC 7; 2017 (5) BCLR 641 (CC), the applicant successfully sought and obtained a declaration in the High Court that the Amendment Act was incorrectly tagged as an ordinary bill not affecting the provinces (a section 75 bill); whereas it ought to have been tagged as a section 76 bill (affecting the provinces). The Constitutional Court upheld this declaration of invalidity. Although the constitutional challenge was directed only at the requirement that municipal managers not be members of any political parties, the entire provision was impugned, the result being that the declaration of constitutional invalidity impacted on the section as a whole.

[4] See *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15; 2019 (4) SA 331 (CC) paras 65-71.

[11] The issues raised in this matter revolve around the appointment of a Municipal Managers and therefore bring the provisions of s 54A[5] of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) into sharp focus.

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[5] Section 54A provides:
'Appointment of municipal managers and acting municipal managers—
(1) The municipal council must appoint—
(a) a municipal manager as head of the administration of the municipal council; or
(b) an acting municipal manager under circumstances and for a period as prescribed.
(2) A person appointed as municipal manager in terms of subsection (1) must at least have the skills, expertise, competencies and qualifications as prescribed.
(2A)*(a)* A person appointed in terms of subsection (1) (b) may not be appointed to act for a period that exceeds three months.
(b) A municipal council may, in special circumstances and on good cause shown, apply in writing to the MEC for local government to extend the period of appointment contemplated in paragraph (a), for a further period that does not exceed three months.
(3) 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; or
(b) the appointment was otherwise made in contravention of this Act.
(4) If the post of municipal manager becomes vacant, the municipal council must—
(a) advertise the post nationally to attract a pool of candidates nationwide; and
(b) select from the pool of candidates a suitable person who complies with the prescribed requirements for appointment to the post.
(5) The municipal council must re-advertise the post if there is no suitable candidate who complies with the prescribed requirements.
(6)*(a)* The municipal council may request the MEC for local government to second a suitable person, on such conditions as prescribed, to act in the advertised position until such time as a suitable candidate has been appointed.
(b) If the MEC for local government has not seconded a suitable person within a period of 60 days after receipt of the request referred to in paragraph (a), the municipal council may request the Minister to second a suitable person, on such conditions as prescribed, until such time as a suitable candidate has been appointed.
(7)*(a)* The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.
(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.
(8) 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), 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.
(9) Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection.
(10) 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.
(11) A person who has been appointed as acting municipal manager before this section took effect, must be regarded as having been appointed in accordance with this section for the period of the acting appointment.
(12) Any pending legal or disciplinary action in connection with an appointment made before this section took effect, will not be affected by this section after it took effect.'

Although the issue of jurisdiction is a procedural point which is ordinarily dealt with at the outset, it is convenient to first outline the applicable legislative framework for purposes of context.

Legislative Framework

[12] The provisions of s 54A of the Systems Act must be seen against the backdrop of s 151 of the Constitution of the Republic of South Africa, 1996, (the Constitution), which stipulates that local government is autonomous and has executive and legislative powers to govern local government affairs, subject to national and provincial monitoring and support legislation as provided in the Constitution. Section 54A was introduced into the Systems Act by virtue of an amendment promulgated on 5 July 2011.[6] Prior to that, the appointment of Municipal Managers was governed by s 82 of the Local Government: Municipal Structures Act 117 of 1998. The 2011 amendment introduced measures to ensure that professional qualifications, relevant experience and competence were the overarching criteria governing the appointment of Municipal Managers.

[13] In *SAMWU*, the provisions of s 54A were declared constitutionally invalid. However, the declaration of invalidity was suspended for 24 months to permit the legislature to cure the procedural defects. As at the time the court a quo heard the applications, the suspension of the order of constitutional invalidity was still extant, which meant that the minimum requirements stipulated in s 54A were still in force. The *SAMWU* judgment thus served as no obstacle to the hearing of the applications by the court a quo. I am alive to the fact that the 24 months' suspension period expired on 9 March 2019 without the legislature having taken any steps to amend s 54A. This, however, is not an impediment in relation to the hearing of this appeal. This succinctly disposes of the third issue raised in this appeal.

[6] Section 4 of the Local Government: Municipal Systems Amendment Act 7 of 2011.

[14] 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 embodied in the Local Government Regulations on Appointment and Conditions of Employment of Senior Managers 2014 (the Regulations). They include, inter alia, five years of relevant experience for a Municipal Manager, as specified in item 2 of Annexure B to the regulations.[7] Section 54A(3) nullifies any appointment made in contravention of that Act.

[15] In terms of s 54A(7)(*a*), the Municipal Council is obliged to notify the MEC within 14 days of the appointment of the incumbent. The MEC must satisfy herself/himself that the appointment complies with the Systems Act. If she/he is not satisfied that the Act was followed, the MEC is empowered to take appropriate steps to enforce compliance by the Municipal Council. These steps include litigation against the Municipal Council that has failed to comply. Section 54A(10)

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[7] The provisions of Item 2 are correctly summarised as follows in the judgment of the court a quo (see *The MEC for The Department of Co-operative Governance and Traditional Affairs v The Nkandla Local Municipality and Others, The MEC for The Department of Co-operative Governance and Traditional Affairs v The Mthonjaneni Municipality and Others* (5369/18P, 5370/18P) [2019] ZAKZPHC 4; (2019) 40 ILJ 996 (KZP); [2019] 3 All SA 772 (KZP) (21 February 2019)) at footnote 9 of para 6:
'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 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".'

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

[16] The role of the Municipal Manager as set out in s 55 of the Systems Act also provides context. In terms of that provision, the Municipal Manager is both the head of administration for the municipality and its accounting officer. As head of administration, the Municipal Manager is responsible and accountable for the formation, development and management of an economical, effective, efficient and accountable administration; the management of the provision of services to the community in a sustainable and equitable manner; the appointment, management, training and discipline of staff; and advising the political structures and office bearers in the municipality. With that contextual background in mind, it is now opportune to consider the issue of jurisdiction.

Jurisdiction

[17] It was contended on behalf of the appellants that the dispute pertains to the termination of their employment and thus falls within the exclusive jurisdiction of the Labour Court as envisaged in s 157 of the Labour Relations Act 66 of 1995 (LRA).[8] The appellants contended that the court a quo had no jurisdiction to entertain the dispute and that on that ground alone, the appeal ought to succeed.

[8] Section 157 of the Labour Relations Act 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.
(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] It was contended on behalf of the appellants that where the MEC has failed to take any steps within 14 days and the incumbent has assumed the office of a Municipal Manager, as in the present case, the consequent employment relationship can only be terminated if the remedies set out in the Labour Relations Act 66 of 1995 (LRA) were invoked. According to the appellants, any relief seeking the setting aside of the appointment of a Municipal Manager who has already assumed office essentially amounts to a dismissal within the contemplation of s 186(1)(a) of the LRA, thereby bringing the dispute within the exclusive jurisdiction of the Labour Court. The fallacy of this proposition is laid bare by the very provisions of s 54(A)(8) which empower the Minister to take appropriate steps, including an order nullifying the appointment if a person is "appointed" in contravention of that section. That provision therefore envisages that the MEC may take those steps after the incumbent has already assumed the status of an employee.

[19] It is clear from the MEC's affidavit that she seeks to set aside the decision of the municipality for want of legality on account of its non-compliance with s 54A of the Municipal Systems Act. The MEC thus brought the application in order to hold the municipality accountable within the powers granted to her by s 54A of the Systems Act. As correctly pointed out by the court a quo, that provision prescribes the remedy the applicant may claim, which includes reviewing the decision of the Municipal Council. That provision thus provides the basis for a challenge to a Municipal Manager's appointment.

[20] On the pertinent issue of whether the Labour Court has exclusive jurisdiction to entertain a dispute, this Court in *Motor Industries Staff Association v Macun NO*,[9] held that where the exclusive jurisdiction of the Labour Court is raised, the question that should rightly be asked is whether the basis of the challenge to the decision is one that arises out of the LRA. This question is equally apposite in the circumstances of this matter. What is essentially challenged in this matter is a

[9] *Motor Industries Staff Association v Macun NO* [2015] ZASCA 190; 2016 (5) SA 76 (SCA).

decision that was statutorily and procedurally flawed.[10] As it is a matter concerning the relationship between the MEC and the municipalities, it is undoubtedly a matter in which the high court ordinarily has jurisdiction. The high court's jurisdiction does not automatically terminate when an employment relationship takes effect. I am fortified in this view by the following remarks by the Constitutional Court in *Gcaba v Minister for Safety and Security and Others*:[11]

'[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.'[12]

[21] The crux of the MEC's case is that the Municipal Managers (Mr Jili and Mr Sibiya) should not have been appointed by the two municipalities in the first place, since they do not have the minimum experience requirements prescribed by the applicable legislative instruments. As I see it, this is a matter in respect of which both the high court and the Labour Court have concurrent jurisdiction. It follows that the challenge to the court a quo's jurisdiction was without merit. This brings me to the issue whether or not the delay in launching the review applications was unreasonable.

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[10] *Mawonga and Another v Walter Sisulu Local Municipality and Others*.
[11] *Gcaba v Minister for Safety and Security and Others* [2009] ZACC 26; 2010 (1) SA 238 (CC); [2009] 12 BLLR 1145 (CC).
[12] *Gcaba v Minister for Safety and Security and Others* para 73.

The extent of the delay in launching the review application

[22] The appellants divided the delay into two periods, namely, the 14-day period after the delivery of the Municipal Council's report advising the MEC of the outcome of the recruitment process as envisaged in s 54A(7)(a) on the one hand, and the period within which the review was launched. While s 54A(7)(*a*) obliges the municipality to deliver its report on the outcome of recruitment within 14 days of its decision, s 54(7)(*b*) requires the MEC to submit a copy of that report to the Minister within 14 days of receipt thereof. It is evident from the provisions of s 54A(8) that once the MEC has received the report, he or she must, within 14 days of that notification, consider whether or not the appointment in question is in contravention of s 54A. If the MEC is of the view that the appointment is irregular on account of its contravention of the skills, competence and experience requirements laid down in s 54A(7), he or she is obliged to take steps, which may include approaching court for a declaratory order. Section 54A(9) provides that where the MEC has failed to take any steps within 14 days, the Minister is entitled to take the same steps.

[23] It is common cause that both Municipal Councils promptly complied with the requirements of s 54A(7) but the MEC did not take any steps within 14 days of receiving the Municipal Councils' reports on the outcome of the recruitment processes. The correspondence that was exchanged between the parties was initiated after the lapse of that 14-day period. The appellants contend that since the 14-day period lapsed without the MEC having taken any steps, the MEC ought to have applied for condonation for its failure to act within the prescribed 14-day period. They further submitted that once that period had lapsed, the baton had, in terms of s 54A(9) passed on to the Minister to intervene by taking the same steps the MEC could have taken.

[24] In relation to Nkandla, after being notified of the decision on 24 January 2017, the MEC's first step was to request further information on 13 February 2017. Some 20 days later, the MEC wrote a letter pointing out that Mr Jili did not meet

the minimum experience requirements and calling upon the Municipality to take 'remedial action'. In respect of Mthonjaneni, the MEC received notice of the appointment of Mr Sibiya within the stipulated 14-day period, but only responded a month later, indicating that the appointment was not in line with the provisions of the Systems Act as he lacked the prescribed minimum experience. The appellants submit that since the MEC failed to take any steps as envisaged in s 54A(8) of the Systems Act within 14 days of receiving the relevant reports, she could not bring the application for review without first asking the court a quo to condone her delay.

[25] The court a quo relied on the judgment of *The MEC for KwaZulu-Natal for Co-Operative Governance and Traditional Affairs v The Ntambanana Municipality and Another* (*Ntambanana Municipality*)[13] for its conclusion that a broad interpretation should be given to the provisions of s 54A(8). In that case, the high court found that s 54A(8) must be interpreted 'broadly' and held that, as long as some steps were taken to enforce compliance within 14 days, it was not necessary that the court application be launched within 14 days. There, the MEC had taken some steps within the prescribed 14-day period as she had written a letter to the municipality. She had not, however, launched the court application within 14 days. In the present instances, however, it is apparent from the papers that the MEC took no steps whatsoever within the 14-day period. The position is thus distinguishable from *Ntambanana Municipality*.

[26] The language used in s 54A(8) is clear and unambiguous. The modal verb 'must' is used, which suggests that the steps that are considered appropriate, which may or may not include litigation at that stage, must indeed be taken within the 14-day period. Section 54A(8) specifically empowers the MEC to take any appropriate steps, including litigation, where the Municipal Council has made an irregular appointment in contravention of s 54A. A purposive interpretation of s 54A

[13] *The MEC for KwaZulu-Natal for Co-Operative Governance and Traditional Affairs v The Ntambanana Municipality and Another* Unreported, Case No. 8793/2013P, KwaZulu-Natal High Court, Pietermaritzburg, dated 30 May 2014.

reveals a clear objective of acting with expedition in order to avoid an illegality from taking root.

[27] There is no obligation on the MEC to delay inordinately on the basis of a desire to seek co-operation with another sphere of government. It is precisely because of the constitutional separation between the municipal and provincial spheres, with the province exercising oversight over certain municipal functions, that the MEC is required to act promptly in relation to taking appropriate steps and notifying the Minister about the appointment. The requirement to notify the Minister is undoubtedly aimed to ensure that the latter, with his or her oversight responsibilities, is apprised of what has transpired so that he or she can take appropriate steps should the MEC fail to do so.

[28] The clearest indication of the promptitude with which the MEC is expected to act is evidenced by the fact that s 54A(9) empowers the Minister to take the steps contemplated in subsec (8) in the event that the MEC fails to do so. Obviously, the Minister's interventions as contemplated in s 54A(9) would be rendered nugatory if the MEC were to be considered to be at liberty to drag his or her feet in deciding to take appropriate action. The following remarks by the Constitutional Court in *Notyawa* in relation to the time limits imposed in the Systems Act leave no doubt as to the requisite expeditiousness:

'Even where an appointment is made, the monitoring function by the MEC *must* be carried out within 14 days from the date on which a report is received. For its part, a municipality is obliged to submit the report within 14 days from the date of appointment.

All these tight time frames are not a surprise. The entire scheme of section 54A is predicated on having suitably qualified persons appointed as municipal managers. And having those appointments made within a short span of time because municipal managers are vital to the proper administrative functioning of municipalities.'[14](Own emphasis.)

[14] *Notyawa* note 13 above paras 10-11.

[29] What exacerbates the situation is that the MEC has advanced no reasons whatsoever for her inaction during that specified period. The following remarks made by the Constitutional Court in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (*Khumalo*)[15] are apposite:

'The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons. Had the matter been brought by a private litigant, this aspect of the test might weigh less heavily. However, given that the MEC is responsible for the decision, that she is obliged to act expeditiously in fulfilling her constitutional obligations, and that she should have within her control the relevant resources to establish the unlawfulness of the decision she impugns, the unreasonableness of the unexplained delay is serious.'[16]

[30] In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [17] the Constitutional Court made the following insightful observation:

'There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.'[18]

[31] In this matter, it is undisputed that after failing to take any steps within 14 days after receiving the notification of the outcome of the recruitment process as envisaged in s 54A(7)(a), the MEC then waited more than a year before launching this application to review and set aside the appointments of the Municipal Managers. The exact delay was over 15 months, in relation to the Nkandla application, 24 January 2017 to 11 May 2018; and over 18 months in relation to the Mthonjaneni application, from 20 December 2016 to June 2018. The same

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[15] *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) para 51.
[16] Ibid para 51.
[17] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC).
[18] Ibid para 82.

MEC was the incumbent in the post from the time of Mr Jili and Mr Sibiya's assumption of their posts as Municipal Managers. She was thus in a position to have provided explanations for the delay and ought to have done so. This was not done. The MEC's delay was, in both instances, a period of 15 months and 18 respectively and such excessive delay was unexplained. Now that the extent of the delay has been set out, I turn now to the nature of the review application.

Was the review brought under PAJA or the principle of legality?

[32] As stated before, an ancillary issue raised in relation to the issue of delay is whether the MEC's review was grounded on PAJA or the principle of legality. The appellants contended in the court a quo and in this Court that the effect of the principle of subsidiarity[19] in the context of this matter is that should PAJA be applicable to the impugned decision, it would be impermissible for the MEC to have proceeded under the principle of legality.

[33] The court a quo observed, correctly in my view, that as to whether PAJA applies depends on whether the action sought to be reviewed amounts to 'administrative action' as defined in that Act. It held that the MEC's review was not hinged on PAJA. It therefore concluded that the 180-day period specified in s 7(1) of PAJA[20] was inapplicable in this matter. It correctly found that the assessment of

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[19] The essence of the principle of legality was captured as follows in *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC): "Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution." PAJA gives content to the right to just administrative action in section 33 of the Constitution. That Act categorises certain powers as administrative and thereby determines the appropriate standard of review (see *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC)). In the context of this case, the appellants' submission is that PAJA, with its time limit of 180 days for the launching of an application for review, must be applied before reliance can be placed on the safety net function of the principle of legality as the Constitutional ground of review.

[20] Section 7(1) of PAJA provides:

'(1) Any proceedings for judicial review in terms of section 6(1) must be instituted without *u*nreasonable delay and not later than 180 days after the date-

(a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or

(b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.' This 180-day bar may be

delay in bringing a review premised on the principle of legality entails a two-stage enquiry that examines (1) whether the delay is unreasonable and, if so (2) whether the court's discretion should be exercised to overlook the delay and entertain the application.[21]

[34] In *Minister of Defence and Military Veterans v Motau and Others* (*Motau*)[22] the Constitutional Court provides a helpful guidance on whether a decision or conduct constitutes 'administrative action.' It distilled the definition of 'administrative action' into seven components: There must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.

[35] As stated before, the crux of the case brought by the MEC is that the Municipal Managers (Mr Jili and Mr Sibiya) should not have been employed in the first place because they are not qualified as required by the legislative instruments that apply. The question is whether, juxtaposed with the criteria set out in *Motau*, the impugned decisions of the two municipalities (i.e. the appointment of Mr Jili and Mr Sibiya, respectively) constituted administrative action to which PAJA applied. It is to that exercise that I now turn my attention.

[36] That a municipality's decision to appoint a Municipal Manager is quintessentially of an administrative character warrants no debate, in my view.[23] A municipality is an 'organ of state' as defined in s 239 of the Constitution and its

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extended in terms of s 9 of PAJA by agreement between the parties or by a court or tribunal if it is in the interests of justice to do so.

[21] See *Khumalo* note 16 above para 44. Also see *Buffalo City Municipality v Asla Construction* note 4 above para 48.

[22] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (5) SA 69 (CC) para 33. Also see *Minister of Defence and Another v Xulu* [2018] ZASCA 65; 2018 (6) SA 460 (SCA) para 34.

[23] Compare *Notyawa* note 13 above para 39 and the minority judgment para 64.

powers are of a public nature.[24] The power related to the appointment of a Municipal Manager is derived from the Systems Act and constitutes a decision or conduct by the State. Given the crucial role of Municipal Managers as delineated in s 55 of the Systems Act, it is indisputable that an irregularity in the appointment of Municipal Managers can adversely affect the rights of members of the public or ratepayers to whom the Municipality owes the duty to lawfully execute its duties and thus had an external effect.[25] Lastly, the decision to appoint Municipal Managers does not fall within the limited exclusions under the definition of 'administrative action' in PAJA.

[37] It is evident from the above that the impugned decisions meet the elements of the definition of 'administrative action' enunciated in PAJA and expounded in *Motau* and would thus meet the threshold for a review grounded on PAJA. However, the matter is not as simple as all that. What cannot be disregarded is that s 54A gives both the MEC and the Minister a supervisory role in relation to the appointment of Municipal Managers. Khampepe J in *Motau* insightfully warned that the distinction between executive and administrative action is often not easily made; that the determination needs to be made on a case by case basis, and that there is 'no ready-made panacea or solve-all panacea'.[26]

[38] It is abundantly clear from a plethora of judgments that the yardstick of reasonableness is applicable regardless of whether the application for review is grounded on PAJA or the principle of legality.[27] The circumstances of this case do not warrant that a firm finding be made on whether the review was grounded on PAJA or the principle of legality, as that determination has no bearing on the outcome.

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[24] Ibid para 31.
[25] Compare *Provincial Minister for Local Government, Environmental Affairs and Development and Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 para 32.
[26] *Motau* note 21 above paras 35-36.
[27] *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) para 31; *Khumalo* note 16 above para 44.

[39] The requirement to institute review proceedings without undue delay is intended to achieve both certainty and finality. In *Merafong City Local Municipality v AngloGold Ashanti Limited*,[28] it was held that the rationale for the rule against delay in instituting reviews was to curb the potential prejudice that would ensue if the lawfulness of the decision remained uncertain. It was also observed that protracted delays could give rise to calamitous consequences not just for those who rely upon the decision, but also for the efficient functioning of the decision-makings.[29]

[40] As to whether the delay is unreasonable or undue is a factual enquiry upon which a value judgment is made, having regard to the circumstances of the matter.[30] The court a quo remarked that 'allowance should be made for administrative bureaucracy not always proceeding with lightning alacrity'. It found that the MEC's delays were occasioned by a spirit of co-operation which allowed for latitude for the municipalities in question to address the lack of experience. It therefore concluded that the delay was not unreasonable. For the reasons that follow, I am unable to agree with that conclusion.

[41] It bears emphasis that s 237 of the Constitution unequivocally stipulates that 'all constitutional obligations must be performed diligently and without delay'. That provision thus acknowledges the significance of timeous compliance with constitutional obligations.[31] Against the Constitution's clear injunction for spheres of government to act expeditiously, it would simply be unreasonable for the MEC to adopt a supine attitude for a long period of time in the guise of affording courtesy to another sphere of government. It must be borne in mind that in relation to Mr Jili, the MEC had previously queried his acting appointment on the same basis, long before the appointment that is currently challenged by the MEC.

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[28] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC).
[29] Ibid para 73.
[30] *Notyawa* note 13 above para 46.
[31] *Khumalo* note 16 above para 46–47.

[42] As mentioned before, the MEC's delay was, in both instances, a period of 15 months and 18 respectively and such excessive delay was unexplained. Given that the delay is well in excess of the 180-day period stipulated in s 7 PAJA, the enquiry pertaining to the delay is essentially the same enquiry that would be conducted by the Court when assessing the delay within the framework of legality review.[32] Notably, both Mr Jili and Mr Sibiya had no hand whatsoever in causing the delay. Against the backdrop of the authorities alluded to earlier, it cannot be gainsaid that the MEC's delay was simply unreasonable[33] regardless of whether the matter is considered through the prism of PAJA or the principle of legality

[43] It is evident from the judgment of the court a quo that since it had concluded that the delay was not unreasonable, it did not have to consider the second leg of the enquiry, i.e. whether an unreasonable delay should be condoned. This is in line with the approach approved by the Constitutional Court in *Khumalo*.[34] I therefore consider it unnecessary to deal with the legal principles applicable to the condonation of an unreasonable delay. Suffice it to mention that it is trite that an unreasonable delay may, in appropriate circumstances, be condoned.[35] As correctly pointed out by this Court in *Valor IT v Premier, North West Province and Others*,[36] whether condonation should be granted in the event that the delay has been found to be unreasonable involves a 'factual, multi-factor and context-sensitive' enquiry in which a range of factors are all considered and weighed before a discretion is exercised one way or another.[37]

[44] I consider next whether the unreasonable delay was likely to prejudice the appellants. An important consideration is that that there is generally a heightened

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[32] *City of Cape Town v Aurecon South Africa (Pty) Ltd* note 26 para 31.
[33] Compare *Khumalo* note 16 above para 50.
[34] *Khumalo* note 16 above para 49.
[35] In relation to reviews grounded on PAJA, a court or tribunal may overlook the delay if it is in the interests of justice to do so. See s 9 of PAJA.
[36] *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; [2020] 3 All SA 397.
[37] Ibid para 30.

obligation on the state to proceed promptly to minimise prejudice.[38] Mr Jili and Mr Sibiya are litigants in their own right. Sufficient consideration must be paid to their own averments as set out in their affidavits in which they specifically raised an issue about the MEC's delay in launching the applications. As stated before, the lengthy delay in launching the application has not been fully explained in the MEC's replying affidavit. A crucial aspect is that no blame whatsoever can be attributed to either Mr Jili or Mr Sibiya for the MEC's delay. Any lack of co-operation on the part of the municipalities cannot be attributed to them. Both Mr Jili and Mr Sibiya will obviously face hardship in the event of the setting aside of their appointments, as they would forfeit all the remuneration they have received and benefits that have accrued to them to date.

[45] On the other hand, the prejudice to the Municipal Council has to do with the fact that the decisions taken by Mr Jili and Mr Sibiya in their official capacities as the Municipal Managers and implemented could be called into question, to the detriment of the municipalities and the ratepayers. Condoning the delay could thus have a significant prejudicial effect on the administration of justice. A disconcerting factor is that despite the fact that an official in the MEC's department had, in a letter dated 9 July 2017, pointed out that all decisions taken by Mr Sibiya in his official capacity 'would be ultra vires' on account of his irregular appointment to the position of Municipal Manager, the MEC was, for some inexplicable reason, content to continue sending letters to the Mayor lamenting the position. It would take her another nine months before launching the review application.

[46] In relation to the merits, an important consideration in relation to Mr Jili is that in his answering affidavit, he was steadfast in disputing the MEC's assertion that he had only one year and one month's relevant experience. He averred that

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[38] See in this regard *R v Secretary of State for Health, ex parte Furneaux* [1994] 2 All ER 652 (CA) at 658 where, with reference to Court of Appeal Authority, Mann LJ held that a delay of even three months may not be condoned if it results in "substantial hardship to any person, substantial prejudice to the rights of any person, or would be detrimental to good administration"; and described the obligation to proceed promptly as "of particular importance where third parties are concerned".

his experience fell squarely within the parameters of the definition of a senior manager as defined in the Regulations. He asserted that he was a Communications Manager from 2008-2014, during which period he reported directly to the then Municipal Manager. That experience was, on its own, sufficient. He further asserted that from 30 September 2016 to 26 January 2016, he was the Executive Manager in the office of the Municipal Manager. He was also an Acting Municipal Manager from 3 February 2016 to 6 August 2016. It was submitted that his cumulative experience far exceeded the five years minimum experience that was indicated as the minimum requirement.

[47] Mr Jili provided details regarding his experience and stressed that while he was in the employment of the Municipality, he reported to the Municipal Manager and therefore fell under the category of senior management as contemplated in the Regulations. He averred that he had functioned at senior management role for far more than the requisite five years. His assertion that he had served at senior management level for 5 years within the contemplation of item 2 of the Regulations s 54A(8) was not seriously disputed.

[48] The court a quo found that there was no real dispute of fact and held that the requirement pertaining to minimum experience had not been fulfilled in respect of both applications. Before us, counsel for the appellants pointed out that the existence of a dispute of fact was raised in the written heads of argument filed on behalf of the appellants and was never conceded before the court a quo.

[49] It seems to me that the court a quo's conclusion that there was no dispute of fact was largely based on the fact that the municipality had written a letter to the Minister requesting that Mr Jili's lack of experience be waived as contemplated in s 54A(8). Sight must not be lost of the fact that the request was directed to the Minister by the municipality and not by Mr Jili. Moreover, in the very letter requesting waiver, the Mayor of Nkandla stated that Mr Jili had ten years' experience in the environment, most of which was acquired while serving in a

senior management position. Given that the municipality itself did not unequivocally concede that Mr Jili did not meet the minimum experience requirements, I am unable to conclude that Mr Jili's lack of experience was admitted impliedly. The municipality's letter wrongly conceding that Mr Jili did not have the relevant experience could in any event not serve to disavow his undisputed assertions that he had the requisite minimum experience of five years on account of having held posts in terms of which he had reported directly to the Municipal Manager.

[50] As to whether a communications manager indeed reported directly to the Municipal Manager is something that was within the peculiar knowledge of the municipality that appointed him. Mr Jili's assertions about his senior management position were not disavowed by the municipality. With the resources at her disposal, the MEC was also well-placed to refute those assertions in order to establish the unlawfulness of the decision she sought to impugn.[39] However, those averments were not refuted by the MEC in her replying affidavit. The trite principle laid down in *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd*[40] is that an applicant who seeks final relief in motion proceedings must, in the event of a dispute of fact, accept the version set up by the respondent unless the latter's allegations do not raise a real, genuine or bona fide dispute of fact. The MEC therefore failed to show that the appointment of Mr Jili was unlawful on account of not meeting the experience requirements. Put differently, the illegality of the impugned decision was not clearly established on the facts.[41]

[51] However, even if it is accepted that Mr Jili, like Mr Biyela, did not meet the applicable minimum experience requirements, I am of the view that the circumstances of this case still do not call for the invocation of a remedy setting aside their appointment. It is settled law that a contract flowing from the invalid

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[39] *Khumalo* note 16 above para 51.
[40] *Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 ALL SA 366 (A); 1984 (3) SA 623 (A) at 634E-635C.
[41] *Notyawa* note 13 para 52.

administrative action can in certain circumstances be preserved as a form of remedial action.[42] The fact that there have been no complaints about both Municipal Managers' competence and performance since their appointment, viewed against the MEC's unexplained inordinate delay, is an aspect that strongly militates against an order setting aside their appointment. Moreover, given the crucial role played by Municipal Managers in terms of s 55 of the Systems Act, setting aside Mr Jili and Mr Biyela's appointment and rendering it void from the outset or from the date of the order of the court a quo would undoubtedly have adverse consequences for the public and the municipalities in whose interests the Municipal Managers purported to act.[43]

[52] An equally compelling consideration is the nature and extent of the illegality raised in relation to the impugned decision.[44] *Notyawa* fortifies my view that the impugned decision, considered in the context of the legal challenge raised and the circumstances of this case, does not concern a serious breach of the Constitution.[45] This is a relevant consideration in relation to the wide remedial power to grant a just and equitable remedy.[46] Notably, the MEC did not identify any prejudice it may suffer as a result of the preservation of their employment contracts for the remainder of the fixed 5-year term. I therefore consider a just and equitable remedy to be one retaining Mr Jili and Mr Sibiya's in their current positions for the remainder of their respective employment contracts.

[53] It is trite that the exercise of a discretion may be set aside on appeal if it was not exercised judicially – if, in other words, it was exercised on the basis of

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[42] *Buffalo City Municipality v Asla Construction (Pty) Limited* note 4 above paras 105 and 125.
[43] Compare *Provincial Minister for Local Government, Environmental Affairs and Development and Planning, Western Cape v Municipal Council of the Oudtshoorn Municipality and Others* [2015] ZACC 24; 2015 (6) SA 115 (CC); 2015 (10) BCLR 1187 para 32. Also see *Millennium Waste Management (Pty) Ltd. v Chairperson of the Tender Board: Limpopo Province and Others* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) para 23.
[44] Ibid.
[45] *Notyawa* note 13 above para 52.
[46] Ibid para 50. Also see *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16 (CC); 2007 (3) SA (CC) 121 para 29.

incorrect facts or incorrect legal principles.[47] I therefore agree with the views expressed by Makgoka JA on this particular aspect. This Court is thus at large to tamper with the discretion of the court a quo in relation to the appropriate remedy. It follows that the appeals ought to succeed.

Conclusion

[54] To sum up, the appeals in relation to both applications ought to succeed. In relation to costs, a factor warranting consideration is that the Municipalities, the Municipal Councils and the MEC are all organs of state. Making costs orders in relation to the state parties in this matter would not serve the interests of justice. A noteworthy consideration is that both Mr Jili and Mr Sibiya were assisted by the same attorneys and counsel who represented the respective Municipalities and their Municipal Councils. However, in so far as adverse costs orders were made by the court a quo against Mr Jili and Mr Sibiya, respectively, these would have to be set aside.

[55] In the result, the following orders are made:

1 The appeals are upheld with no order as to costs.

2 The orders of the court a quo in respect of each application are set aside and replaced with the following:

‘(a) The application is dismissed.

(b) There is no order as to costs.’

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M B Molemela
Judge of Appeal

[47] *Notyawa* note 13 above para 41.

Ponnan JA (Zondi JA concurring)

[56] I have had the benefit of reading the judgment of Molemela JA, who ultimately holds that the high court was wrong in its conclusion that 'the delays were not unreasonable'. I regret that on this aspect of the case I cannot agree with my learned colleague.

[57] The high court judgment detailed all of the relevant considerations and weighing the one against the other, concluded that the delay should be condoned. In that regard the high court held:

'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 there were not unreasonable. The correspondence and time frames rather suggest that the applicant in a spirit of cooperation 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 well be 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.'[48]

[58] In that, in my view, the high court cannot be faulted. What is more, we are not simply at large to interfere with the discretion exercised by the high court. It is important to determine whether the discretion exercised by the high court in granting condonation was one in the 'true' or 'loose' sense. The importance of the distinction, as the Constitutional Court explained in *Trencon Construction (Pty)*

[48] *The MEC for KwaZulu-Natal for Co-Operative Governance and Traditional Affairs v The Ntambanana Municipality and Another* Unreported, Case No. 8793/2013P, KwaZulu-Natal High Court, Pietermaritzburg, dated 30 May 2014 para 59.

Limited v Industrial Development Corporation of South Africa Limited and Another, is that it dictates the standard of interference by this court.[49] However, as the Constitutional Court emphasised, 'even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.'[50]

[59] In *Florence*, Moseneke DCJ stated:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'[51]

[60] What appeared to have weighed with the high court were the principles of co-operative government enshrined in the Constitution. In the context of the unique challenges inherited from our past, a choice was made not to opt for 'competitive federalism' but 'co-operative government'.[52] The drafters of the Constitution envisioned that the best vehicle for accountable and democratic governance was that of co-operative government as outlined in Chapter 3 of the Constitution. Thus, although one sovereign democratic state,[53] government in South Africa is constituted as national, provincial and local spheres of government.[54]

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[49] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 82–97.
[50] Ibid para 82.
[51] *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC) para 113.
[52] *In re: Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (*the First Certification judgment*) para 287.
[53] Section 1 of the Constitution states that the Republic of South Africa is one sovereign, democratic state.
[54] Section 40(1) of the Constitution.

[61] In terms of s 40(1) of the Constitution, the spheres of government are distinctive, inter-dependent and interrelated. Each is duty-bound to 'co-operate with one another in mutual trust and good faith'.[55] These principles inform the normative content of cooperative governance. Thus, although each sphere is enjoined to exercise its powers in a manner that does not encroach on another's sphere,[56] having three spheres of government, each with a degree of autonomy, can at times make for relationships that are fraught and impracticable.

[62] Importantly, Chapter 3 of the Constitution also imposes an obligation on the spheres of government and organs of state to 'avoid legal proceedings against one another'.[57] Section 41(3) of the Constitution requires that 'an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'

[63] In the *First Certification* judgment,[58] the Constitutional Court held that this provision 'binds all departments of state and administrations in the national, provincial or local spheres of government'. The Court added that its implications are that 'disputes should where possible be resolved at a political level rather than through adversarial litigation'.

[64] Against that backdrop, I turn to the relevant facts in each matter. In the case of the Nkandla Municipality: The Council of the Municipality resolved to appoint the third appellant, Mr Jili, as the new Municipal Manager on 24 January 2017. The MEC was informed of the appointment on 26 January 2017. On 13 February 2017 the Provincial Department of Co-Operative Governance and Traditional Affairs (the Department) addressed a letter to the Mayor of Nkandla indicating that 'the

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[55] Section 41(1)*(h)* of the Constitution.
[56] Section 41(1)*(g)* of the Constitution.
[57] Section 41(1)(*h)(*vi) of the Constitution.
[58] *The First Certification judgment* fn 51 above para 291.

information provided had been assessed in terms of the prescribed regulations and based on such information, the following documentation and information must be forwarded to the Department to enable the MEC to assess compliance processes'. There followed a list of some seven items.

[65] On 7 March 2017 the MEC advised the Mayor and Municipal Council that Mr Jili did not comply with the requirements for appointment. The MEC pointed out that Mr Jili did not 'meet minimum experience required of 5 years at senior management level'. During May 2017, the Mayor wrote to the Minister of Cooperative Governance and Traditional Affairs (the Minister) as follows:

'The MEC . . . indicated gaps with regards to the experience. The Council on its sitting on 18 May 2017 resolved to mandate the Mayor to apply to the Minister for the waiver in terms of Section 54A subsection 10 of the Municipal Systems Act No. 32 of 2000. This letter therefore serves as a request to the Minister to waiver section 54A(2)(1) as the appointed candidate does meet all the other requirements of this position except for the number of years in senior management position as required by the regulations'.

[66] On 14 September 2017 the Minister refused the application and advised the Municipality to re-advertise the position. On 10 November 2017 the Department wrote to the Mayor requesting the Municipality to take remedial action in respect of the illegal appointment of Mr Jili. In response, on 21 November 2017 the Mayor wrote to the MEC: '[k]indly note that we are awaiting the legal opinion on the matter. Therefore after getting a legal opinion a proper response will be prepared and sent back to your office.' On 4 January 2018 the Department reminded the Municipality 'to submit the remedial action in respect of the above matter'. According to the Director: Municipal Administration of the Department, who deposed to the founding affidavit in support of the application on behalf of the MEC:

'Email correspondence continued from January 2018 through to March 2018 with the Department reminding the Mayor that remedial action had to be taken. Observing no progress whatsoever the Department made a submission to the MEC to make this application and the MEC is authorised this application.'

[67] In the Mthonjaneni Municipality matter: On 19 December 2016 the Council of the Municipality resolved to appoint the third appellant, Mr Sibiya, as the Municipal Manager. The MEC was thereafter advised of Mr Sibiya's appointment. On 20 January 2017 the MEC informed the Mayor of the Mthonjaneni Municipality that Mr Sibiya's appointment 'is not in line with the provisions of the Municipal Systems Amendment Act No 7 of 2011, based on the fact that [his] years of experience do not meet the minimum requirement stipulated in [the] regulations of at least 5 years' relevant experience at senior management.' The MEC asked for his Department to be advised of the remedial action that would be taken by the Municipality to rectify the matter. On the same day, the MEC wrote to the Minister, informing the latter that she had 'advised the Mthonjaneni Council to submit a report on remedial action taken within seven days of receipt of my letter'. In response, the Municipality advised the MEC that an application would be made to the Minister for a waiver in terms of s 54A(10) of the Act.

[68] According to the Department, it allowed the Municipality sufficient time to make a waiver application, because in its experience such an application could take months. On 9 July 2017 the Department wrote to the Mayor intimating that it had written letters on numerous occasions advising the Municipality to reverse its decision, to which the Municipality has not responded. The Municipality once again was requested to remedy the situation and provide a report. Failure to do so, so stated the letter, would lead the MEC to institute legal proceedings. The response from the Mayor on 19 July 2017 was: '. . . taking into account the express threat of legal action', Council had resolved to obtain a legal opinion, which, 'whatever its outcomes', would be tabled before the next council meeting scheduled for 29 August 2017. The Mayor undertook to revert to the MEC within seven days of the council meeting. That did not happen.

[69] Various further reminders were sent by the Department to the Municipality. On 21 November 2017 the Department in an email to the Municipality stated 'it has come to the attention of the Department that the Municipality resolved to apply for

[a] waiver to the National Minister. Kindly provide this office with a copy of the application . . .'. On 29 November 2017 a further email was despatched, which concluded: '[a]ttached, please find copy of Circular No. 15 of 2017 that will guide on how to submit such an application. Should you have any queries, please do not hesitate to contact me.'

[70] On 26 January 2018, a meeting was held between officials of the Department and the Municipality. As recorded in the minutes, the purpose of the meeting was:

- 'To support municipalities to comply with the MSA Regulations.
- To advise municipalities about requirements in the Regulations:-
    - [T]he filling of vacant senior manager's positions within the prescribed time frames;
    - Ensure that suitable candidates that meet all of the requirements as per the Regulations are appointed;
    - Submission of the report on the remedial action within the specified period.'

The minutes further recorded that it was noted that the 'appointment of the Municipal Manager was in contravention with the legislation' and that the Municipality had 'committed to submit an application for waiver in this regard'.

[71] It is so that the MEC's constitutionally mandated supervisory role in relation to the appointment of municipal managers is expressly provided for in s 54A(8). But, as the Constitutional Court has held in the *First Certification judgment*,[59] '[i]n its various textual forms "monitor" corresponds to "observe", "keep under review" and the like. In this sense it does not represent a substantial power in itself, certainly not a power to control [local government] affairs, but has reference to other, broader powers of supervision and control'. The Court further interpreted the power of monitoring local government as limited to measuring or testing at intervals, local government's compliance with the Constitution and with national and provincial directives.

[59] Ibid paras 372-373.

[72] Importantly, therefore, the power to monitor local government needs be distinguished from the power to intervene in local government. It is thus unclear to me how much earlier, in each instance, the MEC should have acted. Given that each Municipality had intimated that it would be applying for a waiver to the Minister, surely, the MEC was obliged to allow that process to run its course. Anything less, would have been tantamount to the MEC pre-empting the decision of the Minister. It may also have rendered nugatory the power conferred upon the Minister in terms of s 54A(10) of the Systems Act. In that regard, and particularly given each history, the high court cannot be faulted in its conclusion that the 'applications are not time barred by the provisions of s 54A(8) of the Systems Act'.

[73] The Minister refused the application for a waiver submitted by the Nkandla Municipality on 14 September 2017. In the case of the Mthonjaneni Municipality, despite repeated undertakings, it would seem that eventually no application was in fact submitted to the Minister. Moreover, both Municipalities asserted that they had resolved to obtain legal opinions. If either Municipality did indeed obtain a legal opinion, one can only assume that inasmuch as such opinion was not annexed to the papers it could not have been favourable to the Municipality. If no legal opinion had been obtained, then asserting in each instance that they had resolved to do so was plainly contrived and dishonest.

[74] Whatever the case, the MEC would obviously have been acting precipitously had she approached a court in the face of the assertion that a legal opinion was to be procured. In *National Gambling Board v Premier, KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) SA 715 (CC) para 36, the Constitutional Court stated:

'… organs of state's obligations to avoid litigation entails much more than an effort to settle a pending court case. It requires of the organ of state to re-evaluate the need … to consider alternative possibilities and compromises and to do so with regard to the expert advice the other organs of state have obtained.'

[75] In this regard the judgment of the Constitutional Court in *Uthukela District Municipality and Others v President of the Republic and Others* [2002] ZACC 11; 2003 (1) SA 678 (CC) is instructive. In that matter, three Category C municipalities had applied in three separate applications for orders declaring s 5(1) of the Division of Revenue Act 1 of 2001 unconstitutional. The high court gave an order declaring the section unconstitutional and 'invalid to the extent that it excludes Category C municipalities from sharing with Category A and B municipalities in the local government allocation of revenue raised nationally'. In the Constitutional Court the applicants sought an order confirming the high court's order, as well as an order directing the national government to pay to them their respective equitable shares.

[76] However, by the time the application was heard by the Constitutional Court, the Act had been repealed. In considering whether the confirmation should nevertheless be dealt with, the Constitutional Court observed:

'If parties who may be affected by confirmation proceedings are organs of state, a further important factor must be taken into consideration. Organs of state have the constitutional duty to foster co-operative government as provided for in Chapter 3 of the Constitution. This entails that organs of state must "avoid legal proceedings against one another". The essence of Chapter 3 of the Constitution is that "disputes should where possible be resolved at a political level rather than through adversarial litigation." Courts must ensure that the duty is duly performed. This is apparent from section 41(4) which provides: "If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."'[60]

[77] The Constitutional Court added:

'In view of the important requirements of co-operative government, a court, including this Court, will rarely decide an intergovernmental dispute unless the organs of state involved in the dispute have made every reasonable effort to resolve it at a political level. When exercising a discretion whether to deal with confirmation proceedings, this Court must thus bear in mind that Chapter 3 of the Constitution contemplates that organs of state must

[60] *Uthukela District Municipality and Others v President of the Republic and Others* [2002] ZACC 11; 2003 (1) SA 678 (CC) para 13.

make every reasonable effort to resolve intergovernmental disputes before having recourse to the courts.'[61]

And, ultimately concluded that:

'In the circumstances and in the interest of co-operative government, this Court should not exercise its discretion to decide the confirmation issue. It must first be left to the organs of state to endeavour to resolve at a political level such issues as there may still be.'[62]

[78] In reaching that conclusion the Constitutional Court emphasised:

'Apart from the general duty to avoid legal proceedings against one another, section 41(3) of the Constitution places a two-fold obligation on organs of state involved in an intergovernmental dispute: First, they must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for. Second, they must exhaust all other remedies before they approach a court to resolve the dispute.'[63]

[79] It thus seems to me that the cumulative consequence of all of the aforegoing considerations is that the MEC can hardly be faulted for turning to the court as a matter of last resort. At least, up until January 2018, there is nothing to suggest that the MEC ought to have arrived at the realisation that further engagement would be fruitless. It is important to emphasise that co-operative government is not a one way street. The MEC had to tread respectfully not only in relation to each Municipality but also the National Minister. Each Municipality on the other hand, eschewed openness and transparency for guile and sleight of hand. At no stage did they make plain that they had elected to ignore the MEC. Instead, they strung her along. There also is no explanation from them whatsoever for their contradictory stance. To thus raise delay, for which by their conduct they are principally responsible, is, in my view, unconscionable.

[80] There is a further important reason why the MEC should not be non-suited on account of delay in a matter such as this. Constitutional delinquency on the part

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[61] *Uthukela District Municipality* para 14.
[62] Ibid para 24.
[63] Ibid para 19.

of Municipalities and Mayors, contributes in no small part to: (i) the poor state of health of local government; (ii) distress and oftentimes plain dysfunctionality on the part of municipalities; and, (iii) increasing civil society protests against poor service delivery.[64] For a court to overlook delinquency of the kind encountered here, may likely encourage more of the same not just by these litigants, but also others who are similarly placed.

[81] For some time now, the Auditor General (AG) has reported annually on the parlous state of our Municipalities. For the financial year ended 30 June 2018,[65] the AG reported material non-compliance with key legislation at 92% of the Municipalities (an increase from 85% in the previous year); whilst Municipalities with material compliance findings on supply chain management increased from 72% to 81%, representing the highest percentage of non-compliance since 2011-12. The AG's report for the period 2018-19,[66] entitled 'Not much to go around, yet not the right hands at the till', paints a picture of billions of rand in funds allocated to municipalities being managed 'in ways that are contrary to the prescripts and recognised accounting disciplines'. The AG strongly cautions that these administrative and governance lapses 'make for very weak accountability and the consequent exposure to abuse of the public purse'.

[82] Of the 257 municipalities and 21 municipal entities audited for the 2017-18 financial year, only 18 municipalities managed to produce quality financial statements and performance reports, as well as complied with all key legislation, thereby receiving a clean audit. This is a regression from the 33 municipalities that received clean audits in the previous year. At a media briefing on the release of

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[64] See for example Jaap de VIsser & Nico Steytler 'Confronting the State of Local Government: The 2013 Constitutional Court Decisions' (2016) 1 *Constitutional Court Review* at 2.
[65] Auditor General South Africa Media Release *Auditor-general flags lack of accountability as the major cause of poor local government audit results* 26 June 2019 https://www.agsa.co.za/Portals/0/Reports/MFMA/2019.06.25/2019%20MFMA%20Media%20Release.pdf
[66] Auditor General South Africa Media Release *Auditor-general releases municipal audit results under the theme - "not much to go around, yet not the right hands at the till"* 1 July 2020 https://www.agsa.co.za/Portals/0/Reports/MFMA/201819/Media%20Release/2020%20MFMA%20Media%20Release%20Final.pdf

the 2017-18 financial year report on the audit results of municipalities, the AG stated:

'Audit results show an overall decline… this undesirable state of deteriorating audit outcomes shows that various local government role players have been slow in implementing, and in many instances, even disregarded the audit offices recommendations.'

[83] These two Municipalities are no exception. In separate reports dated 30 November 2018 to the two Municipalities and the KwaZulu-Natal Legislature, the AG recorded that: *in respect of the Nkandla Municipality* – (i) liabilities exceeded its assets by R10,46 million, (ii) reasonable steps were not taken to prevent unauthorised expenditure amounting to R11,39 million and fruitless and wasteful expenditure amounting to R194 009 and (iii) an independent firm was investigating allegations of possible maladministration, fraud and corruption for the period 2009 to 2015, which was still in progress at the time of the report;[67] and, (b) *in respect of the Mthonjaneni Municipaility* – reasonable steps were not taken to prevent irregular expenditure amounting to R36,24 million.[68]

[84] According to the AG, recommendations made to local government leadership did not receive the necessary attention at most municipalities. And, there were largely no consequences for those who flouted existing legislation. The situation is rather worrying in KwaZulu-Natal, where Municipalities chalked up R2 943 million in irregular expenditure (up from R2 333 million the previous year). In these circumstances, the MEC's oversight task is an unenviable one.

[85] As the head of the administration and the accounting officer of a Municipality,[69] the Municipal Manager is key to service delivery at the local

[67] Nkandla Local Municipality Annual Report 2017/2018 https://www.nkandla.org.za/images/Documents/Office_Of_The_MM/2019/NKLM_Annual_Report_2017-2018.pdf at 113-115.
[68] Mthonjaneni Municipaility Audit Report 2017/2018 https://www.mthonjaneni.org.za/wp-content/uploads/2019/04/Final-Audit-Report-17-18.pdf
[69] Section 55 of the Systems Act.

government level. Inadequately qualified or experienced Municipal Managers impact adversely on the quality of service rendered to communities. As the Constitutional Court observed in *Notyawa v Makana Municipality and Others*:[70]

'[Section 54A(3) of the Systems Act] lays emphasis on the appointment of suitably qualified municipal managers owing to the position they hold in the administration of a municipality. The role played by the managers is crucial to the delivery of services to local communities and the proper functioning of municipalities whose main function is to provide services to local communities. The section envisages that candidates who are best qualified for the job must be recruited. It obliges municipalities to "advertise the post nationally to attract a pool of candidates nationwide" and select from that pool a manager who meets the prescribed requirements for the post.'

[86] It goes without saying that these additional considerations must also go into the reckoning. They fortify the view that the MEC would have failed in her constitutional duty had she not eventually approached a court for relief. But, hers was a difficulty balancing act. For, whilst she was obliged as a matter of constitutional duty to approach a court, she had to first fully engage with the other two tiers of government before doing so. Could she have acted earlier? Perhaps. Should she have acted earlier? I think not.

[87] It is not as if in the face of earlier supineness the MEC rather belatedly roused herself to action. I believe that she was entitled to expect that each Municipality and Mayor would also place sufficient store by their own constitutional duty. Not just that, but she was quite right to expect that they would do so earnestly and in good faith. Having formed the view that the appointment of each Municipal Manager did not survive scrutiny, she was constitutionally obliged to first afford them every reasonable opportunity to take remedial action. Surely, her operating premise could hardly have been that she would be treated with contemptuous

[70] *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); [2020] 4 BLLR 337 (CC); (2020) 41 ILJ 1069 (CC) para 4.

disdain, and eventually ignored. Our Constitution demands a great deal more of litigants than that displayed by the Mayors and Municipalities in this case.

[88] It follows that I am unpersuaded that such delay as is found to exist in this case is unreasonable or that any warrant exists for us to interfere with the discretion exercised by the high court to condone the delay.

[89] I turn to the jurisdictional challenge: It is difficult to see how a jurisdictional challenge can be successfully maintained in this case. Jurisdiction refers to the power of a court to consider and either uphold or dismiss a claim. Here, the claim in each case clearly falls within the ordinary power of the high court. In both applications the MEC expressly brought applications for declaratory relief. The MEC's cause of action arose out of the provisions of the Systems Act and was confined to the lawfulness of the decisions of the Municipalities.

[90] This is not what may be described as a quintessentially labour relations dispute. Far from it. The MEC did not approach the high court qua employer. She was not in the position of an employer vis-à-vis each Municipal Manager, but a third party to the employment relationship. She sought a declaratory order that each appointment did not comply with the Regulations framed under the Systems Act. The grant of such relief may perhaps impact on the employment relationship. However, that the Municipal Manager may in due course wish to assert a right under the Labour Relations Act (the LRA), is irrelevant to the question whether the high court had jurisdiction to consider this claim.

[91] To be sure, the claim asserted under the LRA will in no ways bear any resemblance to the present claim. And, that such a claim may be one over which the Labour Court has exclusive jurisdiction, in no way detracts from the jurisdiction of the high court to consider and determine this claim. As it was put in *Makhanya v University of Zululand*:

'As I pointed out earlier, it is true that a litigant who has a single claim that is enforceable in two courts that have concurrent jurisdiction must necessarily make an election as to which court to use. In that respect the law specifically allows for "forum shopping" by allowing the litigant that choice. But it is altogether different when a litigant has two distinct claims, one of which may only be enforced in one court, and the other of which may be enforced in another court, which is how the court below applied it in this case.'[71]

[92] Indeed, as the Constitutional Court has made plain:

'As there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations. The High Court's jurisdiction will only be ousted in respect of matters that "are to be determined" by the Labour Court in terms of the Act.'[72]

The present is not such a matter. The point must accordingly be answered against the appellants.

[93] It must follow that the high court's conclusion that the appointment of each Municipal Manager was unlawful when made, cannot be faulted. Nor can the declaration in paragraph (a) of its order that the appointments are 'invalid and null and void for not being in compliance with the provisions of s 54A(3) of the [Systems Act] and the regulations issued thereunder'. The high court, however, declined to set those appointments aside with retrospective effect to the date when made. Instead, in the exercise of its remedial discretion under s 172 of the Constitution, the high court directed in paragraph (b) of its order that the operative date of the setting aside would be the date of its order, namely 21 February 2019.

[94] The argument advanced on behalf of the appellants on appeal, centred, in the main, on the contention that even if we were to support the finding of the high court that the appointments were unlawful and inclined to leave paragraph (a)

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[71] *Makhanya v University of Zululand* [2009] ZASCA 69; 2010 (1) SA 62 (SCA); [2009] 8 BLLR 721 (SCA); [2009] 4 All SA 146 (SCA); (2009) 30 ILJ 1539 (SCA) para 61.

[72] *Fredericks and Others v MEC for Education and Training Eastern Cape and Others* [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693; [2002] 2 BLLR 119 (CC) para 40.

undisturbed, we should nevertheless reconsider paragraph (b) of the high court's order. In that respect, so the argument proceeded, our remedial powers should be exercised to mediate any potential prejudice to the Municipal Managers. On that score, there are several additional factors that weigh in the favour of each Municipal Manager.

[95] First, by the time the order of the high court issued, both Municipal Managers had been in their positions for more than two years. They have continued in those positions pending finalisation of the appeal. A further year-and-a-half has since passed. Each was appointed on a 5-year fixed term contract; the bulk of that period has already run its course. With so little of each contract remaining, there seems little value in commencing a fresh recruitment process or appointing an Acting Municipal Manager pending finalisation that recruitment process.

[96] Second, each Municipal Manager is an innocent third party. In neither instance does the MEC raise any allegations of wrongdoing. Neither solicited the appointment. Since being appointed, each has regulated his affairs in accordance with the benefits of the office of Municipal Manager. In any event, allowing each to see out his contract, will allow for continuity and minimise disruptions in the administration. It needs to be borne in mind that Municipal elections must be held before 1 November 2021. And, in terms of s 57(6)(a) of the Systems Act any 'employment contract for a municipal manager must be for a fixed term of employment not exceeding a period ending two years after the election of the next council of the municipality'.

[97] Third, on 5 July 2011, the Local Government Systems Amendment Act 7 of 2011 (the Amendment Act) was promulgated. It amended the Systems Act to, inter alia, address what was perceived to be an alarming increase in the instances of maladministration within municipalities. The Amendment Act, inter alia, introduced s 54A, after s 54, in the Systems Act. In terms of s 54A(2), 'a person appointed as

municipal manager . . . must at least have the skills, expertise, competencies and qualifications as prescribed.' The skills, expertise, competence and qualifications prescribed in s 54A(2) were set out in the Regulations on Appointment and Conditions of Employment of Senior Managers 2014. They include five years relevant experience for a Municipal Manager. It is this requirement that the MEC asserted had not been complied with in these two cases. The Amendment Act, so the Constitutional Court stated in *SAMWU v Minister of Co-operative Governance and Traditional Affairs*, 'introduced measures to ensure that professional qualifications, experience and competence were the overarching criteria governing the appointment of municipal managers or managers directly accountable to municipal managers in local government, as opposed to political party affiliation.'[73]

[98] In the *SAMWU* matter, it was contended that the Amendment Act was incorrectly tagged as an ordinary bill not affecting the Provinces (a section 75 bill). SAMWU argued that the Bill should have been tagged as an ordinary bill affecting the provinces (a section 76 bill), and should consequently have been passed in accordance with the provisions of s 76 of the Constitution. The State parties effectively conceded the procedural challenge. The Constitutional Court took the view that:

'A great host of decisions and actions have been taken across all nine provinces under the Amendment Act. To allow the invalidity to operate retrospectively would plainly cause disruption to the orderly and effective administration of municipalities. This would be untenable. For these reasons the declaration of invalidity must operate prospectively.'[74]

[99] The Constitutional Court accordingly suspended the declaration of invalidity for a period of 24 months to allow the Legislature to cure the procedural defect. The period has since passed (it expired on 9 March 2019) and the legislature has not seen fit to take any steps to cure the defect. In the light thereof, as things

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[73] *South African Municipal Workers' Union v Minister of Co-Operative Governance and Traditional Affairs* [2017] ZACC 7; 2017 (5) BCLR 641 (CC) para 4.
[74] Ibid para 86.

currently stand, what previously disqualified the present Municipal Managers, namely the requirement of five years relevant experience, no longer obtains.

[100] In all the circumstances, counsel for the MEC accepted that the appropriate order would be for the Municipal Managers to remain in office until the expiry of their current contracts of employment. And, that in the exercise of our remedial discretion under s 172 of the Constitution, it would be just and equitable for such an order to issue. I therefore, endorse the high court's order declaring the appointments invalid, but, unlike the high court, I do not set the appointment aside. This conclusion means that, for all practical purposes, the other grounds raised by the appellants in attack on the judgment of the high court need not detain me.

[101] As to costs: Counsel were agreed that as far as the appeal goes, there should be no order as to costs.

[102] In the result, save for setting aside paragraph (b) of the order of the court below, I would dismiss the appeal.

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V M Ponnan
Judge of Appeal

Makgoka JA

[103] I have had the benefit of reading the judgments of my colleagues Ponnan JA and Molemela JA. I write separately to deal with the way the high court exercised its discretion in respect of the MEC's delays to act in terms of s 54A of the Systems Act. To the extent my colleague Molemela JA concludes that the Municipal Manager in the Nkandla matter was validly appointed, I disagree. Like my colleague Ponnan JA, I accept that both Municipal Managers' appointments were

invalid for want of suitable qualifications. I disagree, though, with my colleague's view that the MEC's delay in approaching the high court for judicial review of the appointments was not unreasonable. The factual background in both cases has been fully set out in the main judgment of Molemela JA, and need no regurgitation.

[104] In relevant parts, s 54(A) reads:

'(7)*(a)* The municipal council must, within 14 days, inform the MEC for local government of the appointment process and outcome, as may be prescribed.

(b) The MEC for local government must, within 14 days of receipt of the information referred to in paragraph (a), submit a copy thereof to the Minister.

(8) 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), 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.

(9) Where an MEC for local government fails to take appropriate steps referred to in subsection (8), the Minister may take the steps contemplated in that subsection.

(10) 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.'

[105] The section gives expression and hierarchal structure to the principle of co- operative governance: the municipal council reports to the MEC about the appointment of a Municipal Manager. The MEC, in turn, reports to the Minister after being informed of the appointment. Each of the parties must make their respective reports within 14 days of the event they are enjoined to report on. However, in the event of the appointment of a non-qualified person, the first responsibility to enforce compliance with the section falls upon the MEC, which she or he must discharge within 14 days of receipt of report of such appointment. Although the section does not expressly oblige the MEC to inform the Minister of the steps she or he has taken in this regard, it must be accepted that, in the spirit of co-operative governance, the legislature must have intended that the MEC would inform the Minister. This must be so regard being had to sub-section (9), in terms of which

the Minister may take the steps contemplated in subsection (8), where MEC fails to act.

[106] It brooks no debate that the powers entrusted to the MEC in s 54A(8) need to be exercised in an effective and decisive manner, given the purpose of the section to prevent an illegality from taking root. It is with this in mind that the MEC's conduct must be measured against.

[107] In respect of Nkandla, the MEC's first reaction to the appointment of the municipal manager was not made within the 14-day period of being timeously informed of the appointment of the municipal manger. Was it an effective action envisaged in the s 54(A)8? No. It was a lame 'request for further information' on 13 February 2017, which information had in fact, been furnished to her on 9 February 2017. A further six weeks period of inaction followed. On 7 March 2017, the MEC informed the municipality that the municipal manager did not meet the minimum requirements and called upon the municipality to 'take remedial action' to 'address the issue'. What exactly she envisaged with this is unclear.

[108] Section 54(A)(8) enjoined her to take 'appropriate steps' to enforce compliance with the law. A 'call' upon a municipality to 'take remedial action', whatever that means, can hardly qualify as an appropriate step in the context of this section, given that time is clearly of the essence. What 'remedial action' it may be asked, could there be, other than to set aside the appointment through judicial review? This is what the MEC should have told the municipality because that is the decree of s 54(A)8. Be that as it may, the municipality did not heed the MEC's call. The MEC did nothing about it. For the whole of March, April and May 2017 nothing happened.

[109] The next step, on 23 May 2017, was taken by the municipality, by applying to the Minister to waive the competency requirement in terms of s 54(A)(10), which, also inexplicably, was only responded to, and refused, on 14 September 2017.

Almost two months thereafter, on 10 November 2017, and without any explanation why nothing was done from 14 September 2017 when the Minister declined the municipality's request for waiver, the MEC requested the municipality to advise her of the 'remedial action' it had taken in respect of the municipal manager. In response, the municipality informed her that it was awaiting a legal opinion on the matter. Had she been attuned to the dictates of her office and its responsibilities, the MEC would have seen through the municipality's delay tactic. This is coupled with the fact that in his letter declining the waiver, the Minister had shown the way by directing the municipality to re-advertise the post of the municipal manager.

[110] It would therefore have been clear to a competent, effective, and astute MEC that no legal opinion of any sort would prevent the inevitable setting aside of the appointment of the municipal manager. She should, at the very least, have ordered the municipality to comply with the Minister's directive to re-advertise the post. But this MEC did nothing of the sort. She did not even consider it necessary to place the municipality on terms regarding the date on which the envisaged legal opinion should have been obtained. As it turned out, and to confirm the municipality's delay tactic, no such opinion was ever obtained. Anyway, nothing was done for the whole of November and December 2017. On 4 January 2018, the MEC addressed a letter to the municipality, bemoaning the fact that 'no remedial action' had been taken in respect of the appointment of the municipal manager. The municipality simply ignored the MEC's letter.

[111] The MEC did nothing for the whole of January, February, March, April and the first part of May 2018. Her application to review and set aside the appointment of the municipal manager was launched on 11 May 2018. The application was received by the sheriff eleven days later. There is no explanation for this delay.

[112] In respect of Mthonjaneni, the MEC was informed of the appointment of the municipal manager on 20 December 2016. The MEC did nothing about the information within the 14-day period set out in either s 54(A)(7)(*b*) or s 54(A)(8). She only responded a month later, when she informed the municipality and the

Minister that she was of the view that the appointed municipal manager was not suitably qualified. The MEC offers no explanation why she did not comply with her obligation within 14 days. Anyway, the municipality ignored the MEC's request to take 'remedial action'.

[113] The MEC took no further formal steps for more than a year. She offered no explanation for this. On 24 January 2018, she again advised the municipality to 'take remedial action' in respect of the municipal manager's appointment, and noted her 'disappointment' that the municipality had not made an application to the Minister to waive the competency requirement, as apparently discussed priorly with her. Again, the municipality ignored the MEC's request. The MEC did nothing about the matter for the whole of February, March, April, May and effectively June 2018. She offered no explanation whatsoever for her inaction over this period. Her application to review and set aside the appointment of the municipal manager was launched on 28 June 2018.

[114] It is against this factual background that the high court's reasoning as to the reasonableness of the MEC's delays should be scrutinised. It is so, as my colleague Ponnan JA correctly points out in para 58 that the high court exercised a discretion in a true sense. We, as the appellate court, are ordinarily, not entitled to interfere, with that, unless we are satisfied that the discretion was not exercised judiciously, or that it had been influenced by wrong principles or a misdirection on the facts, or that the high court had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. See *National Coalition for Gay and Lesbian*[75] and *Trencon*[76]. Below I shall attempt to show that the high court's discretion was not judicially exercised.

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[75] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 10.
[76] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

[115] The high court's reasoning is set out in para 59 of its judgment, which my colleague Ponnan JA quotes in full. For convenience's sake, I repeat it here:

'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 there were not unreasonable. The correspondence and time frames rather suggest that the applicant in a spirit of cooperation 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 well be 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.'

[116] With regard to prejudice, the high court misconstrued its nature and reach by reducing it to the municipalities and the municipal managers. It ignored the broader prejudice to the residents of the municipality whose interests are potentially at risk because of the appointment of ill-qualified municipal managers. Fortunately, in the present case, it does not appear that the appointment of the third respondents had any negative impact on service delivery. There is also prejudice and threat to our constitutional architecture when public office bearers such as MECs, ignore their constitutional mandates.

[117] I also have difficulty with the high court's remarks that 'allowance should be made for administrative bureaucracy not always proceeding with lightning alacrity.' While this holds in some areas of governance, in this instance, the converse is true. Here the 'lightning alacrity' the high court bemoans, is decreed in s 54(A), by proscribing tight time-frames within which the appointment of unqualified municipal

managers have to be rectified. As stated already, those time-frames are meant to prevent an illegality, namely, the appointment of unqualified municipal managers, from taking root. This purpose must always be borne in mind when indulgences are made, lest the purpose of the section is defeated. It could certainly not have been the purpose of the legislature that the 14-day period set out in the section could permissibly drag to lengthy periods, as it happened in these cases, without either the MEC or the Minister not taking the ultimate step of judicially reviewing the appointment of unqualified municipal managers.

[118] The high court correctly acknowledged that there were delays. But it baldly stated that they were not unreasonable. With respect, I disagree. I have pointed out periods of inaction on the part of the MEC in respect of both matters, for which no explanation of any sort, is offered. My colleague Molemela JA, in para 29 and 30, with reference to *Khumalo* and *Kirland Investments*, concludes that the overall periods of 15 and 18 months of unexplained delay, are unreasonable. Her reasoning and conclusions in this regard are, to my mind, unassailable.

[119] It seems to me that the high court ignored not only the overall periods of delay in bringing the applications for review, but also the supine attitude of the MEC in the face of an on-going illegality, which, it must be emphasised, in terms of s 54(A), should be nubbed in the bud within the constrained time frames set out in the section. The high court also ignored the important consideration that there was not a single attempt by the MEC to explain her inaction. It must be accepted, in the circumstances that she had none. It is therefore incorrect to seek to speculate, as the high court seemed to do, that her inaction could be attributed to her considerations of co-operative governance. The language of s 54(A)(8) is clear: the MEC is enjoined to '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.'* (emphasis added.)

[120] With respect, the high court misconstrued the effect of the section and the exigency inherent in it. It assumed that the MEC a had latitude to delay the enforcement of the section on considerations of co-operative governance, which she clearly does not have. This, in face of a clear obligation to act swiftly and decisively. Even if one accepts the MEC had some latitude, it could definitely not have been the intention of the legislature that the steps envisaged in the section, which were to be taken within 14days, could be put off for close to two years, as is the case here. Thus, the high court condoned the MEC's failure to comply with her constitutional mandate, which resulted in an illegality taking root, thus defeating the purpose for which the legislature had intended through the section. On these considerations, I conclude that the high court failed to properly exercise its discretion. It reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. This court is therefore at large to interfere with that discretion.

[121] In conclusion, it is ironic that the review proceedings, which are the subject of this appeal, concern the competence of the third respondents for office. It is ironic because the MEC has shown herself in these proceedings to be inept, incompetent, and utterly not attuned to the dictates of her office, as alluded to earlier. She is fortunate to have the deep pocket of taxpayers' monies for this litigation, and that none of the parties had sought a costs order against her in her personal capacity.

[122] For all these reasons, and subject to the caveat I expressed in para 103, I agree with the order proposed by Molemela JA.

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T M Makgoka

Judge of Appeal

Appearances:

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	Honey Attorneys Inc, Bloemfontein
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