



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Member of the Executive Council for the Department of Cooperative Governance  
and Traditional Affairs, Kwazulu-Natal v Nkandla Local Municipality and Others**

**CCT 304/20**

**Date of judgment: 8 December 2021**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Wednesday, 8 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order of the Supreme Court of Appeal, hearing an appeal from the High Court of South Africa, KwaZulu Natal Division, Pietermaritzburg. The matter related to the validity of the appointments of two Municipal Managers, which was challenged on the basis of alleged non-compliance with section 54A of the Local Government Municipal Systems Act 32 of 2000 (Systems Act).

In 2017, the third and sixth respondents, Messrs Jili and Sibiya respectively, were appointed as Municipal Managers of the first and fourth respondents, Nkandla Local Municipality and Mthonjaneni Local Municipality. Both appointments were challenged by the applicant, the Member of the Executive Council for the Department of Cooperative Governance and Traditional Affairs, KwaZulu-Natal (MEC), on the basis that Mr Jili's experience at management level was less than the stipulated minimum period of five years and that Mr Sibiya's qualifications were irrelevant for the position and that he did not have the required experience at management level. The applicant accordingly argued that the appointments were made in contravention of section 54A(2) of the Systems Act and were null and void as envisaged in section 54A(3) of the Systems Act. On this basis, the MEC launched two separate review applications in the High Court seeking orders reviewing, setting aside and declaring null and void the appointments of Messrs Jili and Sibiya. The High Court dealt with both matters in one judgment, in which it upheld the applications and declared both appointments null and void. However, it ordered that the setting aside of the appointments should not operate retrospectively and should rather take effect from the date of its order. The High Court subsequently granted leave to appeal to the Supreme Court of Appeal. In the majority judgment, supported through a separate concurrence, that Court upheld the appeals, whilst the dissenting judgment would have dismissed them. The MEC appealed to the Constitutional Court seeking an order reversing the Supreme Court of Appeal's judgment and declaring the appointments of Messrs Jili and Sibiya null and void.

The first judgment, penned by Tshiqi J (with Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J and Pillay AJ concurring) (majority) held that the matter was moot and that it was not in the interests of justice for the matter to be determined. The Court accordingly refused leave to appeal.

The majority held that, since the matter concerned the exercise of public power by the MEC as well as the interpretation of section 54A of the Systems Act, a constitutional issue was raised and the jurisdiction of the Court was engaged.

The majority proceeded to determine whether the interests of justice required leave to appeal to be granted. It held that the central enquiry in this regard was whether there were reasonable prospects that the Constitutional Court would reverse or materially alter the decision of the Supreme Court of Appeal. Since one of the arguments before the Court was that the matter was moot, the majority held that it was first necessary to decide whether the matter was moot because if this question were to be answered in the affirmative, no purpose would be served by granting leave to appeal.

The majority held that the principles applicable to mootness are trite: courts should not decide matters that are abstract or academic and which do not have any practical effect, either on the parties before the court or the public at large. The majority held that this question is a positive one, namely whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case. The majority added that a matter is also moot if it no longer presents an existing or live controversy. However, the majority emphasised that where the interests of justice so require, a court still has a discretion to determine a matter despite its mootness.

In deciding whether the matter was moot, the majority emphasised that section 54A of the Systems Act, the provision relied on by the MEC, had been declared invalid by the Constitutional Court in the matter of *South African Municipal Workers' Union v Minister of Co-operative Governance & Traditional Affairs* [2017] ZACC 7 (SAMWU). In declaring section 54A invalid, the Constitutional Court had specified that the invalidity would operate prospectively and would be suspended for a period of 24 months. The period of suspension ended on 8 March 2019, after which that provision ceased to exist. The majority accordingly held that there could be no reliance by the MEC on section 54A to seek an order to declare the appointments null and void because it was invalid and therefore unenforceable. Furthermore, the majority held that since section 54A was declared to be of no force and effect after 8 March 2019, some 15 days after the High Court had delivered its judgment, this meant that the declaration of invalidity of the relevant appointments based on that section can only relate to the period before 9 March 2019. The majority emphasised, however, that the MEC sought a declaration of invalidity operating only from the date of the judgment of the Constitutional Court. Thus, the majority held that the order sought was not competent because a declaration of unlawfulness of the appointments, which is based on the non-existent section and operates from the date of delivery of the Court's order, would effectively suggest that the invalid provision continued to operate even after the suspension period had expired. Since the order sought could not be granted, the majority held that the matter was moot.

Having found that the matter was moot, the majority then considered whether the interests of justice demanded the determination of the matter despite its mootness. The majority noted that it was troubling that a period of more than four years had passed since the allegedly invalid appointments were made, meaning that persons whose qualifications and experience were

questioned by the MEC had been allowed to occupy the critical position of a Municipal Manager for the bulk of the period of their five-year contract. The majority held that the delays that led to this state of affairs were largely occasioned by the failure on the part of the MEC to comply with the timelines prescribed by the Systems Act and later on by the delay in initiating the review applications. The majority held that this failure by the MEC flies in the face of section 237 of the Constitution and the Court's jurisprudence, both of which emphasise the importance of constitutional obligations being performed diligently and without delay. The majority held that these delays could not be ignored by the Court in deciding whether it was in the interests of justice to determine the matter, and that the undesirability of having Municipal Managers, whose credentials were questioned by the MEC, had to be weighed against the prejudice they would suffer if the application was entertained after they had occupied the positions for such a long period of time. The majority also considered the possible impact of the termination of the contracts on service delivery in the affected Municipalities, and held that the reality was that the respective contracts would come to an end on 18 December 2021 for Mthonjaneni Local Municipality and 25 January 2022 for Nkandla Local Municipality. This meant that by the time the Court handed down judgment they would be left with only a month or so before the natural expiry of their employment contracts. The majority also took into account the fact that no complaints were raised regarding the Municipal Managers' competence and performance, and that the MEC had not identified any prejudice that it would suffer as a result of the contracts being preserved for the remainder of the fixed five-year term.

Taking all of this into consideration, the majority held that an order that Messrs Jili and Sibiya should retain their employment for the rest of the five-year period would ensure that service delivery in the Municipalities would not be compromised and that a handover to their successors would occur seamlessly. Consequently, the Constitutional Court held that the interests of justice did not favour granting leave to appeal and the application was accordingly refused, with each party being ordered to pay its own costs.

The second judgment, penned by Theron J (with Tlaletsi AJ concurring), concurred in the order proposed by the majority, albeit for different reasons. Its starting point was that a matter is moot when the order sought would have no practical effect. According to the second judgment, a matter is not moot when it would be legally incompetent to grant the order sought (this being a factor that has a bearing on prospects of success). In this case, the MEC sought orders declaring that the appointments of Mr Jili and Mr Sibiya were unlawful. Notwithstanding that there was only a short time remaining in their terms of office, the removal of either Mr Jili or Mr Sibiya would have practical consequences for them personally, the Municipalities they serve and the residents within these Municipalities. The second judgment therefore concluded that the matter was not moot.

The second judgment disagreed with the majority's finding that an order declaring that the appointments were *ultra vires* section 54A of the Systems Act and setting them aside could only relate to the period before the *SAMWU* order of invalidity came into effect on 9 March 2019. In *SAMWU*, the Constitutional Court declared section 54A unconstitutional and stated that the declaration of invalidity would be suspended until 9 March 2019 to allow the Legislature to cure the defect and that the invalidity, should it come into effect upon the expiry of the two-year suspension period, would operate prospectively. The order was made prospective to avoid unsettling the legal consequences of, amongst others, appointments of municipal managers that had been made in terms of section 54A while it remained in force. The second judgment reasoned that this necessarily entailed the preservation of causes of action based on decisions and actions taken under section 54A. The prospectivity of the *SAMWU*

order was therefore intended to preserve the legal consequences of the appointments made in this case, which were made before the order of invalidity came into effect. The second judgment concluded that it would therefore be contrary to the Court's judgment in *SAMWU* if the coming into effect of the order invalidating section 54A were to render litigation based on section 54A moot and denude courts of their power to grant orders regarding the validity of appointments made while the section was in force. It would also be contrary to the well-established rule of construction that even if a new statute (or an order invalidating a statute) is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless presumed not to affect matters that are the subject of pending legal proceedings. The second judgment also noted that in *Notyawa v Makana Municipality* [2019] ZACC 43, which concerned the review of an appointment of a municipal manager in terms of section 54A that was heard after 9 March 2019, the Constitutional Court implicitly accepted that even though section 54A was at that stage a dead letter, the challenge before it gave rise to a live dispute that was not rendered moot by the *SAMWU* order coming into effect.

The second judgment explained that the Court's power to declare the appointments unlawful is sourced directly from section 172(1)(a) of the Constitution and not section 54A, and is therefore not contingent upon the validity of that section. Moreover, according to the doctrine of objective constitutional invalidity, law or conduct that is inconsistent with the Constitution is unlawful from the moment at which the inconsistency arises. An order declaring the appointments to be unlawful would merely describe the unlawfulness of the appointments at the moment they were made, when section 54A was in force. Upon declaring that the appointments were unlawful in terms of section 172(1)(a) of the Constitution, the Court would then have the power, in terms of section 172(1)(b), to make any order that is just and equitable, including an order setting aside the appointments prospectively from the date of its order. This remedial power is triggered by a declaration of invalidity in terms of section 172(1)(a) and does not depend on the validity or invalidity of section 54A at the time it is exercised.

This led the second judgment to conclude that the coming into effect of the *SAMWU* order did not render the applications moot and would not denude the Court of its power to set aside the appointments with prospective effect from the date of its order. It concluded, however, that the lawfulness of the appointments did not arise for determination because it would not be in the interests of justice to grant leave to appeal. In deciding the merits of the appeal, the Court would have to determine, first, whether the Supreme Court Appeal was correct that the MEC's delays in launching the review applications were unreasonable and then, secondly, whether there was a basis for interfering with the exercise of its discretion to refuse to condone the delays. The second judgment agreed with the Supreme Court of Appeal's finding that the delays in respect of both the *Nkandla* and *Mthonjaneni* review applications were unreasonable. It concluded further that the Supreme Court of Appeal exercised its discretion to refuse condonation properly and that there was no misdirection on either the facts or the law. There were therefore no reasonable prospects of the Constitutional Court interfering with the Supreme Court of Appeal's refusal to grant condonation.

For these reasons, the second judgment concurred in the order made by the majority.