

# The municipal manager?

*Mbatha v Ehlanzeni District Municipality and Others* (Labour Court of SA) (J1392/2007) [2007]

Section 56 of the Municipal Structures Act provides that the executive mayor is obliged to perform duties and exercise such powers as the council may delegate in terms of section 59 of the Municipal Systems Act (the Systems Act). Section 55 of the Systems Act deals with the obligations of municipal managers and provides that the municipal manager is accountable only to the municipal council.

## Facts

The municipal council of the Ehlanzeni District Municipality (the Council) held a special meeting on 4 May 2007 in which it passed a resolution to suspend the municipal manager because of allegations of misconduct. The Council delegated the mayor to deal with the allegations until the issue was finalised and the mayor subsequently issued a suspension notice to the municipal manager.

A few days later, the Council revoked its earlier resolution and lifted the suspension. However, on 17 May the Council held another special meeting and passed another resolution, again giving the mayor authority to suspend the municipal manager. The intention of the suspension was apparently to create a free and uninhibited environment to investigate the allegations against the municipal manager. The Council's delegation to the mayor entailed the following powers:

- the decision to suspend the municipal manager;
- the implementation of that decision;
- the authority to take the necessary decisions to have the required disciplinary procedures instituted against the municipal manager; and, if necessary; and
- to appoint an acting municipal manager as and when needed.

## key points

- It is normal for a municipal council to delegate the implementation of a decision.
- For example, the mayor can be delegated to implement the council's decision to discipline and/or suspend a municipal manager.
- However, this must be distinguished from the power to take decisions reserved exclusively for the council.
- There are some powers that cannot be delegated by the council.
- The power to hold the municipal manager to account, including his/her suspension, is one such power.

On 29 May the executive mayor suspended the municipal manager with immediate effect on full remuneration in order to investigate the allegations against him.

## Issues

The issue before the court was whether a council can delegate, to the mayor, the power to charge and suspend a municipal manager.

## Argument

The municipal manager argued that the council resolution was invalid as it delegated to a political office bearer, in this case the executive mayor, the power to suspend and institute disciplinary proceedings against him. Such power, he argued, cannot lawfully be delegated. A delegation can only be lawful if it conforms to enabling legislation. He conceded that, naturally, a municipal council may and indeed must logically authorise persons to *implement* its decisions. However, that must be distinguished from the power to *take* decisions reserved exclusively for the council. The resolution was invalid precisely because it failed to make that distinction.

The Council argued that the execution of the resolution was an administrative and operational necessity that was within the Council's discretion to delegate to the executive mayor.

## Judgment

In its assessment, the Court considered that section 60 of the Systems Act permits the delegation to an executive mayor of the power to determine or alter the remuneration, benefits or other conditions of service of the municipal manager. The Court observed that this came very close to giving the Council authority to delegate to the executive mayor the power to discipline the municipal manager. This is because the Systems Act does not stipulate how far the delegated powers of the executive mayor may go in changing the municipal manager's conditions of service. However, the Court held that it is:

... inevitable that, in the execution of their statutory duties, a conflict might arise between the municipal manager and mayor. It would not be desirable, in the administration of justice, that the municipal manager must live with a constant fear that, in the event of such conflict, the municipal manager is at the mercy of a mayor with disciplinary powers.

After analysing the provisions of the Structures and Systems Acts in relation to delegations and municipal managers, the Court agreed with the municipal manager's argument that it is:

...plain that these provisions do not envisage the municipal manager being accountable to any political

**The Court held that the municipal manager is not accountable to any political office-bearer, including the Executive Mayor, because "it would not be desirable, in the administration of justice, that the municipal manager must live with a constant fear that, in the event of ...conflict, the municipal manager is at the mercy of a mayor with disciplinary powers."**

office-bearer, including the Executive Mayor, but rather being accountable to Council itself. There are some powers that cannot be delegated and the power to hold the Municipal Manager to account is one such example.

The Court considered the municipal manager's concession that, naturally, a municipal council may and indeed must logically authorise persons to implement decisions taken by it. For example, once a decision to discipline and /or suspend a municipal manager has been considered and taken by the council, the mayor may take appropriate steps as required by law, in the execution of that decision. However, that function must be distinguished from the power to take decisions reserved exclusively for the council.

The Court held that the delegation was invalid because it failed to distinguish between the power to *take* decisions and their *execution*. The delegation removed the power from the Council and wholly delegated it to the executive mayor. As a result, the resolution unlawfully delegated to the mayor the power to decide to suspend the applicant and to decide whether or not to institute disciplinary proceedings against him.

## Comment

Any decision to take disciplinary action against a municipal manager, be it suspension or dismissal, must be taken by the Council itself. The execution or implementation of that decision can be delegated, but not the decision itself. Councils should thus take care when delegating powers to ensure that they distinguish between the powers and their execution, particularly the delegation of so-called 'non-delegable' powers. Only the execution or implementation of such powers is delegable.