

EXTENDING **Municipal** managers' **CONTRACTS**



Mgoqi v City of Cape Town
3619/06

The change of government in the City of Cape Town Metropolitan Council has also seen a change in the office of the municipal manager. Although the decision of the Cape High Court in *Mgoqi v City of Cape Town* dealt with a number of issues, at the core of the dispute was whether the outgoing mayor could have extended the contract of the then-municipal manager, Wallace Mgoqi.

The facts

The municipal manager's three-year contract was due to end on 28 February 2006, one day before the local government election. Although in the latter half of 2005 he was promised by the mayor that his contract would be extended, the matter was not put on the agenda of the last meeting of the council in December 2005, at which it was decided to go into recess pending the 1 March 2006 election. By mid-January 2006 the mayor sought to deal with the extension of the contract. The City's legal advisor suggested three options:

- (a) Convening a council meeting because, in terms of the Municipal Structures Act, the council must make the appointment of a municipal manager.
- (b) The mayor using her delegated power to make an acting appointment for six to 20 working days.
- (c) Changing the system of delegations to make the mayor capable of appointing the municipal manager.

The mayor was of the opinion that it was not feasible to convene a council meeting so shortly before the election. The municipal manager was also not interested in taking an acting appointment for up to 20 days. The remaining option involved assessing whether the mayor could make the appointment in terms of the City's system of delegations, or whether the system needed to be changed to allow this.

key points

- As this case highlights, council is the key decision maker in the appointment of municipal managers and the extension of their contracts.
- It is a function that cannot be delegated.
- Contracts therefore cannot be negotiated and signed at the last minute.
- A municipality's system of delegations must therefore be carefully framed and then observed.

City's system of delegation

In the system of delegation then in operation, clause 5.2.10 provided:

When the Council goes into recess, the Executive Mayor, in consultation with Municipal Manager, takes decisions on behalf of the Council or any of its Committees, where the failure to exercise such delegated authority as a matter of urgency would, in the view of the Executive Mayor, prejudice the Council and/or its services.

The difficulty, the legal adviser pointed out, was that the executive mayor could not consult with the municipal manager on extending his own contract because that would be a clear case of conflict of interest. The only option open, which the legal adviser described as legally complex, was for the mayor, in consultation with the municipal manager, to change the delegation. The reference to consultation with the municipal manager was deleted "solely for purpose of considering an amendment to conditions of service of the Municipal Manager". Having changed the delegation thus, on 16 February 2006 the executive mayor, acting alone, extended the manager's contract for one year, to 28 February 2007.

With the election of DA-led coalition, the new council first attempted to review the delegated decision in terms of the Municipal Systems Act, which provides that a council must review a delegated decision when requested by more than an quarter of its members. It was against the calling of the meeting to do so that the first legal challenge came from the municipal manager. When the matter came before court, the central issue was whether the municipal manager's contract was lawfully extended.

Argument

The validity of the extension of the municipal manager's contract was challenged on three grounds:

First, the council cannot delegate the decision to appoint a municipal manager to the mayor; it can only be done by the council. The Court held that section 82 of the Structures Act is clear: the appointment of a municipal manager is the task of the council and cannot be delegated to the executive mayor.

The first alternative ground of challenge was that the City's system of delegation did not allow for the executive mayor to extend the contract acting alone. The City's system even provided that the determination of the municipal manager's remuneration rested with the council. The Court agreed that the only delegated power the mayor had was to extend the contract for a maximum of 20 days.

The final ground of challenge was, then, whether the power delegated to the mayor could be amended by the mayor, acting in consultation with the municipal manager, in order for the mayor to act alone when appointing the manager. The Court held that the mayor could not, whether in consultation with municipal manager or not, amend the terms of her own delegated power by removing the requirement that the mayor had to act in consultation with the manager during recess, when dealing with the manager's appointment. The recipient of delegated power is confined to the powers so delegated and cannot change the terms of the delegation.

Two of the defences the municipal manager raised are important. First, it was argued that if the manager was not validly appointed after 28 February 2005, then all actions following on the invalid extension of the contract must also be invalid. The first meeting of the council, called by the municipal manager, was thus invalid as were all other actions of the council, including the election of the speaker and mayor and so on. The Court rejected this argument and held that an invalid action remained in existence until set aside by a court. All actions done in terms of invalid act, remain valid.

The second defence of the municipal manager was one of estoppel; the council could not renege on promises of the executive mayor that the municipal manager would be reappointed. The Court disagreed: no representation was made to the municipal manager by the council on which council could be estopped from acting against him.

Decision

The Court concluded that the municipal manager's contract was not validly extended and thus on the termination of his original contract his employment lapsed on 28 February.

Comment

The case illustrates two important matters. First, the importance of council was highlighted as the sole decision maker when it comes to the key appointment of municipal managers and the extension of their contracts. It is a function that cannot be delegated. This means that contracts cannot be negotiated and signed at the last minute. Second, a municipality's system of delegations must be carefully framed and then observed.