

A critique of the law regarding employment of municipal managers and the managers accountable to the municipal manager*

*Johnson Mathenjwa***

1 Introduction

The employment of municipal managers and managers that are directly accountable to municipal managers is regulated by various pieces of legislation in the new democratic constitutional dispensation. Conflicting provisions in the legislation have led to uncertainty and confusion about the legal position on the employment of these managers. This issue was complicated when the Court of first instance declared regulation 38(1) of the municipal performance regulations for managers¹ to be invalid. A further complication came with the subsequent overturn of this decision by the Supreme Court of Appeal in *MEC KwaZulu-Natal v Yengwa*² without the Court making an affirming finding with respect to the legality of regulation 38(1) of the municipal performance regulations for managers.

This paper analyses the relevant provisions of the Local Government: Municipal Structures Act,³ the Local Government: Municipal Systems Act⁴ and the

*I wish to thank Estelle Hurter for her insightful comments on the draft of this paper

**Bluris (UFH), LLB (Wits), LLM (Unisa). Senior Lecturer: Department of Criminal and Procedural Law, Unisa, and Attorney of the High Court of South Africa.

¹See Department of Provincial and Local Government 'Local government: Municipal performance regulations for municipal managers and managers directly accountable to municipal managers, 2006' GNR 805 in GG 29089 of 2006-08-01 (hereafter the municipal performance regulations for managers). The municipal performance regulations for managers seek to set out how the performance of municipal managers and managers directly accountable to municipal managers will be uniformly directed, monitored and improved. It addresses the employment contracts and performance agreements entered into between the managers and respective municipalities.

²*MEC KwaZulu-Natal for Local Government, Housing and Traditional Affairs v Yengwa* 2010 5 SA 494 (SCA) (hereafter the *Yengwa* case).

³Act 117 of 1998 (hereafter the Municipal Structures Act).

⁴Act 32 of 2000 (hereafter the Municipal Systems Act).

Local Government: Municipal Systems Amendment Act,⁵ as well as the municipal performance regulations for managers, the disciplinary regulations for senior managers⁶ and relevant case law. Finally, the paper provides certain proposals on how to rectify the malaise characteristic of the current situation.

2 Background regarding the law of employment of the managers

The power of municipalities to employ personnel emanates directly from the Constitution. Specifically, the Constitution empowers a Municipal Council to employ personnel who are necessary for the effective performance of its functions.⁷ The Constitution further provides that the employment of personnel in public administration must be based on the candidates' ability and that personnel management practices in public administration must be based on objectivity and fairness.⁸ This provision of the Constitution prescribes the basic values and principles governing the employment of personnel in public administration. These values and principles apply to all spheres of government in the Republic.⁹ Accordingly, local government is also bound by this provision of the Constitution when employing its personnel. Apart from the said requirements regarding the ability of a candidate for employment in public administration, and the objectivity and fairness of the process, the Constitution does not provide for specific job requirements in respect of employees in public administration. The categories of employees and job requirements of these employees in public administration are left to the national and provincial legislatures. This view is supported by the provision of the Constitution that confers powers on national and provincial legislatures to prescribe any matter concerning local government not dealt with in the Constitution.¹⁰

Consequently, Parliament promulgated the Municipal Structures Act, the Municipal Systems Act and the Municipal Systems Amendment Act to regulate

⁵Act 7 of 2011 (hereafter the Municipal Systems Amendment Act).

⁶See Department of Co-operative Governance 'Local Government: Disciplinary regulations for senior managers, 2010' GNR 344 in GG 34213 of 2011-04-01 (hereafter the disciplinary regulations for senior managers).

⁷See s 160(1)(d) of the Constitution of the Republic of South Africa, 1996 (hereafter, the Constitution).

⁸See s 195(1)(i) of the Constitution. See also s 50(1) of the Municipal Systems Act which provides that local government is governed by the basic values and principles governing public administration in the Republic of South Africa. Thus, local government administration is part of public administration and is bound by the values of public administration.

⁹See s 195(1)(2) of the Constitution which provides that the basic values and principles governing public administration apply to administration in every sphere of government, including organs of state and public enterprises.

¹⁰See s 164 of the Constitution.

the employment of the managers. In addition to these pieces of legislation, the Minister for Provincial and Local Government Affairs promulgated the municipal performance regulations for managers which, among other things, prescribe job requirements for the managers and the disciplinary regulations for senior managers which provide for internal mechanisms and establish standards and procedures for the management of misconduct by senior managers.¹¹ Consequently, this legislation requires closer scrutiny.

2.1 Old legislation regarding the employment of the managers

Originally, before certain provisions of the Municipal Structures Act were repealed, and before the disciplinary regulations for senior managers were promulgated in 2011,¹² the employment of the managers was regulated by the Municipal Structures Act, the Municipal Systems Act and the municipal performance regulations for managers.

2.2 The Municipal Structures Act

With regard to the employment of municipal managers, the Municipal Structures Act provided that:¹³

A municipal council must appoint—

- (a) a municipal manager who is the head of administration and also the accounting officer for the municipality; and
- (b) when necessary, an acting municipal manager.

The Municipal Structures Act further provides that before a Municipal Council takes a decision on the appointment and conditions of service of a municipal manager and a head of a municipal department, it must first require its executive committee or executive mayor, if it has such a committee or mayor, to submit to it a report and recommendation on the matter.¹⁴ Accordingly, the Act outlined a procedure for the employment of municipal managers and managers directly accountable to the municipal manager who are referred to in the Act as the 'head of a department of the municipality'. In terms of this procedure, the selection of suitable candidates for the position of manager is done by the executive committee or executive mayor of the Municipal Council, if it has such a committee or mayor. Thus, the Municipal Council appoints such a candidate based on the report and recommendation of its executive committee and/or executive mayor.

¹¹See the disciplinary regulations for senior managers.

¹²See s 15 of the Municipal Systems Amendment Act which repealed s 82 of the Municipal Structures Act.

¹³See s 82(a) of the Municipal Structures Act which made provision for the employment of municipal managers. Section 82 of the Act was repealed by s 15 of the Municipal Systems Amendment Act which came in to operation on 5 July 2011.

¹⁴See s 30(5)(c) of the Municipal Structures Act.

2.3 *The Municipal Systems Act*

The Municipal Systems Act makes provision for the appointment of managers in such a manner as to make the incumbent directly accountable to the municipal manager. These managers are appointed by the Municipal Council after consultation with the municipal manager.¹⁵ The Municipal Systems Act provides that municipal managers, and managers directly accountable to municipal managers, should be appointed only in terms of a written employment contract and they should be subject to a separate annual performance agreement.¹⁶

2.4 *The municipal performance regulations for managers*

In 2006 the Minister for the Department of Provincial and Local Government Affairs introduced the municipal performance regulations for managers.¹⁷ In terms of these regulations, the requirement for the job of municipal manager is as follows: a recognised Bachelor's degree in Public Administration or relevant fields, and a minimum of five (5) years' experience at senior management level.¹⁸

2.5 *Legal analysis of the old legislation on employment of the managers*

The analysis of the old legislation regarding employment of the managers reveals that it was regulated by fragmented legislation. The fragmentation is essentially due to the fact that the employment of managers was regulated differentially. Oddly enough, this was done through various pieces of legislation instead of a single piece of all-encompassing legislation. So, for example, different stages in the employment of a municipal manager were regulated by three pieces of legislation; thus, the appointment of the municipal manager was regulated by the Municipal Structures Act,¹⁹ the employment contract was regulated by the Municipal Systems Act,²⁰ and the job requirement for appointment of the municipal manager was regulated by the municipal performance regulations for managers.²¹ Unlike the employment of the municipal manager, the employment of the managers directly accountable to the municipal manager was not regulated by the Municipal Structures Act, but by the Municipal Systems Act.²² All told, the employment procedure for all the managers was regulated by the Municipal Structures Act.²³

¹⁵See s 56(a) of the Municipal Systems Act.

¹⁶*Id* s 57(1).

¹⁷(N 1).

¹⁸See reg 38(1)-(2) of the municipal performance regulations for managers.

¹⁹See s 82(a) of the Municipal Structures Act.

²⁰See s 57(1) of the Municipal Systems Act.

²¹See reg 38(1) of the municipal performance regulations for managers.

²²See s 56(a) of the Municipal Systems Act.

²³See s 30(5)(c) of the Municipal Structures Act.

Conceivably, the regulation of the employment of managers by different pieces of legislation could have created uncertainty regarding the promulgation of regulations to regulate their employment. It should be recognised that the municipal performance regulations for managers were promulgated under the Municipal Systems Act, whereas the appointment of municipal managers was regulated by the Municipal Structures Act. The confusion regarding the relevant Act under which the regulations should be promulgated and executed in practice manifested itself in the Supreme Court of Appeal judgment in *Yengwa*.²⁴

The issues at hand in this case revolved around the employment of a municipal manager at Umvoti Local Municipality, which had advertised a post for municipal manager. The advertisement provided that the job requirement for the position of municipal manager was a Bachelor's degree in either Public Administration or a relevant field. This job requirement was prescribed by the provisions of the municipal performance regulations for managers. Mr Yengwa (the applicant), who had a three-year teacher's diploma and a one-year certificate in municipal leadership, applied for the position of municipal manager. Despite instructions from the provincial government not to employ the applicant because he did not have a Bachelor's degree as required by the regulations, the Municipal Council, by a majority decision, took a resolution to appoint the applicant as the municipal manager of Umvoti Local Municipality.

Following the decision of the Municipal Council to employ the applicant, the MEC for Local Government launched an application to the KwaZulu-Natal High Court for an order to declare the resolution taken by the Municipal Council to appoint the applicant as its municipal manager *void ab initio* and to set it aside. The KwaZulu-Natal High Court found that regulation 38(1) of the municipal performance regulations for managers was not concerned with the matters either listed or prescribed in sections of the Municipal Systems Act and, accordingly, Van Heerder AJ stated that:²⁵

[i]n my view regulations promulgated under the Systems Act cannot lawfully restrict the ambit of section 82 of the Structures Act and to the extent that they purport to do so, as Regulation 38(1) does, they are infringing the principles of legality and as such are [*sic*] invalid.

The MEC appealed against the decision of the court *a quo*, although the appeal was limited to the order for costs. The Supreme Court held that there was no longer a *lis* between the parties because at the time in which the MEC launched the application in the court *a quo* the applicant had indicated that he had decided

²⁴(N 2).

²⁵See *MEC for Local Government, Housing and Traditional Affairs v MS Yengwa* (unreported court *a quo* Case no 147/09) para 12.

not to take up the position of the municipal manager.²⁶ For this reason it was no longer necessary for the court *a quo* to make the order of invalidity of regulation 38(1) of the municipal performance regulations for managers and, therefore, the order of invalidity of regulation 38(1) was set aside.²⁷ It is submitted that the *Yengwa* judgment did not resolve the confusion with respect to the uncertain legality of regulation 38(1). This submission is based on the fact that the Supreme Court of Appeal did not consider and make a finding on the legality of promulgating regulation 38(1) on the employment of municipal managers under the Municipal Systems Act. Van Heerden AJ in the court *a quo* was correct in finding that the Minister for Provincial and Local Government Affairs had no authority to promulgate regulations on the employment of municipal managers under the Systems Act. The principle of legality demands that the bearer of public powers must not misconstrue the powers conferred.²⁸ Woolman and Roux elucidate that the principle of legality implies that the bearer of public power is powerless to act without authority from an Act of Parliament or common law and those who act outside the restrictions laid down by the authorised law-makers are deemed to have acted unlawfully.²⁹ It is apparent that the Minister misconstrued his powers when promulgating the regulation. Consequently regulation 38(1) regarding the employment of municipal managers could lack the requisite validity.

3 The new legislation

It is possible that Parliament realised the confusion caused by the fragmented regulation of the employment of the managers when Parliament passed the Municipal Systems Amendment Act in 2011 which, among other things, tried to harmonise the employment of the managers by placing it under one piece of legislation, namely, the Municipal Systems Act. Although the old legislation regulated the appointment and conditions of employment of the managers it did not regulate the termination of employment of the managers. It is possible that the Minister of Co-operative Governance realised this gap when he promulgated the disciplinary regulations for senior managers to regulate the disciplinary issues around the employment of the managers.

3.1 *The disciplinary regulations for senior managers*

The disciplinary regulations for senior managers were promulgated under section

²⁶See *Yengwa* para 6. In his notice of intention to oppose the costs order in the court *a quo*, Mr Yengwa advised that he did not accept his appointment as the municipal manager of Umvoti Local Municipality.

²⁷See *Yengwa* para 11.

²⁸*Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC) para 31 (hereafter the *Masetlha* case).

²⁹See Woolman *et al Constitutional law of South Africa* (2006) (2nd ed) ch 11:1.

120 of the Municipal Systems Act and they apply to all senior managers including municipal managers.³⁰ The provisions of the regulations relevant for this paper deal with the suspension of the managers. Before a senior manager may be suspended, he or she must be given the opportunity to make written representation within seven days of being notified of the Councils decision to suspend him or her to the Municipal Council as to why he or she should not be suspended.³¹ Furthermore, discipline must be effected with due regard to the Code of Good Practice in Schedule 8 of the Labour Relations Act.³² The Code of Good Practice provides that employers should adopt disciplinary rules that create certainty and consistency in the application of discipline.³³

3.2 The Municipal Systems Amendment Act

In substance, the Municipal Systems Amendment Act repealed the provisions of the Municipal Structures Act regarding the employment of municipal managers.³⁴ The Act further amended the Municipal Systems Act by inserting section 54A into the Municipal Systems Act which makes provisions for the employment of municipal managers.³⁵ Furthermore the Act amended provisions of the Municipal Systems Act by substituting the provisions of section 56 of the Municipal Systems Act which dealt with the appointment of the managers directly accountable to the municipal manager.³⁶ However, the Municipal Systems Amendment Act omitted to repeal section 30(5)(c) of the Municipal Structures Act which regulates the procedure for the employment of the managers.

3.3 The Municipal Systems Act as amended

The amendment to the Municipal Systems Act regulates the appointment of all

³⁰ See reg 1 of the disciplinary regulations for senior managers. Regulation 1(j)(i) defines a 'senior manager' as a manager referred to in the repealed s 82(1) of the Municipal Structures Act and as managers referred to in s 56 of the Municipal Systems Act.

³¹ See reg 6(2) of the disciplinary regulations for senior managers.

³² Act 66 of 1995; see reg 4(3)(b) of the disciplinary regulations for senior managers.

³³ See item 3.1 of the Code of Good Practice: Dismissal in Schedule 8 of the Labour Relations Act (hereafter the Code of Good Practice).

³⁴ See s 15 of the Municipal Systems Amendment Act which repealed s 82 of the Municipal Structures Act.

³⁵ See s 2 of the Municipal Systems Amendment Act which amended the Municipal Systems Act by inserting s 54A into the Act and which deals with the appointment of municipal managers. Before this amendment, the Municipal Systems Act did not make provision for employment of municipal managers, and the employment of municipal managers was dealt with by the Municipal Structures Act.

³⁶ See s 3 of the Municipal Systems Amendment Act which substituted the whole of s 56 of the Municipal Systems Act. Prior to its amendment, s 56 of the Act dealt only with the appointment of managers directly accountable to municipal managers. It did not make provision for the selection procedure for the employment of the managers. After its amendment, s 56 of the Act makes provision for a selection procedure for the employment of the managers.

managers. The municipal manager is still appointed by the Municipal Council, as was the case under the repealed provision of the Municipal Structures Act.³⁷ A suitable candidate is selected from the pool of candidates for appointment to the post by the municipality.³⁸ With regard to the appointment of managers directly accountable to municipal managers, these managers are still appointed by the Municipal Council after consultation with the municipal manager³⁹ as was the case before the amendment to the Act. A person to be appointed as a manager directly accountable to the municipal manager should also have the skills, expertise, competencies and qualifications as prescribed.⁴⁰ A suitable candidate for appointment to the post is selected by the Municipal Council.⁴¹

3.4 *Legal analysis of the employment of the managers under the new legislation*

The disciplinary regulations for senior managers with regard to senior managers remain ambiguous and create uncertainty on the discipline of senior managers. The uncertainty arises from regulation 6 which requires that a manager must be given an opportunity to make representation before he or she is suspended, but at the same time the regulations allow the Municipal Council to take a decision and notify the manager of his or her suspension before he or she had the opportunity to make representation. The inherent contradiction in this regulation was identified by the Labour Court in the case of *Biyase v Sisonke District Municipality*.⁴² In this case Biyase (the applicant), who was Executive Director: Corporate Services at Sisonke District Municipality (the first respondent), was suspended by the first respondent within 4 days after he was notified of the intention to suspend him. Consequently, Biyase launched a court application for an order to set aside the suspension on the grounds that it was unlawful and unfair.⁴³ The Court found that regulation 6 of the disciplinary regulations for senior managers did not make sense.

In order to make sense of regulation 6 the Court gave meaning to the phrase 'within seven days of being notified of the Council's decision to suspend him or her' to mean that the manager must have a period of seven days within which to make representation *before* a decision to suspend him is taken.⁴⁴ It was held that the applicant had a clear right to be given seven days' notice of the Council's intention to suspend him and the suspension of the applicant was declared unlawful and it was

³⁷See s 54A(1)(a) of the Municipal Systems Act as amended.

³⁸*Id* s 54A(4)(b).

³⁹*Id* s 56(1)(a)(i),

⁴⁰*Id* 56(1)(b)

⁴¹*Id* s 56(3)(b).

⁴²2012 33 ILJ 598 (LC) (hereafter the *Biyase* case).

⁴³See *Biyase* para 1.

⁴⁴*Id* para 17.

set aside.⁴⁵ The uncertainty in the regulation renders it in conflict with the provisions of the Code of Good Practice which requires employers to adopt disciplinary rules that create certainty in the application of discipline.⁴⁶

Despite Parliament's attempts to harmonise the employment of the managers by bringing it under one piece of legislation, the omission by the Municipal Systems Amendment Act to repeal section 30(5)(c) of the Municipal Structures Act which regulates the employment procedures in respect of managers negates the attempt to harmonise the law regarding the employment of managers. Instead of harmonising the law the Municipal Systems Amendment Act created further confusion on the employment selection procedure for managers by inserting provisions on the employment procedures for managers into the Municipal Systems Act without repealing the provisions of the Municipal Structures Act on the employment procedures for the managers. Consequently, the selection procedure for the employment of managers is now regulated by two pieces of legislation. Furthermore, the procedure for selecting a candidate in terms of the Municipal Structures Act conflicts with the procedure prescribed by the Municipal Systems Act in that, in terms of the Municipal Structures Act, a suitable candidate is selected by the executive committee or executive mayor for appointment by the Municipal Council, whereas in terms of the Municipal Systems Act a suitable candidate is selected by the Municipal Council alone.⁴⁷

For the purpose of understanding the effect of the conflict in respect of the legislation regarding the procedure for the employment of the managers, the difference between the words 'municipality' and 'Municipal Council' will be briefly outlined. The word 'municipality' is not defined in either the Municipal Structures Act or the Municipal Systems Act, but the Municipal Systems Act provides that 'a municipality consists of the political structures and administration of the municipality; and the community of the municipality.'⁴⁸ While the term 'Municipal Council' is not defined in any of the local government legislation, the Municipal Structures Act provides that each municipality must have a Municipal Council which consists of a number of councillors determined by the MEC for local government in the province.⁴⁹ Accordingly, a municipality includes politicians, administrators, and members of the community, whereas the Municipal Council comprises councillors only. Thus, if a decision is taken by the municipality, it can be taken by any of the components of the municipality, that is, its community, administration or the councillors who are politicians, whereas if a decision is taken by a Municipal Council, that decision would have been taken by political representatives only.

⁴⁵*Id* para 25.

⁴⁶See item 3.1 of the Code of Good Practice.

⁴⁷See s 54A(4)(b) and s 56(3)(b) of the Municipal Systems Act, as amended, and s 30(5)(c) of the Municipal Structures Act.

⁴⁸See s 2(b) of the Municipal Systems Act, as amended.

⁴⁹See s 18(1) and (3) of the Municipal Structures Act.

4 The implications of the uncertainty and conflicts for the law

One might question whether it is necessary to scrutinise the employment procedure if, irrespective of the different procedures contained in different legislation, candidates for the positions of the managers are employed by the Municipal Council. Certainty, in respect of the employment procedure, is essential, in that if the wrong procedure were followed, the employment of that candidate would be the subject of a review for irregularity. The issue of employing a candidate in the position of municipal manager based on irregular employment procedure arose in the Eastern Cape High Court judgment of *Mlokoti v Amathole District Municipality*,⁵⁰ where Mr Mlokoti (the applicant) was aggrieved by his non-appointment by Amathole District Municipality, despite the fact that he performed better than the appointed candidate, Mlamli Zenzile (the second respondent). The rules of Council require that the Council should take a resolution by vote when there are opposing views on a matter before it. In approving the appointment of the second respondent in the position of municipal manager, the speaker of the Council resolved the appointment of the second respondent without allowing the Municipal Council to vote, despite opposing views from councillors on the issue. The court found that the decision to appoint the second respondent was unlawful and null because no vote was taken, in spite of the existence of opposing views about the appointment of a municipal manager.⁵¹ This judgment reveals that even if a candidate for the position of municipal manager is appointed by the Municipal Council, which has the authority to appoint the candidate, if irregular procedures were followed when appointing the candidate that appointment could be set aside by the courts.

Furthermore, the confusion caused by the existence of different procedures for the employment of managerial candidates may lead to arbitrary appointments being made outside the ambit of the law. In the Supreme Court of Appeal judgment in *Gordon v Department of Health: KwaZulu-Natal*,⁵² the appellant, a white male, and Mr Kongwa, a black male, had applied for the post of Deputy Director: Administration: Grey Hospital in the KwaZulu-Natal Department of Health (the respondent). Although the panel recommended that the appellant be promoted to the post, the respondent appointed Mr Kongwa on the directive of the Provincial Public Service Commission. The directive was based on, among other things, the constitutional imperative to promote representivity in the public service. In upholding the appellant's claim that he was discriminated against unfairly, on the arbitrary ground of his race and colour, this Court found that the respondent did not have a specially formulated plan, policy or programme for affirmative action, and that the

⁵⁰2009 6 SA 354 (ECD) (hereafter the *Mlokoti* case).

⁵¹*Mlokoti* para 12.

⁵²2008 6 SA 522 (SCA) (hereafter the *Gordon* case).

appointment was an *ad hoc* and arbitrary act.⁵³ This case illustrates the type of outcome that can be expected when employment procedures are uncertain and that appointments made on the basis of dubious procedures will, in all likelihood, be subjected to judicial review for irregularity.

In a practical sense, the uncertainty over the law regarding the employment procedure for managers is manifested in a circular issued by the Kwazulu-Natal Provincial Department of Co-operative Government and Traditional Affairs in respect of the appointment of managers.⁵⁴ When advising municipalities about the procedure for filling vacant posts of municipal managers and managers directly accountable to municipal managers, the circular recommends that a decision for constituting the shortlist panel and details of its members should be sanctioned by the Municipal Council. The circular correctly interprets the provisions of sections 54A and 56(3) of the Municipal Systems Act on the procedure for employment of the managers. However, the recommendations are contrary to the provisions of section 30(5)(c) of the Municipal Structures Act on the prescribed procedure for employment of the managers. This recommendation reflects the difficulty of reconciling the provisions of the Municipal Structures Act with the provisions of the Municipal Systems Act on the procedure for employment of the managers.

5 The effect of the repeal of section 82 of the Municipal Structures Act

It is pointed out above that the Minister acted *ultra vires* his powers when he promulgated the regulations under the Municipal Systems Act.⁵⁵ However, since the repeal of section 82 of the Municipal Structures Act, and the amendment of the Municipal Systems Act, the employment of municipal managers is now regulated by the Municipal Systems Act. Consequently, the Minister has the authority under the amended provisions of the Act to promulgate regulations on the employment of municipal managers, because the employment of municipal managers is one of the matters prescribed by the amended Municipal Systems Act.

Though the declaration of invalidity of regulation 38(1) by the court *a quo* was reversed by the Supreme Court of Appeal in the *Yengwa* case, the validity of the regulation was debatable, but no further challenge as to the validity of the regulation was raised until Parliament corrected the defect by repealing the relevant provision of the Municipal Structures Act in 2011. The question arises as to whether the repeal of the provisions of the Municipal Structures Act and the amendment to the

⁵³See *Gordon* para 27.

⁵⁴See KwaZulu-Natal Provincial Department of Co-operative and Traditional Affairs Circular 37 of 2011.

⁵⁵See s 120 of the Municipal Systems Act, as amended, which authorises the Minister to promulgate regulations on matters prescribed by the Act.

Municipal Systems Act truly cleared up the uncertainty around the validity of regulation 38(1) of the municipal performance regulations. The implications for the repeal of legislation are largely regulated by the Interpretation Act.⁵⁶ The Act provides that, '[w]here a law repeals any other law, then unless the contrary intention appears, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect'.⁵⁷ Botha points out that this provision of the Interpretation Act means that if an act which declared a particular action to be illegal is repealed the repeal does not operate retrospectively to declare legal that which was illegal before the repeal.⁵⁸ The Act further provides that the repeal of a law shall not affect the previous operation of anything duly done or suffered under the law so repealed.⁵⁹ Botha elucidates that this provision of the Act means that any proclamations or regulations made under the repealed legislation lapse when the legislation from which they derive their validity is repealed.⁶⁰ Regulation 38(1) of the municipal performance regulations for managers was valid since 2006 when it was promulgated, though there was uncertainty about its validity until Parliament repealed section 82 of the Municipal Structures Act and amended by the Municipal Systems Act in 2011. If the declaration of invalidity of regulation 38(1) was not reversed by the Supreme Court of Appeal in the *Yengwa* case, the repeal of and amendment to the old legislation would not have validated the regulation. Furthermore while the uncertainty about the validity of regulation 38(1) arose from the fact that the regulation could only derive its legality from the Municipal Structures Act, the regulation was promulgated under the Municipal Systems Act. Accordingly, the regulation did not lapse with the repeal of the relevant provisions of the Municipal Structures Act because it was not promulgated under the Municipal Structures Act. Thus the repeal and amendment of the old law will not vitiate the validity of regulation 38(1).

The question arises as to whether the validity of the regulation can still be challenged despite the fact that Parliament corrected the defect in the law after the regulation was in operation for four years. It is unlikely that any challenge to the validity of the regulation, which could have been contested before the defect was rectified, can succeed henceforth. The debate about the validity of regulation 38(1) has become academic because there is no longer a live issue about the validity of the regulation. This view is reinforced by the decision of the Supreme Court of Appeal in the *Yengwa* case, when the Court held that since the live issues about the validity of the regulation have fallen away it is no longer necessary to make an order regarding the validity of the regulation.⁶¹ Even if the Court were to consider

⁵⁶Act 33 of 1957 (hereafter the Interpretation Act).

⁵⁷See s 12(2)(a) of the Interpretation Act.

⁵⁸Botha *Statutory interpretation* 42.

⁵⁹See s 12(2)(b) of the Interpretation Act.

⁶⁰See Botha (n 58) 42.

⁶¹See *Yengwa* para 11.

the validity of regulation 38(1) it is doubtful that the Court can declare it invalid after Parliament have already corrected the defect. The matter no longer has a practical effect on the employment of the managers. Thus, the declaration of invalidity of regulation 38(1) would not be an appropriate order.

This view is reinforced by the Constitutional Court decision in the case of *The Head Department, Department of Education, Free State Province v Welkom High School*.⁶² The issues at hand involved the constitutionality of the school policies of governing bodies for Welkom and Harmony High Schools that provided for the automatic exclusion of a learner from the schools in the event of her falling pregnant. Even though the Court found that the school policies contravened the provisions of the Constitution,⁶³ it did not declare the school policies invalid and the Court instead found it appropriate to order the school governing bodies to review their policies to be in line with the Constitution.⁶⁴

6 Conclusion

The discussion on the previous and current legislation regarding the law of employment of the managers reveals that the legislation was promulgated without proper consideration. The regulation of employment of the managers by fragmented pieces of legislation further created uncertainty as to the law in that a researcher or local government practitioner who wanted to refer to the law regarding employment of the managers would have to search in different statutes for one aspect of the law: the employment of the managers. This challenge is further complicated and rendered burdensome by the promulgation of different regulations to regulate the job requirement for appointment of the managers and procedural rules for termination of the employment based on the manager's misconduct. The uncertainty arising from scattered and conflicting legislation on the procedure for correct and lawful employment of the managers contravenes the demand of the Constitution to enforce accountability and transparency in public administration. Dubious, if not arbitrary, employment procedures run the risk of the employment of incompetent managers who are not equal to the challenges of effective local government management. Such incompetence impacts on, and manifests in, the quality of service delivery. Consequently, this will result in poor service delivery and endless community protests about the lack of services.

In order to address the problem of the fragmented and confusing regulation of the employment of managers, section 30(5)(c) of the Municipal Structures Act, which regulates the procedures for employment of the managers, should be

⁶² *The Head of Department, Department of Education, Free State v Welkom High School* (CCT103) 2013 ZACC25 (10 July 2013) (hereafter *The Head of Department, Department of Education, Free State case*).

⁶³ See *The Head of Department, Department of Education Free State* para 13.

⁶⁴ *Id* para 25.

repealed. This would result in the regulation of the employment of the managers being controlled by one piece of legislation, namely, the Municipal Systems Act. The amendment of regulation 6 of the disciplinary regulations for managers would also address the contradiction in the disciplinary procedure of the managers. Easy access to the law of employment for the managers, the job requirement for the appointment of, and the termination of employment of, the managers would be facilitated if they were embodied in one regulation instead of different regulations.

It is hoped that if these recommendations are considered for implementation, there would no longer be undue uncertainty in the law regarding the employment of municipal managers.