THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1066/2019

In the matter between:

NOSIPHO PORTIA NDABENI **APPELLANT**

and

MUNICIPAL MANAGER:
OR TAMBO DISTRICT MUNICIPALITY
(OWEN NGUBENDE HLAZO) **FIRST RESPONDENT**

OR TAMBO DISTRICT MUNICIPALITY **SECOND RESPONDENT**

Neutral citation: *Ndabeni v Municipal Manager: OR Tambo District Municipality and Another* (Case no 1066/19) [2021] ZASCA 08 (21 January 2021)

Coram: PETSE DP, ZONDI and DAMBUZA JJA and EKSTEEN and POYO-DLWATI AJJA

Heard: 10 November 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 released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 21 January 2021.

Summary: Contempt of court proceedings – failure to comply with court order – application for declarator to that effect – standard of proof required – applicant for declarator required to prove non-compliance on a balance of probabilities – once existence of court order, service thereof and non-compliance established, respondent bears evidentiary onus to show that non-compliance neither wilful nor *mala fide* – respondents failing to discharge evidentiary onus.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Griffiths J, sitting as court of first instance):

1. The appeal is upheld with costs on an attorney and client scale.
2. The order of the high court is set aside and replaced by the following:

   '(a) The respondents' conduct in failing to comply with the order of Mjali J (save for para 2 thereof) issued on 13 December 2016 is declared unlawful.

   (b) The respondents are declared to be in contempt of the aforesaid order.

   (c) The respondents are ordered to purge the aforesaid contempt within 30 days of the date of this order.

   (d) The respondents are ordered to pay the applicant's costs on an attorney and client scale'.

JUDGMENT

Poyo-Dlwati AJA (Petse DP and Zondi JA concurring):

[1] This appeal raises the question whether a court order issued by the Eastern Cape Division of the High Court, Mthatha (the high court) (Mjali J) declaring the appellant, Ms Nosipho Portia Ndabeni, a permanent employee of the second respondent, the O R Tambo District Municipality, by virtue of its resolution 10/2011 of 30 January 2011, was a nullity because its implementation would constitute a contravention of s 66 of the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act). This question arises against the following backdrop.

[2] The appellant was, pursuant to an advertisement in a local newspaper of 11 March 2005, employed by the second respondent on a one-year contract on 1 July 2005 as an Aids Training Information and Counselling Centre Manager, later referred to as Senior Coordinator Manager. At the expiry of the initial one year period, her contract was renewed from time to time until 30 January 2011 when the second respondent took a resolution[1] to convert all its contract employees to permanent employees. For unknown reasons, the appellant was excluded from benefiting from this resolution. The appellant tried, to no avail, to have her exclusion resolved amicably. With the matter remaining unresolved, the appellant then launched an application in the high

[1] Resolution 10/11, this resolution was not attached to the papers, but its existence was never disputed. It is not in dispute that the purport of the resolution was to convert all temporary positions to permanent ones.

court pursuant to which an order in the following terms was granted on 13 December 2016 by Mjali J:

'1. The applicant is hereby declared the permanent employee of the first respondent in her capacity as the Manager at Aids Training Information and Counselling Centre Manager Section – ATICC by virtue of resolution 10/11 of 30th January 2011 and any contrary conduct or action taken by the respondents is hereby declared a nullity;
2. The post referred to as AIDS Training Information and Counselling Centre Manager (ATICC) previously occupied by the applicant is hereby declared a permanent post in line with resolution 10/11 of 30th January 2011;
3. The respondents are directed to pay the costs of this application jointly and severally one paying the other to be absolved from liability on attorney and own client scale;
4. The first respondent be ordered to pay the applicant's salary and other benefits, retrospectively from the date upon which such payments ceased; and
5. An order compelling the Municipality to pay the applicant's salary and other benefits, in future, in accordance with benefits and service conditions applicable to an employee of her status'.

[3] It is apposite at this stage to mention that the application before Mjali J was unopposed as the respondents had not filed any answering affidavits despite having been placed on terms to do so. On the day on which the matter served before Mjali J for hearing, the respondents applied for an adjournment to enable them to file their answering affidavits. The respondents' application for adjournment was opposed by the appellant and refused by the learned Judge. The hearing proceeded without the respondents. After hearing argument, the high court granted the order mentioned in the preceding paragraph. The learned Judge subsequently refused the respondents' application for leave to appeal. A further application for leave to appeal to this Court, which was brought out of time, also suffered the same fate.

[4] It is apparent from the record that the respondents were intent on lodging an application for leave to appeal to the Constitutional Court but, when they realised that their envisaged application to that Court would have been woefully out of time by some nine months, the intended application was abandoned. According to the appellant, this Court's order refusing leave to appeal was served on the respondents on 30 July 2018. Despite their knowledge of the two orders refusing leave and Mjali J's order of 13 December 2016, the respondents still failed to comply with the latter order. This led to the appellant launching a contempt of court application on 1 February 2019, as she viewed the respondents' failure to comply with Mjali J's order as contempt of court and therefore unlawful. On 19 February 2019, Mbenenge JP issued a rule *nisi* calling upon the respondents to show cause why they should not be held in contempt of the Mjali J's order.

[5] The respondents opposed the application on various grounds. In their opposition, they never denied the existence of the order and that the order had been served on them. Their main grounds of opposition, in summary, were that employing the appellant would result in a portion of the funds meant to finance the second respondent's service delivery initiatives being diverted to pay the appellant's salary. This, asserted the respondents, would be the case because the appellant's position was not provided for in the second respondent's staff establishment. Furthermore, the respondents contended that the first respondent, the municipal manager would have to enter into an employment contract under circumstances where doing so would, in terms of subsecs (3) and (4) of s 66 of the Municipal Systems Act, be null and void.[2]For

[2] Section 66 of the Municipal Systems Act in relevant parts provides:

his part, the first respondent asserted that employing the applicant in those circumstances would expose him to serious repercussions as he would be held liable for any resultant irregular or fruitless and wasteful expenditure. Consequently, the respondents denied that their non-compliance with the Mjali J's order was wilful and mala fide.

[6] In due course, the application for contempt of court came before Griffiths J. At this hearing the appellant expressly abandoned any relief for criminal contempt against the first respondent. Thus, the only issues for determination were: whether the respondents' conduct, in failing to comply with the court order, was unlawful; and whether the respondents were indeed in contempt of the Mjali J's order. After hearing the application, which was by then opposed, Griffiths J discharged the rule *nisi*. In so doing, the learned Judge held:

'In my view, the situation here is directly analogous to that which pertained in the *Motala* matter. Having found that paragraphs 33 – 35 of the answering affidavit (which deal with the factual basis for the contention that no such post as referred to in Mjali J's order exists in the staff establishment) do not fall to be struck out, and thus remain unchallenged by the applicant, the prohibition in subsection (3) is squarely applicable. Accordingly, the only

---

'(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must—
(a) develop a staff establishment for the municipality, and submit the staff establishment to the municipal council for approval;
(b) provide a job description for each post on the staff establishment;
(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation; and
(d) establish a processor mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service.
. . .
(3) No person may be employed in a municipality unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.
(4) A decision to employ a person in a municipality, and any contract concluded between the municipality and that person in consequence of the decision, is null and void if the appointment was made in contravention of subsection (3).

conclusion that I can reach is that Mjali J was not empowered to grant the order which she did and that it is, in the circumstances, a nullity[3]'.

[7] Dissatisfied with this outcome, the appellant applied for and was granted leave to appeal to this Court. As already indicated, the existence of the order and its service on the respondents were not in dispute and, for the reasons set out later, its validity is unassailable. Consequently, the respondents bore the evidentiary burden to satisfy the high court that their failure to comply with the Mjali J's order was neither wilful nor mala fide.[4]

[8] The logical starting point in this matter is the Constitution[5] itself. Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. There is no doubt that court orders, once issued, are binding and must therefore be complied with. As Madlanga J explained in *Moodley v Kenmont School and Others*[6](para 36):

'I cannot but again refer to section 165(5) of the Constitution which provides that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies". This is of singular importance under our constitutional dispensation which is founded on, amongst others, the rule of law. The judicial authority of the Republic vests in the courts. Thus, courts are final arbiters on all legal disputes, including constitutional disputes. If their orders were to be obeyed at will, that would not only be "a recipe for a constitutional crisis of great magnitude", "[i]t [would] strike at the very foundations of the rule of law" and of our constitutional democracy'. (Footnotes omitted.)

---

[3] *Ndabeni v Municipal Manager and Another* [2019] ZAECMHC 28 para 34.
[4] See *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 SCA.
[5] The Constitution of the Republic of South Africa Act 108 of 1996.
[6] *Moodley v Kenmont School and Others* [2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 BCLR 74 (CC).

[9] It is trite that 'an order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong.'[7] This principle was affirmed most recently by this Court in *Whitehead and Another v Trustees of the Insolvent Estate of Dennis Charles Riekert and Others*.[8] Whilst counsel for the appellant sought to attack the competency of Griffiths J in setting aside Mjali J's order as a nullity, this was not pursued with any vigour before us, correctly so in my view. Nothing prevented Griffiths J from declaring the order a nullity, had his reasons for doing so been correct. He had the necessary jurisdiction and authority to do so. However, as will be demonstrated below, in the context of the facts of this case, the learned Judge erred in doing so.

[10] In finding Mjali J's order to be a nullity, the high court accepted the respondents' explanation that they encountered difficulties in implementing the order because what was required of them would be in contravention of subsecs (3) and (4) of s 66 of the Municipal Systems Act. In reaching its conclusion, the high court had regard to the decisions of this Court in *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others*[9] and *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others*[10]; as well as the decision of the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd*.[11] Also, after analysing the provisions of s 66 (3) and (4), the high court found that 'the

[7] *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C.
[8] *Whitehead and Another v Trustees of the Insolvent Estate of Dennis Charles Riekert and Others* [2020] ZASCA 124 para 18.
[9] *Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* [2011] ZASCA 238; 2012 (3) SA 325 (SCA).
[10] *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others; Mathimbane and Others v Normandien Farms* [2017] ZASCA 163; [2018] 1 All SA 390 (SCA); 2019 (1) SA 154 (SCA).
[11] *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (1) BCLR 1 (CC); 2017 (2) SA 622 (CC).

determination of the staff establishment of a municipality is the preserve of the municipal manager, subject to the approval of the Council, as are the job descriptions, remuneration and other conditions of employment'.

[11] The high court further held that once such staff establishment has been so developed, subsec (3) appears to be cast in imperative terms in forbidding the employment of any person unless the post to which he or she is appointed is indeed for the staff establishment so developed. True, subsec (4) declares that any contract concluded in the circumstances is null and void if the appointment was made in contravention of subsec (3). The imperative nature of the prohibition in subsec (3) is reinforced by subsec (5).[12] It is manifest that this section holds any person who takes a decision contemplated in subsec (4) personally liable for fruitless and wasteful expenditure that a municipality may incur as a result of the invalid appointment.

[12] The learned Judge proceeded to hold that in his view, the situation in this matter was directly analogous to that which obtained in *Motala*. Having found that paragraphs 33-35 of the answering affidavit (which dealt with the factual basis for the contention that no such post as referred to in Mjali J's order existed in the staff establishment) do not fall to be struck out and thus remain unchallenged by the applicant, he held that the prohibition in subsec (3) was squarely applicable. He further found that the only conclusion that he could reach was that Mjali J was not empowered to grant the order which she

[12] Section 66(5) of the Municipal Systems Act provides that any person who takes a decision contemplated in subsec (4), knowing that the decision is in contravention of subsec (3), may be held personally liable for any irregular or fruitless and wasteful expenditure that the municipality may incur as a result of the invalid decision.

did and that it was, in the circumstances, a nullity. In my view, this conclusion is insupportable.

[13] As this Court held in *Motala (*para 14):[13]

'[I]n my view, as I have demonstrated, Kruger AJ was not empowered to issue and therefore it was incompetent for him to have issued the order that he did. The learned judge had usurped for himself a power that he did not have. That power had been expressly left to the Master by the Act. His order was therefore a nullity. In acting as he did, Kruger AJ served to defeat the provisions of a statutory enactment. It is after all a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect (*Schierhout v Minister of Justice* 1926 AD 99 at 109). Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing. For as Coetzee J observed in *Trade Fairs and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W) at 183E: "[i]t would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and to make such a declaration".'

[14] It bears emphasis that the facts in *Motala* are materially distinguishable from those of the present case. There, the high court was found to have impermissibly appropriated to itself a statutory power that vested exclusively in the Master of the High Court by virtue of s 429 of the Companies Act 61 of 1973 therein under consideration. However, in this case the issue is factual, did Mjali J order the respondent to 'employ' the appellant or merely declare that she is in fact employed. Section 66 of the Municipal Systems Act deals with staff establishment within the sphere of local government. Subsections (3) and (4) of s 66 of the Municipal Systems Act deal with employment by a municipality. Mjali J's order, properly construed, did not, in my view, have

[13] See fn 9 above.

the effect of employing the appellant, contrary to what the high court found. All it did was to declare that the appellant was equally a member of the class of temporary employees targeted by resolution 10/11. Accordingly, there was no basis to exclude her from the resolution's ambit.

[15] Before us the high court's finding that the Mjali J's order had the effect of employing the appellant was enthusiastically embraced by the respondents. It suffices merely to state that the respondents' reliance on this finding is misplaced. The truth of the matter is that all that Mjali J did was simply to issue a declaratory order pursuant to resolution 10/11 of the second respondent's Council which converted all its contract employees into permanent employees. Put differently, she declared that the appellant's employment had been converted from contract to permanent employment. As previously mentioned, the existence of the Council's resolution was never disputed by the respondents.

[16] Curiously, the respondents elected not to take the high court into their confidence and explain to the high court how this resolution was to be implemented and why it was never applied to the appellant. Despite the fact that the resolution concerned was their document, it was not placed before the high court. Nor was its absence explained by the respondents. Accordingly, it does not avail the respondents to contend that there was no position for the appellant in their staff establishment. The Council had passed a resolution in terms of which all temporary positions were converted into permanent positions. What then remained was for the first respondent to implement resolution 10/11 and revise the second respondent's staff establishment to align it with such resolution. But lo and behold the high court was not told

why this resolution was not implemented, given that there has been no suggestion that it was subsequently varied or rescinded. It is necessary to emphasize that the provisions of s 66 of the Municipal System Act, erroneously thought by the high court to be an insurmountable hurdle for the appellant, were clearly not applicable. This must be so because one is here not dealing with a decision to employ the appellant but rather the implementation of the second respondent's resolution in so far as it related to temporary employees, and, in particular, the appellant.

[17] Furthermore, there was no genuine dispute of fact that when Council took resolution 10/11 the appellant was a contract employee in the second respondent's employ. As it was put in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*:[14]

'When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied'.

[18] Moreover, there was no dispute about the existence or correctness of the Council resolution itself. In any event as this Court held in *Manana v King Sabata Dalindyebo Municipality*:[15]

'No doubt a municipal council is entitled to rescind or alter its resolutions. And no doubt an interested party is entitled to challenge its validity on review. But once a resolution is adopted, in my view, its officials are bound to execute it, whatever view they might have

[14] *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA (SCA); 2008 (3) SA 371 (SCA) para 13.
[15] *Manana v King Sabata Dalindyebo Municipality* [2010] ZASCA 144; [2011] 3 All SA 140 (SCA); [2011] 3 BLLR 215 (SCA) para 22.

on the merit of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review'.

There was also no evidence that as at January 2011, when the resolution was taken, the appellant's position was not on the staff establishment. The organogram attached to the first respondent's answering affidavit was unhelpful as it was not dated and there was no averment as to when it was adopted or approved by the second respondent.

[19] Inexplicably, the respondents sought to dispute that the appellant was ever employed by them. But this contrived denial was at variance with what the respondents themselves averred in their answering affidavit in the contempt application in which they set out details of the salary that was paid to the appellant before the termination of her employment in 2014. In any event, in the absence of any cogent explanation from the respondents one can safely conclude that prior to the appellant's position being advertised in March 2005, her post must have been in the second respondent's staff establishment hence the need for that post to be filled. She was then employed on a year to year basis for an extended period and occupied that position until 2014 when her services were, without rhyme or reason, summarily terminated.

[20] This then brings me to the crux of this appeal. In essence, this appeal pertinently raises the question whether the respondents discharged their evidentiary duty that their non-compliance with the Mjali J' order was neither wilful nor mala fide. In determining this issue, the high court said the following (para 35):

'Even if I am wrong in this conclusion, it is clear from all the facts in this matter that the first respondent has sincerely believed throughout that these contentions are correct.

Indeed, his own legal team (as led by an eminent senior counsel) have clearly held that view which was advanced before me. Furthermore, as mentioned earlier in this judgment, this question has exercised the minds of some of the top judges in this country and one can hardly expect a municipal manager (who may well be facing personal liability pursuant to subsection (4)) to believe otherwise. In the circumstances, it can hardly be said that he acted mala fide in not carrying out the order of Mjali J'.

[21] The deponent to the second respondent's answering affidavit resisting the contempt of court proceedings stated the following in paragraph 37.2:

'I as the second respondent have *deliberately refused* to give effect to the order. In this regard, I refer this court to my allegations under the rubric reasons for non-compliance.'(My emphasis.)

In their reasons for non-compliance, the respondents, in essence, stated that the appellant's employment was hit by the prohibition contained in s 66(3) and (4) of the Municipal Systems Act to which reference has already been made above.

[22] The question here is not whether or not s 66 applies, but whether the first respondent believed that it applied. The high court found that he believed that it prevented him from giving effect to the order. The reason, it seems to me, why his explanation cannot be accepted is that both Mjali J and this Court had already given consideration to the reasoning in the high court judgment and found there to be no prospects on appeal. Accordingly, the respondents' reliance on s 66 is no more than a ruse employed to justify their misguided attempts not to implement resolution 10/11 which, in the absence of evidence to the contrary, must be taken to be still of force and full effect. In these circumstances, the high court should have found that the respondents dismally

failed to discharge the evidentiary onus resting on them that their non-compliance with the Mjali J's order was neither wilful nor mala fide.

[23] As I have said, the respondents have provided no explanation for their failure to apply resolution 10/11 to the appellant. This grave omission leaves a huge void in the respondents' case. And this void ineluctably leads to one conclusion, namely that the respondents failed to discharge the evidentiary burden that they bore.

[24] The final issue to consider is whether this Court should confirm the Mjali J's order in its entirety without falling foul of usurping a power that it does not have. As discussed above, paragraph 1 of that order is in line with Council's resolution 10/11. Paragraphs 4 and 5 are consequential to paragraph 1. Insofar as paragraph 2 is concerned, different considerations apply. In my view, the terms of paragraph 2 are overbroad to the extent that they in effect create a permanent post in the second respondent's staff establishment when the power to do so is an exclusive preserve of a municipal Council. Thus, to that limited extent paragraph 2 of the Mjali J's order falls to be deleted.

[25] Before making the order, it has unfortunately become necessary to comment on the way the respondents conducted this litigation. The second respondent is an organ of State. Accordingly, it was duty bound to conduct itself in an exemplary manner. For as Cameron J pointed out in *Merafong City v Anglogold Ashanti Ltd*:[16]

'This court has affirmed as a fundamental principle that the state "should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help".

[16] *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 CC para 61.

What is more, in *Khumalo* this court held that state functionaries are enjoined to uphold and protect the rule of law by inter alia seeking the redress of their departments' unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty "to insist that the state, in all its dealings, operate within the confines of the law and, in so doing, remain accountable to those on whose behalf it exercises power". Public functionaries "must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it". Not to do so may spawn confusion and conflict, to the detriment of the administration and the public'.

[26] Although these remarks were made in a different context, in my view, by parity of reasoning they apply with equal force in the circumstances of this case. The lackadaisical manner in which the respondents conducted this litigation warrants a punitive costs order against them. They dragged the litigation unnecessarily to the detriment of the appellant. Almost all their responses to the appellant were preceded by an application for condonation for the late filing of their documents. They were not candid with the court and provided information scantily. They did nothing for at least nine months until the appellant launched the contempt application. This must be frowned upon by this Court in line with what was said by Cameron J in *Merafong.*

[27] In the result, the following order is made:

1. The appeal is upheld with costs on an attorney and client scale.
2. The order of the high court is set aside and replaced by the following:

'(a) The respondents' conduct in failing to comply with the order of Mjali J (save for para 2 thereof) issued on 13 December 2016 is declared unlawful.

(b) The respondents are declared to be in contempt of the aforesaid order.

(c) The respondents are ordered to purge the aforesaid contempt within 30 days of the date of this order.

(d) The respondents are ordered to pay the applicant's costs on an attorney and client scale'.

T P POYO-DLWATI
ACTING JUDGE OF APPEAL

Dambuza JA (Eksteen AJA concurring):

[28] I have had the benefit of reading the judgment (main judgment) penned by my colleague Poyo-Dlwati AJA. Regrettably, I am unable to agree with my colleague's reasoning and conclusion. In my view the court a quo was correct in concluding that the order of 13 December 2016 was a nullity and that, on the evidence before it, no finding of wilfulness or mala fides could be made against the respondents.

[29] With regard to the validity of the order, the basis for the conclusion, in the main judgment, that the court order of 13 December 2016 was not a nullity, is that the judge neither ordered the respondents to employ the appellant nor declared her to be employed by the second respondent. The order was merely a declarator that 'the appellant was equally a member of the class of temporary employees targeted by resolution 10/11'. For these reasons, the provisions of s 66(3) and (4) of the Municipal Systems Act were not applicable in this case.

[30] The reasons for my disagreement on this issue are that, by all accounts, when the order of 13 December 2016 was granted, the appellant was not a permanent employee of the second respondent municipality. The crux of her case before Mjali J was that the municipality should have employed her as a permanent employee in 2011 or as per Council Resolution 10/11. In finding in her favour, Mjali J granted an order declaring that: (a) she was a permanent employee of the first respondent, (b) employed in a specific post,[17] (c) the post in which she was employed was a permanent post', and (d) any contrary conduct or action taken by the respondents was a nullity. The respondents were ordered to implement the terms of the order. The court order was therefore not a mere restatement of Council Resolution No. 10/11; it exceeded the terms of the resolution, in as far as they were set out by the applicant, by far. In this regard I find no valid basis to distinguish between paragraphs 1 and 2 of the order. Each of these paragraphs impermissibly created a specified permanent post in the second respondent's staff establishment.

[31] The respondents' explanation that they were prohibited from employing a person unless the position to which he or she was being employed was provided for in the staff establishment, was a relevant response to the allegation of failure to comply with the order, and was consistent with the provisions s66 of the Municipal Systems Act on which they relied. Importantly, their assertion that the position specified in the order was not provided for in the staff establishment of the municipality was not disputed, as the court a quo found.

[17] As 'the Manager at Aids Training Information and Counselling Centre – ATICC . . .'.

[32] The court a quo considered that the respondents' answer, including an organogram of the municipal staff establishment, which was annexed to their answering papers, had never been considered by Mjali J before she granted the order of 13 December 2016, and this court when it considered the respondents' application for leave to appeal. It found that the factual basis on which the contention pertaining to the municipal staff establishment was based, was never disputed by the appellant. In any event the issue fell to be decided on the respondents' version.

[33] The court a quo then went on to consider the provisions of s66 of the Municipal Systems Act which provide that:

'66 Staff Establishment–

(1) A municipal manager, within a policy framework determined by the municipal council and subject to any applicable legislation, must –

(a) develop a staff establishment for the municipality, and submit the establishment to the municipal council for approval;

(b) provide a job description for each post on the staff establishment;

(c) attach to those posts the remuneration and other conditions of service as may be determined in accordance with any applicable labour legislation and

(c) establish a process or mechanism to regularly evaluate the staff establishment and, if necessary, review the staff establishment and the remuneration and conditions of service'.

[34] It interpreted s66 of the Municipal Systems Act to mean that:

'. . . the determination of staff establishment of a municipality is the preserve of the municipal manager, subject to the approval of the Council, as are the job descriptions, remuneration and other conditions of employment. Once such staff establishment has been so developed, subsection (3) appears to be cast in imperative terms in forbidding the employment of any person unless the post to which he or she is appointed is indeed

provided for in the staff establishment so developed. Indeed subsection (4) declares that any contract concluded in the circumstances "*is null and void if the appointment was made in contravention of subsection (3)*". The imperative nature of the prohibition in subsection (3) is reinforced by subsection (5). As may be seen, this subsection creates a personal liability [o]n the part of any person who takes a decision as contemplated in subsection (4) for fruitless and wasteful expenditure'.

[35] I agree with this interpretation of s 66. I also agree that the order of 13 December 2016, considered against the background that the staff establishment was the preserve of the first respondent, is comparable to the order granted by the high court in *Motala* which was declared a nullity by this court.

[36] To put the matter beyond doubt, the court a quo went further to find that even if the order had not been a nullity, and there had been an obligation on the respondents to comply with it, it could not be said that the first respondent acted wilfully or mala fide in failing to do so. This is because, as the court found, he sincerely believed that his understanding of s66 of the Municipal Systems Act was correct. There can be no basis for rejecting the respondent's explanation as unreasonable, let alone, mala fide.

[37] In *Fakie v CCII Systems* (Pty) Ltd 2006 (4) SA 326 (SCA) the test for when non-compliance with a civil court order constitutes contempt of court was stated as follows:

'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may

be bona fide (though unreasonableness could evidence lack of good faith)'. (Footnotes omitted.)

[38] The deliberate refusal by the respondents to give effect to the terms of the order was in the sense referred to by this court in *Fakie.* The non-compliance in this case was not driven by a deliberate and intentional violation of the court's dignity, repute or authority.[18]

[39] I do agree, however, with the criticism of the shoddy manner in which the respondents prosecuted their case in the original application in the high court.[19] This had the effect that issues were not properly ventilated as timeously as they could have been. And the order of 13 December 2016 might have turned out differently had they acted diligently. Nevertheless, that does not detract from the illegal nature of the order as it is presently, and from the validity of the defence raised by the respondents in the contempt application. For these reasons I would have dismissed the appeal with costs.

N DAMBUZA
JUDGE OF APPEAL

[18] *Fakie* para 10.
[19] Paras 3 and 4 of the main judgment.

Appearances:

For appellant:	V Kunju
Instructed by:	Keightley Sigadla Incorporated, Mthatha
	Christo Dippenaar & Crous Attorneys, Bloemfontein
For respondents:	A M Bodlani
Instructed by:	Sakhela Incorporated, Mthatha
	Eugene Attorneys, Bloemfontein