



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Municipal Manager: OR Tambo District Municipality and Another v Nosipho Portia Ndabeni**

**CCT 45/21**

**Date of hearing: 9 November 2021**  
**Date of judgment: 15 February 2022**

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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 Tuesday, 15 February 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment and order made by the Supreme Court of Appeal. The first and second applicants are the Municipal Manager of O.R. Tambo District Municipality and the District Municipality (the Municipality). The respondent is Ms Nosipho Portia Ndabeni.

On 1 July 2005, the Municipality employed Ms Ndabeni on a fixed term contract for a year as the Manager at its Aids Training Information and Counselling Centre (ATICC). Her contract was repeatedly renewed until 2014 when her services were terminated. On 30 January 2011, the Municipality passed Resolution 10/11 to convert all contract employees to permanent employees. The Municipality did not apply Resolution 10/11 to Ms Ndabeni and gave no reasons.

On 19 May 2015, Ms Ndabeni approached the High Court of South Africa, Eastern Cape Local Division, Mthatha (High Court), for an order declaring her employment to be permanent. The High Court granted an order in favour of Ms Ndabeni and declared her a permanent employee of the Municipality in her capacity as the Manager at ATICC by virtue of Resolution 10/11. The order was granted without opposition after the Municipality failed to file an answering affidavit despite receiving several extensions.

In 2018, subsequent to the High Court and Supreme Court of Appeal's refusal to grant the Municipality leave to appeal and having missed the opportunity to seek leave to appeal to

this Court, the Municipality decided that it would be in the interests of justice to comply with the order of the High Court. But it did not comply with the order.

On 1 February 2019, Ms Ndabeni applied to the High Court to hold the Municipality in contempt of its order. Mbenenge JP issued a *rule nisi*, calling on the Municipality to show cause why their failure to comply with the order of the High Court should not be declared unlawful and in contempt of that judgment. The Municipality submitted that it was not possible to implement the order of the High Court as there was no post on the staff establishment. It argued that enforcing the order of the High Court would result in the Municipal Manager being held personally liable for irregular and wasteful expenditure in terms of section 66(5) of the Systems Act. The Municipality, contended that the order of the High Court was thus a nullity and could be disregarded with impunity. The nullity of the order of the High Court stood as the Municipality's defence against contempt of that court order.

Griffiths J found that the High Court was not empowered to grant the order. He upheld the Municipality's nullity defense and reasoned that even if it was empowered to grant order, the Municipal Parties' failure to comply with that order was neither wilful nor in bad faith. On 17 September 2019, the High Court granted leave to appeal to the Supreme Court of Appeal.

The Supreme Court of Appeal was split three-two. The majority held that the first order issued by the High Court was not a nullity and that the Municipality's reliance on section 66 of the Systems Act was a "ruse". The minority agreed with the second order of the High Court, that the first order was indeed a nullity. That decision of the Supreme Court of Appeal was before this Court in the application for leave to appeal.

This Court granted leave to appeal and held that compliance with court orders by public officials is a constitutional matter. The primary issue before this Court was whether the Municipality should be compelled to comply with the first order of the High Court. This issue would depend on whether that order is a nullity and therefore unenforceable.

The judgment, penned by Pillay AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring) reiterated this Court's assertion in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. It held further that court orders are effective only when their enforcement is assured. This reciprocity between the courts and the public is needed to encourage compliance, and progressively, common constitutional purpose.

This Court held further that it is not self-evident from a reading of section 66(3) of the Systems Act that the staff establishment did not provide for the employment of Ms Ndabeni. It is also not self-evident from a reading of Resolution 10/11 that it is inconsistent with section 66(1) of the Systems Act. Section 66(1) obliges a municipal manager to develop a staff establishment for the municipality within a policy framework

determined by the municipal council and subject to any applicable legislation, and submit that to the municipal council for approval. Resolution 10/11 appears in both form and substance to provide the requisite policy framework. Consequently, it was not apparent from the first judgment of the High Court that the declaration of Ms Ndabeni as a permanent employee was “null and void” under section 66(3). Accordingly, the first order of the High Court was not a nullity, but a lawful order issued by a properly constituted Court. Having found that the first order of the High Court was lawful, this Court held that it must be complied with.

In respect of costs, this Court held the Municipality ought to have known that *Tasima* had already affirmed that irrespective of their flaws, under section 165(5) of the Constitution, court orders are binding until set aside. This Court noted that the Municipality dragged Ms Ndabeni through five courts over six years. Accordingly, a punitive costs order was awarded against the Municipality to assuage some of the harm perpetrated against Ms Ndabeni.