



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE
SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 21 January 2021

Status: Immediate

**Nosipho Portia Ndabeni v The Acting Municipal Manager:
(OwenNgubende Hlazo)- O R Tambo District Municipality and Another
(1066/2019) ZASCA 08 (21 January 2021)**

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Supreme Court of Appeal (the SCA) today upheld an appeal against the decision of the Eastern Cape Division of the High Court, Mthatha which held that the respondents were not in wilful contempt of the order previously granted by Mjoli J on 13 December 2016.

The appellant was employed as a contract employee by the O R Tambo District Municipality (the second respondent) in July 2005. In January 2011 the second respondent's municipal council adopted a resolution to convert all its contract employees to permanent employees. The appellant was part of a group of temporary employees. For unknown and unexplained reasons, the

appellant was excluded from the implementation of this resolution. Aggrieved by her exclusion, the appellant then launched an application in the Mthatha Division of the High Court (the high court) against the municipal manager, as first respondent, and the second respondent to enforce the operation of the resolution. The high court granted the order in terms of which the appellant was declared the second respondent's permanent employee together with other ancillary relief. This, after the respondents failed to file their answering affidavits timeously. The respondents' application for leave to appeal was refused by the high court and so was their petition for leave to appeal to the SCA.

When the respondents failed to comply with the court order, the appellant launched contempt of court proceedings against the respondents which were opposed by the latter. In resisting the application, the respondents explained that their non-compliance with the court order was neither wilful nor mala fide because complying with the court order would be in contravention of s 66 of the Municipal Systems Act 32 of 2000. Section 66 prescribes that no one should be employed by the municipality unless their post is in the staff establishment of the municipality. The high court agreed with the respondents and declared the earlier court order a nullity for these reasons. With the leave of the high court, the appellant subsequently appealed against that decision to the SCA.

The majority judgment of the SCA held that the court order of 13 December 2016 did not have the effect of employing the appellant but rather, in accordance with the municipal resolution of 2011, declared her a permanent employee. It held, therefore, that the provisions of s 66 of the Municipal Systems Act were not applicable and the court order in issue was not a nullity. It also held that the respondents' non-compliance was wilful and mala fide as they failed to discharge the evidentiary burden resting on them. And that their silence in not explaining why the appellant was not permanently employed pursuant to the resolution was deafening. A punitive cost order was granted against the respondents to mark the SCA's displeasure for the shoddy manner in which they conducted the litigation.

The minority judgment agreed with the high court that the court order concerned was a nullity as the contention that the appellant's post was not in the municipality's staff establishment was not disputed. It also found that the order as it stood created a post for the appellant, something which was the preserve of the municipal council. Therefore the court was usurping powers it

did not have, hence the order was a nullity. It further held that the respondents were not wilful and mala fide in their non-compliance as they honestly believed that compliance with the court order would be in contravention of s 66 of the Municipal Systems Act. The minority, however, agreed with the punitive costs order against the respondents.

The SCA therefore set aside the order of the high court declaring the order of 13 December 2016 a nullity. Instead, it declared the respondents' conduct in failing to comply with such an order to be unlawful. Hence the appeal was upheld.