



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/21

In the matter between:

**MUNICIPAL MANAGER O.R. TAMBO
DISTRICT MUNICIPALITY**

First Applicant

O.R. TAMBO DISTRICT MUNICIPALITY

Second Applicant

and

NOSIPHO PORTIA NDABENI

Respondent

Neutral citation: *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Pillay AJ (unanimous)

Heard on: 9 November 2021

Decided on: 14 February 2022

Summary: Local Government Municipal Systems Act 32 of 2000 — section 66(1) — section 66(3) and (5) — nullity of a court order — court orders are binding until set aside.

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Eastern Cape Local Division, Mthatha):

1. Leave to appeal is granted.
2. The appeal succeeds to the extent that paragraph 2(b) and (c) of the order of the Supreme Court of Appeal, which held the first and second applicants to be in contempt of the order of the High Court issued on 13 December 2016 (Mjali J order) and required them to purge such contempt, is set aside.
3. For the rest, the appeal is dismissed.
4. The first and second applicants are ordered to comply with the Mjali J order within 30 days of the order of this Court.
5. The second applicant must pay to the respondent, Ms Nosipho Portia Ndabeni, the costs of this application on an attorney and client scale.
6. Ms Nosipho Portia Ndabeni is given leave to apply on the pleadings in this matter, supplemented as required, to a High Court having jurisdiction, to enforce this order.

JUDGMENT

PILLAY AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J concurring):

Introduction

“If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.”¹

[1] Is a party required to comply with a court order that it believes is a nullity? This question is before us in relation to the order of the High Court of the Eastern Cape Local Division, Mthatha, against the Municipal Manager of the O.R. Tambo District Municipality and O.R. Tambo District Municipality (the Municipality). They are the first and second applicants, together referred to as the “Municipal Parties” for convenience. Ms Nosipho Portia Ndabeni, the respondent, secured that order which declared her to be a permanent employee of the Municipality.

[2] Matters came to a head when the Supreme Court of Appeal held the Municipal Parties to be in contempt of the High Court order. Hence the parties find themselves before us.

Background

[3] The Municipality employed Ms Ndabeni on 1 July 2005 on a fixed term contract for a year as a Manager at the Aids Training Information and Counselling Centre (ATICC). Her contract was repeatedly renewed until 2014 when her services were terminated.

[4] On 30 January 2011, the Municipality passed Resolution 10/11 to convert all contract employees to permanent employees. Resolution 10/11 was not applied to Ms Ndabeni. Aggrieved, Ms Ndabeni approached the High Court on 19 May 2015 for an order declaring her employment to be permanent. On 14 July 2015, the Municipal Parties requested and obtained an extension from Ms Ndabeni to deliver their answering affidavit.

¹ *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* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (*State Capture*) at para 87.

[5] A few days before their answering affidavit was due, the Municipal Parties applied in terms of rule 30 of the Uniform Rules of Court, to declare the proceedings irregular. On 5 April 2016, Ms Ndabeni applied to amend her notice of motion. Once Ms Ndabeni opposed the rule 30 application, the Municipal Parties abandoned it. Leave to amend her notice was granted on 25 October 2016 by consent.

[6] Still the Municipal Parties failed to deliver their answering affidavit. Notwithstanding the long delay since July 2015, at the hearing before the High Court on 13 December 2016, the Municipal Parties formally applied for an adjournment for two weeks to file their answering affidavits. The primary reason advanced for the adjournment was that the Municipal Parties could not provide witnesses to their attorneys while the Municipality was under audit between 25 October and 1 December 2016. Ms Ndabeni opposed the application for adjournment. Unsurprisingly, considering that the application had been launched in May 2015, the High Court refused the adjournment. The matter then proceeded unopposed. The High Court granted an order in favour of Ms Ndabeni.

[7] That order, henceforth referred to as the “Mjali J order”, read as follows:

- “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 No. 10/11 of 30 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 No.10/11 of 30 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 an 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."

[8] On 22 March 2018, the High Court refused leave to appeal. Belatedly and unsuccessfully, the Municipal Parties petitioned the Supreme Court of Appeal. After 30 July 2018, when the Supreme Court of Appeal refused the petition, the Municipal Parties remained inert. Allegedly, they received the order of the Supreme Court of Appeal late. After delays in securing counsel, further delays were encountered in getting papers back from counsel to apply for leave to appeal to this Court. By January 2019, having missed the opportunity to seek leave to appeal to this Court, the Municipal Parties decided to abandon their application. They allege that it would have been in the interests of justice to comply with the Mjali J order. But they did not.

[9] On 1 February 2019, Ms Ndabeni applied to the High Court to hold the Municipal Parties in contempt of the Mjali J order and have imprisoned the erstwhile Municipal Manager, Mr Owen Ngubende Hlazo. She alleged that her employment had been unlawfully terminated, and that in terms of the Mjali J order she was entitled to be treated as a permanent employee. Mbenenge JP issued a *rule nisi*, calling on—

- (a) The Municipal Manager to show cause why his conduct in failing to comply with the Mjali J order should not be declared unlawful and in contempt of that judgment;
- (b) The Municipal Parties to show cause why they should not be directed to purge their contempt; and
- (c) The Municipal Manager to show cause why he should not be committed to jail for contempt and directed to pay costs on an attorney and client scale.

[10] On the return day, the Municipal Parties and their attorney alleged that they became aware of the order of the Supreme Court of Appeal only on 19 November 2018 due to their change of email address. Ms Ndabeni successfully refuted this allegation by proving that the order had been served physically by the sheriff on the Municipal Manager on 13 September 2018 and on the Municipality on 11 October 2018.

[11] Almost four years had passed since the litigation started. Only then did it dawn on the erstwhile Municipal Manager that implementing the order when there was no post on the staff establishment would result in him being held personally liable for irregular and wasteful expenditure, in terms of section 66(5) of the Local Government: Municipal Systems Act² (Systems Act). Seemingly, the erstwhile Municipal Manager awakened to his responsibilities only when he was at risk of being held personally liable. To defend themselves, the Municipal Parties contended in their answering papers that the Mjali J order was a nullity that could be disregarded with impunity.

[12] In reply, Ms Ndabeni indicated that she was no longer pursuing an order for committal or other penal sanction. But, she persisted, the paragraphs of the Municipal Parties' answering affidavit setting out their nullity defence, should be struck out on the basis that the issue was *res judicata* (already adjudicated). The High Court rejected Ms Ndabeni's objection by reasoning that the issue of nullity was being raised in a different cause of action.³ Her striking out application failed. Because Ms Ndabeni had omitted to plead over, the alleged nullity of the Mjali J order stood as the Municipal Parties' defence against contempt of that court order.

[13] As stated, the nullity defence rested on the prohibition in section 66 of the Systems Act against employment in posts not on the staff establishment which, if transgressed, would result in personal liability for the Municipal Manager. Griffiths J

² 32 of 2000.

³ *Nosipho Portia Ndabeni v the Municipal Manager*, unreported judgment of the High Court of South Africa, Eastern Cape Division, Mthatha, Case No 344/2019 (6 June 2019) (High Court judgment) at para 16.

upheld the nullity defence. He reasoned that even if he was wrong on that score, the Municipal Parties' failure to comply with the Mjali J order was neither wilful nor *mala fide* (in bad faith).⁴

[14] Although an order holding the Municipal Parties in criminal contempt was no longer in issue once Ms Ndabeni abandoned any criminal sanction against the Municipal Manager, civil penalties remained an option.⁵ After all, any disregard for court orders and the judicial process requires the courts to intervene.⁶ However, once Griffiths J found that the failure to comply with the Mjali J order was neither wilful nor *mala fide*, civil contempt and sanctions also fell away. After finding that the High Court was not empowered to grant the Mjali J order and consequently that that judgment was a nullity, Griffiths J discharged the *rule nisi*. On 17 September 2019, Griffiths J granted leave to appeal to the Supreme Court of Appeal.

[15] The Supreme Court of Appeal split three-two. The majority held as follows:

- “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:

⁴ High Court judgment above n 3 at para 35.

⁵ *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 30:

“The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.”

And at para 37:

“However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.”

⁶ *State Capture* above n 1 at para 27.

- ‘(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.’”

[16] The first point of departure was whether the Mjali J order was a nullity. The second point turned on whether Griffiths J’s reliance on *Motala*⁷ was appropriate. The majority answered both questions in the negative.⁸

[17] The third point was whether the Municipal Parties had acted *mala fide* in failing to comply with the Mjali J order. While the minority agreed with Griffiths J’s interpretation of section 66 of the Systems Act, the majority described the Municipal Parties’ reliance on that section as a “ruse”.⁹ The majority proceeded to hold the Municipal Parties to be in contempt of the Mjali J order and ordered them to purge their contempt.

[18] Fourth, the majority decided to confirm all but paragraph 2 of the Mjali J order. The majority found the terms of paragraph 2 of the order to be overbroad to the extent that they in effect created a permanent post in the Municipality’s staff establishment, when the power to do so was the exclusive preserve of the Municipal Council.¹⁰ The minority agreed with the majority on this aspect but went on to add that there was “no valid basis to distinguish between paragraphs 1 and 2 of [the Mjali J] order”.¹¹ The

⁷ Id at paras 20-8 citing *Master of the High Court (North Gauteng High Court, Pretoria) v Motala N.O.* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*).

⁸ *Ndabeni v Municipal Manager: OR Tambo District Municipality* [2021] ZASCA 8 at paras 14-9.

⁹ Id at paras 22 and 32-6.

¹⁰ Id at para 24.

¹¹ Id at para 30.

minority would have dismissed the appeal with costs. The three-two split decision of the Supreme Court of Appeal is now before us in this application for leave to appeal.

Jurisdiction and leave to appeal

[19] The jurisdiction of this Court is engaged. Compliance with court orders by public officials is a constitutional matter.¹² The split decision in the Supreme Court of Appeal heralds questions about the legality of the impugned Mjali J order. That raises arguable points of law. Disagreement about whether the Municipal Parties were in contempt and whether the Mjali J order was a nullity are reasons enough to grant leave to appeal. Additionally, whether the Mjali J order was open to amendment when there was no appeal against that order is disputed. Leave to appeal must be granted.

Issues

[20] The primary issue is whether the Municipal Parties should be compelled to comply with the Mjali J order. That would depend on whether the Mjali J order is a nullity and therefore unenforceable. Then, would a special order for costs against the Municipality be justified?

[21] The secondary issue is whether the Municipal Parties are in contempt of the Mjali J order and whether they should be required to purge such contempt. This issue can be determined without much ado. Although Ms Ndabeni abandoned any criminal sanction against the Municipal Manager, civil penalties remained an option. But Griffiths J's finding that the Municipal Parties' non-compliance was neither wilful nor *mala fide*, dispensed with this factual requirement to prove contempt. In addition to the Municipal Parties' claim that they were acting on legal advice, Griffiths J and two judges of the Supreme Court of Appeal agreed with them. Hence the Municipal Parties' version was not so far-fetched or untenable that it could be rejected on the papers. As the Supreme Court of Appeal could not refute Griffiths J's factual finding, it could not declare the Municipal Parties to be in contempt.

¹² Section 165 of the Constitution. See also *State Capture* above n 1 at para 87.

[22] Consequently, the appeal against the order of the Supreme Court of Appeal holding the Municipal Parties in contempt of the Mjali J order and directing them to purge such contempt, must succeed and be set aside. Additionally, by the time the matter reached this Court, the erstwhile Municipal Manager and the person primarily responsible for implementing the Mjali J order, Mr Hlazo, had passed away. But it will soon become clear that this victory is pyrrhic.

Complying with court orders

[23] Trite, but necessary it is to emphasise this Court’s repeated exhortation that constitutional rights and court orders must be respected.¹³ An appeal or review — the latter being an option in the case of an order from the Magistrates’ Court – would be the proper process to contest an order. A court would not compel compliance with an order if that would be “*patently at odds with the rule of law*”.¹⁴ Notwithstanding, no one should be left with the impression that court orders – including flawed court orders – are not binding, or that they can be flouted with impunity.

[24] This Court in *State Capture* reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside.¹⁵ Similarly, *Tasima* held that wrongly issued judicial orders are not nullities.¹⁶ They are not void or nothingness, but exist in fact with possible legal consequences.¹⁷ If the Judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.¹⁸

¹³ *State Capture* above n 1 at para 85; *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima*) at paras 147-9; and *Pheko II* above n 5 at paras 1 and 26.

¹⁴ *State Capture* above n 1 at para 85.

¹⁵ *Id* at para 59.

¹⁶ *Tasima* above n 13 at para 182. In *Tasima*, the court order at issue enforced a fixed term agreement, extending it beyond its five years, allegedly in breach of section 217 of the Constitution and procurement law.

¹⁷ *Id*.

¹⁸ *Id* at para 198.

[25] To distinguish the role of the litigants from the courts, the majority in *Tasima* said:

“The act of proving something irresistibly implies the presence of a court. It is the court that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court’s role in making legal determinations.”¹⁹

[26] Court orders are effective only when their enforcement is assured.²⁰ Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow.²¹ Effective enforcement to protect the Constitution earns trust and respect for the courts.²² This reciprocity between the courts and the public is needed to encourage compliance, and progressively, common constitutional purpose.

[27] Griffiths J relied on *Motala* in which the Supreme Court of Appeal held that an order of the High Court was a nullity, because the High Court had no jurisdiction to exercise the power to appoint persons as judicial managers; that power was specifically assigned to the Master of the High Court by legislation. The majority in *Tasima* regarded that finding in *Motala* to be “a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored”.²³ Whether any tension between *Motala* and *Tasima* should be resolved in this judgment will depend on the answer to the question that follows.

Is the Mjali J order a nullity?

[28] Scrutiny of Mjali J’s judgment reveals that the reasons cohere with the legal material before the Judge. Included in that material was Resolution 10/11, in terms of

¹⁹ Id at para 191.

²⁰ *State Capture* above n 1 at para 26 citing *Pheko II* above n 5.

²¹ Id at para 87.

²² Id at paras 26-7. See also *Victoria Park Ratepayers’ Association v Greyvenouw* 2004 (3) All SA 623 (SE).

²³ *Tasima* above n 13 at para 197.

which the Municipality resolved to convert all contract employees to permanent employees. The validity of Resolution 10/11 had not been impugned. In accordance with that resolution, all contract employees, except for Ms Ndabeni, were converted to permanent employees. Ms Ndabeni's attorneys enquired about her status, but no information was forthcoming from the Municipal Parties.

[29] It is 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 the staff establishment to the municipal council for approval”. Absent any evidence in the proceedings before Mjali J, Resolution 10/11 appears in both form and substance to provide the requisite policy framework.

[30] Furthermore, section 66(3) of the Systems Act provides: “[n]o 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.” Section 66(3) permits the applicant to be appointed, subject to the fulfilment of a condition. It is not self-evident from the legal material before Mjali J that the staff establishment did not provide for the employment of Ms Ndabeni. Proving this precondition fell upon the Municipal Parties. This they failed to do.

[31] Furthermore, the Municipal Parties failed to explain why they did not apply Resolution 10/11 to Ms Ndabeni. If the plan was to transfer her to the Provincial Department of Health, that did not happen. She was left unemployed.²⁴ Disclosure of the plan to transfer Ms Ndabeni to the Provincial Department was made for the first time in the Municipal Parties' affidavit claiming nullity of the Mjali J order.²⁵ Hence this plan was also not before Mjali J.

²⁴ Supreme Court of Appeal judgment above n 8 at para 19.

²⁵ High Court judgment above n 3 at para 16.

[32] The Municipal Parties delivered no answering affidavit, despite Ms Ndabeni granting them extensions of time to comply with the rules. Hence the application before Mjali J proceeded unopposed. Accordingly, in the absence of any jurisdictional or other impediment, Mjali J granted the order in the amended notice of motion. The effect of the order was to declare Ms Ndabeni to be employed permanently as an ATICC Manager by virtue of Resolution 10/11. The Municipal Parties' subsequent explanation about the absence of a post for Ms Ndabeni and funding for the post are irrelevant for determining the lawfulness of the Mjali J order. Consequently, it is not apparent from the judgment of Mjali J that the declaration of Ms Ndabeni as a permanent employee is null and void under section 66(3).

[33] Coupled with the evidence about Ms Ndabeni's employment with the Municipality, Mjali J had jurisdiction to decide that the effect of Resolution 10/11 was to convert Ms Ndabeni's status to that of permanent employment. Once Mjali J had jurisdiction, her order could not be impugned as a nullity. Whether that decision was right or wrong on the merits did not affect the binding force of the order, unless it was set aside on appeal. However, the Supreme Court of Appeal vindicated the Mjali J order by refusing the petition against her judgment. Six months after the Supreme Court of Appeal's refusal, the Municipal Parties abandoned any application for leave to appeal to this Court to set aside that order. Accordingly, the Mjali J order remained extant.

[34] Manifestly, the Mjali J order is not a nullity; it is indeed a lawful order, issued by a properly constituted Court having jurisdiction. On the facts, this case falls squarely within the ambit of the ruling in *Tasima*. *Motala* is distinguishable. Unlike *Motala*, the Mjali J order does not exceed the powers of the Court. Hence the Mjali J order is competent.

Remedy

[35] All that Ms Ndabeni seeks is compliance by the Municipal Parties with the Mjali J order. That order was not on appeal before the Supreme Court of Appeal when

it considered the appeal in the present proceedings. Consequently, it was not open to the majority to exclude paragraph 2 of the High Court order. Having found that the majority also erred in declaring the Municipal Parties to be in contempt of the Mjali J order, it will be necessary to uphold the appeal against the Supreme Court of Appeal in these respects. As indicated above, this is not a victory for the Municipal Parties to celebrate.

[36] In other respects, the attack on the Mjali J order is unsustainable primarily because the Municipal Parties allowed the matter to proceed unopposed. They ought to have properly raised and ventilated their defence in an answering affidavit in the proceedings before Mjali J. If complying with section 66 of the Systems Act was the obstacle, the Municipal Parties offer no explanation why that reason could not have been advanced timeously and not as an apparent afterthought. Crucially, that obstacle turned on facts.²⁶ Those facts should have been placed before Mjali J. And they were not. Instead, the Municipal Parties delayed for more than a year and a half and eventually failed to put up any defence at all. In these circumstances, this Court cannot accept without more that the preconditions for complying with section 66 do not exist or cannot be facilitated.

[37] Having found that the Mjali J order is lawful, it must be complied with. If there are collateral consequences, they arise not from the implementation of this order, but rather from the Municipal Parties' failure to defend themselves against the granting of the Mjali J order. To give effect to the Mjali J order, the remaining grounds of appeal against the order of the Supreme Court of Appeal must be dismissed.

Costs

[38] Although the Municipal Parties escape being held in contempt, their dilatoriness, inertia and unaccountability must be viewed through the lens of the Municipality's

²⁶ As I said earlier, the nullity defence rested on the prohibition in section 66 of the Systems Act against employment in posts not on the staff establishment which, if transgressed, would result in personal liability for the Municipal Manager. Whether a post exists on the staff establishment is a factual question.

heightened duty to comply with court orders. Organs of state, of which the Municipality is one, are expressly enjoined to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”.²⁷ They have obligations under the Constitution to respect the rule of law and the courts as guardians of the Constitution.

[39] *Tasima*, which was handed down on 9 November 2016, was already published by 2018 when the Municipal Parties elected to abandon their application for leave to appeal to this Court. The Municipal Parties 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.²⁸ Pertinently, *Tasima* held that this Court would exercise its discretion to overlook an unreasonable delay, and nevertheless consider a reactive challenge to the validity of an administrative decision or court order.²⁹ And indeed, if the Municipal Parties sincerely believed that Ms Ndabeni was seeking to coerce it to perform a constitutionally invalid act, then *Tasima* could have given it the succour it sought. The majority in *Tasima* was willing to allow state organs to challenge the lawfulness of exercises of public power in appropriate circumstances.

[40] The Municipal Parties elected to abandon their application for leave to appeal to this Court because it was out of time. One of the reasons they advanced for being out of time was that they had received late notice of the outcome of their petition to the Supreme Court of Appeal. Griffiths J found this to be untrue.³⁰

²⁷ Section 165(4) of the Constitution.

²⁸ *Tasima* above n 13 at paras 179-182.

²⁹ *Id* at para 140:

“Drawing on this line of reasoning, the majority judgment in *Merafong* held that the Municipality was not disqualified from raising an active challenge merely because it is an organ of state. The same must apply here. It is both a logical and pragmatic consequence of the aforementioned developments in our jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances. I therefore agree with the first judgment’s sentiment that the Supreme Court of Appeal was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it is a state functionary.”

³⁰ High Court judgment above n 3 at para 5.

[41] If the Municipal Parties genuinely believed that the Mjali J order was a nullity, then they had a public duty to pursue the appeal to correct the illegality. By abandoning their appeal, they also forsook their obligation iterated in *Kirland*³¹ to “do right, and . . . do it properly”.³² Self-interest, rather than any altruism, accompanied their decision to abide by the Mjali J order after the refusal of the petition.

[42] In *Kirland* this Court emphasised that—

“there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline.”³³

Neither a procedural nor a substantive lifeline would be justified in this instance.

[43] The Municipal Parties dragged Ms Ndabeni, an unemployed woman, through five courts over six years. While their litigation was at the expense of the public purse, Ms Ndabeni had to foot her own bills. The Municipality as “the Constitution’s primary agent”³⁴ and employer of Ms Ndabeni had to do better. A punitive costs order will assuage some of the harm perpetrated against Ms Ndabeni. Including an order to give Ms Ndabeni leave to approach the High Court will facilitate her access to justice if the Municipal Parties fail to comply with this order.

Order

[44] The following order is issued:

1. Leave to appeal is granted.

³¹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

³² *Id* at para 82.

³³ *Id*.

³⁴ *Id*.

2. The appeal succeeds to the extent that paragraph 2(b) and (c) of the order of the Supreme Court of Appeal, which held the first and second applicants to be in contempt of the order of the High Court issued on 13 December 2016 (Mjali J order) and required them to purge such contempt, is set aside.
3. For the rest, the appeal is dismissed.
4. The first and second applicants are ordered to comply with the Mjali J order within 30 days of the order of this Court.
5. The second applicant must pay to the respondent, Ms Nosipho Portia Ndabeni, the costs of this application on an attorney and client scale.
6. Ms Nosipho Portia Ndabeni is given leave to apply on the pleadings in this matter, supplemented as required, to a High Court having jurisdiction, to enforce this order.

For the Applicants:

A Dodson SC and A Bodlani instructed
by Sakhela Incorporated Attorneys

For the Respondent:

V Maleka SC and V Kunju instructed by
Keightley Sigadla Incorporated