

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION : MTHATHA**

CASE NO. 344/2019

REPORTABLE

In the matter between:

NOSIPHO PORTIA NDABENI Applicant

and

**THE MUNICIPAL MANAGER 1st Respondent
(OWENI NGUBENDE HLAZO)**

OR TAMBO DISTRICT MUNICIPALITY 2nd Respondent

JUDGMENT

GRIFFITHS J:

[1] The central issue in this opposed application is as to whether or not the first respondent may avoid being found in contempt of court for his failure to comply with a court order. Conceding the existence of the court order and his failure to comply therewith, the respondents maintain that the terms of the relevant court order do not lend themselves to lawful compliance and, on this basis, that the first respondent's failure to comply therewith is not unlawful and/or *mala fide*.

[2] On 13 December 2016 the applicant came before Mjali J by way of application seeking an order, in essence, that she be declared a permanent employee of the second respondent. The respondents were represented at that hearing by their attorney who made an oral application from the bar for a postponement of the matter in order to file an answering affidavit. Although this was apparently the first time that the matter had been set down for a hearing on the merits, Mjali J was not prepared to accede to such application largely because it had not been formally made¹. I was informed from the bar that the respondent's attorney (who had only been instructed to apply for the postponement) was forced thereafter to withdraw and the matter proceeded, in effect, by default thus the court was not given the benefit of an answering affidavit from the respondents setting out their contentions, and in particular their contention that she was not empowered by statute to grant such an order. Accordingly, Mjali J issued the following order:

“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 30th January 2011**

¹ A transcript of the proceedings on 13 December 2016 were placed before me. However the transcript ends after argument and at a stage when the matter was stood down. What subsequently happened was not transcribed but it was common cause between the parties that the oral application for a postponement was refused and that the order, as prayed, was granted. This is furthermore confirmed in the reasons for judgment subsequently delivered by Mjali J.

and any contrary conduct or action taken by the respondents is hereby declared a *nullity*;

2. The post referred to it as (sic) **AIDS Training Information and Counseling Centre Manager (ATICC)** previously occupied by the applicant is hereby declared a permanent post in line with **Resolution No. 10/11 of 30th January 2011**;
3. The respondents are directed to pay 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;
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] Dissatisfied with this result, the respondents duly applied for leave to appeal based largely on the contention that the order of 13 December 2016 was incapable of being carried into effect as payment of salary benefits in an unspecified amount, on an unknown salary scale, from an indefinite date and for an indefinite period relating to a post not provided for, could not meet the requirements of certainty in order to found an application for contempt of court. Mjali J, having heard full argument in this regard from all parties, dismissed the application for leave to appeal in a full judgment delivered on 22 March 2018. In dealing with the aforementioned ground she stated:

"There is no uncertainty in the order as the applicant had advertised in Annexure "ND 1" that post as stipulated in the amended notice of motion and the Court order. Further that in response to the aforesaid advertisement the respondent

applied and was the incumbent of that post for a considerable period of time. The applicant has a record of such a period and also the record of salaries and benefits pertaining to that post. The mere fact that the designation changed to Senior Coordinator Manager in the approved organogram does not render the order granted incapable of being put into effect as on the papers the respondent makes it clear which position she sought to be absorbed in. The Council took a resolution to convert contract post to permanent employees. That resolution of the municipal council was communicated to the respondent in a letter addressed to her and other employees whose positions were subsequently converted but for the respondent. Once the resolution is adopted, its officials are bound to execute it, whatever view they might have on the merits of the resolution, in law or otherwise, until such time as it is either rescinded or set aside on review.”

[4] Once again, unhappy with this result the respondents duly petitioned the Supreme Court of Appeal for leave to appeal the order of 13 December 2016. This petition was dismissed which decision was communicated by that court in a letter dated 30 July 2018 to which the relevant SCA order was attached.

[5] Although there is some dispute as to the precise date or time when this was communicated to the respondents, it is clear that they, as the applicants in the petition, ought to have been apprised of the result within days of 30 July 2018. However, notwithstanding this the applicant's attorneys took the precautionary measure of having the SCA order served by the deputy sheriff on the second respondent on 13 September 2018 and on the first respondent, on 11 October 2018. It was also emailed to the respondents' attorneys. Despite protestations from the respondents in this regard, there can be little doubt but that they received timeous notice of the outcome of their own petition to the SCA.

[6] The next relevant step in this saga was the communication by way of a letter dated 22 November 2018 from the respondent's attorneys of their intention, albeit out of time, to lodge an appeal against the SCA order with the Constitutional Court. The respondents have however not done so. They have given as their reason the fact that their original counsel were not available, that they instructed new counsel,

that such new counsel delayed unduly over the Christmas period and that all these delays, cumulatively, resulted in their being unable to pursue the matter due to the extensive delay. This delay, and non-compliance with the order, resulted in the launch of the present application.

[7] In their answering affidavit the respondents, as I have indicated, accept the existence of the court order and accept that they have failed to comply therewith. Their resistance to the relief sought is based on two legs: firstly, they maintain that the municipal manager, as first respondent herein, has been cited in his official capacity and that, in order for contempt proceedings to ensue against him, he ought to have been joined in his personal capacity. Secondly, they maintain that compliance with the court order would be unlawful owing to the fact that section 66 of the Municipal Systems Act² (“MSA”) effectively prohibits employment in such a municipality *“unless the post to which he or she is appointed, is provided for in the staff establishment of that municipality.”*³ It is their contention that no such post indeed exists within the second respondent municipality and that, accordingly, it is prohibited from employing the applicant.

[8] Pursuant to the foregoing and on 19 February 2019 this court granted a Rule Nisi in the following terms:

“3. The first respondent is called upon to show cause, if any, on 5 March 2019 at 09H30 or so soon thereafter why his conduct in failing to comply with the order issued by this court on 13 December 2018 by Mjali J under case number 1429/2015 should not be declared unlawful and in contempt of the following paragraphs of the order:

3.1 The applicant is hereby declared a permanent employee of the 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 No. 32 of 2000

³ Section 66(3)

3.2 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 30 January 2011.

3.3 The respondents are directed to pay costs of this application, jointly and severally, the one paying the other to be absolved from liability, on an attorney and client scale.

3.4 The respondents are ordered to pay the applicant's salary and other benefits, retrospectively from the date upon which such payments ceased.

3.5 An order compelling the municipality to pay the applicant's salary and other benefits in accordance with benefits and service conditions applicable to an employee of her status.

4. The respondents are called upon to show cause, if any, why they should not be directed to purge the contempt set out in paragraphs 3 and 3.1 to 3.5 within ten (10) days from date of granting this order.

5.....

6. The first respondent is called upon to show cause, if any, (why) he should not be directed to pay the costs of this application on an attorney and own client scale."

[9] The first contention was laid to rest by Mr Kunju (who appeared on behalf of the applicant) in his opening address when he indicated that the applicant would not proceed with any form of criminal sanction against the first respondent and would only seek confirmation of paragraphs 3, 4 and 6 of the above-quoted order. Accordingly, and as accepted by Mr Dodson (who appeared in behalf of the respondents), it was unnecessary to join the municipal manager in his personal capacity.

[10] The second leg of the defence is dependent entirely on the legality of such reinstatement and the payment of emoluments related thereto, the contention being that as there is no such position provided for in the second respondent's staff

establishment (section 66 of the MSA prohibiting such employment) the order was not lawfully granted. It was accordingly submitted by the respondents that, whilst it exists, Mjali J's order is a nullity in law. The applicant's response to this contention is twofold. Firstly, the applicant contends that paragraphs 33 to 35 of the answering affidavit, which succinctly raise the question of the lawfulness of the order, fall to be struck out as *res judicata* because they were dealt with by Mjali J in her judgment on the application for leave to appeal and by the SCA in refusing the petition. Secondly, she denies that the order is a nullity.

[11] The requirements for contempt of court in the circumstances are clear. They have been succinctly set out in the case of ***Fakie NO v CCII Systems (PTY) LTD***⁴ as follows:

"To sum up:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- (d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
- (e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

⁴ 2006 (4) SA 326 (SCA) at paragraph 42

[12] It is common cause between the parties that, in order to succeed, the applicant must establish on a balance of probabilities:

1. The existence of the order;
2. The service or notice of the order on the part of the person sought to be held in contempt;
3. Non-compliance with the order;
4. *Mala fides* and wilfulness.

[13] The first three requirements, namely the order, service or notice and non-compliance are all common cause, save that, as I have already said, the respondents go further and submit that the order is a nullity. Because of this, the respondents submit that such noncompliance cannot be either *mala fide* or wilful as the order is incapable of compliance. Alternatively, they have submitted that because the first respondent believed on reasonable legal grounds that the order was indeed a nullity, his actions in refusing to comply with the order were not *mala fide*.

The strikeout application

[14] As dealt with above, it is the applicant's contention that paragraphs 33 to 35 of the answering affidavit raising, as they do, the question as to whether the order was a nullity, should be struck out as being *res judicata*. For the sake of completeness, I set out hereunder the content of these paragraphs:

"33. The second respondent is, in law, forbidden from employing a person unless the position in which the person is being employed and/or appointed, is provided for in the second respondent's staff establishment. In consequence, compliance

with the order would have meant that the second respondent had to:

33.1 Accept the applicant as it (sic) permanent employee in her capacity as Manager at AIDS Training Information and Counselling Centre Manager Section – ATICC;

33.2 Pay the applicant's salary and other benefits in view of her being the second respondent's permanent employee in her capacity as Manager at AIDS Training Information and Counselling Centre – ATICC; and

33.3 Extend to the applicant, in future, a salary with benefits and the service conditions applicable to an employee of her status.

34. At the same time the second respondent would have had to conclude a contract of employment with the applicant, stating the details of her basic conditions of employment and benefits. Such a contract of employment would have had to be concluded in circumstances where it is known to me and the second respondent that same is null and void and cannot be given effect to, absent provision of the applicant's position to the second respondent's staff establishment, even if concluded.

35. My and the second respondent's compliance with the order in circumstances such as narrated above and our knowledge of the legality of the applicant's employment to the position would have opened up myself to be held personally liable for the irregular or fruitless and wasteful expenditure that the second respondent would have incurred paying applicant's salaries and benefits in view of her objectionable employment with the second respondent. Needless to state that I do not know what benefits and salaries the applicant would have been entitled to because only in the event the position in issue was catered for in the second respondent's staff establishment would it be known (i) what her job description is, (ii) what her remuneration is, (iii) what the conditions of service are."

[15] The requirements for a finding of *res judicata* were succinctly set out by Friedman JP in the matter of ***Bafokeng Tribe v Impala Platinum Ltd and Others***⁵ as follows:

“From the foregoing analysis I find that the essentials of the *exceptio res judicata* are threefold, namely that the previous judgment was given in an action or application by a competent court (1) between the same parties, (2) based on the same cause of action (*ex eadem petendi causa*), (3) with respect to the same subject matter or thing (*de eadem res*).”

[16] The requirements set forth in (2) and (3) of the *Bafokeng* matter are clearly lacking in the present matter. Firstly, the cause of action which served before Mjali J is different to that with which I am seized. In that matter, there was an application for substantive relief which was granted by way of the order dated 13 December 2016. In the present matter, the cause of action is contempt of court based on the various requirements which need to be established in this regard, as listed above. Secondly, Mjali J did not give a full judgment at the time of making the order, she simply granted it. The matters raised in paragraphs 33 to 35 of the answering affidavit were not matters that served before her when she made the order. Thus she clearly did not consider them, and the evidential component (the organogram and other evidence which was in the supporting affidavit in the application to the SCA) was not placed in evidence before her.⁶ She apparently only “dealt” with the question of the legality of the order in dealing with the application for leave to appeal, as she had disallowed the respondents time to file an answering affidavit in which they would surely have raised this point. It is only in the application for leave to appeal that, for the first time, these points were raised before her. An application for leave to appeal can never be decisive of such factual and legal matters. Her decision at that stage was simply based on a consideration as to whether or not another court would come

⁵ 1999 (3) SA 517 (B) at p 566 B - C

⁶ This is confirmed in her undated reasons for the order given sometime subsequent to 13 December 2016 and in which she made it clear that the only version which she considered was that which was placed before her in the founding affidavit by the applicant, which made no mention of the prohibition in section 66 of the MSA. These reasons were not placed before me in the contempt application itself, but were contained in the respondents’ bundle headed “Index to case law”.

to a different conclusion to that which she came. Accordingly, whatever she may have said during the course of that judgment was not dispositive of this issue.

[17] Similar considerations apply to the application to the SCA for leave to appeal. The evidential component as referred to above could only have properly served before the SCA had a successful application been made to that court for the leading of further evidence at the hearing of the appeal. Furthermore, the matter was not argued before the SCA and it is more probable than not that the reason as to why the SCA dismissed the application for leave to appeal was precisely because there was no indication therein that an application to adduce such evidence on appeal would be made, and the court was accordingly entitled to disregard it. In any event, the appeal court provided no reasons for its refusal.

[18] Finally in this regard, it seems fairly clear that the two applications do not relate to the same subject matter. The order of Mjali J given on 13 December 2016 related to the time period preceding the granting of that order and was based on facts which arose during that period. The current proceedings relate to conduct subsequent to the granting of that order. In all the circumstances, the application for striking out falls to be refused.

Is the order of 13 December 2016 a nullity?

[19] The respondents contend that the order is a nullity by virtue of the prohibition contained in subsections (3) and (4) of section 66 of the MSA. The applicant's riposte to this is that the respondents have not established that such a post does not exist, and that the order of Mjali J fell to be complied with until such time as it is set aside together with the resolution of the second respondent which preceded it to the effect that contract employees were to have their contracts converted to permanent posts.

[20] There is considerable authority in support of the proposition that it is important, from a rule of law perspective, that the order upon which a finding of contempt of court is sought, is valid in law. In ***The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others***⁷ the court dealt with the question of contempt of court based on an order (granted on an unopposed basis on 5 August 2010 by Kruger AJ) which placed a company under provisional judicial management and appointed two named persons, Mr Van Vuuren and Mr. Mhlongo, as joint judicial managers. Subsequently, and on 19 August 2010, the Master appointed two separate people, a certain Mr Motala and a Ms Yuen, together with Mr Mhlongo as provisional judicial managers. On 20 August 2010 a further order was granted by Mavundla J upon an application brought by Mr Van Vuuren and others in terms of which a *rule nisi* was issued returnable on 26 October 2010 interdicting the Master from appointing any judicial manager other than those identified in the earlier order of Kruger AJ. A subsequent interdict was granted by Raulinga J restraining Van Vuuren from carrying out the functions of provisional judicial manager.

[21] As a consequence of all this, Van Vuuren thereafter applied for a discharge of the interdict granted by Raulinga J. This application served before Legodi J on 13 September 2010. Legodi J, apparently *mero motu*, directed the Master to file an affidavit by not later than 15 September 2010 in which he was to explain why he should not be found in contempt of the court order dated 5 August 2010 for his refusal to issue Mr Van Vuuren with letters of appointment as judicial manager. The Master duly complied and filed an affidavit in which he sought to explain his actions.

[22] The gravamen of his explanation was an assertion that in terms of section 429 of the Companies Act⁸ the courts only had the power and function to place a company under provisional judicial management and did not have the statutory power to appoint a judicial manager, which function is reserved exclusively for the Master. He also pointed out that he had made the appointment of Mr Motala and

⁷ 2012 (3) SA 325 (SCA)

⁸ No 61 of 1973

others before he received notice of the original application for provisional judicial management.

[23] Legodi J was however not satisfied with these explanations and found the Master and her deputy to be in contempt of the order given on 5 August 2010. The Master appealed this finding to the SCA which considered the provisions of section 429 of the Companies Act and concluded that indeed the Master was correct in his submission that a court had no power to appoint a provisional judicial manager, holding that it was “*plainly impermissible for Kruger AJ to appoint the provisional judicial managers....*”⁹

[24] Ponnann JA went on to say:

“Like Kruger AJ before him, Mavundla J, also misconceived the legal position. Mavundla J went further than Kruger AJ, though, in purporting to compel the Master to act in a particular way. That with respect to the learned judge, he could not do, for as Innes CJ explained in an analogous context in *Hoisain v Town Clerk, Wynberg* 1916 AD 236 at 240:

‘It is sought to compel the Town Clerk to place the applicant’s name upon the statutory list; he can only do that upon the grant of a certificate by the Council, which that body has definitely refused to give. Such a certificate is not in truth in existence. So that the Court is asked to compel the Town Clerk to do something which this statute does not allow him to do; in other words we are asked to force him to commit an illegality.’”¹⁰

[25] After indicating that in any event Mr. Van Vuuren did not qualify as a person who could be appointed as a provisional judicial manager, the court went on to say:

⁹ *Motala* (note 7 above) at paragraph 8.

¹⁰ *Ibid* at paragraph 11.

“[11] What appeared to weigh with Legodi J was the following general proposition: all orders of court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside... No doubt there are important policy considerations why that must be so. But, that raises a logically anterior question, which Legodi J described as ‘the most vexing aspect of this judgment’– namely the status of the order of Kruger AJ. The Master contended that it was a nullity and could, without more, be disregarded. Legodi J took a contrary view.”

[26] The SCA thereafter conducted an analysis of a number of judgments which dealt with the question as to whether or not an order which is a nullity can, without more, be disregarded¹¹ and concluded as follows:

“[14] In 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:

‘It 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.’”¹²

[27] The court accordingly found that the conclusion of the court *a quo* that the Master had acted in contempt of the order of Kruger AJ could not be supported and the appeal succeeded.¹³

¹¹ Ibid at paragraph 11.

¹² Ibid at paragraph 14.

¹³ Ibid at paragraph 15.

[28] *Motala* has been referred to in subsequent judgments of the Constitutional Court with both approbation¹⁴ and some reprobation. However, the reprobation appears to have been *obiter*, as indeed confirmed by the Constitutional Court itself. In the matter of the ***Department of Transport and Others v Tasima (Pty) Ltd***¹⁵ Jafta J, in a minority judgment (concurrent in by Mogoeng CJ, Bosielo J and Zondo J) applied *Motala* pointing out that “[i]n law conduct or a decision taken in contravention of a statutory provision is invalid.”¹⁶

[29] However, in the majority judgment the court criticized the judgment of the SCA in *Motala* primarily on the basis that, in light of section 165 (5) of the Constitution “judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.”¹⁷ After having made this observation, the court thereafter questioned whether or not the authorities which had been relied upon in *Motala* regarding the nullity of court orders provided the necessary support for its proposition.¹⁸

[30] Despite this, it does appear that the criticism levelled by the Constitutional Court against the decision in *Motala* was indeed *obiter*. In paragraph 197 of the majority judgment in *Tasima* it seems that the Constitutional Court, rather than overturning the principle in *Motala*, confirmed it as follows:

“In any event *Motala* dealt with a different issue. There, Kruger AJ, sitting in the High Court, was found to have lacked jurisdiction to appoint judicial managers. The order was treated as a nullity because it purported to exercise power that was specifically assigned to the Master by legislation. In the present matter, Mabuse J clearly had jurisdiction to hear the case. As explained in *Tsoga*, *Motala* is only authority for the proposition that if a court is able to conclude that what the court [that made

¹⁴ *Provincial Government; North West Province and Another v Tsoga Developers CC and Others* 2016 (5) BCLR 687 (CC) at paragraph 50; *Nkata v First Rand Bank Ltd* 2016 (4) SA 257 (CC) at paragraphs 161, 166 and 181.

¹⁵ 2017 (2) SA 622 (CC)

¹⁶ *Ibid* at paragraph 98.

¹⁷ *Ibid* at paragraph 182.

¹⁸ *Ibid* at paragraphs 188 – 196.

the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded. This is 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.”

[31] The fact that the principal enumerated in *Motala* has, in effect, received Constitutional Court approval is confirmed by the fact that *Motala* has recently been applied by the SCA in ***Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd and Others, and Another Appeal***¹⁹ as follows:

“Rule 64 (1) did not empower Sardiwalla AJ to make the alterations in question. Because he was *functus officio*, he lacked jurisdiction. The amended order of 2 April 2014, insofar as it changed the wording of para 4, was thus a nullity. It thus fell within that relatively narrow class of cases where a purported order can be disregarded without taking steps to have it formally set aside. It would have been preferable for *Normandien* to have this clarified by way of a timeous application, as was indeed contemplated at one stage during the pre-trial conferences, but this cannot affect the legal conclusion that the amended order was a nullity.”

[32] Section 66 of the MSA insofar as it is relevant provides as follows:

“66 Staff establishments

(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;

¹⁹ 2019 (1) SA 154 (SCA) at paragraph 53.

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

(2)

(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).

(5) Any person who takes a decision contemplated in subsection (4), knowing that the decision is in contravention of subsection (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.”

[33] It appears from this that the 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. 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 in the part of any person who takes a decision as contemplated in subsection (4) for fruitless and wasteful expenditure.

[34] 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 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.

[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.

[36] One further observation needs to be made. It is by no means the situation that court orders may be disregarded with impunity in the possible belief that they might amount to a nullity. As stressed in the *Normandien Farms* matter such orders fall “... *within that relatively narrow class of cases where a purported order can be disregarded...*” Where it has been found that orders are a nullity, such orders have generally been taken by default or at least in circumstances where countervailing evidence or submissions have not been placed before the court.²⁰ Although the impugned order in this matter did not result from a default judgment *simpliciter*, it fell within the class of matters referred to in this jurisdiction as “*Uncontested opposed matters*”. Because Mjali J refused to allow the respondents time for the filing of an answering affidavit, and because the attorney who appeared before her had only been instructed with regard to the adjournment he sought, she had neither the benefit of the factual component which I have before me nor the legal argument that goes therewith to assist her in coming to a conclusion. It behoves me to mention,

²⁰ See for example *Motala* (note 7 above) especially at paragraph 7

once again, that legal practitioners appearing in unopposed applications are obliged to place before the court all relevant matter including any facts or law which might be seen to preclude the court from granting the order or orders sought. Over the years I have, unfortunately, noticed a progressive failing in this regard.

[37] As regards the question of costs, the respondents have, properly in my view, conceded that this is a matter where they will not be seeking an order of costs against the applicant.

In all the circumstances, the Rule Nisi granted on 19 February 2019 is discharged.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT : Mr Kunju
INSTRUCTED BY : Keightley Sigadla Inc.

COUNSEL FOR RESPONDENT : Mr Dodson SC
INSTRUCTED BY : Sakhela Inc.

HEARD ON : 18 APRIL 2019

DELIVERED ON : 06 JUNE 2019