



IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION, MTHATHA]

CASE NO:-2026-015008

In the matter between:

LUNGILE NDABENI

Applicant

And

**KUMKANI MHLONTLO LOCAL
MUNICIPALITY**

First Respondent

**THE MAYOR: KUMKANI MHLONTLO
LOCAL MUNICIPALITY**

Second Respondent

**THE SPEAKER: KUMKANI MHLONTLO LOCAL
MUNICIPALITY**

Third Respondent

**THE ACTING MUNICIIPAL MANAGER:
KUMKANI MHLONTLO LOCAL
MUNICIPALITY**

Fourth Respondent

JUDGMENT

KUNJU AJ

A. Introduction

[1] This application was launched on urgent grounds. It was enrolled for hearing and at the hearing on 11 February 2026 it was struck off the roll due to lack of urgency.

[2] It is now before me in the ordinary motion Court roll and the relevant relief which is sought by the Applicant is the following:

[2.1] It is declared that the extension of the precautionary suspension of the Applicant on 1 December 2025 (communicated to the Applicant on 5 December 2025) by the first Respondent is unlawful, invalid and unconstitutional.

[2.2] It is declared that the Applicant is entitled to return to work and resume his duties with the First Respondent.

[2.3] The purported extension of the precautionary suspension of the Applicant by the First Respondent is reviewed and set aside.

[2.4] The Respondents are ordered to pay costs of this application on an attorney and client scale, such costs to include the costs of two Counsel.

B. The parties

[4] The Applicant is the suspended Municipal Manager employed by the Kumkani Mhlontlo Local Municipality since 01 March 2023¹ (“the Applicant”).

[5] As the appellation above hints, the first Respondent is the Municipality, and the employer of the Applicant. The second and third Respondents are senior political officials at the Municipality. The fourth Respondent is the Acting Municipal Manager. I will refer to all the Respondents as Municipal Respondents (“the Municipal Respondents”).

C. The preliminary issues

[6] At the hearing before me the Municipal Respondents raised two preliminary issues which I had to rule on before the merits of the application were dealt with. Those issues are: (i) the irregular set – down of the matter to be opposed court; and (ii) an oral application for a postponement. I deal with these issues before any else.

(i) Irregular set – down

[7] Mr Maliwa who appeared for the Applicant argued that the application was improperly enrolled because the Registrar of this Court did not establish if the date of

¹ This appears in paragraph 2.1 of the contract of employment marked annexure “FA1”

hearing to be allocated was convenient and suitable to the Respondents. For that submission he relied on the provisions of rule 29 (1) (a) and (b) of the rules of Court. I promptly pointed out to him that rule 29 deals with the close of pleadings and notice of set – down of trials. He argued vehemently and vociferously that the said rule of Court applies to setting down of the opposed motion Court as well. I also pointed out to him that the notice of set – down for the opposed Court was served upon Respondents' Attorneys on the 13 February 2026 and that no notice was issued in the form of rule 30 (2) (b) challenging the alleged irregularity relating to the notice of set – down. I also indicated to him that in the Court file there is a certificate issued by the Registrar in which the relevant parts contain the following:

"I have perused the Court file in the above matter and I am satisfied that the matter is ripe for hearing in the opposed motion Court.

Accordingly, I enroll the matter as such in the opposed motion Court on 26 February 2026".

[8] Ironically the notice of set – down issued by the Applicants was served on the same day of the endorsement of the Registrar's Certificate of readiness. To me, this means that the Respondents became aware that the matter was set – down on 26 February 2026 on 13 February 2026 but for whatever reason decided not to take any step to challenge what he perceived to be an irregular set – down or raise any discomfort presented by the date of hearing.

[9] It was clear to me that this matter was afforded an expedited dated by the Acting Deputy Judge President. This became clear when the Registrar stated upon inquiry by me that when she allocated the date she was informed by the Secretary of Justice

Dawood that the ADJP stated that the matter was appropriate to be allocated the earliest available date in the opposed Court. It was then that she assessed it and thereafter issued a certificate of readiness. In the end I was not persuaded that rule 29 was of any assistance to Mr Maliwa's argument. I firmly indicated to Mr Maliwa, Counsel for the Respondents, that in the Court file all sets of affidavits and heads of argument were filed and as such no one would have assumed that the Respondents were not ready to proceed with the application and as such the supine attitude of the Respondents would now presented inconvenience and wastage of judiciary resources.

[10] The Respondent had another string on their bow. Mr Maliwa referred me to a judgment of **Nolindelo Primrose Bobotyane & Others v Zukisa Owen Dyantyi and Others** and referenced paragraphs 12 and 13 of the judgment. He then argued that the set – down flouted the provisions of rule 6 (5)(f). In paragraphs 11 – 13 Mbenenge JP said:

“[11] I am, in the first place, of the view that the answer to the question at hand lies not in the enquiry whether Thursday is ordinarily a day on which a motion court sits, but more in the difference in the procedure followed when motions that are opposed and those that are not are being set down. The differentiation between the two categories is not without significance. [12] In terms of rule 15A(aA) of the Practice Directions the set down of opposed motions shall, notwithstanding rule 3(6) of the Rules Regulating the Conduct of the Proceedings of the Eastern Cape Division⁷, be effected in terms of rule 6(5)(f) of the Uniform Rules. Rule 3 of the Eastern Cape Rules relating to the setting down of defended cases applies, mutatis mutandis, to the setting down of “all opposed motion proceedings.” [13] Rule 6(5)(f)(i) of the Uniform Rules empowers the Registrar to allocate dates for the hearing of opposed motions. Unopposed motions, on the other hand, are set down by the

applicant by “[placing] the matter on the roll for hearing”, which is done “by giving the Registrar notice of set down before noon on the court day but one preceding the day upon which the same is to be heard”. The Registrar does not allocate dates for the hearing of unopposed motions and other matters that ordinarily serve in the unopposed motion court which, in this Division, is held on Tuesday.

[12] *Rule 3 of the joint practice rule reference in paragraph 3 of the judgment is devoted on the pagination and indexing of Court files. It therefore does not surprise that the judgment states that such procedure will apply to opposed applications mutatis mutandis. Indeed like all other matters opposed application are supposed to be indexed and paginated in the matter regulated by rule 3 of the practice note.*

[13] *Further, paragraph 13 of this judgment states that the Registrar is empowered by the provisions of Rule 6 (5) (f)(i) of the Uniform Rules of Court to allocate dates for the hearing of opposed motion. Indeed it appears at page 194 – 195 of the paginated and index Court bundle that indeed the Applicant had issued an application for allocation in the opposed motion Court. The notice is titled notice in terms of rule 6 (5) (f)”.*

[11] Rule 3 of the joint practice note reference in paragraph 3 of the judgment is devoted to the pagination and indexing of Court file. It is no surprise that the judgment states that such procedure will apply to opposed applications *mutatis mutandis*. Indeed, like all other matters opposed application are supposed to be indexed and paginated in the manner regulated by rule 3 of the Practice Manual.

[12] Further, paragraph 13 of the Bobotyane judgment states that the Registrar is empowered by the provisions of Rule 6 (5) (f)(i) of the Uniform Rules of Court to allocate dates for the hearing of opposed motion matters. Indeed, it appears at page 194 – 195 of the paginated and index Court bundle that the Applicant issued an application for

allocation in the opposed motion Court. The notice is titled notice in terms of rule 6 (5)(f).

[13] In my view, Rule 6 (5)(f) was complied with substantially in this matter, in that as sounded above all sets of affidavits were in the Court file when the Registrar was presented with an application for allocation including heads of argument. Further, the Acting Deputy Judge President had authorized the matter to be allocated the earliest available date. How the matter can now be classified as irregularly set – down is a mystery to me and can be said only to be rejected. At a procedural level, I find no incongruity with how the matter found itself to be in the opposed motion Court. Of course, if the Respondents believed or observed any irregularity and or inhibiting factors rule 30(2)(b) was available to them – including timeous invocation of rule 41 of the Uniform rules of Court. None of these rules were considered an invoked by the Respondents.

[14] Crucially, the matter involves a breach of the Constitution and wastage of government resources, something that needs to be dealt with quickly so that it does not proliferate unabated. My approach and attitude in this matter is about ensuring that such conduct stops, the rule of law prevails and things are done properly. **MEC for Health, Eastern Cape v Kirkland Investment (Pty) Ltd 2014 (3) SA 481 CC** is an authority for the proposition 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, a drift on a sea of litigious uncertainty to whom the Courts must extend a procedure – circumventing lifeline. Indeed, **Kirland** above must

be supported through the orders I issue hereunder. **Kirland** endorsed in paragraph 103 a principle that:

“[103] The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set – aside – springs deeply from the rule of law. The Courts alone, and not public officials, are the arbitrators of legality. As Khampepe J stated in Welkom:

*“(t)he rule of law does not permit an organ of state to breach what may turn out to be a correct outcome by any means. **On the contrary, the rule of law obliges an organ of state to use the correct legal process**”.*

[15] In this case, the Municipal Respondents are steadfast on perpetuating their own illegality and are prepared to breach any legal injunction so as to achieve their nefarious goals.

[16] A breach of the Constitutional principles and values is a matter that needs to be tackled expeditiously and without delay, because such conduct undermines the constitution and the rule of law.

[17] Before the hearing I had read the application papers with the understanding that it was going to proceed, only to be told in Court that there were skirmishes which were to be argued first. That as well constituted an inconvenience and it appeared that Counsel for the Respondent did not find anything wrong with such behavior.

[18] Mr Maliwa further indicated that there were certain letters or correspondence that was exchanged between the Applicant and Respondents’ attorneys in which the Respondents had pointed out that the matter was irregularity set – down. He stated in

that correspondence they signaled a desire to file further affidavits. The Court was not at all privy to such communication Mr Maliwa referred to in Court.

[19] After a careful consideration of the submission made by Mr Maliwa who appeared together with Ms Mhambi I dismissed the above points with the result that I was ready to hear the merits of the application. At this stage Mr Maliwa applied for a postponement. I deal with the postponement application next.

(ii) Postponement application

[20] After I had ruled that the matter was properly before me, Mr Maliwa applied for a postponement orally in Court and the reason for a postponement was that the Respondents intend to file a further affidavit. No substantive application was before me in respect of such an application.

No reference was made to rule 6 (5) (e) at all. I would have expected that the principles enunciated in the judgement of **Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C)** would be addressed. Some of the principles I had anticipated would have been addressed are, but not limited to: (i) The reason why the evidence was not led timeously; (ii) The degree of materiality of the evidence. (iii) The possibility that it may have been shaped to "relieve the pinch of the shoe; and (iv) The balance of prejudice, viz the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.

None of these were dealt with any form.

[21] Equally the application for a postponement was opposed by Mr Madontsela SC for the Applicant who appeared together with Mr Nombewu. The grounds for the postponement were that in terms of rule 41 of the rules of Court there are certain requirements that should be addressed and met by an Applicant in such application. He argued that in this case the Applicant did not attempt to address a single one of those requirements. He also argued that the application was not on affidavit as contemplated in rule 41.

[22] Indeed, Mr Maliwa did not address any of the requirements and as a result I was in no position to assess if the application was meritorious or not. One thing that stood out though was that the application was made late and was designed to relieve a pinching shoe. It also lacked prospects of success.

[23] Consequently, I had no hesitation to give such an application a short shrift. I dismissed the application.

[24] After the dismissal of the application Mr Maliwa submitted that he was not briefed to argue the matter and as such he did not participate during the hearing of the merits of the application.

[25] Given that all sets of affidavits were filed including the heads of argument for both parties I now dealt with the main application. I address all the issues raised below and it will be convenient to first set – out the relevant background in a truncated way.

D. The background

[26] As indicated above, the Applicant is currently on suspension. He was suspended pursuant to a Council resolution dated 5 August 2025.

[27] The relevant provision of the Council resolution reads:

“The Council resolved as follows:

- *That the municipal manager Mr L. Ndabeni should be put on precautionary suspension for a period of 3 months with full pay pending investigations”.*

[28] The undisputed allegations of the applicant are that his suspension was activated on the same day of the resolution that is 5 August 2025. He contends that the suspension had to endure until 4 November 2025. He duly observed the period of suspension.

[29] Being aware of the expiry date of the suspension, the Municipal Respondents subsequently issued a letter dated 5 November 2025, the effect of which was to extend the period of suspension of the Applicant to 6 November 2026. The relevant part of the letter reads:

“This correspondence serves to formally inform you that your period of suspension has been extended for a period of one month effective from 6th November 2025”.

[30] Once again, on 5 December 2025 the Municipal Respondents penned down another letter of extension. The relevant provision thereof reads:

“This correspondence serves to formally inform you that your period of suspension has been extended until the finalisation of your disciplinary hearing process”.

[31] Dissatisfied with the manner in which his suspension was handled the Applicant issued a letter of demand dated 19 January 2026 which was received by the Municipal Respondents on 20 January 2026. In the letter and after he alleged that he had made attempts to go back to his work but was prevented by the Municipal Respondents using the above quoted council resolutions, he then demanded to be allowed to return to his work.

[32] Indeed the Municipal Respondents attorneys on 21 January 2026 reinforced the Municipal Respondents stance of preventing the applicant from resuming his duties. Paragraph 6 of this letter makes this plain. It reads:

“[6] your client is advised against visiting the municipality whilst the suspension is still in place as same will be viewed as a violation of suspension terms”.

[33] The Applicant at this stage felt it necessary to approach this Court and indeed the urgent application papers I have adverted to above were issued on 28 January 2026 and took up the cudgels on behalf of the Applicant.

(i) Applicant’s case

[34] Pruned of superfluous and peripheral allegations, the case of the Applicant is that both the contract of employment and disciplinary regulations governing suspension were breached by the municipal Respondents.

[35] The basis for that contention is that the Regulations state that if a senior manager is suspended a disciplinary hearing must commence within three months period after the date of suspension, failing which the suspension will automatically lapse.

[36] Applicant's contention is that the expiry of three months from the date of suspension meant that he was entitled to return to work and resume with his duties.

[37] Allied to the above contentions he argues that the conduct of the Municipal Respondents is not supported by the provisions of the contract of employment entered into between him and the first Respondent in that paragraph 14.3 thereof, a provision devoted and dedicated to suspension, reads :

*"14.3 If the employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within (60) days, provided that the chairperson of the hearing may extend such period, **failing which the suspension shall terminate and the employee shall return to fully to his duty**" (underlining is mine to underscore a point).*

[38] In essence, the Applicant argues that the Municipal respondents' conduct or decision of extending the suspension period is not derived or sourced from any legal instrument and therefore illegal.

(ii) Respondents' case

[39] The Municipal Respondents' contentions benevolently viewed are:

- (a) they do not dispute that the suspension activated on 5 august 2025 cannot endure beyond a three months period. Paragraph 31 of the answering affidavit articulates in relevant parts this as follows :

"The Respondents do not contend that a precautionary suspension may lawfully endure beyond the period contemplated in regulation 6(6)..."

- (b) they seem to contend also that the lapse of the suspension does not mean that the applicant is at liberty to return to work without the Respondents' invitation.
- (c) they seem to allege that the service of a notice to attend a disciplinary hearing which was served on 19 November 2025 complies with the provisions of regulation 6 (6)(a). That is so because they say they set the disciplinary action in motion by serving the Applicant with a notice to attend a disciplinary hearing and this they did on 19 November 2025.
- (d) they contend that the Applicant at some point but before the expiry of the 3 months period had requested for some documentation relevant to the disciplinary hearing and doing so they acquiesced to the suspension enduring beyond the three (3) months. They contend that through this conduct of requesting documentation the Applicant had delayed the

matter and such conduct amounted to what they refer to it as “*dilatory discovery requests*”. In this context, they appear to raise a waiver of rights as another ground of opposition.

E. The issue for determination

[40] The issues which needs to be decided in this application are:

- (a) whether it is legally competent for the Municipal Respondents to extend the period of suspension of the Applicant beyond the period that is stated in the Regulations and Contract of employment; and
- (b) if the answer to the above question is **No**, the next issue is whether the Applicant is entitled to go back to his work and perform his duty as the Municipal Manager.

F. The legal framework

[41] Regulation 6 of the local Government: Disciplinary Regulations for Senior Managers, 2010 (the Regulations) provides for the precautionary suspension of Senior Municipal employees and is applicable in this application. Regulation 6 (6) (a) provides:

*“If a Senior Manager is suspended a disciplinary hearing must commence within three months after the date of suspension, **failing which the suspension will automatically lapse**”.*

[42] Regulation 6(6) also provides:

“ (6) The period of three months referred to in paragraph (a) may not be extended by Council”.

G. The discussion

[43] The case presented by the Applicant is in plain terms unanswerable. The Respondents are attempting to defend the indefensible. The Respondents themselves have confessed in paragraph 31 of the answering affidavit quoted above that indeed it is not their contention that beyond the expiry period the suspension still exists. There is no response to allegation of the unlawfulness of the extension based on contract, a separate contention which is based on clause 13.4 of the contract of employment. This allegation is captured in paragraph 29 of the founding affidavit read in tandem with annexure “**FA8**”.

[44] The authorities are harmonious that after the expiry of the 3 months period suspension ceases to exist. Here in this division Jolwana J dealt with this issue in the matter of **Mluleki Fihlani vs Port St Johns Local Municipality and two Others – case no. 1046/2025 delivered on 8 July 2025** – in relevant parts at paragraph 36, he decided the question as follows :

“The issue therefore is whether, as a matter of law, and on any interpretation 6 (6), Mr Fihlani precautionary suspension could be extended after the expiry of three months period. Regulation 6 (6)(b) deals with this issue and it makes it clear that a precautionary suspension may not be extended by Council”.

[45] I align myself with the decision set out above which was reached by Jolwana J. I am therefore bound to follow his judgment. **Makhanya v University of Zululand 2010 (1) SA 62 SCA** in paragraph 6 tells us thus:

“[6] The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts, as Cameron JA said in this court in True Motives 84 (Pty) Ltd v Mahdi, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. He went on to say:

‘Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent, and its proper implementation, are therefore vital constitutional questions’.’

[46] What I am saying is that I agree with the reasoning and the position articulated by Jolwana J. Therefore I am not in a position to depart from the position he espoused in the Fihlani judgment mentioned above.

[47] The labour appeal Court in the matter of **Tshabalala v Maqhaka Local Municipality and Another [2025] 2 BLLR 189 (LAC)** is also on point. There **Van Niekerk JA** in paragraph 8 he endorsed the judgment of **Mgengo v Lekwa Teemane Local Municipality J452/20 [2020] ZALCHJHB 255 11 June 2020** (also a labour Court judgment) –in paragraph 23 of the Megengo judgment, Nkuta – Nkotwana J said in relevant parts:

“...Hence it is perfectly logical that, once the three months’ period of suspension lapses, the municipal council is debarred by Regulation 6 (6)(b) from extending it”.

[48] The Maqhaka Local Municipal judgment mentioned above is also an authority for the proposition that in the context of the Regulations engaged in this matter disciplinary hearing commences by reading out charges to the Senior Manager. This is what clause 10 (3)(a) read with clause 6 (6)(a) envisages and contemplates.

[49] All what the above means is that the Municipal Respondent extended the suspension without any legal source or instrument. **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 CC** reminds us in paragraphs 38 as follows:

“In Fedsure this Court said that “[i]t seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law”. It also said that— “a local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent at least that it expresses this principle of legality – is generally understood to be a fundamental principle of constitutional law. This has been recognised in other jurisdictions. In The Matter of a Reference by the Government in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada the Supreme Court of Canada held that: ‘Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional

supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p.455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source”.

[50] Indeed the Municipal respondents could not and they did not refer me to any source of authority from which they derived a right to extend the period of extension in the manner they did.

[51] Indeed their conduct is unlawful and therefore invalid in terms of the provisions of Section 2 of the Constitution. True, section 7 (2) of the Constitution obliges the State to respect, protect, promote and fulfill the rights in the Bill of Rights.

[52] The Applicant therefore is seeking for an order that gives effect to the provisions of Section 2 of the Constitution. I am permitted in terms of Section 21 (1) (C) of the Superior Court Act 10 of 2013 to entertain such a relief and in that way declare their conduct as unlawful. I have no hesitation to say that the conduct of the Municipal respondents lacks legal foundation and stands to be declared as unlawful.

[53] From a contractual point of view, the Municipal Respondents through their conduct have breached clause 14.3 of the contract adverted to. *Pacta Sunt Servanda* is still part of our law. Ordinarily, parties should be bound by terms and conditions of agreements to which they bind themselves. I subscribe to this view.

[54] The Constitutional Court in **Ever – fresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC)** it was held that good faith is a matter of considerable importance in our contract law and the extent to which our Courts enforce the good faith requirement in contract law is a matter of public and constitutional importance.

[55] The argument that the Applicant's mere asking for the documents which were to be used during the hearing he acquiesced to the illegality that was perpetuated by the Respondents is not apt and the true reflection of the legal position. Let it suffice for current purposes to say that acquiescence and waiver are never assumed. The respondents are asking this Court to endorse their assumption and imaginations without any legal basis in support thereof. I decline that invitation.

[56] It was available to the Applicant to utilize the provisions of Rule 53 in its quest to review and set aside the decisions of the Municipal Respondents. It was not obliged to do so. It being a legality review and having outlined above the legal prescripts which have been violated by the Municipal respondents, I see no reason in principle why in these circumstances I cannot grant the view which is sought by the Applicant. No further determination in my view was necessary for the Applicant to set aside the decisions.

[57] I am satisfied that the Applicant is entitled to the costs of the application and that costs of two Counsel are deserving on scale "**B**" and "**C**".

[58] In these circumstances, I issue the following order:

[58.1] It is declared that the extension of the precautionary suspension of the Applicant communicated to him on 5 December 2025 by the first Respondent is unlawful, reviewed and set – aside as invalid;

[58.2] The Applicant is entitled to return to his position as a Municipal Manager and resume with his duties forthwith;

[58.3] The Respondents shall pay costs of this application on scale “C” for Senior Counsel and scale “B” for Junior Counsel and such costs shall include costs of two Counsel where employed.

V. KUNJU

ACTING JUDGE OF THE HIGH COURT

Appearances :

For the Applicant : **Mr G. Madonsela SC with Mr Nombewu**

Instructed by : Messrs Mvuzo Notyesi Inc.
Mthatha

For the Respondent : **Mr S. Maliwa with Ms L. Mhambi**

Instructed by : Messrs Makangela Mntungani Inc.
Mthatha

Heard : 26 February 2026

Delivered : 27 February 2026

