

SOUTH AFRICA / JUDGMENT

Fihlani v Port St Johns Local Municipality and Others (1046/2025) [2025] ZAECMHC 66 (8 July 2025)

[2025] ZAECMHC 66

COURT

Eastern Cape High Court, Mthatha

BEFORE

M.S. Jolwana

CASE / FILE NUMBER

1046/2025

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE DIVISION: MTHATHA]

CASE

NO.1046/2025

In

the matter between:

MLULEKI

FIHLANI

Applicant

and

PORT

ST JOHNS LOCAL MUNICIPALITY

1st

Respondent

THE

MAYOR: PORT ST JOHNS LOCAL MUNICIPALITY

2nd

Respondent

THE

SPEAKER: PORT ST JOHNS LOCAL MUNICIPALITY

3rd

Respondent

and

in the matter between: PORT
ST JOHNS LOCAL MUNICIPALITY
1st
Applicant
THE
MAYOR: PORT ST JOHNS LOCAL MUNICIPALITY
2nd
Applicant
THE
SPEAKER: PORT ST JOHNS LOCAL MUNICIPALITY
3rd
Applicant
and
MLULEKI
FIHLANI
1st
Respondent
THE
MINISTER: DEPARTMENT OF CO-OPERATIVE
GOVERNANCE
AND TRADITIONAL AFFAIRS
2nd
Respondent
THE
MEC: EASTERN CAPE PROVINCIAL
DEPARTMENT
OF CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS
3rd
Respondent

JUDGMENT

JOLWANA J

Introduction.

- [1] This application was brought as an urgent application in which the applicant sought final relief in the form of a declarator that the extension of his suspension by the first respondent is unlawful. The consequential relief of such a declarator is the applicant being allowed to resume and continue rendering his contractual duties in the normal way, if he is successful. The urgency dissipated subsequent to a counter application being brought by the respondents challenging the constitutionality of the regulation that prohibits the first respondent, qua employer, from extending the suspension. I will, throughout, refer to the respondents simply as the municipality unless reference is made to a specific respondent and to the applicant, simply as Mr Fihlani, both in the main application and in the counter

application.

Factual

background.

- [2] On 9 January 2023, Mr Fihlani entered into a contract of employment with the municipality in terms of which he was appointed as its municipal manager. On 4 November 2024, he was served with a notice of intention to suspend him pending an investigation into serious allegations of misconduct relating to the appointment of a senior manager for engineering services. The issues relating to the said appointment are, in my view, not pertinent to the issue of the lawfulness or otherwise of Mr Fihlani's suspension and his entitlement or otherwise, to the relief sought. Subsequent to internal processes relating to his suspension, the council of the municipality resolved to suspend him on 22 November 2024 pending an investigation. He was formally advised in writing, of the decision to suspend him on the same date.
- [3] On 21 January 2025, the investigation was completed and on 22 January 2025 the investigation report was tabled in a council meeting. That meeting passed a resolution extending Mr Fihlani's suspension until the finalisation of his disciplinary hearing. Council further resolved that the disciplinary hearing must be conducted before the 22 February 2025. That notwithstanding, Mr Fihlani reported for work on 3 February 2025. This was based on the sixty day period for the lapsing of a precautionary suspension referred to in his contract of employment having expired and the investigation pending which he was suspended having been completed. However, the municipality advised him that his suspension was extended pending a disciplinary hearing.
- [4] Mr Fihlani contends that in terms of his contract of employment which makes provision for a sixty day period of suspension, his precautionary suspension terminated on 21 January 2025^[1], which entitled him to return to work.
- [5] In terms of the Local Government: Disciplinary Regulations for Senior Managers, 2010 (the Regulations), the three months period of suspension would expire on 21 February 2025. In terms of the Regulations, a precautionary suspension lapses automatically after

the expiry of the three months period. On the basis of the provisions of the Regulations, Mr Fihlani contends that his suspension lapsed on 21 February 2025. Therefore, whether regard is had to the contract of employment or to the Regulations, his suspension lapsed. This is the basis on which he contends that he is entitled to return to work as, on either basis, his suspension lapsed which therefore makes his continued suspension consequently unlawful. He further contends that at the core of the precautionary suspension, is the employer having time and space within which to conduct the investigation into allegations of serious misconduct, there being no mechanism for the continued suspension of an employee during the period of the disciplinary hearing, if same is conducted outside the three months period. This is because, so contends Mr Fihlani, the suspension in terms of the Regulations is intended to cover the period of the

investigation only, after which there is no legal basis for the continuation of the suspension, with the municipal council having no power to extend the suspension if a disciplinary hearing is not commenced with.

[6] On 13 February 2025 Mr Fihlani was served with a charge sheet containing eleven charges of serious misconduct. He was also advised

that the disciplinary hearing would commence on 10 March 2025 and would continue until the 14 March 2025. On 24 February 2025 he,

however, returned to work. He was not allowed to enter and remain at work in breach of his contract of employment and was advised that his suspension was extended by council pending the disciplinary hearing. The second respondent demanded that he should leave his workplace failing which the law enforcement officers would assist him to leave. He contends that the municipal council's extension of his suspension was unlawful for want of an authority to extend it beyond three months. He further contends that he was not even given a hearing before the decision to extend his suspension was taken and therefore his right to procedural fairness was infringed. In any event, even with a hearing, which he was not given, it would still be unlawful as there would still be no legal basis for the extension. For all these reasons, Mr Fihlani contends that the unlawful extension of his suspension imperilled his right to dignity. It also prevents him from engaging in his profession of choice and his contractual right to perform his duties.

[7] Trimmed of all unnecessary elucidations and embellishments, the municipality's pleaded case initially, was that there were two distinct suspensions. The first suspension which was effected on 22 November 2024 was a suspension pending an investigation report to determine if Mr Fihlani had any case to answer. This suspension is distinct from his suspension effected on 22 January 2025 which arose as a result of the findings of the investigation report and was a suspension pending a disciplinary hearing.

[8] In the midst of Mr Fihlani's urgent application and on the date on which it was set down for hearing, the municipality applied for an order joining the Minister of the Department of Co-operative Governance and Traditional Affairs (the Minister) and the Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs (the MEC). The MEC has not participated in these proceedings, at least not directly. The joinder application was a precursor to and part of the municipality's

counter-application in which the municipality seeks a declaration of constitutional invalidity of regulation 6(6) of the Regulations.

It is the issues relating to the counter-application to which I now turn. Regulation 6(6) which is at the centre of the constitutional

challenge reads as follows:

“(a) 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.

(b) The period of three months referred to in paragraph (a) may not be extended by council.”

[9] The case of the municipality as set out in the counter-application is that regulation 6(6) unreasonably limits the municipality’s

right to govern on its own initiative, the local government affairs of its community by depriving the municipal council, of a power to extend a precautionary suspension of a senior manager. The municipality contends that the power of its council, qua employer, should not be unreasonably limited by the provision that a precautionary suspension automatically lapses if a disciplinary

hearing is not held within a period of three months, as regulation 6(6)(a) does. Furthermore, regulation 6(6)(b) wholly removes the power of a municipal council, qua employer, the traditional and inherent power enjoyed by all employers, to extend a precautionary suspension of an employee by proscribing the extension of a precautionary suspension of a senior manager beyond the three months period. In all these circumstances, these limitations contained in regulation 6(6) are drastic, unreasonable and violate a municipality’s constitutionally entrenched right to govern, on its own initiative, the local government affairs of its community.

[10] The attack on the constitutionality of regulation 6(6) is anchored on Section 151 of the Constitution[2]. Section 151 provides:

“(1) The local sphere of government consists of municipalities which must be established for the whole of the territory of the Republic.

(2) The executive and legislative authority of a municipality is vested in its Municipal Council.

(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality’s ability to exercise its powers or perform its functions.”

[11] In relying on section 151, the municipality contends that subsections

(3) and (4) give a municipal council, in express terms, the right to govern on its own initiative, the local government affairs of its community and the right to exercise its powers and perform its functions. These rights, powers and functions may not be unreasonably and therefore unlawfully interfered with by either the national or the provincial government. These spheres of government are under a constitutional duty to respect these rights and give municipalities space to exercise the constitutional powers accorded to them by the Constitution. In attacking regulation 6(6), as it does, the municipality says it seeks to vindicate its right to govern, in this case, its labour relations with its employees which entails its entitlement to regulate its personnel and staff matters. This is necessary, contends the municipality, because the Minister, through regulation 6(6), has taken away a municipal

council's powers which are common to all employers, to extend a precautionary suspension and in so doing, the Minister has violated the municipality's right to govern. In this case, the municipal manager has been suspended on serious allegations of misconduct. If the precautionary suspension is lifted, Mr Fihlani would have to return to work and be at work while the disciplinary hearing is ongoing. Potentially, he could interfere with witnesses who are his subordinates and temper with the evidence that may be led against him. It contends that regulation 6(6) does not allow a municipality, even on good cause shown in a specific case, to extend a precautionary suspension because of its rigidity.

- [12] Mr Fihlani opposes the counter-application as does the Minister. A submission was made that generally, Mr Fihlani makes common cause with the Minister's opposition to the counter-application in a number of respects. For this reason, I intend to deal with their opposition in tandem. Beyond the issue of urgency, Mr Fihlani also relies on the Intergovernmental Relations Framework Act 13 Of 2005 (IRFA), in particular, sections 40 and 41(2) as does the Minister. The Minister opposes the counter-application mainly in two ways. He raises a number of points of law^[3] which in the main are, proper authority to institute the counter-application; the failure of the municipality to exhaust all available dispute resolution mechanisms before instituting legal proceedings against another arm of government; and the non-joinder of the South African Local Government Association (SALGA).

Authority to institute the counter-application.

- [13] As I understand it, the issue of the lack of authority to institute the counter-application is based on the municipality not having passed or obtained a specific council resolution authorising the institution of the counter-application. It is further contended that the third respondent as the speaker of the municipality has no locus standi to institute the counter-application in the name of the municipality. I am not sure how the issue of the third respondent and therefore, his locus standi to institute the counter-application in his name even arises. This is because he has simply not done so. As regards council resolution authorising the institution of the counter-application, the circumstances leading to its institution are very important. Mr Fihlani instituted the main application seeking relief for his return to work on the basis of the unlawful extension of his precautionary suspension. One of the issues central to Mr Fihlani's application is that in terms of regulation 6(6), his precautionary suspension lapsed because the disciplinary hearing against him was not commenced within three months of his precautionary suspension. On 12 March 2025, the municipal council passed a litany of resolutions amongst which was a resolution to oppose Mr Fihlani's application. It went further and passed a resolution authorising the mayor and the municipality's attorneys to oppose Mr Fihlani's application. It therefore cannot be seriously argued that the opposition to Mr Fihlani's application was not authorised by council.

[14] Council went further and passed a resolution authorising the institution of appeal proceedings should Mr Fihlani's application be successful for any reason. I digress to mention that I have a deep sense of unease at the notion of a pre-emptive resolution

for the launching of appeal proceedings in the event of a party being unsuccessful for "any reason" especially by an organ of state which is rather unusual. The fact of the matter is that there is a boundless authorisation for the opposition of the main application. Effectively, the municipal council, while the case was ongoing, considered it proper to, among other things, take a resolution that it would not apply its mind to a judgment that the court would deliver in due course, but instead, resolved that should it not succeed in its opposition to Mr Fihlani's application, appeal proceedings should be launched. For an organ of state not to apply its mind to a judgment and orders issued by a court but pre-emptively authorise an appeal, cannot possibly be anything else but a seriously shocking disregard for the rule of law and even an abuse of court process. I will revert to this issue later.

[15] There was a submission on behalf of the Minister that even if the main application is authorised, the counter-application, being a self-standing application, should separately be authorized. Besides the patently circuitous logic in this submission, it also unfortunately elevates form above substance ignoring the fact that such a litigant is already before court and opposing the main application, having been duly authorised to do so, bearing in mind that the proceedings subsequent to which a counter-application is issued, are usually the fons et origo of the counter-application. In Graham[4] the court explained the legal position regarding a counter-applications as follows:

"In truth, the counter-application, like the Law Society's application, is in fact incidental to the main application in the

sense that it flows from the order of Mothle J and the respondents' failure to comply with it. It seeks a more effective execution of paras 3 and 4 of the order of Mothle J to ensure full compliance. The relief required in the counter application admittedly goes further than the relief sought by the Law Society, but it aims at an effective procedure and ensuring proper compliance

Were it to be held that the Law Society application is an application in terms of rule 27 for the extension of time periods, as the respondents contend, rule 27 would permit the court to extend the time periods of the order 'upon such terms as it seems meet'. The counter-application seeks an extension of the time period for the investigation on terms different to those applied for by the Law Society. In extending the prescribed time periods in the order, the court may grant the ancillary relief requested by the applicants if it considered it meet. However, because prayer 3 of the notice of motion in the Law Society application may in fact go beyond asking for an extension of time by seeking clarification of the scope of the inspection, it is questionable whether the Law Society application is indeed one in terms of rule 27. It is clear from para 7 of the application that the Law Society prays for more than an extension of time.

Be that as it may, as I have already found there is no bar to the remedies sought by the applicants in the counter-application.

The relief will be permissible under rule 6(11) read with rule 6(7)(a), or under rule 6(7)(a) alone. The need for the firm-wide inspection has been made more pressing by further instances of possible misconduct that have come to light and the fact that the

respondents have been found by Matojane J to be in contempt of the order of Mothle J. The appointment of a curator and the suspension of the respondents during the inspection are undoubtedly new, but nonetheless ancillary or incidental to the relief ordered by Mothle J. The mere quest for a new and additional relief in any event, cannot of itself constitute an irregularity. There is no bar in law or in the rules to a litigant endeavouring to obtain a remedy in a counter-application that is more expansive than, or even unrelated to, relief sought in the main application. As I have said more than once, rule 6(7)(a) imposes no such limitation. Just as nothing prevents a defendant in an action instituting a claim in reconvention that is entirely distinct from the main claim there is no reason in principle why the same should not apply in an application.”

[16] All that the municipality seeks to do in the counter-application is to get an order declaring unconstitutional, the very regulation that Mr Fihlani relies on in the main application. If the municipality succeeds in its constitutional challenge, the main application could possibly fail. It seems to me that the counter-application is not only incidental to the main application, it is in fact inextricably linked to it and is part of the municipality’s armoury in its defence to the main application. It follows that it is simply incorrect that it needs a separate and self-standing resolution authorising its institution.

The non-joinder of SALGA.

[17] The Minister has also raised the issue of the non-joinder of SALGA. This, on the basis that the impugned regulation is of national

application and the Regulations themselves are equally applicable to all municipalities which are therefore interested parties. The municipality is a member of SALGA and as I understand the submission, SALGA should have been joined because of its interest in the issue at hand in its representative capacity on behalf of all the municipalities. In raising the issue of the non-joinder of SALGA, the Minister fails to appreciate a very basic tenet of non-joinder. Regrettably, it is not uncommon for litigants to raise it where they should not and at times fail to raise it where they should. In explaining the test for non-joinder, I can do no better than refer to The South African History Archive Trust[5] in which the Supreme Court of Appeal restated the applicable test concisely in the following terms:

“The test for joinder of necessity was restated by Brand JA in Bowring NO v Vrededorp Properties CC:

‘The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned ...’

The question is therefore whether Messrs Hill and Palazzolo might be prejudicially affected by a judgment on the application.”

[18] It might very well be that municipalities or, on their behalf, SALGA could be curious to know if the regulation will not be declared unconstitutional in which case nothing changes for them. But in the event that the municipality succeeds and an order of constitutional invalidity is granted, again, no prejudicial effect shall be visited upon any municipality. This is so because in that case, instead of having to conclude investigations of misconduct against their senior managers and commence with disciplinary hearings within three months, they will have a longer period within which to do so. However, none of that translates into a substantial interest in the outcome of the counter-application as they will not be affected by the granting of the order sought. The point of law of the non-joinder of SALGA must therefore fail as the orders sought by the municipality will not have any prejudicial effect on any other municipality.

The non-compliance with IRFA.

[19] The last question of law raised by the Minister is that the municipality failed to comply with IRFA in not first exhausting all available dispute resolution measures before instituting its counter-application against the Minister, being another arm of

government. In making this proposition, reliance is heavily placed on sections 40 and 41 of IRFA and on Resilient Properties[6] in which, in part, Petse DP, writing for the full court, had this to say:

“... [S]ection 41(3) requires organ of state to exhaust all other remedies to resolve disputes before they approach a court. True, in this instance, Eskom never approached a court. Instead, it took the impugned decisions to interrupt electricity supply to municipalities, hoping that doing so would coerce the municipalities to pay for the electricity supplied over several years. This Eskom asserts, had the desired effect in the Sabie matter that was settled between the parties. In taking this route, Eskom in effect, circumvented the consequences that flow from the prohibition contained in ss 40 and 41 of the IRFA against instituting proceedings in a court to settle intergovernmental

dispute, and all efforts to resolve that dispute have not been exhausted in terms of chapter 4 of IRFA and proved unsuccessful.

Nothing less than a ‘reasonable effort in good faith’ to resolve the dispute will suffice.”

[20] In his answering affidavit to the counter-application, Mr Fihlani also raises the same issue as the Minister and complains that the municipality has failed to comply with its constitutional obligations set out in section 41(2) of the Constitution[7]. In providing for the obligation to avoid and settle intergovernmental disputes, section 40 of IRFA reads:

“(1) All organs of state must make every reasonable effort to –

- (a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and
 - (b) to settle intergovernmental disputes without resorting to judicial proceedings.
- (2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute settlement

mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.”

[21] The rest of chapter 4 of IRFA provides for the manner in which a formal intergovernmental dispute is declared and what must happen after a formal intergovernmental dispute is declared and how it should be resolved. Mr Fihlani relies on Adonisi in his postulation that the municipality had an obligation to first consult with the Minister in seeking a remedy for the alleged

unconstitutionality of regulation 6(6) before bringing this application. In Adonisi[8], Dambuza AP explained the centrality of the IRFA in fostering the spirit of co-operative governance among all the spheres of government. She said:

“Even within the context of co-operative governance and the framework established in IGRFA for the promotion and facilitation of

intergovernmental relations, powers and functions of the different spheres of government must be maintained. The preamble to IGRFA highlights cooperation and integration of actions in government and the necessity to establish a legislative framework applicable to all spheres of government, to ensure intergovernmental relations, in the spirit of the Constitution. Section 41 of the Constitution sets out the principles of cooperative government and intergovernmental relations. In terms of s 41(1)(g) all spheres of government and organs of state within each sphere must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. In any event, once the National Minister of Human Settlements conceded that there was no obligation to consult her on every proposed disposal her case caved in, as the issue had been pleaded as an across the board obligation to inform and consult.”

[22] There is so much that can be said about IRFA and I might add, mostly very good, but what must always be born in mind is that, as the court said in Adonisi, nothing in it trumps the Constitution and nothing should be done in the spirit of co-operative governance and dispute resolution should undermine the constitutional framework. Everything should be done to promote and not undermine constitutionalism. On this, I venture to say that it is without exception that everything must flow from the Constitution and must find its legitimacy in the Constitution. If it does not, then it cannot be done. That this is so is made

abundantly clear in section 2 of the Constitution in which its supremacy is put at the forefront of all that must happen. Section 2 provides that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

- [23] What the municipality is contending for is that for the reasons it sets out, regulation 6(6) is unconstitutional. If it is correct, it means regulation 6(6) is invalid. It therefore cannot, in my view, be cogently contended that whether or not a piece of legislation or regulation such as regulation 6(6) is constitutionally invalid must be negotiated and settled inter partes. That is simply counter-intuitive. An agreement or parties finding a middle path on the constitutionality of a piece of legislation by reaching some form of a compromise, does not convert or transform legislation which, if objectively, is constitutionally invalid, into one that is constitutionally compliant. Even if parties reach some form of agreement and reach consensus declaring among themselves, the questioned legislation constitutionally consistent, that changes nothing to its actual constitutionality as its wording remains unchanged. Section 172(1) of the Constitution provides that [w]hen deciding a constitutional matter within its power, a court – “must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.” As counsel for the municipality correctly pointed out, there is nothing preventing a court, even mero motu, from raising the issue of the constitutionality of any law or conduct, which, in my view, section 172 of the Constitution in fact enjoins it to do. It seems to me that where a sphere of government is of the view that a particular piece of legislation is invalid for lack of constitutionality, that dispute must be resolved by a court with the requisite competency. Once it is declared to be constitutionally compliant, only then can the parties negotiate its implementation through the IRFA processes before any dispute or disagreement is referred to court for adjudication. Most importantly, IRFA is more about the exercise of statutory powers or the performance of statutory functions whose manner of exercise or performance may be negotiated. It goes without saying that negotiations can only be on the basis that, that which is being negotiated is itself constitutional. The point of law in this regard is therefore

unsustainable.

The merits of the counter-application.

- [24] Section 151 of the Constitution, to which I referred earlier, has to be read in tandem with section 154(1) which provides that:

“The national government and provincial governments, must support and strengthen the capacity of municipalities to manage their own

affairs, to exercise their powers and to perform their functions.”

- [25] The Minister also contends that he is empowered in terms of section 155(7) of the Constitution to make regulations. This does not appear to be in dispute. Part of the case pleaded by the Minister is that the purpose of the Regulations is, *inter alia*, to do away with a fragmented approach to disciplinary processes in respect of senior managers; to provide internal mechanisms for the management of misconduct; the establishment of a common understanding and application of procedures for the management of misconduct; to provide support for constructive labour relations; and to prevent arbitrary or discriminatory actions. The Regulations do not prevent municipalities from investigating the conduct of their employees and subjecting them to disciplinary processes where necessary. They are not prevented from placing senior managers on precautionary suspension. The Minister contends that if the municipality succeeds and regulation 6(6) is declared constitutionally invalid, that will have a detrimental effect not only on senior managers but also there will be financial repercussions in that a suspended senior manager may continue receiving his salary indefinitely subsequent to a precautionary suspension when he or she is unable to provide services to the communities served by that municipality.
- [26] The Minister further contends that regulation 6(6) must be read with regulation 5 so as to understand that it should not be difficult to commence with a disciplinary hearing within three months from the date a senior manager is placed on a precautionary suspension. This is because when there are allegations of misconduct against a senior manager, the mayor or the municipal manager has seven days within which to table such allegations before council and for this purpose, the speaker may even be requested to convene a special council meeting to consider same. Where a municipal council is, on reasonable basis, satisfied that a senior manager has committed a serious act of misconduct, it has seven days within which to appoint an independent investigator to investigate the allegations.
- [27] Where an investigator has been appointed, he/she has thirty days within which to submit a report to the mayor or the municipal manager with recommendations. The mayor or municipal manager must table the report before a council meeting within seven days for consideration. After having considered the report, council may pass a resolution authorising the institution of disciplinary proceedings against the senior manager concerned. Throughout this initial process, a municipal council does not have to place a senior manager on precautionary suspension as the council must first be satisfied, on reasonable grounds, that the senior manager concerned has committed an act of serious misconduct. The point that the Minister makes in this regard is that there is more than enough time for a municipal council to establish if it has a reasonable basis for placing a senior manager on precautionary suspension. Even where it determines that a senior manager has to be placed on precautionary suspension, he or she must first be given an opportunity to show cause within seven days why he or she should not be suspended.
- [28] The Minister contends that with all of these elaborate processes, the timing of the decision to place a senior manager on precautionary

suspension is ultimately entirely at the discretion of the council. It is only once the senior manager has been placed on precautionary

suspension and advised accordingly that the three months period kicks in. Therefore, the three months period is reasonable in that it ensures that a senior manager is not made to remain on precautionary suspension endlessly or beyond what is reasonably necessary. In terms of regulation 6(5) the council has to inform the Minister and the MEC of its decision to place a senior manager on precautionary

suspension. This enables the Minister to exercise his oversight role over municipal councils including their management of disciplinary

processes and to ensure accountability as provided for in the Constitution. The regulations enable the Minister not only to exercise his constitutional duty of playing an oversight role but also to standardise disciplinary processes across all municipalities. On these bases, the Minister contends that the three months limitation period is in line with the Minister's constitutional

mandate to ensure accountability especially if regulation 6(6) is not read in isolation but is read in the context of the Regulations as a whole.

[29] The Minister further contends that it is not the municipality's case that it could not finish the pre-disciplinary hearing steps within the three months period and commence with the disciplinary hearing. Had that been the case, the municipality would have pleaded its case accordingly and accounted for the whole three months period and the difficulties that it may have encountered that made it impossible for it to complete the investigation processes and commence with the disciplinary hearing within three months. On the contrary, the municipality has pleaded that the investigation report was tabled before council on 22 January 2025. It is unclear why the disciplinary hearing could not commence a month later. The Minister further contends that even if the municipality's case was that of an inability to commence with the disciplinary hearing before the 22 February 2025, that would have been the result of the municipality having elected to first suspend Mr Fihlani on 22 November 2024 when the report would only become available on 21 January 2025. The suspension was done without the benefit of the report. It was, therefore, the municipality that made that choice and acted pre-emptively and should not complain that the disciplinary hearing could not be commenced with before the 22 February 2025.

[30] Besides, it is not the municipality's case that Mr Fihlani made it impossible for it to meet the three months deadline within which to commence with the disciplinary hearing. To the extent that any suggestion is made that Mr Fihlani frustrated the investigation process and thus delayed it, no attempt has been made to substantiate such a bald averment. No witnesses are alleged to have been intimidated or influenced by Mr Fihlani. There is no constitutional misalignment between the regulation and section 152 of the Constitution which provides for objects of local government which is its core business whereas the suspension of an employee or the disciplinary processes as a whole do not even feature. In any event, nothing prevents a municipality from approaching a court for an extension of the

suspension period where the disciplinary hearing, objectively, could not be commenced with within three months. In that case the court would have an inherent jurisdiction to adjudicate such a case and where an extension is warranted, the court would be at large to grant an appropriate relief. Section 22 of the Constitution is the constitutional entrenchment of the right of all citizens including senior managers to practice their occupation freely. However, were the municipality to be entitled to extend a suspension indefinitely or at whim while not causing an employee to appear at a disciplinary hearing, that would undermine that right. The regulation is another safe guard against unjustified, unnecessary and endless extensions of suspensions with no objectively determinable basis for the need for the extension. A regulated suspension compels municipalities to act with the requisite promptitude and prevents an abuse of taxpayer's monies in paying an employee who is sitting at home on full pay without rendering the services which the communities so desperately need, for which he is being paid.

Discussion.

- [31] Divested of all ornamentation, the real issues in this matter are whether or not Mr Fihlani's suspension lapsed either on the basis, firstly of the contractual agreement embodied in his employment contract. Secondly, whether it lapsed on the basis of regulation 6(6). Lastly on this issue, whether a municipal council is entitled to extend a precautionary suspension. That is the first issue. The second issue is whether and, in any event, regulation 6(6) is constitutional or not. It is common cause that Mr Fihlani was suspended on 22 November 2024; that his contract of employment provides for a two months precautionary suspension period; that regulation 6(6) provides for a three months precautionary suspension period; that no disciplinary hearing was commenced with within two months as provided for in the employment contract; and finally the disciplinary hearing was not commenced with within three months of his precautionary suspension as provided for in regulation 6(6) of the Regulations. On these common cause facts, it is very difficult to understand the municipality's case in the main application. Furthermore, its case has metamorphosed as the court proceedings progressed taking different shapes and forms with some of the submissions not being aligned to its pleaded case or some of its contentions being incongruent to some of the objective and indisputable facts.
- [32] The municipality's case, as pleaded in the main application, is that there was what it called the initial decision to suspend Mr Fihlani for purposes of preserving the integrity of the investigation. It contends that that decision was subsumed by six subsequent decisions. These were to appoint an independent investigator who then found that Mr Fihlani committed acts of misconduct. Thereafter on 22 January 2025 council resolved to adopt the independent investigator's recommendations which were that the allegations were serious and that Mr Fihlani should be charged and arraigned before a disciplinary committee. The third decision of council was to constitute a disciplinary committee and appoint a presiding officer and evidence leader. Then the evidence leader

decided to charge Mr Fihlani with various charges of serious misconduct and that he would appear at a disciplinary hearing scheduled to take place from 10 March 2025 to the 14 March 2025. The last decision was the council's decision that Mr Fihlani would

remain on precautionary suspension until the disciplinary proceedings were finalised. The municipality contends that because of these decisions, if this Court grants the relief sought, such an order will be what it called a *brutum fulmen* (a useless thunderbolt).

[33] I do not understand the municipality's pleaded case for two suspensions in this regard. I am not aware of any legal basis for this proposition which, in any event, flies in the face of the entire processes as set out in the Regulations. No basis is laid for what appears to be a case for two suspensions for the same offence or offences and does not appear to be founded on any legal framework. The strangest part of the municipality's case in this regard is that it is not even aligned to the municipality's letter dated 24 February 2025 in which it is made clear that Mr Fihlani's suspension was extended by way of a council resolution. Even the council resolution itself which was taken on 22 January 2025 is to the effect that "Council resolved that the suspension of the Municipal Manager should be extended up until the finalisation of Disciplinary hearing

process." [9] The municipality's case does not address Mr Fihlani's case at the heart of which is the alleged unlawfulness of the extension of the suspension. That is one of the difficulties with the municipality's case as it also seems to be misaligned to its own council's resolution in this regard.

[34] Equally, if not even more difficult to understand, and is in fact a misplaced contention, is that Mr Fihlani is inviting the court to intervene in *medias res* or in incomplete disciplinary proceedings. This contention ignores the fact that Mr Fihlani is not challenging any part of the disciplinary processes or the charges that have been issued against him or the *locus standi* of any of the appointed officials like the chairperson and the evidence leader, at least not in this matter. The municipality has not pleaded how Mr Fihlani, through this application, is preventing the disciplinary hearing from taking place. Once again the municipality's case is difficult to understand as it, once more, fails to answer Mr Fihlani's case with this point being, in any event, irrelevant.

[35] The municipality, for the second time in the same affidavit, raised the issue of the two suspensions. It referred to the suspension of the 22 November 2024 which, it describes as having been a suspension pending an investigation report. It also referred to what it calls a distinct and subsequent suspension taken on 22 January 2025. It avers that the latter suspension was as a result of the investigation report and was a suspension pending a disciplinary hearing. To make its case even more clearer in this regard, the municipality pleads that on the occasion of the tabling of the investigation report, the initial suspension lapsed. It further pleads that Mr Fihlani was thereafter placed on a new suspension pending the disciplinary hearing. As indicated earlier, the municipality's pleaded case in this regard is contrary to the council resolution taken on 22 January 2025 which was to extend Mr Fihlani's precautionary suspension. Nothing is said about a new suspension at all, not in the

resolution nor in the letter dated 24 February 2025 that the mayor addressed to Mr Fihlani.

- [36] The municipality alleges that Mr Fihlani conflates the two distinct suspensions because of the use of the word “extend” in the resolution. It then disavows that it extended the suspension and pleads that it could not have done so. What it says it did was to pass a resolution making a new suspension pending a disciplinary hearing. On these bases, the municipality contends that from the 22 January 2025 which is the date on which the new suspension was passed, the period of sixty days referred to in his employment contract would only expire on 23 March 2025. With regard to regulation 6(6), its case is that the three months period of precautionary suspension would only expire on 23 April 2025 reckoned from the 22 January 2025, the date on which it alleges a new suspension resolution was passed. In the final analysis, its case is that whether Mr Fihlani’s suspension is considered in terms of his contract of employment or in terms of regulation 6(6), it has not expired. The resolution of council of the municipality was, in no uncertain terms, to extend the precautionary suspension. No resolution was passed for a new suspension and it would seem, nor was the passing of a new resolution even proposed or discussed. The deponent to the municipality’s affidavit is not entitled to read whatever he likes into a council resolution or substitute words he does not like in the resolution and thus usurp the powers and functions of council. The issue therefore is whether, as a matter of law, and on any interpretation of regulation 6(6), Mr Fihlani’s precautionary suspension could be extended after the expiry of the 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.
- [37] There appears to have been an appreciation of this reality when the council of the municipality looked into Mr Fihlani’s case on 22 January 2025. It, inter alia, resolved that it would have to comply with regulation 6(6) by commencing with the disciplinary hearing on or before the 22 February 2025. That resolution was a clear demonstration of the municipality’s appreciation that it is required to comply with regulation 6(6). It lamentably failed to do so and has not explained why it could not do so. Contrary to the clear provisions of regulation 6(6)(b), on 22 January 2025 it resolved to extend the precautionary suspension. As at that date, the precautionary suspension in terms of regulation 6(6) had not yet expired. It was, however expiring on that date in terms of the contract of employment. That is what, it seems to me, informed its decision to pass a resolution to extend the suspension at that stage so as to prevent the suspension from lapsing. It then failed not only to comply with regulation 6(6) but also with its own resolution which was to ensure that the disciplinary hearing was commenced with before the 22 February 2025.
- [38] Mr Sicotho’s bizarre averments about the suspension not having been extended, but council having resolved to make a new suspension are him being brazenly disingenuous and, as a state functionary, deliberately misleading this Court in an attempt to manipulate the council resolution by seeking to excise, the word “extend” in the resolution and undo a clear intention of council to comply with the law. This was an unlawful conduct on Mr Sicotho’s part and to the extent that he did so on behalf of council, or with the acquiescence of

council, council had in any event, no power to extend Mr Fihlani's precautionary suspension. If the municipality felt that it needed more time before it could commence with the disciplinary hearing and it was faced with a looming expiry of the three months precautionary suspension period provided for in regulation 6(6), it is unclear why it did not approach court to seek an appropriate relief. Instead of doing so, it exercised self-help by simply disavowing that it extended the suspension. It disingenuously came up with a theory of two distinct suspensions. This it did because it knew that it could not, on the face of regulation 6(6), contend that it extended the suspension which, as a matter of fact, it did and did so unlawfully. At some stage during oral submissions in court, I understood counsel for the municipality to be conceding that in fact Mr Fihlani's suspension was extended. In making this concession which, while it was well made by counsel in line with

his duty as an officer of the court, it was an unexpected volte face which had a consequence of undoing the municipality's entire case on the theory of two distinct suspensions.

[39] The underlying constitutional principle with regard to the municipality's obligation to respect the law and its fidelity

to the constitutional framework is not optional. This principle has been restated in various ways in different circumstances and contexts by our courts all the way up to the Constitutional Court. As an illustrative examples, in *Asla Construction*[10], not so long ago, the Constitutional Court said:

"This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in Kirkland:

"[T]here 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. It is the Constitution's primary agent. It must do right, and it must do it properly."

In *Khumalo*[11], the court made it clear that the constitutional and legislative framework must inform an approach that does not undermine the

hard-won protections afforded to public sector employees. The standard against which a state litigant's conduct is measured

is high and ought to accord with the prescripts of the law. In *Merafong*[12], it was stated that it is the duty of state litigants to rectify unlawful decisions:

"This Court has affirmed as a fundamental principle that the state 'should be exemplary in its compliance with the fundamental constitutional principle that proscribes self-help.' What is more, in Khumalo, this Court held that state functionaries are enjoined to uphold and protect the rule of law by, inter alia, seeking the redress of their department's unlawful decisions. Generally, it is the duty of a state functionary to rectify unlawfulness. The courts have a duty to insist that the state, in all its dealings, operates within the confines of the law and in so doing, remains accountable to those on

whose behalf it exercises power. Public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise seek to redress it.”

- [40] One of the ways in which state functionaries or organs of state may seek redress is to approach court for appropriate relief. Instead of acting in an exemplary fashion as a constitutional citizen, the municipality granted itself a right it did not have, the right to extend the precautionary suspension of Mr Fihlani when it realised that the two months contract was due to expire on 22 January 2025. It was contractually proscribed from doing so. However, in terms of regulation 6(6), it still had another month up until the 22 February 2025 as the three months precautionary suspension period would only expire on that date. It therefore still had a month in terms of regulation 6(6) within which to commence with a disciplinary hearing. It inexplicably failed to do so. This therefore means that it had no legal basis to keep Mr Fihlani away from his job or to turn him away when he reported for duty to tender his services on 24 February 2025. In doing so, it acted in flagrant contravention of regulation 6(6) of the Regulations and therefore in breach of its obligation to observe the rule of law.
- [41] The municipality, must have, at some point, realized that it was in a legally awkward situation and in an indefensible violation of the unlawfulness of its conduct. That is possibly why it belatedly, and on the day on which the main application was to be heard, came to court armed with an urgent counter-application raising the issue of the alleged unconstitutionality of regulation 6(6). As indicated earlier, I have decided to deal with both the main application and the counter-application on the basis that any urgency, to the extent that it may have existed, dissipated as a result of the municipality’s need to join the Minister for the purposes of moving the counter-application. I took the view that the main application could not be determined separately from the counter-application whose urgency, if it existed, was said to be inextricably linked to the urgency of the main application. In all the circumstances, the issue of urgency became moot. I turn now to examine, in some detail the counter-application.

Analysis

re counter-application.

- [42] The municipality’s case in the counter-application is that local government is a distinctive sphere of government alongside

national and provincial spheres. As such, it is autonomous with an original constitutional right to govern on its own initiative, the local government affairs of its community, only subject to national and provincial legislation. Therefore, its right to govern may not be compromised or impeded. It relies on various provisions of the Constitution as well as the case of Independent Outdoor Media[13] in which the court said:

“In considering the impugned provisions, one needs to consider the empowering provisions of section 43(c) of the Constitution, which

provides that the legislative authority of the local sphere of government is vested in the Municipal Councils, as set out in section

156. This entitlement connotes a regulatory and policy-making role more than a mere authority to administer and implement

prescripts. This position was confirmed by this Court in *Fedsure*, where it was held that municipal councils are deliberative, legislative assemblies with constitutionally guaranteed legislative

powers.”

[43] The point of emphasis by the municipality is that the constitutional right to govern which is provided for in section 151(3) of the Constitution and the Constitution’s injunction provided for in section 151(4) is that neither the national nor the provincial sphere of government may compromise or impede a municipality’s right to govern or interfere with the exercise of its powers, or the performance of its functions. These provisions suggest that a municipality’s right to govern is not merely a right to implement or to administer laws. In the final analysis, and more relevantly to the issue at hand, the municipality submits that in the narrow context of labour relations, its constitutional right to govern entails an entitlement to regulate its personnel affairs unhindered and therefore regulation 6(6) impermissibly and unconstitutionally interferes with its right to govern in this regard. In doing so, regulation 6(6) takes away a power that is ordinarily enjoyed by all employers to extend a precautionary

suspension of a senior manager in violation of a municipality’s right to govern. This creates a patently untenable situation in which a senior manager such as Mr Fihlani could, while undergoing a disciplinary hearing, be at work and may potentially interfere with witnesses who are usually his subordinates and may also temper with evidence in circumstances in which he or she cannot be temporarily removed pending the conclusion of the disciplinary hearing. That makes regulation 6(6) rigid in that it fails to take into account the existence of instances in which it may be necessary to extend a precautionary suspension after three months in a specific case and on good cause shown.

[44] In advancing the above contentions, the municipality relies, inter alia, on *Economic Freedom Fighters*[14] in which Majiedt J, writing a minority judgment of the Constitutional Court said:

“In Prince this Court explicated that “[a] challenge to the constitutionality of legislation on the grounds that it is over broad is in essence a challenge based on the contention that the legitimate government purpose served by the legislation could be achieved by less restrictive means.”

[45] The constitutional challenge is not without difficulties, some of which I briefly encapsulate below. In mounting the constitutional

challenge, the municipality simply seeks an order declaring regulation 6(6) unconstitutional, invalid and of no force and effect.

If this order is granted in the manner it is pleaded and prayed for in the notice of motion, there would be nothing left in its stead. This means that it would be up to each municipality in the country to decide how long the precautionary suspension should be, where they choose to be specific. There is another more ominous possibility of two endless suspensions that, on the approach adopted by the municipality, in the first instance, would be a suspension pending the finalisation of the investigation, no matter how long that would take. This would be a distinct suspension from a precautionary suspension pending a disciplinary enquiry which would be the second suspension, as the municipality pleaded its case. This is not grounded on any reading of the applicable and relevant regulatory framework.

[46] The suspension communicated to Mr Fihlani in the municipality's letter dated 22 November 2024 specifically refers to a suspension pending the completion of the investigation. That is the suspension which was, through a council resolution taken on 22 January 2025, extended, if the suspension letter dated 22 November 2024 and the resolution of council dated 22 January 2025 are anything to go by. That is what the municipality calls the initial suspension which was, on the case it advances, a suspension pending the investigation report. The report was received on 21 January 2025 and tabled before council on 22 January 2025. In that council meeting, a resolution was taken to extend the suspension. The only suspension that could be extended is the suspension that was in effect which was a suspension pending the investigation report. It is difficult to make sense of extending a suspension whose purpose has been served as the investigation report had been received and dealt with.

[47] Despite the clear wording of the resolution taken on 22 January 2025, the municipality also advanced a case of a new suspension distinct from the initial suspension. The municipality describes this suspension as a suspension pending a disciplinary hearing. The Regulations also do not refer to a suspension pending an investigation or pending a disciplinary hearing. On any reading of

the Regulations, there is only one suspension. It is referred to as a precautionary suspension. Therefore, a municipality is free to explain it in whatever fashion it so desires, but it is required to commence with the disciplinary hearing within three months from the date of the said suspension, should it resolve to subject the senior manager to a disciplinary hearing. If the municipality commences with the disciplinary hearing, it seems to me that an argument could be made that the suspension does not lapse. It follows that the senior manager continues being on suspension until the disciplinary hearing is concluded, if the Regulations are understood in their totality and considered purposefully. There is another conundrum that results from the constitutional challenge of regulation 6(6). Regulation 10(1) whose constitutionality is not under attack provides that the disciplinary hearing must commence within three months of the

resolution to institute disciplinary action. If there is no obligation to expedite the disciplinary processes of a senior manager and his or her suspension can be extended whenever a municipality sees a need to do so, how the disciplinary hearing is going to take place within three months as required by regulation 10(1) comes to the fore. The declaration of constitutional invalidity of regulation 6(6) and the vacuum that is left could render regulation 10(1) legally insensible.

[48] No case was sought to be made by the municipality on why the three months period or the provision that it cannot be extended is too restrictive or overbroad. The municipality just badly asserts in its papers that the provision is overbroad without explaining how it is overbroad beyond saying that this is because it leaves no room for an extension even in a deserving case. There is no explanation why it was unable to meet the three months deadline prescribed by regulation 6(6). No case is sought to be advanced in the municipality's papers what it was doing from the 22 November 2024 and at what stage in the process did it encounter what must surely have been an unexpected, unforeseen environment or situation that militated against it commencing with the disciplinary hearing on or before the 22 February 2025. As I understood it, the municipality had been operating under the understanding that commencing with a disciplinary hearing meant serving Mr Fihlani with a charge sheet which it did on 13 February 2025.

[49] An argument was advanced that in Tshabalala[15] the Labour Appeal Court interpreted regulation 6(6) to mean that the extension of a precautionary suspension is prohibited unless a disciplinary hearing is commenced with which is when the evidence leader reads out the charges to an employee at a disciplinary

hearing. This, notwithstanding the fact that the employer would have commenced with disciplinary processes. It was submitted that the municipality disagrees with this interpretation. The interpretation of the Labour Appeal Court that the municipality

disagrees with was expressed as follows in Tshabalala:

"... A disciplinary hearing is an integral part of the disciplinary process or proceedings; it does not constitute the proceedings in themselves. Read sequentially, the regulations contemplate that the disciplinary hearing is convened by the presiding officer and commenced by the reading of the charges to the senior manager accused of misconduct.

This construction has previously been upheld and applied by the Labour Court. In *Mgengo v Lekwa-Teemane Local Municipality*, Nkutha-Nkontwana J (as she then was) said the following:

[22] The issuing of the charge sheet and the notice to attend the disciplinary hearing do not commence the disciplinary hearing but facilitates the process towards its commencement. I agree with Cele, J that the disciplinary hearing can only commence in the actual sitting when the presiding officer officiates over the proceedings or proverbially takes the captainship and navigate the ship. This construction accords with Regulation 10(1)(a) which states that the disciplinary hearing must commence within three months from the date the Municipal Council

resolved to institute a disciplinary hearing.

[23] I get the impression that the purpose of the Disciplinary Regulation is to ensure that the suspension and disciplinary hearing of a senior manager in the Municipality is attended to expeditiously so as to avoid prolonged leadership vacancy which could impede the rendering of the Municipal services. Also, it cannot be overstated that 'suspension is a measure that has serious consequences for an Employee, and is not a measure that should be resorted to lightly'. Hence it is perfectly logical that, come the three month period of suspension lapses, the Municipal Council is debarred by Regulation 6(6)(b) from extending it. In my view, it is incumbent upon the Municipal Council to act with the speed of a gazette consequent to the resolution to institute a formal disciplinary hearing against a senior manager.'

To that conclusion I would add that the regulation of precautionary suspension is directed not only at the interests and protection of the affected employee; the general public has an interest in the funds expended on public sector employees who remain on suspension

for inordinate periods. As the Court in *Mgengo* observed the regulations hold the municipalities to tight timetables. The interpretation for which the municipality contends is more likely than not to protract periods of suspension particularly where charges of misconduct are served and the convening of the disciplinary hearings are delayed."

[50] The Municipality has not advanced any argument on or challenged regulation 10(3)(a) which reads thus:

"3. The officer leading evidence –

(a) must commence the disciplinary hearing by reading out the charges to the senior managers."

(b)

[51] It seems to me that the interpretation that the service of charges on an employee is the commencement of the disciplinary hearing is incongruent with regulation 10(3)(a). All that the court did in *Tshabalala* was to interpret regulation 10(3)(a) in the manner in which the ordinary grammatical meaning of the words used in that regulation actually mean considered in the context of the Regulations as a whole. Therefore, even without *Tshabalala*, regulation 10(3)(a) has always clearly told all concerned what it means to commence with the disciplinary hearing. In any event, the case advanced by the municipality in the main application was also that it commenced with the disciplinary hearing on time in that it served Mr Fihlani with the charges on 13 February 2025. It should be remembered that part of its case is that there were two distinct suspensions, and therefore, it was not out of time for the commencement of the disciplinary which it did or intended to commence on 10 to 14 March 2025, way before the expiration of the three months period reckoned from the 22 January 2025. It is clear that the municipality has adopted, and it would appear, quite deliberately, an obfuscatory approach to this matter which it is difficult not to conclude that this is done, presumably just to keep Mr Fihlani away from his job beyond the process and

period set out in the Regulations. In other words, it has deliberately embarked on a crafty strategy that is not informed or governed by the Regulations and has thus chosen to operate outside of the Regulations.

- [52] This brings me to the last issue concerning the municipal council's resolution to appeal against a judgment or order of this Court if it did not succeed which is illustrative of what I am alluding to. If this is the case and I hope it is not, it would be very concerning as it would make the municipal council's fidelity to the Constitution in general and the rule of law in particular, at the very least, questionable. This very point was made and emphasised more than two decades ago in Mamabolo[16], albeit in a different context. In that case, the Constitutional Court expressed itself as follows:

"No-one familiar with our history can be unaware of the very special need to preserve the integrity of the rule of law against governmental

erosion. The emphatic protection afforded the judiciary under the Constitution therefore has a particular resonance Recognising the vulnerability of the judiciary and the importance of enhancing and protecting its moral authority, chapter 8 of the Constitution, which marks off the terrain of the judiciary significantly commences with the following two statements of principles:

- '(1) The judicial authority of the Republic is vested in the courts.*
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.'*

These two general propositions are then flossed out and reinforced in the succeeding three subsections of section 165 of the Constitution:

- '(3) No person or organ of state may interfere with the functioning of the courts.*
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality,*

dignity accessibility and effectiveness of the courts.

- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'*

The breath of the injunction is emphasised if one has regard to the compendious meaning the Constitution gives to the term "organ of state" so as to include all executive and legislative bodies in all spheres of government.

The judiciary cannot function properly without the support and trust of the public. Therefore, courts have over the centuries developed a method of functioning, a self-discipline and restraint which, although it differs from jurisdiction to jurisdiction, has a number of essential characteristics. The most important is that judges speak in court and only in court. They are not at liberty to defend or even debate their decisions in public. It requires little imagination to appreciate that the alternative would be chaotic. Moreover, as a matter of general policy judicial

proceedings of any significance are conducted in open court, to which everybody has free access and can access the merits of the dispute and can witness the process of its resolution. This process of resolution ought as a matter of principle to be analytic, rational and reasoned. The rules to be applied in resolving the dispute should either be known beforehand or be debated and determined openly. All decisions of judicial bodies are as a matter of course announced in public, as a matter of virtually invariable practice, reasons are automatically and publicly given for judicial decisions in contested matters. All courts of any consequence are obliged to maintain records of their proceedings and to retain them for subsequent scrutiny. Ordinarily the decisions of courts are subject to correction by other, higher tribunals, once again for reasons that are debated and made known publicly.”

[53] I understand this injunction to mean that organs of state, as part of their duty to respect the authority of the courts, must debate disputes publicly in court proceedings. Thereafter they must consider and carefully apply their minds to the reasons given for whatever decisions courts make. Only thereafter should an organ of state, such as a municipality, consider and if so advised, launch an appeal informed by its deep conviction that the court may have erred in its application of the law to whatever factual matrix that was presented to it or made an error of the law. Where a decision of the court is sound in fact and in law, organs of state, being constitutional beings, are obliged to simply obey judicial decisions. It is not for them to use public funds meant for service delivery to fund litigation, at great cost to the taxpayer, fighting uninformed and unprincipled legal battles just to muscle their way through, regardless of and in total disregard of the judicial process and in particular, without applying their minds to the reasons given for the decisions courts make. This is more so if regard is had to the fact that senior managers are usually appointed on fixed term contracts which may run out while the senior manager has been kept away on full pay unlawfully.

[54] The municipality’s contention that regulation 6(6) is unconstitutional for not allowing for a situation that could arise

and on good cause shown, for a precautionary suspension to be extended, is made without stating the good cause situation that it

was faced with. Therefore, the good cause argument seems to be a hypothetical case on the basis of which the municipality argues, this Court should find regulation 6(6) unconstitutional. Its overbroad argument also ignores what the Constitutional Court said in *Economic Freedom Fighters*[17]. The court in that case also expressed itself as follows:

“... [I]t is important to consider the issue of the widely phrased term “any offence” in the context of the less restrictive means enquiry. This leg requires its own proportionality enquiry in the form of what can conveniently be termed a “costs – benefits analysis” (the limitation must achieve benefits proportional to the costs of the limitation).

The main judgment regards the criminalisation of “any offence” by the impugned section as overbroad. For this reason, it finds the section unconstitutional in its present form. As stated above, it is well established that the central enquiry in respect of the challenge of overbreadth is whether there are less restrictive means available to achieve the purpose of the limitation....

In Case, this Court explicated:

“To determine whether a law is overbroad, a court must consider the means used (the it, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives the law may be deemed overbroad.”

[55] The municipality has not addressed its own understanding of the constitutionally legitimate underlying objectives of regulation 6(6) and indicated how those objectives could have been achieved with any less restrictive means that could have been used. It has, instead, sought to make a case for regulation 6(6) being overbroad only because it does not provide for an extension even on good cause shown. The municipality does not indicate to whom would the good cause would have to be shown by council considering that a municipal council is the ultimate decision making body of a municipality. It is the very structure that would have decided to place a senior manager on precautionary suspension. It is also the very structure that would have failed to ensure that a disciplinary hearing is commenced with within three months. Presumably, it would be the very same structure that would show to itself that a good cause exists for the extension of the precautionary suspension. I cannot imagine a more asymmetrical argument as the one in this case, especially where there is a weaker party and a stronger party in the greater scheme of things or employer/employee relations.

[56] This also ignores the Minister’s argument that what the regulation seeks to do or does is not unique to the municipality.

Some of the objectives of the Regulations are universally applicable in the employment sector and are consistent with the Constitution.

The regulation seeks to ensure that discipline in local government is applied in a prompt, fair, consistent and progressive manner. There is also a need for efficient service delivery which can only be achieved through timeous information on allegations of misconduct and the holding and conclusion of disciplinary hearings. This gives confidence to the communities served by that municipality that their affairs are properly managed and the monies set aside for service delivery are not wasted or misappropriated through a prompt and efficient investigation, management and conclusion of allegations of misconduct.

[57] I am unable to discern any dissonance between the provisions of sections 151 of the Constitution on the right of a municipality to govern on the one hand, and the prompt and timeous investigation of allegations of misconduct, the prompt commencement of a disciplinary hearing - and the lapsing of a precautionary suspension if disciplinary hearing is not commenced with within a reasonable time as provided for in regulation 6(6), on the

other hand. Sight should not be lost of the fact that not all cases of misconduct may require the absence of a senior manager from work. For a precautionary suspension to be effected, a municipal council must have a reason to believe that the senior manager's presence at the workplace may jeopardise the investigation of the alleged misconduct; that it may endanger the well-being or safety of any person or municipal property; or be detrimental to stability in the municipality; or that the senior manager may interfere with potential witnesses; or commit further acts of misconduct[18]. These are all the jurisdictional factors for a precautionary suspension of a senior manager.

- [58] It seems to me that there must be a process to determine if a precautionary suspension is even necessary. What this means is that the Regulations place a very high premium on the presence of a senior manager at work for obvious reasons. This must be juxtaposed with a senior manager being on an endless precautionary suspension on as yet unsubstantiated allegations of misconduct while he or she is on full pay with no loss of benefits. The taxpayer must pay for his services while no service delivery to the communities is taking place. While this may be ameliorated through the appointment of an acting senior manager, that comes at even more expense as two people occupying the same position are paid while the senior manager is on endless suspension. Add to that the fact that the absence of the senior manager causes institutional instability. The fact that some of the unfortunate circumstances leading to these suspensions which could be due to either political instability which, regrettably, is not uncommon or even sheer negligence or poor management of labour relations cannot be downplayed. Surely, the ministerial interventions in the form of these Regulations are absolutely understandable and amply justified as an oversight mechanism. Otherwise communities in these municipalities most of whom serve poor communities, have no other hope for survival other than through the delivery of basic services provided by these very municipalities. When there is lack of service delivery, these communities remain tramped in abject poverty, disease and are even exposed to preventable deaths. These considerations make the poignant point that senior managers should be suspended under very exceptional circumstances, with the council being very constrained to let a suspension continue longer than it is absolutely necessary. A suspension of a senior manager is not just a matter of investigating misconduct no matter how long it takes, it may also be a matter of livelihood or quality of life for the citizenry or even life and death because of the ripple effect it may have on service delivery. In this case, there is no attempt in the papers to explain how the municipality got to the situation where it did not comply with regulation 6(6) by conducting a disciplinary enquiry within three months or even its contractual obligation, by conducting a disciplinary hearing within two months, not to mention its own resolution to conduct the disciplinary inquiry on or before the 22 February 2025. It has not, even by way of an example, demonstrated the good cause scenario on which it partly hoists the constitutional challenge. In these circumstances the constitutional challenge is made abstractly, presumably because the municipality could not explain its failure to comply with all these obligations, otherwise it would have done so.

[59] An argument was made on behalf of Mr Fihlani that even the right to govern that is provided for section in 151(3) of the Constitution is not applicable to any and everything. This is not made clearer than in section 156(1)(a) of the Constitution which provides that “[a] municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5.” I need not enumerate the matters listed in Part B of Schedules 4 and 5, save to point out that labour relations is not one of them. The basis on which within our constitutional arrangement, the municipality should be left to its own devices, accountable to no one in respect of labour matters which are a key cog for service delivery, is foggy at best or non-existent on the papers.

Conclusion.

[60] In all the circumstances, Mr Fihlani must succeed in the main application as the extension of his suspension effected on 22 January 2025 was without any legal basis, it having been effected contrary to the clear provisions of regulation 6(6) of the Regulations. Mr Fihlani’s main application must therefore succeed. The constitutional challenge to regulation 6(6) which was advanced by the municipality in the counter-application must fail. It must fail also because there is no dissonance between section 151 of the Constitution and regulation 6(6) of the Regulations. Regulation 6(6) is simply not overbroad and is in fact properly aligned with what it seeks to achieve which is to strike an appropriate balance between the interest of municipalities and the senior managers as well as taxpayers, and indeed all interested parties, by ensuring that disciplinary processes commence and are concluded with the necessary degree of promptitude. With all of this in mind, regulation 6(6) is simply not unconstitutional. Differently put, the municipality has failed to show that regulation 6(6) is in any way unconstitutional. Therefore, the counter-application falls to be dismissed. There is no reason why costs should not follow the result.

The result.

[61] In the result, the following order shall issue:

1. It is declared that the precautionary suspension of Mr Mluleki Fihlani by the Port St Johns Local Municipality (the municipality) terminated on 21 February 2025.
2. The municipal council’s decision to extend the suspension of Mr Fihlani is declared invalid and is reviewed and set aside.
3. It is declared that Mr Fihlani is entitled to return to work forthwith as the Municipal Manager of the municipality.
4. The municipal council of the municipality is interdicted from unlawfully suspending, denuding and/or taking away from Mr Fihlani,

his right to render his contractual duties to the municipality.

5. The Mayor and the Speaker of the municipality are directed to see to the immediate implementation of the terms of this court order.
6. The municipality shall pay the costs of the main application, such costs to be inclusive of the costs of two (2) counsel, where such services were engaged on scale C.
7. The counter-application is dismissed.
8. The applicants in the joinder application and in the counter-application shall pay the costs of the joinder application and the counter-application, such costs to include the costs occasioned by the employment of two counsel where so employed on scale C.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicant : M Gwala SC with Z Mashiya

Instructed by

: Sakhela Inc.

MTHATHA

Counsel for the respondents : G Madonsela SC with M Nombewu

Instructed by

: Mvuzo Notyesi Inc.

Counsel for the 1st & 2nd respondents: T.M. Jikwana

(counter-application)

Instructed by

: State Attorney

Date heard

: 02 May 2025

Date delivered

: 08 July 2025

[1] The relevant clause of his contract of employment reads as follows: “14. PRECAUTIONARY SUSPENSION 14.1 The employer may suspend the Employee on full pay in accordance with the Local Government: Disciplinary Regulations for Senior Managers, 2010, if he is alleged to have committed a serious offence and the Employer believes his presence at the

workplace might jeopardize any investigation into the alleged misconduct or endanger the wellbeing or safety of any person or municipal property. 14.2 The Employee who is to be suspended shall be notified, in writing of the reasons for his suspension simultaneously or at the latest within 24 hours after suspension. He shall have the right to respond within seven (7) working days, such a procedure is complaint with the requirements of Local Government: Disciplinary Regulations for Senior Managers, 2010. 14.3 If the Employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within sixty (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 full duty.”

[1] The relevant clause of his contract of employment reads as follows:

“14. PRECAUTIONARY SUSPENSION

14.1 The employer may suspend the Employee on full pay in accordance with the Local Government: Disciplinary Regulations for Senior Managers, 2010, if he is alleged to have committed a serious offence and the Employer believes his presence at the workplace might jeopardize any investigation into the alleged misconduct or endanger the wellbeing or safety of any person or municipal property.

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14.3 If the Employee is suspended as a precautionary measure, the employer must hold a disciplinary hearing within sixty (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 full duty.”

[2] Constitution of the Republic of South Africa, 1996.

[3] Rule 6(5)(d)(iii) of the Uniform Rules of Court provides – Any person opposing the grant of an order sought in the notice of motion shall – if such person intends to raise any question of law only such person shall deliver notice of intention to do so, within the time stated in the preceding subparagraph, setting forth such question.

[4] *Graham v Law Society*, NP 2016 (1) SA 279 GP at 291 paras 41 and 43.

[5] *South African History Archive Trust v South African Reserve Bank and Another* [2020] 3 All SA 380 (SCA); 2020(6) SA 127 (SCA) para 30.

[6] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce & Tourism and Others Chweu Local Municipality & Others v Sabie chamber of Commerce and Tourism and Others* 2021 (3) SA 47 (SCA) para 81.

- [7] Constitution of the Republic of South Africa, 1996. Section 41(2) thereof provides: An act of Parliament must – (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental relations.
- [7] Constitution of the Republic of South Africa, 1996. Section 41(2) thereof provides: An act of Parliament must –
- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
- (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental relations.
- [8] Minister for Transport and Public Works: Western Cape & Others v Adonisi and Others 2024 (4) SA 499 (SCA) para 93.
- [9] Resolution No. 22/01/2025 – 10351 Upon a motion moved by Cllr Jam-jam and seconded by Cllr Mhlabeni, the Council resolved to adopt the recommendations of the independent investigator. Council also resolved to set up the disciplinary committee and appointment of a disciplinary hearing presiding officer. Council resolved that the suspension of the Municipal Manager should be extended up until the finalization of Disciplinary hearing process. Council resolved that the disciplinary hearing should be instituted without delay from the date of this investigation report and the council must ensure that it complies with regulation 6(6) of Local Government: Municipal Systems Act, 32 of 2000 Regulations on Senior Management Disciplinary Procedures which states that if a Senior Manager is suspended, a disciplinary hearing must commence within three months after the date of the disciplinary hearing must be conducted before the 22nd February 2025.
- [10] Buffalo City Metropolitan Municipality v Asl a Construction (Pty) Limited 2019 (4) SA 331 (CC) para 60-61
- [11] Khumalo v MEC for Education 2014(5) SA 57 (CC) at 589D.
- [12] Merafong City v Anglogold Ashanti 2017 (2) SA 211 and 235 H to 236 A.
- [13] City of Cape Town v Independent Outdoor Media (Pty) Ltd and Others 2024 (1) SA 301 (CC); 2024 (4) BCLR 483 (CC) para 45.
- [14] Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another 2021(2) SA I (CC); 2021(1) SACR 387 (CC) at para 134.
- [15] Tshabalala v Moqhaka Municipality and Another [2025] 2 BLLR 189 (LAC); (2025) 46 ILJ 590 (LAC) paras 7-9.
- [16] S v Mamabolo 2001(3) SA 409 (CC); 2001(5) BCLR 449 (CC); 2001 (1) SACR 686 (CC) at paras 17-18.

[17] Note 2 supra at para 134-136.

[18] Regulation 6(1) of the Regulations.

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