

SOUTH AFRICA / JUDGMENT

Khali v Uphongolo Local Municipality and Others (2025/058478) [2025] ZALCD 20 (10 June 2025)

[2025] ZALCD 20

COURT

Labour Court Durban

BEFORE

Allen-Yaman

CASE / FILE NUMBER

2025/058478

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IN

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case

No: 2025-058478

Not

Reportable

In

the matter between:

MNTONJANI

BETHUEL KHALI

Applicant

and

UPHONGOLO

LOCAL MUNICIPALITY

First Respondent

MAYOR

OF THE UPHONGOLO LOCAL MUNICIPALITY

Second Respondent

SPEAKER

OF UPHONGOLO LOCAL MUNICIPALITY

Third Respondent

Heard:

28 May 2025

Delivered:

This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 16h00 on 10 June 2025

JUDGMENT

ALLEN-YAMAN J

Introduction

[1] In his application, the applicant sought orders relating his suspension (ostensibly effected by the first respondent's

council),

'2. The purported suspension of the Applicant as Municipal Manager by the Second Respondent in the letter dated 11 April 2025, but given to the Applicant on 14 April 2025, is hereby declared invalid and set aside.

3. The First and Second Respondents are interdicted from preventing the Applicant from performing his functions as Accounting Officer and Municipal Manager of the First Respondent.'

[2] The application was opposed by the respondents, albeit that the authority of those who were said to have acted on behalf of the first respondent was disputed by the applicant. Such issue was raised in the applicant's initial replying affidavit, and subsequently addressed by way of a Notice in terms of Rule 7 of the Rules of the High Court.

[3] When the matter first came before this court on 12 May 2025 it was adjourned to 28 May 2025 for the parties to deal with the issue of authority, and to deliver further affidavits. By 28 May 2025, the following affidavits had been delivered:

- The applicant's founding affidavit;
- The applicant's supplementary founding affidavit;
- The respondents' answering affidavit;
- The applicant's replying affidavit;
- The respondents' supplementary answering affidavit;
- The applicant's supplementary replying affidavit;
- A number of affidavits deposed to by members of the first respondent's council, at various intervals throughout the exchange of the main affidavits;
- A further supplementary affidavit deposed to by the third respondent; and
- Three affidavits deposed to by individuals relating to what was said to be a transcription of a meeting of the first respondent's council of 28 March 2025.

- [4] At the outset of the hearing the respondents' agreed that the application was to be dealt with as an urgent application, which order will be granted accordingly. Also at the outset, the parties agreed that the outcome of two crisp issues would be dispositive of the application: (1) the question of the authority on the part of the second and third respondents to have instructed

attorneys to have represented the first respondent, and thereby to have entered opposition on its behalf; and (2) the admissibility of what the applicant asserted was the transcription of a meeting of the first respondent's council on 28 March 2025.

Background

- [5] The applicant is the Municipal Manager of the first respondent, having been appointed to such position in 2023.

- [6] At a Special Council Meeting convened on 5 March 2025 the first respondent's council considered an item on its agenda

concerning certain allegations made regarding misconduct said to have been committed by the applicant. Pursuant to deliberations

having taken place, the first respondent's council resolved as follows:

'Council was satisfied that this prima facie evidence was sufficient to institute possible financial misconduct, and given the seniority of this position of Municipal Manager, the following recommendations as tabled were considered:

- a) On the basis of the prima facie evidence before Council, that the Municipal Manager, Mr M B Khali be suspended with immediate effect,

with full pay i.e. salary, except tools of trade benefits, pending an investigation.

- b) Due to the seriousness of the allegations and the seniority of the position, it would not be proper to conduct investigation while he is still at work as he might intimidate witnesses, tamper with crucial documents as he is the custodian of these records, as such he should be instructed to vacate the municipal building with immediate effect until investigation is concluded. Further to that, he must not have access to any municipal assets and must not be in any contact with municipal employees while still under investigation.

- c) Subsequent to the above, the Finance Department to terminate all services (electricity and water) in the official house occupied

by the Municipal Manager with immediate effect.

- d) Mr M V M Mbatha is appointed as an Acting Municipal Manager immediately for the period of three months whilst the investigation is undergoing.

- e) The appointment of an independent legal or labour professionals outside of the municipality's panel to investigate and present the matter in a hearing.
 - f) The appointment of an independent and competent legal professionals outside of the municipality's panel to preside over a hearing.
 - g) The disciplinary process be concluded within 03 months and the outcome of the hearing to be presented to Council.'
- [7] The letter subsequently transmitted to the applicant did not, however, effect his suspension with immediate effect. Instead he was informed of the allegations of misconduct which had been levelled against him and was called upon to make written

representations as to why he ought not to be suspended from the performance of his duties as Municipal Manager. The letter,

written on 5 March 2025, required his response on or before 14 March

2025. The applicant approached a firm of attorneys who

responded by way of a letter dated 12 March 2025 in which the legality of the notice of intention to suspend was raised.

This, in turn, elicited a response from a firm of attorneys, said to be acting on behalf of the first respondent. The applicant

ultimately made the representations requested of him on 14 March 2025.

- [8] On 19 March 2025 the first respondent's council convened a further Special Council Meeting in which a further resolution was taken concerning the applicant, it seemingly by then having been drawn to the attention of those dealing with the matter that the initial resolution taken had not been in compliance with the Disciplinary Regulations for Senior Managers, 2020. The

resolution taken was that,

'1. Council was satisfied that this prima facie evidence was sufficient to institute possible financial misconduct and given the seniority of this position of Municipal Manager, the following recommendations as tabled were considered:

- a) the matter has been reviewed and Council considered various amendments to the resolution adopted under Items 17.1 on 05 March 2025, to ensure compliance with the Disciplinary Regulations for Senior Managers, 2020, promulgated under Section 120 of the Municipal Systems Act.
- b) on the basis of the prima facie evidence before Council, that the Municipal Manager, Mr M B Khali, be notified of the council's

intention to suspend him and provided with a period of seven days to make written representations to the municipal council why he should not be suspended, in terms of Regulation 6(2), as a precautionary measure.

- c) due to the seriousness of the allegations and the seniority of the position, it would not be prudent for the Municipal Manager to remain in Office, for the 07-day period, as he may intimidate witnesses or tamper with crucial documents and other evidence, as he is the custodian of such records. As such he must be requested not to attend work until the Council has deliberated and resolved on any written representations he may make. He must vacate the municipal offices with immediate effect until Council has considered his representations and resolved thereon. Further to that, he must not have access to any municipal assets and must not be in contact with any municipal employees whilst this process unfolds.
 - e) The appointment of an independent legal or labour professionals outside of the municipality's panel to investigate and present the matter in an hearing.
 - g) The Mayor to oversee the processes contemplated by paragraphs e) and f) above.
2. The Honourable Mayor is authorised to advice the Municipal Manager in accordance with the resolutions above, and the Honourable Speaker is to be requested to convene a Special Council meeting to consider any written representations made by the Municipal Manager, once the 07-day period has expired.'
- [9] It was common cause that the first respondent's council met by way of an Ordinary Council Meeting on 28 March 2025, during the course of which the representations previously made by the applicant were considered. Precisely what transpired at that meeting was not common cause, and the question whether a resolution to suspend the applicant from his duties as the first respondent's Municipal Manager had been validly passed forms the basis of the present application.
- [10] On 11 April 2025 the applicant was notified of his suspension,
- '1. The municipal council have considered the allegations of misconduct by you, which was referred to in the notice of the allegation of misconduct, as well as the representation submitted by you. The municipal council is satisfied that there is reasonable cause to believe that you committed these acts of misconduct.
2. The allegations are serious and therefore, the municipal council will appoint an independent investigator to investigate the allegations and submit a report with recommendations to it within the prescribed period.

3. The municipal council have reason to believe that your presence at the workplace may jeopardize any investigation into the alleged misconduct, or you may interfere with potential witnesses, or commit further acts of misconduct, amongst others. The municipal council has resolved to suspend you on full pay, effect from 11th April 2025. You are requested to return municipal laptop, router and office keys to Honourable Mayor.
 4. You shall have no contact with any of the municipal employees unless such authority is granted to you by the Mayor.'
- [11] This led the applicant to having initiated the present application, his assertion that his suspension was unlawful having been predicated upon his allegation that the question of his suspension had not been voted upon and accordingly no resolution to effect his suspension had been taken by council.
- [12] As previously indicated, it was agreed at the commencement of proceedings that the outcome of this application would rest on this court's findings in regard to two issues; authority and the admissibility of a document upon which the applicant relied.

Authority

- [13] In the first of his replying affidavits the applicant raised an 'in limine' point that the deponent to the answering affidavit (the third respondent) did not have the authority to oppose the application on behalf of the first and second respondents. On the first occasion on which this matter came before this court, this court drew the applicant's counsel's attention to the need on the part of the applicant to have addressed the issue by way of a Notice in terms of Rule 7 of the High Court Rules, if indeed he intended to raise a challenge to authority.[1]
- [14] By the time the matter again came before this court, the applicant had delivered such a Notice and a response thereto had been provided, in the form of a resolution passed by the first respondent's council on 19 May 2025,

'1. Council was satisfied with the submissions presented by the Acting Municipal manager, that:

- a) the Acting Municipal Manager's decision to instruct Nompumelelo Hadebe Inc (NHI) and Advocate Kuboni to represent the Municipality,

Honourable Mayor and Honourable Speaker in opposing Urgent Labour Court application instituted by the Municipal Manger, Mr M B Khali is ratified.

- b) The Acting Municipal Manager, Mr M V M Mbatha is authorised to take all necessary steps to defend the application instituted by the Municipal Manager, Mr M B Khali.
- c) The Honourable Mayor, Honourable Speaker and Acting Municipal Manager are authorized to sign papers to defend the urgent Labour Court application instituted by the Municipal Manager, Mr M B Khali.'

[15] In his supplementary replying affidavit, having referred to such resolution, the applicant asserted,

‘I reiterate my denial that the Third Respondent was authorised to depose to the answering affidavit or to oppose the application on behalf of the First Respondent.

I have been advised and respectfully submit that the Reply to the Rule 7 notice and the Resolution attached thereto does not confer the necessary authority and further legal argument shall be advanced at the hearing of this matter.’

[16] Mr Dayal SC argued on behalf of the applicant that the resolution could not ex post facto ratify that which had been done by Mr Mbatha in his capacity as the first respondent’s Acting Municipal Manager for the reason that his appointment to such position on 5 March 2025 had itself, not been lawfully effected. This was so, he argued, for the reason that the first respondent’s council had then resolved to suspend the applicant (and appoint Mr Mbatha as the Acting Municipal Manager) in circumstances in which the Disciplinary Regulations for Senior Managers had not been complied with. In response, Mr Kuboni argued on behalf of the respondents that the applicant’s concerns were unsustainable in light of the principles established in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 SCA.

[17] In *Oudekraal* the Supreme Court of Appeal held on the point of unlawful administrative action that,

‘... the proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect or ignored depending on the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing valid consequences for so long as the unlawful act is not set aside.’[2]

[18] The consequence of the first respondent’s resolution of 5 March 2025 was, inter alia, Mr Mbatha’s appointment as the first respondent’s Acting Municipal Manager. As that resolution has not been reviewed and set aside his resolution remains valid and effective.

[19] To the extent that it was argued further that Mr Mbatha, as Acting Municipal Manager, did not have the power or the authority to instruct attorneys to act on behalf of the respondents, given that the authority to do so could only have been exercised by the first respondent’s council, the respondents argued that the first respondent’s council had ex post facto ratified the actions taken by him and accordingly, to the extent that he may have lacked the power to have taken the steps taken by him prior thereto, by 19 May 2025 such powers had been vested in him.

[20] The permissibility of ex post facto ratification was considered in *Smith v Kwa Nonqubela Town Council* [1999] 4 All SA 331 (A), in which the court was called upon to decide the self-same issue; the locus standi on the part of the factionary to have acted on behalf of the municipality in circumstances in which his authority to have done so had been ratified after the fact. The Supreme Court of Appeal found that this was permissible,

‘It is in general essential for a valid ratification "that there must have been an intention on the part of the principal to confirm and adopt the unauthorised acts of the agent done on his behalf, and that the intention must be expressed either with full knowledge of all the material circumstances, or with the object of confirming the agent's action in all events, whatever the circumstances may be" (*Reid and Others v Warner* 1907 TS 961 at 971 in fine - 972). Counsel for Smith submitted that there is no evidence that the councillors of the Transitional Council had knowledge of the fact that Watson's action had been unauthorised and, consequently, that the purported ratification was of no effect. I do not think, on the wording of the stated case, that this argument is open to Smith. In any event, the minutes of the meeting state that the matter was discussed in full and, further, the decision to proceed with the case evinces a clear intention to ratify whatever action was taken, irrespective of the legal niceties involved.’[3]

[21] In the circumstances, this court finds that the respondents’ attorneys are duly authorised to represent the first respondent in the present proceedings. As such, the application is to be determined on the basis of it having been opposed, and consideration will be given to the affidavits which have been delivered on behalf of the respondents.

Admissibility of transcript

[22] The applicant sought to rely upon what he alleged was a transcription of the recording of the council meeting of 28 March

2025. The respondents challenged the admissibility of such transcript, for the reason that the respondents did not accept the authenticity thereof.

[23] There was no dispute between the parties that the admission of the transcription was governed by the Electronic Communications and Transactions Act, 2022 (the ECTA), the parties having been in agreement that the original recording of the meeting met the definition of a ‘data message’,

‘... means data generated, sent, received or stored by electronic means and includes –

- (a) voice, where the voice is used in an automated transaction; and
- (b) a stored record.’

In seeking to establish the admissibility of the transcription, the applicant relied on section 15(1) of the ECTA,

‘In any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence on the mere grounds that it is constituted by a data message; or if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.’

[24] The fact that the ECTA allows for the admission of a data message does not mean that the ordinary rules relating to the admissibility of evidence are thereby excluded; the admissibility of the data message is still required to meet general evidentiary standards.[4] This being so, it was incumbent upon the applicant to establish, at the outset, the authenticity thereof.

[25] In consideration of this issue, it is instructive to set out the manner by which the data message came to be introduced by the applicant, in the form of what was said to be the transcription thereof.

[26] In his founding affidavit the applicant did no more than allude to the existence of a recording of the meeting of 28 March 2025, then said to have been in the possession of one Mr S Mncwango, the clerk responsible for the recording of the first respondent’s council meetings,

‘My legal representatives have obtained a copy of the Minutes of the meeting of 28 March 2025, which is annexed hereto marked H. They have also confirmed with Mr Mncwango that he has an audio copy of the recording of the meeting which he is willing to make available to this Honourable Court at that hearing of this matter.’

Such audio recording was not made available to this court at the initial hearing of the matter.

[27] In a supplementary founding affidavit, the applicant indicated that he had obtained a copy of the audio recording of the meeting of 28 March 2025, and was, ‘willing to make it available to this Honourable Court at the hearing of the matter.’

[28] Pursuant to the respondents having delivered their answering affidavit and the applicant having delivered his reply, on 19 May 2025, the applicant delivered under cover of a filing notice what was alleged to have been the transcript of the meeting of 28 March 2025.

[29] The respondents delivered a supplementary answering affidavit in which they challenged the admissibility of the transcript on the basis that:

- The source of the transcription had not been identified;
- The applicant had not explained under oath how he had obtained the recording;
- It constituted inadmissible hearsay; and
- To the extent that the entire transcription was rendered in English, no explanation had been provided as to how that which had been said in the course of the meeting in isiZulu had been translated into English.

- [30] This in turn led the applicant to deliver several additional affidavits in which the authenticity of the transcription was sought to have been established, which affidavits included those deposed to by his attorney of record, a transcriber, Ms N Joshua, and another person in the employ of the transcription service, Mr S Msomi.
- [31] In consideration of that which has been placed before this court, this court is unable to conclude that the applicant has established the authenticity of the data message upon which he seeks to rely.
- [32] Firstly, the only person capable of establishing the authenticity of the data message was Mr S Mncwango, the person who had been responsible for the creation of the recording of the meeting of 28 March 2025. He himself provided no affidavit concerning the authenticity thereof. Whilst the reason for his failure to have done so does not detract from the omission itself, the reason provided by the applicant for such omission (being that Mr Mncwango was alleged to have been intimidated) was itself hearsay, without any application for its admission in accordance with s3 of the Law of Evidence Amendment Act, 1988.
- [33] To compound matters, not one of the affidavits deposed to in relation to the recording itself evinces either (1) that Mr Mncwango had indicated to the recipient thereof that the recording had indeed been the recording of the meeting of 28 March 2025, or (2) even that the recording upon which the applicant relied had in fact been obtained from Mr Mncwango.
- [34] In his founding affidavit dated 24 May 2025 the applicant alleged that his legal representatives had 'confirmed with Mr Mncwango that he has an audio copy of the recording of the meeting which he is willing to make available to this Honourable Court at the hearing of this matter.' No confirmatory affidavit by his attorney in which the correctness of that allegation was provided to this court. In his supplementary founding affidavit dated 30 May 2025 the applicant sought to explain the circumstances which had resulted in his inability to obtain a confirmatory affidavit from Mr Mncwango. Given that it was alleged that Mr Mncwango had declined to depose to a confirmatory affidavit on 23 May 2025, it is uncertain as to why this issue was not addressed in the applicant's founding affidavit. Be that as it may, the applicant asserted only that he then had a a copy of the audio recording of the meeting of 28 March 2025, and was willing to make it available to this Honourable Court at the hearing of the matter. At no point in that affidavit did the applicant articulate that he had, in fact, obtained the audio recording from Mr Mncwango, or that in so doing, the latter had provided any assurances to him that the recording he was then being given was in fact the recording of the meeting of 28 March 2025.
- [35] In his replying affidavit of 11 May 2025 the applicant did no more than reiterate the reasons given in his supplementary founding affidavit for the absence of any confirmatory affidavit on the part of Mr Mncwango.

[36] The transcription upon which the applicant relied was filed as a stand-alone document, unsupported by any affidavits, on 19 May 2025 which resulted in the respondents having challenged the admissibility thereof in their supplementary answering affidavit for the reasons detailed above. It was only then, at a point in time when the respondents had no further opportunity to deliver any further affidavits, that the applicant in his supplementary replying affidavit endeavoured to establish the authenticity of the recording.

[37] Having attached a copy of the transcript to his supplementary replying affidavit dated 23 May 2025, the applicant alleged,

‘My attorneys have attended to obtaining an independent transcription service to interpret and transcribe the meeting that took place on 28 March

2025. They have obtained a recording of that meeting from Mr Sanele Nhlakanipho Mncwango, who is the scribe of the First Respondent. The transcript has been served and filed as part of these proceedings. A copy of same is also annexed hereto, marked “RA10”.

[38] At no point thereafter did any of the applicant’s attorneys themselves assert that they had obtained an audio recording from Mr Mncwango, or confirm the correctness of the applicant’s statement made that they had obtained the audio recording of the meeting of 28 March 2025 had been obtained from Mr Mncwango. The further affidavit by Ms N Joshua did no more than confirm that she had transcribed an audio recording which had been provided to her by the applicant’s attorney, having been informed that it was a recording of a meeting of 28 March 2025 of the first respondent’s council.

[39] This court is accordingly unable to conclude that the data message provided is authentic. However, and even if this court could somehow have concluded otherwise, the accuracy of the transcription provided by the applicant was nevertheless in doubt.

[40] The certificate of veracity provided by KZN Transcription Service in respect of the transcription is at variance with the affidavit deposed to by Ms Joshua. The relevant portions of the certificate read,

‘We, hereby certify that in as far as it is audible the foregoing is a true and correct transcript of the recording provided by you in the matter:

...

TRANSCRIBER’S NOTES: The recording was fairly clear however, it was in both isiZulu and English. There were interruptions due to Councillors speaking simultaneously and certain parties leaving the auditorium while the meeting was in progress.’

- [41] The transcription was rendered entirely in English. In consideration of the transcriber's note, and that which was stated by her in her subsequent affidavit, it is clear that the meeting was not conducted in English alone. Given that isiZulu was at times employed, the certification asserting that the transcription is a true and correct transcription of the recording cannot possibly be correct.
- [42] From the affidavit deposed to by Ms Joshua it is clear that a certain amount of interpretation was undertaken in the completion of the transcription. She explained the process followed, '4. ... I confirm that I listened to the recording of this council meeting, with particular reference to item 17, when councillors were dealing with the Applicant's item.
5. I realised that in the recording, some councillors were speaking in both English and Isizulu. I also realised that some councillors were speaking sentences in English only and also in Isizulu only.
6. I managed to transcribe a portion of the recording which was in English. I then asked my colleague, Mr Sandile Oscar Msomi who understands IsiZulu better than me, to interpret the Isizulu portion of the recording. Mr Msomi assists me with interpretations and translations from Isizulu to English and from English to Isizulu, whenever needed. He has been an interpreter since 2016.
7. After Mr Msomi interpreted, I once again listened to the recording and read the portion of the transcript that was interpreted from Isizulu to English. I read the completed English transcript and also read the minutes of the Council meeting of 28 March
2025. I satisfied myself that the minutes and the transcript and the recording are in conformity. I accordingly issued a certificate of veracity.'
- [43] From this it is evident that Ms Joshua herself was capable of transcribing only the English portion of the recording. For those individuals who had spoken in isiZulu, she was obliged to rely on the interpretation done by Mr Msomi. Mr Msomi, in his affidavit, did no more than express his experience in the field of interpretation (albeit not specifically in relation to the isiZulu language), and confirm the correctness of the allegations made by Ms Joshua in relation to him. Insofar as Ms Joshua's affidavit was concerned, absent therefrom was any allegation that Mr Msomi had confirmed the correctness of his interpretation of the isiZulu portion thereof.
- [44] Ms Joshua's subsequent statement that the minutes, the transcript and the recording were in conformity took the matter of the accuracy of the transcription no further. She, by her own admission, was insufficiently proficient in the language of isiZulu to have been able to determine the accuracy or otherwise of Mr Msomi's interpretation of that part of the recording.

Moreover, leaving aside for the moment that the authenticity of the minutes of the meeting of 28 March 2025 which had been placed before the court had been placed in dispute, (if they were indeed the same minutes as had been placed before the transcriber), those minutes did not accord with the transcription in material respects. By way of example, whilst a copy of the applicant's representations which had been made to the first respondent had been placed before the court, neither the minute nor the transcription reflected precisely what had been stated therein, despite the fact that it was recorded in both that the representations were being read out at the meeting.

[45] As the transcription does not distinguish that which Ms Joshua transcribed directly, being the statements made in English, and that which she had relied upon Mr Msomi to interpret, being the statements made in isiZulu this court is unable to distinguish between them. In the circumstances, it is not possible to determine which portions of the transcript may have been established, on the basis of Ms Joshua's affidavit alone, to have been accurate.

[46] In his supplementary replying affidavit dated 23 May 2025 to which the transcript in question was attached, the applicant sought to place reliance upon 'the confirmatory affidavits of the various councillors of the first respondent, confirming the correctness of the transcript.' As at 23 May 2025, no affidavit by any of the first respondent's Councillors was yet in existence which had dealt with the accuracy of the transcript upon which the applicant sought to place reliance.

[47] Subsequent to having delivered his supplementary replying affidavit, the applicant caused several further affidavits to be delivered, all of which had been deposed to by Councillors of the first respondent, the earliest of which was dated 25 May 2025 and the latest 27 May

2025. Each stated,

'I attended an Ordinary Council Meeting of the uPhongolo Local Municipality held on 28 March 2025.

I have read the replying and supplementary affidavits of MR MNTONJANI BETHUEL KHALI, the Applicant in this matter, and I confirm the averments made in those affidavits which deal with the Council Meetings of the uPhongolo Local Municipality and how the item regarding the suspension of the Applicant was dealt with.

I have also read a copy of the transcript of a recording of the Ordinary Council Meeting of 28 March 2025, and I confirm that the transcript accurately records what was said and transpired during the said Ordinary Council Meeting.'

[48] Given that the transcription sought to be relied upon by the applicant was annexed to his supplementary founding affidavit as its final annexure, it is difficult to understand why the individual Councillors had each stated that they had also read a copy of the transcript, thereby intimating that the document read had not been a part of the supplementary replying affidavit. Given the reference to the transcript as a separate document, without any reference having been made to that which had been incorporated in the supplementary

replying affidavit, and without any other means of identification, it is also not possible to conclude that the transcript to which each referred was, indeed, the same document as had been annexed to the applicant's supplementary replying affidavit. This is compounded by the fact that in each affidavit it was stated that 'the transcript accurately records what was said' in circumstances in which such assertions could not have been correct in relation to the transcript relied upon by the applicant, rendered as it was entirely in English.

- [49] In the circumstances, and in the event that the authenticity of the data message itself had not been placed in dispute, in consideration of the factors listed in s15(3) of the ECTA, the transcription itself falls to be rejected on the basis of it having had no evidential weight.
- [50] This being the case, the issue of the legality of the applicant's suspension is required to be determined on the basis of the parties' respective affidavits, without reference to the transcription. It was the applicant's case that his suspension was unlawful for the reason that he alleged that no resolution had been passed by the first respondent's council authorising the Mayor to have acted as he had done. The respondents on the other hand, denied the absence of a resolution. Despite the dispute between the parties concerning whether a resolution had been passed, it was nevertheless common cause that no vote had taken place in the course of the first respondent's council's meeting of 28 March 2025 concerning the applicant's suspension.
- [51] Although not the applicant's pleaded case, the applicant argued that the absence of any voting in and of itself was dispositive of the unlawfulness of his suspension, by virtue of the first respondent's Standing Rules and Orders, 2017. Clause 29 thereof concerns decisions taken by voting, and provides,

'Decisions by voting

- (1) A quorum must be present in order for a vote to be taken.
- (2) All questions concerning the following matters must be determined by a decision taken by the council with a supporting vote of a majority of the number of Councillors determined in accordance with the municipality's establishment notice –
 - (a) the passing of by-laws;
 - (b) the approval of budgets;
 - (c) the imposition of rates and other taxes, levies and duties;
 - (d) the raising of loans;
 - (e) the rescission of a council resolution within 6 months of the taking thereof; and
 - (f) any other matter prescribed by legislation.
- (3) All other questions before the council must be decided by a majority of the votes cast by the Councillors present.

- (4) If on any matter there is an equality of votes, the Speaker or chairperson may exercise a casting vote in addition to a deliberative vote as a Councillor, provided that a Speaker or chairperson will not exercise a casting vote during the election of any office bearer of council and when Council considers matters listed in section 162 of the Constitution.’
- [52] This provision does not establish a requirement that every decision to be taken by the first respondent’s council must be taken by way of a vote; it stipulates the minimum standard of agreement to be reached in circumstances in which the Councillors present are not *ad idem* concerning an issue before them for their decision. Accordingly, there is no requirement in terms of the Standing Rules and Orders that an issue in respect of which there has been neither objection nor disagreement is required to be put to the vote.
- [53] Only in the event that there had been any type of objection or disagreement concerning the applicant’s proposed suspension would that issue have been required to have been put to the vote. Whether there had been such a disagreement is that in respect of which there is a material dispute between the parties: the applicant asserted that the councillors had not been in agreement concerning his suspension and the matter was accordingly required to have been voted upon, whereas the respondents asserted that there had been no dispute and the resolution had been passed accordingly.
- [54] The applicant was not himself present at the Council meeting at the relevant time and accordingly relied upon a number of affidavits deposed to by several of the first respondent’s Councillors who supported his assertion that there had been dissent amongst their number, as a result of which the issue of his suspension had been required to have been put to the vote, which had not been done.
- [55] The respondents, in support of their version that the issue had not been contentious and accordingly that no vote had been required to have been taken, introduced the affidavits of a number of other Councillors who asserted that there had been no disagreement on the issue. In addition, three of the Councillors who had previously deposed to affidavits in support of the applicant’s version deposed to further affidavits in which they recanted their previous affidavits.
- [56] Distinct from the affidavits themselves, the only other evidence upon which the applicant relied was that which was said to have been the minutes of the meeting of the 28 March 2025, said to have been authored by Mr Mncwango. As with the transcript, the authenticity of those minutes were placed in dispute by the respondents. For the reasons previously expressed regarding the absence of any affidavit by Mr Mncwango, and in the absence of any application having been made for the admission of such minutes as hearsay, the authenticity thereof was not established. There was moreover no evidence placed before this court that such ‘minutes’ had ever been ratified as correct at any subsequent meeting of the first respondent’s Council.

[57] There is accordingly an irresolvable dispute of fact on the papers. Mr Dayal SC argued that in the event that this court were to arrive at such a conclusion, the matter should be referred to oral evidence. Mr Kuboni, on the other hand, argued that such a request ought to have been made by the applicant at the outset, and referred this court to *Law Society, Northern Provinces v Mogami* 2010 (1) SA 186 (SCA), a decision binding on this court,

‘The appellant submitted that in these circumstances we should refer those disputed for oral evidence. We cannot comply with the request. An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on an appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.’[5]

[58] The applicant was aware of the respondents version upon the delivery of their first answering affidavit. Despite this, the applicant delivered of a number of further affidavits and persisted in the relief sought in the face of the respondents’ version. In the circumstances, it is not apparent to this court that any exceptional circumstances are present which justify the referral of the dispute to oral evidence.

[59] As the applicant seeks final relief in motion proceedings, this court is constrained to assess the evidence before it by means of the test established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A):[6] disputes of fact are to be determined in favour of the respondents, unless it is found that the respondents’ version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that it can be rejected on the papers. No such findings can be made in the present instance, and the applicant’s application accordingly falls to be dismissed.

Costs

[60] The applicant’s application was predicated on information conveyed to him by others, including a number of the first respondent’s own Councillors, some of whom subsequently changed their versions. This being the case, the applicant cannot be faulted for having approached this court to set aside his suspension. This court is of the view that both his bona fides as well as the existence of an ongoing employment relationship between the parties militates against ordering him to pay the respondents’ costs.

Order

1. The application is enrolled as an urgent application and the applicant’s non-compliance with forms and periods of service is condoned to the extent necessary.
2. The application is dismissed.
3. There is no order as to costs.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr S Dayal SC, instructed by F W Ntombela Attorneys

Respondents:

Mr W S Kuboni, instructed by Nompumelelo Hadebe Inc

[1] See Firststrand Bank v Fillis 2010 (6) SA 565

[2] At paragraph 26

[3] At paragraph 9

[4] See Ndlovu v Minister of Correctional Services and Another

[2006] 4 All SA 156 (W) at 172F-G and LA Consortium & Vending v MTN Service Provider 2011 (4) SA 577 GSJ

[5] At paragraph 23

[6] At pages 634 - 635

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