



**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case Number: 15162/2017**

**8/6/2018**

In the matter between:

**SOPHIA MARIA DE VILLIERS**

Applicant

and

**ANTHONY KRUGER**

First Respondent

**DRAKENSTEIN MUNICIPALITY**

Second Respondent

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**JUDGMENT**

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**BOQWANA, J**

**Introduction**

[1] The applicant applies for an order declaring that the respondents are in contempt of a Court Order granted by the Judge President, under case number 20048/2016, on 29 March 2017 ('the Order'); that the respondents be ordered to fully comply with every term of that Order and that they give reasons why they should not be committed to imprisonment, or another appropriate sanction be visited upon them for their aforementioned contempt.

[2] The second respondent on the other hand brings an application seeking clarification of paragraph 3 of the Order in terms of Rule 42(1)(b) of the Uniform

Rules of Court; alternatively, applies for the rescission and setting aside of paragraph 3 of that Order.

[3] The Order states as follows:

- “1. First Respondent shall remove, with immediate effect and in any event within 7 (seven) days of this order, all obstructions and encroachments in the portion of Riesling Street abutting his property as well as the encroachments in the servitude road, including but without limiting the generality of the foregoing:
  - 1.1 the garden in Riesling Street;
  - 1.2 the gate which he has erected on Riesling Street;
  - 1.3 the pedestrian gate and attached wall between the servitude road and Riesling Street erected on the servitude road;
  - 1.4 the wall erected on the servitude road at the western (top) end thereof and which runs across Riesling Street;
  - 1.5 the flower bed erected at the western (top) end of the servitude road in front of the pedestrian gate, next to the steps;
  - 1.6 the steps erected on the servitude road at the western (top) end thereof.
2. In the event that First Respondent fails to comply with prayer 2 above, the Sheriff of this Court is authorised to remove the structures in question at First Respondent’s costs.
3. Second Respondent shall take such steps necessary to remove and regularize the encroachments on Riesling Street so as to enable it to be used as a public street by members of the public at large.
4. First Respondent to pay the costs of this application, on a party and party scale in accordance with his Notice of Withdrawal of Opposition dated 12 December 2016.”

[4] The Order was taken unopposed as the first respondent, who had initially filed a notice to oppose, withdrew his opposition. The second respondent (‘the Municipality’) elected to abide by the Court’s decision; however, it filed an

explanatory affidavit to assist the Court. For convenience, I refer to the application before the Judge President as 'the main application.'

**Applicant's case**

[5] The applicant alleges that the respondents have failed to comply with the Order in that they failed to remove some of the contents forming part of the garden, namely: trees and grass, as well as paving situated on Riesling Street. According to her, the first respondent removed most of the encroachments and obstructions, but that was only done on 27 July 2017, which was almost 4 months after he was ordered by the Court to remove all of them. Also, only after the applicant's attorney had sent numerous letters demanding compliance and had gotten the Sheriff of the High Court involved, as stipulated in the Order.

[6] According to the applicant, the first respondent refuses to remove a tree that is still blocking her access from Riesling Street, as well as other smaller trees, grass, and paving which formed part of the driveway that had been constructed by the first respondent. When she demanded removal of these structures, the first respondent advised her that he had been told by the Municipality not to break down the structures.

[7] The Municipality, through its attorneys, advised that it had some difficulty understanding the meaning of paragraph 3 of the Order. It interpreted the Order to effectively mean that no action was required of it: it would not prevent the first respondent or the Sheriff from removing the encroachments pursuant to paragraphs 1 and 2 of the order; it would, however, continue to consider an application brought to it by the first respondent to permit him to build encroachments on the affected land; and lastly it did not propose developing a road of any sort over that land. The applicant contends that this attitude directly contradicts the Order. According to her, the terms of the Order are clear and unequivocal, and any approval of the application of the first respondent for his encroachments would be contravening the Order.

[8] She contends further that the Municipality had in fact, after the issuance of the Order, erected a steel gate and fence on the affected land, preventing the Sheriff from removing the encroachments. Not only did the Municipality advise the first respondent not to continue with the removal of encroachments, it has taken no steps to regularise Riesling Street so as to make it suitable for use as a public street.

[9] The applicant alleges that the Municipality is openly biased against her; the Municipality refused her application in respect of building lines, whereas same cannot be said of how they treat the first respondent. She was further ordered to remove illegal building structures in the servitude road between her property and the first respondent's property. She recently wanted to correct the encroachment from her property. To do so, she requested the builder to enter her property *via* Riesling Street South, however the builder's truck could not reach the off-load site *via* the servitude road and had to be redirected. The gate erected by the Municipality, blocking the affected land, had to be opened and as the truck was driving towards her property, it got stuck in the mud on the affected land. She is constantly faced with criminal charges against her, regarding the encroachments, which she cannot rectify because her construction work is being impeded.

[10] It appears in the applicant's replying affidavit that the steel gate and the fence, erected by the Municipality, were removed on 8 September 2017.

[11] The applicant alleges that the paving and the grass create the impression that the street is still part of the first respondent's property, as opposed to being a public street, as required by the Order. At some point, a guest of the first respondent parked where the paving starts, thereby blocking further access to the street. This impression is obviously exacerbated by the continued presence of the trees. The grass area is no longer being maintained and the surface is deteriorating rapidly.

[12] The applicant admits that the 'large' tree sprung up in the mid to late 90's, it flourished and grew in front of her and her late husband's property, and by the time the first respondent bought the property he now lives in, the tree was already big. She alleges that when the first respondent built a wall between their properties the tree was included in his erf and used by his guests to braai under.

### **Respondent's case**

[13] The first respondent alleges that he chose to withdraw his opposition in the main application and abide the Court's decision, in part because he had no desire at the time to be part of a never ending dispute caused by the applicant, who has been making their (his and his wife's) lives a misery. Furthermore opposing the application would have cost him a lot of money, which he could not afford. Complying with the Order has, however, ended up costing them far more, as they had to get a new

perimeter wall and new gate in their driveway after demolishing the encroachments referred to in the applicant's application. According to him, this was a reasonable compromise and he thought it would potentially de-escalate matters.

[14] The first respondent alleges that he has complied fully with the Order by building a new wall along the boundary of his property and Riesling Street; attending to having plans drawn up for submission and approval by the Municipality; demolishing the old gate and fence which previously separated the portion of Riesling Street behind his property from the part of it which is used as a road; removing the wall at the top end of the servitude road and the flower bed and steps at the end of the road; and removing the garden which he and his wife planted in the portion of Riesling Street behind their property.

[15] According to him, the grass and paving referred to by the applicant are not encroachments or obstructions which prevent access across the relevant portion of Riesling Street; on the contrary the paving enhances vehicular movement over the area and which they all require, including the applicant, for access to their properties, from Riesling Street.

[16] As to the truck that allegedly got stuck in the mud, when the applicant sent it, it was able to drive comfortably over the paved area; it got bogged down in the muddy area beyond that. After dragging itself out of the mud, it gained access to the applicant's house via Riesling Street North, one of the other points of access to her property. The first respondent alleges that the applicant managed to do renovations to her house without access to Riesling Street to the South/South West. According to him, the applicant is being unnecessarily difficult; alternatively she has ulterior motives (making their lives a misery).

[17] The first respondent alleges that the trees referred to by the applicant were not planted by him, as they were already in place before he purchased the property. He did not understand the Order as requiring him to remove those trees. He in fact believed that it would be illegal for him to remove the trees. His understanding of the Order was based on how the applicant had characterised the relief sought in her application, in which she requested an order for the first respondent to remove all obstructions erected by him. Had he known that the applicant would seek an Order for the removal of the trees, which he did not consider to be covered by the word

‘encroachment’, which he also did not plant and which did not belong to him, he would have reconsidered his approach of not opposing the relief sought in that application.

[18] One of these disputed trees is a camphor tree, which has been there for at least 60 years and has to be protected, as stated by the Municipality. In any event, argues the first respondent, it is ecologically unsound, selfish, unreasonable and simply destructive to expect a tree to be removed purely for the sake of removing it, or for some emotional personal reason.

[19] The first respondent agrees that the content of the Order is clear and, according to him, it did not require him to remove the items which form the basis of the applicant’s allegations of non-compliance and for which the applicant seeks him to be held in contempt of court.

[20] According to him, it appears that the disagreement is between the applicant and the Municipality and he does not wish to be involved in it at all. He is now being threatened with a contempt application in circumstances where the Municipality had informed him not to remove the trees without its consent. This places him in an invidious position through no fault of his own.

### **The Municipality’s case**

[21] The Municipality owns this unmade portion (southern portion) of Riesling Street. Riesling Street is divided into two parts. The northern portion forms part of the applicant’s property. The southern part lies behind the first respondent’s property. This land has been earmarked for possible future development of a road, where both portions would be linked making it a through-road. There are however no immediate plans to develop it as an extension to existing roads in the area. This unmade portion of the road has never been publicly accessible or used as a public street and is not a spending priority for the Municipality at present.

[22] The Municipality alleges that paragraph 3 of the Order did not require it to take any positive steps to immediately remove any grass, paved surface, or trees from the disputed area. According to it, paragraph 3 of the Order does not prevent the Municipality from erecting its own fences around Riesling Street and from considering applications from any person, including, but not limited to, the first

respondent, to lawfully encroach onto Riesling Street – in accordance with the Municipality's Asset Transfer Policy. It further alleges that paragraph 3 of the Order does not require it to build an extension of Riesling Street immediately –incorporating the disputed part of Riesling Street in a state which will allow it to be used as a public street, once the Municipality decides to construct such a public street. The Municipality seeks the clarification of the Order along those lines.

[23] The Municipality also alleges that in the 1980's there had already been a dilapidated fence running across this land, preventing it from being used as a thoroughfare. According to it, it had at all times made it clear that it had no intention of using rate payers' money to get involved in what is essentially a hard fought and acrimonious dispute between neighbours.

[24] For many years the first respondent and his predecessors in title had gardened the unmade portion of the land reserved for the possible extension of Riesling Street. The first respondent fenced in this garden area more securely and, while this was not a problem for the Municipality, it appears to have displeased the applicant.

[25] According to the Municipality, the Order primarily required that the encroachments created by the first respondent into Riesling Street be removed by the first respondent, and this has been done. The remnants of the garden are insignificant.

[26] The hard paved area had previously been part of a driveway, and would be a better road surface than a gravel road. The grassed area could be easily removed if a road is ultimately developed, and in the interim it protects the area from eroding. As far as the trees are concerned, these are not "encroachments" requiring removal under the Order. In any event, the Municipality has no problem with the removal of the dead stump, the fir-tree sapling, and the avocado tree. The camphor tree, however, is a well-established tree and should remain. It also poses no obstacle. Even if the area is used as a road, there is enough space for an ordinary vehicle to get around the tree and access the applicant's property.

[27] The Municipality alleges that its interest in these proceedings primarily arises to the extent that the applicant appears to adopt the view that paragraph 3 of the Order also compels the Municipality to completely clear the road reserve area in the

unmade portion of Riesling Street, and to immediately develop this area as a public road. It submits that this is not what the Order provides. This is because the Municipality bears the power to determine when and how it will develop the area and this was explained in an explanatory affidavit that it provided in the main application.

[28] The Municipality would construct roads if and when it sees fit, as explicitly recognised in section 129 of the Municipal Ordinance 20 of 1974 ('Municipal Ordinance'), which provides that a Municipal council "may in its municipal area ... make, construct, reconstruct, alter and maintain streets ...". This provision is repeated in section 38(a) of the Drakenstein Municipality By-Law No. 15/2007 ('By-Laws'), which states that: "*The Municipality may in its area – (a) make, construct, reconstruct, alter and maintain streets and public places.*" The use of the word "may" makes it clear that the provision is permissive.

[29] The Municipality also refers to the provisions of other laws, and the Constitution, to assert the point that it is the only one empowered to make choices based on its assessment of its infrastructure priorities, the needs of the community, and the available budget. This is an aspect it alleges is properly left to the discretion of the Municipality. According to it, it will be a startling outcome for this Court to have dictated to the Municipality that it must immediately prioritise the development of a specific piece of road – in preference to any other infrastructure development in the Municipality's area – even though no budgetary allocation had been made for this project and the Municipality had made it clear that it does not wish to do so. In a nutshell the Municipality's case is that the Order could not be interpreted so as to fetter its discretion and that it was not obliged to immediately construct the road.

[30] It further states that the trees are not an obstruction and leave more than enough space for a large 'bakkie' to drive northwards from the southern end of Riesling Street, through the southerly end portion and into the gate in the southwest end of the applicant's property, and also to drive from the southern end of Riesling Street through the southerly unmade portion and into the servitude road between the applicant's and the first respondent's properties and on to Main Street. Therefore the applicant has the through-road that she desires.

[31] Furthermore in terms of section 5(1)(a) of the By-Laws, no person may "*in any way cut down a tree or a shrub in a street or public place or remove it there from,*



*except with the written permission of the municipality*". Under section 5(2) such trees are the property of the Municipality and it is thus not open to the first respondent to simply cut down the trees. The Municipality has not given its permission to have these trees cut and the applicant is within her rights, if she wishes to remove such trees, to attempt to obtain the Municipality's permission in the ordinary course.

[32] The Municipality alleges further that it is prepared to allow the dead stump, the fir-tree sapling and the avocado tree to be removed, although they do not pose any real obstruction. However when it comes to the camphor tree, the position is different. According to it, camphor trees are generally designated as invasive aliens, but are not on the priority list in Paarl, and an old established tree ought to be retained if possible. This particular tree also will not obstruct an ordinary vehicle gaining access to the applicant's property, even if a road is ultimately developed. The likelihood is that, should the Municipality decide to develop the road, it will attempt a development that allows for the tree to be retained.

[33] According to the Municipality, the Order related to the garden gates and wall erected by the first respondent, which have now been removed. Furthermore the Order could not be interpreted as not allowing the Municipality to place its own fences, on its own property, in perpetuity. Section 37(1) of the By-Laws specifically allows the Municipality the power to temporarily close public streets. This allows a temporary closure either during construction or pending construction, or in other circumstances, and that would be if such street or public place is, in the opinion of the Municipality, in a state dangerous to traffic; or for any other reason which in the opinion of the Municipality, renders the temporary closing of such street necessary.

[34] It further alleges that the Order merely required it to maintain the existing road reserve in a state which would allow it to be used as a public street, if and when the Municipality decides to construct such a public street.

[35] In the event that the Municipality is not successful with this interpretation of the Order, it seeks the rescission of the Order on the basis that it was obviously incorrect, and was erroneously granted by default in the absence of the parties affected by it. It states that the Court in the main application could not have had proper regard to the explanatory affidavit provided by the Municipality in those proceedings and that the Order was granted without hearing from other residents in

the area, as some of them do not favour the extension of the road. Ordinarily, if it was left to the Municipality to determine whether such an extension of a public street was required, it would be required to hear from all persons affected. Not hearing other residents could not be procedurally fair in terms of section 3 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), which requires the Municipality to consult them. The Municipality did not appear in the main application, based on the reasonable assumption that its explanatory affidavit would be drawn to the attention of the Court – including the statement that the decision whether to construct a public street on any particular land remained one for the Municipality alone.

[36] Finally, it alleges that it attempted to settle this matter by tendering to allow the removal of a dead stump, a fir-tree sampling, and an avocado tree even though it was not required to do so. It also informed the applicant that if she wished to improve the road surface on the southerly unmade portion of Riesling Street, she was welcome to do so at her own expense, subject to reasonable conditions to ensure the safety and integrity of the unmade portion and provided she applies to the Municipality in the ordinary course. Even without these modifications, the applicant would have both the entrance and the through-road that she desires. The applicant has refused to accept this tender, which the Municipality views as unreasonable.

### **Discussion**

[37] I must first express my displeasure as to the amount of resources spent in litigating this matter. Whilst it is understood that these are contempt proceedings, which may carry serious consequences, I do think the manner in which this case was handled by the parties was over-elaborate. Apart from the fact that each of the parties had two counsel, volumes of documents and papers, some of which were at times repetitive, were presented before me. Parties also asked the Court to conduct an inspection *in loco* in Paarl. Whilst it may have been useful to have the inspection, sight should not be lost to the fact that the purpose of the application before me was not to re-hear the case that should have been presented in the main application, or to assess how convenient or not access in Riesling Street is for the parties. Neither was it to measure how obstinate or difficult each of the neighbours are to one another, or how unreasonable they are - particularly the applicant, since she has sufficient access points to her property. This was, however, a path the parties, at times, seemed to have invited me to take. The issue before me is simply whether

there has been non-compliance with the Order – and if there was, whether such non-compliance amounted to contempt of the Court Order.

[38] It is clear that the relationship between the applicant and the first respondent and his wife, is a hostile one. It does seem to me that the nature of the parties' relationship has veiled the manner in which they look at this matter, such that their objectivity in trying to resolve the situation may have been obscured. The parties sought to bring all other neighbourly issues and disputes to this case, which for the most part were irrelevant. I deal with the role that the Municipality has played in this case in due course.

[39] The case in essence is about the interpretation of the Order. According to the applicant most of the encroachments and obstructions have been removed, excepting the paving, the grass, and the trees.

[40] Commenting on the importance of complying with Court Orders, the Constitutional Court in the decision of *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2015 (5) SA 600 (CC), held at paragraph 28:

“Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.” (Footnotes omitted - Own emphasis)

[41] The Court in *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) articulated the test as follows, at paras 9 and 10 of the judgment:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way

claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.” (Footnotes omitted - Own emphasis.)

[42] In order to succeed the applicant must prove that there was an order; that it was served on or that notice was given to the respondent; and that there was non-compliance which was wilful and *mala fides*. Such requirements must be proved beyond reasonable doubt. However, *“once the applicant has proved the order, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.... A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”* (Fakie N.O., supra, at para 42.)

[43] Turning to the interpretation of the Order. In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013 (2) SA 204 (SCA), the Court held at para 13:

“...the determination of this appeal depends on the proper interpretation of the Preller J order. The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its

intention. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A).” (Own emphasis.)

[44] This approach was quoted with approval by the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29. In *Firestone South Africa (Pty) Ltd* supra, at 304E–H, the Court went further to state:

“If, on such reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what its subjective intention was in giving it.... Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of appeal against it or otherwise.... But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court’s granting the judgment or order may be investigated and regarded in order to clarify it.” (Own emphasis.)

(See also *ABSA Bank Ltd t/a Volkskas Bank v Page and Another* 2002 (1) SA 617 (SCA) at para 7.)

[45] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), at para 18, elucidated a slightly more expansive approach in interpreting documents (in general) as follows:

“...Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...” (Footnotes omitted - Own emphasis.)

[46] Therefore, as articulated in *Educated Risk Investments 165 (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Others* 2016 (6) SA 434 (SCA), at

para 19, “... [a]s with all exercises in interpretation the words must be taken as the starting point and construed in the light of their context and purpose...”.

[47] In the present matter the Order was granted, unopposed, in favour of the applicant. The parties did not ask the Court for reasons pertaining to its Order. They also did not seek clarity from the Court as to its meaning. What is before me is the Order itself, the material leading to the granting of the Order, which is the main application, and the affidavits filed therewith, including the Municipality’s explanatory affidavit and the current papers forming the basis of the interpretation they attach to the Order.

[48] It is common cause that the Order was made and served on the respondents. The issues remaining are whether there was non-compliance with the Order and whether if there was, such was wilful and *mala fide*.

**Has there be non-compliance with the Order by the first respondent?**

[49] According to the applicant, the Order is very clear. It required the first respondent to remove, within seven days of the Order, “*all obstructions and encroachments... including, but without limiting the generality thereof*”, inter alia, “*the garden in Riesling Street...*” (As per paragraph 2). This meant every obstruction and encroachment without exception or qualification had to be removed. Therefore, according to the applicant, the trees, grass and pavement had to be removed. The first respondent says those are not obstructions or encroachments.

[50] The use of “*all*” in the Order connotes that no obstructions and encroachments were excluded. It is also evident that the list of things that required removal was not exhaustive. Obstruction can be defined to mean “*a thing that impedes or prevents passage or progress; an obstacle or blockage*” (See Google online dictionary). Cambridge online dictionary also defines obstruction as “*something that blocks a road, passage, entrance etc. so that nothing can go along it, or the act of blocking something in this way.*”

[51] Whilst, the online Google search dictionary defines encroachment as, inter alia “*intrusion on a person’s territory, rights etc*”. The Oxford Dictionary refers to “*a gradual advance beyond usual or acceptable limits*”.

[52] In my view, to answer the question of what is entailed by obstructions and encroachment in the context of the Order, *“the extrinsic circumstances surrounding or leading up to the court’s granting the judgment or order may be investigated and regarded in order to clarify it”*, as found in the *Firestone* and *ABSA Bank* decisions mentioned above. Therefore the content of the main application becomes relevant.

[53] In the main application, under the heading *“Nature and Aim of the Application”*, the applicant mentioned that Riesling Street is a public street, which was found to be so in a judgment of this Court by Henney J, wherein the applicant was also a party, namely, *Sophia Maria de Villiers and Another v Coenraad Stephanus Jacobus Louw and Another*, case number 13960/13. That Riesling Street is a public street is not disputed.

[54] She further stated that the first respondent unlawfully appropriated to himself a portion of Riesling Street, which he used as a garden, thereby denying her entry to her property, and also blocking the servitude road that ran between the applicant’s and the first respondent’s properties. She therefore sought relief in wording similar to that which became the Order. In her founding affidavit she referred to a number of structures, some of which are not necessary to mention for the purposes of this dispute. Key though is that she mentioned removal of all obstructions and encroachments constructed by the first respondent in a public street. This much is repeated in numerous parts of the founding affidavit including paragraphs 22, 25, 28, 30 and others, where phrases like *“obstructions erected by the first respondent”*, *“garden planted by the first respondent”*, appear.

[55] According to the applicant although trees were not mentioned specifically as part of the relief sought, they were stated as part of the garden. The picture seems to be the following. The affected portion of Riesling Street, although designated as a public street and owned by the Municipality, was for many years used as part of private property. The large tree (which the respondents refer to as a “camphor tree”) grew and developed in that context. When the first respondent bought the property he incorporated it into his garden. He did the same in respect of the smaller trees.

[56] If one has regard to the context of the main application, it seems to me it was brought with the view to directing the first respondent to remove all obstructions and encroachments that he caused. Although the trees would have formed part of the

garden, “a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...” as was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality* supra. It cannot be sensible to interpret the Order to have required the first respondent to remove an object he found there. Such interpretation is not supported by the premise of the main application. Although the trees may be obstructions, they were not caused by the first respondent. The applicant should have been more categorical in her main application if she wanted the first respondent to remove the trees as they fell outside the theme of structures he constructed. It is common cause that when he bought his property the large tree, which grew by itself, was already big. Therefore, although the list of obstructions to be removed by the first respondent was not exhaustive in the Order, it could not be interpreted to have included the trees, if the proper context of the main application is taken into account.

[57] Turning to the paving, since this was constructed as part of the enclosed area which was used by the first respondent as part of his private property, it is not reasonable to hold that the paving would not constitute part of the structures which the Court stated were to be removed as encroachments.

[58] Paving on a public street built by a resident, in my own assessment of the Order, forms part of encroachments that the Court ordered to be removed. It constitutes an intrusion into someone else’s territory. It is noteworthy that section 2 of the Municipality’s By-Law states that:

“No person shall –

- (a) make, construct, reconstruct, or alter a street or sidewalk –
  - (i) except with written permission of the municipality, or
  - (ii) otherwise than in accordance with the requirements prescribed by the municipality, or
- (b) construct a veranda, stoep, steps or other projection or erect a post in a street or public place except with written permission of the municipality.”

[59] I am alive to the fact that the applicant has stated that because the paving provides a usable driving surface, for pragmatic reasons, it can stay. This once again



is a different question or issue altogether. The issue to be determined is whether or not the paving would have been an encroachment for the purposes of the Order. Whether or not it serves a convenient purpose and that the applicant has had a change of heart in regard thereto, does not mean that it was not an encroachment in terms of the Order.

[60] Insofar as the grass patches are concerned, to the extent that the grass was planted by the first respondent, it would have been included in the Order; it was part of the garden. The first respondent, however, removed the garden and what remains are small patches of grass. Small patches are simply an indication that grass existed in that area before. The grass as depicted from the photos in the main application is not the same as the small patches that remained. That was the picture noted during the inspection *in loco*. In this regard I do not find that there was non-compliance with the Order. It would be expected that small remnants of a formerly existing garden might still be visible.

[61] In sum, on the first question of non-compliance by the first respondent, the Order should be interpreted to have excluded the trees but included the grass and the pavement. However, there has been non-compliance with the Order only with regards to non-removal of the pavement. There is no non-compliance by the first respondent insofar as the remaining patches of grass are concerned. The issue, however, does not end there for contempt to be proven. Conduct must be shown to have been wilful and *mala fide*.

#### **Was non-compliance wilful and *mala fide*?**

[62] Even if it were to be found that the first respondent was ordered to remove the trees, he was informed by the Municipality that he could not remove them, as they belong to the Municipality. He was further advised that doing so would amount to an unlawful act. He was, therefore, placed in an invidious position.

[63] Secondly, the main application insofar as the first respondent was concerned, was premised on the fact that the first respondent remove all obstructions erected or planted by him and that was what he understood from the founding affidavit to the main application. That appears in many of the paragraphs of the applicant's founding affidavit. Therefore, the fact that the first respondent did not plant the trees in Riesling Street, as well as the warning that he got from the Municipality not to

remove the trees, are, in my view, sufficient reasons to hold that his conduct in this regard was not wilful and *mala fide*. The first respondent has placed *bona fide* reasons before the Court as to why he did not comply with the Order.

[64] With regards to the paving, whilst the first respondent may have been aware that the paving should form part of the encroachments to be removed, I am not satisfied that he acted wilfully and *mala fide* in disregarding the Order. This is because both he and the applicant have made common cause that the paving serves an important function to both of them, meaning that if it were to be removed (particularly in an instance where the Municipality has taken a view that it was not required by the Order to do anything in that street, or to put it differently, it was simply ordered to “maintain” the road, until it decides to build a road), the removal of the paving may make it unpleasant or impossible to drive, as the road could be worse than before, if nothing further is done to fix it. I therefore find that insofar as the first respondent is concerned no contempt of court has been shown.

#### **Has there been non-compliance by the Municipality?**

[65] Paragraph 3 of the Order directed the Municipality to “take such steps necessary to remove and regularise the encroachments on Riesling Street so as to enable it to be used as a public street by members of the public at large.”

[66] As can be seen, the first part of the Order in relation to the Municipality is confined to taking such steps necessary to removing and regularising encroachments, there is no mention of obstructions. It will be recalled that encroachments refer to intrusion on some else’s territory. As the trees belong to the Municipality and having grown on its land, they cannot be regarded as “intruding” as the public street is property of the Municipality. Therefore, on a proper interpretation, the Municipality has not been ordered to remove the trees. The body of the main application did not require of it to do so either. The Order clearly required it to take such steps to remove and regularise the encroachments. The trees are not encroachments. Had paragraph 3 of the Order included “obstructions” as objects to be removed by the Municipality, the picture could have been different.

[67] The position is, however, different when it comes to the paving. It is an encroachment on land belonging to the Municipality. Therefore as an encroachment there is a requirement to take such steps necessary to remove and regularise it. It is

within the powers of the Municipality to require the first respondent who caused it to remove it or to do so itself.

[68] The second part of the Order is a further requirement suggestive of the fact that the purpose of removal and regularisation of the encroachment on Riesling Street is “so as to enable it to be used as a public street by members of the public at large.”

[69] In my view, this part of the Order suggests some action on the part of the Municipality. It is well and good that the first respondent has removed most encroachments and that the pavement enhances vehicular movement. That however does not absolve the Municipality of its responsibilities in terms of the Order to enable the street to be used as a public street by members of the public at large and not only portions of it. It is irrelevant that the street is, in fact, only used by the residents of the properties adjacent to the street.

[70] The Municipality suggests that its obligation only exists insofar as it is necessary to enable the disputed portion to be used as a public street by the members of the public at large, and it suggests that that has been done, or to maintain it until it decides whether it would build a road.

[71] I do not think so. It was contemplated in the main application that the Municipality would take active steps. The content of the founding affidavit in the main application, which forms part of the material to be considered in interpreting the Order, confirms this. For example, at paragraph 12, thereof the applicant stated that the Municipality *“had a legal obligation to remove or cause to be removed encroachments in the public street and moreover, to effect the necessary improvements and/or maintenance required for Riesling Street to be capable of being used as a public street by members of the public.”* Part of paragraph 30 states *“...[t]he Second Respondent has also failed to develop the part of Riesling Street, so as to comply with all the relevant requirements for a public street...”*

[72] What *“all the relevant requirements for a public street”* are is for the Municipality to determine. During the hearing of the main application, it appears from the transcripts of those proceedings that counsel for the applicant mentioned to the Court that the applicant was not seeking to tell the Municipality that the road must be tarred or must be kept as a gravel road, or that it must be paved. All the relief sought

to do was for the Municipality to deal with this street in accordance with the ordinances and the regulations.

[73] It is manifestly clear from what was sought in the main application, that the Municipality was required to take active steps in making the road compliant to the requirement of a public street. If upon its assessment the Municipality finds that the road cannot be used by the members of the public at large as it currently stands, then it is incumbent upon it to make the street compliant with the law and, most importantly, to comply with the Order. This is consonant with section 127(1) of the Municipal Ordinance which states that:

“When any immovable property owned by a division or under the control or management of a council is encroached upon, the council may and, when so directed by the Administrator, shall take such steps as may, in the opinion of the council, be necessary to remove or regularise such encroachment.’

[74] In *Escherich and Another v De Waal and Others* 2017 (6) SA 257 (WCC) Bozalek J stated at para 36: “...s 127 (1) of the Ordinance (pursuant to which ownership of the public street in question is vested in the local authority) provides that when there has been any encroachment upon such a street, as in this case, the local authority may take such steps as it considers necessary to remove or regularise such encroachment.”

[75] Although the section confers a discretion upon the Municipality to remove or regularise encroachments, in this case it has been ordered by a Court to do so and that is an important factor. The Municipality suggests that the Order could not mean that it was obliged to do anything other than just maintaining the road for public use, because any other interpretation would raise the matter of separation of powers and the Court would not have intended to do so. The Order is clearly not prescriptive.

[76] To the extent that the Court would have treaded upon separation of powers, which in my view is not the case, that would be a contest for another forum. The Order must be interpreted in its context, which according to the main application, was that a portion of the street that was previously used for private purposes and which had certain structures built on it, should be made usable as public street to member of the public at large.

[77] It is sensible to interpret the Order to require action from the Municipality because there could still be disfigurements and remnants on the street resulting from the removal of structures that were there before. Whether this means levelling the road or removing any material on the ground to bring the road to acceptable standards for use by members of the public is up to the Municipality to decide. Once again, assessment of how that should be done is left to the Municipality

[78] In a letter that the Municipality wrote to the Public Protector, attached as annexure “MDV 26” to the founding affidavit of the main application, the Municipality stated that it *“acted within its rights to inform Dr Louw that Mrs De Villiers (and the general public) have the right to use the portion of Riesling Street abutting his property Erf 26160, as it is a public road which has been constructed to acceptable gravel standard (including kerbstones) funded by the rate payers. Dr Louw’s demand that Mrs De Villiers should be allowed access via this already constructed portion of public road once Riesling Street has been constructed along its entire intended length is considered inappropriate and unreasonable.”*

[79] Henney J in *Sophia Maria De Villiers and Another v Coenraad Stephanus Jacobus Louw and Another*, which I have already mentioned, did not prescribe what had to be done; in fact the Municipality was not directed to do anything by the Court, as it has been in this case. The Municipality however saw it fit, in that case, to put gravel on the Northern portion of Riesling Street. This is not to say it is obliged to put gravel in this case too, but what it goes to show is that following the removal of structures by Mr Louw in that case, there was a need to make the street usable to members of the public.

[80] The issue that the Municipality will have to tap into its funds to do so is not the issue I have to determine in interpreting the Order (in this case). The notice of motion in the main application contained a prayer requiring the Municipality to take active steps as I have outlined above. Its explanatory affidavit was placed before the Court hearing the main application. It appears from the transcripts of the proceedings in the main application that the Court was aware of that affidavit and did not see it as taking the matter any further.

[81] If the Municipality wanted to challenge prayer 4 of the main application, which became paragraph 3 of the Order, it should have done so. Instead it confined itself to

prayers 2.1, 2.2, and 2.4 of the notice of motion in the main application. It further alleged in paragraph 6 of its explanatory affidavit *“that any decision regarding Riesling Street in these proceedings (this is not an application for the review of any decisions made by The Municipality) falls outside the parameters of judicial authority to prescribe to The Municipality of the how to fulfil its executive functions regarding Riesling Street, as such a decision by this Honourable Court may infringe on the doctrine of separation of powers between the Legislature and the Judiciary.”*

[82] The Municipality further stated in paragraph 7 of the explanatory affidavit: *“it is also respectfully submitted and I was advised accordingly that, should this Honourable Court prescribe to The Municipality how its administrative functions should be performed, (sic) will constitute a violation of the doctrine of separation of powers and will infringe on the executive powers of the municipalities”*.

[83] If the Municipality viewed paragraph 4 of the main application as not directing it to do anything, it begs the question why it would consider it necessary to warn the Court that any decision it makes may infringe on separation of powers. In other words, the Municipality appears to have been well aware that paragraph 4 contained a directive to it to take a certain action; hence it warned the Court that any decision regarding Riesling Street fell outside the parameters of judicial authority. I must underline any decision. In fact the Municipality was telling the Court that it could not make any decision regarding Riesling Street as that was outside the Court’s powers and only it, as the Municipality, could make decisions regarding that street. It follows therefore that there has been non-compliance with the Order by the Municipality.

### **Was non-compliance wilful and mala fide?**

[84] The Municipality submits that even if it is assumed that it was mistaken in its interpretation of paragraph 3 of the Order, it is not guilty of contempt in that it did not wilfully disobey the Order. Put differently, a misunderstanding as to the true meaning of an Order negates an inference that non-compliance is wilful. In this regard it relies on the decision of *Fakie N.O.* supra at paragraph 62 where the Court said that *“. . . the Auditor-General’s claim that he so understood the order – though clearly wrong – is not entirely incapable of comprehension. Mr Rogers, for CCII, emphasised that the Auditor-General had not claimed to rely on legal advice in taking his stand on the meaning of the order. That is true; but his stance is nevertheless not capable of*

*being rejected on the papers as ‘fictitious’ or palpably uncreditworthy, without his being afforded an oral hearing.”* (Footnote omitted)

[85] The Municipality is a respondent in the contempt application, therefore the version it puts regarding its interpretation of the Order must be accepted, unless it is regarded to be so far-fetched or clearly untenable such that the Court is justified in rejecting it on the papers. In this regard, I find no reason not to accept the Municipality’s version – given its interpretation of its discretion it understands to ordinarily possess. It may have wrongly interpreted the Order in this case, but I am unable to find it in wilful disregard of the Order. Whilst I am unhappy with the fact that it did not immediately approach the Court to seek clarity, I am willing to accept that its conduct was not wilful. It may have been unreasonable but I have to find that its actions were not *mala fide*.

[86] Having said that though, I find the Municipality’s approach in this matter perplexing. The reading of the papers gives an impression, rightly or wrongly that the Municipality has not been willing to come to the assistance of the applicant to the extent that she had to approach the Court in the main application for anything to be done regarding the use of a public street by the first respondent for private purposes, which the Municipality did not dispute was unlawful.

[87] Having been granted an order in her favour, she received very little assistance from the Municipality. Although the Municipality has stated that it did not want to get involved in the dispute between neighbours, in some way it possibly may appear to be favouring the first respondent’s case, and not simply adopting a neutral approach and abiding by the decision as it said it would, particularly in respect of the encroachments which were supposed to have been removed, primarily by the first respondent.

[88] The Municipality stated that in the event that its interpretation is found to be incorrect, it applies for rescission of the Order in terms of Rule 42. In my view this application is misdirected. I agree with the applicant’s counsel, that the Court in the main application is *functus officio*. A decision of the Court cannot be rescinded on the basis that it treads upon the doctrine of separation of powers, and that it was erroneously granted by default in the absence of the residents on the basis that PAJA was not followed. The argument that the Court was not empowered to usurp

the powers of the Municipality is a case that should have been argued in the main application. It is not permissible for the Municipality to re-open its case in these proceedings.

[89] Insofar as an allegation is made that the Order was made in the absence of affected parties, the Municipality knew what order was sought, and did not raise these issues in the main application. It states that it was under the reasonable assumption that its explanatory affidavit would properly be considered. If the explanatory affidavit was not properly considered by the Court, rescission proceedings are not an appropriate forum to challenge the non-consideration or improper consideration thereof. I need not spend much time on the rescission application because it is clearly unfounded.

### **Costs**

[90] This is a kind of matter where each party should pay its own costs. Each had a role to play in this case and none could claim substantial success. Insofar as the applicant is concerned she was not clear in the main application with regards to the issue of the trees, which ended up being, to a large extent the focus of the dispute. I have found that the Order required neither of the respondents to remove the trees, for reasons set out in this judgment.

[91] The first respondent, on the other hand, did not comply with the Order insofar as the paving was concerned and even took months to comply with the Order – after being pushed to do so.

[92] The second respondent did not comply with the Order as I have indicated above.

### **Conclusion**

[93] In view of the fact that the applicant has stated that the paving can stay, I make no order in that regard, but simply reiterate that to the extent required, the Order made on 29 March 2017 includes paving as an encroachment. It is best to leave the issue of the paving to the Municipality when considering what it seeks to do on the affected street in compliance with the Order.



[94] In view of the fact that the Order did not include a timeline by which the Municipality was to comply, I also choose to leave that open, but implore the Municipality to take steps within a reasonable period to comply with paragraph 3 of the Order.

[95] In light of my findings, I do not need to deal with the application to strike out.

[96] In the circumstances, I make the following order:

1. A declaratory order that the respondents are in contempt of the Court Order granted against them by this Court, under case number 20048/2016 on 29 March 2017, is refused.
2. The application for clarification of paragraph 3 of the Court Order made on 29 March 2017, as brought by the second respondent, is refused.
3. The alternative application for rescission of paragraph 3 of the Court Order made on 29 March 2017, as brought by the second respondent, is refused.
4. The second respondent is ordered to comply with paragraph 3 of the Court Order made on 29 March 2017 under Case Number 20048/2016.
5. Each party is to pay its own costs.

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**N P BOQWANA**

**Judge of the High Court**

**APPEARANCES**

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|----------------------------|--------------------------------------------------------|
| For the Applicant:         | Adv. C Joubert SC with Adv. A De Wet                   |
| Instructed by:             | Brand & Robberts Attorneys, Stellenbosch               |
| For the First Respondent:  | Adv. R Stelzner SC with                                |
|                            | Adv. J.R. Whitaker                                     |
| Instructed by:             | Francios Louw Attorneys, Paarl                         |
|                            | c/o Fairbridges Werthen Becker Attorneys,<br>Cape Town |
| For the Second Respondent: | Adv. D Borgström with                                  |
|                            | Adv. P. Olivier                                        |
| Instructed by:             | Van der Spuy and Partners, Cape Town                   |