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**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 1760/2022

(1) REPORTABLE: *yes*.
(2) OF INTEREST TO OTHER JUDGES:
Yes
(3) REVISED.
DATE: 18 October 2023
SIGNATURE

In the main application between:

STEPHAN MPHEDI MADIRO

Applicant

and

MADIBENG LOCAL MUNICIPALITY

First Respondent

BOJANALA PLATINUM DISTRICT MUNICIPALITY

Second Respondent

THE MUNICIPAL MANAGER MADIBENG LOCAL MUNICIPALITY

Third Respondent

THE ADMINISTRATOR MADIBENG LOCAL MUNICIPALITY

Fourth Respondent

THE MUNICIPAL MANAGER BOJANALA PLATINUM DISTRICT MUNICIPALITY

Fifth Respondent

**THE REGISTRAR: GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA
PRETORIA**

Sixth Respondent

In the counter-application:

MADIBENG LOCAL MUNICIPALITY

First Applicant

THE MUNICIPAL MANAGER MADIBENG LOCAL MUNICIPALITY

Second Applicant

THE ADMINISTRATOR MADIBENG LOCAL MUNICIPALITY

Third Applicant

and

STEPHAN MPHEDI MADIRO	First Respondent
BOJANALA PLATINUM DISTRICT MUNICIPALITY	Second Respondent
THE MUNICIPAL MANAGER BOJANALA PLATINUM DISTRICT MUNICIPALITY	Third Respondent
THE REGISTRAR: GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA PRETORIA	Fourth Respondent

AND In the counter-application:

BOJANALA PLATINUM DISTRICT MUNICIPALITY	First Applicant
THE MUNICIPAL MANAGER BOJANALA PLATINUM DISTRICT MUNICIPALITY	Second Applicant
THE ADMINISTRATOR MADIBENG LOCAL MUNICIPALITY	Third Applicant
and	
STEPHAN MPHEDI MADIRO	First Respondent
MADIBENG LOCAL MUNICIPALITY	Second Respondent
THE MUNICIPAL MANAGER MADIBENG LOCAL MUNICIPALITY	Third Respondent
THE REGISTRAR: GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA PRETORIA	Fourth Respondent

J U D G M E N T

The judgment and order are published and distributed electronically.

VERMEULEN AJ

Introduction:

- [1] Both the main application and the counter-applications came before the Court as opposed applications. Applicant was represented by Adv De Kock, the First-, Third- and Fourth Respondents (referred to as the Madibeng Respondents) were represented by Adv Kutumela and the Second-, and Fifth Respondents (referred to as the Bojanala Respondents) were represented by Adv Mthombeni.
- [2] In the main application the Applicant, Mr Stephan Madiro (Mr Madiro) approached the Court for an order to authorise warrants of arrest for the Municipal Manager and/or the Administrator of the Madibeng Local Municipality, (the Third and Fourth Respondents

respectively) and/or the Municipal Manager of the Bojanala Platinum District Municipality (the Fifth Respondent).

- [3] When Mr Madiro approached the Court with the present main application, he was already armed with an interdict order obtained in June 2018 in this court in respect of which the Madibeng Local Municipality (First Respondent) and the Bojanala Platinum District Municipality (Second Respondent) were respectively ordered that sewerage discharged or situated on Mr Madiro's property be cleared and removed and that the necessary steps and actions be implemented to prevent any future discharge of sewerage onto Mr Madiro's property.
- [4] In addition, Mr Madiro also obtained an order in this court in May 2019 declaring the Municipal Managers of the two Municipalities (3rd and Fifth Respondents) to be in contempt of Court.
- [5] In response to the main application both the Madibeng and the Bonjanala Respondents filed counter applications. The counter-application launched by the Madibeng Respondents is to rescind and set aside both the interdict and contempt orders. The Bojanala Platinum District Municipality applies for the interdict and contempt orders to be set aside as nullity.
- [6] The counter-applications are opposed by Mr Madiro.

RELEVANT BACKGROUND:

- [7] Mr Madiro resides on the remaining extent of Portion 2[...], a portion of Portion 1[...] of the Farm Roodekopjies 4[...], JQ, Brits (*"the subject property"*).
- [8] It is common cause that the subject property falls within the local jurisdiction of the Madibeng Local Municipality which area forms part of the greater Bojanala Platinum District Municipality.
- [9] On the 6th of June 2018, Mr Madiro approached this Court under Case no. 16592/2018 for interdictory relief, *inter alia* against both the Madibeng Local Municipality and the Bojanala

Platinum District Municipality (the “*interdict proceedings*” and “*interdict order*”) order. Neither the Municipal Manager of the Madibeng Local Municipality nor the Municipal Manager of the Bojanala Platinum District Municipality were parties to the interdict proceedings.

[10] Although this application was duly served upon the relevant Municipalities, the application was not opposed them.

[11] On the 6th of June 2018 my sister, Justice Molopa, granted the interdict order in the following terms:

- “1. *That the Fourth and Fifth Respondents are ordered and directed to ensure that the sewerage discharged or situated on the remaining extent of Portion 2[...] (a portion of Portion 1[...]) of the farm Roodekoppies, Swartkoppies 4[...] JQ, Brits, North West Province (the property) as well as the access roads traversing the property (the spilled road) are cleared and removed from the property and the spilled road within a period of 14 days from the date of service of this order on the Fourth and Fifth Respondents;*
2. *That the Fourth and Fifth Respondents are ordered and directed to take all necessary steps and actions required to prevent any future discharge of spillage or sewerage on the property and on the spilled road;*
3. *That the Applicant may in due course on the same papers, duly supplemented, approach this Court for any alternative relief sought against the First, Second and Third Respondents;*
4. *Costs of the application to be paid by the Fourth and Fifth Respondents on an attorney and client scale;*
5. *That the Fourth and Fifth Respondents file a report with the Court as to what steps they intend taking resulting the sewerage problem on the property within 30 days from service of this order.”*

[12] A copy of the interdict order is annexed as Annexure “A” to the main application.¹

[13] It appears from the record that the interdict order was served on the Madibeng Municipality on the 6th July 2018² and on the Bonjanala Municipality on the 31st August 2018.³

¹ See copy of order dated 6 June 2018 on Case line, p. 005 – 16 to 005 – 17

² Return of service CaseLine page 018-101

³ Return of service CaseLine page 018-102

- [14] At no time did any of the Respondents proceed with appeal procedures against that judgement and order.
- [15] It appears that Mr Madiro was of the opinion that the two Municipalities did not comply with the provisions of the interdict order, as a consequence of which he again approached this court on the 6th of May 2019 with a separate substantive application under Case no. 80219/2018 for an order that the Municipal Managers of both the Madibeng Local Municipality and the Bojanala Platinum District Municipality be found in contempt of the interdict order (*“the contempt proceedings”* and *“the contempt order”*). In the contempt proceedings the First Respondent was *“The Municipal Manager of the Madibeng Local Municipality”* and the Second Respondent was *“The Municipal Manager of the Bojanala Platinum District Municipality”*.⁴
- [16] Notwithstanding that this application was also duly served upon them, the Municipal Managers did not oppose the application.
- [17] On the 6th of May 2019 the Honourable Acting Justice Strydom, issued the contempt order in favour of Mr Madiro. A copy of the contempt order is annexed as Annexure “B” to the main application ⁵ and provides as follows:

- “1. *The First and Second Respondents are found to be in contempt of the court order issued out of this court on the 6th of June 2018 under Case no. 16592/2018;*
2. *The First and Second Respondents are committed to prison for a period of 30 days, which committal is suspended for a period of 14 calendar days on the condition that the First and/or Second Respondents complies with the order granted on the 6th of June 2018 within 14 calendar days from date of this order;*
3. *The First and Second Respondents to pay the costs of this application on an attorney and client scale.”*

⁴ See heading of order on Case line, p. 005 – 18

⁵ See order dated 6 May 2019 on Case line, p. 005 – 18

- [18] It appears that the contempt order duly came to the knowledge of both the Madibeng and Bojanala Municipal Managers. On the 20th of February 2020 a copy of the contempt order was sent to the Municipal Manager of the Madibeng Local Municipality⁶ and on the 10th of June 2019⁷ the contempt order was received by the Municipal Manager of the Bojanala Platinum Municipality.
- [19] The Municipal Managers also did not proceed with any appeal procedures against this judgement and order.
- [20] In the present application, Mr Madiro claims that neither of the Municipal Managers have complied with the provisions of the interdict order, as ordered in terms of the contempt order, and hence he is entitled to the relief in the present application.
- [21] As aforementioned the Respondents not only opposes the present application but have also launched counter-applications.⁸
- [22] I will deal with the opposition and counter applications of the Madibeng and the Bonjanala Municipalities separately below.

APPLICATION TO RESCIND INTERDICT AND CONTEMPT ORDERS BY MADIBENG RESPONDENTS:

- [23] The gist of the Madibeng Respondents' application to rescind and set aside the interdict and contempt orders is contained in paragraph 99 of their Answering Affidavit⁹ where it was stated as follows:

"99. *It is apparent, I submit, that at the time when the 2018 and 2019 orders were issued, the court was unaware of the facts set out above, particularly those relating to the steps that were undertaken by the municipality to prevent recurrence of the spillage.*"

⁶ See Acknowledgement of receipt of Madibeng Municipality on Case line, p. 005 – 65;

⁷ See Acknowledgement of receipt on Case line, p. 005 – 68;

⁸ See: Opposing Affidavit, Case line, p. 009 – 9 to 009.46

⁹ See: par. 99 of Answering Affidavit, p. 009 - 30

- [24] The well-established rule is that once a Court has duly pronounced the final judgment order, it has itself no authority to set it aside or to correct, and/or to supplement it. The reasons are twofold: first the Court becomes *functus officio* and its authority over the subject matter ceases¹⁰ and secondly the principle of finality of litigation expressed in the maxim “*interest rei publicae ut sit finis litium (it is in the public interest that litigation be brought to finality) dictates the power of the court should come to an end*”¹¹
- [25] An order of the High Court stands until set aside by a court of competent jurisdiction.¹² Until that is done, the court order must be obeyed even if it may be wrong.¹³ There is further a presumption that the judgment is correct.¹⁴
- [26] Relevant to the present counter application an order of the High Court could be set aside under Rule 42, on appeal or in terms of common law grounds. As indicated no appeal was ever noted.
- [27] Rule 42 of the Uniform Rules of Court makes provision for the rescission of an order in one of the following events:
- [27.1] the rescission or variation of an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby, either by the court *mero motu* or upon the application of any party affected by such an order or judgment (sub-rule (1)(a));
- [27.2] the rescission or variation of an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission, either by the court *mero motu* or upon the application of any party affected by such order or judgment (sub-rule (1)(b));

¹⁰ *West Rand Estates Ltd v New Zealand Insurance Company Ltd* 1926 AD 173 at 176, 178, 186 to 187 and 192

¹¹ *Zondi v MEC, Traditional and Local Government Affairs* 2006 (3) SA 1CC at par. 28

¹² *Bezuidenhout v Patensie Sitrus Beherend Beperk* 2001 (2) SA 224 (E) at 229 B – C; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at 242 C – 244A; *Jacobs v Baumann* NO 2009 (5) SA 432 (SCA) at 439 G – H

¹³ *Culverwell v Beira* 1992 (2) SA 490 (W) at 494 A – C; *Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 SCA at 570 F – G; *Department of Transport of Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) at 667 G – 675 F and 670 E – F; *Secretary, Judicial Commission of Enquiry into Allegations of State Capture v Zuma* 2021 (5) SA 327 CC at par. 59;

¹⁴ *Makings v Makings* 1958 (1) SA 338 (A) at 349; *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565

[27.3] the rescission or variation of an order or judgment granted as the result of the mistake common to the parties, either by the court *mero motu* or upon the application of any party affected by such order or judgment (sub-rule (1)(c)).

[28] In the present counter application the Madibeng respondents rely upon the provisions of Rule 42(1)(a).

[29] It is evident from the content of Rule 42(1) that with the using of the word “may” the court has a discretion whether or not to grant an application for rescission under this sub-rule.¹⁵ It would accordingly be a proper exercise of the court’s discretion to say that even if the applicant for a variation of an order of court prove that sub-rule (1) apply, such an applicant should not be heard to complain after the lapse of a reasonable time.¹⁶ What is a reasonable time depends upon the facts of each case.¹⁷ It is further important to note that where one of the jurisdictional facts contained in sub-paragraph 42(1)(a) to sub-paragraph 42(1)(c) does not exist, the court does not have a discretion to set aside an order in terms of the said sub-rule.¹⁸

[30] In ***Zuma v Secretary of the Judicial Commissioner of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State***¹⁹ the Constitutional Court held that the words “*granted in the absence of any party affected thereby*” in sub-rule 42 existed to protect litigants whose presence had been precluded and not those who had been afforded procedurally regular judicial process, but opted to be absent.

[31] The Constitutional Court held²⁰ that the sub-rule provided for two separate requirements (although one could give rise to the other in certain circumstances):

¹⁵ *De Wet v Western Bank Ltd* 1977 (4) SA 770 (T) at 77 F – G; *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 862 J – 863 A;

¹⁶ *First National Bank of South Africa v Van Rensburg NO: in re: First National Bank of South Africa Ltd v Jurgens* 1994 (1) SA 677 (D) at 681 B – G; *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306 H

¹⁷ *Troumedia Drukkers and Uitgewers (Edms.) Beperk v Kaimowitz* 1996 (4) SA 411 (C) at 421 G

¹⁸ *Van der Merwe v Boneiro Park (Edms.) Beperk* 1998 (1) SA 697 (D) at 702 H; *Swart v Absa Bank Ltd* 2009 (5) SA 219 (C) at 222 B – C

¹⁹ 2021 (11) WCLR 1263 (CC) at par. 56

²⁰ at par. 57

[31.1] a party had to be absent;

[31.2] and an error had to be committed by the court.

[32] In that case Mr Zuma brought an application to rescind the judgment and order that the court handed down in respect of contempt proceedings launched against him for his failure to comply with an order of the court. The court found that Mr Zuma had not been absent when the order was granted. The following was said in this regard by Khampepe J, writing for the majority (footnotes omitted):

[60] . . . As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing absentia (absence).

[61] The cases I have detailed above are markedly distinct from that which is before us. We are not dealing with a litigant who was excluded from proceedings, or one who was not afforded a genuine opportunity to participate on account of the proceedings being marred by procedural irregularities. Mr Zuma was given notice of the contempt of court proceedings launched by the Commission against him. He knew of the relief the Commission sought. And he ought to have known that that relief was well within the bounds of what this Court was competent to grant if the crime of contempt of court was established. Mr Zuma, having the requisite notice and knowledge, elected not to participate. Frankly, that he took issue with the Commission and its profile is of no moment to a rescission application. Recourse along other legal routes were available to him in respect of those issues, as he himself acknowledges in his papers in this application. Our jurisprudence is clear: where a litigant, given notice of the case against them and given sufficient opportunities to participate, elects to be absent, this absence does not fall within the scope of the requirement of rule 42(1)(a). And, it certainly cannot have the effect of turning the order granted in absentia, into one erroneously granted. I need say no more than this: Mr Zuma’s litigious tactics cannot render him “absent” in the sense envisaged by rule 42(1)(a).”

[33] This is also applicable to the facts in the present matter.

[34] The Madibeng Respondents and in particular the Madibeng Municipality (First Respondent in the present application) and the Municipal Manager for the Madibeng Municipality (Third Respondent in the present application) at no time deny having received knowledge of the interdict and contempt proceedings.²¹

²¹ In respect of knowledge attributed to the Madibeng Municipality reference is made to par. 52, Answering Affidavit, Case line, p. 009 – 19 and par. 54, Answering Affidavit, Case line, p. 009 – 20

[35] In paragraph 60 of the Answering Affidavit the deponent states that after having received the interdict proceedings the Municipality decided not to participate. It stated as follows:

“60. As the municipality was taking the necessary steps to address the risk of pollution, it was decided that it would be a futile exercise and waste of much needed funds to oppose the application”.²²

[36] It is apparent that the Madibeng Municipality and the Madibeng Municipal Manager were well aware that notwithstanding their “*apparent efforts to assist the applicants*” as alleged in the Answering Affidavit, they were well aware that the Applicant persisted with his interdict application and the relief sought therein and again opted not to oppose such relief.²³

[37] The reason provided by the Madibeng Municipality and the Madibeng Municipal Manager for not opposing the said application is formulated in paragraph 63 of their Answering Affidavit as follows:

“The municipality did not oppose this application as it was already taking the necessary steps to maintain the sewerage pipe and have it cleaned on a regular basis. This was conveyed to the applicant as aforementioned”.²⁴

[38] Similarly, it is apparent that the Madibeng Municipal Manager was also aware of the contempt proceedings.²⁵

[39] Although the Madibeng Respondents state in paragraph 73 of the Answering Affidavit that it came as a surprise to them when Mr Madiro proceeded with the contempt proceedings, they continue to state that they decided to amicably resolve the issue. In paragraph 74 they state as follows:

“74. Consistent with its conciliatory approach of seeking to result these issues amicably, on the 25th of June 2019 and upon receipt of the court order, the erstwhile acting municipal manager, Ms M M Grace Magole, transmitted

²² See: par. 60 of Answering Affidavit, Case line, p. 009 – 21

²³ See: par. 62 of Answering Affidavit, Case line, p. 009 - 22

²⁴ See: par. 63 of Answering Affidavit on Case line, p. 009 – 22;

²⁵ See: par. 69 of Answering Affidavit on Case line, p. 009 - 23

*correspondence to Langenhoven Attorneys and advised them of the steps that were being taken by the municipality to maintain the sewerage network and present pollution ...”*²⁶

- [40] The Madibeng Respondents, however, failed to provide any reason why they did not participate in opposing the contempt proceedings and failed to provide any explanation why the said contempt order was granted in their absence. In passing the Madibeng Respondents make mention of the fact that on the 6th of May 2019 the Madibeng Municipality was again placed under administration in terms of Section 139(1)(b) of the Constitution of the Republic of South Africa. This is the same date upon which the contempt order was granted on an unopposed basis. This comment, however, does not take the matter any further as it is apparent that the contempt proceedings were launched prior to that date and no explanation was provided for not opposing those proceedings prior to the 6th of May 2019.
- [41] With respect the only reasonable deduction to be made on the papers is that once again the Madibeng Municipal Manager and Madibeng Municipality opted not to oppose that application. This being the case, it is clear that the relevant Madibeng Respondents, having had the required notice and knowledge of the contempt proceedings, again elected not to participate.
- [42] Where the Madibeng Respondents have elected to be absent, their absence does not fall within the scope of the requirements of Rule 42(1)(a) and it can certainly not have the effect of turning the contempt order (and as I have indicated above the interdict order) granted in absentia into one erroneously granted.
- [43] It is further evident that the Madibeng Municipality’s purported absence is not the only respect in which its application fails to meet the requirements of rule 42(1)(a). It has also failed to demonstrate why the order was erroneously granted.

²⁶ See: par 74 of Answering Affidavit on Case line, p. 009 – 24

[44] In ***Zuma v Secretary of the Judicial Commissioner of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State***²⁷ the Constitutional Court also held as follows:²⁸

“Was the order erroneously sought or granted?”

[62] *Mr Zuma’s purported absence is not the only respect in which his application fails to meet the requirements of rule 42(1)(a). He has also failed to demonstrate why the order was erroneously granted. Ultimately, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because “there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment”.*

[63] *It is simply not the case that the absence of submissions from Mr Zuma, which may have been relevant at the time this Court was seized with the contempt proceedings, can render erroneous the order granted on the basis that it was granted in the absence of those submissions. As was said in Lodhi 2:*

“A court which grants a judgment by default like the judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought. The existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained judgment into an erroneous one.”

[64] *Thus, Mr Zuma’s bringing what essentially constitutes his “defence” to the contempt proceedings through a rescission application, when the horse has effectively bolted, is wholly misdirected. Mr Zuma had multiple opportunities to bring these arguments to this Court’s attention. That he opted not to, the effect being that the order was made in the absence of any defence, does not mean that this Court committed an error in granting the order. In addition, and even if Mr Zuma’s defences could be relied upon in a rescission application (which, for the reasons given above, they cannot), to meet the “error” requirement, he would need to show that this Court would have reached a different decision, had it been furnished with one or more of these defences at the time.’*

[45] In the premises the existence or non-existence of a defence on the merits now disclosed by the Madibeng Respondents is an irrelevant consideration and it subsequently cannot transform a validly obtained judgment into an erroneous one.

²⁷ 2021 (11) WCLR 1263 (CC) at par. 56

²⁸ Ibid paragraphs 62 and 63

- [46] Similarly as in the *Zuma* matter above, the Madibeng Respondents, bringing what essentially constitute their “*defence*” to the interdict and contempt proceedings through a rescission application, when the horses have effectively been bolted, is wholly misdirected.
- [47] In the premises where the counter application is premised upon the provisions of Rule 42, it must fail.
- [48] Notwithstanding, at common law a judgment can also be set aside on the grounds of:
- [48.1] fraud;
 - [48.2] *iustus* error;
 - [48.3] in certain exceptional circumstances when new documents have been discovered;
 - [48.4] where judgment had been granted by default;
 - [48.5] in the absence between the parties of a valid agreement to support the judgment, on the grounds of *iustus causa*.
- [49] The only relevant common law ground that can be applicable to the Madibeng counter application is in respect of rescinding a default judgment. In order to succeed an applicant for rescission of a judgment taken against him by default must show good/sufficient cause.²⁹ This generally entails that the applicant must:
- [49.1] give a reasonable (and obviously acceptable) explanation for his default;
 - [49.2] show that his application is made *bona fide*;
 - [49.3] show that on the merits he has a *bona fide* defence which prima facie carries some prospect of success.³⁰
- [50] In ***Van Wyk v Unitas Hospital***³¹ where the Constitutional Court dealt with the element of good cause to be shown in respect of condonation it inter alia held as follows:

²⁹ *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA at 9C; *Silver v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 H – 353 A

³⁰ *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042 F – 1043 A; *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) at 350 D

³¹ 2008 (2) SA 472 (CC) at 477 G

“An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay and what is more the explanation given must be reasonable. In addition in Special Investigation Unit & Another v Engineered Systems Solutions (Pty) Ltd³² the Supreme Court of Appeal summarised the present test to be applied as follows:

“[29] The reasonableness of the delay is assessed by considering the explanation for the delay which must cover the entire period of the delay. Where the delay can be explained and justified, then it is reasonable, and the merits of the review can be considered But where there is no explanation for the delay, the delay will necessarily be unreasonable.

[51] In the Madibeng counter application the Madibeng Municipality has dismally failed to provide a full explanation for the delay. In addition their explanation is porous and does not cover the entire period of delay. There is substantial periods not accounted for. I do not find their explanation reasonable.

[52] In ***Zuma v Secretary of the Judicial Commissioner of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State***³³ the Constitutional Court also dealt with a rescission premised upon the common law. I refer extensively to this judgement where it *inter alia* held as follows (footnotes omitted):

“[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission.[35] “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in Chetty,[36] and affirmed in numerous subsequent cases,[37] including by this Court, in Fick. In that matter, this Court expressed the common law requirements thus—

“The requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is

³² (216/2020) (2021) ZASCA 90; (2021) 3 All SA 791 (SCA) (25 June 2021)

³³ *Supra* at par. 71 to 76

taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”^[38]

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose these proceedings, and that he has a bona fide case that carries some prospects of success.

[72] *In its submissions, the Commission correctly demonstrated that Mr Zuma has failed to meet both of these requirements. Firstly, and as canvassed above, Mr Zuma’s prospects of success, insofar as his defences are concerned, are undeniably remote: his arguments have already been dealt with and disposed of by this Court. Even if we overlook this, Mr Zuma’s case is wholly misguided, presented to us, as it is, in the form of a rescission application when it is a plea to substitute the judgment of the majority with that of the minority. His arguments constitute the stuff of an appeal.*

[73] *Secondly, even if Mr Zuma was at the helm of a meritorious application bearing some prospects, which he had managed to steer clear of the perilous dangers of the doctrine of functus officio, one cannot ignore the simple common law rule that both the requirements must be met:*

“For obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”^[39]

[74] *In other words, even if Mr Zuma had prospects of success on the merits, he cannot escape the obligation to adequately explain his default. In Chetty, the Court dismissed*

the application for rescission because, it said, "I am unable to find . . . any reasonable or satisfactory explanation for his default and total failure to offer any opposition whatever to the [previous proceedings]".^[40] The Court said that "even if the [applicant's] case was that he was ignorant of the proceedings which had been instituted against him, he would have been obliged to show a supremely just cause of ignorance, free from all blame whatsoever".^[41] And my concerns in this respect meet endorsement abroad: by way of example, the House of Lords, considering rescission, stated that it shall not re-apply itself except in circumstances where the parties have been prejudiced through no fault of their own.^[42] The Court in *Chetty* concluded as follows:

"It appears to me that the most likely explanation of the appellant's otherwise inexplicable failure to offer any opposition to the respondent's application is that he was not consonant in his resolve to oppose it. Reviewing his verbal undertakings and his acts and omissions throughout that period, together with his ex post facto explanations, one gets the impression of moods fluctuating between a desire to achieve a particular goal and total indifference to its achievement - of a person now engaged in a flurry of activity, then supine and apathetic. . . [his behaviour] is indicative of a high degree of indifference or unconcern on his part in regard to the actions [being taken] against him, and is of a piece with his apathetic and ineffectual approach to the question of putting up opposition to the [proceedings]".^[43]

[75] The same is true here. Mr Zuma intentionally declined to participate in the contempt proceedings, and disdainfully dismissed a further opportunity when invited to do so. Mr Zuma only now attempts to justify his absence from this Court. He goes to great lengths to point out that his failure to appear before the Commission was bona fide because, so he contends, the Chairperson was biased against him; the Commission is unconstitutional; he had received poor legal advice; and he lacked financial means to participate. Yet, he seems to overlook the fact that none of these reasons justify his

refusal to participate in the proceedings before this Court. His plea of poverty is totally irreconcilable with his extra-curial statements that not only unequivocally evinced his resolve not to participate in the proceedings, but also displayed his attitude of utter derision towards this Court. This plea is quite plainly an afterthought, if not subterfuge. It falls to be rejected out of hand. Coming to the alleged poor legal advice, this makes sense only in the context of non-participation in the proceedings as a result of that advice. If the true reason for non-participation was lack of funds, it must follow that he would still not have had funds even if there was no poor legal advice. What then is the relevance of the alleged lack of funds? For these reasons, it is difficult to comprehend this assertion about poor legal advice. I make bold and say, because of this incomprehensibility, this assertion, too, smacks of being an afterthought.

[76] *The truth is that Mr Zuma has failed to provide a plausible or acceptable explanation for his default. This being so, he cannot hope to succeed on the merits, for ultimately, “an unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits”.*^[44] *In fact, and although I have considered the merits of this application, in the absence of a reasonable explanation for his default, we are not even obliged to assess Mr Zuma’s prospects, for—*

“in the light of the finding that the appellant’s explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant’s prospects of success.”^[45]

(Footnotes omitted)

[53] As indicated above the same principles applicable to the explanation of the delay in the Zuma matter are applicable to the Madibeng respondents explanation. They intentionally declined to participate in the interdict and the contempt proceedings. Only at this belated stage do they now attempt to justify their absence from this Court with a half-baked explanation that does not pass muster.

[54] In the premises the Madibeng Respondents' application for rescission cannot succeed and should be dismissed.

AD MERITS TO OPPOSITION OF PRESENT APPLICATION BY MADIBENG RESPONDENTS:

[55] In order for Mr Madiro to succeed with the present application he has the onus to prove (a) that a court order was granted; (b) that the court order was served on the Municipal Managers or that the Municipal Managers had knowledge of the court order; and (c) that the court order was not complied with by them. If Mr Madiro proves these requirements a presumption arises that the Municipal Managers' non-compliance is wilful and mala fide.³⁴ Once Mr Madiro has satisfied the requirements to prove contempt, an evidentiary burden rests on the respondent to show reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.³⁵

[56] The only question that now remains is whether the Madibeng Respondents have disclosed a valid defence and shown reasonable doubt in opposition to the relief sought by Mr Madiro in the present application.

³⁴ The test was summarised in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) fn 9 (Page 336) as follows: "once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the respondent establishes a reasonable doubt relating to wilfulness and mala fides."; In *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) para 36 it was held that- "the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

³⁵ *Pheko II* para 28; *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 22 (*Fakie*); *SJCI v Zuma* para 37; In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC).

- [57] Notwithstanding what was stated in paragraphs 55 and 56 above, this court is presented with a contempt order wherein it was already held that the Municipal managers of both the Madibeng and Bonjanala Municipalities are in contempt, are sentenced to 30 days imprisonment which imprisonment was suspended for 14 days to provide the relevant parties with a further opportunity to comply with the interdict order.
- [58] This is not an appeal and not a rehearing of either the proceedings before the Honourable Molopa J or Strydom AJ. This court must simply determine whether there was compliance with the contempt order. Anything that transpired before date of that order is irrelevant for the present exercise.
- [59] The Madibeng Respondents contend that there has been compliance with the two orders.
³⁶ Their explanation provided for the events post the contempt order is contained in paragraphs 74 to 84 of the opposing affidavit.
- [60] In order to evaluate their defence it is necessary to start with the content of the interdict order.³⁷
- [61] Nowhere did I find any explanation why the report as contemplated within prayer 5 of the interdict order was not filed by the Madibeng Municipality within 14 days from date of the contempt order, or at all. The Madibeng Municipality has not even attempted to provide any explanation for this failure.
- [62] In prayer 1 of the interdict order the Madibeng Municipality was ordered to remove sewerage discharged or situated on the subject property as well as on the access road traversing the subject property within a period of 14 days from date of service of that order. Even if I accept that this prayer was indeed properly executed by the Madibeng Municipality, whether within or after the 14 days of the order, it is unfortunately not the end of the matter.

³⁶ See para. 104 and 105 of Answering Affidavit, Case line, p. 009 - 31

³⁷ See interdict order, Case line, p. 005 – 17

- [63] Prayer 2 of the interdict order is not ambiguous in any sense and provides that the Madibeng Municipality is ordered and directed to take all necessary steps and actions required to prevent “*any future discharge of spillage of sewerage*” on the subject property and on the spilled road.³⁸
- [64] It is noteworthy that this prayer does not stipulate that all “*reasonable steps and actions*” should be taken. It particularly stipulates that all “*necessary steps and actions*” should be taken.
- [65] On a clear interpretation of this prayer it is evident that the court ordered the Madibeng Municipality to ensure that such spillage will not occur again in the future. Their reasonable or best efforts will not suffice. It is not difficult to understand the reasoning behind such an order. A mere consideration of some of the provisions of the Constitution of the Republic of South Africa (Constitution)³⁹ justifies such an order:
- [65.1] Since the advent of the Constitution of the Republic of South Africa⁴⁰, the Bill of Rights incorporated therein serves as a cornerstone democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.⁴¹ The State must respect, protect, promote and fulfil the rights in the Bill of Rights.⁴² Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and binds the legislator, the executive, the judiciary and all organs of state.
- [65.2] Section 24 of the Constitution provides:
- “*Everyone has the right –*
- (a) *to an environment that is not harmful to their health or wellbeing;*
- (b) *to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-*

³⁸ See prayer 2 of interdict order on Case line, p. 005 - 17

³⁹ Act 108 of 1996

⁴⁰ Act 108 of 1996

⁴¹ See section 7(1) of the Constitution (*supra*)

⁴² See section 7(2) of the Constitution

- (i) *prevent pollution and ecological degradation;*
- (ii) *promote conservation; and*
- (iii) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

- [65.3] Section 41(1) *inter alia* provides that all spheres of Government and all organs of state within its sphere must secure the wellbeing of the people of the Republic;
- [65.4] Section 152(1)(b) of the Constitution provides that the object of the Local Government are *inter alia* to ensure the provision of services to communities in a sustainable manner and in terms of Section 152(1)(d) to promote a safe and healthy environment.
- [65.5] Section 153 of the Constitution provides that a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community.
- [65.6] Section 157(1)(a) further provides that a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of schedule 4 to the Constitution. Part B of schedule 4 *inter alia* provides that the municipality will have executive authority in respect of water and sanitation services limited to potable water supplies systems and domestic waste water and sewerage disposal systems.
- [66] It is evident from the evidence placed before the court that at the time the contempt order was made, and at the time the application was argued before me, the sewage problem has not been resolved. As such, subject to what is stated from paragraph 125 below, the Madibeng Respondents and in particular the Madibeng Municipal Manager have not complied with the court order.

[67] The question that remains is whether the Madibeng Respondents and in particular the Madibeng Municipal Manager has shown reasonable doubt. I will deal with this aspect separately below where I deal with what sanction the court should now impose.

THE BONJANALA RESPONDENTS' APPLICATION TO RESCIND INTERDICT AND CONTEMPT ORDERS AND OPPOSITION TO PRESENT APPLICATION:

[68] The position in respect to the Bonjanala Respondents is different than that of the Madibeng Respondents.

[69] Similarly as the Madibeng Respondents, the Bonjanala Respondents are opposing the application for contempt of court and have also launched a counter-application. The purpose of the counter-application is to set aside as a nullity both the interdict and the contempt orders.⁴³

[70] The Bonjanala Respondents contend that the interdict order it is a nullity in law. They submit that it has no force and effect as it is both unlawful and unconstitutional in that it orders the Bonjanala Municipality (District Municipality) to perform a function it is not statutory empowered to do and has no competence to actually perform same. As a result the interdict order is not capable of implementation insofar as it relates to the Municipal Manager of the Bonjanala Municipality.⁴⁴

[71] The Bonjanala Respondents submit that they are entitled to raise the aforementioned defence and to bring the present counter-application as a reactive challenge to the present proceedings that are before court.⁴⁵

[72] Because of their approach in raising a reactive challenge, they are also of the opinion that they are not subject to the time frames provided for in Rule 42 of the Uniform Rules of Court.

⁴³ See par. 10 of Answering Affidavit, Case line, p. 015-8

⁴⁴ See par.13 of Answering Affidavit, Case line, p. 015-10

⁴⁵ See par. 19 of Answering Affidavit, Case line, p. 015-12

They submit that a reactive challenge can be brought at any time.⁴⁶ I will deal with the time aspect separately in the paragraphs below.

- [73] It is now settled law that while reactive challenges in the first instance and perhaps in origin protect private citizens from state power, good practical sense and the call of justice indicate that they can usefully be employed in a much wider range of circumstances. There is no practical or conceptual justification for straitjacketing them to private citizens. A reactive challenge should be available where justice requires it to be. That will depend in each case on the facts. An organ of state will also be allowed to bring a reactive challenge.⁴⁷
- [74] Although the Bonjanala Respondents' submissions may be correct that the time periods provided for in Rule 42 does not *per se* prohibit them from raising a reactive challenge at a later stage, it does not mean that their delay to approach a court to set aside the relevant decision complaint of would merely be overlooked. In this regard reference is made to the following passages in Merafong (*supra*)⁴⁸:

*"[41] The import of Oudekraal and Kirland was that Government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. The sole power to pronounce that decision as defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective until properly set aside."*⁴⁹

"54. If we were to sustain Merafong's argument that it was entitled to ignore the Minister's decision until it was sought to be enforced, this must extent to all cases of patent invalidity. This would suggest that an official may ignore a decision, taking under statutory power (intro-veres), that is tainted by patent improper influence or corruption. But that is precisely what happened in Kirland – and the self-help argument was not countenance. What is more, not only with what is or is not 'patently unlawful' be decided outside the courts, but that would be no rules on who gets to decide and how. If failure to review a disputed decision is defensible

⁴⁶ See par. 29 of Answering Affidavit, Case line, p. 015-15

⁴⁷ See *Merafong City v Anglogold Ashanti Limited* 2017 (2) SA 211 (CC) in para. 55 and 56

⁴⁸ Footnote 47 *supra*

⁴⁹ Also see *Economic Freedom Fighters v Speaker, National Assembly & Others* 2016 (3) SA 580 (CC) and *MEC for Health, Eastern Cape & Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) in par 106

on the basis that a decision was considered patently unlawful, the rule of law immediately suffers. So the argument is not tenable.

[58] *The Supreme Court of Appeal in effect imposed a duty of proactivity on Merafong, though it did so without the benefit of the Minister's views before it. It held that Merafong could not simply ignore the Minister's ruling. Once it concluded the Minister's decision was wrong, it was duty-bound to initiate proceedings to set it aside – and until it did, the decision remained binding on it*

[63] *..... This is that, when all reasonable measures and alternative remedies have been exhausted, an Organ of State to which a contested ruling applies should ordinarily go to court to have the legal rights and wrongs of the ruling determined. In the circumstances, without holding that Merafong was under a standalone duty to clarify the Minister's decision, once Merafong disputed the decision, and decided it did not wish to comply with it, Merafong owed a duty to AngloGold, which relied on the decision. Their duty was to seek clarification from the courts. What it could not do was to sit on its hands or defy the ruling by enforcing its own unilateral view.*

[70] *The virtue of 'classical' reactive challenges lies precisely in the fact that they provide a defence to parties who face the enforcement of the law but who never previously confronted it. And it is for this reason that they may sometimes be disallowed. Where a statute provides for an appeal or other remedy, and the disputed decision was specifically directed to the challenging party, our courts have forbidden a collateral challenge.*

[71] *The point of these cases is that a ruling or decision was not directed to the world at large. It was specific. It was known to the subject".*

(Own emphasis and footnotes omitted)

[75] In the Merafong-matter, the Merafong Municipality also by way of a collateral challenge brought a counter-application to set a previous order of court aside. Although the Constitutional Court concluded that the Merafong Municipality was entitled to raise this counter-application by way of a collateral challenge, it held that Merafong's reactive challenge is of a category that necessitates scrutiny in regard to delay. The delay can be a disqualifying consideration. For this reason the Constitutional Court referred the matter back to the High Court to determine whether there was in the specific circumstances an unreasonable delay or not.

[76] In the matter of ***The Department of Transport & Others v Tasima (Pty) Ltd***⁵⁰ (Tasima) the majority judgment referred with approved to ***Khumalo & Another v MEC for Education, KwaZulu Natal***⁵¹ (Khumalo) where the Constitutional Court held that the provisions of the Constitution has not dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with the court's discretion to overlook a delay.⁵²

[77] Tasima further held that reactive challenges may be brought by State Organs, providing that the delay is not unwarrantably "undue".⁵³

"[150] *An organ of state, like any other party, must therefore challenge an administrative decision to escape its effects. This it can do reactively, provided reasons for doing so are sound and there is no unwarranted delay.*"

[78] With the necessity to provide an explanation for the delay, reference is again made to the ***Van Wyk v Unitas Hospital***⁵⁴ matter supra. The Constitutional Court has also held that while a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power it is equally a feature of the rule of law that undue delay should not be tolerated.⁵⁵

[79] From the Answering Affidavit filed by the Bonjanala Respondents it is evident that although they submit that they are not bound by the periods provided for in Rule 42 of the Uniform Rules of Court, similarly as in the Merafong matter their reactive challenge is of a category that necessitates scrutiny in regard to delay. This is borne out by their explanations for their delay as contained in paragraphs 30 to 35⁵⁶. The question that then remains is whether a reasonable explanation for the delay was provided by the Bonjanala

⁵⁰ 2017 (2) SA 622 (CC)

⁵¹ 2014 (5) SA 579 (CC)

⁵² See par. 45 of Khumalo judgment

⁵³ See par 143 of Tasima judgment

⁵⁴ 2008 (2) SA 472 (CC) at 477 G

⁵⁵ See Khumalo-judgment, para. 45 to 46; also see *National Treasury & Others v Opposition to Urban Tolling Alliance & Others* 2012 (6) SA 223 (CC) at par. 26

⁵⁶ See para. 30 to 35, Case line, p. 015 - 15 – 015 - 17

Respondents? Before dealing with their explanation it is necessary to provide the relevant surrounding facts in which the explanation should be evaluated:

[79.1] As aforementioned both the applications for the interdict order and the contempt order were duly served and notwithstanding proceeded unopposed.

[79.2] As early as the 6th of June 2018 the Applicant obtained the interdict order against both the Madibeng Local Municipality and against the Bonjanala Municipality. This order was duly served upon the Municipal Manager of the Bonjanala Municipality on the 31st of August 2018;

[79.3] On the 13th of August 2018 a letter was directed to the Municipal Manager of the Bonjanala Municipality wherein:

- (i) He was referred to a copy of the interdict order that was annexed to the said letter;
- (ii) He was made aware that in terms of Section 55 of the Local Government: Municipal Systems Act 32 of 2000, the Municipal Manager as the Head of Administration of a Municipality is responsible and accountable for *inter alia* the management of the provisional services to the local community in a sustainable and equitable manner;
- (iii) The Municipal Manager was requested, as the designated officer to properly comply within 7 days from date of that letter with the directions contained in the attached court order, failing which the Applicant advised that he would proceed without further notice of apply for contempt of court against the Municipal Manager personally.⁵⁷
- (iv) On the 31st day of August 2018, a copy of the relevant court order was served by way of Sheriff on the Municipal Manager, Bonjanala Municipality.⁵⁸

⁵⁷ See letter to Municipal Manager annexed as Annexure M2 to Answering Affidavit filed in opposition to counter-application, Case line 018 - 97

⁵⁸ See return of service, Case line, p. 018 - 102

- (v) The interdict order was again sent by way of correspondence to the Bonjanala Municipality on the 16th of October 2019 and also served by hand on the 25th of October 2019.⁵⁹

[80] It is nowhere alleged by either the Madibeng or the Bonjanala Respondents that any of the two applications were not properly served upon them, or that the interdict and contempt orders obtained pursuant thereto were not properly served on them or did not come to their notice.

[81] The Bonjanala Respondents reasons provided for their delay are as follows:

[81.1] Attempts were made by their officials who tried to comply with the ⁶⁰ order as evidenced by correspondence. In support of this contention reference is made to a letter dated the 25th of June 2019 annexed as Annexure “AK4”;

[81.2] A substantial delay was caused because the Bonjanala Municipality did not have a permanent Accounting Officer over the last 5 years. This has caused that the Municipality was not able to properly function.

[81.3] Consistent changes of acting Municipal Managers have also not helped as it has created some degree of instability and lack of accountability. The Bonjanala Respondents state in paragraph 31 that it is for this reason that there was a delay in bringing the application to challenge the court orders;⁶¹

[82] Premised upon their explanation provided, the Bonjanala Respondents conclude in paragraph 36 that “the delay in launching the application is properly explained”. I do not agree.

[83] There is no explanation from the Bonjanala Respondents why, since the first application for an interdict was served upon them, they took no steps to oppose the application.

⁵⁹ See Annexure M5 to Answering Affidavit filed in opposition to counter-application, Case line, p. 018 – 103 and Annexure M6, Case line, p. 018 - 105

⁶⁰ See Annexure AK4 to Bonjanala Answering Affidavit, Case line, p. 015 - 27

⁶¹ See par. 31 of Bonjanala Answering Affidavit, Case line, p. 015 - 16

- [84] The facts further indicate that although the interdict order of Molopa J. was only formally served upon the Bonjanala Municipality on the 31st of August 2018, it was already notified of the order on the 13th of August 2018 by way of a letter from the Applicant's attorneys.⁶² I have already discussed the content of this letter in paragraph 73.2 above.
- [85] After the Bonjanala Municipality received notice thereof, no explanation is provided why the Bonjanala Municipality did not or could not comply therewith. It is also not explained why, if they were in disagreement with the order, no steps were taken to appeal the order.
- [86] Again, no reason is provided why, after the application for contempt was served upon them no steps were taken to oppose the second application.
- [87] Since the contempt order was obtained before Strydom AJ, and since they received knowledge of the contempt order there is again a glaring absence of reasons why no appeal proceedings were implemented. The further question that remains is what steps were taken by them until the present counter-application was launched in August 2022?
- [88] The onus is on the Bonjanala Municipality to explain why the delay of some 5 years is not unreasonable.⁶³
- [89] The explanations provided by the Bonjanala Respondents in the present Founding Affidavit for the explanation for their delay do not pass muster. The explanations are general in nature without any specific details whatsoever. The explanation provided by the Bonjanala Municipality was both porous and lack the markings of good constitutional citizenship.
- [90] To utilise the excuse that one meeting was facilitated in an attempt to resolve the matter amicably, is no explanation for a lapse of a period of 5 years.
- [91] I am unconvinced that the explanations provided by the Bonjanala Municipality, on their own, warrant a delay of 5 years.

⁶² Annexure M2 annexed to Replying Affidavit to Answering Affidavit to counter-application, Case line, p. 018 - 97

⁶³ See *Kasima* matter, par. 153

[92] This, however is not the end of the enquiry. The delay cannot be evaluated in a vacuum.⁶⁴

[93] In ***Khumalo*** the Constitutional Court emphasised that an important consideration in assessing whether a delay should be overlooked is the nature of the decision. This was said to require analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge.⁶⁵

[94] The reasons why the first interdict order is allegedly a nullity are provided in paragraphs 20 to 27 of the Bonjanala Respondents' founding affidavit in the present counter-application. The Bonjanala Respondents' contend that:

[94.1] A Municipality has the functions and powers assigned to in terms of Sections 156 and 229 of the Constitution;

[94.2] The functions and powers referred to in sub-section 1 must be divided in the case of a District Municipality and the Local Municipalities within the area of the District Municipality as set out in this chapter (without any further elaboration);

[94.3] The powers and functions of a District Municipality are spelled out in section 84 of the Local Government Municipal Structures Act. It is clear in law that a District Municipality can only perform those functions which are assigned to it in law;

[94.4] The interdict court order ordered the Bonjanala Platinum District Municipality to perform functions which are beyond its competence and in contravention of the law (without any elaboration).

[94.5] The interdict order specifically orders that the Fourth and Fifth Respondents are ordered and directed to ensure that the sewerage discharged or situated on the relevant property under consideration are cleared and removed from the property within a period of 14 days on date of that order. In addition the Fourth and Fifth Respondents were ordered and directed to take all necessary steps and actions

⁶⁴ See *Khumalo-judgment*, par. 52

⁶⁵ See *Khumalo-judgment*, par. 57

required to prevent any future discharge of spillage of sewerage on the property on the spilled road

[94.6] That if regard is had to the powers and functions of the District Municipality, it is apparent that the services which the interdict order directed be carried out, fall squarely within the ambit of the Local Municipality, which is the Madibeng Local Municipality. The District Municipality is not statutory empowered to carry out the said services or to usurp the performance of same by the Local Municipality. To compel the district municipality to carry out the services which are contained in the interdict court order granted will result in further contravention of the law and such will be unconstitutional.

[94.7] The court order as it stands is in violation of the principles of separation of powers which is envisaged in the aforementioned Act.

[94.8] The district municipality only perform limited functions such as bulk sewerage purification works and main sewerage disposal that affects a significant proportion of municipalities in the district, solid waste disposal sites serving the area of the district municipality, municipal health services serving the area of the district municipality and fire fighting services serving the area of the district municipality as a whole.

[95] For the reasons that follow I am satisfied that the Bonjanala Respondents have not established to prove that the interdict and subsequent contempt orders are nullities:

[95.1] Shared authority in local government was first introduced in the 1996 Constitution⁶⁶.

[95.2] Section 155 of the Constitution makes provision for three categories of municipalities that may be established, Category, A, B and C. While category A

⁶⁶ *Constitution of the Republic of South Africa Act 108 of 1996*

was a self-standing municipality, a “shared” local authority was created for the areas falling outside category A municipal areas. Category A municipal areas what is known as the metropolitan areas.

[95.3] Section 155(1)(b) states that a category B municipality is “*a municipality that shares municipal executive and legislative authority in its area with a category C within whose area it falls*”.

[95.4] This means that a category B municipality shares its powers and functions, as listed in Part B of schedules 4 and 5 with a category C municipality.

[95.5] In subsequent legislation category B municipalities are termed Local Municipalities and category C Municipalities are termed “the District Municipality”.

[95.6] The Constitution leaves the division of authority between category B (Local) and C (District) Municipalities to Parliament. Section 155(3)(c) of the Constitution provides that National Legislation must make provision for an appropriate division of powers and functions between Municipalities when an area has Municipalities of both categories B and C. In addition, section 155(4) of the Constitution *inter alia* provides that the division of powers and functions between a Local and District Municipality can be asymmetrical. Thus the powers of Local Municipalities within a District Municipality’s jurisdiction need not or be the same. Worded differently, as the purpose of a District municipality is to respond to the need and capacity of Local Municipalities, the Constitution foresees and permit that a District Municipality may play a different role in respect of each Local Municipality in its district. The division of functions and powers between a District Municipality and the Local Municipality in a district can thus be asymmetrical and will depend on need and capacity.

[95.7] Since the objective of democratic and accountable Government is best pursued by Local Municipalities because they are closer to the people, the idea was never that the District Municipality is there to dominate Local Municipalities. The overall

objective of the district municipality was therefore succinctly described by the Constitutional Court in the second certification judgment as the performance of “*coordinating functions*”.⁶⁷

[95.8] This was followed by the “*White paper on Local Government: coordination, support and equalisation*”. Giving flesh to these “coordinating functions” as contemplated within the Constitution, the white paper clearly articulated the purposes that District Municipalities should pursue as well as the outcome that they should achieve. The division of a District Municipality that the white paper portrays is as a coordinator, an initiator of development and, only as a last resort, a provider of services directly to the public.

[95.9] The Local Government: Municipal Structures Act (MSA),⁶⁸ as initially enacted, by and large gave effect to the overall objective, purposes and outcomes identified in the foretasted white paper.⁶⁹ However, a significant shift occurred in the Municipal Structures Amendment Act of 2000, transforming the District Municipality from a coordinator and provider of bulk services to a regular end-user service provider. In an astounding shift in policy and conception, District Municipalities were made responsible for *inter alia*:

[95.9.1] Portable water supply systems;⁷⁰

[95.9.2] Bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and where applicable the generation of electricity;⁷¹

[95.9.3] Domestic waste water and sewerage disposal systems;⁷²

⁶⁷ In re: Certification of the amended text of the Constitution of the Republic of South Africa 1996: 1997 (1) BCLR (1) (CC) par. 77

⁶⁸ Act 117 of 1998

⁶⁹ See De Visser 1999:10

⁷⁰ Section 84(1)(b)

⁷¹ Section 84(1)(c)

⁷² Section 84(1)(d)

[95.9.4]Municipal health services;⁷³

[95.10] Accompanying these allocations was the provision that the National Minister of Provincial and Local Government may shift the functions back to local municipalities in respect of those functions mentioned in the aforementioned paragraph.⁷⁴

[95.11] In addition Section 85(1) of the MSA provides as follows:

“85(1) The MEC for Local Government in a province may, subject to the other provisions of this section, adjust the division of functions and powers between a district and a local municipality as set out in section 84(1) or (2) by allocating, within a prescribed policy framework, any of those functions or powers vested –
(a) in the local municipality, to the district municipality; or
(b) in the district municipality (excluding a function or power refer to in section 84(1)(a), (b), (c), (d), (i), (o), or (p), to the local municipality”.

[95.12] A District Municipality is thus statutory empowered to render and to act as a direct service provider in respect of sewerage disposal to the community within its district.

[95.13] Section 84(2) of the MSA provides that a Local Municipality has the functions and powers referred to in Section 83(1), excluding those functions and powers vested in terms of sub-section 84(1) in the District Municipality in whose area it falls. Section 83(1) of the MSA provides that a municipality has the functions and powers assigned to it in terms of Section 156 and 229 of the Constitution.

[95.14] Section 156(1) of the Constitution provides that a municipality has executive authority in respect of, and has the right to administer: (a) the local government matters listed in Part B of schedule 4 and Part B of schedule 5 as well as any other matter assigned to it by National or Provincial legislation.

⁷³ Section 84(1)(i)

⁷⁴ Section 84(3)(a)

[95.15] Schedule 4, Part B of the Constitution inter alia provides that the local municipality is responsible for “*water and sanitation services limited to potable water supply system and domestic waste water and sewerage disposal systems*”.

[96] It is thus evident that:

[96.1] there is a clear overlap in respect of the powers and functions of the Local Municipalities relating to “**sewerage disposal systems**” as provided for in Part B of schedule 4, as well the powers and functions of a District Municipality in respect of “**sewerage disposal systems**” provided for in Section 84(1)(d) of the MSA;

[96.2] a clear and consistent module of the allocation of functions and powers to Local Municipalities and District Municipalities was not achieved. What has emerged is thus a very case specific construction of the powers and functions of District Municipalities.

[97] For the Bonjanala Respondents to merely make a bold allegation in its counter-application that the interdict order made by Her Ladyship Molopa J. and the services directed in terms thereof do not fall within the powers and functions of the Bonjanala District Municipality is therefore not sufficient. No evidence was placed either before myself or before Molopa J. who made the interdict order or before Strydom AJ. who made the contempt order to support this allegation to indicate that the Bonjanala Municipality functions and powers did not and do not include the responsibility for “sewage disposal systems” to Mr Madiro. Clearly this is not sufficient to satisfy the evidential burden that rests upon them.

[98] It is a trite principle that a local authority can only act within the powers conferred upon it. In ***National Credit Regulator v Getbucks (Pty) Ltd & Another***⁷⁵ the Supreme Court of Appeal once again reaffirmed this principle:

⁷⁵ (140/2020) (2021) ZASCA 28; (2021) 2 All SA 747 (SCA) [26 March 2021]

“These provisions implied that the local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition – it is fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law – to the extent that lead that it expresses this principle of legality ‘is generally understood to be a fundamental principle of constitutional law’. It is necessary to emphasise that constitutional rights court orders must be respected.”⁷⁶

[99] What I am now requested to consider, however, is whether this court can find that the interdict order is a nullity. This court cannot merely determine that on the Bonjanala Respondents’ say so. The court needs to evaluate the evidence before it and the evidence that served before Molopa J and Strydom AJ.

[100] In this regard I wish to reiterate that an appeal would have been the proper process to contest an order.⁷⁷ This procedure was not followed in the present matter.

[101] In the Ndabeni-matter the Constitutional Court held that the initial judgment, the subject of the collateral challenge before it (in the present matter the “interdict order”), that was given in the court of first instance, cohered with the legal material that served before the relevant High Court Judge.⁷⁸ Similarly as in the present matter, the municipal parties also did not deliver any Answering Affidavits and the application in the court of first instance also proceeded unopposed. In the premises the Presiding Judge in the High Court, in the Ndabeni-matter, Mjali granted the order in the amended Notice of Motion on an unopposed basis. In dealing with the collateral challenge in the Constitutional Court the Constitutional Court *inter alia* held as follows:

“[32] The Municipal Parties delivered no answering affidavit, despite Ms Ndabeni granting them extensions of time to comply with the rules. Hence the application before Mjali J proceeded unopposed. Accordingly, in the absence of any jurisdictional or other

⁷⁶ *Municipal Manager OR Tambo District Municipality & Another v Ndabeni* 2023 (4) SA 421 (CC); (2021) 5 BLLR 393(CC); (14 February 2022); Secretary of the Judicial Commission of Enquiry into allegations of State Capture Corruption and Fraud in the Public Sector, including Organs of State v Zuma 2021 (5) SA 327 (CC); 2021 (9) BCLR 992(CC); (2021) ZACC18 in par. 85

⁷⁷ *Ndabeni-case (supra)* at par. 23; *State Capture-case (supra)* at par. 85

⁷⁸ *Ndabeni-case (supra)* at par. 28

impediment, Mjali J granted the order in the amended notice of motion. The effect of the order was to declare Ms Ndabeni to be employed permanently as an ATICC Manager by virtue of Resolution 10/11. The Municipal Parties' subsequent explanation about the absence of a post for Ms Ndabeni and funding for the post are irrelevant for determining the lawfulness of the Mjali J order. Consequently, it is not apparent from the judgment of Mjali J that the declaration of Ms Ndabeni as a permanent employee is null and void under section 66(3).

[33] *Coupled with the evidence about Ms Ndabeni's employment with the Municipality, Mjali J had jurisdiction to decide that the effect of Resolution 10/11 was to convert Ms Ndabeni's status to that of permanent employment. Once Mjali J had jurisdiction, her order could not be impugned as a nullity. Whether that decision was right or wrong on the merits did not affect the binding force of the order, unless it was set aside on appeal. However, the Supreme Court of Appeal vindicated the Mjali J order by refusing the petition against her judgment. Six months after the Supreme Court of Appeal's refusal, the Municipal Parties abandoned any application for leave to appeal to this Court to set aside that order. Accordingly, the Mjali J order remained extant.*

[34] *Manifestly, the Mjali J order is not a nullity; it is indeed a lawful order, issued by a properly constituted Court having jurisdiction. On the facts, this case falls squarely within the ambit of the ruling in Tasima. Motalais distinguishable. Unlike Motala, the Mjali J order does not exceed the powers of the Court. Hence the Mjali J order is competent."*

[102] The Constitutional Court in addition held in paragraph 37 of the Ndabeni judgement as follows:

"[37] Having found that the Mjali J. order is lawful, it must be complied with. If there are collateral consequences, they arise not from the implementation of this order, but rather from the municipal parties' failure to defend themselves against the granting of the Mjali J. order. To give effect to the Mjali J. order, the remaining grounds of appeal against the order of the Supreme Court of Appeal must be dismissed."

[103] Although a court would not compel compliance with an order if that would be *"patently at odds with the rule of law"*, no one should be left with the impression that court orders, including flawed court orders, are not binding or that they can be flooded with impunity.

“If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.”⁷⁹

[104] The Constitutional Court in *State Capture* reaffirmed that irrespective of the validity, under Section 165(5) of the Constitution, court orders are binding until set aside. Similarly, the Constitutional Court held in ***Department of Transport v Tasima (Pty) Ltd***⁸⁰ that wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the Judges had the necessary authority to make the decisions at the time they made them, then those orders would be enforceable.⁸¹

[105] In view of what I have already stated above I am of the opinion that the same principles are to be applied in the present matter. In the premises I find that the order of Molopa J. is lawful and that the collateral challenge does not succeed. The counter application of the Bonjanala Respondents should also be dismissed with costs. Again, this is not the end of the matter. The question still remains whether the Bonjanala Respondents were/are in contempt of the court orders.

AD MERITS TO OPPOSITION OF PRESENT APPLICATION BY BONJANALA RESPONDENTS:

[106] I refer to what was stated in paragraphs 55, 56 and 57 of the judgement above.

[107] The only question that now remains is whether the Bonjanala Respondents have disclosed a defence and shown reasonable doubt in opposition to the relief sought by Mr Madiro in the present application.

⁷⁹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (*State Capture*) at para 87.

⁸⁰ *2017 (2) SA 622 CC* at par. 182

⁸¹ *Tasima-matter* at par. 198; *Ndabeni-case* (*supra*) at par. 24

- [108] I reiterate that this court is presented with a contempt order wherein it was already held that the Municipal managers of both the Madibeng and Bonjanala Municipalities are in contempt, are sentenced to 30 days imprisonment which imprisonment was suspended for 14 days to provide the relevant parties with a further opportunity to comply with the interdict order.
- [109] This is not an appeal and not a rehearing of either the proceedings before the Honourable Molopa J or Strydom AJ. This court must simply determine whether there was compliance with the contempt order. Anything that transpired before date of that order is irrelevant for the present exercise.
- [110] Firstly the Bonjanala Respondents contend that the fact that the Municipal Managers were not parties to the initial application when the interdict order was obtained is fatal to the contempt order that was subsequently obtained.
- [111] I am of the opinion that this is a defence that should have been raised either in the contempt proceedings or in a subsequent appeal of the contempt order. In any event I do not agree with the submission.
- [112] Section 55(1) of the Local Government: Municipal Systems Act⁸² provides that a Municipal Manager as Head of Administration of a municipality is subject to the policy direction of the Municipal Council, responsible and accountable for *inter alia* the management of the provision of services to the local community in a sustainable and equitable manner⁸³. In the premises the said statute provides that the Municipal Manager will be held accountable for the provision of services by the said municipality, whether or not a party to the proceedings.

⁸² Act 32 of 2000

⁸³ See: Section 55(1)(d)

- [113] I admit that the *modus operandi* followed by Mr Madiro is not the norm. He issued his initial application for the interdict order under case number 16592/2018 and did not join the Municipal Managers to that application.
- [114] It is, however, nowhere contended for by the Bonjanala Respondents that although the Municipal Manager was not a party to the application for the interdict it did not come to the attention of the Municipal Manager prior to the granting of the interdict order.⁸⁴ In his capacity as Municipal Manager and accounting officer I would in any event find it highly improbable that he would not have received notice.
- [115] In any event, as I have already indicated in paragraph 77.3 above, on the 13th of August 2018 a letter was directed to the Municipal Manager of the Bonjanala Municipality wherein he was referred to a copy of the interdict order that was annexed to the said letter, and was made aware that in terms of Section 55 of the Local Government: Municipal Systems Act he is responsible and accountable for *inter alia* the management of the provisional services to the local community in a sustainable and equitable manner. He was requested, as the designated officer to properly comply within 7 days from date of that letter with the directions contained in the attached court order, failing which Mr Madiro advised that he would proceed without further notice of apply for contempt of court against the Municipal Manager personally.⁸⁵ I also reiterate that on the 31st day of August 2018, a copy of the relevant court order was served by way of Sheriff on him⁸⁶ and the interdict order was again sent by way of correspondence on the 16th of October 2019 and also served by hand on the 25th of October 2019.⁸⁷

⁸⁴ Paragraphs 52 and 54 Opposing affidavit CaseLines pages 009-19 and 009-20

⁸⁵ See letter to Municipal Manager annexed as Annexure M2 to Answering Affidavit filed in opposition to counter-application, Case line 018 - 97

⁸⁶ See return of service, Case line, p. 018 - 102

⁸⁷ See Annexure M5 to Answering Affidavit filed in opposition to counter-application, Case line, p. 018 – 103 and Annexure M6, Case line, p. 018 - 105

[116] The second application that was launched in respect of the contempt proceedings was launched as a separate substantive application under a separate case number, 80219/2018 with new respondents, the Municipal Managers of both the Local and District Municipalities as parties. This application was brought in terms of the long form and provided more than sufficient time to the Municipal Managers to oppose this application and bring any defences to the application before the court. It is again noteworthy that it is neither contended for by the Bonjanala Respondents that the Municipal Manager did not receive proper notice of the application for contempt nor that the contempt order did not come to the attention of the Municipal Manager.⁸⁸ If the contempt application was brought under the same case number as the interdict application, without the Municipal Managers having formally been joined as parties, there may have been merits to the Bonjanala Respondents submissions. At present I am of the opinion it carries no merit.

[117] Even the present application that serves before the court was brought under a separate case number, all relevant parties being joined as respondents. Again this application was brought in terms of the long form providing sufficient time to any party to oppose.

[118] I cannot find any prejudice to any of the two Municipal Managers following the modus operandi that was followed by Mr Madiro. Both Municipal Managers were part of the contempt application and the present application before me. I am satisfied that both Municipal Managers had more than sufficient time and opportunity to ensure that they have a fair hearing.⁸⁹ In addition, this court also has a duty to ensure and 'secure the inexpensive and expeditious completion of litigation and to further the administration of justice. It would not be in the interests of justice to order Mr Madiro to start over with his contempt proceedings.

[119] In **EKE v PARSONS**⁹⁰ the Constitutional Court held as follows:

"[39]..Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained

⁸⁸ Paragraphs 52 and 54 Opposing affidavit CaseLines pages 009-19 and 009-20

⁸⁹ *Arendsnes* id para 19.

⁹⁰ 2016 (3) SA 37 (CC) par 39 page 53 Madlanga J (Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Molemela AJ and Tshiqi AJ concurring)

by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules.⁹¹ Not surprisingly, courts have often said '(i)t is trite that the rules exist for the courts, and not the courts for the rules'.⁹²

[40] Under our constitutional dispensation the object of court rules is twofold. The first is to ensure a fair trial or hearing.⁹³ The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'.⁹⁴ I have already touched on the inherent jurisdiction vested in the superior courts in South Africa.⁹⁵ In terms of this power the High Court has always been able to regulate its own proceedings for a number of reasons,⁹⁶ including catering for circumstances not adequately covered by the Uniform Rules,⁹⁷ and generally ensuring the efficient administration of the courts' judicial functions.⁹⁸

[120] The fact that a court possess the necessary authority to regulate its own process has also now been embedded in section 173 of our Constitution.

[121] In ***South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others***⁹⁹ the Constitutional Court held as follows in respect of this inherent discretion:

[36] ...The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on

⁹¹ See, for example, *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T); and *Mostert NO v Sable Group Holdings (Pty) Ltd* [2013] ZAGPJHC 143 (Mostert).

⁹² *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA) (Arendsnes) para 18, citing *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783A – B; *Mynhardt v Mynhardt* 1986 (1) SA 456 (T); and *Ncoweni v Bezuidenhout* 1927 CPD 130 (Ncoweni).

⁹³ *Arendsnes* id para 19.

⁹⁴ Id, relying on *Kgobane and Another v Minister of Justice and Another* 1969 (3) SA 365 (A), which dealt with this concept in the context of the number of condonation applications that were being received by the Appellate Division at the time, which Rumpff JA decried at 369H as a 'tendency [which] must be reduced in order to ensure that the administration of justice is maintained on a proper level'.

⁹⁵ At [28].

⁹⁶ See generally Taitz *The Inherent Jurisdiction of the Supreme Court* (Juta and Co Ltd, Cape Town 1985) at 14-8.

⁹⁷ See, for example, *De Wet and Others v Western Bank Ltd* 1977 (2) SA 1033 (W), which identified the ability of courts in the then Natal Province to order rescission of judgments even though no relevant rule allowing for such an order existed at the time.

⁹⁸ Taitz above n62 at 14. This principle appears to date to *Ncoweni* above n58, where Gardiner JP remarked at 130 that '(t)he Rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go so far as I can in granting orders which would help to further the administration of justice'. It was referred to recently in, amongst others, *Arendsnes* above n58 para 19; *Absa Bank Ltd v Lekuku* [2014] ZAGPJHC 274 para 22; and *Mostert* above n57 para 13.

⁹⁹ 2007 (1) SA 523 (CC)

the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice.

[37] When Courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in chapter 2 of the Constitution. A Court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (s 35 of the Constitution) and the right to have disputes resolved by Courts (s 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated.

[122] Accordingly I find that in the present matter there is with respect no merit in this submission and that the procedures followed by Mr Madiro rendered the subsequent orders a nullity.

[123] I have thoroughly perused the remaining content of the Bonjanala Respondents answering affidavit but could not find any further explanation for any acts done post the contempt order to implement the interdict order as ordered.

[124] It is evident from the evidence placed before the court that at the time the contempt order was made, and at the time the application was argued before me, the sewage problem has not been resolved. As such, subject to what is stated from paragraph below, the Bonjanala Respondents and in particular the Bonjanala Municipal Manager have not complied with the court order. Similarly the question that remains is whether the Bonjanala Respondents and in particular the Madibeng Municipal Manager has shown reasonable doubt. I will deal with this aspect separately below.

SUITABLE SANCTION TO BE IMPOSED:

[125] In the present matter the court is again confronted with a court order that was granted against an organ of state where the organ of state is in contempt. A Municipality, as an organ of state, has a heightened duty to comply with court orders. In ***Municipal Manager***

O.R. Tambo District Municipality and Another v Ndabeni the Constitutional court inter alia held as follows:

“Although the Municipal Parties escape being held in contempt, their dilatoriness, inertia and unaccountability must be viewed through the lens of the Municipality’s heightened duty to comply with court orders. Organs of state, of which the Municipality is one, are expressly enjoined to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts”.¹⁰⁰ They have obligations under the Constitution to respect the rule of law and the courts as guardians of the Constitution.¹⁰¹

[126] It is the duty of courts to ensure that court orders are complied with. In **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others**¹⁰² the Constitutional Court held:

[1] “It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function.”

[127] Unfortunately for Mr Madiro, he waited more than 2 ½ years after the contempt order to proceed with the present application. In addition, the wheels of justice turns slowly. Due to the huge quantity of matters the court rolls are full and it takes a considerable time for

¹⁰⁰ Section 165(4) of the Constitution.

¹⁰¹ [2022] ZACC 3 ¹⁰¹ par 38-40;

¹⁰² 2021 (5) SA 327 (CC), para 1 per Khampepe ADCJ [SJC v Zuma]; S v S.H (771/21) [2023] ZASCA 49 (13 April 2023); See also S v Mamabolo [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) para 17.

matters to come before the court to be heard. The present application was heard 13 months after the application was launched.

[128] As was indicated by the Bonjanala Respondents the present Municipal Manager who deposed to the opposing affidavit is not the same person against whom the contempt order was given. Similarly with the Madibeng Municipal Manager the erstwhile Municipal Manager when the interdict order was granted was Mr Morris¹⁰³. Thereafter on 6th May 2019 the Madibeng Municipality was placed under administration¹⁰⁴ and in June 2019 its Municipal Manager was Mrs Magole.¹⁰⁵ It is further apparent that its Municipal Manager at the time the Answering Affidavit was deposed was Mrs Mmope.¹⁰⁶

[129] In addition, in respect of the Madibeng Municipality and its Municipal Manager various steps were indicated that were taken or implemented since the contempt order was obtained in May 2019.¹⁰⁷ Although it is evident, as aforementioned that the steps implemented did not resolve the sewage spill as contemplated within the interdict and contempt order, it does have an impact on whether the Municipal Managers have created reasonable doubt to have personally, deliberately defied the court order.

[130] In **Matjhabeng Local Municipality v Eskom Holdings Ltd and Others**¹⁰⁸ the Constitutional Court held that the officials in question, personally, must deliberately have defied the court order:

“[75] ...From the facts, it is clear, that the municipal manager was aware of the relevant orders. But it cannot safely be said that the order imposed any obligations on Mr Lepheana in his personal capacity.

Wilfulness and mala fides

[76] The next issue for determination is whether the non-compliance on the part of Mr Lepheana was wilful and mala fide. The reason for these requirements lies in the nature of the

¹⁰³ Answering Affidavit par 54 CaseLine page 009-20

¹⁰⁴ Answering Affidavit par 71 CaseLine page 009-23

¹⁰⁵ Answering Affidavit par 74 CaseLine page 009-24

¹⁰⁶ Answering Affidavit par 1 CaseLine page 009-10

¹⁰⁷ Answering Affidavit pars 74-98 CaseLine pages 009-24 to 009-30

¹⁰⁸ 2018 (1) SA 1 (CC)

contempt proceeding and its outcome. In order to give rise to contempt, an official's non-compliance with a court order must be 'wilful and mala fide'. In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply. As the Supreme Court of Appeal has held —

'there is no basis in our law for orders for contempt of court to be made against officials of public bodies nominated or deployed for that purpose, who were not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings'."¹⁰⁹

[131] The remedy to incarcerate a person is a severe remedy to be left as an utmost last result.

Due to the long period of time that had elapsed and in particular due to the fact that the present Municipal Managers before the court are not the same as the ones who were parties to the contempt application and contempt order and in view of the alleged steps taken by the Madibeng Municipality aforementioned, I cannot find that the present Municipal Managers before me were not able to create **reasonable doubt** that they in their personal capacities had not deliberately defied the court order. The same applies to the Fourth Respondent.

[132] In the premises, although it is clear that there was non compliance with the contempt and interdict order, this court cannot impose a criminal sanction on them and incarcerate the present Municipal Managers or the Fourth Respondent.

[133] The question that remains is whether Mr Madiro has been left remediless? This entails a further enquiry and a different standard of onus to be applied.

[134] In ***Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni***¹¹⁰ the Constitutional Court continued to hold as follows:

"[14] Although an order holding the Municipal Parties in criminal contempt was no longer in issue once Ms Ndabeni abandoned any criminal sanction against the Municipal Manager, civil

¹⁰⁹ From paragraph 75

¹¹⁰ Supra par 14.

penalties remained an option.¹¹¹ After all, any disregard for court orders and the judicial process requires the courts to intervene.

[135] In clarifying the principles applicable to contempt proceedings in **Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited**¹¹² Nkabinde ADCJ stated that:

‘... I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.’

[136] Reference is also made to **Burchell v Burchell**^{113 114} where a two bench court of appeal stated as follows:

“Declarations of contempt

[27] Civil contempt proceedings have always had a dual nature and the discussion thus far has focused only on its criminal aspect. In my judgment the perceived difficulties associated with its continued treatment as a criminal offence should not prevent attention being given also to its purely civil character and the possible development of the common law in that regard. In addition to its retention as a criminal offence, albeit with a stricter standard of proof, the potential effectiveness of issuing a (civil) declaratory order that an offending litigant is in contempt of a court order should not be underestimated. Such a declaration would have as its

¹¹¹ *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko II) at para 30: “The term civil contempt is a form of contempt outside of the court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.” And at para 37: “However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.”

¹¹² 2018 (1) SA 1 (CC)

¹¹³ (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005)

¹¹⁴ Approved by Supreme Court of Appeal; in *FAKIE NO v CCII SYSTEMS (PTY) LTD* 2006 (4) SA 326 (SCA) para 17-19

purpose to uphold the rule of law too, but even if shorn of its criminal sanction or punishment there is, in my view, no reason why other civil sanctions may not attach to such an order. One of them may be that the offending litigant could be prohibited from using the civil courts in other litigation until he has purged his contempt, or, in the case of an appeal against such an order, that the usual suspension of the order pending the determination of the appeal should not come into operation. The important point is, however, that upholding the rule of law and ensuring the effective administration of justice is not wholly dependent on the effectiveness of civil contempt proceedings in its guise as the prosecution of a criminal offence that allows committal to gaol of the offender. Other possibilities, purely civil in nature, need to be explored and developed as well. The form of the order in this judgment will reflect an attempt to develop ancillary civil sanctions in this manner.”

[137] It is evident that the present sewage problem already originated in 2017¹¹⁵ and was already at that time raised as a serious concern with the Madibeng Municipality. It’s been a long time coming.

[138] In addition to the civil application and civil action instituted by Mr Madiro, the Madibeng Municipality was on at least two occasions in May 2017 and April 2018 put on terms by The Department of Rural, Environment and Agriculture (READ) to implement steps to prevent sewage spillage on Mr Madiro’s property and to rehabilitate his premises.¹¹⁶ From the evidence that served before the court the position of Mr Madiro’s premises has already in 2017 been critical and must be resolved as a matter of extreme urgency. The urgency already appears from the READ’s notice to issue a directive in terms of Section 28(4) of the NEMA Act¹¹⁷ dated 5 April 2018 directed to The Madibeng Municipality.¹¹⁸ I quote from the Notice:

“It is evident that sewage/effluent spillage from a manhole at the remaining extent of portion 2[...] of the farm Roodekopjes4[...] JQ is causing significant pollution to the environment; and will continue to do so if decisive action is not taken immediately. Moreover this sewage spillage

¹¹⁵ Answering Affidavit paragraphs 28 on CaseLines pages 009-15

¹¹⁶ Answering Affidavit paragraphs 45 and 48 on CaseLine pages 009-18 and 009-19

¹¹⁷ Act 107 of 1998

¹¹⁸ Annexure C to founding page CaseLine page 005-19

has a potential to cause significant harm, not only to the environment, but to the people on site and the Aukasia community.”

- [139] In addition to the READ notices it appears from the evidence before the court that the problem experienced by Mr Madiro was well documented in various reports drafted by the Madibeng Municipality¹¹⁹: long-and short term solutions were formulated¹²⁰ and formal letters written¹²¹. There were also appointments of independent contractors to assist¹²². In addition meetings were held with Mr Madiro and his legal representatives.¹²³ The Bonjanala Respondents also refer to steps implemented by them to amicably resolve the issues and even letters written by them in this regard.¹²⁴
- [140] It is important to note that already in 2017 the maintenance team that was appointed by the Madibeng Municipality proposed an upgrade to the sewer whole network system in the relevant Township. It is submitted by the Madibeng Municipality that this was an expensive exercise planned for 2018/2019.¹²⁵ It was also stated that the Madibeng Municipality intended to raise funds for this exercise.¹²⁶
- [141] A party being appointed in the position of a Municipal Manager will certainly know his duties and functions as imposed in terms of section 155 of the systems act aforementioned. This is a position that carries substantial responsibilities and an appointed person will surely be aware of not only his responsibilities but also his accountability.
- [142] Having regard to the facts of the present matter, the seriousness of the complaint that appears from their own records and also formed the basis of the READ notice to issue a directive in terms of section 24 of NEMA, and having regard that two court orders were obtained by Mr Madiro (the contempt order that imposes personal liability on the Municipal

¹¹⁹ Answering Affidavit paragraphs 50, 55 and 57.3 on CaseLine pages 009-19, 009-20 and 009-21

¹²⁰ Answering Affidavit paragraph 39 and 40 on CaseLine page 009-17 and 009-18

¹²¹ Answering Affidavit paragraph 43 and 74 on CaseLine pages 009-18 and 009-24

¹²² Answering Affidavit paragraph 74.3 on CaseLine page 009-25

¹²³ Answering Affidavit paragraph 57 on CaseLine page 009-20

¹²⁴ Answering Affidavit paragraph 76 on CaseLine page 009-25

¹²⁵ Answering Affidavit paragraph 37 on CaseLine page 009-17

¹²⁶ Answering Affidavit paragraph 41 on CaseLine page 009-17

Managers), I am satisfied that on a preponderance of probabilities a newly appointed Municipal Manager would have been made aware of the serious existing problem of Mr Madiro, the unsuccessful attempts to resolve the issue, the terms of the court orders and his/her obligation to ensure that the orders be properly executed and that necessary steps were to be implemented to ensure that the sewage problems be resolved. The same applies to the Fourth Respondent that is appointed over the Madibeng Municipality.

[143] Notwithstanding such knowledge, it is undisputed that the sewage problem still subsists. All necessary steps were not implemented to ensure that the sewage problem was resolved. In addition the remark by the Madibeng Respondents in paragraph 68 is absolutely astounding. Although its own maintenance teams have already in 2017 recognise the urgent need for the upgrade of the whole sewer network in the Township, and although it has already been placed on terms by READ in terms of NEMA and although it intended to include the upgrade of the sewage system in its 2018/2019 budget it merely mentions in passing that there were insufficient funds to upgrade the system.¹²⁷ It appears that that was the end of the matter as no further mention is made of any attempts to raise funds or to include the project in any further budgets to resolve Mr Madiro's problem. It is also interesting that the papers are void of any explanation by the Bonjanala Respondents what steps they took to give effect to the interdict and contempt orders.

[144] Under these circumstances I am satisfied that Mr Madiro has established on a preponderance of probabilities that the Madibeng and Bonjanala Respondents' failure to comply with the interdict and contempt order was mala fide.

[145] During argument, counsel appearing for Mr Madiro submitted that Mr Madiro was not head fast in having the Municipal Managers committed. It was submitted that Mr Madiro would be satisfied with any remedy imposed to ensure that the interdict order be properly

¹²⁷ Answering Affidavit paragraph 68 on CaseLine page 009-23

executed and the sewage problem resolved. Counsel for the Respondents never made submissions in response thereto.

[146] Notwithstanding, in preparation of this judgement, when it became evident to the court that the imposition of civil remedies may become a possibility the court issued a directive to the Counsel who appeared for all parties, inviting them to provide the court with additional submissions on this aspect. The directive reads as follows:

“Counsel is requested to present written submissions to the Court, not exceeding 5 pages within 14 days from date of this directive on the following questions of fact and/or law:

“In the event that the court should find that:

- a. both the Madibeng and Bonjanala Counter applications have no merit and should be dismissed; and*
- b. in the event that the court may find that although reasonable doubt may have been established by the Madibeng and Bonjanala Respondents whether a criminal sanction be imposed on the respective Municipal Managers and that a criminal sanction of incarceration should not be sanctioned; and*
- c. in the event that the court may find that the Applicant has on a preponderance of probabilities established that the Municipal Managers have not purged their contempt;*

Then and in that event the court requires submissions whether:

- d. the court in the present application can impose civil penalties?;*
- e. should civil penalties be imposed against the respective Municipalities or against the Municipal Managers?;*
- f. what civil penalties remains an option to the court?;*
- g. is the Court entitled in the present application to mero motu raise the aforementioned as questions of law that emerges fully from the evidence before the Court in the application and counter applications and which the Court may deem necessary for the decision of the case?*

[147] Counsel acting for all the parties presented the Court with supplementary Heads of Argument which addressed some of the questions as contained in the aforementioned directive.

[148] Mr Madiro placed reliance on the matter of **Fischer and Another v Ramahlele and Others**¹²⁸, submitting that it is proper for the court to raise issue of imposing civil sanctions mero motu. In **Fisher** the Appellate Division stated:

"[13] Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for '(i)t is impermissible for a party to rely on a constitutional complaint that was not pleaded'. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

(Own emphasis)

[149] The Constitutional Court has similarly in the matter of **Molusi & Others v Voges NO. & Others**¹²⁹ held:

"[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in Sunker:

'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'

[28] The purpose of pleadings is to define the issues for the other party and the court. And it is for the court to adjudicate upon the disputes and those disputes alone. Of course there are

¹²⁸ 2014 (4) SA 614 (SCA) in paras 13 and 14

¹²⁹ 2016 (3) SA 370 (CC)

instances where the court may of its own accord (mero motu) raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In Slabbert the Supreme Court of Appeal held:

*'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'*¹³⁰

[150] Also relying on the **Fisher** matter the Madibeng and Bonjanala Respondents submit that “it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone”. They also submit that there are complex issues of fact involved that must be clearly pleaded by Mr Madiro and hence the court cannot merely raise the issue of imposing civil remedies mero motu.

[151] I do not agree that in the present matter the court cannot raise the imposition of civil remedies **mero motu**. There are no additional facts required for this enquiry and the imposition is clearly only dependant on the standard of onus applied, whether or not it was proved on a balance of probabilities. The same facts are applicable and determination of this issue emerges fully from the evidence before the court.

[152] I am further of the opinion that the facts of the present matter necessitates that the court intervenes to address the Municipal Managers contempt and to ensure proper compliance with its orders. In **Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng**¹³¹ Kirk-Cohen inter alia held as follows:

'Contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court.'

¹³⁰ Also see: *MEC for Health, Eastern Cape and Khumbulela Melane & Special Investigating Unit*, unreported judgement with case no. 2017/2015 reported in *the High Court of South Africa (Eastern Cape Local Division, Mthatha in par. 23; and Fischer & Another v Ramahlele & Others 2014 (4) SA 614 (SCA) at para. 13 – 14*

¹³¹ *2002 (1) SA 660 (T)* at 670-E

[153] Kirk-Cohen then continues¹³² to emphasize the importance of government bodies to comply with court orders and in particular that a deliberate non-compliance or disobedience of a court order by the State through its officials amounts to breach of the State's constitutional duty to protect and enforce citizens and non-citizens rights. Such conduct impacts negatively upon the dignity and effectiveness of the Courts. An effective Judiciary is an indispensable part of any democratic government:

"Counsel for the appellant referred, inter alia, to the judgment of the Full Court in Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (Tk). To attempt to paraphrase the relevant portion of the judgment of Jafta J would do an injustice, so I quote it verbatim from 452C - 453C:

'Quite clearly and just like any other party, the State is bound to comply with orders of the courts. It has a duty to honour them whenever it is directed to do something. The authority of courts of law over government departments has also received constitutional recognition. Section 165 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that orders issued by courts of law bind all persons, including organs of State, to whom they apply and that State organs must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. There is no doubt, I venture to say, that this constitutes the most important and fundamental duty imposed upon the State by the Constitution. The significance of this duty was highlighted by the Constitutional Court in De Lange v Smuts NO and Others 1998 (3) SA 785 (CC). At para [31] Ackermann J stated:

"In a constitutional democratic State, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the B constitutional State) 'citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.' "

See also Bernstein and Others NNO v Bester and Others 1996 (2) SA 751 (CC) at para [105]. A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to breach of that constitutional duty. Such conduct impacts negatively upon the dignity and effectiveness of the Courts. An effective Judiciary is an indispensable part of any democratic government. The importance of an effective and independent judiciary was emphasised by Mahomed CJ in a speech published in (1998) 115 SALJ 111. The learned Chief Justice said at 112:

"The exact boundaries of judicial power have varied from time to time and from country to country, but the principle of an independent Judiciary goes to the very heart of sustainable democracy based on the rule of law. Subvert it and you subvert the very foundations of the civilization which it protects. . . . What judicial independence means

¹³² Page 678-679

in principle is simply the right and the duty of Judges to perform the function of judicial adjudication through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any person or institution."

Although the emphasis of the statement quoted above is on the independence component of judicial authority, it should apply with equal force to the effectiveness part thereof. An independent but ineffective Judiciary would be of little help to litigants. Successful litigants against the State need institutionalised mechanisms to enforce their rights once those rights are declared and defined pursuant to proper adjudication by the courts of law. A complete denial of such mechanisms would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disorder. The constitutional right of access to the courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made.'

[154] I again refer to the **Ndabeni**¹³³ matter above. In that matter the court was also only requested to impose criminal remedies. No alternative for civil remedies was provided. At some stage in the proceedings the applicant in that matter decided not to pursue criminal sanctions any longer. The court held as follows:¹³⁴

"[14] Although an order holding the Municipal Parties in criminal contempt was no longer in issue once Ms Ndabeni abandoned any criminal sanction against the Municipal Manager, civil penalties remained an option.¹³⁵ After all, any disregard for court orders and the judicial process requires the courts to intervene.¹³⁶

¹³³ *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* 2022(ZACC3)

¹³⁴ par 9

¹³⁵ *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko II) at para 30: "The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu." And at para 37: "However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor behave in a particular manner, a fine and any further order that would have the effect of coercing compliance."

¹³⁶ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) (State Capture) at para 27.

- [155] It may not even have been necessary to request additional submissions from the parties in this regard. All the facts were before the court. In adopting this approach, however, any potential unfairness to any of the parties has been removed.
- [156] The Respondents in addition, submit that it would not be proper to impose civil remedies in the present matter. Various reasons were offered in this regard.
- [157] Firstly it was submitted that once **bona fides** were shown, it serves as a defence to an application for contempt as a whole. The Respondents draw no distinction between establishing contempt on the standard “without a reasonable doubt” and “on a preponderance of probabilities”. In this respect they are not correct. The court has found that in the present matter Mr Madiro has succeeded with his onus to establish contempt on a preponderance of probabilities.
- [158] The Respondents rely on the decision of **Fourwheel Drive Accessories Distributors CC v Rattan NO**¹³⁷ and the **Fisher**¹³⁸ matter supra in support of their submission that it is not open for Mr Madiro to plead a specific case and during the hearing to establish a different case or for the court to have regard to issues falling outside the Plaintiff’s case. They submit that once the Court is satisfied that Mr Madiro has not succeeded in the case he presented (for a criminal sanction), Mr Madiro should fail, it is not allowed to pick the Mr Madiro up and let it stand upon a different case (for a civil remedy).¹³⁹
- [159] I completely agree with the principles enunciated in those cases. The material difference is, however, once the court finds that it is entitled to raise these issues **mero motu**, it is allowed to impose these sanctions. This accords with both the findings of the Appellate Division in the **Fisher** matter and the Constitutional Court in the **Molusi** matter supra. I cannot find any obstacle or prohibition against a court adopting a procedure that once it

¹³⁷ 2019(3) SA 451 (SCA) par 21

¹³⁸ Par 13

¹³⁹ In support the Respondents referred to *KwaZulu-Natal Joint Liason v MEC Department of Education, KwaZulu-Natal* 2013(4) SA 262 (CC) para 158 and 160,

finds that an applicant has not succeeded in establishing its case above reasonable doubt, that it a court cannot investigate whether the case was indeed established on a preponderance of probabilities for the imposition of civil remedies. The facts remain the same only the standard of onus differs. Such an approach was indeed followed in the **Ndabeni** matter supra and accords with the courts duty to intervene when its orders are not complied with.¹⁴⁰

- [160] The Respondents with reference to the judgement of the Supreme Court of Appeal in **Fakie**¹⁴¹ submits that the Mr Madiro as an applicant has deliberately chosen to disavow civil remedies and to pursue a punitive purpose and claim committal solely to secure compliance. I do not agree. The fact that no mention was made in the founding papers of the imposition of civil remedies does not mean that he has disavowed not pursuing such imposition. At the very least one would have expected a positive declaration by Mr Madiro that he has no intention to pursue a civil remedy and would only be satisfied with a criminal sanction. There is no evidence to justify such an inference or deduction of disavowment. On the contrary such a deduction would contradict with Mr Madiro's Counsel's address at the hearing and the submissions made in response to the courts directive. In any event I reiterate that contempt of court is an issue between the court and the respondents as confirmed in **Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng**¹⁴².
- [161] What remains is what appropriate civil remedy to impose to ensure compliance. In **Pheko and Others v Ekurhuleni City**¹⁴³ in a unanimous decision delivered by Nkabinde J the Constitutional Court inter alia explained that:

¹⁴⁰ Para 14.

¹⁴¹ Ibid 132 par 18

¹⁴² 2002 (1) SA 660 (T) at 670-E

¹⁴³ 2015 (5) SA 600 (CC) par 37

“[30] The term civil contempt is a form of contempt outside of the court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.”

Nkabinde J continued in paragraph 37:

“[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief,¹⁴⁴ a mandamus demanding the contemnor behave in a particular manner,¹⁴⁵ a fine¹⁴⁶ and any further order that would have the effect of coercing compliance.¹⁴⁷

[162] In the present matter the court, through this order wishes to coerce compliance with the interdict and contempt orders. In the words of Sachs J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*¹⁴⁸,

¹⁴⁴ See, for example, *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003 (4) SA 477 (T) ([2003] 2 All SA 710) at 506C – D.

¹⁴⁵ See, for example, *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) ([2006] 2 All SA 455); and *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 (1) SA 141 (SE) ([2005] 1 All SA 745) para 21.

¹⁴⁶ See, for example, *Jeebhay v Minister of Home Affairs and Another* 2007 (4) SA 294 (T) para 54; and *S v Mkize* 1963 (3) SA 218 (N).

¹⁴⁷ Some of the mechanisms employed in other jurisdictions include community service, striking a written submission, an order that the contemnor tender security for costs.

¹⁴⁸ 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382; [1995] ZACC 7) para 61.

'the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

[163] As indicated above, in not complying with the interdict and contempt orders constitutional rights of Mr Madiro are inter alia affected. Thus in issuing this order the court wishes to bring finality to the matter and issue an appropriate and effective order.¹⁴⁹

[164] As indicated above, from the evidence that served before the court the position of Mr Madiro's premises is critical and must be resolved as a matter of extreme urgency. The urgency already appears from READ's notice to issue a directive in terms of Section 28(4) of the NEMA Act¹⁵⁰ dated 5 April 2018 aforementioned.

[165] It has not been unexplained before this court why this process was not proceeded with by READ or what the status of that process is. Notwithstanding, the provisions of the NEMA Act are a mighty sword that may assist in coercing the respondents to comply with the orders of this court and this court intends to refer this matter to READ to properly investigate this matter and to pursue their remedies in terms of NEMA against the Respondents.

[166] In addition, due to the seriousness of the nature of the complaint that forms the subject of the interdict and contempt orders, this court intends to issue a structured interdict to provide immediate relief to Mr Madiro.

[167] As I have indicated the sewage problem on the premises has been coming since 2017. It is not only in the interests of justice that this problem be urgently addressed but it is in the interests of justice that an order be issued to vindicate this court's honour in respect of the contempt, to bring the litigation between the parties to finality and to be effective in all respects. In order to provide an effective order this court also relies upon its inherent discretion provided in terms of section 173 of the Constitution that vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a

¹⁴⁹ *EKE v Parsons 2016 (3) SA p62 (CC)* at par 73-74

¹⁵⁰ Act 107 of 1998

regular, orderly, and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction.

[168] In ***Social Justice Coalition and Others v Minister of Police and Others***¹⁵¹ Kollappen J with reference to various authorities discusses the inherent jurisdiction that vests in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for several reasons, including catering for circumstances not adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions. Kollappen J inter alia held as follows:

"[54] The Rules of court provide both details of substance and of procedure that govern the litigation of disputes and it would be fair to say that those rules seek to broadly achieve the fair and efficient management of the litigation process. Fairness is ensured by allowing the proper participation of parties and the full ventilation of issues and efficiency is advanced through the regulation of timelines and time periods that apply in the litigation process.

And,

[72] This Court in SABC,¹⁵² described the provision as an important one, pointing out that the only qualification on the exercise of the power contained in section 173 was that the Court must take into account the interests of justice. This Court said in that context:

*"Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power must take into account the interests of justice."*¹⁵³

[73] This Court went on to state that:

"In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and [the Constitutional Court] in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular,

¹⁵¹ [2022] ZACC 27

¹⁵² *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

¹⁵³ *Id* at para 36.

orderly, and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution."¹⁵⁴

[169] Lastly I need to mention that there are three applications for the late filing of the Madibeng and Bonjanala Respondents' opposing affidavits and Mr Madiro's Replying affidavit before the court. No submissions were made by any of the parties during argument in respect of any opposition to these applications. All the parties presented argument on all the affidavits filed before the court. In the premises I am satisfied that condonation be granted to all the parties.

[170] **I make the following order:**

- (1) Condonation is granted to the Applicant and the First- to Fifth Respondents for the late filing of their respective affidavits.
- (2) The First, Third and Fourth Respondents' counter application is dismissed with costs.
- (3) The Second and Fifth Respondents' counter application is dismissed with costs.
- (4) It is declared that the First and Second Respondents have not complied with the order of Molopa J of 8th June 2018 (interdict order) and the Third and Fifth Respondents have not complied with the order of Strydom AJ of 8th May 2019 and the contempt as provided for in the contempt order has not been purged.
- (5) The First and Second Respondents, are ordered, within thirty days from date of this order, to comply with the interdict order.

¹⁵⁴ *Id* at para 90

- (6) The First and/or Second Respondents are ordered to allow within 12 months from date of this order in their next budget the required funds to implement and construct the necessary infrastructure to eradicate the flow of sewerage over the Applicant's premises at the Remaining Extent of Portion 2[...], a portion of Portion 1[...] of the farm Roodekopjes 4[...], Brits (the Premises) and to prevent any future sewage discharge, which implementation and construction will be commenced with within 15 months from date of this order.
- (7) The First and Second Respondents are ordered, pending finalisation and implementation of the Order in prayer 6, on a weekly basis to remove all sewage discharge onto the Applicant's premises by utilizing a honeysucker or any other suitable and lawful means available to them to clean the sewage pipelines to prevent such discharge.
- (8) The First and Second Respondents are ordered to, within 7 days from the date of implementation of prayers 6 to 10 of this Order to take such measures and actions as may be necessary for purposes of removing any sewage from the surface of the Applicant's premises and replacing such with acceptable topsoil.
- (9) This matter is referred to the Department of Agriculture and Environmental Affairs (READ) and they are requested to urgently investigate the status of the sewage problem at the premises of the Applicant and if deemed necessary to proceed with steps in terms of Section 28(4) of the NEMA Act¹⁵⁵ or such other steps as it may deem appropriate. READ is further requested to file with this court within 60 days from the implementation of this prayer a report with their findings and their proposal of steps to be implemented to rectify the position if necessary.

¹⁵⁵ Act 107 of 1998

- (10) If the First and Second Respondents fail and/or refuse to comply with this order within 30 days as contemplated within prayer 5 ***alternatively*** fail to comply with prayers 6, 7 and 8 above then and in that event:
- 10.1 the Applicant is authorised to take all steps necessary to remove all sewage from the premises and road leading to the premises and to implement all measures to prevent further spillage of sewage on the premises.
- 10.2 the First and Second Respondents are ordered to reimburse the Applicant with all amounts spent by the Applicant in execution of prayer 10.1 above, which amount/s will be paid to the Applicant within 30 days from submitting the amounts to the First and Second Respondents accompanied by supporting invoices.
- (11) The provisions of prayers 6 to 10 is suspended for a period of thirty days subject to the First and Second Respondents duly complying with the interdict order. By the lapse of the 30 days the Applicant will be entitled to appoint an independent engineer of his choice to certify that the sewage problem has or has not been suitably resolved by the First and Second Respondents as provided for in the interdict order. Should it be certified that the sewage problem has not been resolved as provided for in the interdict order, the provisions of prayers 6 to 10 of this order will become effective on the first business day following the day on which the First and Second Respondents were provided with a copy of the certification by way of email. To ensure effective service the Third and Fifth Respondents are ordered to provide the Applicants attorneys with their respective email addresses where they will receive the certification.
- (12) The Third, Fourth and Fifth Respondents are ordered to ensure that the content of this order be conveyed to any successor/s in title.
- (13) The First and Second Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the cost of this Application.

P J VERMEULENActing Judge of the High Court
Gauteng Division, Pretoria**Appearances****Counsel appearing on behalf of Applicant:**

Adv De Kock

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Adv Mthombeni

0603946304; percymthombeni14@gmail.com**Attorney:** Setsedi Makgale & Matlapeng Attorneys012 5240301; info@mlenyalaiattorneys.co.za**Date of Hearing:** 2nd MARCH 2023**Judgment delivered:** 19th October 2023