



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: **5660/2021**

In the matter between:

KET CIVILS CC

Applicant

and

**THE FREE STATE PROVINCIAL DEPARTMENT OF
POLICE, ROADS AND TRANSPORT**

1st Respondent

**ROBINSON THEKISO, in his official capacity as the
Acting Head of the Free State Provincial Department
of Police, Roads and Transport**

2nd Respondent

TAU PELE CONSTRUCTION (PTY) LTD

3rd Respondent

MAXIMUS EARTHWORKS (PTY) LTD t/a PHEZULU PLANT

4th Respondent

CORAM: JP DAFFUE J

HEARD ON: 5 MAY 2022

DELIVERED ON: 20 JUNE 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 13:00 on 20 June 2022.

I INTRODUCTION

- [1] The proceedings before me started off as urgent contempt of court proceedings, but at a stage during the litigation I was requested by the applicant to make an alleged settlement agreement between the parties an order of court. There was an objection to this. Eventually and after the matter was postponed for the reasons mentioned later herein, the applicant's counsel contended that the

court should not consider making the alleged settlement agreement an order of court, but to declare the first and second respondents in contempt of court and to commit the second respondent to imprisonment for contempt of court, subject to suspension of the order on certain conditions.

II THE PARTIES

[2] The applicant is KET Civils CC ("KET Civils"), a close corporation, *inter alia* involved in road construction. The applicant was throughout the litigation before me represented by Adv N Luthuli, instructed by Webber Wentzel, c/o the local firm, Symington and De Kok.

[3] The Free State Provincial Department of Police, Roads and Transport ("the Department") was cited as the first respondent and its acting Head of Department, Mr Robinson Thekiso ("the Acting HOD"), as the second respondent. They have been represented by Adv T Sibeko SC and L Bomela, instructed by the State Attorney. Two other construction firms, to wit Tau Pele Construction (Pty) Ltd and Maximus Earthworks (Pty) Ltd t/a Phezulu Plant, the successful bidders in the tender processes to be dealt with in some detail later herein, were *cited* as third and fourth respondents, but no relief was sought against them. These respondents did not oppose the application.

III THE RELIEF SOUGHT

[4] The applicant brought an urgent application on 31 March 2022, seeking an order that the first and second respondents be declared in contempt of a court order issued by Mr Justice Molitsoane on 31 December 2021 ("the Molitsoane order") and that the second respondent be committed to imprisonment for contempt of court, however subject to the condition that the relief will not come into operation once the first and second respondents satisfy the court that they have complied with the Molitsoane order and will continue to comply therewith. Several further orders were also sought, including an order in terms whereof the first and second respondents be ordered jointly and severally to pay the costs of the application on an attorney and own client scale.

The Molitsoane order

- [5] On 3 December 2021 KET Civils filed an urgent application in application 5660/2021 (“the main application”), seeking an interdict preventing the Department to take further steps in connection with termination notices issued by it to KET Civils in relation to three road construction contracts while there was pending litigation between the parties, including appeals pursuant thereto.
- [6] On 17 December 2021 Molitsoane J heard the so-called semi-urgent application. The pending litigation relates to the disputes in applications 1510/2021 and 1640/2021. On 31 December 2021 the learned judge interdicted the Department pending finalisation of the disputes from taking further steps in connection with the termination notices sent by it to KET Civils in relation to the three road construction contracts. The court also ordered that no invitations for tenders should be issued and/or third parties appointed and/or that contracts be concluded pertaining to the particular road works.

The litigation in applications 1510/2021 and 1640/2021

- [7] I do not intend to deal in any depth whatsoever with the litigation in the aforesaid applications. I shall confine myself to the following:

7.1 In application 1510/2021 KET Civils sought urgent relief on the basis that *inter alia* its appointment was unlawful; consequently, and in particular an order in terms whereof it is declared that the Department is obliged to initiate a process to ensure the orderly termination of the contracts between the parties. It appeared earlier that the Auditor-General had found that the panel of contractors of which KET Civils was one was constituted irregularly and as a result the Department intended to disband the panel and to follow a new competitive procurement process. KET Civils consented to termination on an orderly fashion. Later the Department changed its mind and this led to the application. On 29 April 2021 this application was struck from the roll due to lack of urgency.

- 7.2 The Department brought an application 1640/2021 which it also set down for hearing on 29 April 2021. It incorrectly referred to this application as a counter-application to KET Civils' application 1510/2021. In that application it sought an order that its own decision to appoint KET Civils and other contractors on 21 February 2019 as part of a panel for the upgrading and maintenance of certain Free State roads be reviewed and set aside.
- 7.3 Three different orders were issued causing serious confusion which even necessitated a letter by KET Civils' attorneys to the Judge President in order to ensure that the matter was clarified. I refer to the letter of 16 September 2021, but do not want to get embroiled in that confusion.
- 7.4 KET Civils eventually filed an application for leave to appeal the amended order granted under application 1640/2021, apparently on 13 September 2021. By the time the present application was heard, no evidence was presented to the court to the effect that this application for leave to appeal was enrolled for hearing and/or adjudication. I find this amazing as this should and could have been entertained within a month.
- 7.5 Notwithstanding the Auditor-General's report the Department in the words of KET Civils "has persistently pestered" it "to resume the full scope of works under the contracts." Letters of demand were sent after KET Civils had filed its application for leave to appeal. On 24 November 2021 the Department issued three notices of termination of the three contracts between the parties, alleging that KET Civils was in breach of the contracts and as a result it was entitled to retain the performance and retention guarantees provided by KET Civils.
- 7.6 These termination notices triggered a response from KET Civils who again on an urgent basis brought the main application in application 5660/2021 heard by Molitsoane J who issued the order on 31 December

2021 referred to above. KET Civils emphasised the following points in its founding affidavit:¹

“If KET Civils is unsuccessful on appeal then on the order sought by the Department it is entitled to remobilise and fully return to the three sites to complete the remaining works under the contracts. If KET Civils were to succeed in the appeal, then it will be entitled to an orderly termination which was initially promised by the Department in November 2020 and which KET Civils seeks.” (Emphasis added)

IV THE FACTUAL MATRIX PERTAINING TO EVENTS OCCURRING DURING 2022

[8] The facts, which are either common cause, or can be accepted, bearing in mind the principles enunciated in *Plascon-Evans*, are the following:

8.1 On 21 January 2022 the Department filed an application for leave to appeal the judgment and orders of Molitsoane J² which application is opposed by KET Civils. The parties did not take any steps *ex facie* the documents before the court to have that application enrolled and adjudicated, something which I find extraordinary. I may return hereto again during the evaluation of the evidence.

8.2 Notwithstanding knowledge as early as 28 December 2021 that the Department had awarded tenders to the third and fourth respondents in this application and a letter sent by KET Civils' attorneys to the Department's attorneys on 24 January 2022 to inform them that the Molitsoane order was not suspended as a result of the application for leave to appeal, KET Civils' attorneys accepted an invitation dated 7 February 2022 to meet with the Department's legal team in an attempt to resolve all pending issues.³

¹ Paras 45.3.2 & 45.3.3 of the main application on p 19

² Founding Affidavit: para 14, p 10

³ Founding Affidavit: paras 33 – 36, p 16

- 8.3 The following email by KET Civils attorneys to the State Attorney dated 14 February 2022 is quoted in full:⁴

"Dear McGentle,

I'm following up on my email below. Given that your invitation to meet referred to the amicable resolution of the dispute between our clients – which we assume to be that underpinning case number 1640/21 – we intend discussing the orderly termination of our client's contracts. On this score, we request your proposed settlement terms in advance of the meeting.

Our clients' rights remain reserved."

- 8.4 The parties actually met on 15 February 2022,⁵ but notwithstanding the negotiations, the subsequent conduct of the first and second respondents led KET Civils to believe that the matter had stagnated and that there was a deliberate strategy by the Department not to resolve the matter amicably.⁶

- 8.5 Eight days after the meeting of 15 February 2022 KET Civils' legal team sent its proposed terms of settlement to the Department on 23 February 2022. Instead of dealing therewith, the Department's junior counsel who attended the meeting, as strange as it may sound, sought minutes of the meeting whilst no party asked for minutes to be kept.⁷

- 8.6 On 2 March 2022 KET Civil's counsel responded as follows to the email of the Department's counsel:⁸

"My understanding, (and Prelisha (his attorney) will add) was that the discussions went along the relief that our client sought in its application (ie orderly termination) and then it was asked to go and put together a compilation of what was due to it."
(Emphasis added)

Clearly, the issue at that stage was to try and find each other on orderly termination of the contract, and not to return to complete the work.

⁴ Annexure "KET 8" on p 54

⁵ Founding Affidavit: paras 28, 33 - 37, pp 14, 16 & 17

⁶ Founding Affidavit: para 39, p 17

⁷ Founding Affidavit: para 38, p 17

⁸ Annexure "KET 11", p 61

- 8.7 As mentioned, the Department's attitude caused KET Civils to believe that it was busy with a deliberate strategy and that it was not interested in resolving the matter amicably.⁹
- 8.8 On 7 March 2022 KET Civils received information that the Department had proceeded to implement the new contracts. It obtained evidence of contract works on one of the road construction sites.¹⁰ The State Attorney was warned on 9 March 2022 that the Department was in breach of the Molitsoane order, but a request not to proceed was ignored.¹¹
- 8.9 Although KET Civils pointed out that the Department was in wilful disregard of the Molitsoane order, the following was recorded:¹²
- "KET Civils has for the longest time sought orderly termination of its contract with the Department. The contracts are clear on how such a termination should take place and KET Civils is not asking the Department for anything beyond that which is provided for under the contracts and the Department's own policies and practices." (Emphasis added)
- 8.10 Correspondence ensued between the parties, but to no avail and on 15 March 2022 the present application was issued. The papers were served on 16 March 2022, allowing the respondents a mere four court days to file their answering affidavits.
- 8.11 The matter was set down for hearing on 31 March 2022 which date fell on a Thursday. All unopposed motions in the Free State High Court are set down for Thursdays to be heard by one judge. Furthermore, the date fell within the recess, meaning that only one judge, to wit myself, was available to deal with the unopposed motion court roll, all urgent applications and pre-trial hearings. On 29 March 2022 I received an email from KET Civils' attorneys stating that there was no need to read

⁹ Founding Affidavit, para 39, p 17

¹⁰ Founding Affidavit, para 42, p 18

¹¹ Founding Affidavit, paras 44 - 48

¹² Founding Affidavit, para 49

the papers any further as in all likelihood all litigation would be settled and that the parties would appear on 31 March 2022 to present a settlement agreement to be made an order of court. By then I had already utilised the previous weekend to read the application papers including the answering affidavit filed on behalf of the respondents.

- 8.12 The first and second respondents' answering affidavit was filed on 23 March 2022, but KET Civils failed to file its replying affidavit as anticipated in its notice of motion. This replying affidavit was only filed on 4 April 2022.
- 8.13 By 31 March 2022 no settlement could be reached and consequently, the application was postponed by agreement to 7 April 2022, which was still in the recess, but on the basis that the parties may still find each other in settling the matter. It should perhaps be mentioned that it turned out later on receipt of the replying affidavit that KET Civils believed by then already that a settlement had indeed been reached. An unsigned settlement agreement was attached thereto, the reason being that the one signed by KET Civils had been forwarded to the Department for signature, but not yet returned.¹³
- 8.14 On 7 April 2022 it dawned upon the parties that as the Department was not prepared to have the settlement agreement signed, the matter remained opposed, that it would not be possible to argue an opposed motion at that stage as the Department failed to file heads of argument and the matter was definitely not ripe for hearing. By agreement the application was postponement to the first opposed motion court roll after the recess, to wit 14 April 2022.
- 8.15 On 14 April 2022 I heard argument. On this occasion KET Civils' counsel presented me with two draft orders prepared by him. The first order, marked "A", was based on the relief sought in the notice of motion, *ie*

¹³ Replying affidavit: paras 26 -31 and annexure "RA5", p 165

contempt of court, and the second, marked "B" was to have the alleged written settlement agreement which it believed recorded the agreement reached with the Department, made an order of court. It was vehemently denied by the Department that a settlement was reached as the Acting HOD still had to consider the terms of the document. I reserved judgment.

8.16 On 19 April 2022 I granted an order only, postponing the application to the opposed roll of Thursday, 5 May 2022 with leave to the Acting HOD to file a detailed response pertaining to the allegations that a settlement agreement had been reached. Leave was also granted to KET Civils to file a supplementary affidavit in response to the Acting HOD's affidavit. The parties were also granted leave to file additional heads of argument.¹⁴

8.17 The further affidavits were indeed filed and on 5 May 2022 I heard further argument whereupon judgment was reserved.

V EVALUATION OF THE EVIDENCE AND THE SUBMISSIONS OF THE PARTIES IN LIGHT OF RELEVANT LEGAL PRINCIPLES

[9] It is KET Civils' submission that the Department and its Acting HOD implemented the three road construction contracts with the third and fourth respondents in flagrant disregard of the Molitsoane order and that they acted in complete disregard of s 165 of the Constitution in ignoring the operation of the judgment and order, thereby contemptuously undermining the court's authority. Although KET Civils has attempted to settle all pending litigation, the Department is not co-operating.

[10] The Department and its Acting HOD have a different view. They accept that wilfulness and mala fides are the only outstanding issues to be proven before they could be declared in contempt of court. Three defences are raised: (a)

¹⁴ Record: pp 180 & 181

the Acting HOD was not cited in his personal capacity, but his official capacity as Acting HOD; (b) the parties have reached an "in-principle agreement" and (c) the effect of the Molitsoane order is final and therefore appealable and the application for leave to appeal suspended the order.¹⁵ I shall deal with the defences later during the evaluation of the evidence and after referring to relevant authorities.

[11] I indicated above that KET Civils waited quite some time before it decided to approach the court on the basis of alleged urgency. KET Civils brought three applications to this court within a year and all three were brought on the basis of alleged urgency. My view of its attitude is that it is immaterial to this entity whether or not the opposition or the court is put under unnecessary pressure. Although urgency has become moot insofar as I was prepared to entertain the application and the parties were given an opportunity to deal fully with the merits in their affidavits as well as in argument, I am constrained to record this. This will not play any role in the judgment to be delivered.

[12] A question to be considered in this regard is whether KET Civils really intended to be a *nuntius* to make the court aware of the Department and its Acting HOD's alleged contempt of court, or whether it merely embarked upon a process to pressurise the Department in order to gain a commercial advantage and therefore acted purely in its own interest in the hope to settle on terms favourable to it. Having said this, I accept that committal to prison for civil contempt of court for coercive reasons is permitted and that proceedings for breach of a court order have the effect of vindicating judicial authority as well as having a remedial or coercive effect.¹⁶

¹⁵ Answering affidavit: para 6, pp 86/7 as more fully explained on pp 88 - 100

¹⁶ *Fakie NO v CCH Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) ("*Fakie*"), at paras 30 – 34 & 38, where Cameron JA commented as follows: "Elaborating this, Plasket J pointed out in the *Victoria Park Ratepayers* case that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government: There is thus a public interest element in every contempt committal. He went on to explain that when viewed in the constitutional context

'it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. . . . That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.'

- [13] The factual matrix points to KET Civils' willingness to try and reach a settlement with the Department. It is also apparent that it was dissatisfied with the Department and its Acting HOD dragging their feet in considering settlement proposals. Only once the application was served, the Department showed a willingness to continue with negotiations. This was seen as delaying tactics.
- [14] Eventually KET Civils placed a document before the court. It was signed on behalf of KET Civils only (although the signed copy was not before the court as the document was sent to the Department for signature), but submitted to be a settlement agreement as it embodied the exact terms of the agreement reached with the Department's officials and legal team, they having been authorised by the Acting HOD to represent the Department during negotiations. It requested the court to make this an order of court. The notice of motion did not provide for such an order, but in any event, the first and second respondents denied that a settlement agreement was entered into on the terms as set out in the written document. In the heads of argument prepared on behalf of KET Civils dated 6 April 2022 and also during oral argument on 14 April 2022, KET Civils' counsel submitted that a settlement agreement was in fact and in law entered into and the court was requested to make that an order of court. In the alternative, and only in the event of the court not being persuaded to make that an order of court, relief was sought in terms of the notice of motion, subject to the alterations provided for in the draft handed up from the bar referred to earlier.
- [15] On the second occasion when the matter was argued, to wit 5 May 2022, KET Civils' counsel made an about turn, obviously in light of the respondents' stance in the supplementary affidavit, and submitted with vigour that I should not even consider making the alleged written settlement agreement an order of court. In fact, the court was told that counsel had strict instructions to abandon such relief. I was also told, bearing in mind the version put up by the Acting HOD in the supplementary affidavit, that the dispute between the parties should be determined on arbitration.

[16] In light of KET Civils' decision not to seek an order that the alleged settlement agreement be made an order of court, I shall not deal with any of the submissions by the parties in this regard and in particular the several authorities referred to in the heads of argument placed before me prior to the arguments on 14 April 2022, save to point out that a settlement agreement can only be made an order of court if the court is satisfied that it indeed embodies the agreement between the parties and confirms to the Constitution and the law.¹⁷

[17] In order to consider KET Civils' reliance on contempt of court, I shall firstly refer to applicable authorities where after the evidence shall be evaluated. Many judgments have seen the light about what is expected of organs of state and public functionaries. The latest is an unreported judgment of the Constitutional Court, to wit *Municipal Manager O.R Tambo District Municipality and Another v Ndabeni*,¹⁸ (*Ndabeni*) in which case the municipal parties relied on a so-called nullity defence, to wit that the court order which they were accused of failing to comply with, was a nullity and consequently they were not compelled to comply with the order. In a unanimous judgment the Constitutional Court stated the following pertaining to complying with court orders:¹⁹

"23. Trite, but necessary it is to emphasise this Court's repeated exhortation that constitutional rights and court orders must be respected. A court would not compel compliance with an order if that would be "patently at odds with the rule of law". Notwithstanding, no one should be left with the impression that court orders – including flawed court orders – are not binding, or that they can be flouted with impunity.

24. This Court in *State Capture* reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. Similarly, *Tasima* held 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 authority to make the decisions at the time that they made them, then those orders would be enforceable.

25. To distinguish the role of the litigants from the courts, the majority in *Tasima* said:
"The act of proving something irresistibly implies the presence of a court. It is the *court* that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations."

¹⁷ *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paras 22 – 25 and *Eke v Parsons* 2016 (3) SA 37 (CC) paras 8, 11, 12 & 15

¹⁸ [2022] ZACC 03

¹⁹ *Ibid* paras 23 - 26

26. Court orders are effective only when their enforcement is assured. Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow. Effective enforcement to protect the Constitution earns trust and respect for the courts. This reciprocity between the courts and the public is needed to encourage compliance, and progressively, common constitutional purpose.” (Footnotes omitted and emphasis added)

[18] There can be no doubt that organs of state and their functionaries should be exemplary in their compliance with fundamental constitutional principles and they should not misuse the mechanisms of the law, but instead bear a special obligation to ensure that the work of courts is not impeded. Government and all other organs of state should be scrupulous role models and they are expected to respect the rights of those with whom they transact.²⁰ In conclusion, the legal principles are clear: the importance of complying with court orders is *trite*;²¹ contempt of court, as the Constitutional Court defined it, is the commission of an act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity.²² Yet, having mentioned these lofty ideals and the available punishment and corrective measures, it occurs too frequently that court orders are disobeyed by organs of state and their functionaries with impunity. Not only do I have personal experience thereof, but a perusal of the law reports will show that it is a relatively common theme.

[19] The Supreme Court of Appeal set out the foundation and bases for a conviction of a contempt of court authoritatively in *Fakie*.²³ In the light of the concessions made on behalf of the respondents, it is not necessary to deal with the first three requisites of contempt, to wit (a) the order, (b) service or notice thereof and (c) non-compliance with the order. The issues that are in dispute *in casu* are

²⁰ *Mohamed and Another v President of the Republic of South Africa and Others (Society for the abolition of the death penalty in South Africa and Another intervening)* 2001 (3) SA 893 (CC) para 68; *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (5) BCLR 547 (CC) para 82; *MEC: Department of Police, Roads and Transport, Free State Provincial Government v Terra Graphics (Pty) Ltd t/a Terra Works and Another* [2015] 4 All SA 255 (SCA) para 21 and numerous other judgments

²¹ *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 187

²² *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) para 28

²³ *Loc cit* at para 42

wilfulness and *mala fides*. As confirmed in *Fakie*, the applicant must now prove the requirements beyond reasonable doubt.

[20] *In casu*, insofar as the Department and the Acting HOD admitted the first three requirements, they bore an evidential burden relating to wilfulness and *mala fides*. Should I find that they failed to advance evidence that establishes a reasonable doubt as to whether the non-compliance was wilful and *mala fide*, KET Civils will have established contempt of court beyond reasonable doubt.

[21] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*²⁴, the Constitutional Court made the following point why it *inter alia* disagreed with the Free State High Court which found the acting Municipal Manager of Matjhabeng guilty of contempt of court in the following words:²⁵

"In particular, the court did not consider various attempts made by the municipal manager and other senior personnel of the Municipality to settle the dispute with Eskom. In my view, no case for wilfulness and *mala fides* on the part of Mr Lepheana was established. The order of the Free State High Court should be set aside." (Emphasis added)

[22] In *Mwelase and others v Director-General, Department of Rural Development and Land Reform and another*²⁶ the Constitutional Court acknowledged how difficult it is to find that someone acted wilfully and *mala fide* in transgressing a court order. I quote:

"[72] After the Land Claims Court granted the negotiation order in May 2016, which required the parties to negotiate in good faith in setting up a national forum of organisations in the field to assist the Department, the parties' relationship plunged to a nadir. The applicants contended that the Minister refused or failed to parley with them in good faith. They consequently charged that the Minister marginalised or excluded AFRA in the national meeting he convened in July 2016, which he conceived as a powerless talk shop. They thus sought a declaration that the Minister was in contempt of the Land Claims Court's order.

[73] In response, the Minister smoothly denied that he had refused or failed to comply with the order. If he did, he insisted that his conduct was not wilful or in *mala fide* (bad faith).

[74]

²⁴ 2018 (1) SA 1 (CC)

²⁵ *Ibid* para 78

²⁶ 2019 (6) SA 597 (CC) paras 72 - 77

- [75] In this court, the applicants persisted in complaining that the Minister interpreted the negotiation order in a disjointed and artificial way. The circumstances showed that the parties consented to negotiate the order because that would allow more time for settlement negotiations and would form an alternative to appointing a special master. Drawing a red line through this, the Minister instead precipitately (and deviously, the applicants claimed) set up the national forum without, the applicants alleged, consulting or including them (which the Minister denied). The applicants further charged the order was not intended to license the Minister to act unilaterally in establishing the national forum.
- [76] It is not difficult to appreciate why the applicants were incensed by their treatment at the hands of the Minister. Yet it is not possible on the affidavits before us to infer that he acted in mala fide. This was why both the Land Claims Court and the Supreme Court of Appeal concluded that the Minister's sworn denials of bad faith sufficiently walled him off from a successful charge of contempt.
- [77] That conclusion cannot be impeached. Making an inference of bad faith in the face of an affidavit denial will unfortunately often prove difficult. It certainly was here. The alternative, to ask the court to order evidence under oath, with cross-examination, will certainly pierce the paper defence the affidavit provides, but the applicants did not ask for that here. It follows that their attempt to overturn the findings of the Land Claims Court and Supreme Court of Appeal on the contempt issue must fail.” (Footnotes omitted and emphasis added)
- [23] In *Secretary, Judicial Service Commission of Inquiry into allegations of State Capture v Zuma and others*²⁷ Khampepe ADCJ, the scribe of the majority judgment, provided the following introduction:
- “[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.”

²⁷ 2021 (5) SA 327 (CC) at para 1

[24] The Constitutional Court had little difficulty to find Mr Zuma guilty of contempt of court in that he failed to present any evidence before the court to establish a reasonable doubt that his disobedience of the court's order was wilful and *mala fide*. I quote:²⁸

"[39] The applicant submits that Mr Zuma failed to appear and give evidence before the Commission on the dates so ordered. He also failed to file any affidavit in accordance with the Chairperson's directives under reg 10(6). 36 He is therefore in violation of this court's order in CCT 295/20, specifically paras 4 and 5.

[40] This court cannot have reason to doubt the veracity of the applicant's assertions. And, in any event, the extent of the breach has not been challenged by Mr Zuma who, instead, has taken to multiple public platforms upon which he has affirmed the extent of his non-compliance. Those public utterances impliedly confirm not only that he is aware of the order and its contents, but also that he stridently elects to remain in defiance of it. Most importantly, Mr Zuma has not presented any evidence before this court to establish a reasonable doubt as to whether his disobedience of this court's order was wilful and mala fide.

[41] As held in *Pheko II* —

'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.'

[42] As demonstrated, the three elements have been established. Notwithstanding that Mr Zuma has been afforded the opportunity to advance evidence before this court to contest his wilfulness or mala fides, he has outright refused to do so. This court cannot but find for the applicant on this because Mr Zuma bore an evidentiary burden to refute the allegation of contempt, which he elected not to discharge. Accordingly, contempt of court has been established beyond any doubt. In fact, Mr Zuma's contempt of this court's order is both extraordinary and unprecedented in respect of just how blatant it is." (Footnotes omitted and emphasis added)

[25] In *Ndabeni supra* the Constitutional Court was again not prepared to make a finding of contempt of court. It set aside the majority judgment of the Supreme Court of Appeal. I quote:²⁹

"[16] The first point of departure was whether the Mjoli J order was a nullity. The second point turned on whether Griffiths J's reliance on *Motala* was appropriate. The majority (in the SCA) answered both questions in the negative.

²⁸ *Ibid*, paras 39 - 42

²⁹ *Ndabeni loc cit* paras 16, 17 & 21

- [17] The third point was whether the Municipal Parties had acted *mala fide* in failing to comply with the Mjali J order. While the minority agreed with Griffiths J's interpretation of section 66 of the Systems Act, the majority described the Municipal Parties' reliance on that section as a "ruse". The majority proceeded to hold the Municipal Parties to be in contempt of the Mjali J order and ordered them to purge their contempt.
- [21]In addition to the Municipal Parties' claim that they were acting on legal advice, Griffiths J and two judges of the Supreme Court of Appeal agreed with them. Hence the Municipal Parties' version was not so far-fetched or untenable that it could be rejected on the papers. As the Supreme Court of Appeal could not refute Griffiths J's factual finding, it could not declare the Municipal Parties to be in contempt." (Emphasis added)
- [26] It is now an opportunity to evaluate the evidence and the parties' submissions pertaining thereto. Insofar as I am dealing with an opposed application for final relief, the *Plascon-Evans* test must be applied as *inter alia* set out in *National Director of Public Prosecutions v Zuma*³⁰ which I quote:
- "[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version."
- [27] One might be forgiven if the view point is held that the Department and its Acting HOD are guilty of a ruse. When the Acting HOD was given the opportunity to file a supplementary affidavit to show why he could not sign the settlement agreement presented to the court by KET Civils, which it believed was indeed the agreement entered into with the Department, the Acting HOD raised serious

³⁰ 2009 (2) SA 277 (SCA) para 26; see also *Fakie N.O. v CCII Systems Pty (Ltd)* loc cit para 55 and *Thint Holdings (Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 (1) SA 141 (CC) paras 8 - 10

issues which were never communicated by its officials and legal team, including an in-house lawyer, advocate and attorney, either during the meeting of 15 February 2022 or thereafter. In fact, some of the issues were not even raised in the answering affidavit. In addition to his accusation in the supplementary affidavit that KET Civils' application for contempt of court "has been launched as a ploy to force the Department's hand in settling the dispute between the parties in the manner that would advantage the applicant"³¹ we heard for the first time that KET Civils owes the Department about R9 million in respect of the Reitz/Tweeling contract for work paid and not completed and nearly R25 million in respect of the Tweeling/Frankfort contract pertaining to defects and for work paid and not completed.³² The Acting HOD relied in this regard on a report from the project manager dated 22 April 2022, issued three days before the supplementary affidavit was signed.³³ The Acting HOD then concluded that the court was not in a position to make a ruling on the issues in dispute and proposed that the matter be referred for *viva voce* evidence, alternatively that an independent arbitrator be appointed to arbitrate the issues in dispute. In KET Civils' supplementary affidavit the allegations of the Acting HOD were denied and a point was made that he had a personal vendetta against KET Civils and its deponent. Also, that his responses in the supplementary affidavit demonstrated that he was acting in bad faith.

- [28] This is not a case as dealt with by the Constitutional Court in *Zuma* when Mr Zuma failed to present any evidence. This matter calls for a proper consideration of the Acting HOD's responses. As mentioned in *Mwelase supra* it is often extremely difficult to infer bad faith in the face of an affidavit denying same. I was not asked to refer the matter to oral evidence in order for the Acting HOD to be cross-examined in order to pierce the paper defence in the respondents' affidavits. Consequently, I have to consider whether the Department and its Acting HOD were wilful and *mala fide* in ignoring a court order whilst it is common cause that the Department not only filed an application for leave to appeal the Molitsoane judgment, but also initiated a process to

³¹ Paras 13.2, p 188

³² Paras 18.5 & 18.6, p 191

³³ Annexure "RT8", p 337

possibly settle the disputes between the parties. The Acting HOD endeavoured to advance evidence that established reasonable doubt that his non-compliance with the court order was wilful and *mala fide*. In deciding the dispute, I shall consider several aspects appearing from the evidence.

[29] Firstly, the Acting HOD alleged as his first defence that he was not cited in his personal capacity; therefore, relying on a *dictum* in *Matjhabeng supra* and consequently, he could not be convicted. I do not believe that the Constitutional Court meant that the functionary in his personal capacity, rather than his official capacity, shall be cited, notwithstanding the comment in paragraph 76 of the judgment.³⁴ In any event, that judgment is distinguishable as the Acting Municipal Manager was not cited as a party, but only the municipality. This defence must fail as the Acting HOD was duly cited and had full opportunity to respond to the allegations against him.

[30] The Acting HOD's version that he believed that the application for leave to appeal suspended the Molitsoane order on the basis that its effect was final must now be considered. According to him he relied on legal advice. He failed to say who gave that advice, when and on what basis, save to say that "on the facts of this specific case" the court order was final in effect. The Acting HOD was at all relevant times not only assisted by the Department's in-house lawyer, but also the State Attorney as well as an eminent silk and a senior/junior counsel. Although the principles pertaining to the appealability of *interim* orders are clear, several judgments in the recent past concluded that even if an order is in the form of an *interim* interdict, it will be appealable if it has the effect of a final judgment. I quote the following from the Constitutional Court judgment in *Mathale v Linda and another*:³⁵

"[25] Ordinarily, interim execution orders are considered interlocutory in that they provide parties with interim relief, pending the finalisation of legal action. Generally, it is not in the interests of justice for interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief.

³⁴ This must be read with para 94 and further

³⁵ 2016 (2) SA 461 (CC) paras 25 – 30; see also *National Commissioner of Police & Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA) paras 14 – 18 & 46

[26]

[27] There is little doubt that, once a court permits the eviction order to be executed, pending an appeal, Mr Mathale's right to occupy his home will be brought to an abrupt end. When the eviction order was granted he had not been afforded alternative accommodation by the municipality. He is a poor individual who resorted to unlawfully occupying land — a choice made out of desperation and destitution. Mr Mathale seized an opportunity to erect a simple structure to house himself and his family.

[28]

[29] Furthermore, the execution order has an immediate and devastating effect upon implementation — it renders Mr Mathale homeless. The suffering and indignity that are sure to result from giving effect to the execution order are immeasurable.

[30] It is indubitable that this execution order has the effect of a final judgment and is therefore appealable.”

[31] The respondents' counsel did not rely in their heads of argument or during argument before me on any authority in this regard including those mentioned in the previous paragraph. It was merely submitted on their behalf that insofar as the parties were in agreement that negotiations would be conducted on the basis of orderly termination of the contracts, there could be “no issue at all that suggests that the First and/or the Second Respondent is in contempt. The interim interdict itself has a final effect.” It might be argued that the mere fact that the parties tried to reach settlement based on orderly termination, that in itself could not change the effect of the order, because if no agreement could be reached, the parties would be back at square one, to wit the *interim* interdict. The court order remains valid until set aside. However, the *ratio* thereof has fallen by the wayside *in casu* as the parties agreed on orderly termination of the contracts and that is what KET Civils wanted at all time. Unfortunately, there is a dispute as to the consequences of orderly termination. It must also be accepted that KET Civils' unequivocal intention was always not to return to the sites, unless ordered by the court. Now that orderly termination was agreed upon, that proposition was not available anymore.

[32] I am unable to find, notwithstanding the issues mentioned and my own personal perspective, that the Department and its Acting HOD did not go into the negotiations with the *bona fide* purpose of settling disputes. They knew that they could not wait years for appeal procedure to be completed, bearing in mind

the poor state of the roads and the public's interest in safe travelling, and that the best solution would be to agree with KET Civils on orderly termination of the contracts which was at all times KET Civils' primary goal. However, the invitation to negotiate and what followed must be considered in light of the Acting HOD's revelation in his supplementary affidavit.

- [33] Out of the blue the court was told that KET Civils owed the Department about R34 million which is much more than the meagre amount of about R7.7 million admitted to be payable to KET Civils.³⁶ This last affidavit was deposed to on 25 April 2022 and after the Acting HOD was directed on 19 April 2022 to set out in detail what amounts were payable by the Department to KET Civils. Nowhere in any of the negotiations *ex facie* the record or during argument on 14 April 2022 was any mention made of amounts owing by KET Civils to the Department. If so, my order would have read differently. The Department knew at all time that KET Civils left the sites more than a year ago and should have known about defects long before the start of negotiations in February 2022, but as mentioned, it cannot be disregarded for purposes of this application that the Acting HOD received a report of the damages suffered from the project manager as late as 22 April 2022. In the absence of a settlement pertaining to orderly termination of the contracts and in the event of the Department succeeding in defending the order granted under application 1640/2021, KET Civils would have to resume with construction works and the issue of defects and damages would not come into consideration. But orderly termination has been agreed upon, although the other issues are still in dispute. Surely, KET Civils made it clear that it did not want to go back to the sites. Although logic dictates that if the Department believed from the onset that KET Civils owed it money – not even to speak of an enormous amount such as R34 million – that it would not even invite settlement talks, or at best, to make its stance clear at the beginning, but it is apparent that the issue of defects and damages were only considered at a late stage and when an agreement was reached about orderly termination. If the contracts with KET Civils remained intact, damages could not be claimed at such stage, but now that the parties have agreed on

³⁶ P191 & annexure "RT8", p 337

termination, defects and/or damages may become relevant. I do not make any finding in this regard and merely point out these aspects in considering whether the Department and its Acting HOD are wilful and *mala fide*.

VI CONCLUSION

[34] In conclusion, I emphasise that I had serious concerns about the bona fides of the Department and its Acting HOD. Subjectively, I have reason to believe that the negotiations were not in good faith. However, as reiterated by the Supreme Court of Appeal in *Zuma supra*, motion procedure is about the resolution of legal issues based on common cause facts and unless the circumstances are special motion procedure cannot be used to resolve factual issues because it is not designed to determine probabilities. The Constitutional Court, although consistently pointing out that court orders should be obeyed as quoted above, often conclude in cases adjudicated by that court that contempt of court has not been proven.³⁷ It is not difficult to understand this if the principles applicable to the adjudication of opposed motions are considered. Viewed objectively and in line with the trite principles, I cannot find that the Acting HOD's version is far-fetched or so clearly untenable that it can be rejected on the papers. Therefore, I am persuaded that the Department and its Acting HOD have established reasonable doubt as to whether the non-compliance with the Molitsoane order was wilful and *mala fide*. KET Civils has thus failed to establish contempt of court beyond reasonable doubt.

[35] The parties made submissions about referring the dispute to arbitration or even *viva voce* evidence to be heard by this court. I do not intend to make any order in this regard. It is for them to decide the way forward.

[36] KET Civils' claim that the Department and the Acting HOD were in contempt of court was certainly not 'frivolous or vexatious, or in any other way manifestly inappropriate' and consequently, the *Biowatch* principle applies. Although it also had its own commercial interest at heart, it attempted to enforce constitutional rights against

³⁷ I refer *inter alia* to the judgments quoted above

a state institution and its functionary in its contempt proceedings and did so in a manner that cannot be criticized. Compliance with court orders by public officials is a constitutional matter.³⁸ It is entitled to immunity from costs.

VII ORDER

[37] The following orders are issued:

1. The application is dismissed.
2. Each party shall be responsible for the payment of their own costs, including all costs previously reserved.



JP DAFFUE J

On behalf of the applicant:
Instructed by:

Adv N Luthuli
Webber Wentzel Attorneys
c/o Symington & De Kok
BLOEMFONTEIN

On behalf of the 1st and 2nd respondents: Adv L Bomela
(the heads of arguments being drawn by
Adv T Sibeko SC and L Bomela)
Instructed by: State Attorney
BLOEMFONTEIN

³⁸ Section 165 of the Constitution