



NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

CASE NO. CA115/2021

In the matter between:

ENOCH MGIJIMA LOCAL MUNICIPALITY First Appellant

**THE EXECUTIVE MAYOR OF ENOCH MGIJIMA
LOCAL MUNICIPALITY *NOMINE OFFICIO*,
BEING MS LULEKA ELIZABETH
GUBHULA-MQINGWANA** Second Appellant

**THE MUNICIPAL MANAGER OF ENOCH
MGIJIMA LOCAL MUNICIPALITY
NOMINE OFFICIO,
BEING MS NOKUTHULA CECILIA MGIJIMA** Third Appellant

and

TWIZZA (PTY) LTD First Respondent

CRICKLEY DAIRY (PTY) LTD Second Respondent

FARMHOUSE FROZEN FOODS CC Third Respondent

KING FISHER INDUSTRIES CC Fourth Respondent

IN RE

BORDER-KEI CHAMBER OF BUSINESS First Applicant

TWIZZA (PTY) LTD	Second Applicant
CRICKLEY DAIRY (PTY) LTD	Third Applicant
FARMHOUSE FROZEN FOODS CC	Fourth Applicant
KING FISHER INDUSTRIES CC	Fifth Applicant
SIGHTFUL 142 CC t/a SHELL ULTRA CITY	Sixth Applicant
and	
ESKOM HOLDINGS SOC LTD	First Respondent
THE NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Second Respondent
ENOCH MGIJIMA LOCAL MUNICIPALITY	Third Respondent
THE ADMINISTRATOR OF ENOCH MGIJIMA LOCAL MUNICIPALITY <i>NOMINE OFFICIO</i>	Fourth Respondent
THE EXECUTIVE MAYOR OF ENOCH MGIJIMA LOCAL MUNICIPALITY <i>NOMINE OFFICIO</i>	Fifth Respondent
THE ACTING MUNICIPAL MANAGER OF ENOCH MGIJIMA LOCAL MUNICIPALITY <i>NOMINE OFFICIO</i>	Sixth Respondent
THE MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, EASTERN CAPE PROVINCE	Seventh Respondent
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Eighth Respondent

FULL BENCH APPEAL JUDGMENT

HARTLE J

[1] The appellants, with the leave of the court below, sought on appeal to set aside a finding that they are in contempt of a high court order dated 12 December 2019 (“the Mfenyana order”).

[2] The first appellant is the Enoch Mgijima Local Municipality (“the municipality”). The second appellant is cited in her official capacity as mayor, and the third appellant as municipal manager of the municipality.¹

[3] The contempt order was granted against the second and third appellants but leave to appeal was evidently granted to all three parties at their collective request to appeal their conviction for contempt of court, and by necessary implication the sanction imposed upon them pursuant to such finding.

[4] The order appealed against provides as follows:

“(a) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima are convicted of contempt of court for failing to comply with the order of Mfenyana AJ, dated 12 December 2019, under case number 3413/2018;

¹No explanation was given why the second appellant attracted any personal obligation under the Mfenyana order, but it appears to have been accepted that the order necessarily imposed a positive duty on the third appellant to carry out certain obligations, not only in her capacity as municipal manger, but also pursuant to the municipality’s nomination of her as the responsible person to oversee its compliance with the order’s terms.

- (b) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima are sentenced to six months imprisonment, wholly suspended, on condition that they give effect to the order of Mfenyana AJ, dated 12 December 2019, under case number 3413/2018, within thirty (30) days of the granting of this order;
- (c) That should Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima not give effect to the said order within the specified time, that the applicant may approach the court on the same papers, duly amplified, for an additional order in the following terms:
 - (aa) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima be held in contempt of court and that the second and third respondents be committed to prison for a period of twelve months, alternatively, for such a period as the Honourable Court may deem meet;
 - (bb) That Ms Luleka Elizabeth Gubhula-Mqingwana, and Ms Nokuthula Cecilia Mgijima are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved, on the scale as between attorney and client;
- (d) That the first, second, and third respondents are to pay the applicant's costs of this application, jointly and severally, the one paying, the other to be absolved."

[5] The respondents in the present matter operate businesses in Komani within the municipal area of jurisdiction of the first appellant.

[6] They were co-applicants together with Border Kei Chamber of Business and Sightfull 142 CC trading as Shell Ultra City in an antecedent application launched in November 2018 against Eskom Holdings Soc Limited ("Eskom"), the National Energy Regulator of South Africa, the municipality, an administrator who had at the time been appointed pursuant to the provisions of section 139 (1)(c) of the Constitution,² the second appellant, and the then acting municipal manager.³ The latter three were all cited *nomine officio* in the original matter.

[7] The purpose of the application was ostensibly to obtain an interdict against the municipality and its officials to cause them to enter into and to enforce a payment plan with Eskom. It is common cause that at the time the municipality

² The Constitution Act 108 of 1996.

³ The appellants filed a notice on 18 December 2019 after the conclusion of the *mandamus* application nominating the third appellant as the responsible person for purposes of par 5 of the Mfenyana order. She had not been cited before in the application. Instead, the acting municipal manager had been included as the sixth respondent. The notice additionally indicated that the mandate of the then administrator, and the appointment of the sixth respondent as acting municipal manager at the time, had terminated.

owed Eskom approximately R265 million in arrears for electricity and had proposed to interrupt its supply to the municipality to vindicate the arrear situation.

[8] The respondent and their cohorts had conceived of the litigation as a means of averting the looming disaster that would befall them and countless end-users of the electricity supply, not to mention the knock-on-knock effect that this would have for so many, were Eskom to implement its plans to cut or disrupt the electricity supply to the municipality.

[9] The outcome of this application is that the parties reached a settlement agreement on 12 December 2019 that was made an order of court by Mfenyana AJ. The order incorporated an acknowledgement of debt by the municipality to Eskom as well as a carefully crafted payment plan vis-à-vis themselves that would in the parties' view provide a panacea to the problem and avert certain disaster. It also incorporated a structural interdict in the respondents' favour that entailed the municipality and a designated person (the third appellant) reporting to the respondents and Eskom and ensuring that the municipality complied with its obligations under the payment plan.⁴

⁴ Given what had preceded the granting of the order and the interests of the respondents and general public in keeping the electricity on, it is clear that the parties had resolved to forge an instrument to deal with a serious problem that went beyond simply recovering a debt. In *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* (767/2013) [2014] ZASCA 209 (1 December 2014) (at paragraph [35]) the court commended the grant of a similar order on a consensual basis (in a scenario where the municipality had failed to pay its dues to Eskom) as a necessary tool to ensure that the municipality both met its constitutional obligations and involved itself in the oversight of the implementation of the order crafted to achieve exactly that end:

“Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. There is considerable experience in the United States of America with orders of this nature

[10] The Mfenyana order which the appellants were found by the court below to have been in deliberate defiance of, provided as follows:

- “1. THAT the acknowledgment of debt and payment agreement (referred to collectively as “the payment agreement”) reached between the First Respondent’s (“Eskom”) and Third Respondent (“Enoch Mgijima Local Municipality”) and attached marked “A” be and is hereby made an Order of Court.
2. THAT Eskom undertakes to supply electricity to Enoch Mgijima Municipality in the ordinary course, provided that Enoch Mgijima Local Municipality complies with the payment agreement (and excepting load shedding as may be scheduled nationally from time to time).
3. THAT Enoch Mgijima Local Municipality is to comply with the conditions in the payment agreement.
4. THAT Enoch Mgijima Local Municipality is to deliver written notice, on affidavit, to this Court, Mr. Jacques van Zyl of Metcalf Sahd & Company by e-mail at jacques@msco.co.za, and Eskom (through its attorneys of record) on or before the 8th day of each month indicating and providing evidence of its compliance with its obligations under the payment plan, and its monthly currently account obligations to Eskom.
5. THAT Enoch Mgijima Local Municipality and the Fourth and Fifth Respondents are to nominate by name and designation, within 7 days of the granting of this order, the responsible person(s), by name, and designation, who are mandated to ensure compliance with the terms of its order and give effect thereto, by giving written details of such person’s name (or such persons’ names) and such person’s designation or designations) to this Court, to Eskom (through its attorneys of record) and to the Applicants (through their attorneys of record).⁵
6. THAT Enoch Mgijima Local Municipality is to pay the Applicants’ costs of suit, (Wheeldon Rushmere & Cole Inc), (Netteltons and Smith Tabata), such costs to include the costs of two counsel on the opposed basis, and all reserved costs.”

[11] The payment plan envisaged that the municipality would meet both its current obligations to Eskom and at the same time would pay off the arrears owed to Eskom in instalments over an agreed period. Significantly the agreement provided between debtor and creditor what would transpire in the event that the municipality defaulted in respect of any of its payments, or if it entered into a compromise with its creditors. In this respect it recorded its consent to judgment being taken against it and reconciled itself to the further eventuality that Eskom might without further notice take whatever legal remedies were available to it

arising from the decision in *Brown v Board of Education* and the federal court supervised process of desegregating schools in that country. The Constitutional Court referred to it with approval in the *TAC (No 2)* case. Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders”. (Footnotes omitted)

⁵ See footnote 3 above.

including the disconnection of the supply of electricity to the municipality or the obtaining of judgment against it by making the acknowledgement of debt an order of court.⁶ The agreement (also incorporated in the Mfenyana order) was signed by the third appellant in her capacity as municipal manager whose authority to execute the agreement on behalf of the municipality was vouched for.

[12] The first instalment of R23 144 474.65 under the payment plan was promptly paid in December 2019 and the municipality timeously made two payments in respect of its current account in January and February 2020.

[13] As is indicated above, the third appellant was nominated as the responsible person in terms of prayer 5 of the Mfenyana order to ensure compliance with its terms and to give effect thereto. Concerning the personal obligation on her to report arising from the Mfenyana order she duly complied in this respect as was contemplated in terms of paragraphs 4 and 5 thereof until the end of February 2022.

[14] The municipality claims to have been fully intent on meeting its obligations to Eskom in terms of the payment plan, but a letter penned on its behalf by its attorneys dated 26 March 2020, ostensibly written as a report of its situation in

⁶ Both contractually (in terms of the relevant electricity supply agreement) and in terms of section 21(5) of the Electricity Regulation Act, no 4 of 2006 ("ERA") Eskom would be entitled to reduce or terminate the supply of electricity where the municipality contravenes the payment conditions of that license. In *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* 2021 (3) SA 47 (SCA) ("*Resilient*") the court however held that despite such power Eskom - before it decides to invoke its powers under section 21 (5) to interrupt the supply of electricity to an entire municipality, must, as an organ of state, be mindful of its constitutional obligations. In this respect it is required to comply with sections 40 and 41 of the Intergovernmental Relations Framework Act, no 13 of 2005 ("IRFA") which requires it to make every reasonable effort to settle disputes between it and a municipality (including financial disputes related to the quantum of the debt and the manner in which the debt can be liquidated) before it approaches a court to resolve such a dispute.

the spirit of the Mfenyana order, heralded that it would be entering a tumultuous period of financial uncertainty as a result of the then impending COVID-19 crisis. It also disclosed that the implementation of the payment plan was wreaking havoc on its ability to meet its normal operational expenses, impacting ultimately upon its service delivery. It asserted that the continuation of the payments set out in the plan in the short term was simply unsustainable and would lead to its inevitable collapse. It consequently asked for a “reasonable” extension of time to pay the two instalments of R30 million each due on 31 March and 31 July 2020 respectively, spread over the period November 2020 to 31 July 2022, on the understanding that it would continue to the best of its ability to service the current Eskom debt. It intimated that it would have to report to the court (as per the Mfenyana order) that it was unable to comply with its obligations and would seek appropriate relief from the court thereanent.

[15] Its attorneys attached a report ostensibly prepared by the third appellant addressed “to whom it may concern” dated 26 March 2020 which illustrated the municipality’s dire financial position. In it the third appellant refers to its approach to Eskom with a view to reaching agreement on the “rescheduling of the agreement pending submission to the court” but acknowledges having been informed by Eskom that the municipality would be obliged to seek its recourse by approaching the court to effect such variation.

[16] Despite noting the urgency of the situation and repeating the municipality’s intention to do exactly that, namely, to approach the court “in pursuance of the stated position”, it is common cause that it did not do so.

[17] On 17 April 2020 the local attorneys of the respondents (who are the beneficiaries of the monthly report envisaged in prayer 4 of the Mfenyana order) noted that the “evidence” by the municipality of its compliance with its

obligations under the payment plan (refer paragraph 4 of the order) was lacking, and the appellants supposedly in contempt of court thereby. They made demand for proof of payment to be provided failing which they intimated that the respondents would proceed with the contempt application.

[18] On 27 April 2020 the municipality's attorneys, observing that the legal representatives of the relevant parties had not reverted regarding its request for an extension under the payment plan, laid bare the fact that the municipality's financial position had considerably worsened in the intervening period. Reasons for this conclusion were noted and attention was once more drawn to the fact that unless a re-negotiation was in the offing and a settlement agreement could be reached involving new affordable payment terms, the municipality would be obliged to approach the court for its intervention, on an urgent basis if necessary.

[19] The respondents' attorneys replied with unbridled sarcasm that it was anticipated that the municipality would blame all its woes and contempt of court on the COVID-19 virus. It further questioned what the municipality had done with revenue earmarked for the supply of electricity and insinuated that it was "pillaging the Eskom funds again, for other purposes". It confirmed that it would proceed with the contempt application against all of the appellants.

[20] Eskom's attorneys in the meantime unequivocally confirmed to the municipality's attorneys that it would not accede to its request for a "payment holiday." It urged the first appellant to apply its share of the special allocation to municipalities to alleviate the effects of COVID-19 to the payment of the debt owing to it, pointing out that this grant was specifically intended to enable municipalities to meet their constitutional and contractual obligations despite the hardship brought on by the COVID-19 pandemic.

[21] On 11 June 2020 the respondents issued out the contempt application, on the basis of the municipality's failure to have paid arrear instalments and on the further basis of its intimation to Eskom in separate correspondence that it was unable to meet payment of its current account.⁷

[22] In launching the proceedings for contempt, the respondents articulated the twofold purpose of the application as follows:

“This is an application to convict the first, second, and third respondents for contempt of court, and in particular, for failing to comply with the order of the Honourable Madame Acting Justice Mfenyana, handed down on 12th of December 2019, in case number 2313/2018.

8.

A further purpose is to ensure compliance with that order by affording the first, second and third respondents a final opportunity to comply with the aforesaid order, failing which, that the applicants be granted leave to enroll this matter again for an order committing the second and third respondents to imprisonment for a period of twelve months, alternatively, for such a period as the Honourable Court may deem meet.

9.

The first, second, and third respondents are also required to pay the costs of this application on the scale as between attorney and client.”

[23] The appellants accepted their collective failure to have complied with the order in the obvious sense of the municipality having defaulted on its payments to Eskom as provided for in the acknowledgement of debt and payment plan that had been incorporated in the Mfenyana order.

[24] Thus, they accepted that the respondents had proved the first three requisites of contempt as provided for in *Fakie NO v CCII Systems (Pty) Ltd*⁸ essential to establish in proceedings for civil contempt, namely the order; service or notice; and non-compliance.⁹

⁷ It appeared from further correspondence addressed by Eskom to the municipality dated 29 April 2020 that it had failed to pay its current account “for the past two months” which in the respondents’ view was a further indication that the municipality was in contempt of court.

⁸ 2006 (4) 326 SCA at 344.

⁹ At paras 41 and 42.

[25] The concession notwithstanding, the third respondent averred that contempt proceedings were not appropriate in all the circumstances:

“The (respondents) seek an order declaring the (appellants) to be in contempt in respect of that portion of the above Honourable Court’s order which amounts to a claim sounding in money; because the (municipality) had not paid that which the Court ordered, so the (respondents) contend, they are in contempt of the above Honourable Court’s order. I am advised, and it will be so argued on behalf of the (appellants), that the (respondents) have misconstrued their remedy because contempt proceedings are not appropriate in circumstances such as the present.”

[26] What those peculiar circumstances entailed, so the appellants appeared to suggest, is that the Mfenyana order was essentially an obligation imposed on the municipality to pay a money debt (an obligation between itself and Eskom that could conceivably have been enforced in terms of the acknowledgement of debt and payment plan by way of ordinary execution once judgment was obtained),¹⁰ but missing in their appreciation is the fact that the obligation on them to ensure compliance by the municipality for the payment of its debt had been cast in the Mfenyana order in the form of a structural interdict as between the appellants and Eskom in the first place, and as between themselves and the respondents in the second place, since the whole objective of the initial application had been to procure a payment plan that would appease Eskom and avert the disastrous eventuality that it might disconnect the supply of electricity to the municipality.¹¹ The latter concern self-evidently underpinned the whole basis for the respondents to have sought the intervention of the court in the first instance.¹²

¹⁰ See *Mateis v Plaaslike Munisipaliteit Ngwathe en Andere* (254/2002) [2003] ZASCA 9 (7 March 2003) which confirms the principle that a municipality’s assets can be seized under execution of a money order. In this instance though there was no enforceable judgment that Eskom was entitled to execute against at that point.

¹¹ The *lis* was the municipality’s failure to meet its constitutional obligations to the respondents and other end users.

¹² What was at stake for the respondents by the municipality’s failure to pay, assuming Eskom invoked the right to disrupt the supply of electricity to it, was poignantly recognized by the court in the similar matter of *Resilient* as follows:

“Terminating the supply of electricity to an entire municipality in the circumstances provided for in s 21(5) would be a radical step. Such reduction or termination of the supply of electricity would adversely affect every consumer within the affected municipality. Indeed, it would have the effect of collapsing the entire municipality, rendering it unable to fulfil its constitutional and statutory mandate to provide

[27] As for the fourth requirement for contempt proceedings, namely wilfulness and *mala fides*, in this instance proof of which was required to be established by the respondents beyond reasonable doubt,¹³ the appellants denied any deliberate or criminal non-compliance with the Mfenyana order. The third appellant purported to explain to the court below in an opposing affidavit filed on behalf of the municipality how and why it had come to find itself in a difficult situation financially which had impacted its ability to meet the anticipated payments it had committed itself for.¹⁴ She repeated what had been foreshadowed in the correspondence by the municipality's attorneys regarding what had contributed to that unfortunate predicament and its difficulties going forward.

[28] She related that this had resulted *inter alia* in the executive council for the province resolving, on 11 March 2020, to reinstate an earlier section 139 (5) intervention imposing a financial recovery plan on the municipality and authorizing further measures as envisaged in section 139 (1) of the Constitution. This occurred after the terms of two previous administrators had ended and their respective efforts at achieving a successful intervention were purportedly frustrated. The third respondent attempted to assure the court below (in the hope that less austere payment terms might instead be implemented) that this intervention would be more effective than what had gone before to secure a

basic services. The objects of local government spelt out in s 152 of the Constitution would be subverted. And a municipality whose electricity supply is terminated by Eskom would not be able to 'give members of the local community equitable access to the municipal services to which they are entitled' as required by s 4(2)(f) of the Municipal Systems Act. Nor would such a municipality be able to provide services in respect of water, sanitation and electricity in terms of s 9(1)(a)(ii) of the Housing Act as these services rely on electricity for their functionality."

¹³ This is the standard of proof required when an applicant in civil contempt proceedings requires a committal order. A declarator and other appropriate remedies as a means of securing compliance with court orders remain available to an applicant on proof on a balance of probabilities. (*Fakie NO Supra* at paras 41 and 42.)

¹⁴ Once an applicant in contempt proceedings proves the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt. (*Fakie NO Supra* at paras 41 and 42.)

turnaround in the municipality's ability to fulfil its executive obligations in terms of the Constitution and to be able to pay Eskom in particular.

[29] She explained that a financial recovery plan was already in place and mandated by the court on 25 June 2020 in related litigation that essentially pivoted around the same dilemma that had at its core the financial crisis of the municipality and its inability to pay Eskom.¹⁵ A new administrator, Mr. Monwabisi Somana, had also been appointed to the position of administrator by the Provincial Executive Committee on 19 March 2020.

[30] She expressed the stated desire of the municipality, in respect of the Eskom debt and its undertakings arising from the Mfenyana order in all the circumstances, to renegotiate the previous payment terms because it could no longer afford the payment terms it had agreed to. She alluded to a process underway with the Municipal Infrastructure Support Agency ("MISA") at the helm under the auspices of the executive committee of the province in related litigation (involving the province's formal intervention and oversight of the municipality), which had already made representations in this regard to Eskom concerning the arrears of the present municipality (amongst others) and how these could be liquidated.

[31] With regard to the terms of reference of the administrator she suggested that it was really no longer in the hands of the appellants to carry forward the implementation of the Mfenyana order since, and because of, his official appointment. In other words, it was out of her hands or sphere of influence how and under what circumstances its indebtedness to Eskom might be liquidated

¹⁵ This application was colloquially referred to as the "Let's Talk Komani" matter. The applicants in that matter with similar interests and concerns sought an interdict to compel the province to intervene in terms of section 139 (1) (b) of the Constitution. It appears that a financial recovery plan was ultimately agreed upon to remediate the municipality's dire financial crisis.

since the administrator had assumed responsibility for the implementation of the financial recovery plan.

[32] She further expressed the view that the order of 25 June 2020 in the related litigation (pursuant to which the financial recovery plan was made an order of court) had replaced or rendered the provisions of the Mfenyana order “unenforceable” or obsolete so to speak.

[33] She also explained, although in my view not as the *primary* reason for the unfortunate turn of events, that the fight against the COVID-19 pandemic had additionally been thrust upon the Municipality and had had huge and devastating financial consequences for it since local authorities had been required to mobilize and spend enormous and wholly unanticipated resources in seeking to combat the spread of the virus. The pandemic had also affected the municipality’s ability to recover revenue from customers who had suffered from the economic downturn.

[34] She repeated what had been heralded in prior correspondence to Eskom and the respondents written on behalf of the municipality that it was unable to comply with the Mfenyana court order and emphasized the necessity for those payment terms to be varied.

[35] Notwithstanding her allegation that the payment terms necessarily had to be reviewed in the light of all the circumstances, she purported to assure the court below that the initial agreement in terms of the Mfenyana order had been premised on the genuine expectation (before COVID-19) that the municipality could successfully manage its already disastrous financial position in a manner that would ensure compliance with its terms.

[36] Despite having talked up what it was critically necessary to do because the municipality could in the end not meet its obligations to Eskom which it had committed itself for, it is common cause that the appellants failed to file a counterapplication or to bring fresh proceedings for the court to intervene on the basis set forth in Chapter 13 (Part 3) of the Local Government: Municipal Finance Management Act, No 56 of 2003 (“MFMA”).¹⁶

[37] In determining the issue of whether the appellants were in criminal contempt, the court below rejected the notion that the appointment of the administrator had had any role to play in the municipality’s competence to comply with the Mfenyana order or that this had shifted responsibility away from the third appellant who had been nominated to ensure compliance with the initial order on behalf of the municipality.¹⁷ Indeed, at the time the Mfenyana order had been agreed to an administrator was also in place, but this had not detracted from the third appellant’s autonomy at the time to conclude the settlement agreement or, initially, to have given effect thereto. It also made short shrift of the COVID-19 excuse raised by the parties evidently on an anticipatory basis to absolve it from complying with the terms of the initial order. The disaster was only proclaimed towards the end of March 2020 whereas the municipality was already back peddling on its obligations even before the COVID-19 onslaught was felt, leading the court to question why it had committed itself to the Mfenyana order in the first place well knowing that it would not be able to keep up with the payment plan. It was additionally struck by evidence that came to light days

¹⁶ Mr. Rorke informed the court from the bar however that, apart from the negotiations entered into with Eskom under the auspices of the province, the municipality had also in the meantime launched an application to rescind the Mfenyana order.

¹⁷ The point of the material misjoinder of the administrator seems to have been unfortunately taken and was certainly not repeated or relied upon in the present appeal. So too the claim that the effect of the Mfenyana order had simply been overtaken by the Lets Talk Komani litigation. With hindsight the appellants should have sought in that matter to have formally substituted the payment plan under the Mfenyana order with the financial recovery plan order. There was however never any real suggestion that the Mfenyana order was unenforceable in the legal technical sense of the word.

before the hearing that in the court's view seriously impacted on the appellants' credibility. It emerged in this respect that the municipality had in fact been paid its equitable share by the National Treasury in July 2020 already of an amount of R89 000 000.00 which the respondents had pleaded could obviously have been applied toward the payment of its debt to Eskom, yet the municipal parties said nothing of this critical development in their answering papers.

[38] One gets the impression that the appellants' failure to have disclosed this pointed information in their answering affidavits was the tipping point, leading the court below to infer that this conduct (coupled with them having taken the point of the material misjoinder of both Eskom and the new administrator, and the raising of implausible excuses to justify the municipality's non-payment) demonstrated beyond a reasonable doubt that "the non-compliance with the order was wilful and *male fides*."

[39] The respondents opposed the present appeal citing the same complaints against the appellants of their criminal lack of compliance with the Mfenyana order but withdrew their opposition and filed a notice to abide the outcome of this court's decision a week or so before the matter was due to be heard. We were advised by Mr. Rorke, who appeared for the appellants, that this was in recognition of the fact that costs were running up and adding to the financial burden of the municipality.

[40] Mr. Rorke also informed the court that the municipality had in the meantime further sought a rescission of the Mfenyana order. We were advised that that application too was opposed by the respondents and was due to be heard in August 2022.

[41] The basis for the rescission application has to be understood in the context of the judgment of the Supreme Court of Appeal in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd & Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* (“Resilient”)¹⁸ which he suggested might provide a basis for the municipality to set aside the consent order on the basis that it had felt pressurized to agree to the payment plan in the first place as a result of Eskom’s (unlawful) threat that it would interrupt the supply of bulk electricity to it. Implied in this revelation is the suggestion that Eskom may have used the threat as a leverage to enforce payments well knowing that the municipality was in a parlous financial situation. Reading between the lines the appellants are hopeful that if successful in rescinding the Mfenyana order, the issues in dispute between Eskom and the municipality concerning how its admitted debt can and should be liquidated under the prevailing circumstances can be revisited utilizing the machinery at their disposal in terms of sections 40 and 41 of the Intergovernmental Relations Framework Act, No. 13 of 2005.¹⁹

¹⁸ *Supra*. See footnote 6 above.

¹⁹ The issue before the SCA concerned whether a decision taken by Eskom to interrupt the bulk supply of electricity to two municipalities (described *inter alia* as “financial delinquents”) at scheduled times was defensible on both constitutional and statutory grounds. Eskom asserted that its principal objective in resorting to the drastic measure was to contain the spiralling of the municipalities’ debt, which over the years had increased exponentially. The municipalities signed acknowledgements of debt in which they undertook to pay off their accumulated debt in instalments but such undertakings came to naught since both defaulted and also failed to pay for their ongoing current consumption. Before imposing the scheduled blackouts, it invited representations from members of the public and interested parties. Resilient comprises of private companies that own a large mall located within the jurisdiction of the Emalahleni Local Municipality. Eskom was unmoved by representations made by Resilient and forged ahead with their controversial decision. Ironically in justifying its stance it stated that it was open to Resilient and other parties aggrieved by the decision to seek a mandamus directing the municipalities to pay their debts which would then obviate the need for it to implement its decision to interrupt the supply of electricity. This precipitated Resilient and the Sabie Chamber of Commerce and Tourism bringing an urgent application for interim and final relief, the latter entailing a consideration *inter alia* of whether section 21 (5) of the ERA is inconsistent with the Constitution and invalid, and interdicting Eskom from disconnecting the electricity supply for the purpose of compelling the municipalities to pay their debts to it especially having regard to the interests of Resilient and Sabie that were compromised by the decision. The court examined the constitutional and statutory framework applicable and remarked upon the unique roles of both Eskom and the municipalities and their symbiotic constitutional fealty owed to end users of electricity (an indispensable basic municipal service), concluding that Eskom must as organ of state be mindful of its constitutional obligations before it can decide to invoke the provisions of section 21 (5) of ERA to interrupt the supply of electricity to an entire municipality. One of those obligations is to engage meaningfully with each other in terms of sections 40 and 41 of the IRFA before compromising end users by such interruptions. In the whole

[42] Although we were initially inclined of the view that this might render the present appeal academic, Mr. Rorke correctly persisted in arguing the matter before us on the basis that even if successful, rescission of the Mfenyana order will not expunge the finding of the court below that as at the date of the contempt order (30 March 2020), the second and third appellants were found to have been culpably non-compliant with its terms on the facts found. I add that there is obviously a further concern that looms and that is the ability of the second and third appellants to give effect to the coercive order of the court below going forward since this is the premise upon which their incarceration for a “period of 6 months”, imposed as the sanction for their declared contempt, has been suspended. Further and in any event, the civil contempt remedy of committal employed in this instance has material consequences on the second and third appellants’ freedom and security of their person.

[43] The first question for determination before us on appeal is whether it was competent for the respondent to have sought a committal order against the second and third appellants in circumstances where the respondent’s claim was for one sounding in money or rather premised on an order involving as it were the payment of a money judgment.

[44] In this respect Mr. Rorke at the outset filed supplementary heads of argument in which the point is taken on behalf of the appellants that it was in principle not competent for the court below to have convicted them for contempt of court at all in circumstances where the municipality was alleged to be in breach of what is in essence a money order.

scheme of things and bearing in mind the constitutional duties of both Eskom and municipalities to end users it is impermissible and unlawful for Eskom to invoke the provisions of section 21 (5) of ERA to force its hand or use the municipalities’ debt as leverage to extract payment.

[45] Our courts have at common law drawn a clear distinction between orders *ad pecuniam solvendam* relating to the payment of money, and orders *ad factum praestandum* which require a person to perform a certain act or refrain from specified action. Failure to comply with an order to pay money was not regarded as contempt of court, but the disobedience of an order calling upon a party to perform an obligation under an order, or to refrain from specified action, was.²⁰

[46] In *Mjeni v Minister of Health and Welfare, Eastern Cape*,²¹ the court endorsed the long line of authority that an order must be *ad factum praestandum* before the court can enforce it by means of committal, the only exception being in respect of orders to pay maintenance.²²

[47] Did the Mfenyana order entail such an obligation?

[48] The answer in my view lies in the nature of the proceedings and the unique purpose sought to be achieved by the Mfenyana order. Vis-à-vis the appellants and the respondents, the Mfenyana order indeed imposed positive obligations on the second and third appellants (until the appointment of the third respondent as the designated responsible person) to monitor and supervise the payment of the arrear and current debt owing to Eskom and to ensure that the financial obligations undertaken by the municipality to it be met as and when the payment targets arose. The purpose was specific to avoid the municipality from failing to meet its constitutional obligations *to the respondents* which would have resulted in disaster not only for themselves, but the community served by the municipality in the area as well, were Eskom were to carry out its threat to interrupt the supply of bulk electricity to the municipality. The application antecedent to the

²⁰ *Coetzee v Government of RSA; Matiso v Commanding Officer, Port Elizabeth Prisons* 1995 (4) SA 631 at para 61.

²¹ 2000 (4) SA 446 (Tk).

²² At 451D-F.

Mfenyana order was one to compel the municipality to meet its constitutional obligations *to the respondents*.²³ If Eskom had in my view sought to enforce the order (as opposed to the respondents who were pursuing a *mandamus* based on their own unique interests), I can appreciate that we would be dealing with an entirely different kettle of fish.

[49] It is further plain from the pretext to the Mfenyana order that the intention was to hold the second and third appellants accountable for its enforcement as the officials who would ordinarily be liable to oversee its implementation.

[50] I accept however that the papers do not suggest exactly how or why the second appellant came to be the subject of the order or rather why, once the third appellant was designated as the responsible person to keep her finger on the pulse so to speak, it was necessary to seek her committal. Mr. Rorke correctly pointed out that given the requirement in the order that a responsible person had to be nominated it followed (as per the parties' agreement) that she was the only person that could be held in contempt were the eventuality of non-compliance with the order's terms to have arisen. I agree that she ought therefore without further ado to be exonerated from the committal order under appeal.

[51] As for the third appellant, despite the conscious nomination of her as the responsible person (she was also involved from the outset as the signatory to the

²³ In *Resilient* (see paragraphs 29-37) the court helpfully outlines the constitutional and statutory framework that should guide a municipality in appreciating what its constitutional mandate to the community is concerning *inter alia* the provision of services in a sustainable manner, the promotion of social and economic development (that self-evidently can't happen without such a basic service) and of a safe and healthy environment (that will notably be compromised when there are rolling blackouts), and to be exemplary in its financial management so as to be able to give priority to basic needs and to promote the social and economic development of the community. Further statutory obligations arise from local government and related legislation, in particular the MFMA, which enjoins it to handle its financial problems in a very specific way, especially when in financial crisis. When seen from this perspective and properly understanding the pretext to the Mfenyana order, it is abundantly plain that the order sought to compel the municipality to act as the Constitution behoves it to act. The fact that a claim sounding in money gave rise to the peculiar situation *in casu* rendering a *mandamus* necessary to nudge its payment along for a significant reason is a mere coincidence.

acknowledgement of debt and payment plan), the municipal manager of a municipality would in the ordinary course be saddled with the burden of overseeing the implementation of court orders.

[52] In *Meadow Glen Homeowners Association v City of Tshwane Metropolitan Municipality*²⁴ the court helpfully summarized the numerous legislative provisions regarding the person or persons responsible for the administration of local authorities:

“**Section 82** of the **Local Government: Municipal Structures Act 117 of 1998** determines that the municipality must appoint a municipal manager as the person responsible for the administration of the municipality and such person will also be the accounting officer of the municipality. In terms of **s 56(3)** of the same Act, the executive mayor, in performing his duties must monitor the management of the municipality’s administration in accordance with the direction of the municipal council (**s 56(3)(d)**) and oversee the provision of services to communities in the municipality in a sustainable manner (**s 56(3)(e)**). **Section 54A** of the **Local Government: Municipal Systems Act 32 of 2000** also provides that the municipal council must appoint a municipal manager as the head of administration of the municipal council. Furthermore, **s 55** sets out the responsibilities of the municipal manager as head of the administration, subject to the policy directions of the municipal council. **Section 55(1) (b)** determines that the municipal manager is responsible and accountable for the management of the municipality’s administration. Section 60 of the Local Government: Municipal Finance Act 56 of 2003 provides that the municipal manager is the accounting officer of the municipality.”²⁵

[53] As was articulated in *City of Johannesburg Metropolitan Municipality and Others v Hlophe*²⁶ (endorsed in *Meadow Glen*),²⁷ the Municipality - as is the position with the State, can only act through the functionaries that are responsible to perform the specific function or act on its behalf.²⁸

²⁴ See footnote 4 above.

²⁵ At [23]. See also *City of Johannesburg Metropolitan Municipality and Others v Hlophe and Others* 2015 All SA 251 (SCA) at [19] and *Pheko & Others v Ekurhuleni Metropolitan Municipality (No. 2)* 2015 (5) SA 600 (CC) at [58] and [59].

²⁶ *Supra*.

²⁷ At paragraphs 20-22 & 30.

²⁸ At [17].

[54] *MEC for the Department of Welfare v Kate*,²⁹ similarly a judgment of the Supreme Court of Appeal, provides direct authority for a *mandamus* on pain of committal for contempt of court against the responsible functionary:

“It goes without saying that a public functionary who fails to fulfil an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him or her to do so. That remedy lies against the functionary upon whom the statute imposes the obligation, and not against the provincial government. If *Jayiya* has been construed as meaning that the remedy lies against the political head of the government department, as suggested by the Court below, then that construction is clearly not correct. The remarks that were made in *Jayiya* related to claims that lie against the State, for which the political head of the relevant department may, for convenience, be cited nominally in terms of **s 2** of the **State Liability Act 20 of 1957**, though it is well established that the government might be cited instead. Moreover, there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles, and there is nothing in *Jayiya* that suggests the contrary.”³⁰

[55] Indeed, it was never suggested *in casu* that the third appellant had not attracted personal obligations under the Mfenyana order in her official capacity and, but for the suggestion that the remedy of contempt did not avail the respondents because a claim sounding in money (enforceable through execution upon judgment) was at the core of it all, she appeared to accept that there was a burden on her, arising from the Mfenyana order, to take the necessary steps borne out of the statutory and constitutional obligations that come with her position as municipal manager, to ensure that the terms of the structural order were met to the extent that this was possible.

[56] The next question for determination then is whether the court below correctly found the third appellant to have deliberately defied the order. I am inclined to find in the negative in this respect based on the accepted facts and applying the criminal standard of proof.³¹

²⁹ 2006 (4) SA 478 (SCA).

³⁰ At [30].

³¹ See *Fakie supra* at paras 41 and 42; *Pheko supra* at [36].

[57] Firstly, even on the respondents own showing, the municipality was clearly in dire financial straits, or in deep financial crisis, which fact was confirmed by a report of the auditor general co-incidentally put up by the respondents themselves. Indeed, in respect of the financial year under consideration the auditor general rendered his professional conclusion that the liabilities of the municipality exceeded its assets by a significant degree, which in turn cast doubt on its ability to continue as a going concern.

[58] Even if it could be said that the third appellant was reckless in agreeing to the payment plan on behalf of the municipality, it is common cause that the municipality was under threat by Eskom to discontinue the bulk electricity supply to it. Given the deleterious effect that this would have had on the respondents and members of the community, it is not unreasonable to assume that this must have played a huge part in the municipality's decision to agree to the Mfenyana order to avoid such disaster. However commercially naïve or insensible this decision may appear (although the third respondent was optimistically of the view that the municipality's already disastrous financial position could be managed in a manner that would ensure compliance with the terms of the court order), this was simply the opposite of an opportunistic *male fide* response.

[59] When she realized the serious predicament of the municipality further along the line after making the initial payments (not a trifling amount for a small municipality), other steps (apart from pleading for an extension of time to pay) entailing negotiations between the administrator and Eskom were initiated. The municipality also launched the rescission application which if successful will oblige the municipality and Eskom to meaningfully engage with each other in the greater interests of the community served by the municipality to resolve the

dispute between themselves concerning how and when the municipality's indebtedness to it is to be liquidated.

[60] Further and more importantly, frank reports of the municipality's situation were given in the spirit of the Mfenyana order that required her to keep the parties fully informed. This consistency was maintained even under the constraints of managing the COVID-19 pandemic.

[61] Far from suggesting a basis for the municipality to be absolved from its obligations under the order, the third appellant's pleas for indulgences were properly premised on an acceptance that compliance with the order was first and foremost vitally necessary.

[62] As for failing to disclose the fact that the special grant had been paid in July 2020 (after the launch of the contempt application but before deposing to her answering affidavit) Mr. Somana, who had become tasked with ensuring that a recovery plan was devised and implemented, as it was ultimately, explained in a supplementary affidavit that he had met with representatives of Eskom (admittedly only after the revelation had come to light that the municipality had been paid its equitable share by the National Treasury of R89 million in July 2020) to renegotiate a payment regime which was followed up by a firm offer and payment to Eskom of the first instalment of R25 million already by 2 September 2020. Evidently Mr. Somana was firmly in the driving seat by this time, and whereas it may have been more desirable for the third appellant to have given a personal account of this development and to explain why Eskom was not paid immediately after receipt of its grant from National Treasury, the progression of the matter by then to the stage of provincial intervention seems to me to be a good reason why the municipality's legal advisors would have put Mr. Somana up to give the official explanation rather than the third appellant. Nothing else points

to any devious non-disclosure on the part of the third appellant or the municipality. As an aside, although Mr. Rorke did not hesitate to concede that despite the appointment of an administrator the third appellant continued to accept without reservation that she had been identified as the responsible person to give account for the municipality's compliance with the Mfenyana order, it would be counter intuitive in my view for the court below to have ignored the practical consequences of his appointment or the impact of the order granted in the related litigation. Her obligations as municipal manager would surely have required of her to get aboard the objective of the provincial intervention and to defer to the necessary extent to the lead of Mr. Somana. If the third appellant can be criticized for anything it would be for failing to have sought a variation of the Mfenyana order (the compliance with which she was specifically mandated) or to have insisted that it be formally substituted in the related litigation by the new financial recovery plan that was made an order of court.

[63] Mr. Rorke submitted that the appellants' collective endeavour to meet the problem head-on was not dissimilar to the scenario in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited*³² in which the court accepted on the basis of various attempts made by its municipal manager and senior personnel to settle a dispute with Eskom that no case for wilfulness and *male fides* on the part of the municipal manager was established or had been made out.

[64] I am inclined to agree with him that no such case was made in the present instance either. Even from the tenor of all the communications addressed to those on the subject of the municipality's financial inability to comply with the

³² [2017] ZACC 35.

Mfenyana order, it is self-evident that the third appellant was not avoiding her responsibilities. To the contrary, what appears is a clear admission of the municipality's indebtedness (and acceptance of the existence of a valid and binding order the implementation of which was in her hands) and a genuine plea to assist the municipality by granting it an indulgence of time. The third appellant's particular hands-on approach and sensitivity regarding the municipality's obligation (and the devastation its default might cause if left unchecked) were carried forward in the subsequent intervention by the administrator who took an active part in trying to resolve the issues with Eskom so as to alleviate the concerns of the respondents.

[65] In my view the evidence does not establish a deliberate deviance of the terms of the Mfenyana order on the criminal standard, and the third appellant's conviction accordingly also falls to be set aside.

[66] The order which I propose be made herein takes account of Mr. Rorke's intimation to the court that, by agreement with the respondents' legal representatives, the municipality would not persist with its claim for costs.

[67] In the result we issue the following order:

1. The appeal is upheld.
2. The order of the court below is altered to simply read as follows:

“The application is dismissed.”

B HARTLE
JUDGE OF THE HIGH COURT

I agree,

R BROOKS
JUDGE OF THE HIGH COURT

I agree,

S RUGANANAN
JUDGE OF THE HIGH COURT

DATE OF HEARING: 3 May 2022

DATE OF JUDGMENT: 26 August 2022

*Judgment delivered electronically by email to the parties.

APPEARANCES:

For the appellants: Mr. S.C Rorke SC instructed by Whitesides, Grahamstown (ref. Mr. Barrow).

For the respondents: No appearance.