

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, EAST LONDON CIRCUIT LOCAL DIVISION**

REPORTED

In the matters between:

CASE NO.: EL179/2019

PETRUS BIERMANN

Applicant

v

BUFFALO CITY METROPOLITAN MUNICIPALITY

Respondent

CASE NO.: EL555/2019

BUFFALO CITY METROPOLITAN MUNICIPALITY

Applicant

v

PETRUS BIERMANN

Respondent

CASE NO.: EL554/2019

BUFFALO CITY METROPOLITAN MUNICIPALITY

Applicant

v

PETRUS BIERMANN

Respondent

CASE NO.: EL1262/201

BUFFALO CITY METROPOLITAN MUNICIPALITY

Applicant

v

PETRUS BIERMANN

1ST Respondent

THE REGISTRAR OF DEEDS, KING

WILLIAM'S TOWN

2ND Respondent

[DATE ARGUED: 14 NOVEMBER 2019]

[DATE DELIVERED: 5 DECEMBER 2019]

JUDGMENT

SWANEPOEL AJ:

1. Petrus Biermann ("Biermann") is a developer whose entrepreneurial spirit was to be tested when he decided to construct housing units in East London administered by a municipality which has as of late attracted criticism from the apex court of the land, in the matter of **Buffalo City Metropolitan Municipality v ASLA Construction Pty) Ltd 2019 (4) SA 331 (CC)**¹. The approach of the Buffalo City Metropolitan Municipality ("the Municipality") in the matters reflects adversarial obstructionism, instead of proactively facilitating housing developments and realising socio-economic rights and expectations. Despite the fact that the proposed housing development was

¹ Henceforth referred to as "**Asla**"

regarded as “*desirable*” by the planning division of the municipality, Biermann would encounter legal problems and skirmishes that would have caused the average man to turn his back on the development. He had initiated the construction project in his own name to provide desperately needed housing in an urban densification drive, expending substantial amounts on the development through bank loans procured by him, presumably at personal risk. He persisted with the development, despite all sorts of legal woes and stumbling blocks arising, as the facts will show.

2. Four inter-related applications, namely a contempt application brought by Biermann against the municipal manager of the Municipality, a rescission application brought by the Municipality to set aside a High Court order in Biermann’s favour, a (self) review application brought by the municipality to set aside its own municipal decision to approve amended building plans, and an interlocutory interdict application brought on an urgent basis to prevent Biermann’s transferring attorneys from having the sectional diagram registered and opened, have to be adjudicated on. Mercifully, a spoliation application which Biermann had to launch after the Municipality had disconnected the electricity supply to the units being constructed, was resolved earlier by way of a court order obtained by Biermann, with the electricity supply having been reinstated after Biermann had to approach the court for such relief.
3. Biermann is the owner of ERF 5078 East London in Cambridge West (“the property”). By the time he decided to purchase and develop the property in

October 2013, it was not vacant as there was already a dwelling erected on the property which was being let to third parties for rent. He identified the potential of the property as being suitable for the construction of sectional title units, also referred to in the papers as “flats” or “town houses” (hereinafter referred to as “units”).

4. The title deed of the property contained restrictive conditions allowing only one dwelling; imposing a two storey height limitation and further containing a density limitation. These title deed conditions necessitated a court application by Biermann for the removal of such restrictive restrictions. Such relief was granted by Hartle J who issued an appropriate rule *nisi* on 21 June 2016, with the rule *nisi* being confirmed on 19 July 2016. The court order removing the restrictions was duly served on the Municipality.

5. The zoning of the property also had to be addressed by Biermann and his land surveyors, because the property was zoned as residential Zone 3 B, and a rezoning to residential Zone 5 was required in terms of the municipal zoning scheme. In terms of paragraph 3.6.1 of the zoning scheme, “*Primary Use*” relates to “*Town Houses, Flats above 50 units Ha, dwelling house*”. A “*flat*” is defined as “*a building containing three or more dwelling units for human habitation, together with such outbuildings as are ordinarily used therewith: provided that in those zones where flats are permissible, fewer than three dwelling units shall also be permissible*”. Regulation 3.6.2 of the zoning scheme regulations, under the heading *Town Houses: Land use restrictions*, provides that in residential areas a **three** storey height restriction

applies. Consequently, it was common cause when the matters were argued, that flats or townhouses (or units) of up to three storeys could be approved *intra vires* the zoning scheme regulations of the Municipality.

6. When the rezoning application was granted in terms whereof the property was rezoned with a residential Zone 5 zoning , one of a number of conditions contained in paragraphs a to zz) of various conditions imposed, provided that a height restriction of “2 storeys only” applied to the proposed development. It appears from papers filed by the Municipality in the rescission application that the Council had approved the rezoning on 25 November 2015, but only notified Biermann’s appointed land surveyors of the approval on 1 February 2016, more than two months after the actual decision was taken. The approval letter referred to the “*attached Approved Site Development Plan*”. Such plan contained graphic designs of the “*Proposed New Townhouse Complex*”, depicting the envisaged construction of two storey units, although such plan did not specifically indicate the exact location of the individual units on the property.
7. On 21 July 2016, amended plans were submitted on behalf of Biermann in terms of which additional units were to be constructed on the property, in addition to the existing dwelling. The applicant approved these amended plans on 17 August 2016.
8. On 10 August 2017, a written request was made by Biermann to the Director Planning of the Municipality, as follows: “*I hereby request an extension of the*

approval for the above plan for a further 24 months due to delays experienced with other projects in the area.” It was asserted in a related email that these delays had been caused by the Municipality. At this stage, it appears that Biermann was under the impression that the removal of the title deed restriction in terms of the court order also removed the two storey height restriction imposed as a condition when the rezoning application was granted, which was incorrect. On the other hand, it appears, as will be shown with reference to a municipal letter subsequently written, that although the court order removing the restrictive title deed restrictions including the height restriction was served on the Municipality, municipal officials were seemingly under the impression that the title deed restriction containing a height restriction of two storeys still applied, which title deed restriction rendered paragraph 5.3 of its Zoning scheme regulations applicable. Zoning scheme regulation 5.3 provides that *“[N]othing in these regulations shall be construed as permitting any person to do anything that is in conflict with the conditions registered against the title deed of the land”*.

9. On 7 June 2018, a set of amended building plans was submitted to the Municipality. These plans included a detailed site development plan clearly showing sectional units in buildings of three storeys in height. Official stamps appended to the plans forming part of the papers before court, reflect that the Directorate Spatial Planning and Development, Department Architecture, (section Building Control) did receive the plans. Plan approval fees (R12081.01) with tax thereon (R1812.15) totalling R 13 893.17, were duly paid on behalf of Biermann and received by the Municipality. That these

plans were processed by municipal officials is also apparent from official stamps and signatures appearing on the plans and related documentation, which documents clearly show, in considerable detail, the three storey buildings depicted thereon. Not only were detailed graphic designs provided, but photographic illustrations were also included. Some of the stamps reflect that site inspections must have been carried out by municipal officials employed in the fire safety division of the Municipality, with the signature of the chief fire officer also appearing on the approved site plans and documentation.

10. That these plans were approved by the Municipality on 25 October 2018, is admitted by the Municipality and is common cause. Arising from an alleged complaint from a neighbour, one Kershan Naidoo of the Municipality then informed Biermann personally that the building work had to stop, and queried the three storey height. What exactly the job description is of Naidoo is unclear. What is clear from the correspondence is that the route of a building inspector issuing of a compliance or non-compliance notice, issued by a building inspector was seemingly not followed. To the contrary, an email was sent by Naidoo on 20 November 2018 to the “*reception*” of Biermann’s land surveyors, with Biermann’s being copied in, which email referred to an attached zoning certificate. The email contains no reasons, but is a cryptic one-line mail to the reception of the land surveyors, referring to an attached zoning certificate. This attached “*zoning certificate*”, bearing the municipal logo and purporting to be from the spatial planning and development

directorate, and bearing Naidoo's name for enquiry purposes, contained the following two introductory sentences:

THIS IS TO CERTIFY THAT ERF 5078 EAST LONDON, BEING 42 GRIFFIN ROAD,CAMBRIDGE IS ZONED IN TERMS OF THE BUFFALO CITY ZONING SCHEME FOR RESIDENTIAL ZONE 3B PURPOSES.

NOTE: THE REZONING APPROVAL TO RESIDENTIAL ZONE 5 (FLATS) DATED 1/02/2016 HAS LAPSED AS THE USE HAS NOT BEEN ACTED UPON WITHIN THE STIPULATED 2 YEAR PERIOD.

The maximum height is stated to be two storeys in this "*certificate*". At the foot of this "*zoning certificate*", dated 20 November 2018 appears the following entry: "*Information by: K. Naidoo*", and below such entry," *checked by K. Chettiar*".

11. Neither of these two individuals deposed to affidavits to explain and confirm their authority to generate this document. No Council minutes, or proof of an appropriate resolution to authorise Naidoo and Chettiar to produce such a certificate, were produced. The main deponent deposing to the papers on behalf of the Municipality, was Mr Andile Sihlahla, the municipal manager who was also the person nominally in the firing line in a contempt application subsequently instituted by Biermann (hereinafter referred to as "Sihlahla"). Due process, especially the *audi*-principle, was apparently ignored by the Municipality and its officials in the process of arriving at a purported decision that the rezoning to Zone 5 had reverted to Zone 3B again. Biermann was

simply provided with a document bearing the names of Naidoo and Chettiar, purportedly reflecting an alleged reversion to the residential Zone 3B zoning as a *fait accompli*.

12. A letter prepared at approximately the same time by the “HOD: Spatial Planning and Development”, and signed by N. Mbali-Majeng on 22 November 2018, bearing the reference of one Mr. Z.C.Nyamza, reads as follows;

You are hereby advised that the approval of the above building plans is reversed.

It has been discovered that the proposed building would be in contravention with the Town Planning Zoning Scheme in that the site on which the building is to be erected has two (2) floor height restrictions. No building exceeding two(2) floors is permitted on the land on which the building is permitted.(sic). It is explicitly stated on the approval stamp that the approval is subject to compliance with all the applicable legislation.

Your attention is also brought to the approval stamp which states:

‘Approval is subject to compliance with the National Building Regulations and Building Standards Act 103 of 1977 as lawfully amended from time to time and with the endorsement on the reverse side hereof. This approval does not absolve the applicant from complying with all the conditions of title as per township establishment, conditions of subdivision and the requirements of the Occupational Health and Safety Act, Act 85 of 1993’.

You are therefore advised that such approval is invalid furthermore no building work must commence on site and commencing with the building

works will constitute an offence that would be the direct contravention with the National building Regulations and Building Standards Act 103 of 1977”.

13. Two comments are apposite at this juncture. Firstly, the zoning scheme regulations of the Municipality do *not* impose a two storey height restriction in respect of properties zoned residential zone 5. Secondly, instead of referring to the municipal zoning scheme regulations, the letter refers to a “discovery” that the building would be in contravention of the “*Town Planning Zoning Scheme*” and that the applicant was not being absolved from “*complying with all the conditions of title as per township establishment.*” This convoluted explanation seemingly refers to the title deed restrictions which had been removed by way of a court Order.

14. That the Municipality had approved the building plans submitted on behalf of Biermann showing the three storey units and incorporating a detailed site development planning, and that such approval of 25 October 2018 constituted a decision, is not in dispute. It was not argued that such a decision was void *ab initio*, or had no legal effect. To the contrary, the existence of such a decision was a pre-requisite to the institution of the self-review application, categorised during argument as a legality review, which was only launched on 24 May 2019, seven months after the aforementioned decision had been taken. As will be shown below, this self-review application was only instituted after the contempt application had been launched by Biermann against the municipal manager. The court order of 8 January 2019 obtained by Biermann is being challenged in the

rescission application. The main thrust of the argument of the Municipality is that the approval of amended site development plan approving the construction of three storey units, was allegedly a mistake, described by the municipal manager Sihlahla as an “*obvious*” mistake, and during argument, as a “*big*” mistake.

15. The premise of the argument sought to cast in stone the original municipal decision to impose a two storey height limitation , ruling out any subsequent decision to allow a revised three storey design *intra vires* the three storey height restriction imposed by the municipal zoning scheme regulations. But no minute of a meeting at which it was decided that a “mistake” had occurred and at which meeting it was decided to purportedly reverse the (admitted) decision to approve the Biermann’s amended building plans, was provided or referred to. No minutes were produced by the Municipality clarifying the process which was followed -if any process was followed at all- leading to Naidoo and Chettiar producing their seemingly self-created “zoning certificate”. Neither Naidoo, nor Chettiar, deposed to affidavits, whether supporting or confirmatory, in the review application of the Municipality. The founding affidavit, which conspicuously has the heading “*supporting*” affidavit, has been deposed to by Sihlahla. He refers to explanations and advices given to him, and to the “*municipality having realised the error and unlawfulness*” of the decision of 25 October 2018. He gives second-hand evidence, based on views and opinions of others, not supported or confirmed under oath by those officials, mostly unidentified, which by nature constitutes hearsay. No minutes of any council meetings or of sub-committee meetings at which it was decided

and formally minuted that the approval of Biermann's revised site development plan was a "*mistake*", were produced by the Municipality. No mention whatsoever is made of Biermann's stance and contentions, which were seemingly disregarded. Biermann's written request for an extension in 2107 is not even mentioned. In the belatedly instituted self-review application, the municipal manager Sihlahla effectively postulates his own conclusions or one-sided assessments as constituting the factual basis for the review application. One example [para 9] reads as follows: "*On 1 March 2019, I became aware, for the first time, of the unlawful approval and of the applicant's letter dated 23 November 2018.*" How he as a municipal official determined "*unlawfulness*", is only known to him.

16. That council decisions may be altered or revised, and that revised development proposals may be approved from time to time by municipal councils, is further clear from the very authority relied upon by the Municipality, namely **MANANA vs KING SABATA DALINDYEBO MUNICIPALITY [2011] 3 All SA 140 (SCA)**. This decision not only deals with the binding nature of resolutions, but also affirms that a municipal council is entitled to "*rescind or alter its resolutions*" (see page 147 at d to e). The decision is further authority for the proposition that no municipal official, such as Sihlahla (or Naidoo and Chettiar for that matter), may disregard a resolution or municipal decision, such as the **admitted** decision of 25 October 2018 to approve Biermann's amended plans, on the basis that he or she has a belief that it is invalid. (see **Manana**, supra, at para [21], with reference to **Grace v McCulloch 1908 TH 165**).

17. But the context in which Sihlahla arrived at his own “*legal*” conclusion of “*unlawfulness*” of the approval of the amended site development plans, is important. This requires an analysis of the events which followed upon Naidoo’s assertion during November 2018, and the subsequent production of the Naidoo and Chettiar zoning certificate. Biermann pertinently challenged Naidoo’s assertion that the residential 5 zoning of the property had lapsed, and his attorney formally demanded that a “*corrected*” zoning certificate had to be provided by 21 November 2018. But these protestations and demands were disregarded. Instead of properly investigating the matter fairly to ensure that all the facts at the disposal of the Municipality are put before the court (see **Asla** at para [78]), Sihlahla simply became the law, declaring “*unlawfulness*”. As had been the case in **Asla**, the Municipality did not tell the court what it knew or knows now, or ought to have known, about precisely that “*unlawfulness*” (see p 371 at G and 359 at H).

18. A general thread in the papers delivered on behalf of the Municipality is the apparent attempt of Sihlahla, the municipal manager, to somehow adduce evidence on authorisations or administrative steps not within his personal knowledge. In the contempt application, he stated unequivocally that the approval or refusal of zoning applications is the function of the Directorate: Spatial Planning and Development, whilst the approval or refusal of building plans is the function of the Directorate of Development Planning and Management. He admits that he had no direct involvement in the approvals necessary in respect of Biermann’s development. He asserts that he read

“documentation pertaining to the approvals” which was *“made available to me.”* Neither Sihlahla nor the Municipality have with specificity identified such documents, or produced an actual record demonstrating the alleged illegality or instance of *“unlawfulness”*. Sihlahla further vaguely asserts that he *“also conferred with the OD’s and relevant officials of both Directorates”*. The source of a deponent’s information must be stated. **(Herbstein & Van Winsen: The Civil Practice of the High Court of SA, Vol 1, 5th edition Juta, pages 444-445.)** According to **Erasmus Superior Court Practice, Van Loggenberg, Second Edition, Juta,** at D1-58A, there is *“an initial assumption that facts are within an applicant’s personal knowledge where the application is brought personally, while the converse is true where is brought in a representative capacity”*.

19. Sihlahla testifies in his capacity as municipal manager with respect to the decisions taken, including the decision to approve the amended building plans and the unilateral *“decision”* of a building inspector to withdraw such approval. He fails to explain why the resubmitted building plans clearly showing three storey units, falling within the Zone 5 storey height restriction, were somehow approved by *“mistake”*. Biermann asserts that it is *“ludicrous”* to suggest that he (Biermann) could not rely on such approval formally conveyed to him. Especially in the absence of the record of the actual internal processes which were followed, the principle *omnia praesumuntur, rite esse acta*, becomes relevant. Biermann could justifiably assume that the approval process of the amended building plans was regular and valid, especially because the residential Zone 5 zoning *does* allow for three storey buildings. In any event,

the labelling of the alleged mistake as an “*obvious mistake*” on behalf of the Municipality is meaningless. Biermann denies a cryptic assertion by the Chief Building Inspector of the Municipality that a mistake was made, averring that it is “*highly prejudicial*” to him and to any members of the public in general, who ought to be entitled to rely on “*fair*” (and *presumably procedurally intra vires, valid*) decisions, and disputes the authority of the building inspector to unilaterally seek to “*withdraw*” such a decision based on an alleged “*mistake*”.

20. Biermann accordingly found himself in a predicament. In order to procure the approval of the sectional title scheme, the land surveyor *inter alia* had to be in possession of approved building plans. It has been mentioned that the municipal approval of 17 August 2016 was followed by a written request from Biermann for an extension of time for a further period of twenty four months, which extension request was submitted on 10 August 2017. This request was simply not responded to by the Municipality. The amended plans for three storey units were also submitted and processed, with payment being made by Biermann to, and accepted by, the Municipality for the additional planning fees. The amended site development plans were then officially approved. Not only did Biermann request an extension for an extension of the two year period; submitted an amended site development plan and paid the planning fee of the Municipality within the two year period, but he contends that he leased out the existing property for rent as a residential unit.
21. Yet again, Biermann had to spend money on matters legal, when the Municipality simply ignored his request, protests and demand. Not only was

the conduct of the municipality and its officials unreasonable and high-handed, but Biermann was indeed being treated procedurally unfairly. The letter of 22 November 2018 which refers to a “*discovery*”, which seemingly refers to the title deed restriction imposed against the “*land*” which had already been removed by a court order, was vague and the “*reasons*” offered therein unclear, infringing Biermann’s right to (sensible) written reasons *after* due process was followed, presupposing compliance with the procedural imperative: “*audite et alteram partem*”². Biermann’s legitimate expectation to procedurally fair, justifiable administrative action was negated. As indicated in the introductory passages, Biermann’s overheads spent on lawyers would now start to escalate alarmingly. Yet again he had to turn to the court for assistance, as is expected of citizens faced with bureaucratic obstinacy in a “*rechtstaat*”.

22. Accordingly, another application had to be instituted by him under case number 1417/2018, which came before Justice Tokota. Such papers were handed to me by agreement. Biermann instituted this application which was aimed at reviewing and setting aside the following decisions: the decision that the rezoning of the property to residential Zone 5 had lapsed; the refusal to issue him with a residential Zone 5 zoning certificate ; the purported “*decision*” contained in the Chettiar/Naidoo “certificate” that the property had reverted from a residential Zone 5 zoning to a residential Zone 3 B Zoning and lastly, the decision made on 22 November 2018 to withdraw (or perhaps “revoke”)

² Appearing as the motto of the City Council above the main entrance to the city hall of Gouda in the Netherlands, in which country this antique Roman concept of procedural fairness was received.

the approval of the building plans of 25 October 2018. He further sought an order directing the Municipality (*cited though as “The Municipal Manager, Buffalo City Metropolitan Municipality”*) to:

- *issue a Residential zone 5 zoning certificate in respect of the Property.*
- *give written confirmation that the amended building plans, approved by the Respondent on 25 October 2018, are valid and that the letter of withdrawal of the building plans is withdrawn,”* and that such confirmation be provided to him within a fixed period from date of the order.

23. In paragraph 1(a) of the notice of motion, the wrong month of the original 2016 rezoning approval was mentioned *per incuriam*, namely April instead of February, but the relief which Biermann was seeking, was perfectly clear. In any event, in paragraph 15 of the founding affidavit of the application, Biermann correctly referred to the actual letter which the Municipality had sent to MEH Surveyors and attached same as an annexure (PCB3). Paragraph 54 also correctly referred to the February 2016 decision. It was also clear to which subsequent 2018 decision Biermann was referring, namely to the purported decision that the residential Zone 5 zoning had reverted to residential Zone 3B zoning. The email and Naidoo certificate of 20 November 2018 were attached to the papers. The background and factual history of events were properly and adequately set out in Biermann’s founding papers. The application was then duly served in terms of the rules of court.

24. That proper service did occur was common cause when the matter came before me. A number of individuals attempted to explain under oath what they supposedly did with the formally served court papers. Their explanations remind one of the *Fawlty Towers* series in Britain. Dereliction of official duties and ineptitude were effectively admitted in various affidavits seemingly tendered to somehow explain the municipal manager's own inaction. That this was a tragic comedy of errors, had to be confessed by understandably exasperated senior counsel for the Municipality. The duly served court application of Biermann under case number 1417/2018 was not opposed, and despite the lapsing of more than two months after the institution of the application before it was heard, there was no appearance for the Municipality when the matter came before Tokota J on 8th January 2019. That a notice of set down had also been served on the Municipality on 11th December 2018, was also common cause. Junior counsel for Biermann, Adv Mostert, who had appeared at the time on his behalf, assured me that the court was appraised of the material facts and that she had argued in *extenso*. The presiding judge had also requested the court usher to call out the matter to ascertain that there were indeed no representatives for the Municipality at court.
25. After considering the papers before court and hearing the address of counsel for Biermann, Tokota J granted the following order:
1. *The following decisions made by the respondent (i.e the Municipality) are reviewed and set aside:*

- a. *The decision that the rezoning approval issued by the respondent on 1 April 2016 in terms of which the immovable property described as ERF 5078 East London, Buffalo City Metropolitan Municipality, Division of East London, Province of the Eastern Cape and with physical address as 42 Griffin Road, Cambridge West, East London ('the property') was zoned as Residential Zone 5 had lapsed;*
- b. *The decision not to issue a Zoning Certificate in terms of which the property was certified as zoned for Residential Zone 5 purposes in terms of the Buffalo Zoning Scheme;*
- c. *The decision to issue the Zoning Certificate dated 20 November 2018 in terms of which the property was certified as zoned in terms of the Buffalo City Zoning Scheme as being zoned for Residential Zone 3B purposes and not for Residential Zone 5 purposes;*
- d. *The decision made on or about 22 November 2018 to withdraw the approval of the building plans in respect of the property which plans were approved on 25 October 2018;*

2. The Respondent is directed to:

- a. *Issue a Zoning Certificate in respect of the property, in terms of which the property is certified as zoned in terms of the Buffalo City Zoning Scheme for Residential Zone 5 purposes;*
- b. *Give written confirmation that the amended building plans, approved by the Respondent on 25 October 2018, are valid and*

that the letter of withdrawal of the building plans dated 22 November 2018 is withdrawn;

- c *The written confirmation as in 2(b) above shall be provided to the Applicant within 10 (ten) days of the date of service of the Order upon the Respondent;*
- d *The Respondent shall pay the costs of this application.*

26. It was suggested during argument that the reference to the incorrect month in paragraph 1(a) of the order (namely April instead of February), was somehow a basis on which the whole order had to be set aside. There is no merit in this contention. Paragraph 15 of the applicant's founding affidavit referred correctly to the 1 February 2016 decision and incorporated the self-explanatory municipal letter of that date as an annexure to the papers. The directory orders made in paragraph 2 (a), (b), (c) are furthermore clear, unequivocal and unambiguous. This was eventually conceded.
27. Court orders must be read as a **whole** to ascertain their intention (**Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) 298 (AD)** at 304 E to F.) The incorrect month having been referred to in paragraph 1 (a) of the order does not in my view, detract from the import of court order read as a whole, and in no way obfuscates the language and meaning of the directory orders made by the court. The manifest purpose of the order granted was clear. (compare: **Finishing Touch 163 (Pty) Ltd vs BHP Billiton Energy Coal South Africa Ltd and Others 2013 (2) SA 204 (SCA)**, at para 13, approved in **Eke v Parsons 2016 (3) SA 37 (CC)** at paragraph [29]).

28. Despite the court order of 8 January 2019 being duly served by the Sheriff on 10 January 2019 on one “Lumko” at the offices of the municipality manager, there was no timeous compliance or reaction from the Municipality. In anticipation of a lack of compliance, Biermann’s attorney had already addressed a further letter threatening the institution of contempt proceedings against the municipal manager should no response be forthcoming by 25 January 2019. This letter was sent to the municipal manager and to the Land Use Management Department of the Municipality, both by email and telefax. The court order of 8 January was enclosed. Naidoo of the Municipality acknowledged receipt by way of an email copied in to Chettiar and one Nanto, and also to a secretary in the legal department of the Municipality, stating that *“[T] his matter has been sent to our Legal Department (who is cc’d in this mail) to advise on the situation **as we were not involved in this process that took place.**”*
29. Lo and behold, Naidoo and Chettiar (the same two officials who had signed and seemingly produced the certificate proclaiming that the residential 5 zoning had reverted to residential 3B) now professed their non-involvement, passing the buck back to Nanto. Nanto, who described his position as *“Manager” Legal Assurance*”, then unassuredly passed the buck back to Naidoo and Chettiar, as well as to one Nkosimbini, enclosing the aforementioned Naidoo/Chettiar letter of exculpation, *“default judgment”* and court order, with the following request:

“Anyone who knows about these documents should respond urgently, so that this office can make an informed decision.”

The absurd had become the bizarre.

30. Biermann and his attorney kept their wits about them though, at least so it appears, because Biermann’s attorney patiently provided Naidoo with a full set of Biermann’s application papers on 5 February 2019. Buck- passing them permutated into ostrich-like evasive tactics, because simply *nothing* then happened - until Biermann was approached by a building inspector on 11 February 2019. He was verbally informed that he had to cease building, despite the terms of the order of court. Biermann states that he had previously taken the court order of 8 January 2019 to the same building inspector, who had then “*assured*” him that the records of the Municipality would be amended accordingly. Upon questioning the building inspector about his about-turn, he was informed by the building inspector that the Municipality did not regard the court order as being binding. Biermann perceived this stance as contemptuous, and regarded the municipal manager as being in contempt himself. Complaining of prejudice, which he motivates fully in his papers, (*inter alia* with reference to the sectionalising process, the financial ramifications arising from the delay running into millions of Rands), he resorted to the institution of contempt proceedings.
31. An application was instituted on 13 February 2019 under case number 179/2019, in which Biermann cited (only) “*The Municipal Manager, Buffalo*

City Metropolitan Municipality” as the respondent. This application was served and set down for hearing on 5 March 2019. The notice of set down, as well as a full set of the application papers and annexures, were served on Sihlahla personally on 27 February 2019, as is clear from the sheriff’s return of service. A *rule nisi* was then obtained on 5 March 2019, returnable on 19 March 2019, calling on the respondent why a final order holding “the respondent” in contempt should not be granted. Opposing papers were filed, resulting in the agreed postponement of the matter on 22 August 2019 to the 14th November 2019, when this contempt application was heard together with the rescission, self- review and interdict applications.

32. In the answering affidavit delivered in the contempt application, the Municipal Manager, the said Sihlahla, emphasised his opposition on behalf of the Municipality, in his representative capacity. Before setting out to provide all sorts of lame or unconvincing explanations for the lamentable inaction and ineptitude on the part of the Municipality, he took an *in limine* point which³ **did** have merit. He emphasised that he was not a party to the application in his personal capacity and that he had not been served with or notified of any application “*that I personally he held in contempt of the Order of this Honourable Court of 8 January 2019 and liable to criminal sanction.*” He also denied having sought or obtained legal advice personally and denied that he personally disobeyed the court order, which was in any event not directed at him personally. He also denied personal wilfulness and *mala fides*. By reason

³ as unfortunately as it might have been for Biermann given the circumstances that he was confronted with

of the fact that the *rule nisi* was directed at the Municipality and cited him only in his “*representative*” capacity, it fell to be discharged, according to the point taken *in limine*.

33. That this *in limine* point had merit, is evident from the Constitutional Court judgment in **Mathabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA 1 (CC)**. In this authoritative decision, it was held that public officials who are threatened with contempt proceedings, should first be joined in their personal capacities by name, and not merely be cited in their nominal capacities. Contempt convictions in the Free State High Court and in the Supreme Court of Appeal and the sentences imposed were accordingly overturned by the highest court. This significant hurdle, pleaded and expanded on in the heads, was raised with counsel for Biermann. When the contempt application was called, Adv Pienaar SC, appearing for Biermann with Adv Mostert, without further ado withdrew the contempt application and tendered costs.
34. This left the rescission application instituted by the Municipality to rescind the court order of Tokota J of 8 January 2019; the self-review application aimed at setting aside the approval of the amended three storey development plans, and the related interlocutory interdict application which was launched pending the outcome of the rescission and review applications. Counsel were in agreement that the outcome of the rescission application would have a direct bearing on the outcome of the self-review and interdict applications. Counsel for the Municipality agreed with Biermann’s counsel to address the court on all

three remaining matters. Logically, the rescission application required attention first. The criticism directed at the incorrect description of the month in one paragraph of the order, lost its weight⁴ when a fair concession was made by counsel for the Municipality, upon some prodding from the court, that the directory orders contained in paragraphs 2(a), (b) and (c) of the order of Tokota J were indeed clear and unequivocal.

35. I find that the order of 8 January 2019, read as a whole, was clear and unequivocal, as I have intimated previously. Adv Pienaar SC furthermore referred to the founding papers of the Municipality in the rescission application, and pointed out that the alleged ambiguity of the 8 January 2019 order, was not the main thrust of the rescission application as made out in the founding papers of the Municipality at all. This is correct. Indeed, to identify the exact ground on the Municipality relies in its founding papers in seeking to have the court order rescinded, is not without its difficulties. Alleged non-disclosures at the time when the matter was heard on 8 January 2019 were not established.

36. During argument, I enquired of counsel for the Municipality whether the rescission application was being brought under rule 31(2)(b⁵); rule 42(1)(and if so, under which subrule), or under the common law. I was referred at the outset to the decision of **Mansell v Mansell 1953(3) SA 716 (N)** at page 72, as authority for the principle that court orders should be capable of being

⁴ The point having been already been somewhat lightweight at the start.

⁵ Which provides for an application on notice within a period of **20 days** after " he or she has knowledge of the judgement", and the court may **on good cause** set aside the judgement on such terms as to it seems meet.

enforced. However, my views about the clear import, validity and enforceability of the 8 January 2019 court order have been already been stated. The **Mansell** decision which affirms the principle of enforceability, does not assist the Municipality. With respect to possible reliance on rule 31 (2) (b), the culpable remissness, (if not gross bureaucratic ineptitude) displayed by the Municipality in failing, firstly, to not oppose the Biermann application culminating in the 8 January 2019, and secondly, by ignoring and even disregarding the court order, is such that the Municipality fails to make out a proper case for setting aside the court order of Tokota J dated 8 January 2019. Its “*default*” of appearance is inadequately explained, or not explained at all, and good cause for the setting aside of the order granted has not been shown. Such purported “*evidence*” tendered, if regarded as admissible at all, demonstrates not only culpable remissness, but also non-compliance with the constitutional values and principles contained in s 195 of the Constitution⁶, read with ss 33, 152 (1) (a) and 237 of the Constitution.

37. Municipal personnel employed by a municipal council are supposedly employed as “*being necessary for the **effective** performance*” of the municipal council⁷. Public administration is supposed to uphold, and not undermine the rule of law (ss 1 (c) and 2 of the Constitution). A high standard of professional ethics must be promoted and maintained (s195 (1) (a)). Instead of making life as difficult as possible for Biermann, and seemingly treating him at times with high-handed arrogance, simultaneously displaying no perception of their

⁶ Constitution of the Republic of South Africa, 1996

⁷ See section 160 (1)(d) of the Constitution

actual roles, the municipal officials concerned *ought* to have been part of a “*development- oriented*” public administration (s 195(1) (c)). Municipal services - and this applies to all the “*departments*” or “*divisions*” concerned at the Municipality that interacted with Biermann, with his land surveyors and also with his attorneys - ought to have been provided impartially, fairly, equitably and unbiasedly (s195(1)(d)). The municipal manager and all the employees who interacted with Biermann and his professional appointees, were, together with the Municipality itself, supposed to have acted accountably and were supposed to have been engaged in “*fostering transparency*”, by providing Biermann and the public with “*timely, accessible and accurate information*” (s195 (1 (f) and (g))).

38. These constitutional principles and values go hand in hand with the objectives of accountable local government, “*to promote social and economic development*” s152 (1) (a) and (c). Section 237 of the Constitution requires in no uncertain terms, that “*all constitutional obligations must be performed diligently and without delay.*” This section imposes a constitutional *obligation* on the Municipality. The non-appearance of the Municipality at the hearing of Biermann’s application before Tokota J on 8 January 2019 was entirely of its own making, ascribable to gross negligence and indeed tantamount to lackadaisical recklessness on the part of several municipal officials involved. The application had been served and re-served. The notice of set down was also properly served. Biermann’s attorney had also communicated with municipal employees prior to instituting the application, as already

summarised above. Yet again, the strategy of deflecting criticism by buck - passing was resorted to.

39. One Kobese, employed in the office of the “*City Manager*,” was served with Biermann’s application papers under case number 1417/2018 on 27 November 2018. She delivered same to one Mboto in the Department: Legal Services. Mboto does not know what she did with the application, but seeks to obfuscate her own negligence by referring to a municipal strike during the period of 20 November 2018 to 7 December 2018. One Manqina states that she is an administrative assistant in the office of the municipal manager. She admits that the notice of set down of Biermann’s application was served on her on 11 December 2018 by the deputy sheriff of this court. She cannot explain what she did with the notice of set down, which was supposed to have been handed to “*legal services*”. Sihlahla himself then seeks to hide behind all these failures and inefficiencies in his own affidavit, by asserting that he allegedly only became aware of Biermann’s review application after service on him of Biermann’s contempt application. He avers that this occurred on 1 March 2019. But the notice of set down reflects personal service on Sihlahla on 27 February 2019. The application for rescission was nonetheless only delivered on **24 May 2019**.

40. The purported “*explanation*” offered implicitly relies on a bizarre series of ongoing failures as well as infringements of constitutional principles, values, and obligations owed to Biermann and the public. This is legally intolerable. The application for rescission is furthermore brought substantially late, way

outside the twenty day period prescribed by rule 31 (2) (b). (See the authorities referred to in **Erasmus Superior Court Practice, Van Loggenberg, revision service, Juta at D1-365**, and **Harms: Civil Procedure in the Superior Court, revision service, LexisNexis Butterworth** at B31.10). No reasonable explanation for the default was provided. Instead, gross negligence bordering on recklessness towards court processes and also towards Biermann, in breach of constitutional imperatives, is evident. The purported “*defence*” disclosed, as being an alleged “*obvious mistake*.” is merely an assertion of Sihlahla, unsupported by cogent evidence. The actual individual or individuals responsible for the alleged mistake are not identified, whilst Naidoo and Chettiar have *ex post facto* denied any responsibility or involvement. Internal memoranda; letters or minutes have not been provided. Biermann makes the valid point in his opposing affidavit that the Municipality as applicant “*has failed to annex an explanatory affidavit from the employee of the Applicant actually responsible for the approval of the building plans which would clarify the procedures followed in reaching the conclusion that the building plans were to be approved*.” As had been the case in **Asla**, the lack of candour is apparent from the papers of the Municipality and especially from Sihlahla’s sweeping assertions. Compare paragraph [99] of the **Asla** judgement: “*[A]t no point did the Municipality take the court into its confidence and explain its conduct. It simply presented the court with whatever view it felt suited to at the time, vacillating between positions when convenient to it*”. Evidentially inadequate founding papers are fatal to applications, especially to a rescission application submitted late and not

establishing good cause, aimed at setting aside a court order duly granted in respect of a duly served and argued application.

41. Not only has no reasonable explanation been provided, but the purported grounds relied on in the papers of the Municipality in the application for rescission gave way during argument to a challenge to the content of the actual court order itself which was granted on 8 January 2019, as being unclear and invalid. This court has found that the order of 8 January 2019 was clear, unequivocal, and enforceable.
42. Not only has the Municipality not made out a proper case under rule 31(2)(b) for the setting aside of the judgment granted by default but which was caused by its own ineptitude, but the interests of justice will *not* be served, especially at this belated stage, by setting aside the order of 8 January 2019. The merits of the dispute concerning the alleged “mistake” relating to the approval of the amended plans, has also been considered, and this factor also weighs heavily in Biermann’s favour. (*vide: De Witts Auto Body Repairs (Pty) Ltd vs Fedgen Insurance Co Ltd 1979 (2) SA 298(E); Harris vs ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (TPD).*
43. In the heads of argument submitted on behalf of the Municipality as the applicant for rescission, reliance was also placed on rule 42 (1) (a), with specific reliance being placed on the decision of **Nyingwa vs Moolman NO**

1993 (2) SA 508 (Tk).⁸ But according to the Supreme Court of Appeal the learned judge in that matter had “*misunderstood*” the factual position in the decision relied on, namely that of **Topol and others v LS Group Management Services (Pty) Ltd 1988 (1) SA 639 (W)** – see **Lodhi 2 Properties Investments CC v Bondev Investments 2007 (6) 87 (SCA)** at para [21].

44. Rule 42 (1) (a) provides as follows:

“ (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

On the facts, Biermann had duly served his application as well as the set down for the hearing on the Municipality. He was procedurally entitled to the order which Tokota J duly granted in his favour on 8 January 2019. The judgment of the Supreme Court of Appeal in **Lodhi 2 Properties Investments CC v Bondev Developments 2007 (6) SA 87 (SCA)** makes it clear that the Municipality is *not* entitled to rescission of the judgment of 8 January 2019. Paragraph [27] of the judgement, *per* Streicher JA, explains the applicable position:

⁸ The decision referred to does not assist the Municipality at all in the light of the **Lodhi 2 Properties Investments CC v Bondev Developments 2007(6) SA 87 (SCA)**.

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

45. A judgement granted to which a party was procedurally entitled, such as Biermann clearly was, cannot be said to have been “erroneously” granted in the absence of the other party. (**Freedom Stationery (Pty) Ltd and others v Hassam and others 2019 (4) SA 459 (SCA)** at p465 H.) Reliance by the Municipality on rule 42 (1) (a) is accordingly misplaced.
46. Insofar as the Municipality also seeks to rely on the common law for the rescission of the 8 January 2019 order, the founding papers simply do not

make out a proper case for such relief. The challenge to the validity of the court order, directed during argument at *one* paragraph of the order granted, was without merit, for the reasons already stated. The Municipality has neither established a reasonable explanation for its default, nor a *bona fide* defence which *prima facie* has prospects of success. Evidentially, the papers of the Municipality and Sihlahla's assertions in particular, are wholly inadequate. The case for rescission is substantially premised on Sihlahla's own "*legal*" conclusions; on his own adjective in his "***obvious error***" epithet, or on his mere *ipse dixit*, instead of reliance being placed on first-hand evidence or documentary records. Such conclusions, views or opinions are quite meaningless in the absence of cogent, admissible evidential material, as already explained above. A number of the considerations alluded to previously, including the blameworthy conduct of the municipal employees; the disregard for constitutional values, norms and principles displayed by the Municipality; the need for legal certainty and finality of court orders (especially orders granted to members of the public, such as Biermann, who have been treated unfairly by an organ of state); the absence of any *iustus* error and the interests of justice, all weigh heavily against the Municipality as the applicant.

47. It follows that the rescission application of the municipality under case number 555/2019, should fail. The rescission application of the Municipality is accordingly dismissed with costs, such costs to include Biermann's costs consequent upon the employment of two counsel. This brings one to the self-review application under case number 554/2019.

48. Senior counsel for the Municipality correctly stated during argument that the fate of the self- review application under case number 554/ 2019 to set aside the decision to approve Biermann's amended building plans on 25 October 2018, would effectively be sealed if the rescission application of the Municipality failed. Its rescission application has now failed, as set out above. The same evidential shortcomings, vagueness, lack of municipal documentation and of accountability and transparency evident in the rescission papers, are present in the self-review application. It was also only instituted after a considerable delay, namely on 24 May 2019, *seven* months after the decision had been taken. As the Municipality is an organ of state, it is in the somewhat fortunate position that it does not first have to overcome the 180 day time bar hurdle confronting private litigants faced with s 7(1) of the Promotion of Access to Justice Act, Act 3 of 2000. (**State Information Technology Agency SOL Limited v Gijima Holdings (Pty) Ltd 2018 (3) SA 23 (CC); Buffalo City Metropolitan Municipality v Asla Construction 2019 (4) 331(CC)**). I am unable to find that the seven month delay, although significant, is so unreasonable that the door has to be closed to the Municipality on this ground alone, especially in the context of a legality review. The court in any event has a discretion to overlook a delay (**Gijima**, supra, at para 47 and see the judgement of Justice Jafta in **Notyawa v Makana Municipality and Others [2019] ZACC 43** at para [48]).
49. Even if the Municipality has overcome the delay hurdle, its papers are evidentially and substantively lacking to make out a proper case of self-review for the setting aside of Biermann's approved amended plans. The

Municipality has not by way of admissible evidence from the actual official(s) involved in the decision-making processes, supported with the actual record of decisions, fully and candidly explained the purported mistake. Minutes to prove a legally excusable mistake, have not been produced.

50. In contrast to Sihlahla's sweeping, disrespectful assertion in reply that the order of Tokota J was an "*unlawful*" order (paragraph 11.2 page 158) the court order of 8 January 2019 decided the prevailing legal issues at that time in Biermann's favour. In terms of ss 1 (c) and 2 of the Constitution, the court order **ought** to have been complied with and ought to have been respected by the Municipality. Whilst counsel for Biermann declined an invitation to address me on the principles of issue estoppel or *res iudicata*, it appears from the application which served before the court on 8 January 2019 that Tokota J *did* have to consider the merits of Biermann's review application before granting the directory relief which he indeed granted. In Biermann's answering papers to the review application brought by the Municipality, he might therefore have considered raising the *exceptio rei iudicatae* by relying on issue estoppel, but contended instead, incorrectly so, that the court was "*functus officio*." *He also contended* that PAJA applied and was not complied with. Both these points were correctly abandoned in the heads of Biermann's counsel.

51. Biermann also contended that the delay was brought after an unreasonable delay, but , as already indicated, I do not believe that the Municipality ought to be non-suited on this ground, especially if the test of reasonableness as

elucidated in the **Asla Construction** decision⁹ is applied. However, Biermann understandably complains in his answering papers that the applicant had failed, for several months, to comply with the peremptory provisions of the court order of 8 January 2019, even after the Municipality had ignored his right to lawful, reasonable and procedurally fair administrative action *prior* to the order being obtained. This raises a constitutional issue, involving s 33 of the Constitution.

52. Equally understandable is his complaint that the applicant “*has a history of failing or refusing to comply with orders of court and acting in an unlawful and irrational manner towards me*”¹⁰. Affidavits are before court in support of Biemann’s allegation that the court order was regarded as not binding by municipal employees, deposed to by Williams and one Van der Poel. The apparent disrespect for the rule of law by the Municipality and its officials was further demonstrated earlier, by the use of a municipal vehicle with a “*cherry picker*” crane marked to be from the “*Electrical Department*” of the Municipality, which was employed to disconnect the electricity supply to the property, resulting in a *mandamus* having to be granted by Judge President Mbenenge in Biermann’s favour on 8 March 2019. Rules of natural justice seemingly did not exist, according to this Municipality. The municipal officials acted as if they were above the law (or were a law unto themselves). The purported unilateral “*withdrawal*” of approved plans without following due process; the unilateral decision that the residential Zone 5 zoning had

⁹ **Buffalo City Metropolitan Municipality vs Asla Construction (Pty) Ltd**, *supra*, at paras [50] to [53]

¹⁰ At paragraph 83 of Biermann’s answering papers

“*lapsed*” and that the property zoning had reverted to a residential Zone 3B, were all irregular, unfairly taken or arrived at, arbitrary, unreasonable and unlawful. Prejudice to Biermann was disregarded and of no apparent concern. The conduct of the municipal officials, of whom some tried to distance themselves after having issued or signed certificates, formed part of an unfair, unreasonable and invalid process which undermined nearly each and every constitutional value and principle applicable to proper public administration. Such conduct constituted constitutionally unlawful conduct as being inconsistent with the Constitution¹¹.

53. The temerity of Sihlahla in such a setting, to seek costs against Biermann should he oppose the belatedly instituted self-review application of the Municipality, is of concern, given Biermann’s entitlement to rely on the **Biowatch** principle¹² insofar as he was all along (*inter alia*) seeking to vindicate his constitutional right to administrative fairness and relying on a court order duly granted in his favour¹³ against an organ of state.

The self-review application brought by the municipality under case number 554/2019 is accordingly dismissed with costs, with the Municipality being ordered to pay Biermann’s costs, including the costs of two counsel.

54. This leaves the urgent interim interdict application which the Municipality launched in October 2019 against Biermann under case number 1261/19.

¹¹ See ss 2; 7(2); 8(1) and 172(1) (a) of the Constitution.

¹² **Biowatch Trust vs Registrar, Genetic Resources 2009 (6) SA 232 (CC); Harrielall v University of Kwa-Zulu Natal 2018 (1) BCLR 12 (CC)** at paragraphs [9]] and [20]

¹³ Involving s 34 of the Constitution

The application, brought on an urgent basis, was aimed at interdicting further construction - at that stage substantially completed it appears - pending the determination of the rescission and self-review applications of the Municipality, which this court has now both dismissed above. The Municipality also sought to interdict anyone from occupying the units without occupation certificates issued by the Municipality, pending the determination of the aforementioned rescission and review applications. Lastly, the Municipality sought to interdict the Registrar of Deeds from opening a sectional title register pending the determination of the review and rescission applications.

55. By reason of the dismissal of both the rescission and the review applications brought by the Municipality, this interim interdict application should also be dismissed. After rehashing all his own submissions about the alleged “*mistaken approval*” of Biermann’s plan, and disclosing the unilateral attempt of “*withdrawing*” the approved plans by “*an official*” in the Directorate of Spatial Development and Town Planning (one Nyamza), Sihlahla again plays judge by asserting that he had identified an “*unlawful*” approval of 25 October 2018. He says so, under oath, despite the court order having been granted on 8 January 2019. Scandalously, he asserts that “*the unfortunate consequence of the order of Justice Tokota is that it purports to usurp the function of municipal planning*”. After accusing Biermann without foundation of non-disclosure in the application that served before Justice Tokota, it appears from Biermann’s answering papers that Sihlahla himself failed to disclose that eighteen of the units had already been completed. Even more

startlingly, Biermann produced fourteen occupation certificates already provided to him. The relief which was sought by the Municipality in paragraph 2.2 of its notice of motion was then correctly abandoned. Despite that part of the interim interdict being as dead as a dodo, the indomitable Sihlahla nonetheless sought to suggest in reply¹⁴ that the certificates were not valid. Biermann's general manager, one Williams, stated in response, in an affidavit which was allowed by agreement to deal with new matter in reply, that this was untrue, and with specificity explained how the occupancy certificates had been hand-delivered on 10 September 2019 already, as had also previously occurred.

56. Much criticism was levelled at Biermann's attorney of record who had undertaken not to make application for the registration of the sectional plan and to open the sectional register. But Biermann's attorney did also state that approved Surveyor-General diagrams had already been provided to the Municipality 6 weeks earlier, on 6 September 2019, and did assert that such approved diagrams were "*fully compliant with the rule of law*". Between the Municipality and Biermann, four hundred and sixty pages were generated in the "*interim*" interdict application, with various factual disputes evident, the majority of which are no longer relevant. Biermann and his attorney dispute the contention that an undertaking was given which would operate for an indefinite period of time. It further appears that other attorneys had attended

¹⁴ And despite the Plascon- Evans principle being applicable (Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A))

to the registration of the sectional plan and the opening of the sectional register on behalf of Biermann.

57. More relevant is what the Municipality itself did *not* disclose to the Court, especially the fact that the majority of the units had already been completed, and were ready for occupation (and *ex facie* the answering papers, that occupancy certificates had already been issued in respect of a number of units). In Biermann's answering papers, he states that despite Sihlahla's assertion that the units were somehow "*unlawful*", the Municipality had acted in a manner inconsistent with the version advanced by Sihlahla in its papers, by already having taken the following steps:

- (1) the Municipality itself had insisted that a 150KVA electric supply had to be installed to supply the property and the units thereon, *which was approved on 24 May 2019 by Sihlahla himself*;
- (2) Biermann had paid an amount of R1 147 594.31 for the installation of the 150 KVA electrical supply, which significant amount was accepted by the Municipality. In addition, Biermann had paid a further amount of R108 600 to the Municipality to have the electricity supply connected, which was paid, whereafter the supply was connected;
- (3) the water supply to the property had been upgraded during July 2019 at Biermann's expense (R34 333) which upgrade was approved by the Municipality (with proof of these foregoing steps being attached to his answering papers);

- (4) the Municipality had also issued rates clearance certificates in respect of the 18 units (by now sections) on 21 October 2019.

58. That the Municipality and its officials were by now suffering from both administrative *scizophrenia* and bouts of embarrassing amnesia, is an apt diagnosis. Once these answering papers were delivered, with supporting documentation attached, the writing was on the wall, and the bells ought to have tolled for the litigious Municipality, having regard to the **Plascon-Evans** approach and the need to establish the requisites for an interlocutory interdict as laid down in **Setlogelo vs Setlogelo 1914 AD 221 at 227**. But prudent perceptiveness was lacking, and lengthy replying papers were filed, containing numerous arguments and disclaimers which are now largely irrelevant, because the unmeritorious rescission and review applications have been dispensed with. The units have been completed. The practical effect of any interdictory relief (other than putting up another hurdle for Biermann) sought at such late stage, was always open to question. Such unlawfulness that has been established on the papers, is rather the unconstitutional conduct of the Municipality which paid lip service to pursuing good governance, but in practice did the opposite. In the process, the Municipality even ignored court processes and a court order, undermining the rule of law in doing so, in being of s 1 (c) of the Constitution .
59. That a rule *nisi* might have been agreed to at some stage, cannot detract from Biermann's success in the rescission and review applications. Although I did experience some discomfort with the explanation proffered in respect of the

apparent reneging by Biermann's attorney on the undertaking not to proceed with the registration of the sectional plan and the opening of a sectional title register, Biermann subsequently did agree to such an interim order, pending the determination of the rescission and review applications. By then, some of the interlocutory relief initially sought, had also been abandoned, as previously mentioned. But the inconsistent conduct of the Municipality as the applicant, its disregard for an existing court order and its own glaring non-disclosures and contradictions, as pointed out above, were much more odious. Whilst a factual dispute prevails in respect of the belated challenge to the authenticity of the fourteen occupation certificates already issued, Plascon-Evans applies insofar as the Municipality has approached the court for interdictory relief. Moreover, the averments in rebuttal in a supplementary affidavit of Biermann's general manager which was admitted without opposition, *prima facie* sounds plausible, but this dispute does not have to be resolved. The averments under oath by Biermann that the Municipality had instructed its building inspectors *not* to perform inspections, indicating clearly unlawful instructions in the face of the facts and especially the court order obtained by Biermann, are supplemented by detailed factual averments in the answering papers relating to the involvement of competent experts to perform electrical, roof, plumbing, and fire installation inspections, with certificates attached running into several pages. Not one assertion appears that the units have *not* been properly constructed. The photographic evidence indicates the contrary, in favour of Biermann as the respondent in this application.

60. In reply, presumably to address the embarrassing disclosures made in Biermann's answering papers, Sihlahla avers that *["t]he applicant is a large organ of state and as such, I am entitled to rely on information provided by officials of the applicant. To contend otherwise would result in an absurdity."* However, it is equally absurd of him to expect a court to accept hearsay from mostly unidentified officials, or purported "evidence" from officials who have implicitly admitted their own gross negligence or ineptitude, or their lack of dedication to public service in their overly cryptic, self-exculpatory affidavits. Sihlahla's "satisfaction that the information provided by the officials of the applicant is true and correct," therefore rings hollow. This court is not all satisfied with the purported "evidence" tendered by the Municipality. Biermann has further paid significant amounts contributing, indisputably so, to the infrastructural improvement of the electricity and water supply. The occupation of the units forming part of a development regarded by the planning section of the Municipality as desirable, will lead to increased monthly revenue in the form of rates and Municipal charges. Much needed housing will be provided. These factual assertions are not disputed.
61. The completed units are shown on photograph "KK1"¹⁵. Biermann further asserts, justifiably so, if regard is had to the design and overall appearance of the neatly constructed units, that the development of the property will lead to an increase in the value of the surrounding properties. The balance of

¹⁵ On page 384 of the papers in the self-review application

convenience evidently favours Biermann. He seeks the dismissal of the interlocutory interdict on an attorney and client scale. I would have been inclined to accede to such a prayer, but for his litigation attorney's undertaking which was reneged on. If the admittedly cryptic undertaking of his attorney was regarded as no longer being applicable for whatever reason, this would still have required (at the very least) a clear notification of such a change in stance, especially as between colleagues. Accordingly, I shall *not* accede to such a request on behalf of Biermann. But for this reservation, the conduct of the Municipality which put every possible stumbling block before Biermann, failed to tell the full story in its papers and intolerably disregarded the 8 January 2019 court order, has been deplorable and *deserved* a punitive costs order.

The rule *nisi* of 5 November 2019 is accordingly discharged and this interim interdict application is dismissed with costs, including the costs of two counsel insofar as two counsel were engaged.

M. G. SWANEPOEL

ACTING JUDGE OF THE HIGH COURT

29 NOVEMBER 2019

APPEARANCES:

For Biermann, the applicant in case no.: EL179/2019 and the respondent in case numbers EL555/2019; EL554/2019 and EL 1262/2019:

ADV B J PIENAAR SC and ADV D MOSTERT

(instructed by Niewoudt-Du Plessis Incorporated)

**For the Municipality, the respondent in case no.: EL179/2019 and the
applicant in case numbers: EL555/2019; EL554/2019 and EL 1262/2019:**

ADV R P QUINN SC and ADV D T YOUNG

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