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

Case number: 1019/2015

In the matter between:

REON ESIAS BADENHORST N.O.	1st Applicant
ZAFIRHA INVESTMENT CC	2nd Applicant
and	
MOQHAKA LOCAL MUNICIPALITY	1st Respondent
DIE UITVOERENDE BURGEMEESTER: MOQHAKA MUNISIPALITEIT Mnr. JUSTICE MAREKA	2nd Respondent
MUNISIPALE BESTUURDER MOQHAKA MUNISIPALITEIT: Mnr MNCEDISI SIMON MQWATHI	3rd Respondent

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CORAM: RAMPAI, J

HEARD ON: 8 OCTOBER 2015

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 14 JANUARY 2016

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[1] The matter came to court by way of motion proceedings. The relief sought by the applicant was two-fold. Firstly, the applicants apply for an order whereby the respondents are declared to be in contempt of court and punitively fined. Secondly, they apply for an order whereby certain railway siding tariffs imposed in respect of four specific erven for the three consecutive financial years are reviewed, declared ultra vires and the respondents directed to refund any money so paid to the applicants. The respondents oppose the application.

[2] The first applicant was personified by three individuals cited in their representative capacities as the trustees of Renhof Badenhorst Family Trust TT1765/2000. The full names and physical addresses of the trustees were set out in para 2.1. The trio was collectively referred to as the first applicant. However, the face of the 1st applicant was Mr Reon Esias Badenhorst NO, the first applicant's deponent.

[3] The second applicant was a business enterprise known as Zafirha Investment CC whose principal place of business was situated at Andries Steyn Gebou Cross Street Kroonstad Free State Province.

[4] It appeared that Mr Rean Esias Badenhorst was also authorized on the 13 April 2011 to act as a trustee of RBF Trust. It also appeared that he was authorised on the 26 February 2015 by the board of trustees to launch this application as per resolution (anx rb1(a)). However the respondents questioned the validity of his alleged authority.

[5] The second applicant's certificate of incorporation was issued on 6 November 2003 – (anx rb2(b)). Mr Abdul Kader Noorbhai and Ms Hajerabibi were Zafirha's members. Mr Reon Esias Badenhorst was apparently authorized on 26 February 2015 by the board of members to file this application of its behalf. The required resolution was attached as anx rb 2(a). The respondent also questioned the validity of his alleged authority.

[6] The first respondent is Moqhaka Local Municipality, a statutory organ and a legal person establish in terms of section 12 Local Government: Municipal Structures Act 117 of 1998. Its offices are in Hill Street Kroonstad. Again the respondent questioned the correctness of the first respondent's citation.

[7] The second respondent is Mr Justice Mareka. He is sued and cited in his representative capacity as an executive mayor of Moqhaka Local Municipality, the first respondent.

[8] The third respondent is Mr Mncedisi Simon Mqwathi. He is sued and cited in his representative capacity as the municipal manager of Moqhaka Municipality, the first respondent.

[9] The trust called Renhof Badenhorst Family Trust consists of 3 trustees. The trio is collectively cited as the first applicant. The closed corporation called Zafirha consists of 2 members. The corporations is cited as the second applicant. The applicants together instituted the current proceedings against the 3 respondents, Moqhaka Local Municipality, Mr Justice Mareka, the

executive mayor and Mr Mncedisi Simon Mqwathi, the municipal manager.

[10] The relief sought by the applicants is twofold. The applicants principally seek an order whereby the respondents are held to be in contempt of court and a punitive fine of R100 000 imposed on each of them. The first category of the relief is encapsulated in paragraph 1, 2 and 3 of the notice of motion. It is evident that the first category is directed at all the respondents.

[11] In the second place, the applicants residually seek an order whereby the railway siding tariffs imposed by the municipality on the applicants for the financial years 2012/13, 2013/14 and 2014/15 in respect of erven [....], [....], 1545 and [....] Kroonstad are declared to have been unlawfully imposed and set aside. This second category of the relief is encapsulated in paragraph 4, 5 and 6 of the notice of motion. It is evident that the second category concerns the first respondent only.

[12] Murray AJ adjudicated the previous application in favour of the applicants. Her judgment was delivered on 13 September 2013. It was attached to the founding affidavit as (anx rb4). The material aspects of the court order were:

12.1 That the railway siding tariffs imposed in respect of erven 1545, [....], [....] and [....] were unlawfully imposed and that they were, therefore, set aside;

12.2 That the municipality must reserve all the amounts by which the accounts of the applicants were debited for the financial years 2009/10, 2010/11 and 2011/12 by crediting them with corresponding amounts;

12.3 That the municipality must pay the amounts of railway siding charges debited against the accounts of the applicants for the aforesaid financial years back to the applicants with interest.

[13] In the founding affidavit the applicants' deponent alleged that the trust was the registered owner of erf [....] size 7231 square meters; erf [....] size [....] square meters and erf [....] size 1,9022 hectares. All of those erven were situated at (Extension 11) district Kroonstad province Free State. The deponent also alleged that the second applicant , the closed corporation, was the registered owner of erf [....] district Kroonstad province Free State. From now on I shall collectively refer to the 4 erven as the property.

[14] The deponent for the applicants also alleged that the current applicants in collaboration with Selborne Hotel (Pty) Ltd launched an application against Moqhaka Local Municipality on the 25 February 2015 under case number 744/2013. I shall refer to those proceedings as the previous application. Selborne Hotel (Pty) Ltd, the second applicant in the previous application, had since sold its property, erf [....], that formed part of the subject matter in the previous application. Consequently that corporate

persona had no further interest in the current application which is an offshoot of the previous application.

[15] The notice of motion relative to the previous application was attached to the current application as "anx rb3". The notice was crafted as follows:

"1. 'n Bevel dat:

1.1 alle belastings, heffings en/of tariewe soos gehef onder die kodes "*SU", "sylyn erf", "Users Levy"* en *"Rental"* soos uiteengesit in aanhangsels "**RB2a, RB2b, RB2c, RB3 en RB4"** tot die meegaande funderende eedsverklaring (**die sylyntariewe**), asook

1.2 alle belastings, heffings en/of tariewe, uitgesonderd belastings, heffings en/of tariewe ten opsigte van elektrisiteit, water, saniteit, vullisverwydering en BE (soos omskryf in paragraaf 3.4.1.5 van die meegaande funderende eedsverklaring) (**die normale belasting en tariewe**) wat tot datum van hierdie aansoek deur die respondent ten opsigte van die eiendom gehef is;

met betrekking tot Erf [....] Kroonstad (uitbreiding 11), Erf [....] Kroonstad (uitbreiding 11), Restant van Erf [....], Kroonstad, Erf [....], Kroonstad en Erf [....], Kroonstad, distrik van Kroonstad, provinsie Vrystaat (**die eiendom)** *ultra vires* verklaar word.

2. 'n Bevel ingevolge waarvan die respondent beveel word om alle bedrae wat deur die applikante ten opsigte van sylyntariewe, asook die rente daarop, aan die respondent betaal is, aan die applikante terug te betaal.

3. ‘n Bevel ingevolge waarvan die respondent beveel word om alle bedrae, asook die rente daarop wat deur hom teen die applikante gedebiteer is as sylyntariewe, terug te skryf en die applikante se rekening daarmee te krediteer.

4. ‘n Bevel ingevolge waarvan die respondent beveel word om die koste van hierdie aansoek te betaal op ‘n skaal soos tussen prokureur en eie kliënt.

5. Verdere en/of alternatiewe regshulp.

The municipality opposed the previous application.

[16] The applicants alleged that the first respondent failed to comply with the aforesaid court order. As a result of such failure, the trust instructed its attorney to take steps to compel the first respondent to comply. Pursuance to those instructions, Attorney HSL du Plessis addressed a letter (anx rb5) to the first respondent on 1 September 2014. He pointed out that the first respondent was in possession of the judgment by Murray AJ under case number 744/2013 delivered on 13 September 2013; that certain employees of the first respondent were aware of the court order; that they were making themselves guilty of contempt of court through their persistent disregard of the court order and that the trust demanded compliance with the court order by Friday 12 September 2014. On behalf of Zafirha, the same attorney addressed a similar letter to the first respondent on 16 October 2014 (vide anx rb6).

[17] The aforesaid deadline came and went. The first respondent did not comply. The demands of the trust (anx rb5) and those of the

close corporation (anx rb6) elicited no satisfactory response from the municipality to the dismay of the applicants. Instead the municipality continued to bill the applicants as before the court order was given.

[18] The applicants alleged that, subsequent to the court order, the respondents merely readjusted the tariffs in respect of the railway sidings without any attempt to implement *de novo* the legally required promulgation process. They asserted that the imposition of railway siding charges which the municipality continued living on them in connection with their industrial properties since 13 September 2014 was unlawful. By so doing, the applicants contended that the respondents wilfully and unlawfully disobeyed the court order.

[19] In the answering affidavit the respondent denied all the allegations that one, or two or all of them deliberately refused to comply with the court order by Murray AJ. Although they confessed that they did not comply, they averred that their actions were not actuated by any deliberate and mala fide intention to violate the dignity, repute or authority of the court.

[20] As regards the third respondent, the respondents alleged that since he was not cited as a party in the previous application he could not, without more, be cited as a party to the current application. They also added that since he was cited in his representative capacity as the municipal manager, he could not be personally criminalized and sanctioned. They maintained that the management of financial affairs of the municipality in general

was a matter that fell within the chief financial officer's scope of responsibilities and not the municipal manager's. They stated that all legal processes were handled by the department: corporate services of the municipality and not the municipal manager.

[21] The respondent denied that the court order was ever served on the third respondent personally. However, they admitted that the third respondent was made aware of the court order by the responsible staffers in the department: corporate services. He was not intimately involved in the matter afterwards. He expected that the department: corporate services would, in the ordinary scheme of things, liaise with the department: municipal finance in order to implement the court order. [It was not until the current application was served on the respondents that the third respondent became aware that the court order had not been carried out.]

[22] The respondent's deponent explained that all the correspondence exchanged between the attorney for the applicant's and the municipality were handled by the administrative official in the relevant department. In the ordinary course of events he signed certain letters on the strength of the information provided to him by such officials.

[23] He expected his subordinates, who were responsible and qualified officials, to comply with the court order. It was never brought to his attention that the court order could not be carried out for some or other reason. He stressed that, as a municipal

manager, he never instructed any official to disobey the court order or caused the court order to be disregarded. As a municipal manager he never deliberately violated the court order. He was unaware that the court order had not been carried out until the current application was brought to his attention.

[24] As regards the second respondent, the respondents' deponent alleged that since the second respondent was cited in his representative capacity as the executive mayor, he too could not be properly criminalized and sanctioned. He too was not cited as a party in the previous application. He alleged that, as in his case, the court order was not similarly served on the second respondent. He elaborated that the second respondent was not even in the employ of the municipality at the time the previous application was instituted against the first respondent. He stated that the second respondent was appointed the executive mayor long after the court order had been granted. Therefore, the deponent contended that the second respondent had no direct knowledge of the previous application and the relative court order until the current application was brought to his personal attention.

[25] Some information concerning the previous application were, at one stage, included among the reading packs that were disseminated among the members of the municipal council prior to council meetings. In that way the second respondent might have come across some information about the court order. All the same he maintained that the second respondent never caused the court order to be disregarded or instructed anyone not to comply with it.

[26] As the executive mayor, the second respondent was not involved in the finance department of the first respondent or in the accounting systems. There was a department specifically authorized and tasked to attend to the accounting business of the first respondent as there was a department specifically authorized and tasked to receive and to attend to court orders. The executive mayor was not a kind of a watchdog to see to it that each and every person in those departments does his or her job. It was absolutely impractical for an executive mayor of such a huge municipality to oversee compliance by all the officials in the various departments of the first respondent.

[27] As regards the first respondent, the respondent's deponent alleged that the first respondents credit control and debt collection by-law contained complaints and appeal procedure. Such by-law published in the provincial gazette number 36 of the Free State on 14 May 2004. Provision for customers queries, complaints and appeals was made in Part 5 Provincial Gazette No 36/2014. The applicants, so he objected, did not follow the prescribed procedure in order to afford the first respondent the opportunity of investigating the alleged inaccuracies of the monthly statements of account in respect of the railway siding charges.

[28] The respondents deponent also pointed out that although the first respondent regularly rendered monthly accounts to the first applicants in respect of railway siding charges in connection with the three financial years as specified in the court order, the first applicant neglected to pay any of the accounts so rendered in

respect of all its three industrial properties. Once again the applicants withheld those facts from the court. The first applicant, unlike the second applicant, was therefore, not entitled to any credit or refund whatsoever in terms of the court order.

[29] On behalf of the first respondent the deponent indicated that the first respondent had since revised its accounts sent to each of the two applicants for the three financial years 2009/10, 2010/11 and 2011/12. The precise details as to how each account in respect of each particular industrial property was credited with the reversed amounts for railway siding charges and interest thereon appeared from "anx aa1", "anx aa2", "anx aa3" and "anx aa4".

Since the first applicant did not pay any municipal account for 3 consecutive years immediately preceeding the court order, it received zero refund (vide anx aa1, anx aa2 and anx aa3). The second applicant received a refund of R10 418.59 because it had paid the municipal accounts during the same period (vide anx aa4).

[30] The crediting and refunding was done in accordance with the first respondents understanding of the court order. Such interpretation was confirmed as correct by the legal opinion the first respondent obtained in order to clarify the dispute between the then parties. The first respondent's attorney furnished the attorney for the applicants with a copy of the legal opinion, (anx aa5). On 4 March 2015 the applicants launched the current application. After the sheriff had served the current application on the first respondent, the first respondent did the crediting and

refunding in terms of the court order relative to the previous application. The opinion by senior counsel confirmed the limitation of the retrospective operation of the court order in accordance with the interpretation by the respondents.

[31] In the replying affidavit the applicants deponent replied that the respondents deliberately violated the court order whereby the railway siding tariffs applied to debit the accounts of the applicants were declared unlawful and set aside.

[32] As regards the first respondent, the applicants pointed out that the first respondent was obliged in terms of the court, to credit the accounts of the applicants with the wrongful debits made during the three financial years 2009/10, 2010/11 and 2011/12. Moreover, the first respondent was also obliged to refund with interest all the payments made by the applicants during the same period. They denied the allegation that they demanded, on the strength of the court order, that the first respondent had to credit all the accounts for the period longer than the period mentioned in the court order and to refund all the payments made during the same period.

[33] It was never their case, so they replied. Their case, they stressed, was that the railway siding charges imposed by the first respondent after the 2011/2012 financial year were unlawful seeing that Murray AJ had declared all the tariffs as embodied in "anx 06" null and void and that she had set them aside. They asserted that the nullification and rescission was not confined to the railway siding charges imposed only for the 3 financial years

specified in the court order, being 2009/2010, 2010/2011 and 2011/2012.

[34] The applicants contended that the first respondent continued to implement increased railway siding tariffs notwithstanding the court order that nullified and rescinded the official tariffs schedule, “anx o”. Such conduct was indicative of the determination of the respondents to disregard the court order.

The applicants’ deponent admitted that the first applicant did not pay any municipal account rendered by the first respondent during the period of 36 months immediately preceding the court order but alleged that it was not obliged to pay.

[35] The applicants replied that the allegation by the respondents that the belated compliance with the court order was brought about by the uncertainty of its interpretation, was a lame excuse. Firstly they pointed out that the respondents never disputed that the crediting and refunding had to be done. Secondly, they pointed out that notwithstanding their appreciation of those undisputed legal obligations, they took their time to actually do the crediting and refunding. They pointed out that the respondents performed those obligatory acts after the current application was served on them.

[36] They contended that since Murray AJ had nullified the entire railway siding tariff as such and set it aside the first respondent had acted unlawfully and contemptuously in that the first respondent simply carried on annually adjusting railway siding

tariffs which no longer legally existed and imposing such increased railway siding charges on the applicants after the court order had been granted. They alleged that such conduct indicated that the municipality deliberately refused to respect and execute the court order. In view of all this, they concluded that the first respondent was also obliged to refrain from debiting the applicants in respect of the accounts rendered by the first respondent, post the financial year 2010/13, an obligation which according to their own version was never carried out.

[37] They denied the allegation that they ever demanded from the first respondent to credit them for the period prior to 2009/10 financial year. The only exception in respect of which they made such demands concerned the issue of clearance certificates. Such an exceptional demand was based on the provisions of sec 118 The Local Government: Municipal Systems Act 32/2000.

[38] The applicants also denied the allegation that the first respondent's tariff policy, "anx rb14" which concerned the levying of taxes, charges or tariffs for the municipal services for the financial year 2012/13 complied with the Provisions of Local Government: Municipal System Act 32/2000 and that it reflected the principles encapsulated in sec 74(2) and sec 74(3) of that statue.

[39] As regard the second respondent, the applicants' deponent repeated that the second respondent was the co-chief executive officer of the municipality and that he was constitutionally required to see to it that the decisions of the first respondent's municipal

council, as well as the court orders against the first respondent, were carried out. He stressed that the second respondent was aware of the court order and that he supported the first respondent's refusal to carry it out. The second respondent was not prepared to respect the court order. He stated that the second respondents interpretation of the previous judgment was incorrect; that the judgment was applicable to the period after 2011/12 financial year; that the applicants did not demand to be credited and refunded in respect of the period before the 2009/10 financial year; that the second respondent was obliged to ensure that the applicants were also credited and refunded for the period after the 2011/12 financial year; that the second respondent deliberately refused to have such crediting and refunding acts performed by and on behalf of the first respondent. Consequently the applicant's contended that the second respondent was also guilty of contempt of court.

[40] As regard the third respondent, the applicant's deponent repeatedly replied that, the third respondent, as the municipal manager, was responsible for the accounting obligations of the first respondent as the local government. The admission by the third respondent that the court order was not honoured before the current application was launched, was once again indicative of the third respondents deliberate refusal to comply. The third respondent's allegation that he could not understand why the current contempt application was instituted against the respondent was surprising, the deponent replied. He pointed out that the undeniable facts of the matter showed that the accounts of the applicants were not credited; that there was no money

refunded to the applicants; that the applicant’s local attorney pointed out to the first respondent that the court order had contemptuously been disregarded and that further legal steps would be taken. He alleged that since the correspondence by the applicant’s local attorney was ignored, the applicants had no alternative remedy other than launching the current contempt application (vide 6.1 anx rb5).

[41] The essence of the factual allegations levelled as against the second respondent were also levelled against the third respondent.

[42] It was common cause that the first applicant owned 3 industrial properties technically known erf [....], erf [....] and erf [....] Kroonstad; that the second applicant owned 1 industrial property technically known as erf [....] Kroonstad and that Selbourne Hotel (Pty) Limited owned 1 industrial property technically known as erf [....] Kroonstad. That was the state of affairs before the previous application was launched during the calendar year 2013. Those 5 erven were situated within the municipal jurisdiction of the first respondent. Originally all those 5 properties were connected to the main railway track by means of subsidiary railway lines technically termed sidings. Later on but still before the previous application was launched, the railway siding on the first applicant’s erf [....] was removed with the consent of the first respondent. Where the siding once was on that industrial property, a building structure, approved by the first respondent, was erected.

[43] The first respondent was obliged to maintain the railway sidings. For rendering such municipal services in connection with the railway sidings, the first respondent was entitled to impose railway siding charges on the owners of such industrial properties and to collect such charges as part of municipal revenue. Over the years there were apparently some relatively cordial dealings between the first respondent as the supplier of such railway siding services and the property owners as the consumers of such services. All that dramatically changed when the first applicant applied for the clearance certificates in order to sell its industrial properties, erven 1545 and [....]. The first respondent informed the first applicant that its accounts were in arrears. The first applicant queried the enormous sums of the alleged arrears.

[44] The stand-off or impasse precipitated the previous application for a declaratory order. The current application revolves around the court order given in favour of the aforesaid 3 consumers against the supplier. The court declared, per Murray AJ, that the first respondent had unlawfully imposed railway siding charges on the 3 consumers. It then nullified such charges, set them aside, directed the supplier to reverse the railway siding charges debited to their accounts in respect of a 3 year period immediately preceding the 2012/2013 financial year; to credit the accounts of the 3 consumers accordingly; and to refund the credit balances of such railway siding charges to them with interest in respect of those specified years. The second respondent was not involved in the previous proceedings but the third respondent was.

[45] The court order was not carried out by the first respondent. In the current contempt application the mayor and the municipality were cited together with the municipality as the second respondent and the third respondent respectively. Subsequent to the launch of these contempt proceedings, the first respondent complied with the previous court order. Before then the respondent sought and obtained a legal opinion to obtain clarity of the court order. They furnished the applicants with a copy thereof. The applicants did not respond. The applicants warned the respondents that they would take further legal steps against them unless the court order was complied with. There was no immediate reaction from the first respondent to the letter “anx rb5”.

[46] This brings to an end my summary of the factual allegations pertaining to the first category relief. A brief overview of the principles of law applicable to this type of legal proceedings appears to be necessary.

[47] It must be constantly borne in mind that, although these proceedings have all the conventional hallmarks of a civil matter, they have a very strong criminal essence – **Fakie NO v CC II Systems (Pty) Ltd** 2006 (4) SA 326 (SCA). That nature of these contempt proceedings is a material consideration. The outcome of the application may have serious civil as well as criminal repercussions. Quite often where one walks such a tight rope an even balance is difficult to maintain. One has to tread lightly and with care.

[48] In **Pheko & Others v Ekurheleni Metropolitan Municipality (No 2)** 2015 (ZACC 10) [1] we were reminded that contempt of court entailed the commission of an act or the utterance of a statement, that displays disrespect for the authority of the court as a stabilizing social instrument for orderliness in society. It entails two senses or aspects of contumacy: being wilful disobedience and obstinate resistance to lawful court order. Wilful disobedience of a court order made in civil proceedings is contemptuously criminal. The object of contempt is to have a punitive criminal sanction imposed on the wilfully disobedient or obstinately resistant recalcitrant in order to reclaim the honour of the court and to compel performance in accordance with the previous court order.

[49] The eminent judge had this to say about wilful disobedience, dignity and authority of the court and the enforcement thereof:

> "[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

Nkabinde J in **Pheko**, *supra*, [1]

[50] It is incumbent upon the applicant, to prove the requisites of the contemptuous offence. The applicant is required to establish beyond reasonable doubt that a lawful court order was indeed given against the respondent; that such order was duly served on the respondent or that the respondent was duly given notice thereof; that the respondent did not comply with such order notwithstanding his knowledge thereof; that the respondent's non-compliance was occasioned by wilful disobedience and that the respondent's conduct was actuated by *mala fides*, Fakie, *supra*, [42]. It follows that the application must fail, should the applicant fail to discharge such onus on the required standard of proof.

[51] The distinguish judge, Cameron J, qualified the applicants onus as follows:

> "(a) But once the applicant has proved 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.."

[52] It has previously been held, on more occasions than one, that in order to have the failings of a local government properly attributed to its responsible public functionary, the applicant is required to have such functionaries personally and properly joined to contempt proceedings, that primarily concerned the governmental organ in question. The underlying idea is that they should be

given an opportunity of giving their explanation for the alleged noncompliance. **<u>Pheko</u>**, *supra*, [56] – [60]; **<u>Jayiya v MEC Welfare Eastern Cape & Another</u>** 2004(2) SA 611 (SCA); **<u>MEC Department of Welfare Eastern Cape v Kate</u>** 2006(4) SA 478 [30] – [31].

[53] In the first place I proceed to consider the alleged contemptuous conduct of the first respondent. It was common cause between the first respondent and the applicants that the first three requisites of the offence of contempt had been established beyond reasonable doubt by the applicants. Therefore, the real live issue here was whether the first respondent had or failed to establish or the evidential burden in relation to wilfulness and *mala fide* presumed to have underlined its non-compliance. **<u>Fakie N.O. v C11 Systems</u>**, *supra*.

[54] On behalf of the applicant Mr Knoetze argued that the first respondent failed to tender evidence that justified its admitted failure to comply with the proven lawful order. The final submission by counsel was that the first respondent was accordingly guilty of contempt of court.

[55] On behalf of the municipality, Mr Claasen argued that the contention of the applicant that the first respondent had failed to present a sound explanation for its non-compliance was not correct. Although the first respondent did not expeditiously comply with the court order, counsel contended that it could not be concluded from such non-compliance that the conduct of the municipality was both wilful and *mala fide*. He submitted that

since the first respondent's actions were *bona fide* and unwilful they constituted no contempt.

[56] A total of 23 annexures were attached to the founding affidavit. Of those 16 concerned the second category relief. Only the remaining 7 annexures really concerned the first category relief – in other words – the contempt component of the current application. It will be recalled that the judgment from which the court order stemmed was delivered on 13 September 2013. For months the court order was not obeyed by the municipality, the respondent whose primary obligation it was to obey the binding order lawfully issued by the court. A considerably long period of almost 12 months lapsed. What actually transpired between the applicants and the first respondent during that period appeared nowhere in the founding affidavit.

[57] On the 1 September 2014, approximately 12 months since the court order was granted in favour of the applicants, the first applicant complained, for he very first time about the municipalities disobedience thereof. Attorney HSL du Plessis protesting on behalf of the first applicant wrote:

> "6.1. From the accounts rendered after the Court Order and by submitting the aforementioned clearance certificates, it is clear that you have failed to implement the relevant provision of the Court Order and more particularly **Messrs R Meyer and R Odendaal** are actively ignoring the Court's Order and are thereby making yourself (and themselves) guilty of the **Contempt of a Court Order** (It is hereby recorded that the said

> <u>Messrs R Meyer and R Odendaal were privy to the Court Order as early as the beginning of this year).”</u>

[58] Something more needs to be said about “anx rb5”. It was a six page document. It was type-written and consisted of 11 distinct paragraphs. The complaint that the municipality had contemptuously disobeyed the court order was written down in 7 lines only. The passage labelled as para 6.1 occupied less than a quarter of a page. It was, therefore, fair to say that “anx rb5” had more to do with the review component than the contempt component of these procedures. The attorney specifically identified responsible officials of the municipality who had direct dealings with him, and indicated that they only became aware of the court order “as early as the beginning of this year”. The reference to the year meant the year 2014. However, the precise meaning of the expression “the beginning of the year” was rather vague. It seemed to me that any date from 1 January 2014 and the 30 April 2014 would probably qualify. The comments I have made as regards para 6.1. “anx rb5” and the first applicant applied with equal force to the second applicant and paragraph 4.1 “anx rb6”, the second applicant’s complaint dated 16 October 2014. The ambivalent nature of “anx rb5” was, however, not that material.

[59] The material consideration was that the first applicant waited for almost twelve months before it demanded from the first respondent compliance with the court order. The question was why? In the answering affidavit the first respondent denied the allegation that it was in wilful default and gave the following explanation:

> "25.2.7 The applicants, as aforesaid, have not conveyed to the court that there was an unabated dispute between the parties in regard to the interpretation of the court order. The view of the applicants was that the first respondent was obliged to credit not only 2009/2010, 2010/2011 and 2011/2012, but also all the previous years. The applicants however did not approach the court to clarify the court order. The first respondent however obtained the opinion of senior counsel confirming an interpretation of the restrictive retrospective aspect of the order. This opinion was provided to applicants' attorney. I attach hereto a copy of the opinion in fact received from senior counsel who had acted in the preceding matter as annexure **AA5**. Further annexure **RB5** to the founding affidavit shows that the applicants were aware of the reservations the first respondents has about the interpretation they contend."

[60] The applicants denied the first respondent's aforesaid allegations. They replied in the following manner:

> "21.4 Die respondente poog om 'n dispuut daar te stel betreffende die interpretasie van die Hogbevel en voer ek respekvol aan dat daar geen twyfel kan wees aangaande die interpretasie daarvan nie."

[61] The applicants amplified their reply further at paragraph 21.6 of the replying affidavit. They said:

> "21.6 Die applikante neem kennis van die opinie soos vervat in Aanhangsel "AA5" maar stem nie daarmee saam nie.

Regsargument in hierdie verband sal by die aanhoor van die aansoek aan die bogenoemde Agbare Hof voorgedra word."

[62] Although the applicants denied that they and the municipality differently interpreted and understood the court order, they did not pertinently deny that the conflicting understanding gave rise to a dispute of interpretation. They merely tried to trivialize the dispute. Moreover, they also did not pertinently deny that there was mutual agreement reached to seek clarity of the court order. They also did not deny that the respondent did send a copy of the legal opinion to them in due course. What they point out was that they did not agree with the first respondent as far as the correctness of the written legal opinion (anx rb5) was concerned. That, however, was besides the point.

[63] At par 25.5 answering affidavit the respondents alleged:

"25.5 Messrs Meyer and Odendaal verbally communicated with attorneys acting for the applicants who acknowledged that clarity should be obtained. The present application for contempt of court is therefore puzzling."

[64] The reply of the applicants to the aforesaid allegation was:

"24.1 Ek verstaan nie op grond waarvan die deponent beweer dat hierdie aansoek vir minagting van die Hof vir hom onverstaanbaar is nie – dit nadat hy self erken het dat die hofuitspraak nie nagekom is nie, deurdat die applikante se rekeninge nie gekrediteer is nie en die fondse nie terugbetaal is nie. Die respondente se verbasing val

> verder vreemd op gesien in die lig daarvan dat Du Plessis in sy korrespondensie aan die eerste respondent dit duidelik gestel het dat die Hofbevel geminag word en stappe daaromtrent geneem sal word en verwys ek die Agbare Hof eerbiediglik na aanhangsel. "RB5" en meer in die besonder paragraaf 6.1 daarvan."

[65] The reply of the applicants was more significant for what it did not say than what it said. They did not at all deny that the first respondent's responsible officials, namely Mr Meyer and Mr Odendaal and the applicants attorneys verbally communicated and mutually agreed that clarity should be obtained as to the precise ambit of the court order. Since that crucial allegation by the first respondent was not denied by the applicants, it had to be accepted as a true averment.

[66] Given the peculiar circumstances of this particular matter, I am persuaded by the version of the first respondent. It seemed to me that there was a genuine dispute as regards the precise ambit of the court order. According to the applicants the court order was not only retrospective but also prospective. For instance, the applicant's attorney affirmed this. He wrote:

> "4.3.1 In respect of the 2009/2010, 2010/2011 and 2011/2012 financial years, client is not indebted to you as far as siding charges are concerned;
>
> 4.3.2 In respect of the period post the 2011/2012 financial year, no charges are due by reason of the fact that the charges were set aside;"

[67] I hasten to mention that paragraph 4.3.2. was not apparent *ex facie* the court order itself. The applicant's stance further fuelled the fire of dispute. They sought to broaden the ambit of the court order through the importation of findings implicitly extrapolated from paragraph 81 of the main judgment. I express no view as to whether the court order could or could not be so broadened. It is enough to say that the attempt by the applicants to prospectively broaden the ambit of the court order did little to resolve the impasse that already polarised the parties as to how far retrospective the court order was. It made the uncertainty and confusion worse.

[68] I am further persuaded that the parties mutually agreed to obtain legal opinion; that it was implicitly if not expressly understood by the parties that the implementation of the court order would be held in abeyance pending its clarification by senior counsel; that the first respondent sought and obtained legal opinion as agreed; that first respondent furnished the applicants with a copy thereof; that first respondent waited to hear from the applicants in connection with the legal opinion; that the applicants did not react pertinently to the legal opinion as the first respondent had expected; and that, instead, the applicants later brought the current application. In those circumstances, I understand why the first respondent was taken aback by the contempt component of the current application.

[69] Given all those material considerations I am of the view that it cannot objectively be said that the first respondent wilfully disobeyed the court order. Deliberate disobedience requires that the refusal to obey should be both wilful and *mala fide* in in order to constitute contempt. Unreasonable non-compliance or unreasonable disobedience does not constitute contempt provided it was *bona fide*. The first respondent was not saddled with a legally heavy evidential burden to disprove, on a balance of probabilities, the requirements of wilfulness and *mala fide* on its part. The first respondent was required by law to merely advance evidence that established a reasonable doubt, about the wilfulness and bad faith presumed from its proven disobedience **Fakie**, *supra*. I am of the opinion that the first respondent advanced evidence, much more compelling than the law requires, that substantially established reasonable doubt. The reasonably innocent explanation given by the first respondent means that the applicants have failed to prove all the requisites of contempt beyond reasonable doubt **Fakie**, *supra*.

[70] The contention that the first respondent disobedience or non-compliance was occasioned by wilfulness and *mala fides* was not borne out by the proven and undisputed facts earlier alluded to. Since the version of the applicants as set in the founding affidavit and further amplified in the replying affidavit and comparatively considered together with the version of the respondents as set out in the answering affidavit did not satisfy the requisite standard of proof, the first category relief has to be denied. Where, as in this instance, no wilful disobedience and reckless resistance to a lawful court was proven the party on whom the onus rests, has to

fail. **<u>Pheko</u>**, *supra*. I would, therefor, dismiss the contempt component of his application.

[71] In the second place I deal with the executive mayor, Mr Justice Mareka, cited as the second respondent. He was not the executive mayor at the time the court order was granted. He was not the accounting officer of Moqhaka Local Municipality at the time the contempt proceedings were initiated. There was no simple letter addressed to him in his official capacity about his employer's alleged wilful refusal to obey the court order. There was no single letter addressed to him in his personal capacity to warn him that his employer's wilful disobedience and reckless resistance to a lawful court order could have adverse criminal repercussions on his personal civil liberty. He was not advised in any manner whatsoever as to what his statutory duties were or what he was precisely required to do in order to avoid having the failings of the municipality directly attributed to him.

[72] There was virtually no written proof attached to the founding affidavit, or even to the replying affidavit for that matter, to show that the court order was ever served on him or notice thereof ever given to him. There was no evidence, however terse and slender was tendered by the applicants, to show that he had direct knowledge of the previous application, judgement and the ultimate order until the current application was brought to his attention. He was never invited to participate in the compliance processes before these contempt proceedings were instituted against him. He stated that he was required to exercise political and not administrative oversight and to perform ceremonial and

not operational duties. These, he said, constituted the nucleus of his primary function as the mayor: sec 56 Local Government: Municipally System Act 117 of 1998.

[73] The mayor just like the minister is the executive overseer and monitor. He is legislatively empowered to exercise supervisory authority in the affairs of the municipality. He oversees and monitors the performance of the municipal manager as regards the implementation and the enforcement of the municipal policies and by-laws- Sec 99 Local Government: Municipal Structures Act 32 of 2000. I am just analogising here. Ordinarily the director-general and not the minister is sued in his representatives capacity for failings or acts of omission committed by a department. Section 2, State Liability Act 20 of 1957. Seemingly a municipal mayor enjoys no such privilege.

[74] Having considered the version of the applicants and that of the second respondent, I am not persuaded that the applicants have made out a case beyond a reasonable doubt against the second respondent. It was not shown that the court order was properly served on him; that he wilfully disobeyed such order; or that he spitefully resisted or instigated any responsible functionary of the municipality to unlawfully refuse to implement the order. In my view the exculpatory version of the second respondent was reasonably innocent. No contempt can be imputed to him. The failing if any, by the first respondent cannot be justly attributed to the second respondent. In the light of all these material considerations, I am inclined to dismiss the first category relief sought against the second respondent as well.

[75] In the third place, I deal with the third respondent, Mr Mcedisi Simon Mqwathi. As the municipal manager he obviously sits much closer to the burning fire than the executive mayor. He is the public functionary ultimately responsible for the administrative operations of the first respondent, Moqhaka Local Municipality. He is the accounting officer of the municipality – sec 82 Local Government: Municipal Systems Act 32 of 2000. Sec 60 Local Government: Municipal Finance Management Act 56 of 2003 also provides likewise. The responsibilities of the third respondent as the municipal manager and as the ultimate head of administration are set out in sec 55 Local Government: Municipal Systems Act 32 of 2000. As the accounting officer of the municipality the third respondent, was managerially responsible and accountable, among other, for the discharge of all the liabilities of the first respondent, Moqhaka Local Municipality - section 55(2)(c) Local Government: Municipal Systems Act 32 of 2000.

[76] The third respondent was akin to the ultimate chief of operations. He was the responsible functionary. He was legally tasked, among others, with the ultimate function of driving the enforcement and implementation of the policies, by-laws, resolutions integrated development plan, general administration programme and general principles of good governance. Monitoring the implementation of all those, including court orders against the municipality by the subordinates officials of the municipalities, is central to the municipal managers core

functions. The previous application was launched against the municipality during his term of administration as the municipal manager. Although there was no proof that the order was served on him, he gained full knowledge thereof long before the current application was initiated. Even though certain matters are delegated to others subordinates officials, it still remained his ultimate duty to ensure that the court order was complied with.

[77] I have already found in favour of the first respondent, that the interpretation dispute between the applicants and the municipality concerning the court order was the real cause of the delay. The applicants started it all by reading too much in the court order. Legal opinion was sought and obtained by the first respondent. Attorney B Majavu sent a copy thereof to the applicants attorneys. He would not have done so unless there was mutual agreement to that effect. The legal opinion was embodied in a memorandum dated 30 May 2014. I could not ascertain precisely when it was sent to the applicants.

[78] All the same the applicants received the legal opinion but repudiated it. However, they did not bother to seek a second legal opinion to back up their interpretation of the court order. On 1 September 2014 the applicants without reference to the legal opinion, warned the respondents that they were in contemptuous breach of the court order (vide para 6.1 anx rb5). Without providing the first respondent with a contrary legal opinion they threatened to take legal steps. The purpose of the threat was simply to force the first respondent to accept the disputed interpretation of the applicants. That, in my view, was not in

keeping with the dictates of good faith. Such threat notwithstanding, the applicants took their time to initiate these contempt proceedings. They finally did so on 4 March 2015, over six months since they threatened to do so. The municipality subsequently complied with the court order in accordance with the legal opinion groundlessly rejected by the applicants.

[79] The municipality could not at all have complied, not even in a month of Sundays, with the applicants excessive demand which was not apparent *ex facie* the court order by Murray AJ. It was obvious to me, in the light of all this, that the municipal manager never deliberately disobeyed the court order or caused the first respondent, the second respondent or any other responsible functionary of the municipality to wilfully and spitefully refuse to comply. In the absence of the requisite wilful disobedience and *mala fide* refusal on his part, the wilful and *mala fide* failings of the municipality, if any could be proven – could not be justly and fairly be attributed to the third respondent. To a very large extent the applicants were to blame for the delayed compliance by the municipality. In my view the municipal manager has advanced a reasonably innocent explanation which was inconsistent with his alleged wilful and *mala fide* disobedience or contemptuous refusal to carry out a lawful court order – **<u>Fakie</u>**, *supra.* The contemptuous guilt of the third respondent was, in my view not established beyond reasonable doubt.

[80] Since no contempt against the municipality, the first respondent, was established, it was not necessary for me to even consider the merits and demerits of the case against the executive mayor and

the municipal manager as I did – **Pheko**, *supra* para [56]. I did so because I believed there was a long felt need to elucidate some grey areas in our municipal law. I have endeavoured to highlight the fundamental distinction between the municipal manager and mayor. That functional differentiation between the two local governors is crucial especially in contempt proceedings. The two cannot simply be painted with the same brush merely on the grounds that they are both senior functionaries of the municipality.

[81] There remains one more aspect I have to comment on. Where, as in this matter, the municipal functionaries who were not jointly cited as co-respondents in the previous proceedings, are accused of contempt in the subsequent proceedings - the applicants must ideally engage the responsible and accountable functionaries in extra-curial constructive compliance process. In the course of such process the court order should be directly brought to the personal attention of the functionary. For instance it can be done in various ways, including but not limited to a face to face meeting, email, private registered mail, private letter personally delivered *per tradio brevi manu* with acknowledgment of receipt, service by the sheriff or by any combination of any two or more or all such pre-litigation compliance methods.

[82] It seems desirable that all these should be done over and above an official letter or notice given to the functionary concerned. An official letter alone is not sufficient, in my view. In a huge establishment, such as the first respondent, things may and do go horribly wrong sometimes. Important official letters may go astray between the designated official whose duty it is to open letters

and the functionary for whom the official letter was intended. The purpose of privatising communiqué between the winner or beneficiary of the court order and the remote functionary of the municipality is to bring nearer home to the functionary not only the failings of the municipality but also their adverse criminal consequences to the functionary's private interest, civil liberty and personal profile.

[83] In this instance no such constructive compliance process was followed before the contempt proceedings were initiated against the third and second respondent. The mayor was simply hauled to court without any prior warning whatsoever. In the ordinary course of public administration an applicant who seeks to compel a public functionary to act in a particular way, first has to obtain a mandamus against such a functionary before recourse can be had to court for a criminal sanction based on contempt of court – MEC: Department of Welfare: **ECP v Kate** 2006 (4) SA 326 (SCA) para [30-1]. This brings to end the contempt component of this proceedings.

[84] Now I turn to the second category of the relief sought. Here the applicants seek a declarator. This is the second component of the motion proceedings before me. As earlier pointed out they pray to have railway siding charges levied by the first respondent to the accounts of the applicants post the 2011/2012 financial year nullified and set aside. The precise terms of the second category of the relief are fully spelt out in para 4, 5 and 6 of the notice of motion. This second time around the first applicant is

alone on the hot seat. Its functionaries, the second and the third respondents are not in the firing line.

[85] During the course of her judgment, Murray AJ commented on "anx 06" to the previous application as follows:

> "The Respondent did not annex any document that could have served as such a section 10G(7)(c) notice or as a section 10G(7)(e) copy thereof regarding the November 2000 decision or any earlier decision on the amounts listed in the tables in annexures "RB10(2)" or "06", whether in relation to an original determination of tariffs or to an amendment to existing tariffs. The language regarding the notice in both section 10G(7)(c) and section 10G(7)(e) is peremptory. In the absence of such a notice, which absence the Municipality in argument admitted, the implementation of the resolution would have been unlawful and the Applicants would simply have been confronted with a fait accompli once the new or amended tariffs were imposed."

[86] The second category of the relief sought has its *fons et origio* in the aforesaid finding. The applicant also relied on the further findings by Murray AJ as contained in para 48, 52, 54, 62, 67 and 79 in their endeavour to have the scope of the court order also prospectively extended to the financial years 2012/13, 2013/14 and 2014/2015.

[87] It was common cause that by itself the court order did not expressly deal with those years. In other words it did not expressly deal with the future. It expressly dealt with the past. According to its plain wording it appeared that its essence was

that the railway siding charges in respect of erven [....], [....], 1545 and [....] were set aside because they had been unlawfully imposed in the past; that such railway siding charges with which the accounts of the applicants in respect of the three financial years immediately preceeding the court order, being the years, 2009/2010, 2010/2011 and 2011/2012, be reversed; that the accounts of the applicants be credited with the amount corresponding to those of such unlawful debit charges; that the railway siding charges unlawfully levied by the municipality and undeservedly paid by the applicants in respect of those financial years be refunded to the applicants with interest. (para [82] "anx rb4").

[88] It was also undisputed that after 13 September 2013, being the date of the court order, the first respondent passed a resolution whereby all the municipal service charges as previously specified in "anx 06" were adjusted by annually increasing them. The annual increment was based on a certain percentage relative to the consumer price index and the inflation rate.

[89] On the strength of those findings the applicants, through their attorneys, objected to the railway siding charges the municipality continued to levy against them after the financial year 2011/2012 in connection with their industrial properties, namely: erven [....], [....], 1545 and [....]. They contended:

- that in respect of the period post 2011/2012 financial year, no railway siding charges were due by the applicants to the municipality because such charges had been set aside by the court;

- that, in the light of such setting – aside, there existed no lawful railway siding tariffs in respect of the period commencing with the financial year 2012/13 onwards;
- that, in view of the a foregoing two assertions, no railway siding charges could lawfully be reflected by the municipality on the clearance certificate requested by the first applicant.

Vide para 4 “anx rb 5” founding affidavit.

[90] It was on that premise that the applicants approached the court for the relief as set out in prayers 4, 5 and 6 of the notice of motion. That, by itself, was tantamount to an acknowledgment by the applicants that the court order did not expressly restrain the municipality to refrain from continuing to levy consumers of railway siding services on the basis of the outlawed: “anx 06”.

The generous interpretation that the judgment of Murray AJ also prospectively declared all railway siding tariffs themselves for all the years post the 2011/2012 financial year to be *ultra vires*, was heavily attacked. The municipality described it as legally, logically and patently wrong.

[91] The first respondent indicated that the formula for the railway siding tariffs as reflected in “anx 06” was adopted by the municipal council after investigations, inputs by all steakholders, opinions by experts and deliberations and considerations of all those matters by the municipal council.

[92] The issue revolves around the interpretation of the court order. On the one hand Mr Knoetze argued that the intention of Murray AJ as far as the court order was concerned, had to be determined in the light of the findings that she made in her judgment. He argued that the court order concerned the validity of the decision taken by the municipality about the imposition of the railway siding tariffs as contained in ”anx 06”. Counsel submitted that it was evident from the court order that Murray AJ found “anx 06” as a whole invalid.

[93] On the other hand Mr Claasen sharply differ. He argued:

> “8.3 Murray AJ, also carefully distinguished between the years preceding the 2012/2013 financial year. Previously, from 2003 and before the 2012 financial years, there was no resolution dealing with siding tariffs and no proof of advertisement and public participation regarding these siding tariffs and no credit control by-law to levy and collect these tariffs. For the 2012/2013 financial year, a resolution was taken, advertisement took place, public participation occurred and by-law implemented in accordance with the provisions of the Systems Act and the Finance Act. Therefore it was only the years *ante*/prior to 2011/2012 that were found to be *ultra vires.* Only the tariffs imposed from 2003 until 2012 were invalid. The applicants did not appeal the decision in regard to the 2012/2013 financial year, but asked this court, as a Court of Appeal, to set Murray, AJ’s decision aside.”

[94] Turning to the interpretation and the argument that "anx 06" as a whole had already been declared unlawful, Mr Claasen argued:

> "The applicants contention that annexure **'06'** is 'van nul en gener waarde – sien paragraaf 79 van aanhangsel **"RB3"** (sic)(judgment Murray AJ) is again completely wrong. The reasons, *ratio,* facts, principles leading to the formula of how to charge fees for sidings, was never dismissed by Murray, AJ. All she said was that the process to levy these charges was fundamentally flawed. There was no council decision, no siding tariff, no tariff policy provided, no advertisements and public participation and no tariff and credit by-law provided from 2000 to 2012. Therefore, the sidings were set aside as *ultra vires.* The reason being the absence of the processes not complied with, the doctrine of legality, namely, non-compliance of the prescripts of the procedures in S10G(7) of the Local Government Transition Act, 209 of 1993 and later S74 and S75 of the Local Government: Municipal Systems Act, 32 of 2000.[57]"

[95] The procedure followed by the applicants in bringing the second component of the current application to court was unusual. The judgment by Murray AJ in connection with the previous application was attached to the founding affidavit as an annexure. Murray AJ was then extensively quoted in the founding affidavit and in the applicant's heads of argument. I have to say that there were 3 sets of such heads filed. I had a feeling, and it was a very strong feeling, that the applicants were suggestively prescriptive to me. The foundation of their case was loud and clear. They advised me that Murray AJ had already considered "anx 06",

found it entirely unlawful and nullified it as a whole. Therefore, they advised me further that all I was required to do was to accept that conclusion as given and merely set aside the railway siding charges levied against them since 13 September 2013 in respect of the financial years 2012/2013, 2013/2014 and 2014/2015 on the strength of a nullified municipal railway siding tariffs.

[96] I am because I think. I think, therefore, I am. Unless I think, I am not. I gained the impression that I was not supposed to think independently judging by the way the applicant's papers were drafted and the way the matter was brought to court. During the course of his oral argument Mr Claasen did not mince his words about the unsatisfactory procedural aspect of the matter. He said I, sitting alone on the bench, was in required to review the decision of another judge. Of course I have no jurisdiction to do so. The response of Mr Knoetze confirmed my anxiety. He orally replied that these were not review proceedings; that Murray AJ had already reviewed the matter and that I was not required to review anything afresh but that I was merely required to set aside what my colleague had already reviewed and declared unlawful. I understood counsel to mean that mine was not to think and question the validity or invalidity of "anx 06" but merely endorse my colleague's finding(s) that it was invalid. I found it difficult to compromise my independent judicial thinking in that way.

[97] The question is why did Murray AJ not crown her finding with an appropriate and explicit order to give effect to it? Only Murray AJ could have given a satisfactory answer to that question. It is lamentable that she was not approached to reconsider her order.

There may well be a sound reason why she did not do what I am now required to do. If on the one hand I were to follow the uncritical approach as proposed by the applicants, I would not do justice to the argument presented by the municipality. If, on the other hand I were to adopt the critical approach as proposed by the municipality, I might find myself in breach of the hallow norms of the bench governing, not only reviews and appeals, but also relational issues between a colleague and a colleague. I have no jurisdiction sitting as I was on my ordinary bench, to judge and critique another colleague. I am not sitting on an elevated appellate bench with 2 other colleagues to consider the decision of a colleague on appeal. As Mr Claasen correctly pointed out, sitting alone on the same bench as Murray AJ I have no authority to question the correctness or otherwise of her decision whether it is amenable to the interpretation of the applicant or the respondent.

[98] In my view what happened after 13 September 2013 between the applicants as consumers of the railway siding services and the first respondent as the service provider had all the hallmarks of a distinct and a separate cause of action. Had the matter been brought to court on such a new ticket I would not have found myself in this invidious position. Instead the applicant chose to bring it to court as an old appendage of the previous application. The unusual procedure they chose lamentably complicated matters, for me at least.

[99] In view of the aforesaid peculiar considerations I find it undesirable to adjudicate the matter. Doing so may lead to foreseeable irregularities. Therefore, I decline to entertain the second component of the proceedings. I would, therefore, strike the application down to this extent.

[100] There were certain points raised in limine by the respondents in connection with the first component of these proceedings. In the light of the conclusion I have reached, it has become unnecessary to deal with them.

[101] Now the question of costs remains. The respondents have successfully resisted the grant of the reliefs sought by the applicants. They are entitled to the fruits of their success. The parties urged me, albeit for different reasons, to award costs on a punitive attorney and client scale to the successful party. Although the applicants were less than candid, I am not inclined to saddle them with a punitive order of costs. The matter warranted the employment of senior and junior counsel by the municipality. Therefore, the order has to make provision for two counsels.

[102] Accordingly I make the following order:

102.1 The application is dismissed with costs as regards the first relief, in other words the contempt component of these motion proceedings;

102.2 The application is struck off with costs as regards the second relief, in other words the setting-aside component of these motion proceedings;

102.3 The costs shall include the costs occasioned by the municipal respondent's employment of two counsels.

M.H. RAMPAI, J

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