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**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO. 2673/20114

MAHOGANY RIDGE 2 PROPERTY OWNERS' ASSOCIATION Applicant

and

THE UNLAWFUL OCCUPIERS OF LOT [....] PINETOWN	First Respondent
ETHEKWINI MUNICIPALITY	Second Respondent
MR MTSHALI	Third Respondent
MR BONGANI KHUMALO	Fourth Respondent
MR NATHI NDLULI	Fifth Respondent
MR SEMZO WANDA	Sixth Respondent
MR DOUGLAS KHUMALO	Seventh Respondent

JUDGMENT

Delivered on 15th February 2016

CHETTY, J

[1] On 7 November 2012 Sishi J handed down judgment in favour of the applicant, which sought the eviction of the first, third, fourth, fifth, sixth and seventh respondents from its property, being Erf [....] Pinetown. The second respondent, the Ethekwini Municipality, was cited in the proceedings to the extent that it has a

constitutional and statutory duty to provide emergency shelter and alternative housing to families rendered homeless as a result of an eviction.

[2] After hearing argument in respect of the eviction application under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE') Sishi J issued an Order in the following terms:

'(1) All persons presently occupying Erf [...] Pinetown (hereinafter referred to as "the first respondent) are Ordered in terms of section 4(1) of the Prevention of illegal Eviction from and Unlawful Occupation of Land Act 1998 to vacate Erf [...] Pinetown ('the property1').

(2) The persons referred to in paragraph 1 above are Ordered to vacate the said property by 22 February 2013.

(3) The second respondent (municipality) is Ordered and directed to erect and construct the wood and corrugated iron structures situated upon concrete platforms in the located sites owned by the second respondent at Emaus area, as contemplated in their housing report dated 4 April 2012 to relocate and house the Unlawful Occupiers currently occupying the applicant's property.

(4) The second respondent is given a period of three months from the date of this judgment within which to erect and complete the structures referred to in the preceding paragraph. The erection and construction of these structures shall be finalised on or before 7 February 2013.

(5) In the event that the Unlawful Occupiers do not vacate the property in accordance with the provisions of paragraph 2 hereof, then, two (2) days following the day referred to in para 2 thereof, being 25 February 2013, the sheriff is authorised to evict any such persons remaining in occupation of the property and is further authorised to employ any necessary force in Order to give effect to this Order.

(6) The second respondent is Ordered to pay the wasted costs occasioned by the adjournments on 25 November 2011, 20 January 2012 and 04 April 2012.

(7) Save for the costs Orders in the preceding paragraph, the first respondent is Ordered to pay the costs of this application, jointly and severally, the one paying, the others to be absolved.'

[3] The issue which is now before me is whether the second respondent should be held in contempt, as to date it has failed to implement the Order.¹ It is not in dispute that none of the structures referred to in the Order have been constructed. To that end, the applicant contends that the city manager be called upon to show cause why an Order should not be made committing him to prison and to remain imprisoned until the Order is complied with. In addition, the applicant, in its replying affidavit and heads of argument, seek damages in the amount of R 76,846.00 per month, from the date of the granting of the Order until the date when the unlawful occupiers vacate its property.

[4] In response to the application to hold the city manager in contempt, the municipality on 10 February 2015 delivered a counter application for the variation of the Order granted on 7 November 2012. While it is correct that the unlawful occupiers sought to appeal the judgment of Sishi J, as at 24 February 2014 their attorneys had conveyed to the municipality's attorneys that they were no longer persisting with the appeal. The application for leave to appeal was eventually withdrawn on 6 June 2014. Even if the municipality contends that it was unable to comply with the Order while the appeal by the unlawful occupiers was still being prosecuted, as at 6 June 2014, that excuse fell away.

[5] The essence of the variation application is that information has subsequently come to light which indicates that if the unlawful occupiers were to be relocated to Emaus, in accordance with the Order, such relocation would be met with violent opposition by the community of Emaus. As an alternative, the municipality submits that the unlawful occupiers be relocated to land in the nearby Motala Heights community, which is closer to public transport, as well being serviced with ablution facilities. The problem which emerges in this matter is that the unlawful occupiers insist that the municipality relocate them to Emaus, the site referred to in the Order. They resist any attempt to relocate them to Motala Heights, whose existing residents the occupiers contend, would oppose their relocation on the grounds that they will essentially be occupying land earmarked for low cost housing development for members of that community.

¹ Refers to the judgment and Order issued by His Lordship Mr Justice Sishi on 7 November 2012.

[6] The applicants, unfortunately, are saddled with the unlawful occupation of their land, despite a court Order for the eviction of the unlawful occupants having been handed down more than three years ago. As set out in its application papers, the applicant has become exasperated by the failure of the municipality to comply with the Order, and has in the intervening three years spent R1 608 211, 03 in providing security on the site to prevent further unlawful occupation of the land, and to regulate the influx and egress of persons already occupying the site.

[7] The applicant further set out details of the threats to the security guards on the site, and that it has taken steps to put in place perimeter fencing and erect guard houses to protect its property from becoming a further target for illegal land occupation. In addition, the security officers on site have been threatened, intimidated and harassed when attempting to confront illegal invasions, and the security fencing erected has been vandalised at certain parts. The ablution facilities for the security guards have also been stolen and burnt. The guards have also been threatened with weapons while attempting to prevent illegal invasion of the property. According to the applicant, no assistance has been obtained from the South African Police Services, on the basis that this is supposedly a private land dispute.

[8] The applicant therefore has not brought the application lightly. It is of the view that the municipality is under a duty in law to comply with the orders of Courts, and to that extent no justifiable explanation exists for the non-compliance with the Order. Consequently, it submits that the municipality should be held in contempt and that its municipal manager should be called upon to explain why he should not be committed to prison until such time as there has been compliance with the Order. Insofar as the applicant is concerned, it has done all that could be asked of it. The obligation to accommodate the unlawful occupiers does not fall on the private landowner. However as the Constitutional Court held in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another*,² para 40 and *Occupiers of Mooiplaats v Golden Thread Ltd & others*³ what is needed is patience in these situations. In *Blue Moonlight* para 40 the Court held:

‘Of course, a property owner cannot be expected to provide free housing for the

² 2012 (2) SA 104 (CC).

³ 2012 (2) SA 337 (CC).

homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE'.

As I understood the applicant's case, it has been patient for more than three years with the municipality and has come to Court after all else has failed.

[9] It is against this backdrop that this Court must assess whether the variation application of the municipality has any merit. The structures contemplated in the Order require the fairly simple construction of concrete platforms and wooden structures erected thereon. Mr *Broster* who appeared for the municipality, pointed out that the municipality was committed to erecting structures which would give the unlawful occupiers a degree of permanence in respect of housing. On the other hand, this could only become a reality at the Motala Heights site, and not at Emaus, to where the court had ordered their relocation. The municipality further contended that if the unlawful occupiers were relocated to Emaus, and threats of violence are carried out against them by disgruntled members of that community, the structures erected in terms of the Order could be razed to the ground. In that event, all that the municipality would then be able to offer would be emergency housing, a far cry from the structures contemplated in the Order.

[10] It is necessary to make a few preliminary remarks in relation to the judgment of 7 November 2012 before dealing with the variation application brought by the municipality. Mr *Jeffrey SC*, who appeared for the unlawful occupiers, correctly pointed out that in the absence of 'fresh facts', Courts are understandably reluctant to grant variations of their Orders. In *Bell v Bell* 1908 TS 887, Innes CJ at 894 held that:

'Courts will not lightly vary their own Orders, even though they may be of a merely interlocutory character. And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous'.

[11] The municipality obviously contends that “fresh facts” have indeed surfaced since the date of the Order. Notwithstanding, the Order remains in force until set aside. As set out in *Erasmus, Superior Court Practice*, Rule-B1 at 306F-G:

‘An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done, the court order must be obeyed even if it may be wrong; there is a presumption that the judgment is correct. A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside. An order could only be set aside under rule 42, rule 31(2)(b), on appeal or on common-law grounds.

The general well-established rule is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it-it becomes *functus officio*. The inherent jurisdiction of the High Courts does not include the right to interfere with the principle of finality of judgments, other than in the circumstances specifically provided for in the rules or the common law.’

[12] Similarly, in *Mchunu & others v Executive Mayor, Ethekwini Municipality & others*,⁴ Hollis AJ was called upon to consider a contempt application against the municipality which had failed to find alternative accommodation for occupiers who had been evicted from an informal settlement and relocated to a transit camp for more than a year. As part of the programme to oversee the relocation of the occupiers, the Court ordered the municipality to investigate the misallocation of housing and further directed that the occupiers were not to remain in the transit camps or more than a year. Notwithstanding, the occupiers remained in the transit camp for more than 22 months, and eventually an application was brought to hold the municipal manager in contempt of the earlier Court order. In dealing with an assertion that the earlier Order directing the municipality to comply with certain conditions was a nullity the Court, relying on the decision in *Culverwell v Beira*,⁵ noted that orders of Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside.⁶

⁴ 2013 (1) SA 555 (KZD).

⁵ 1992 (4) SA 490 (W).

⁶ See also *Clipsal Australia (Pty) Ltd & others v GAP Distributors & others* 2010 (2) SA 289 (SCA).

[13] It should be noted that apart from the particular site to which the court directed that the occupiers be relocated, the municipality does not challenge any other aspect of the judgment of Sishi J. That being the case, the reasoning of Sishi J remains intact. It is relevant to note that in reaching his decision, Sishi J took into account the housing report delivered by the municipality and that an offer had been extended to the occupiers to relocate them to Emaus, adjacent to the area where they are presently located. The court further took into account that the proposal had been made by the municipality to construct concrete platforms, on which wooden structures would be put up. At the time when the matter had been argued, they had been no opposition to the proposal by the community of Emaus. A further feature of the proposal was that the applicant (the landowner) had offered an amount of R 10 000 in respect of the relocation of each family. This was, in my view, a generous offer by a landowner whose property had been unlawfully occupied, and whose members had paid significant amounts for security since November 2011, when the property was illegally occupied.

[14] The housing report by the municipality further indicated that a period of three months would be required from the granting of the Order for the construction of the structures to which the seven families were to be relocated. Accordingly, after considering the merits of the application, the Court ordered the eviction of the unlawful occupiers and as set out above, ordered their relocation to the area of Emaus, in accordance with the municipality's housing report. What the municipality now seeks to do in its variation application is to alter the conclusion arrived at in its own housing report.

[15] The variation application asserts that in attempting to ensure compliance with the Order the municipality encountered "*significant resistance*" from the local community of Emaus and was accordingly unable to comply with the construction of temporary housing. The affidavit of Mr Dumisane Petros Ndlovu, the Manager of the Housing Department in the municipality, states that a meeting was called to discuss the relocation of the unlawful occupiers to the sites in Emaus. No details are given as to when this meeting took place except that members of the local community in Emaus refused to agree to the relocation as they wanted priority to be accorded to their existing members who had long been in the queue to receive proper housing.

[16] As a result of the fear that any structures erected by the municipality would be damaged or destroyed, the municipality undertook to then look at alternative sites. This led to the identification of Motala Heights as a suitable location. This site was described as being “*sufficiently far away so as not to cause difficulties with the local community*”. The municipality further states that a meeting with the representatives of the unlawful occupiers as well as the members of the community from Motala Heights was held wherein it was apparently agreed to by the unlawful occupiers, that they would have no objection to relocating to Motala Heights. The latter contention that the unlawful occupiers had either attended the meeting or that they were in agreement with the revised relocation offer was strenuously disputed by the unlawful occupiers.

[17] Accordingly the municipality contends that it remains respectful of the Order and in an attempt to comply with its constitutional obligations, it identified a suitable alternative site for housing, which in no way prejudices the occupiers, and seeks to give content to the rights of access to housing as set out in s 26 of the Constitution. This, it argues, amounts to “substantial compliance” with the Order. The municipality was at pains to point out that it had actively been taking steps to comply with the Order, and that its primary reason for a change of location was due to the threats made by the local community.

[18] The variation application was opposed by the applicant, which pointed to a delay of more than a year in the municipality bringing the application. According to the applicant, the municipality’s attorneys would have known since 24 February 2014 that there was the potential for problems associated with the relocation of the occupiers to the site at Emaus. Despite this, there is no explanation as to why the application for variation was only delivered on 15 February 2015. That delay apart, the applicant’s counsel submitted that a delay of more than a 1000 days had elapsed since the Order of 7 November 2012 and the applicant still does not have undisturbed possession of its property. In the interim, it has continued to bear the costs of security guards and patrolling of the area, costing an average of R76 848, 00 per month, which it has no realistic prospect of recovering from the occupiers.

This aspect of the claim for damages is dealt with later in this judgment.

[19] The variation application was also opposed on the grounds that there are no exceptional circumstances set out by the municipality to justify a departure from the Order made by Sishi J, particularly as the Order endorsed a proposal put forward by the municipality itself. It is almost akin to a party agreeing to an order by consent, only to return later to Court and argue for a rescission.

[20] At the time when the housing report was placed before Sishi J, the municipality was aware that both the sites at Emaus and Motala Heights would have already been occupied by communities. No explanation is tendered as to why these threats against the relocation of the unlawful occupiers did not surface at the time when the housing report was being prepared.

[21] The most compelling reason why the variation application should be dismissed, according to the applicant, is that despite resistance, the unlawful occupiers are in favour of relocating to the land allocated at Emaus. Their choice was based upon the acceptance of an offer made by the municipality, and subsequently endorsed by the Court in its judgment of 7 November 2012.

[22] The unlawful occupiers joined forces with the applicant in opposing the variation application and point to the dispute of fact that arises from the affidavit of Dhanasagree (Shamitha) Naidoo on behalf of the Motala Heights Community Committee, who states that if the unlawful occupiers are relocated to Motala Heights, that would result in strife for those in that community who are waiting patiently for the allocation of houses. Should the unlawful occupiers be moved onto this land, they may be perceived as receiving preferential treatment to those who have been waiting for some time for the allocation of houses. Ms Naidoo suggests that if such relocation is to take place, *“conflict will erupt, workers will be attacked, equipment destroyed and any structures will be broken down”*. She makes it clear in her affidavit that the unlawful occupiers will not be accepted by the Motala Heights community.

[23] To the extent that there is a dispute of fact between the version of the municipality and that of the unlawful occupants, relying on the test in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷ read with *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*⁸ the occupiers submit that their version must be accepted.

[24] While I am mindful of the information presented by the municipality of the possibility of resistance by the Emaus community to the relocation of the unlawful occupiers to their area, this court cannot allow a climate to develop where implementation of its Orders are second guessed or resisted by members of the public. As stated earlier, the judgment of Sishi J has not been reviewed or set aside and therefore must stand. Disobedience of court orders cannot be countenanced, especially where it results in the most destitute in our society being deprived of the benefit of a constitutional right to have adequate shelter provided by an organ of state. In addition, resistance to the implementation of court orders has the potential to erode the dignity and authority of the courts, and serves to undermine the rule of law.

[25] In the result, I am satisfied that no grounds exist for the variation of the Order issued by Sishi J on 7 November 2012. The counter-application of the municipality is accordingly dismissed.

[26] I now turn to the issue of whether the municipality has been in contempt of the Order issued by Sishi J. The test for whether the municipality has acted in contempt is set out in *Fakie NO v CCII Systems (Pty) Ltd*⁹ where Cameron JA said the following:

'[7] The form of proceeding CCII invoked appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not

⁷ 1984 (3) SA 623 (A).

⁸ 2008 (3) SA 371 (SCA).

⁹ 2006 (4) SA 326 (SCA).

invariably, has the object of inducing the non-complier to fulfil the terms of the previous Order.

[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] These requirements - that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.' (Footnotes omitted)

[27] The municipality appears to have been careful to bring itself within the framework of the decision in *Fakie*. As I understand its contentions regarding the aspect of contempt, the municipality states that it is striving to provide suitable alternative accommodation to cater for the influx of thousands of people into the urban area that falls within its jurisdiction – particularly those living on, what the municipality calls, the “*fringes of society*”.

[28] In response to the allegation of contempt, the municipality states that it held meetings, through the ward councillor and housing officials, with the community at Emaus who were opposed to the relocation of the unlawful occupiers to their area. It then investigated the possibility of relocating the unlawful occupiers to Motala Heights and to this end held meetings with the community who expressed no opposition to the unlawful occupiers being housed on that site. As set out earlier, the

version that the Motala Heights community would welcome the unlawful occupiers into their fold is strenuously disputed by the unlawful occupiers.

[29] Notwithstanding my conclusion that the municipality's efforts to seek a variation of the Order cannot succeed, there is nothing on the papers before me to suggest that the municipality has acted in wilful disregard of the Court's Order. The municipality appears to have believed that it was acting in the best interests of the unlawful occupiers by seeking their resettlement to Motala Heights. It was clearly mistaken in that belief, as evidenced by the affidavit of Ms Naidoo on behalf of the Motala Heights Community Committee. The unlawful occupiers themselves do not wish to go to Motala Heights and are quite content, despite the threats against their safety, to be relocated to Emaus. Can it be said that the municipality's conduct has been in wilful disobedience of the Court? As Cameron JA pointed out in *Fakie supra* para 9, "*good faith avoids the infraction*".

[30] The test for contempt received the attention of the Constitutional Court in *Pheko & others v Ekurhuleni City*¹⁰ where Nkabinde J said the following:

[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

...

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

¹⁰ 2015 (5) SA 600 (CC).

previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.

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

[31] The Court in *Pheko* intimidated in para 37 that resort to means other than contempt proceedings may be had in dealing with a recalcitrant litigant. The Court said the following:

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

[32] After careful consideration of the history of the matter and the municipality's failure to comply with the Order of this Court, I am not satisfied that, on a balance of probabilities, the applicant has succeeded in surpassing the threshold to show that the municipality's conduct was in wilful disobedience of the Court Order. As the Constitutional Court in *Pheko* para 42 held:

'While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority.'

[33] I accordingly dismiss the application for contempt.

[34] I now turn to the applicant's claim for damages. Mr *Boulle* submitted that notwithstanding the Notice of Motion containing no prayer for damages, as a result of

the continued occupation of its property by the unlawful occupiers and owing to the failure of the municipality to comply with this Court's Order, I should grant an Order holding the municipality liable for the on-going costs associated with the provision of security services at the site where the unlawful occupiers presently reside. As stated earlier, these costs to date exceed R1,6 million. I agree with counsel that in the absence of an Order for contempt, a sanction (such as an award of damages) would probably be sufficient to accelerate a positive response from municipal officials.

[35] The question that arises is whether a law-abiding landowner should indefinitely continue to pay for the costs of maintaining some degree of order on its property by providing security services without any prospect of recovery from the occupiers, or for that matter, from the municipality who are primarily responsible for the delay in the relocation? I am of the view, *albeit obiter*, that in the absence of such costs ultimately not being borne by the municipality, the latter could continue to drag its feet in complying with the Order of this Court, without any repercussion for its recalcitrance. Mr *Boulle* urged me to be "creative" and grant relief to the applicant's for the damages sustained to date, despite the paucity of information before me as to how these costs were arrived at, their reasonable etc. In *Meadow Glen Home Owners Association & others v Tshwane City Metropolitan Municipality & another*¹¹ Wallis JA at para 35 notes the need for Courts to be:

'...to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socioeconomic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order; and the myriad other issues that may arise with orders, the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure ongoing oversight of the implementation of the order.'

¹¹ 2015 (2) SA 413 (SCA).

[36] I take no issue with the observations by Wallis JA above, but I am constrained by the facts in the matter presently before me. I also agree with Mr *Broster* that the municipality has not come before this Court to contest a damages claim. The applicant assesses its claim to be R999 001,80 based on costs incurred from the date of non-compliance with the Order of Sishi J until June 2015. That amount would have obviously increased with the effluxion of time from June 2015. The applicant may well have good grounds to pursue such a claim; however I do not consider that such a claim is properly before me, nor is the amount claimed clearly ascertainable without regard to further evidence. The claim also arose only in the replying affidavit and was pursued in the applicant's Heads of Argument. The municipality, to the extent that the claim would lay against it alone, has had no opportunity to raise a defence to the claim.

[37] I therefore decline the invitation to make any ruling in relation to the claim for damages, but consider it appropriate to refer the matter to trial in order for the claim to be properly ventilated. I am of the view that that is a just and equitable approach to such a claim.

[38] Mr *Boulle* handed several draft orders to me which contemplated either a dismissal or granting of the variation application, and all were consistent in believing that I would grant the order for contempt. That not being the case, the remaining issue is what steps must be taken to alter the time periods of the Order of Sishi J. Uniform Rule 27(1) empowers me to extend the time periods for the compliance with the Order. It seems entirely logical as the dates for the compliance with that Order have long passed and have been superseded by other events. To avoid any confusion that may result from the deletion of certain words, sentences or dates, the Order is modified to cater for the immediacy of the situation. I am not inclined to make any Orders as to the obligations of the municipality and/or the City Manager in carrying out the Order of 7 November 2012 (subject to the amended time periods below). These obligations are self-evident from sections 55 and 56 of the Local Government: Municipal Structures Act 117 of 1998.¹² I am also not inclined to grant any Orders to oversee the municipality's compliance with the relocation Order. The municipality must now comply with the Order and provide alternative housing to the

¹² See *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 JDR 0541 (SCA).

unlawful occupiers, whose names appear at pages 83 and 84 of the indexed papers. A salutary reminder as to the importance of observance of court orders was reinforced by the Full Court in *SA Litigation Centre v Minister of Justice*¹³ albeit with reference to the government as opposed to local authorities. The Court referred to section 165 of the Constitution which provides that the judicial authority of the Republic is vested in the courts, more particularly that

“(3) No person or organ of state may interfere with the functioning of the courts.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

[39] With regard to costs of the contempt application, the applicant sought costs on an attorney client scale. The municipality, in its Heads of Argument, tendered the applicant’s costs in respect of the contempt application. The applicant was compelled to come to Court only because of the delay by the municipality in relocating the unlawful occupiers. Even though it was unsuccessful in the contempt application, it would be unfair that the members of the applicant bear the costs of instituting these proceedings designed to ensure compliance by the municipality with its legislative obligations. I consider that an award of party and party costs to the applicant is an equitable result. As regards the counter claim, that application is dismissed with costs. The unlawful occupiers were represented *pro bono*. This Court is indebted to Mr *Jeffrey SC* and his instructing attorneys for their assistance to the occupiers.

[40] In the result, I make the following Order:

1. The second respondent’s counterclaim and variation application is dismissed with costs.
2. The applicant’s application for contempt of the eviction and relocation Order granted by this Court on 7 November 2012, is dismissed.

¹³ 2015 (5) SA 1 GP at 19, para [38]

3. The second respondent is directed to pay the applicant's costs of the contempt application;
4. The time periods set out in the Order of this Court issued on 7 November 2012 are amended to read as follows :

'(2) The persons referred to in paragraph 1 above are Ordered to vacate the said property by 31 March 2016.

(3) The second respondent (municipality) is Ordered and directed to erect and construct the wood and corrugated iron structures situated upon concrete platforms in the located sites owned by the second respondent at Emaus area, as contemplated in their housing report dated 4 April 2012 to relocate and house the Unlawful Occupiers currently occupying the applicant's property.

(4) The erection and construction of these structures shall be finalised on or before 24 March 2016.

(5) In the event that the Unlawful Occupiers do not vacate the property in accordance with the provisions of paragraph 2 hereof, then, three (3) days following the day referred to in para 2 thereof, being 4 April 2016, the sheriff is authorised to evict any such persons remaining in occupation of the property and is further authorised to employ any necessary force in Order to give effect to this Order.'

5. The applicant's claim for damages suffered from the date of non-compliance of the Order of 7 November 2012 until the date of final relocation of the 1st, 3rd, 4th, 5th, 6th, 7th and 8th respondents from its land situate at Erf [...] Pinetown, is referred for trial.
6. The applicant's replying affidavit dated 4 August 2015 shall stand as a simple summons.
7. The second respondent is directed to file its declaration within twenty [20] days of the granting of this Order.

M R CHETTY

Appearances:

For the Applicant

: Adv. A Boulle

Instructed by : Garlicke & Bousfield
Ref: CSeger\PN\yn\A235
Umhlanga Rocks- 031 570 5300

For the First Respondent : Adv AG Jeffrey SC

Instructed by : Larson Falconer Hassan Parsee Inc
Ref: 21\P303\001
Umhlanga Rocks- 031 534 1600

For the Second Respondent : Adv JB Broster

Instructed by : Berkowitz Cohen Wartski Attorney
Ref: e Sibiya\tn\52e336230

Date of Hearing : 26 November 2015

Date of Judgment : 15 February 2016