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**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

CASE NO: 2832/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED

DATE: 19/4/2024

SIGNATURE

In the matter between:

KOMATIPOORT DESPONDENT RESIDENTS ASSOCIATION

APPLICANT

And

**NKOMAZI LOCAL MUNICIPALITY
RESPONDENT**

FIRST

**MUNICIPAL MANAGER
NKOMAZI LOCAL MUNICIPALITY**

SECOND RESPONDENT

**EXECUTIVE MAYOR
EHLANZENI DISTRICT MUNICIPALITY**

THIRD RESPONDENT

**MEC ENVIRONMENTAL AFFAIRS, MPUMALANGA
RESPONDENT**

FOURTH

**MEC CO-OPERATIVE GOVERNANCE &
TRADITIONAL AFFAIRS
RESPONDENT**

FIFTH

MINISTER OF HUMAN SETTLEMENTS,
WATER AND SANITATION

SIXTH RESPONDENT

MINISTER OF ENVIRONMENTAL AFFAIRS
RESPONDENT

SEVENTH

JUDGMENT

Vukeya J

Introduction

[1] This application was first brought as an urgent application on 21 July 2023 after which it was case managed and enrolled for hearing in the normal cause on 25 January 2024. It served before me as an opposed application. Only the first, second and the seventh respondents opposed the application, the fifth respondent filed a notice to abide and the others did not oppose the application. Although the relief sought was in two parts, namely Part A and Part B, this court was only called upon to grant the relief sought in terms of Part A of the application.

[2] The relief sought by the applicant in terms of Part A of the notice of motion is for an order in the following terms:

2. Declaring that raw sewerage works at Komatipoort and at the places of spillage more comprehensively described at paragraph 11.3 of the founding affidavit, are flowing into and contaminating the Crocodile River. (For ease of reference: Para 11.3 reads as follows: 'Raw sewerage are flowing from inter alia the town's sewerage works to the Crocodile River. The sewage is spilling across Komatipoort Town, at inter alia the Transnet Building, Hotchkiss Street at the circle by Engen Garage, [...] L[...] Street, Spar Complex, the sewage pump at the

corner of Krokodil and Hartebees Streets, [...] G[...] Street and the sewerage plant in Krokodil Street')

3. Declaring that the Nkomazi Local Municipality represented by the first and second respondents, is in breach of its obligation to prevent contamination of the environment whilst allowing raw sewerage spills;

4. Declaring that the MEC for Environmental Affairs, fourth respondent, despite being informed of the problem, has not resolved the raw sewage spills;

5. The first, second and third respondents, representing the Municipalities involved, are compelled and ordered to urgently take remedial steps to stop the raw sewerage spills by immediately fixing the causes to the spillages and to remedy the effects of the pollution caused, and to rehabilitate the affected areas;

6. The first, second and third respondents, namely the Municipalities of Nkomazi and Ehlanzeni, are to report to court within ten (10) days of the order on the steps taken by them to give effect to prayer 5;

7. Authorising the applicant to employ an expert(s) to monitor the sewerage works from date of this order for a period of ten (10) weeks and to compile a comprehensive report for the court, with the first respondent being liable to pay all such reasonable costs of the said expert. To the extent that costs are disputed, the taxing master is to be approached for resolution thereof;

8. Ordering the Municipal Manager of the Nkomazi Local Municipality to imprisonment for 90 days, suspended on the following terms:

a) That the spillage of raw sewerage into the Crocodile River be cleared up within ten (10) calendar days from the date of the order and that the Nkomazi Local Municipality, represented by

*the First and/or second respondents duly assisted by the third to seventh respondents, be ordered to take all necessary steps to ensure that raw sewage is not discharged into the aforesaid river or onto land surrounding the respective sewerage works at Komatipoort and that spillage of raw sewage be resolved at the areas described *in paragraph 11.3 of the Founding Affidavit;*

b) that the Municipal Manager of the Nkomazi Local Municipality take immediate steps to ensure that the Municipality complies with its Constitutional obligations to provide potable water on a daily basis to the citizens within its resort;

c) The Municipal Manager of the Nkomazi Local Municipality to file a report at Court 11 calendar days from the date of this order on steps taken to resolve the spillage of raw sewage and the prevention of similar incidents in the near future and of the sustainable provision of potable water to all citizens in the resort of the Municipality.

9. That in the event that spills are not resolved within ten (10) days of this order and the Municipality fails to sustain the supply of potable water in terms of the Municipality's Constitutional obligation:

a) the order in 8 above be put into effect;

b) the Applicant be authorised to approach the court on the papers duly amplified for the relief set out in Part B.

10. Costs of suit of Part A, alternatively to be ordered on the return date.

11. To the extent that the court does not grant the final order as aforesaid under Part A, that:

a) the prayers as per part A to serve as interim order with immediate effect returnable on 17 November 2023 or such other date set by the Court whereat the respondents be called upon to show cause why the interim order should not be made final.

12. The applicant be granted leave to supplement the papers prior to the return date.”

Brief Background

[3] The applicant is the Komatipoort Despondent Residents Association. It is alleged in the founding affidavit that this association is a voluntary organisation which consists of paying consumers mainly of the town of Komatipoort and has about fifty (50) members. According to Lene Roux, a member of the applicant who avers that she is duly authorised to depose to the affidavit on behalf of the applicant, the members of the association act in concert to stop the violation of the applicant's rights to a safe environment as contained in section 24 of the Constitution. In the applicant's founding affidavit Lene Roux explains that the purpose of the application is to address a sewerage crisis experienced in Komatipoort, to protect the residents' Constitutional rights, to deal with the supply or lack of supply of potable water and to obtain appropriate relief to address the existing crisis.

[4] The bone of contention between the parties has to do with the shortage of potable water leading to appalling sewerage conditions and sewage spillages which, according to the applicant has some hazardous consequences to the citizens of Komatipoort and surrounding areas. This affects particularly the Komatipoort town and the Crocodile River, which, as it is alleged, was aimed to supply drinking water to the community yet raw sewage is dumped into that same river. It is further alleged that the situation is so out of control that residents received drinking water from the municipality on 06 May 2023 wherein live fish came through the pipes into the people's houses. The water received could not even be used as it contained many impurities.

- [5] It is the applicant's averment that the Municipality constantly fails its constitutional obligations. It avers that the spillage of raw sewage into the Crocodile River threatens the livelihood of all people dependant on the river, namely, the tourism community, residents, nature and natural resources in and around the river. The poor supply and the inadequate management of raw sewage steals the dignity from the people, it impacts on the health of the citizens and causes fly infestations and infectious diseases such as chronic diarrhoea.
- [6] The applicant avers that, on the strength of section 24 of the Constitution the provision of clean water and the treatment of sewage is the responsibility of the Municipality. The Municipality is obliged to provide services of which the standard improves over time. It submits that the pollution of water sources represents pollution of the environment and further that this pollution constitutes a breach of the respondents' constitutional obligations. According to the applicant, in spite of the obvious water shortages in the area, the Municipality failed to provide water to the residents by using water tankers, it (the applicant) had to get water from people with boreholes to make water available to those with no water.
- [7] Aggrieved by all of these, the applicant resorted to writing to various stakeholders of government, including COGTA and the Municipal Manager, complaining of the shortage of water and of the overflowing of the raw sewage into town and seeking intervention in terms of section 139 of the Constitution. A response from COGTA was received in which it recognised the issues regarding service delivery and associated some of the issues with the disastrous floods experienced in December 2022. COGTA undertook to monitor the implementation of plans by the Municipality. (See page 123).
- [8] The first and second respondents state, in their answering affidavit, that they wrote to the applicant's attorneys suggesting that the dispute be referred to the Inkomati-Usuthu Catchment Management Agency ("IUCMA") formed in terms of the National Water Act 36 of 1998. In this correspondence it is suggested to the applicant to report these incidents to the agency for it to take

charge of the process and to find a long-term solution. The applicant has not accepted this approach. The first and second respondents further denied that the Komatipoort sewerage works is not maintained. It denied any knowledge of the change of the colour of the water that reaches the households and that fish came out of the pipes as this was not reported to the Municipality. The second respondent disputes that he can be imprisoned without being charged and convicted of committing a criminal offence and prays to court not to grant an order for his imprisonment.

[9] Mr Grant Walters, the Director: Enforcement – Environmental Impact and Pollution, employed by the Department of Forestry, Fisheries and the Environment (“DFFE”) also deposed to an opposing affidavit on behalf of the seventh respondent. He states in the affidavit that the DFFE does not have the constitutional and legislative competence to prevent the flow of sewage that emanates from a Municipal sewerage works into rivers. He avers that the relief sought is misplaced. Mr Walters also avers that through the office of the State Attorney, it directed a letter to the applicant informing it that the relief sought is incompetent for the abovementioned reasons and advised the applicant to withdraw the application, an advice the applicant refused to heed to.

[10] The seventh respondent further avers that the applicant has failed to make out a case for the relief sought because it is placing the responsibility of the Municipality’s obligations on the DFFE, a National government department, in circumstances where it has failed to make out an appropriate case for a National Intervention as contemplated in section 139(7) of the Constitution. It submits that section 139 (7) does not provide for the National Executive to take over all of the Municipality’s functions. According to Mr. Walters the duties and functions which the National Executive is enjoined to perform in the event that section 139 (7) becomes applicable are limited to those set out in section 139 (4) and (5) depending on which section has been invoked by the provincial executive.

Points in limine

[11] Mr XT Mabila, the Municipal Manager (the “MM”) of the first respondent, deposed to an opposing affidavit on behalf of the first and second respondents. In this affidavit, save for denying that there is a spillage of raw sewage into the Crocodile river and that the first respondent has defaulted in its public duty to supply potable water to the communities forming part of the first respondent, the MM does not deal with the issues raised in the applicant’s founding affidavit, but raises the following points in limine:

11.1. The applicant lacks the necessary *locus standi* to institute this application as:

11.1.1. The applicant institutes this application as a class action, however, it has not complied with the requirements of a class action as it has not been certified as a class action;

11.1.2. Rule 16A of the Uniform Rules of Court requires that a party raising a Constitutional issue should issue a notice to that effect. The applicant has failed to comply with Rule 16A as required.

11.2. The applicant seeks a declaratory order on an interim basis. The first and second respondents argue that a declaratory order is a final relief and cannot be granted on an interim basis; and

11.3. The applicant should have exhausted all internal remedies before approaching the court for the relief it seeks.

Class Action

[12] With regard to the first point *in limine*, the respondent contends that the applicant institutes this application as a class action while it has not complied with the requirements of a class action one of which is to be certified as a class action by the court. In *Trustees for the time being of the Children’s*

Resource Centre Trust v Pioneer Food (Pty) Ltd (Legal Resources Centre as amicus curiae) 2013 (1) All SA 648 (SCA) at para 16 Wallis JA defines a class action as follows:

*“In class actions the party bringing the action does so, on behalf of the entire class, every member of which is bound by the outcome of the action, so that a separate action by a member of the class after judgment can be met with a plea of res judicata.”¹⁵ The concept is most fully defined, by Professor Mulheron (Professor Rachael Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* 3), in the following terms:*

‘A class action is a legal procedure which enables the claims (or parts of the claims) of a number of persons against the same defendant to be determined in the one suit. In a class action, one or more persons (‘representative plaintiff’) may sue on his or her own behalf and on behalf of a number of other persons (‘the class’) who have a claim to a remedy for the same or a similar alleged wrong to that alleged by the representative plaintiff, and who have claims that share questions of law or fact in common with those of the representative plaintiff (‘common issues’). Only the representative plaintiff is a party to the action. The class members are not usually identified as individual parties but are merely described. The class members are bound by the outcome of the litigation on the common issues, whether favorable or adverse to the class, although they do not, for the most part, take any active part in that litigation.’

- [13] In class actions a preliminary application should be brought before court requesting leave to institute or defend an action as a class action proceedings and to ask for directions as to procedure. An application for certification as a class action may be granted by the court where: (a) there is an identifiable class of persons; (b) a cause of action is disclosed; (c) there are issues of fact or law which are common to the class; (d) a suitable representative is

available; (e) the interests of justice so requires; and (f) the class action is the appropriate method of proceeding with the action. The list is not exhaustive, depending on the circumstances of each case. (See *CRC Trust v Pioneer Food* (Supra))

[14] The applicant stated as follows in its founding affidavit: *“To the extent that the first respondent or anyone else may wish to take issue with the applicant, I ask the court to authorize / certify the members of the applicant as a class with locus standi, albeit that they act herein in concert styled as the applicant. To stop violation of rights as contained in inter alia section 24 of the Constitution, to a safe environment and to have it protected and breached provisions of various environmental legislation”*. It avers that it is not a class action and therefore it is not necessary to comply with the requirements of a class action. It submitted that it stated the above in its affidavit to deal with any nature of any opposition challenging its *locus standi*, so it avers in its submissions.

[15] It was submitted by the applicant that, apart from the possibility of it being a class action, it also relies on section 24 and section 38 of the Constitution to show that it has a right to launch this application and to approach this court for the relief it seeks. Section 24 of the Constitution states that everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. It is on the basis of this section that the applicant finds *locus standi* and also relies on section 38 to seek the relief it prays for in the Notice of motion on the grounds as stated under section 38 (d) of the Constitution.

[16] The purpose of section 38 of the Constitution is to broaden the standing in constitutional litigation since the constitutional era. As a result, anyone acting in the interest of others or public interest may, since the Constitution came

into operation, approach the court for relief where there is an alleged infringement of a constitutional right and not only those with direct vested interest in litigation. Section 38 opened the doors for people acting in their own interests, on behalf of others who cannot act on their own, anyone acting in public interest, etc. Section 38 of the Constitution Act of the Republic of South Africa 108 of 1996 provides that:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

(a) Anyone acting in their own interest;

(b) Anyone acting on behalf of another person who cannot act in their own name;

(c) Anyone acting as a member of, or in the interest of, a group or class of persons;

(d) Anyone acting in the public interest; and

(e) An association acting in the interest of its members.

- [17] In this constitutional democracy, the role of Section 38 of the Constitution is to actually cover a wide range of wavelengths which includes class actions. In *Ferreira v Levin and Vryenhoek v Powell* 1996 1 BCLR 1 (CC) the following was stated regarding the role of section 38: *“This role requires that access to courts in constitutional matters should not be precluded by rules of standing developed in a different constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.”*

[18] In *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape and others* 2001 (2) SA 609 (E) it was held that Section 38 of the Constitution of the Republic of South Africa Act provides for the enforcement of the rights protected by the Bill of Rights not only by persons acting in their own interests but also, inter alia, by '(b) anyone acting on behalf of another person who cannot act in their own name; [and] (c) anyone acting as a member of, or in the interest of, a group or class of persons'. In essence, section 38 of the Constitution is not restrictive. It is in fact flexible and generous as it allows for an easy approach towards the litigation of public issues that may even affect some of the indigent members of our society who may not afford to bring their own issues to court. In this particular case, the applicant consists of citizens of Nkomazi Local Municipality who are acting in their own interests and the applicant also states that it is an association acting in the interests of its members who are affected by the alleged conditions in the Municipal area concerned. Closing the doors of litigation in the face of the applicant will therefore be contrary to the objectives of section 38 of our Constitution.

[19] On the basis of the above, my view is that there is no justification for a finding that the applicant has no *locus standi* to bring this application. Whether the applicant applies as a class action is irrelevant, the applicant's reliance on sections 24 and 38 of the Constitution is sufficient to find *locus standi*. It is my considered view that the point *in limine* has no merit and that it falls to be dismissed. It is accordingly dismissed.

Rule 16A of the Uniform Rules

[20] It is further contended by the first and second respondents that, the applicant does not have *locus standi* because it has not complied with Rule 16A of the Uniform Rules of Court which requires that a party raising a Constitutional issue should issue a notice to the registrar at the time of filing the relevant affidavit or pleading and therefore the application ought to be dismissed for non-compliance. Rule 16A (1) (a) provides that:

“Any person raising a constitutional issue in an application or action shall give notice thereof (b) Such notice shall contain a clear and succinct description of the constitutional issue concerned. (c) The registrar shall, upon receipt of such notice, forthwith place it on a notice board designated for that purpose. (d) The notice shall be stamped by the registrar to indicate the date upon which it was placed on the notice board and shall remain on the notice board for a period of 20 days”.

- [21] The first and second respondents took issue with the applicant’s failure to file a notice with the registrar as required in terms of Rule 16A (1) (a) and in replying to this issue, the applicant states in its replying affidavit that although it speaks about the trampling of Constitutional rights, it does not raise a constitutional issue per se which requires a rule 16A notice and therefore this point *in limine* cannot be allowed to stand. The applicant’s submission is that it is not calling upon the court to interpret the constitution or to declare any law unconstitutional. It is actually calling upon the court to apply the constitution and to give effect to the constitutional rights of the applicant.
- [22] Counsel for the applicant submitted that when one relies on rights entrenched in the constitution but does not ask the court to consider or to declare a specific portion of an act or regulation unconstitutional, there is no requisite that a rule 16A notice be given to the registrar. He relied on the case of *Kenton-on-sea Ratepayers Association and Others v Ndlambe Local Municipality and Others* 2017 (2) SA 86 (ECG) to support this submission. On the basis of these arguments the applicant prays to the court to dismiss the point *in limine*.
- [23] Although rule 16A seems to be peremptory, it still gives the court discretion to dispense with the notice requirement if it is in the interests of justice to do so. This is provided for in sub-rule 9 of Rule 16A which reads thus: *“The court may dispense with any of the requirements of this rule if it is in the interests of justice to do so.”* In *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) the court remarked as follows:

“One can conceive of many reasons why, in a particular case, it may be in the interests of justice to dispense with this requirement of Rule 16A. Here, two are relevant. First, this application has received very wide notice in the public media. The public attention which it has received is considerably greater than would have been occasioned by placing a notice on a notice board at this Court. That being so, the fundamental purpose sought to be achieved by the Rule has, in fact, been achieved, namely, that the existence of this litigation has been brought to the attention of persons who might wish to intervene. Secondly, there is an element of urgency in the proceedings, as it is in the public interest that this dispute should be resolved one way or the other, so that members of the public and the City will know where they stand. The case affects the budget and operations of a major city, and the monthly liabilities of a very large number of people who live in Cape Town. It is in the interests of justice that the matter be disposed of as soon as is reasonably possible.”

- [24] Firstly, the issues complained about in *casu* affects the Komatipoort community in general and if the allegations are found to be true, it is a health hazard that has to be attended to as a matter of urgency. Secondly, the purpose of the application is to encourage service delivery in a form of providing drinkable water to the affected communities and ensuring that they live in an environment that is not harmful to their health or well-being; and to prevent pollution and ecological degradation. This is a call for the court to defend their constitutional rights and to deal with a breach of a Constitutional right rather than a constitutional challenge. It is therefore my respectful view that it is in the interests of justice that the giving of the 16A notice be dispensed with. The point *in limine* is dismissed.

A final Order or an Interim order

- [25] The second point *in limine* relates to the fact that the applicant seeks a declaratory order on an interim basis. Counsel for the first and second respondents argued that a declaratory order is a final relief and cannot be

granted on an interim basis. He contends that the applicant's Notice of Motion is irregular and that on the basis of this point, the application falls to be dismissed. Counsel for the applicant made submissions and referred the court again to *Kenton-on-sea* (supra) and to *Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others* 2017 (3) SA 383 (ECG) to argue that there is no irregularity in the manner in which the Notice of Motion was drafted by the applicant and that the court ought to dismiss this point *in limine*.

- [26] As is apparent from the prayers in the applicant's notice of motion (Part A), the applicants are seeking to curtail the respondents' alleged unlawful conduct by means of declaratory orders, alternatively, and to the extent that the court does not grant the final order that the prayers as per part A to serve as interim order with immediate effect returnable on such a date set by the Court whereat the respondents be called upon to show cause why the interim order should not be made final. Clearly, the applicant is aware of the fact that it prays for a declaratory order which is final in its very nature, however, it also prays for an interim order, only in the alternative depending on whether the court refuses to grant the declaratory and the structural orders. The first and second respondent's point *in limine* is dismissed, it has no merit.

Internal remedies

- [27] Although this issue was not raised as a point *in limine*, it is important that it be dealt with at this point for the sake of completeness. The first and second respondents stated in their founding papers that they wrote to the applicant's attorneys suggesting that the dispute be referred to the Inkomati-Usuthu Catchment Management Agency ("IUCMA") formed in terms of the National Water Act 36 of 1998, suggesting to the applicant to report these incidents to the agency for it to take charge of the process and to find a long-term solution. They averred that the applicant did not accept this approach.
- [28] According to Counsel for the applicant, there is no statutory provision that binds the applicant to exhaust internal remedies. Counsel submitted that the

suggested remedy was not an internal remedy available to the applicant. He basis his submission on the evidence of the applicant that the IUCMA is another example of a complacent organ of the state that came into movement after this application was issued. Counsel referred the court to certain emails and correspondences showing that there has been no response on the reported challenges from IUCMA. He submits that, despite the reported challenges to IUCMA, no problem is resolved sustainably.

- [29] Firstly, the IUCMA was established in terms of section 78 of the National Water Act 36 of 1998 to manage water resources and to promote equal access to water and to promote the environment. Its functions include, amongst others, to investigate and advise interested persons on the protection, use, development, conservation, management and control of water resources in its water management areas and to prevent and remedy effects of pollution. This may be the position with IUCMA, however, it is not a requirement to first approach this agency before one brings a matter to court. Even-so, the applicant has shown that it wrote several letters to IUCMA to intervene but never received any responses to the requests it made. This shows that this agency totally ignores the pleas of the people it was established to serve or that it is total dysfunctional. This point *in limine* is also dismissed.

The merits

- [30] Having dismissed the respondent's points *in limine* I now proceed to deal with the application on its merits, taking cognisance of the fact that the respondents based their opposition of the application only on the points *in limine* and ignored the merits. In essence the application becomes unopposed and I only have to determine whether the applicant has made out a good case for the granting of the prayers in the Notice of Motion and whether these prayers are competent to grant.
- [31] Firstly, the applicant bases its application on the fundamental constitutional rights as expressed in section 24 of the Constitution which guarantees

everyone a right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[32] There is no doubt, when properly reading the Constitution under Part B of Schedule 4 and 5, that water and sanitation services limited to potable water supply systems, domestic waste water and sewage disposal systems responsibilities and obligations are placed on the Local and District Municipalities. These responsibilities are also placed on Local and District Municipalities by sections 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998. Although these responsibilities are divided between the two institutions by these sections, it bestows the powers and functions to these two bodies.

[33] In *Kenton-on-sea* (supra), Lowe J said the following at paragraphs [19] – [22] regarding the responsibilities of the Local and District Municipalities:

“[19] The constitutional imperatives that direct the duties of organs of state must be read with ss 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) which divides this responsibility between first and second respondents. Section 84 states as follows:

'Division of functions and powers between district and local municipalities

(1) A district municipality has the following functions and powers

—

. . .

(d) *Domestic waste-water and sewage disposal systems.*

(e) *Solid waste disposal sites, insofar as it relates to —*

(i) the determination of a waste disposal strategy;

(ii) the regulation of waste disposal;

(iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district.

. . .

(m) Promotion of local tourism for the area of the district municipality.

(n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality'

[20] *In terms of s 83 of the Structures Act:*

'(1) A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution.

(2) The functions and powers referred to in subsection (1) must be divided in the case of a district municipality and the local municipalities within the area of the district municipality, as set out in this Chapter.

(3) A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by —

(a) ensuring integrated development planning for the district as a whole;

(b) promoting bulk infrastructural development and services for the district as a whole;

(c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and

(d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area.'

[21] *Section 84(2) of the Structures Act provides that:*

'A local municipality has the functions and powers referred to in section 83(1), excluding those functions and powers vested in terms of subsection (1) of this section in the district municipality in whose area it falls.'

[22] *In the result, the constitutional responsibility of first respondent in this matter arises from the Bill of Rights and the provisions of s 156 of the Constitution as read with ss 83 and 84 of the Structures Act."*

[34] The provision of services by the Municipality is not merely a matter of defining competences. Rather it is an issue that defines and constitutes the very nature of this state institution. Of all the three spheres of government, the notion of a government in service of its community is perhaps most

compelling with respect to local government. Not only is the role of the Municipality that of service provider, but also, very distinctively that of developer of the community. The notion of developmental local government should therefore be the leitmotif in interpreting the constitutional mandate with regard to municipal services. (See Woolman & Bishop *Constitutional Law of South Africa* 2 ed vol 2 (Juta) at 22 – 63).

- [35] I conclude that the constitutional obligations to ensure that these services are provided to the communities rests on the Local and District Municipalities and that the applicants have proven on a balance of probabilities that they have a clear right to the relief sought in the Notice of motion against first, second and third respondents.
- [36] The next question is whether the Minister of Environmental Affairs (seventh respondent) has the same responsibilities as the Local and District Municipalities when it comes to solid waste, resolving issues of raw sewage spills and ensuring that raw sewage is not discharged into the Crocodile river or onto land surrounding the sewerage works at Komatipoort or anywhere in the Republic of South Africa for that matter. The National Environmental Management Act was enacted to give effect to section 24 dealing with environmental rights.
- [37] Perhaps one should start by visiting the preamble of the National Environmental Management Act 107 of 1998 (“NEMA”) in order to try and answer this question. NEMA was enacted to acknowledge that the society has environmental challenges by stating that many inhabitants of South Africa live in an environment that is harmful to their health and well-being. It also acknowledges the basic human rights to an environment that is not harmful to the health or well-being of the South African citizens and it bestows the responsibility to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities to the state.

- [38] Furthermore, and amongst many other factors mentioned in the preamble of NEMA, it acknowledges that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. It is clear that the promulgation of NEMA was intended for all spheres of government and all organs of state to co-operate with, consult and support one another in protecting the constitutional rights of the citizens to an environment that is not harmful to their health and well-being.
- [39] Amongst other principles established by section 2(4) (p) of NEMA, it is even stated that, in the event anyone is found to have polluted the environment, the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimizing further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.
- [40] The seventh respondent, being a National Government department, contends that the applicant has failed to make out a case for a National Intervention as contemplated in section 139 (7) of the Constitution which provides that, if a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive. Section 139 (4) and (5) provide that:
- (4) *If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and-*

(a) *appointing an administrator until a newly elected Municipal Council has been declared elected; and*

(b) *approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.*

(5) *If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-*

(a) *impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-*

(i) *is to be prepared in accordance with national legislation; and*

(ii) *binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and*

(b) *dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-*

(i) *appoint an administrator until a newly elected Municipal Council has been declared elected; and*

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

[41] My view, however, is that, as the issues in this application relate to an environmental hazard, amongst others, the Provincial executive, the fourth respondent in *casu*, does have a constitutional obligation to intervene as directed by section 139 (1) which provides that, when a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including, but not limited to, issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations and assuming responsibility for the relevant obligation in that municipality to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of a service.

[42] The National Government Department, namely, the seventh respondent can only intervene if the provincial executive cannot or does not adequately exercise its powers or perform the functions referred to in section 139 (4) or (5) of the Constitution. I am inclined to agree with the seventh respondent that the applicant has not made out a case for the relief sought against it. The DFFE is not necessarily exonerated from its constitutional obligations but the different functional areas of the National and Provincial bodies have to be recognized. It is true, if one looks at section 139 of the Constitution that it lacks the competence and authority to interfere in the prevention of sewage spillages in the flow of these spillages into rivers. The fourth respondent however, being the relevant provincial executive responsible for matters of

environmental health hazards such as the one complained about in this application, may intervene if the municipality cannot or does not fulfil its obligation in terms of the Constitution.

[43] Evidence of different water shortages and sewage spillages as depicted under Annexures “RA 2” to “RA 4” is overwhelmingly shocking. Several Email correspondences addressed to a number of state organs were sent about the raw sewage spillages in Komatipoort and the surrounding areas falling under the first respondent, to no avail. Some of these correspondences caught the attention of the Human Rights Commission during 2019 and when the HRC gave directives to the first respondent and such were not followed. The fifth respondent who elected to abide by the court order, did respond to the cries of the residents of Komatipoort and recognized the issues but blamed these issues on the floods experienced by the Municipality during December 2022. The fifth respondent promised to intervene and respond to the residents’ concerns but it is clear that nothing has been done up to the date of this application.

[44] These and factors such as the water shortages, the dirty water provided to the communities, the sewage spillages in the streets and into the Crocodile river, are sufficient to conclude that the first, second and third respondents have failed in their constitutional duties to ensure that they protect the citizens’ right to an environment that is not harmful to their health or well-being; and to have the environment protected, for their benefit. I therefore find that the Nkomazi Local Municipality represented by the first and second respondents, is in breach of its constitutional obligations to prevent contamination of the environment whilst allowing raw sewerage spills to flow in the town and into the Crocodile River. Such could have been prevented by ensuring a continuous maintenance of the sewerage works in Komatipoort and by providing potable water to its communities.

Contempt of Court

[45] Under paragraph 8 of the Notice of Motion the applicant prays for an order that the Municipal Manager of the Nkomazi Local Municipality be ordered to imprisonment for 90 days, an order which should be suspended on condition that: a) That the spillage of raw sewerage into the Crocodile River be cleared up within ten (10) calendar days from the date of the order and that the Nkomazi Local Municipality, represented by the First and/or second respondents duly assisted by the third to seventh respondents, be ordered to take all necessary steps to ensure that raw sewage is not discharged into the aforesaid river or onto land surrounding the respective sewerage works at Komatipoort and that spillage of raw sewage be resolved at the areas described in paragraph 11.3 of the Founding Affidavit; b) that the Municipal Manager of the Nkomazi Local Municipality take immediate steps to ensure that the Municipality complies with its Constitutional obligations to provide potable water on a daily basis to the citizens within its resort; and c) that the Municipal Manager of the Nkomazi Local Municipality to file a report at Court eleven (11) calendar days from the date of this order on steps taken to resolve the spillage of raw sewage and the prevention of similar incidents in the near future and of the sustainable provision of potable water to all citizens in the resort of the Municipality.

[46] The applicant further prays under paragraph 9 of its Notice of motion that in the event that spills are not resolved within ten (10) days of the order and the Municipality fails to sustain the supply of potable water in terms of the Municipality's Constitutional obligation then the order referred to in paragraph 8 of its Notice of Motion be put into effect. Counsel for the applicant referred the court to the case of *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) in support of the submission that the approach the applicant wishes the court to follow is correct. This approach requires the court to make an order against the MM for imprisonment for 90 days in the absence of a previous order directing the MM to perform certain acts. It seems the applicant wants to put the cart before the horse and this is evident from a proper reading of *Fakie* (supra). In *Fakie*, Cameron JA summarised the requirements for the granting of an order for Contempt of Court as follows at para 41 and 42:

[41] Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. [My emphasis] The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.

[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) 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.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

[47] In *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C) the court defined contempt of court as “*the deliberate, intentional (i.e. wilful) disobedience of an order granted by a court of competent jurisdiction*”. It is clear from the above wording (*in Fakie, (supra)*) that the applicant must first obtain an order against the MM to perform certain duties; that order must first be served on the MM, and then there has to be non-compliance with the order which non-compliance must be wilful and *mala fide*. The applicant therefore bears the onus to show that these three requirements have been met and the respondent only has to advance evidence which establishes a reasonable doubt that non-compliance was wilful and *mala fide*. What I see in this application is an applicant who seeks an order for contempt of court before any order has been granted and served on the MM. The applicant seeks an order for contempt of court simultaneously with an order directing the MM to perform certain duties. This prayer is for an order for committal to prison suspended until it has been breached. This approach is bad in law and if the order is granted, it will amount to a violation of a Constitutional right of the person to be committed to prison.

[48] My view is that, it is premature at this stage to grant an order for contempt of court as no order has been granted against the MM yet and therefore no order has been breached by the MM at this point. The relief sought in prayer 8 of the Notice of Motion is in my view inappropriate because of the reasons stated above. Therefore I find that the applicant has failed to show that there was an order granted against the MM, which was served and not complied with, wilfully.

Conclusion

[49] I am satisfied that the applicant has, made out a good case for the relief they seek in terms of the Notice of motion, in summary, showing that there are water shortages and sewage spillages flowing in the town of Komatipoort and surrounding areas which spill into the Crocodile river thereby causing a health hazard to the communities. The waste disposal sites and sewerage works in Komatipoort are not well managed and therefore need urgent attention as these are the causes of the sewage spillages encountered. The applicant has also proven that the first respondent, represented by the second and third respondent is in breach of its constitutional obligations to prevent contamination of the environment by allowing raw sewerage spills.

Order

[50] In the result I make the following order:

50.1. It is declared that raw sewerage works at Komatipoort and at the places of spillage namely, the Transnet Building, Hotchkiss Street at the circle by Engen Garage, [...] L[...] Street, Spar Complex, the sewage pump at the corner of Krokodil and Hartebees Streets, [...] G[...] Street and the sewerage plant in Krokodil Street are flowing into and contaminating the Crocodile River.

50.2. It is declared that the Nkomazi Local Municipality represented by the first and second respondents, is in breach of its constitutional obligation to prevent contamination of the environment by allowing raw sewerage spills;

50.3. The first, second and third respondents, representing the Municipalities involved, are compelled and ordered to urgently take remedial steps to stop the raw sewerage spills by immediately fixing the causes to the spillages and to remedy the effects of the pollution caused, and to rehabilitate the affected areas;

50.4. The first, second and third respondents, namely the Municipalities of Nkomazi and Ehlanzeni and the Municipal Manager of Nkomazi Municipality, are to file a report to the Registrar of this court within twenty one (21) days of this order on the steps taken by them to give effect to prayer 50.3;

50.5. The applicant is authorised to employ an expert to monitor the sewerage works from date of this order for a period of twelve (12) weeks and to compile a comprehensive report to be filed with the registrar of this court, with the first respondent being liable to pay all such reasonable costs of the said expert. To the extent that costs are disputed, the taxing master is to be approached for resolution thereof;

50.6. The Municipal Manager of the Nkomazi Local Municipality is ordered to:

50.6.1 ensure that the spillage of raw sewerage into the Crocodile River be cleared up within twenty one (21) calendar days from the date of the order;

50.6.2. ensure that the Nkomazi Local Municipality, represented by the second respondents duly assisted by the third to sixth respondents, be ordered to take all necessary steps to ensure that raw sewage is not discharged into the aforesaid river or onto land surrounding the respective sewerage works at Komatipoort and that spillage of raw sewage be resolved at the areas described in paragraph 50.1 of this order.

50.6.3. take immediate steps to ensure that the Municipality complies with its Constitutional obligations to provide potable water on a daily basis to the citizens within its resort;

50.6.4. file a report with the registrar of this Court, 21 calendar days from the date of this order on steps taken to resolve the spillage of raw sewage and the prevention of similar incidents in the near future and of the sustainable provision of potable water to all citizens in the resort of the Municipality.

50.7. Costs to be paid by the first respondent on a party and party scale, such costs to include costs of Counsel.

VUKEYA J
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION

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Heard on: 25 January 2024

Delivered on: 19 April 2024 (*TRANSMITTED BY E-MAIL TO THE PARTIES*)