

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2019-42316

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	
DATE 28 February 2025	SIGNATURE

BEFORE THE HONOURABLE JUSTICE, AUCAMP AJ

In the matter between:

NICHOLAS JOHN ROBERT WAGG

First Applicant

SARAH JANE WAGG

Second Applicant

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

**ACTING MANAGER OF THE CITY OF JOHANNESBURG
MR FLOYD BRINK**

Second Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

- [1] On 08 March 2021 the applicants obtained an order from this court against the first respondent, (***“the Municipality”***) in respect of which the Municipality was directed and ordered to *inter alia* make certain adjustments to the applicant’s municipal account held with the first respondent (***“the Majavu AJ judgement”***)
- [2] It is common cause that the Municipality did not comply with the aforesaid order and as a consequence, the applicants proceeded to issue a warrant of execution against the Municipality which writ was duly executed and certain moveable assets of the Municipality was placed under judicial attachment.
- [3] The execution of the writ of execution was met with an urgent application launched by the Municipality on 14 May 2021 seeking, in terms of Part A, a suspension of the execution and in terms of Part B, the rescission and variation of the Majavu AJ judgment.
- [4] Manoin AJ on 20 May 2021 granted an order interdicting the sheriff from removing from the offices of the Municipality the assets under judicial attachment and staying the execution of the writ of execution pending the rescission and variation application initiated by the Municipality.
- [5] The rescission and variation applications served before Motha AJ and on 17 March 2023, and in respect of which the following order was made:
- “1. The rescission application is dismissed.
 2. The variation application is dismissed.
 3. The suspension of Majavu AJ’s Judgement is lifted.
 4. The City is ordered to pay costs on an Attorney and Client scale.”
- [6] Motha AJ was further extremely critical of the manner in which the Municipality conducted itself and which dissatisfaction formed the corner stone of the costs order against the Municipality.
- [7] The Municipality unsuccessfully applied for leave to appeal against the judgment of Motha AJ. With the suspension ordered by Manoin AJ having been lifted by Motha AJ, and the Municipality having failed to comply with the Majavu AJ judgement, the applicants initiated contempt proceedings against

the Municipality and second respondent, the Municipal Manager which application served before me.

- [8] I granted the application and it is against this judgement that the respondents make application for leave to appeal.

THE TEST: - LEAVE TO APPEAL

- [9] Leave should be granted if the appeal "...*would have reasonable prospects of success or there is another compelling reasons to grant it*"¹ Leave to appeal is not for the asking. It should be granted "...*only when there is 'a sound, rational basis for the conclusion that there are prospects of success on appeal.*"²

GROUND FOR LEAVE TO APPEAL

- [10] The Majavu AJ judgement and that the Municipality failed to comply therewith are not in dispute.³ It is further common cause that the requirements of a contempt of court application are, (a) the existence of a court order, (b) the contemnor must have had knowledge of the court order, (c) there must be non-compliance with the court order and (d) the non-compliance must have been wilful or *mala fide*.⁴

[i] Non-Joinder of Municipal Manager

- [11] The respondents submit that I erred in having found that the non-compliance to the Majavu AJ judgement was wilful and *mala fide*. It is further suggested that I erred in not having dismissed the application on the grounds that the Municipal Manager was not a party to the proceedings before Majavu AJ or in the contempt of court application and as such he needed to have been formally joined.

- [12] I deal with the latter objection or ground for leave to appeal first.

¹ Superior Court's Act 10 of 2013 s17(1)(a)

² Four Wheel Drive Accessory Distributors CC v Rattan NO [2018] ZASCA 124; 2019 (3) SA 451 (SCA) at para 34, quoting from S v Smith [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7

³ See paragraph 9. of the Heads of Argument filed on behalf of the Respondents

⁴ Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52

[13] The argument of the respondents in this regard goes as follows:

- a. I erred in having found that the Municipal Manager, as Accounting Officer, was served with the application and that since he was cited to the application, that he had an opportunity to respond to the allegations made by the applicants.
- b. The contempt application was initiated under the same case number as the case number assigned to the Majavu AJ judgement, however, the Municipal Manager was not a party to that application.
- c. I erred in not having followed **Spectrum (Pty) Ltd and Others v City of Johannesburg Metropolitan Municipality and Another**⁵ wherein it was purportedly found that the failure to join a party to the contempt proceedings is fatal to the said application in instances where the party sought to be held in contempt, was not a party to the initial proceedings.

[14] As will be demonstrated, the issue is not whether the Municipal Manager was cited in his personal capacity and/or that the application was not served on him personally. It is clear that the second respondent was cited in his personal capacity and that the application was served upon him in his personal capacity. The issue instead, is a rather technical one, whether it is competent to hold the Municipality Manager in contempt, where he was not cited as a party to the initial application, but cited as a party in the contempt application. Both applications are issued under the same case number.

[15] Impliedly, the respondents, with reference to the various authorities, submit that in an application concerning a Municipality or any other organ of state for that matter, the applicant to such an application must, as a matter of necessity join the responsible person for that state organ, the Municipal Manager in this instance to the initial application. This is so, so the argument is understood, to be able to hold the Municipal Manager in contempt of court, should the Municipality fail to comply with the said order at a later stage in respect of an application (contempt). If the Municipal Manager is not cited as an initial party

⁵ (28694/2020) [2024] ZAGPJHC 929 (17 September 2024)

to the underlying application, and a subsequent contempt application is brought under the same case number, then a formal joinder of the Municipal Manager in terms of Rule 10 of the Uniform Rules of Court, would be required. Impliedly, the arguments of the respondents further suggest that a subsequent contempt application should be brought under a separate case number with the Municipal Manager cited therein as an interested party.

- [16] The objection levelled at my judgement that I erred in following or applying legal precedence on this issue, calls upon me to consider each of the authorities referred to by the respondents in this application.

Spectrum (Pty) Ltd and Others v City of Johannesburg Metropolitan Municipality and Another

- [17] The applicants initiated contempt proceedings, using the same case number as the underlying main proceedings and alleging that the respondents failed to comply with an earlier court order.
- [18] The applicants brought the contempt proceedings against both the City (first respondent) and the Municipal Manager, Floyd Brink (second respondent), arguing that non-compliance with the earlier order warranted a contempt finding.
- [19] The respondents submitted that the applicants had not complied with key procedural rules *inter alia* that they did not properly join the Municipal Manager as an interested party under Rule 10 of the Uniform Rules of Court.
- [20] The central issue for consideration was whether the failure to formally join and personally serve the Municipal Manager (Floyd Brink) rendered the contempt application defective.
- [21] In paragraph 32 of the said judgement, McCafferty AJ, held that: "*In the ordinary course, the issue by the Applicants of their Contempt Application under the same case number as the main application which gave rise to the Order, would mean that the joinder of the Second Respondent for the purposes of executing the Order was procedurally necessary.*" This finding,

not supported by any authority or previously decided cases, must be read with what the learned Judge stated in paragraph 38 of his judgement, as this paragraph seems to have been the motivation behind the finding in paragraph 32. Paragraph 38 reads:

“In *casu*, there is nothing on the papers which indicates that before the service of the Contempt Application upon the Second Respondent, Brink, he was served with the Order personally, or that he was informed in his personal capacity, of the case he was to face. These facts, as in *Diluculo*, show, in my view, that the objection of non-joinder by the Respondents is not a purely idle or technical one taken simply to cause delays but rather from a legitimate concern regarding the rights of the Second Respondent, Brink. I find therefore, that the point in limine has merit and is thus upheld.”

[emphasis added]

- [22] The finding(s), as a consequence, were arrived at, not as a result of the procedural objection raised and premised on Rule 10, but rather on the grounds that the court was not satisfied that the Municipal Manager had any knowledge of the application and the relief being claimed against him.

Malaoa v Malaoa and Others⁶

- [23] The matter concerned contempt proceedings in which the applicant had alleged non-compliance with a previously obtained court order.
- [24] The central issue for consideration was whether the failure to join a party to the pending application by not having served that party with the application personally, rendered the contempt application defective.
- [25] The judgement, finding support in **Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Ltd⁷** held that the non-joinder of a necessary party to proceedings does not constitute a mere technicality but a fatal defect. The

⁶ 2023 JDR 1931 (FB)

⁷⁷ (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (1) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017)

judgement confirmed that if a key party is not personally notified, the proceedings targeting that person cannot be sustained.

Diluculo Properties (Pty) Ltd v City of Johannesburg and Another⁸

[26] In this matter, the applicant initiated contempt proceedings against the Municipality in respect of the alleged non-compliance with a prior order. The proceedings raised the very same issue regarding whether the Municipal Manager had been properly joined in his / her personal capacity.

[27] Although the Municipal Manager was cited in the proceedings, he was not formally joined or served in his personal capacity. This, the court held to be crucial in relation to contempt proceedings, given their potential for severe sanctions. The court held that any party against whom a contempt finding is sought must be given proper personal notice and an opportunity to respond thereto.

[28] The court ultimately concluded that personal service is indispensable when a contempt order might impose serious consequences.

[29] The failure to effectuate personal service means that the intended public official's rights to due process had been violated.

**Matjhabeng Local Municipality v Eskom Holdings Limited and Others;
Mkhonto and Others v Compensation Solutions (Pty) Ltd**

[30] The dispute arose from a settlement agreement between the Municipality and Eskom concerning overdue electricity bills. A court order was issued to regulate monthly payments to clear the arrears. When the Municipality, and specifically the Municipal Manager, failed to comply with the subsequent, more stringent order, the Municipal Manager was held in contempt by the Free State High Court and sentenced to a suspended term of imprisonment.

[31] In the Mkhonto *supra*, the issues centred on the administration of a settlement order by the Compensation Fund. The order called upon the Commissioner to

⁸ [insert]

process and pay medical claims within a set timeframe. After multiple actions and settlement attempts, the Commissioner was later found in contempt by the Supreme Court of Appeal for failing to establish that his non-compliance was not wilful or *mala fide*. He was sentenced for a period of time.

[32] The Constitutional Court⁹ held:

“Bearing in mind, that the persons targeted were officials concerned – the Municipal Manager and Commissioner in their official capacities – the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their personal capacities – by name – and not in their nominal capacities. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the circumstances, be said to have been in contempt and be committed to prison.”

[33] In *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another*¹⁰ the director in question, a certain Mr Fanie Fenyani, was directly cited by name and served with the application. The application was however refused on the basis that the court deemed it inappropriate to hold the Municipality Manager in contempt of a structural order.

[34] The logical conclusion of what the Municipality submits is that, either, and in anticipation of a failure by the Municipality to comply with the initial order, the Municipality Manager as a pre-cautionary step should be cited as an interested party, or, in subsequent contempt proceedings under the same case number, a substantive application to have the Municipality Manager joined to the application is required, this, regardless of the Municipal Manager having been cited in the contempt application and having been served with the application personally.

[35] The authorities referred to and relied upon by the respondents do not support the contention that in the present instance, a formal joinder in terms of Rule 10 had to be effected and that the failure to have done so should have been fatal to the contempt applications.

⁹ At Para [103]

¹⁰ 2015(2) SA 413 (SCA)

[36] In the present matter, the Municipal Manager, or acting Municipal Manager, Mr Floyd Brink, was joined to the application in his personal capacity. It is equally, common cause that the application was served on him.

[37] As a consequence, the first ground of appeal is without any merit.

[ii] Wilful of *Mala Fides*

[38] As previously stated, the respondents admit the existence of and the terms of the Majavu AJ judgement. Equally, the respondents admit that the first respondent has not complied with the said order. The respondents however submit that my judgement and order is appealable on the grounds that:

- a. I failed to specify in my judgement which orders of the Majavu AJ judgement the Municipality failed to comply with which leaves the assumption that the Municipality failed to comply with all of the orders of the judgement under consideration.
- b. In support of the above contention, reliance is placed on **Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others**¹¹
- c. I failed to engage on the issue left by Judge Motha AJ in refusing to change the credit into the money judgement and there is no clarity on how the Municipality could implement such order.
- d. I erred in that I failed to consider the facts pleaded in both the founding affidavit and the defences raised by the Municipality in finding that the applicants proved their case beyond reasonable doubt and imposed an imprisonment of the Municipal Manager.
- e. I failed to appreciate that there existed an apparent clear confusion and a genuine dispute on how the Majavu AJ judgement was capable of implementation in light of the fact that the applicants' account was closed and that the applicants were no longer the owners of the account.

¹¹ (CCT 54 / 22) [2023] ZACC 2; 2023 (4) BCLR 361 (CC) (24 January 2023)

[39] On the aforesaid submissions it is alleged that the applicants apparently:

- a. Failed to demonstrate, either on a balance of probabilities or beyond a reasonable doubt that the respondents had failed and refused to comply with the judgement and order of Majavu AJ, especially under circumstances where the Municipality purportedly complied with the said order.
- b. Failed to provide any evidence produced by the applicants to demonstrate that the respondents could still comply with the aforesaid order after the closure of the account.

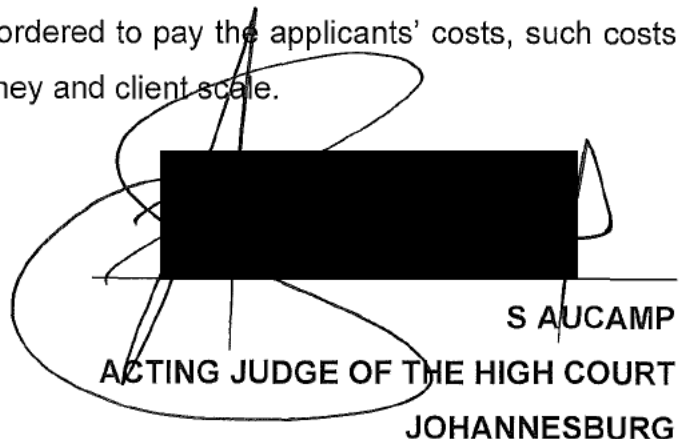
[40] The issue seems to remain, i.e the purported impossibility to comply with the judgement of Majavu AJ given the closure of the account. This issue, as stated in my judgement (paragraph [22]) had previously been dismissed by Motha AJ. The respondents do not provide any basis upon which I would be able to, even if I am of the view that there is merit to their submissions, which I do not, to revisit the issue and possibly come to a different conclusion.

[41] As such the application for leave to appeal on this ground must fail.

RELIEF

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

- a. The application for leave to appeal is dismissed.
- b. The first respondent is ordered to pay the applicants' costs, such costs to be taxed on the attorney and client scale.



S AUCAMP
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

DELIVERED: *This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be **10h00 on- 28 February 2025***

Heard On: 23 October 2024
Date of Judgement: 28 February 2025

For the Applicants:

Adv T Paige-Green
instructed by:
Boruchowitz Attorneys, Mr
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For the Respondents:

Adv E Sithole
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