



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

Reportable:	YES
Of interest to other Judges:	YES
Circulate to Magistrates:	NO

Appeal no: **A23/2024**

In the matter between:

MAFUBE BUSINESS FORUM

1st Appellant

AFRIFORUM NPC

2nd Appellant

JOHAN ALEXANDER ANTHONIE UNGERER

3rd Appellant

and

THE PREMIER OF THE FREE STATE PROVINCE

1st Respondent

MEC: COOPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS – FREE STATE

2nd Respondent

MEC OF FINANCE FREE STATE

3rd Respondent

THE MEC OF ECONOMIC, SMALL BUSINESS

DEVELOPMENT, TOURISM, AND ENVIRONMENTAL

AFFAIRS, FREE STATE PROVINCE

4th Respondent

THE EXECUTIVE COUNCIL OF FRE STATE

PROVINCE

5th Respondent

THE ADMINISTRATOR: MAFUBE LOCAL

MUNICIPALITY

6th Respondent

THE MAFUBE LOCAL MUNICIPALITY

7th Respondent

THE MUNICIPAL MANAGER: MAFUBE

LOCAL MUNICIPALITY

8th Respondent

THE MAYOR: MAFUBE LOCAL MUNICIPALITY

9th Respondent

THE FEZILE DABI DISTRICT MUNICIPALITY

10th Respondent

THE MINISTER OF COOPERATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS	11th Respondent
THE MINISTER OF FINANCE	12th Respondent
THE MINISTER OF WATER AND SANITATION	13th Respondent

Coram: DAFFUE, CHESIWE JJ and HEFER AJ

Heard: 11 OCTOBER 2024

Delivered: 25 MARCH 2025

Summary: Appeal to the full bench against an order of the court *a quo*, dismissing an application to find the Premier of the Free State Province guilty of contempt of court, certain declaratory and mandatory orders and a structural interdict. On appeal, the full bench agreed that the Premier could not be convicted for contempt of court, but upheld the appeal insofar as declaratory and mandatory orders and a structural interdict were granted against the Mafube Local Municipality and other respondents.

ORDER

1. The appeal is upheld.
 2. The order of the court *a quo* is set aside and substituted with the following:
 1. It is declared that the first to fifth respondents are in non-compliance with the order issued on 28 April 2022 under case number 1969/2021.
 2. It is declared that the first, sixth, seventh and eighth respondents are in non-compliance with the order made on 29 July 2021 under case number 3339/2021.
 3. The first to ninth respondents are directed and ordered to forthwith comply with the aforesaid two court orders in the following respects:
 - 3.1 to provide the sixth respondent with the requisite logistical, political and administrative support to effectively execute his intervention role in the seventh respondent, the Mafube Local Municipality;
 - 3.2 to finalise and implement a Financial Recovery Plan without delay;
 - 3.3 to ensure that the pollution of the Vaal and Wilge Rivers caused by the Mafube Local Municipality's Wastewater Treatment Works (the Works) cease immediately;
 - 3.4 to implement immediate emergency measures at the Works to prevent all sewage spillages and to ensure that the Works function according to the required legislative standard until such time as the upgrading thereof is complete.
 4. The first to ninth respondents are directed and ordered to report to this court in detail and under oath within 60 days of the date of this order, specifically dealing with the following:
 - 4.1 the steps taken by them to implement this order with particular emphasis on interim measures taken to prevent sewage spillages, including proactive maintenance of the sewage works;
 - 4.2 where the order is not complied with, a detailed explanation shall be provided to address the reasons for non-compliance and the remedial steps to be taken.
 5. The first to thirteenth respondents shall pay the costs of the application on an attorney and client scale, jointly and severally, the one to pay the others to be absolved.'
 3. The first to thirteenth respondents shall pay the costs of the appeal including the costs of both counsel on scale C, jointly and severally, the one to pay the others to be absolved.
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JUDGMENT

Daffue J (Chesiwe J and Hefer AJ concurring)

Introduction

[1] 'The people of the Free State deserve better.' This is not a quote from a member of the judiciary, criticising another arm of the State. The Deputy Minister of Cooperative Governance and Traditional Affairs of the Republic of South Africa, Dr Namane Dickson Masemola concluded his speech delivered on 3 December 2024 at the Free State Local Government Summit in these words.¹

[2] The Honourable Deputy Minister continued as follows:

'This visit was not just a routine engagement, it was necessitated by a stark and sobering reality. The grim picture painted by the Auditor General's audit report released in June 2023, coupled with the handover report from the previous Minister of CoGTA, brought into sharp focus the precarious state of local governance in the Free State Province ...

As the sphere of government closest to the people, municipalities are meant to embody the principles of governance, responsiveness, and accountability. Yet, the reality paints a troubling picture of governance systems in disarray. Municipal Councils are failing in their critical mandate to provide leadership and enforce accountability. They are not delivering on their primary responsibility that is ensuring essential services reach the communities they serve. ... Across the province, our communities are walking through sewage daily, a glaring health hazard and a blatant violation of the constitutional principles that demand a safe and healthy environment for all. It is a crisis that speaks not only to service delivery failures but to a disregard for human dignity.

Court judgments, such as the recent Matjhabeng ruling, highlight the judiciary's increasing role in directing government action - a role that should be unnecessary if municipal councils and administrations functioned as intended. ...

A PATH FORWARD: ACCOUNTABILITY AND ACTION

Our municipalities must embody a new culture of accountability. Municipal managers who fail to address directives will face consequences, including criminal charges where applicable. Infrastructure grants like the Municipal Infrastructure Grant (MIG) must be utilized effectively, and perpetual under-expenditure must be curtailed.

The sewer spillages, unfinished projects, and corruption that have become synonymous with some municipalities in this province must end. The time for complacency is over. ...'

¹ The speech is a public document issued by the Ministry of Cooperative Governance and Traditional Affairs, Republic of South Africa.

[3] The Honourable Deputy Minister pointed out that ten of the 23 municipalities in the Free State Province are classified as distressed, requiring urgent and coordinated intervention. These ten municipalities are not named, but I have reason to believe that Mafube Local Municipality is one of them.

The parties

[4] The first and second appellants are two non-profit organisations, to wit Mafube Business Forum and AfriForum. The third appellant is a private individual, Mr Johan Alexander Anthonie Ungerer.

[5] Thirteen respondents have been cited, including the Premier of the Free State Province, three Members of the Executive Council of the Free State Province (MEC's), the Executive Council of the Free State Province, the Administrator of Mafube Local Municipality, the Municipality itself as well as its Municipal Manager and Mayor, the Fezile Dabi District Municipality and three National Ministers, to wit those of Cooperative Governance and Traditional Affairs (CoGTA), Finance and Water and Sanitation. The three MEC's of the Free State Province cited are those for CoGTA, Finance and Economic, Small Business Development in Tourism and Environmental affairs.

The appeal

[6] The appellants were the applicants in the court *a quo*. Under application number 6435/2022 they sought several orders, *inter alia* that the Premier of the Free State Province, Ms Sissy Ntombela, the incumbent of that office at the time, be held guilty of contempt of court and sentenced to imprisonment which sentence was to be suspended on certain conditions. They also sought declaratory and mandatory orders and a structural interdict. The court *a quo* dismissed the relief claimed and ordered each party to pay their own costs.

The litigation history

[7] On 29 July 2021 under application number 3339/2021 Mr Ungerer as the sole applicant brought an urgent application against the Mafube Local Municipality, its municipal manager at the time, and two other respondents. The application was heard by Opperman J who granted the following relief (the Opperman order):

'1. The First and Second Respondents, jointly and severally, are to implement the following steps immediately:

1.1 To properly maintain and operate all the pumps at the Namahadi Pump House and the Namahadi Sewage Works situated on the Remaining Extent of the Farm Paisley no 73, District Frankort (collectively referred to as "the works").

1.2 To effect any repairs that may be required to the works.

1.3 Inspecting the works on a regular basis.

1.4 Attending to any operational crises at the works promptly and without undue delay when it arises.

1.5 Specifically to prevent any sewage spillages which may affect the Wilge River.

1.6 To make available to Applicant samples of effluent produced at the works, upon request.

1.7 To make timeous payment to Eskom in order to ensure continuous functioning of the works.

2. First and Second Respondents, jointly and severally, are ordered to report back to Applicant's attorney (Ms M van Schalkwyk) in writing, regarding the progress made with the required steps set out in the previous paragraph – every **2 (two) weeks** for 6 months from date of service of this order. In the event of further non compliance by the Respondents the Applicant is permitted to approach this Court on the same papers for an order of contempt against them.

3. First Respondent is to pay the costs of the application – including the costs of two counsel.'

[8] Before the Opperman order was granted, the first two appellants in this appeal caused an application to be issued against Mafube Local Municipality and sixteen other respondents under case number 1969/2021. Most of these respondents are also cited as respondents in the present proceedings. On 27 January 2022 (after the Opperman order) Van Rhyn AJ heard the opposed application. The learned judge delivered her judgment on 28 April 2022. The following relief was granted (the Van Rhyn order):

'1. It is declared that:

1.1 The First Respondent the Mafube Local Municipality (hereinafter referred to as "the Municipality") together with the Second to Fifth and Sixteenth Respondents (collectively referred to as "the Local Respondents") are in breach of the constitutional, legislative and regulatory obligations towards their residents.

1.2 The conduct of the First Respondent (including the Second to Fifth and Sixteenth Respondents), in failing to ensure the provision of services to its community in a sustainable manner; in failing to promote a safe and healthy environment for its community; in failing to

structure and manage its administration, budgeting and planning processes, in failing to give priority to the basic needs of its community, is inconsistent with the Constitution of the Republic of South Africa, 1996; is in breach of s 152(1) and s 153(a) of the Constitution, as read with its supporting legislation in terms of the Local Government: Municipal Finance Management Act of 56 of 2003 (hereafter: "the LGMFMA") and the Local Government: Municipal Systems Act 32 of 2000 (hereafter: "the LGMSA"), and is declared invalid to the extent of these inconsistencies.

1.3 In terms of the provisions of section 139(1)(b) and s 139(4), read with s 139(5) of the Constitution, and read further with sections 139 and 140 of the LGMFMA, it is declared that the Provincial intervention by the Sixth to Tenth Respondents has failed to ensure that the Municipality and the rest of the Local Respondents meet the obligations to provide basic services and to meet their financial commitments.

1.4 The conduct of the Sixth to Tenth Respondents, in failing effectively to carry out their mandate in terms of section 139 of the Constitution and the LGMFMA, to intervene and resolve the issues of the First and the rest of the Local Respondents, is inconsistent with the Constitution and is declared invalid to the extent of these inconsistencies.

1.5 The jurisdictional facts for mandatory Provincial intervention in the affairs of Mafube Local Municipality in terms of s 139(4) and (5) of the Constitution, as read with s 139, s 140, s 146 to 149 of the LGMFMA are now present and have consistently been present in the past; as a result of the failure of the First to Fifth and Sixteenth Respondents, as well as the Sixth to Tenth Respondents, to ensure that the First Respondent meets its constitutional obligations.

2. In terms of the provisions of s 139(4) and (5) of the Constitution, read with the aforementioned provisions of the LGMFMA, Sixth to Tenth Respondents ("the Provincial Respondents") are directed forthwith to undertake a mandatory provincial intervention into the affairs of the First Respondent by exercising the powers conferred by section 139(4) and (5) of the Constitution, as read with sections 139, 140 and 146 to 149 of the LGMFMA. The Sixth to Tenth Respondents are specifically directed:

2.1 to approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the Financial Recovery Plan detailed in paragraph 2.2 below, to provide for the continued functionality of the Municipality.

2.2 to implement a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the Financial Recovery Plan already developed for Mafube Municipality (the plan is attached to the Founding Affidavit as Annexure "JJS6").

2.3 to take immediate action to ensure that any and all pollution of the Vaal River or any other water sources in the Municipality's vicinity – by the Municipality's sewage works – ceases immediately.

3. The First to Tenth Respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved. This includes the costs consequent upon the employment of two counsel, where applicable. The Eleventh to Seventeenth Respondents and the Applicants are ordered to pay their own costs occasioned by the claims against the said respondents.'

[9] There are no pending appeals against these two orders.

[10] The Mafube Local Municipality (Mafube) is not a strange litigant to proceedings in the Free State High Court. The learned judge Van Rhyn dealt with the history of litigation relating to Mafube in some detail.² I have no reason to doubt the correctness of the facts set out in the judgment. It is apposite to mention some. On 9 June 2004 this court ordered Mafube to repair sewerage pumps servicing the Namahadi Township situated at Frankfort. A similar order was issued on 2 August 2008. On 20 February 2014 this court found Mafube in contempt of its orders of 9 June 2004 and 2 August 2008. On 16 October 2015 a further order was issued by this court pertaining to sewage spillage. Less than a year later, on 1 September 2016, yet another order was granted, compelling Mafube to take action and to rectify the problems at the sewerage works. On 20 January 2017 this court again found that Mafube had not complied with its order relating to sewage spillage caused by the improper operation and maintenance of the pumps at the sewerage plant. In submissions to the South African Human Rights Committee, Mafube was described as the main culprit, causing pollution of the upper Vaal River system.

[11] On 20 January 2017 this court granted Mafube Business Forum, the first appellant in the present proceedings, authority to make direct payments to Eskom in an effort to prevent electricity cut-offs. Mafube owes Eskom millions of rands. An attachment order was already granted against it in favour of Eskom for more than R60 million in August 2020. Mafube is guilty of serious maladministration in that at some stage it did not pay the salaries of employees, but more importantly, failed to pay over the provident fund contributions deducted from employees' salaries to the South Africa Municipal Workers' Union Provident Fund. On 5 May 2016 this court ordered Mafube to pay an amount in excess of R16 million to this fund. The sheriff attached some fourteen farms belonging to Mafube to satisfy the judgment debt owed to the fund.

² Appeal record: pp 90-95; paras 15-33 of the judgment.

Mafube and its administrator were called upon by the Standing Committee on Public Accounts to a meeting on 17 September 2019 to deal with its dire situation. The Auditor-General made highly negative findings against it pertaining to its poor financial track record and dismal financial position.

[12] Mafube was previously placed under administration in terms of s 139(1)(b) of the Constitution, but the Free State Provincial Executive Council resolved to terminate this intervention with effect from 30 March 2021. The national Minister of Finance conceded before Van Rhyn AJ that Mafube and its administrators had failed to implement the required Financial Recovery Plan as was evident from the contents of the handover report.

[13] The three appellants, having been dissatisfied with the respondents' alleged failure to comply with the Van Rhyn and Opperman orders, brought a new application under application number 6435/2022. They sought the following relief:

1. That it be declared that the First to Fifth Respondents are in non-compliance with the order of Her Ladyship, the Honourable Madam Acting Justice Van Rhyn, made on 28 April 2022, under case number: "1969/2021";
2. That it be declared that the First, Sixth, Seventh and Eighth Respondents are in non-compliance with the order of her Ladyship, the Honourable Madam Justice Opperman, made on 29 July 2021, under case number: "3339/2021".
3. That the First Respondent, the Premier of the Free State Province, be found guilty of contempt of the court orders identified in prayers 1 and 2 above.
4. That the First Respondent be imprisoned for a period of one month, alternatively that this Honourable Court impose upon her such sentence as it deems appropriate.
5. That the relief in prayer 4 be suspended, on condition that the First Respondent complies with the orders identified in prayers 1 and 2 above, to the extent as required specifically in paragraph 7 of this order, below.
6. The First to Ninth Respondents be ordered to comply with the orders identified in prayers 1 and 2 and to demonstrate substantial compliance with these orders within one (1) month from the date of this order being made.
7. In amplification of prayer 6, it is specifically ordered that the First to Ninth Respondents give effect to the Van Rhyn Order by ensuring that:
 - 7.1. The provincial intervention in the Seventh Respondent be undertaken in terms of the order and in accordance with the requirements of section 139(4) and (5) of the Constitution, as read with the relevant empowering municipal legislation.

7.2. That the Sixth Respondent be provided with the requisite logistical, political and administrative support so as to effectively execute his intervention role in the Seventh Respondent.

7.3. That the Financial Recovery Plan as referred to in the order of Judge van Rhyn form the basis for the new Financial Recovery Plan and that same be expedited and implemented without delay.

7.4. That First Applicant be represented on the audit committee of the Municipality.

7.5. That Rural Free State's ("RFS") proposal to assist with revenue collection-as set out in Annexure "JJS 26" to the founding affidavit- be responded to within 10 (ten) days of this order by Sixth Respondent and, should it not be implemented, that reasons be supplied to RFS within 10 (ten) days thereafter.

8. In amplification of prayer 6, it be specifically ordered that the First to Ninth Respondents give effect to the Opperman J Order by ensuring that:

8.1. Pollution of the Vaal and Wilge River by Seventh Respondent's Wastewater Treatment Works is ceased immediately.

8.2. Priority is given to immediate emergency measures to be implemented at the Works to prevent all sewage spillages.

8.3. All necessary steps are taken to ensure that the Works function according to the required legislative standard, until such time as the upgrading thereof is complete.

8.4. Representatives of First Applicant be permitted to enter the municipal treatment works of Mafube Municipality at reasonable times and with prior notice to the Municipality – to inspect the processes and infrastructure in order to make further recommendations and assist the Municipality with proper functioning of such works.

9. That the First Respondent be ordered to report to this Honourable Court, in detail and under oath, on a two-weekly basis from the date of this order being handed down on the implementation of this Order. Such report must specifically make reference to:

9.1. The steps taken by First to Ninth Respondents to implement the orders of Van Rhyn AJ and Opperman J,

9.2. Action plans, with realistic time frames and deliverables drawn-up by the First Respondent, towards ensuring effective implementation of both orders.

9.3. A particular emphasis on all interim measures taken to prevent sewage spillages, including proactive maintenance of the sewage works.

9.4. Where the orders were not complied with for a specific period, a detailed explanation as to why this occurred and what is being done to address the non-compliance.

9.5. Establishment of the Municipality's audit committee and First Applicant's representation on such committee.

9.6. The status of Rural Fee State's proposal as referred to in prayer 7.5 hereof.

10. That, in the event of the First Respondent failing to comply with any of these orders, prayer 4 of this order immediately becomes effective upon the request of Applicants.
11. That the First to Ninth Respondents be ordered to liaise, consult with and accept support and assistance of the First and Second Applicants insofar as they provide same, as local community organisations, towards ensuring the effective implementation of this order.
12. That the First Respondent be ordered to pay the costs of this application on an attorney-and-client scale.

[14] Application number 6435/2022 was eventually heard by the court *a quo* who dismissed it, but granted leave to appeal to the full court. The court *a quo* stated that the issue to be adjudicated was whether the respondents were in contempt of court in respect of the Van Rhyn and Opperman orders and held that the only issue for determination was whether there had been a wilful and *mala fide* disobedience of the orders. It did not properly consider whether declaratory and mandatory orders and a structural interdict ought to be granted, especially bearing in mind the obvious urgency which I shall address later herein.

[15] In 2024 another application was issued against Mafube,³ this time by the Municipal Workers' Retirement Fund, for payment in excess of R14 million in respect of employees' contributions. Opperman J was called upon to adjudicate the dispute. The opposed application was heard before we heard the present appeal, but the judgment was delivered after the appeal hearing. The learned judge made some scathing remarks against Mafube's office-bearers. She referred to the history of the litigation and the several applications relating to employees' contributions, indicating that Mafube was unsuccessful in all of them.⁴ The outcome of this judgment will not play any role in adjudication of this appeal.

The respondents' constitutional duties

[16] Section 165 of the Constitution grants the courts with judicial authority. No person or organ of state may interfere with the functioning of the courts. Furthermore, organs of state shall assist and protect the courts to ensure, amongst other things, their dignity and effectiveness. Section 165(5) stipulates that orders of court are binding on all persons to whom and organs of state to which it applies. The following

³ *Municipal Workers' Retirement Fund v Mafube Local Municipality and Others* (1653/2024) [2025] ZAFSHC 7 (17 January 2025).

⁴ *Ibid* paras 58 – 65.

dictum of the Constitutional Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others (State Capture)* highlights these fundamental principles:⁵

'It is indeed the lofty and lonely work of the judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society — lawyers, laypeople and politicians alike — is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of state, courts rely solely on the trust and confidence of the people to carry out their constitutionally mandated function.'

[17] In *Government of the Republic of Zimbabwe v Fick and Others*⁶ the Constitutional Court dealt with the enforcement of court orders as follows:

'[61] The right to an effective remedy or execution of a court order is recognised as a crucial component of the right of access to courts. This position was eloquently articulated by Jafta J in *Mjeni v Minister of Health and Welfare, Eastern Cape* in these terms:

"The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made. The process of adjudication and resolution of disputes in courts of law is not an end in itself but only a means thereto; the end being the enforcement of rights or obligations defined in the court order."

[18] The objects of local government are contained in s 152 of the Constitution which reads as follows:

'152 Objects of local government Constitution

(1) The objects of local government are-

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

[19] It is also apposite to quote s 73 of the Municipal Systems Act 32 of 2000, providing for the duties of municipalities to give effect to the Constitution:

⁵ 2021 (5) SA 327 (CC) para 1.

⁶ 2013 (5) SA 325 (CC) para 61.

'73 General duty

(1) A municipality must give effect to the provisions of the Constitution and-

- (a) give priority to the basic needs of the local community
- (b) promote the development of the local community; and
- (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

(2) Municipal services must-

- (a) be equitable and accessible;
- (b) be provided in a manner that is conducive to-
 - (i) the prudent, economic, efficient and effective use of available resources; and
 - (ii) the improvement of standards of quality over time;
- (c) be financially sustainable;
- (d) be environmentally sustainable; and
- (e) be regularly reviewed with a view to upgrading, extension and improvement.'

[20] Having referred to the constitutional duties of municipalities, it is accepted that the State and/or an organ of state can do no more than its available resources permit as pointed out in *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*.⁷ I quote:

'[46] The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources. As Chaskalson P said in *Soobramoney*:

"What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water, and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled."

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.'

[21] Although financial difficulties must be considered, it would be a sad day if organs of state would be allowed to use this as a general defence when they fail to

⁷ (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) at para 46.

carry out their constitutional obligations. More than a decade ago Madala J, writing for the majority, made the following comment in *Nyathi v MEC for the Department of Health, Gauteng and Another (Nyathi)*⁸ which has in my view all too often fallen on deaf ears;

'[80] Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view means at the very least that there should be strict compliance with court orders.' (emphasis added)

Contempt of Court

[22] The appellants only asked that Ms Sissy Ntombela be found guilty of contempt of court and imprisoned, although declaratory and mandatory orders were sought against her and other respondents insofar as they did not comply with the Opperman and Van Rhyn orders. Therefore, attention shall only be given to the relevant legal principles pertaining to Ms Ntombela.

[23] Adv Mene SC submitted on behalf of the respondents that it was common cause that the appellants had proved the first three requirements for contempt of court, to wit:

- a. the existence of the two orders;
- b. the respondents' knowledge of the orders; and
- c. the failure to comply with the orders.

[24] The court *a quo* did not expressly state that the third requirement had been met, but if the judgment is read in context, Mr Mene's submission must be accepted as correct. Consequently, insofar as the aforesaid three requirements have been met, a presumption arose that Ms Ntombela's non-compliance was wilful and *mala fide*. The

⁸ 2008 (5) SA 94 (CC) para 80; see also *MEC for Public Works Eastern Cape and Others v Ikamva Architects CC* 2023 (2) SA 514 (SCA) para 32.

evidentiary burden therefore shifted to her to show reasonable doubt and failing to discharge this burden, contempt of court would have been established.⁹

[25] The appellants' purpose with the orders sought against Ms Ntombeni was to coerce her to comply with the two court orders for her to be kept out of prison. In *State Capture*¹⁰ the Constitutional Court confirmed that a coercive order provides a respondent with an opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. The purpose of such order is to ensure the effectiveness of the original order.

[26] Not every court order warrants committal for contempt of court in civil proceedings, although there can be no doubt that the breach of a court order, especially by an organ of state, undermines the authority of the courts which has a severe adverse effect on the broader public interest. Organs of state and the people in charge of them shall be an example to the public in demonstrating how constitutional obligations and court orders should be complied with. Madala J's warning in *Nyathi* quoted above shall be kept in mind.

[27] If a court dealing with a contempt of court application cannot find that the applicant proved beyond reasonable doubt that the alleged contemnor *mala fide* and wilfully breached the relevant court order, but find on a balance of probabilities that the contemnor acted *mala fide*, civil contempt remedies other than committal may still be employed. In *Pheko & Others v Ekurhuleni City*¹¹ the Constitutional Court remarked as follows:

'(W)here 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 to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.'

[28] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others (Matjhabeng)* the Constitutional Court held that the alleged contemnor had to be

⁹ *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) para 42.

¹⁰ *Loc cit* para 8.

¹¹ 2015 (5) SA 600 (CC) para 37; see also *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC).

personally called upon to explain why he should not have been convicted of contempt of court in his personal capacity.¹² In *casu*, Ms Ntombela was never personally served with the order as far as I could have ascertained, but she was well aware thereof. This is common cause. The court *a quo* pointed out that the application issued under case number 6435/2022, calling upon the first respondent as Premier of the Free State Province to give reasons why she should not be committed to imprisonment for contempt of court, was never served on her personally. That is so, but of more importance, Ms Ntombela was not cited in the notice of motion in her personal capacity in line with the judgment in *Matjhabeng*. Belatedly, only in paragraph 3.1 of the founding affidavit, an attempt was made to show that as incumbent of the office of the Premier, she 'is also cited in her personal capacity.'

[29] It is common cause that Ms Ntombela resigned as Premier and that Mr M Dukwana, the MEC of CoGTA at all relevant times hereto, was thereafter appointed as Premier on 24 February 2023. There is no evidence that she was informed of the serious relief sought against her personally and given an opportunity by the respondents' legal team to put up her version.

[30] In any event, even if Ms Ntombela was well aware of the application and the relief sought against her, but decided on legal advice or otherwise not to put up her version, I am of the view that no order could have been granted as requested in the notice of motion. She would have no opportunity to play any role in the administration of the Free State Provincial Government, especially in the Premier's office, in an attempt to escape imprisonment. There was just no way in which she could comply with the relief sought in the latest application. At best for the appellants, a declaratory order could have been issued to the effect that she in her capacity as Premier failed to comply with her constitutional duties and in particular, the Opperman and Van Rhyn orders. There is no reason to interfere with the court *a quo*'s order, refusing to find Ms Ntombeni guilty of contempt of court.

The further relief sought

[31] It is now necessary to consider whether the court *a quo* erred in failing to grant declaratory and mandatory orders and further relief in the form of a structural interdict.

¹² *Loc cit* para 76.

Competent courts have wide powers in making appropriate orders in disputes relating to constitutional matters as mentioned above. Moseneke DCJ reiterated the trite principle as follows in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*¹³:

'[97] It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution.'

[32] Sandra Liebenberg¹⁴ provided a comprehensive summary of some of the reported judgments dealing with structural interdicts. For purposes hereof I shall make use of her invaluable contribution. In *Fose v Minister of Safety and Security*¹⁵ the Constitutional Court dealt with constitutional remedies and the courts' role in this regard. Without effective remedies for breach, the court stated, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.

[33] Numerous courts in our country have already granted structural interdicts in the form of mandatory relief together with a requirement that respondents report back to them and the other parties to the litigation pertaining to the implementation of the orders granted. In terms hereof ongoing supervision by the courts are provided regarding respondents' lack of compliance with their constitutional obligations. In *Treatment Action Campaign v Minister of Correctional Services and Another*¹⁶ the High Court issued declaratory and mandatory orders, accompanied by a reporting order,

¹³ 2010 (2) SA 415 (CC) (2010 (3) BCLR 177; [2009] ZACC 32).

¹⁴ Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution*, JutaStat e-publications, 2010 ed, chpt 8.2 p 380 and further and chpt 8.6 p 424 and further.

¹⁵ 1997 (3) SA 786 (CC) para 69.

¹⁶ 2002(4) BCLR 356 (T).

requiring the Minister to roll out a comprehensive national programme to prevent mother to child transmission of HIV. Eventually the Constitutional Court confirmed declaratory and mandatory orders against the State, but declined to exercise supervisory jurisdiction. However, it made the following statement:¹⁷

'[129] The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council* this Court recognised that Courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.'

[34] In *Minister of Home Affairs v National Institute for Crime Prevention (NICRO)*¹⁸ the Constitutional Court accepted that it was necessary for an order to be issued to supervise the implementation of its order. Another example of the Constitutional Court issuing a mandamus and exercising supervisory jurisdiction to ensure compliance with its order is *Sibiya v Director of Public Prosecutions: Johannesburg*.¹⁹

[35] I referred to the Constitutional Court judgment in *Nyathi* above and the *dictum* of Madala J, emphasising the fundamental importance of compliance with court orders. In that case the Constitutional Court issued an order to exercise judicial supervision over the State's compliance with outstanding judgment debts.²⁰

[36] Having referred to some of the judgments regarding structural interdicts, I accept, as Liebenberg²¹ stated, that it is 'a prevalent concern regarding structural interdicts that they infringe the separation of powers doctrine in that the supervising courts are drawn into usurping the functions of executive administrative authorities through intrusive orders and excessive monitoring of administrative authorities.'

¹⁷ *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) para 129.

¹⁸ 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) paras 79 & 80.

¹⁹ 2005 (5) SA 315 (CC).

²⁰ *Nyathi loc cit* para 92.

²¹ *Loc cit* p 435.

[37] Except for the answering affidavit by the sixth respondent, no other respondent deemed it necessary to respond to the damning averments in the founding affidavit. The silence of the Premier, the three MEC's and the three national Ministers is deafening. The sixth respondent failed to deal with material issues as mentioned in the replying affidavit and furthermore, it was not for him to explain the non-compliance by other respondents. The court *a quo* suggested that the appellants could have utilised rule 30 procedure, but failed to consider the principles applicable to opposed motion procedure. The respondents did not heed the warning in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*²². I quote:

'[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter." (emphasis added)

[38] The issue to be considered now is whether the court *a quo* misdirected itself on the facts and/or the law. The court *a quo* failed to consider the request for declaratory and mandatory orders and structural relief with the appropriate care. It focused in the main on the contempt of court issue. It concluded that the 'only criticism that can be

²² 2008 (3) SA 371 (SCA).

levelled against the Respondents is the failure to address the issues raised in the orders with the urgency they deserve.' It continued:

'I am unable to find that the Respondents are in contempt of the orders of the two Justices. This application must thus fail.'²³

[39] Mafube was indeed placed under administration in terms of s 139(5) of the Constitution. As long ago as 15 August 2022 Mafube *inter alia* confirmed in a letter to its mayor that s 139(5) had been invoked, that the intervention team had been appointed, that this team and National Treasury were in the process of drafting a Financial Recovery Plan, that the Department of Water and Sanitation was assisting with the water treatment works and that the Provincial Government promised to make money available to assist with emergency works to prevent sewage spilling. It should be mentioned that this letter was never sent to any of the appellants as contended in the replying affidavit. The sixth respondent's answering affidavit was deposed to on 9 May 2023. By then there was no material compliance with the Opperman and Van Rhyn orders. Also, the Financial Recovery Plan that was promised to be finalised and implemented during the first week of May 2023 was not forthcoming. The court *a quo* was bound to state that Mafube's actions (or lack thereof) were 'demonstrating the snail's pace the Municipality has taken to deal with [sewage] spillage.' Mafube contradicted itself in respect of the construction of emergency ponds. No responsive tender was allegedly received. Mafube and all role players are guilty of irresponsible lack of their constitutional responsibilities. One would have thought that an emergency procurement process would have been undertaken immediately. It is unnecessary to go into any detail about the seriousness of this single issue. The facts presented by the appellants were largely uncontested. The pollution of the Vaal and Wilge rivers could not have been shrugged off on the basis that Mafube and its administrator should be allowed to continue at its 'snail's pace'. The history set out by the learned judge Van Rhyn, quoted to an extent earlier herein, should have been taken into account. The other arm of the State has shown its unwillingness to co-operate in the interests of the community of not only Mafube, but residents and livestock in surrounding areas as well.

[40] Mafube has sought assistance from others, including the Department of Water and Sanitation. It was known to the court *a quo* that the Department of Public Works

²³ Record: p 912 – paras 48 & 49 of the judgment.

had filed a report which the court *a quo* admitted painted 'a disturbing picture.'²⁴ Dysfunctional pump stations are the order of the day. Raw sewage is channelled into rivers. The Department's Green Drop Report of 2022 pertaining to Mafube showed a drop in the score from 36% in 2013 to 0% in 2021. A 100% risk rating was recorded in respect of each of the various towns in Mafube. The report stated that urgent interventions were required from the national and provincial governments.²⁵ The Blue Drop Risk Rating provided by the Department of Water and Sanitation put Mafube in the 'Critical Risk Supply Systems' category, indicating the poor status of drinking water.²⁶ Neither the MEC's, nor the national Departments appreciated the urgency. Also and with respect, the court *a quo* did not appreciate the emergency.

[41] I accept that Mafube as a small municipality does not have the resources to pay for upgrading of its infrastructure, but its maladministration apparently has no boundaries. I mention again its Eskom debt and its failure to pay employees' contributions to the relevant Fund. The court *a quo* heard that it approved a budget. It did not appreciate that the budget was unfunded, but merely held that a budget [an unfunded budget] was in place. No acceptable evidence was put on record where the funds would be derived from. Mafube failed to introduce relevant bylaws to ensure effective and legal collection of revenue. It is accepted that National Treasury has the final say in Mafube's Financial Recovery Plan, but nothing material had been achieved by the time the answering affidavit was deposed to. Neither the Minister of Finance, nor anyone from National Treasury was prepared to explain the delay. Consequently, the administrator 'crafted a plan of action that focuses on financial recovery' but clearly, this is not what Mafube had to do. A structural interdict will hopefully ensure that Mafube explains in detail what it did to obtain assistance from National Treasury in this regard.

[42] It is apparent from the record that the sixth respondent, appointed as administrator, did not get proper logistical, political and administrative support to meaningfully continue with his task. He was not provided with accommodation in Mafube and a suitable vehicle. In fact, he was at the relevant time still staying in

²⁴ Record p 913: judgment para 24.

²⁵ Record pp 203-206, annexure JJS17.2E and pp 204 & 205 in particular; see also the report by the Department of Water and Sanitation about the Villiers' system which was regarded as almost totally non-functional: annexure JJS17.2F on pp 207 – 218.

²⁶ Record p 71&72: founding affidavit paras 73 – 75.

Mangaung. I do not believe it is necessary to add anything more to that already mentioned herein.

[43] I disagree with Mr Mene's submission that a structural interdict 'is of no moment as it will serve no purpose, this wheel is already in motion, as it was at the time of the hearing.' The record shows in no uncertain terms that the former Premier, Ms Ntombela, her three MEC's cited herein and the other municipal respondents did not comply with the respective orders applicable to them. It is accepted that intervention in terms of s 139(5) was a step in the right direction, but unfortunately it did not provide any meaningful and positive results. Therefore, declaratory and mandatory orders as requested should have been issued, but the court *a quo* misdirected itself in failing to appreciate this. The court *a quo* also misdirected itself in failing to grant a supervisory order, at least in the terms set out in the order to be issued.

[44] Having acknowledged the concern that courts should be careful not to overstep their boundaries, in my view this is a case where the mandatory and supervisory orders to be granted will do no more than to reinforce the foundational constitutional values of accountability, responsiveness and openness.²⁷ Having said this, the relief sought by the appellants is overly broad. Although community participation is encouraged in s 152(1)(e) of the Constitution quoted above and although the first appellant offered to utilise its expertise free of charge – a commendable approach – which was rejected, I am not prepared to grant the further relief sought. It will place an unnecessary burden on the court if the respondents are ordered to file two-weekly reports for the unforeseeable future. Hopefully the supervisory order to be granted will persuade the respondents not to drag their feet any longer.

Costs

[45] The disdain with which the respondents regarded the Opperman and Van Rhyn orders is evident from the litigation in the court *a quo* as well as the history of the litigation over more than a decade as shown herein. Unlike as could be expected, except for the administrator cited as sixth respondent, not one of the other respondents accepted responsibility to show why the court orders were not complied with. No confirmatory affidavits were filed. The administrator could not speak on their behalf

²⁷ Section 1(d) of the Constitution.

pertaining to all the aspects alleged by the appellants. They also have no regard for the Uniform Rules of Court. The answering affidavit was filed more than two months late and the reasons provided to the court *a quo* were rather unpersuasive. Also, the deponent to the answering affidavit elected not to deal pertinently with all the crucial allegations made by the appellants.

[46] The Constitutional Court reiterated the constitutional duties of organs of state as follows in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni*:²⁸

'Although the Municipal Parties escape being held in contempt, their dilatoriness, inertia and unaccountability must be viewed through the lens of the Municipality's heightened duty to comply with court orders. Organs of state, of which the Municipality is one, are expressly enjoined to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". They have obligations under the Constitution to respect the rule of law and the courts as guardians of the Constitution.'

[47] The constitutional gravity of this case cannot be ignored. The residents of Mafube, in particular, are entitled to basic rights, *inter alia* such as an environment which is not harmful to their health and well-being as provided for in s 24 of the Constitution, good and effective governance and compliance with the rule of law principle which is based on a social contract between society and the state. Mafube is a perpetual perpetrator. All the respondents hereto are fully aware of this. Their dilatoriness and unaccountability must be considered on the basis of their heightened duty to comply with court orders. They must respect the rule of law and the courts as guardians of the Constitution. They hopelessly failed in their duty. A punitive costs order was warranted in the court *a quo*.

Order

[48] The following order is made:

1. The appeal is upheld.
2. The order of the court *a quo* is set aside and substituted with the following:

²⁸ *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3 para 38; also *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 82 where the Constitutional Court emphasised that 'there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline.'

‘1. It is declared that the first to fifth respondents are in non-compliance with the order issued on 28 April 2022 under case number 1969/2021.

2. It is declared that the first, sixth, seventh and eighth respondents are in non-compliance with the order made on 29 July 2021 under case number 3339/2021.

3. The first to ninth respondents are directed and ordered to forthwith comply with the aforesaid two court orders in the following respects:

3.1 to provide the sixth respondent with the requisite logistical, political and administrative support to effectively execute his intervention role in the seventh respondent, the Mafube Local Municipality;

3.2 to finalise and implement a Financial Recovery Plan without delay;

3.3 to ensure that the pollution of the Vaal and Wilge Rivers caused by the Mafube Local Municipality’s Wastewater Treatment Works (the Works) cease immediately;

3.4 to implement immediate emergency measures at the Works to prevent all sewage spillages and to ensure that the Works function according to the required legislative standard until such time as the upgrading thereof is complete.

4. The first to ninth respondents are directed and ordered to report to this court in detail and under oath within 60 days of the date of this order, specifically dealing with the following:

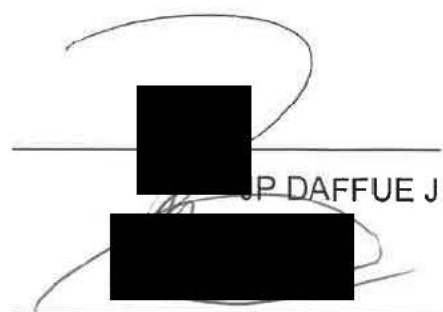
4.1 the steps taken by them to implement this order with particular emphasis on interim measures taken to prevent sewage spillages, including proactive maintenance of the sewage works;

4.2 where the order is not complied with, a detailed explanation shall be provided to address the reasons for non-compliance and the remedial steps to be taken.

5. The first to thirteenth respondents shall pay the costs of the application on an attorney and client scale, jointly and severally, the one to pay the others to be absolved.’

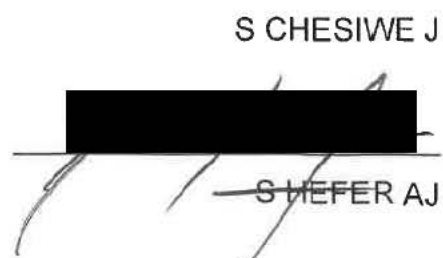
3. The first to thirteenth respondents shall pay the costs of the appeal including the costs of both counsel on scale C, jointly and severally, the one to pay the others to be absolved.

I concur



P DAFFUE J

I concur



S CHESIWE J

S HEEFER AJ

Appearances

For appellants: Advv FJ Erasmus SC and P Eilers

Instructed by: Hurter Spies Inc
c/o Hendre Contradie Inc
Bloemfontein

For respondents: Advv BS Mene SC and TM Ngubeni

Instructed by: State Attorney
Bloemfontein.