

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 118/2024

In the matter between:

NORTHERN CAPE RANCHERS CC
REGISTRATION NUMBER 1989/008309/23

APPLICANT

and

SOL PLAATJE MUNICIPALITY

FIRST RESPONDENT

**THE MUNICIPAL MANAGER,
SOL PLAATJE MUNICIPALITY**

SECOND RESPONDENT

**THE MINISTER OF WATER AND
SANITATION, REPUBLIC OF SOUTH AFRICA**

THIRD RESPONDENT

**THE PROVINCIAL HEAD, NORTHERN CAPE,
DEPARTMENT OF WATER AND SANITATION**

FOURTH RESPONDENT

TRANSNET LIMITED
REGISTRATION NUMBER 1990/000900/06

FIFTH RESPONDENT

**THE SOUTH AFRICAN NATIONAL
ROADS AGENCY LIMITED (SANRAL)**
REGISTRATION NUMBER 1998/009584/30

SIXTH RESPONDENT

BIRDLIFE SOUTH AFRICA

SEVENTH RESPONDENT

Neutral citation: *Northern Cape Ranchers (CC) v Sol Plaatje Municipality and 6 Others* (118/2024) [24 March 2025]

Coram: Stanton J

Heard: 18 February 2025

Delivered: 24 March 2025

Summary: Application for contempt of court – whether the respondent adduced sufficient evidence to discharge the onus to prove that they were not in wilful and mala fide contempt– contempt of court against the second respondent, cited in his official capacity, not competent – first and second respondent not wilful and *mala fide* – structured interdict necessitated and granted – claims for monetary damages dismissed – dispute of fact – claim for a constitutional breach dismissed – cost order against the first and second respondent just in the circumstances.

ORDER

1. The relief for contempt of court against the first respondent is dismissed;
2. The first and the second respondents are ordered to file, by no later than 12:00 on 30 May 2025, a report on the progress made in respect of the sewage/sewerage discharge on the farms and the Kamfersdam;
3. The report must contain the following information: -
 - 3.1. The steps taken as at 20 May 2025 to ensure that:
 - 3.1.1. No untreated sewage/sewerage or waste water with an E. Coli content exceeding the legally prescribed limit (1000 CFU/100 megaliters) is discharged into any portion of the Kamfersdam or any part of the Farm or Kenilworth;
 - 3.1.2. The amount of treated sewage/sewerage or waste water discharged into the Kamfersdam on the Farm is limited to 30 megaliters per day, alternatively to the extent that the water levels in the Kamfersdam should return to their 2015 levels;
 - 3.1.3. The sewerage- and/or reticulation systems and infrastructure in and about the area of the Homevale Waste Water Treatment Works ("the HWWTW") are repaired and/or reinstated to be fully optimal and at full operational capacity in order to ensure that no spillage, irregular

discharge or overflow of sewerage and effluent water occurs over or on to the land in the area surrounding the water resource;

- 3.1.4. To ensure that the HWWTW and the area around it are properly secured, including the installation of CCTV cameras;
- 3.2. The progress made in respect of the acquisition, delivery and installation of the 3km water line;
- 3.3. The progress made with regard to the Malu joint venture;
- 3.4. The progress made with regard to the Ekapa Mining and Kimberley Golf Estate project;
- 3.5. The report must be accompanied by a specified budget indicating the amount allocated to each action and the date on which the funds were/would be made available to ensure compliance; and what amount has been expended up to the date of the report;
- 3.6. The report must be accompanied by an updated expert water analysis;
- 4 Thereafter, and on the last Friday of every following fourth month, on or before 12h00, the first and the second respondents are ordered to file a report on the progress made in respect of the sewage/sewerage discharge on the farms and the Kamfersdam to this Court by way of delivering it to the Registrar of the Court ("the further progress reports");
- 5 The further progress reports must contain the following information: -
 - 5.1. The steps taken, including the commencement date thereof, during the previous four months to ensure that:
 - 5.1.1. No untreated sewage/sewerage or waste water with an E. Coli content exceeding the legally prescribed limit (1000 CFU/100 megaliters) is discharged into any portion of the Kamfersdam or any part of the Farm or Kenilworth;
 - 5.1.2. The amount of treated sewage/sewerage or waste water discharged into the Kamfersdam on the Farm is limited to 30 megaliters per day, alternatively to the extent that the water levels in the Kamfersdam should return to their 2015 levels;
 - 5.1.3. The sewerage and/or reticulation systems and infrastructure in and about the area of the Homevale Waste Water Treatment Works ("the HWWTW") are repaired and/or reinstated to be fully optimal and at full operational capacity in order to ensure that no spillage, irregular discharge or overflow of sewerage and effluent water

occurs over or on to the land in the area surrounding the water resource;

- 5.1.4. To ensure that the HWWTW and the area around it are properly secured, including the installation of CCTV cameras;
- 5.2. The progress made in respect of the acquisition, delivery and installation of the 3km water line;
- 5.3. The progress made with regard to the repair of all three phases of the 33 megaliters module;
- 5.4. The progress made with regard to the Malu joint venture;
- 5.5. The progress made with regard to the Ekapa Mine and Golf Estate venture;
- 5.6. Every further progress report must be accompanied by a specified budget indicating the amount allocated to each action and the date on which the funds were made available to ensure compliance with the March 2024 order;
- 5.7. Every report that is required to be delivered to this Court must be accompanied by an updated expert water analyses report, reflecting: -
 - 5.7.1. The faecal coliforms per 100 milliliters;
 - 5.7.2. The Chemical Oxygen Demand (COD) per liter;
 - 5.7.3. The pH;
 - 5.7.4. The Ammonia (ionised and un-ionised) as Nitrogen per liter;
 - 5.7.5. Nitrate/Nitrite as Nitrogen per liter;
 - 5.7.6. Chlorine as Free Chlorine per liter;
 - 5.7.7. Suspended solids per liter;
 - 5.7.8. Electrical conductivity per milliSiemens per metre (mSm);
 - 5.7.9. Ortho-Phosphate per /liter;
 - 5.7.10. Fluoride per liter; and
 - 5.7.11. Soap, oil or grease per liter;
6. The first and second respondents' obligation to submit the further progress reports will endure until the determination of the final date thereof by this Court;
7. The applicant's claim for payment of the amount of R625 000 is dismissed;
8. The applicant's claim for payment of the amount of R125 000 per annum until the first and second respondents have fully complied with the March 2024 order, is dismissed; and

9. The first and second respondent shall pay the applicant's costs on a party and party scale, scale C.

JUDGMENT

Stanton J:

Introduction:

[1] On 17 July 2024, the applicant (Northern Cape Ranchers CC) filed an application in which it requests the following relief, namely that:

1. The first respondent (the Municipality) and the second respondent,

1.1 The first respondent ("the Municipality") and the second respondent, cited in his official capacity ("the Municipal Manager"); — jointly referred to as the "participating respondents", be found in contempt ("the contempt order") of the order granted by Stanton J on 22 March 2024 ("the March 2024 order") under the above case number ;

1.2 An order be granted that the Municipal Manager, cited in his official capacity, be committed to imprisonment for contempt of court for a period of 30 days, which committal shall be suspended for a period of one year, on condition that the participating respondents fully comply with the March 2024 order within 30 days from date of this order ("the compliance order");

1.3 In the event of the participating respondents further failing to comply with the March 2024 order within the period of 30 days, leave be afforded to the applicant to approach this court on the same papers, supplemented if and where necessary, for an order for the Municipal Manager's committal to prison for the period of 30 days;

1.4 The participating respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay to the applicant an amount of

R625 000 as compensation for the failure by the participating respondents to comply with the March 2024 order and for allowing the continuance of an untenable situation of non-compliance with a servitude agreement of 1964 between the applicant and the Municipality, registered under number 185/1964, ("the deed of servitude"); and the laws regulating the quality of water permitted to be deposited into a natural water resource ("the R625 000 claim");

- 1.5 The participating respondents, jointly and severally, the one paying the other to be absolved, be ordered to continue to pay an amount of R125 000 per year to the applicant for each ensuing year, starting in 2025 up and until such time that the participating respondents have fully complied with the March 2024 order ("the future monetary claim"); and
- 1.6 The participating respondents, jointly and severally, the one paying, the other to be absolved, be ordered to pay the costs of the main application and this application on a scale as between attorney and client.

Relevant background:

- [2] The applicant is the registered owner of the following two properties:

- 2.1 A Portion of the Remaining Extent of the Farm Flamingo Number 183, District Kimberley, Northern Cape Province represented by the figure lettered A.B.C.D.a.G.H.J.K.L.M.N.O.P.Q. on Diagram SG Number 583/73 filed together with Certificate of Consolidated Title Number T737/1973, measuring 826, 6998 hectares and held by Certificate of Consolidated Title Number T737/1973 ("the Farm"); and
- 2.2 A Portion of the Remaining Extent of the Farm Flamingo Number 183, District Kimberley, Northern Cape Province represented by the Figure lettered E.F.G on Diagram SG Number 583/73 filed together with Certificate of Consolidated Title Number T737/1973, measuring

173,3555 hectares and held by Certificate of Consolidated Title Number T737/1973 ("Kenilworth").

- [3] Kamfersdam, originally a closed basin non-perennial salt pan, approximately 400 hectares, is wholly within the Farm's borders and in normal times comprises almost 40% of the Farm's total area.
- [4] In terms of the deed of servitude, the applicant granted the Municipality the right to discharge, run, deposit sewerage effluent, after such effluent is treated with normal practices, into and upon the Farm. No limitation whatsoever was placed on the Municipality to the volume or quantity of sewerage effluent.

The main application:

- [5] On 29 January 2024, the applicant lodged an application on a semi-urgent basis ("the main application") in terms of which the applicant moved for:

[6] "The main application" is set out in the following terms:

- 5.1 A structural interdict, the gist of which was that the Municipality was to be ordered to prepare a technical report within 60 calendar days, setting out the proposed steps to be taken, as well as the timeframes within which these steps were to be taken, to ensure that:

- 5.1.1 No untreated sewage/sewerage or waste water with an E. Coli content exceeding the legally prescribed limit (1000 CFU/100 megaliters) is discharged into any portion of the Kamfersdam or any part of the Farm or Kenilworth, beyond 120 days of the order being granted;

- 5.1.2 The amount of treated sewage/sewerage or waste water discharged into the Kamfersdam on the Farm is limited to 30 megaliters per day, alternatively to the extent that the water levels in Kamfersdam should return to their 2015 levels within six months from the grant of the order sought;

- 5.1.3 The sewerage- and/or reticulation systems and infrastructure in and about the area of the Homevale Waste Water Treatment Works ("the HWWTW") are repaired and/or reinstated, if need be, to optimal and full operational capacity in order to ensure that

no spillage, irregular discharge or overflow of sewerage and effluent water occurs over or on to the land in the area surrounding the water resource;

5.1.4 The HWWTW and the area around it are properly secured to prevent theft and vandalism;

5.2 An order that the participating respondents shall be obliged to serve a copy of the technical report upon the applicant and file the original thereof with the Registrar of this Court not later than 15h00 on 22 May 2024; and that the applicant shall respond to this report, should it so wish, by filing a supplementary affidavit no later than 17h00 on 13 June 2024;

5.3. In addition, the applicant requested the Court to exercise the powers of amendment granted to it in Section 129(1)(b) of the National Water Act 36 of 1998, and order the amendment of the deed of servitude, *inter alia* by:

5.3.1. The deletion of paragraph 1 thereof and the substitution of the following paragraph therefor, namely:

"1. Subject to the provisions of Clause 4 below, the GRANTOR hereby gives and grants unto and on behalf of the GRANTEE the right to run, discharge, and deposit sewerage effluent emanating from the GRANTEE'S Homevale Waste Water Treatment Works which lies adjacent to the southern border of the Farm into and upon the ephemeral, endorheic Kamfersdam salt pan on the said farm, after such effluent shall have been treated by the GRANTEE in accordance with such statutory norms and standards for the conduct of sanitation services and the treatment of sewerage and waste water as may be in force from time to time at the time of any such deposits and discharges provided that the deposits and discharges shall not exceed 30 (Thirty) megaliters ("mg/l") per day and provided further that:-

5.3.1.1 Faecal coliforms in the material do not exceed 1000 CFU per 100 milliliters ("ml") at any time;

5.3.1.2 Chemical Oxygen Demand (COD) does not exceed 75mg/l;

- 5.3.1.3 pH is not less than 5,5 or more than 9,5Ph units;
- 5.3.1.4 Ammonia (ionised and un-ionised) as Nitrogen does not exceed 3 mg/l;
- 5.3.1.5 Nitrate/Nitrite as Nitrogen does not exceed 15mg/l;
- 5.3.1.6 Chlorine as Free Chlorine does not exceed 0.25 mg/l;
- 5.3.1.7 Suspended solids do not exceed 25mg/l;
- 5.3.1.8 Electrical conductivity does not exceed 70 milliSiemens above intake to a maximum of 150 milliSiemens per metre (mSm);
- 5.3.1.9 Ortho-Phosphate as phosphorous does not exceed 10mg/l;
- 5.3.1.10 Fluoride does not exceed 1 mg/l; and
- 5.3.1.11 Soap, oil or grease does not exceed 2.5 mg/l."

5.3.2 By the deletion of paragraph 3 thereof and the substitution therefor of the following, namely: -

"3. The rights hereby granted shall commence as and from the date of execution of this Agreement and shall continue to remain in force and effect in perpetuity and until terminated by 90 (Ninety) days' notice in writing to be given by THE GRANTEE to THE GRANTOR; alternatively, and should THE GRANTEE be in breach of the terms and conditions hereof, by 90 (Ninety) days' notice in writing to be given by THE GRANTOR to THE GRANTEE in which case THE GRANTEE shall further be liable to THE GRANTOR in damages in respect of any pollution of the water resource or the surrounding land consequent upon such breach by THE GRANTEE";

[6] The applicant alleged that the main application was necessitated as the Municipality breached the terms of a deed of servitude as well as its statutory obligations with regard to the treatment of sewerage and its deposition into the natural water resource on the Farm. The participating respondents in their

answering affidavit in the main application, quite rightly, admitted this allegation.

- [7] It was further alleged in the main application by the applicant that the nature of the participating respondents' breaches of the deed of servitude and its statutory obligations had resulted in the discharge of untreated sewerage in uncontrolled quantities into Kamfersdam resulting in *inter alia*:

7.1 The destruction of the Flamingo wetland sanctuary on the Farm;

7.2 The flight of the Flamingos from the wetland and the Farm generally;

7.3. Serious pollution of the water resource in the pan and the surrounding area of the Farm and the inundation of approximately 700 hectares of the Farm;

[7] 7.4. The increase of the area of the Farm under untreated sewerage water from 150 hectares in 2015 to 700 hectares in August 2023;

7.5. The flooding and submergence of Kenilworth, which is not subject to the deed of servitude; and

7.1 The destruction of the Flamingo wetland sanctuary on the Farm

7.6. The threatened loss of two Transnet railway lines that traverse the area as well as the area of the N12 national road that runs adjacent to the eastern boarder of the Kamfersdam and the Farm.

- [8] The relief sought in the main application was granted in favour of the applicant by agreement between the parties. As a result:

8.1 The participating respondents were ordered to prepare and submit a technical report ("the technical report") by 22 May 2024 (60 calendar days from the date of the granting of the 22 March 2024 order), setting out the steps proposed to be taken and the timeframes within which such steps would be taken to ensure compliance with the March 2024 order; and

- 8.2 The main application was postponed to Friday 19 July 2024 on condition that the Municipality had to file an affidavit deposed to by the Municipal Manager that specifies what steps were taken to give effect to the March 2024 order, and in the event of non-compliance, the steps proposed to be taken and the timeframes within which such steps will be taken.

The applicant's case in the founding affidavit in the contempt and compliance application:

[9] According to the applicant:

9.1 The March 2024 order was made an order of court by agreement between the applicant and the participating respondents, in the presence of the participating respondents' attorney of record. The participating respondents were therefore fully conversant with the terms of the March 2024 order, and consequently, also with their obligations in terms thereof;

9.2 The participating respondents, however, failed to comply with the March 2024 order in that the 120 days from the 22 March 2024 order had expired on 21 July 2024 without any visible signs that any steps were taken by the participating respondents to rectify the issues highlighted in the main application and the March 2024 order; and that after 310 days from the March 2024 order, 700 hectares or 70% of the Farm remains under untreated or inadequately treated sewerage, rendering the property useless for agricultural purposes whilst also posing a significant threat to public health.

9.3 On or about 22 June 2024, 91 calendar days subsequent to the March 2024 order, the attorney for the participating respondents provided the applicant's attorney with a document called "Business Plan: Refurbishment of Homevale WWTW" dated 29 May 2023 ("the May 2023 report") by e-mail. According to the May 2023 report, the

Municipality effectively concedes that the HWWTW is dysfunctional and that sewage/sewerage is deposited onto the Farm in quantities and of a quality that is unacceptable as well as unlawful. The May 2023 Report *inter alia* states as follows:

"The water level at Kamfer's Dam should be managed so as to remain within an envelope of between 1156.0m and 1156.3m (metres above sea level). Currently the water level in the Pan is at approximately 1161m, which is significantly above the desired limit";

Further:

"The requirements for the proposed additional pipe line to the transfer scheme should therefore be to initially reduce the level of water to within the required 120 (One Hundred and Twenty) day window in the order, a window the First and Second Respondents agreed to."

And further:

"..... the project will address the renewal of the Homevale WWTW through the refurbishment of the 33M1/d which is currently not in operation due to aged infrastructure and vandalism. The refurbishment of the 33M1/d plant will ensure that the quality compliance with the effluent"

Also:

"Homevale WWTW has design treatment capacity of 48 M1/d. the model results indicate that the flow contribution from the Homevale drainage area is 36.3M1/d. therefore, the Homevale WWTW has 14.7M1/d capacity for the existing scenario."

- 9.4. Bearing in mind that the inflow is 36,3 M1/d and 33M1/d of the treatment capacity is said to be out of operation, there is no spare capacity and an average of 21,3 M1/d of untreated sewerage/sewage is therefore being discharged into the Kamfersdam, and

- 9.5. Further examples of admissions by the Municipality are the fact that the HWWTW is not being maintained properly, or at all, includes the state of disrepair, vandalism and theft to the extent that the electricity supply to all working equipment has been cut and is not functioning at all.

The answering affidavit:

[10] The participating respondents opposed the enforcement application, alleging that they are not in wilful and *mala fide* contempt of court. The crux of their opposition is:

- 10.1 The March 2024 order was not served on the participating respondents by the sheriff of the court, but by the applicant's attorney on 18 April 2024, which service is not proper in terms of the Uniform Rules;
- 10.2 The date of the May 2023 report was incorrectly captured and the report should have been dated 29 May 2024. The error allegedly occurred when Mr Mukosi, the city engineer: water and sanitation, was involved in the planning of an emergency water shutdown for 04 to 16 April 2024 with the resultant effect that Mr Mukosi was out of the office for a substantial period, and only able to attend to the report from the latter half of June 2024, which was ultimately "dated 29 May 2024" and delivered on 12 August 2024 ("the May 2024 report");
- 10.3 The chlorination leak has been repaired and the chlorination room is operational;
- 10.4 The Municipality is fixing the malfunctioning electrical and mechanical components, including the chlorine room, to ensure that the quality and effluent discharged into the natural water is improved;
- 10.5 The Homevale plant has a treating capacity of 48 megaliters per day which consists of a 15 megaliters newly built module and a 33 megaliters module. The 33 megaliters module was vandalised and has malfunctioning electrical and mechanical components. The Municipality

has subdivided the repair into three stages and is currently working on the first phase which would take approximately 20 months;

- 10.6 Transnet is assisting the Municipality to purchase three mobile pumps. In addition, Transnet will assist the Municipality with the replacement of the 3km rising main pipe which would take approximately 12 months. On replacement of the 3km pipe, the Municipality will resume the pumping of water from the Kamfersdam to the Vaal River. It is anticipated that the pumping will commence in approximately four months' time;
- 10.7 The Municipality has appointed a service provider to install a clear-vu fence that will be erected within eight months; and
- 10.8 The Municipality contends that the water currently pumped onto the farm is "not fully raw sewage" and that it obtained an independent laboratory report that indicates that the water levels at the Kamfersdam is "of good enough quality" to be pumped into the Vaal River as the E.Coli content is currently averaging between 23-50 CFU/100ml. In support of these allegations, the participating respondents rely on a certificate of water analyses completed on 03 July 2024 and attached to an undated and unsigned addendum to the May 2024 report.

The replying affidavit:

[11] In its replying affidavit, filed on 28 August 2024, the applicant:

- 11.1. Stresses that the participating respondents concede that nothing has changed since the March 2024 order, and in fact, will not change for at least 20 months; and that the participating respondents have not complied with the March 2024 order;
- 11.2. Submits that the participating respondents admit: (a) the destruction of the flamingo wetland sanctuary on the farm Flamingo and the flight of the flamingos from the farm; (b) the serious pollution of the water

- resources in the pan and surrounding area of the Farm and the inundation of approximately 700 hectares of the Farm; (c) the increase of the area of the Farm under untreated or poorly treated sewerage water from 150 hectares (2015) to 700 hectares of the Farm; and (d) the threatened loss of the two Transnet railway lines;
- 11.3. Argues that the May 2024 report is exactly the same as the May 2023 report, save that the date is different; the report is not addressed to the Department of Water and Sanitation ("the Department"); and the issue that existed with the chlorine leak;
- 11.4. Persists that the May 2024 report does not comply with the March 2024 order;
- 11.5. Places the veracity of the technical report in dispute in view of: (a) the date of May 2024, which is contrary to the submission that Mr Mukosi could only attend thereto in the latter part of June 2024; (b) the fact that no explanation is proffered why the report was not submitted after 29 May 2024, if it was available; and (c) why the report is not addressed to the Court, as ordered;
- 11.6. Emphasises that the participating respondents failed to adhere to the 60 day and 120 day timeframes set out in the March 2024 order as no timeframes, or the steps that had to be taken, is set out in the technical report or in the answering affidavit;
- 11.7. Contends that the waste water is not being directed to the new section of the HWWTW for treatment, but to the old section, which is not operational, even on the participating respondents' version, with the result that 36.3M1/d of untreated sewage is contributed onto the Farm; and even if both components were fully operational, the discharge of untreated sewage would amount to 21.3M1/d which is unacceptable and contrary to the deed of servitude;

- 11.8. Denies that, with reliance on the Aquatico water quality report dated November 2023, which reflects results from tests conducted between March 2020 to December 2022 indicate well over a 100 000 CFU/100ml, that the current average E.coli content is only 23-50 CFU/100ml.

The application for amendment:

- [12] The participating respondents raised, for the first time in their heads of argument and supplementary answering affidavit, filed on 12 February 2025, a point in *limine* that the Municipal Manager had to be joined in his personal capacity before a court could find him in contempt of court.

- [13] On 14 February 2025, the applicant accordingly filed a notice of intention to amend its notice of set down by deleting the order prayed for in respect of the contempt and committal; and the substitution thereof with the following:

- 13.1 The participating respondents be found to be in contempt of the March 2024 order;

- 13.2 The participating respondents be ordered to fully comply with the March 2024 order within a period of 30 days of the granting of the order;

- 13.3 In the event of the participating respondents further failing to comply with March 2024 order within the 30 day period, leave be afforded to the applicant to approach the court on the same papers, duly supplemented, if and where necessary, within 21 days' notice for:

- 13.3.1: An order joining the Municipal Manager, currently cited in his official capacity, in his personal capacity as well; and

- 13.3.2: A rule nisi requiring the Municipal Manager to show cause why he should not be committed for contempt of court for a period of 30 days.

- [14] On 17 February 2025, the participating respondents objected to the proposed amendment on the following grounds: (a) the notice of amendment unjustifiably deviates from the requirements of Rule 28; (b) the proposed amendment would cause serious prejudice to them that cannot be cured by means of a postponement or an order for wasted costs; (c) the applicant has not explained its inordinate delay in issuing the notice to amend; and (d) the applicant seeks to withdraw a common cause admission.
- [15] Mr Volmink, on behalf of the participating respondents, submitted that the applicant is not entitled to make an oral application for an amendment in terms of Rule 28(4) or before the expiration of the 10 day period within which an application to amend should be filed.
- [16] The court in *De Kock v Middelhoven*,¹ with reference to *Swartz v Van der Walt t/a Sentraten* 1998 (1) SA 53 (W), confirmed that the words used in rule 28(4), i.e. 'lodge an application', cannot in the context of an amendment, which by nature is an interlocutory application, denote an intention on the part of the legislator that a formal notice of motion procedure supported by an affidavit contemplated in rule 6 must be followed. The court unequivocally stipulated:
- 'What the new rule 28(4) has done is to abolish the regimented procedure of the old rule 28(4) which compelled a party seeking an amendment to bring a substantive application for leave to amend. The new rule 28(4) does not compel a party seeking an amendment to deliver an application for leave to amend.'
- [17] I was also not persuaded that the applicant was dilatory in filing its intention to oppose as the applicant was only alerted to the *point in limine* of non-joinder in the participating respondents' heads of argument and the supplementary affidavit filed on 12 February 2025.
- [18] The applicant, in its heads of argument, submitted that the application is fully ventilated and therefore it abandoned any further reliance on the rule *nisi*. In view of the fact that the contempt and compliance application was fully ventilated, the applicant indicated that it will no longer move for a rule *nisi* as

¹ 2018 (3) SA 180 (GP) para 16-17.

originally intended, but will approach the court hearing the contempt and compliance application for a final order. Mr Volmink, for the participating respondents, argued that the applicant, by virtue of the amendment, reintroduced the rule *nisi*; and this reintroduction amounts to a withdrawal of an admission, and as such, the applicants had to file a supporting affidavit. I do not agree that the amendment amounted to a withdrawal of an admission.

[19] However, I determined that the proposed amendment would not be constitutionally competent in view of the following:

19.1 The Constitutional Court dealt with and clarified the issue of the need or requirement for personal joinder in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (“*Matjhabeng*”)² where it said:

‘A question of non-joinder was also raised. On 3 December 2015, the Chief Justice issued directions inviting parties to file written submissions on whether municipal managers who fail to give effect to court orders can be found guilty of contempt in the absence of their joinder to the proceedings’. It is common cause that both Messrs Lepheana and Mkhonto were convicted and sentenced without having been joined as parties to the proceedings. At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, *mero motu*, raise a question of joinder to safeguard the interests of a necessary party and decline to hear a matter until joinder has been affected. This is consistent with the Constitution. The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived.’; and

² 2018 (1) SA 1 (CC) at paras 90-2; see also paras 93- 96 thereof.

19.2 In *Mabasa and Another v Municipal Manager: O R Tambo District Municipality and Others*,³ the court, guided by *Matjhabeng*, confirmed that:

'If regard is had to the relief sought by the applicants, it would have been observed that they want the municipal manager to be found guilty of a crime. This has very serious implications which include possible incarceration for a period of time. That could inevitably result in the deprivation of personal liberty which is enshrined in our Constitution. Therefore, the very idea of a deprivation of a personal right of a person, any person, without that person having been heard is irreconcilable with the jealousy with which the right to personal liberty is and should be regarded and protected by courts. Mr Matomela who refused to comply with the court order citing all manner of excuses was not cited in a personal capacity. This means he cannot be found guilty of contempt of the court order as that could lead to a possible deprivation of his liberty.'

[20] The resultant effect of the amendment, if allowed, would have prejudiced the Municipal Manager, in that he could be found guilty of contempt of court without him first being joined in his personal capacity as a party to the proceedings. The application for an amendment was accordingly dismissed.

[21] On dismissal of the application for the amendment, Mr Olivier, on behalf of the applicant, confirmed that the applicant is no longer seeking a contempt of court order against the Municipal Manager; and that it will request the following final order, namely that:

21.1. The Municipality be found in contempt of the March 2024 order;

21.2. The participating respondents be ordered to fully comply with the March 2024 order within the said period of 30 days, failing which, leave be afforded to the applicant to approach this court on the same papers supplemented, for the joinder of the Municipal Manager in his personal capacity, and for an order for the Municipal manager's committal to prison for a period of 30 days; and

³ (2503/2022) [2024] ZAECHMHC 7 (23 January 2024) para 28.

21.3. The R625 000 claim and future monetary claims.

The application for the filing of further affidavits:

[22] On 12 February 2025, the participating respondents filed a supplementary answering affidavit. The applicant did not oppose the admission of the supplementary answering affidavit on condition that its supplementary replying affidavit is also admitted. In the absence of serious opposition, both supplementary affidavits were accepted into evidence.

[23] According to the supplementary answering affidavit, the following events have transpired since the filing of the answering affidavit:

23.1 The malfunctioning mechanical components in respect of the 15 megaliter module was repaired in full during September 2024;

23.2 The chlorine room that accommodates the chlorination process and that services both the 15 and 33 megaliter modules was repaired;

23.3 The three mobile pumps have been acquired and were delivered in October 2024. These pumps will facilitate the distribution of water discharge from the Kamfersdam to the HWWTW, which would ensure that the water levels at Kamfersdam will return to the 2015 levels. The pumps are, however, not operational as the 3km water pipeline has not yet been replaced;

23.4 The 3km pipeline was purchased by Transnet and delivery is expected at the end of February 2025. The installation of the pipe will take approximately eight months as procurement processes must be factored into the time frames;

23.5 The water levels at Kamfersdam have been reduced drastically as Kimberley Golf Course and Ekapa Mining could resume pumping water

from the HWWTW to their respective facilities. This process started in September 2024 ("the Ekapa/ Kimberley Golf Course proposal");

23.6 According to Mr Mukosi, the raw sewerage discharge has been reduced by 50%;

23.7 For the 33 megaliter module to become fully operational, funding of R106 000 000 is required. A request for funding was made to the Department of Water and Sanitation ("the Department") in June 2024, but is still under consideration;

23.8 The clear-vu fence had been installed; and

23.9 The Municipal Manager and Mr Malherbe, the owner of Malu Landgoed (Pty) Ltd, met on 04 February 2025 during which meeting Mr Malherbe submitted a proposal to alleviate the sewerage discharge crisis. The proposal entails a joint venture for 30 years, at no cost to the Municipality, to divert discharge to farming areas. ("the Malherbe joint venture"). The proposal will be submitted to the Municipality's council at the next council meeting. The Municipal Manager has also met with the engineers of the proposed joint venture and the Municipality's technical team, and they are in principle in agreement with the proposal.

[24] The participating respondents also explain that the reference to June 2024, being the date that the water levels improved, is incorrect and the correct date on which Mr Mukosi could attend to the report was in fact May 2024.

[25] In its supplementary replying affidavit, the applicant, in essence, takes note of the repairs alluded to, but persists that it has not made a material difference to the position that untreated sewerage is still being deposited into the Kamfersdam; and that there is paucity about the practical implementation of the steps alleged to have been taken. The applicant also questions why the supplementary affidavit is silent on the time period it will take to ensure that the water levels return to the 2015 levels, despite the fact that the March 2024 order required the participating respondents to provide a plan to ensure that

the water levels would return to the 2015 levels within six months of the order. The applicant disputes that there has been a substantial reduction in water levels; and stresses that despite the allegation that the discharge of raw sewerage has been reduced by 50%, it had to, in terms of the March 2024 order, cease completely by 20 July 2024. The applicant takes issue with the submission that the discharge has been reduced by 50% in view of the participating respondents' business plan that states that 21.3 megaliters of raw sewerage is still discharged into Kamfersdam daily. The applicant questions why funding of R106 000 000 is required as, according to the participating respondents, the National Treasury has made an amount of R492 000 000 available to the Municipality for the 2024/2025 financial year; and an amount of R574 000 000 for the 2025/2026 financial year, which are enormous amounts of money. The applicant also expressed reservations about the allocation of R106 000 000 allegedly already made during May 2024. The applicant admits that the clear-vu fence was installed, but states that no mention is made of the security installation that the Department indicated as a necessity to prevent further vandalism. The applicant also questions whether the Malherbe joint venture and the Ekapa/Kimberley Golf Estate proposal are feasible.

- [26] In addition, the applicant, based on two newspaper articles (Daily Maverick, published on 09 January 2025 and the Diamond Fields Advertiser, published on 24 December 2024), and an affidavit of Ms E van der Westhuizen, an environmentalist who was involved in the retrieval of dead and dying birds from the Kamfersdam, submits that the sewerage bacteria deposited into the Kamfersdam caused the outbreak of avian botulism that resulted in the death of more than 150 birds, with the result that the Department has initiated criminal proceedings against the Municipality for pollution; and its failure to improve the standard of effluent discharge into Kamfersdam.

The contempt of court order:

Applicable law:

[27] As pronounced by the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality*,⁴ the rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[28] Courts have the power to ensure that their decisions or orders are complied with, including those imposed against organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant, but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.⁵ The Municipality as an Organ of the State, and the Municipal Manager as its functionary (the participating respondents), are held to an even higher standard. Not only must they act in strict compliance with court orders, but they are also constitutionally bound to facilitate the efficiency of the judicial branch.⁶

[29] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements needed to be established on a balance of probabilities:⁷

⁴ (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) para 1.

⁵ *Ibid* para 2.

⁶ *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) paras 34–36; see also *Nyathi v MEC for Department of Health, Gauteng and Another* 2008 (5) SA 94 (CC) para 43.

⁷ *Pheko and Others v Ekurhuleni Metropolitan Municipality* ('Pheko'), *ibid* fn 5, para 32; see also *Fakie NO v CCII Systems (Pty) Ltd* (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (Fakie) para 12.

29.1 The order must exist;

29.2 The order must have been duly served on, or brought to the notice of, the alleged contemnor;

29.3 There must have been non-compliance with the order; and

29.4 The non-compliance must have been wilful or *mala fide*.

[30] In the post-constitutional dispensation, the Supreme Court of Appeal in *Fakie* concluded that this standard for a finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt.⁸ Once an applicant has proved the first three elements, wilfulness and *mala fides* are presumed and the respondent accordingly bears an evidentiary burden thereof. Thus, the respondent must produce evidence that establishes a reasonable doubt as to whether the non-compliance was wilful and *mala fide*, failing which contempt will have been established beyond a reasonable doubt.⁹ Consequently, should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.¹⁰

[31] The Concise Oxford English Dictionary defines *mala fides* as “bad faith; intent to deceive”, whereas wilful is defined as “intentional, deliberate; stubborn and

⁸ *Fakie* (*Supra*) paras 19, 29 and 39, endorsed by the Constitutional Court in *Pheko* (*Supra*) para 35.

⁹ *Mashamaite and Others v Mogalakwena Local Municipality and Others; Member of the Executive Council for Coghsta, Limpopo and Another v Kekana and Others* [2017] 2 All SA 740 (SCA) para 44.

¹⁰ See *Tasima (Pty) Ltd v Department of Transport and Others* [2016] 1 All SA 465 (SCA) wherein the SCA observed thus:

“[18] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paragraph 9 [also reported at [2006] JOL 17080 (SCA) – Ed]. *Fakie* also held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies (paragraph 19). A declarator of contempt (without imprisonment) and a mandatory order can however be made on the civil standard (see *Fakie* paragraph 42). The applicant for a committal order must establish (a) the order; (b) service or notice of the order; (c) non-compliance with the terms of the order and (d) wilfulness and *mala fides*, beyond reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears an evidentiary burden in relation to (d) (*Fakie* paragraph 42). Should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt (*Fakie* paragraphs 22–24)”. (Emphasis supplied); see also *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 208.

determined”.¹¹ Cameron JA in *Fakie NO v CCI Systems (Pty) Ltd*,¹² explained the nature of the test in determining whether the breach was committed “deliberately and *mala fide*” in the following terms:

“... A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

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

Evaluation of the evidence and arguments:

- [32] During argument Mr Volmink conceded that the March 2024 order exists and had been brought to the notice of the participating respondents. He also acknowledged that the participating respondents did not strictly comply with the March 2024 order, but argued that the steps taken, as explained in the answering and supplementary answering affidavits, ousted any insinuation of wilful and *mala fide* disobedience by the participating respondents. Mr Olivier urged me to grant an order of contempt against the Municipality in view of the fact that no report nor affidavit was filed by the participating respondents in accordance with the March 2024 order.

¹¹ In terms of the “*West’s legal thesaurus/dictionary: a resource for the writer and the computer researcher*.” — ‘*Mala fide*’ is defined as “*Bad faith*”. Therein, “*Bad faith*” is defined as “Conscious doing of wrong; dishonest purpose. Improper dealing, untrustworthiness, breach of faith, deception, double-dealing, dishonesty, insidiousness, fraud, meretriciousness, underhandedness, wilfulness, wilful failure, malice, intentional or gross recklessness, affirmative misconduct, conscious disregard, deliberate misleading, deliberate refusal, base, abjection, collusion, deceit, conspiracy, duplicity, falsehearted, treachery, perfidy, foul play”. Furthermore, “*Wilful*” is defined as “proceeding from a conscious motion of the will (wilful volition). Voluntary, not accidental, designed, conscious, purposeful, wanton, reckless, planned, calculated, volitional, studied, contemplated, stubborn”. Similarly, Black’s Law Dictionary defines *mala fide* as “*bad faith*”. Furthermore, “*bad faith*” is defined therein as “dishonesty of belief or purpose”.

¹² *Fakie Ibid* fn 8 paras 9-10.

[33] The crux of the matter is whether the Municipality was wilful and *mala fide* and why it should not be held in contempt of court for not complying with the March 2024 order.

[34] In order to evaluate the Municipality's defence, it is necessary to start with the content of the interdict order, which in essence required (a) the submission of the technical report on or before 22 May 2024, setting out the steps to be taken and the timeframes within which they would be taken to address the applicant's concerns about the discharge of untreated sewage/sewerage into the Kamfersdam or onto the properties, which original technical report had to be filed at the office of the Registrar; and (b) an explanatory affidavit to address the compliance, or in the event of non-compliance, the steps to be taken and the timeframes within which they would be taken, which affidavit had to be filed on 27 June 2024.

[35] The participating respondents' submissions regarding the submission of the technical reports are rather disingenuous. I am persuaded that the May 2024 report is the same as the May 2023 report, save that the date is different; the report is not addressed to the Department and that the issue that existed with the chlorine leak is addressed. The two mutually destructive explanations about Mr Mukosi's availability to attend to the report cast doubt on the veracity of these allegations. In my view, no satisfactory explanation is provided in the answering or supplementary answering affidavits about the concerns of the applicant in this regard. Furthermore, neither report were delivered to the Office of the Registrar. Be it as it may, two reports, containing proposed steps and timeframes, are extant.

[36] The question is, do these incongruities establish *mala fide* and wilful disobedience of the March 2024 order? To my mind, it does not. Both the May 2023 and the May 2024 reports contain timeframes, albeit non-specific, within which timeframes, specified steps would be taken, including a vague indication of the amounts that would be allocated in respect of each step. On a strict and purposive interpretation, this is in line with the March 2024 order, which was similarly worded and required nothing more from the participating respondents. In retrospect, the terms of the March 2024 order as agreed to

between the parties are not defined with sufficient particularity to ensure the effective implementation thereof. I am therefore persuaded, on a consideration of all the evidence, including the other incentives taken, that the Municipality was not wilful and mala fide in its disobedience of the March 2024 order.

The compliance order:

[37] My findings in respect of the order for contempt is, however, not the end of the matter.

[38] It is not difficult to understand the reasoning behind the March 2024 order. A cursory glance at the following provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution") justifies same:

38.1 Since the advent of the Constitution, the Bill of Rights incorporated therein serves as a cornerstone of our democracy. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The State must respect, protect, promote and fulfil the rights in the Bill of Rights.¹³ Section 8(1) of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

38.2 Section 24 of the Constitution provides that:

'Everyone has the right –

- (a) to an environment that is not harmful to their health or wellbeing; 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.'

¹³ Section 7 of the Constitution.

- 38.3 Section 41(1) *inter alia* provides that all spheres of government and all organs of state within its sphere must secure the well-being of the people of the Republic;
- 38.4 Section 152(1)(b) of the Constitution provides that the object of the Local Government is *inter alia* to ensure the provision of services to communities in a sustainable manner and in terms of Section 152(1)(d), to promote a safe and healthy environment;
- 38.5 Section 153 of the Constitution provides that a municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community;
- 38.6 Section 156(1)(a) further provides that a municipality has executive authority in respect of and has the right to administer the local government matters listed in Part B of Schedule 4 to the Constitution. Part B of Schedule 4 *inter alia* provides that the municipality will have executive authority in respect of water and sanitation services limited to potable water supply systems and domestic wastewater and sewerage disposal systems.
- [39] The preamble to the Water Services Act 108 of 1997 acknowledges the duty of all spheres of government to ensure that water supply services and sanitation services are provided in a manner that is efficient, equitable and sustainable; and confirms that municipalities have the authority to administer water supply and sanitation services within the limits of physical and financial feasibility.
- [40] It is evident from the evidence placed before the Court, even by the participating respondents themselves, that at the time the March 2024 order was made, and at the time the contempt and compliance application was argued, the sewage problem as contemplated within the interdict had not been resolved at all, despite the steps taken by the participating respondents' as set out in the supplementary answering affidavit. The participating respondents' submission that funding in the amount of R106 000 000 is required for the

repair of the 33 megaliter module is absolutely astounding as it is contrary to the common cause facts that a submission for funding had been made to the Department during June 2024. It is also common cause that the Department had made available an amount of R492 000 000 for the 2024/2025 financial year; and an amount of R574 000 000 for the 2025/2026 financial year to the Municipality for water infrastructure refurbishment.

[41] I am thus of the opinion that the facts of the present matter necessitate that the Court intervenes to ensure proper compliance by issuing a structured interdict to alleviate not only the applicant's plight but to ensure that the Municipality adheres to its constitutional obligations for those whose interests it is there to serve. To provide an effective order, this court relies upon its inherent discretion provided in terms of section 173 of the Constitution that vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly, and effective manner.¹⁴

[42] In *Social Justice Coalition and Others v Minister of Police and Others*,¹⁵ Kollappen J, with reference to various authorities, discusses the inherent jurisdiction that vests in the Superior Courts in South Africa. In terms of this power, a High Court always has been able to regulate its own proceedings for several reasons, including catering for circumstances not adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions. Kollappen J *inter alia* held as follows:

[54] The Rules of court provide both details of substance and of procedure that govern the litigation of disputes, and it would be fair to say that those rules seek to broadly achieve the fair and efficient management of the litigation process. Fairness is ensured by allowing the proper participation of parties and the full ventilation of issues and efficiency is advanced through the regulation of timelines and time periods that apply in the litigation process.

And,

¹⁴ *South African Broadcasting Corporation Limited v National Director of Public Prosecutions and Others* (CCT58/06) [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC); 2007 (1) SACR 408 (CC) para 90; see also *Madiro v Madibeng Local Municipality and others and a related application* [2024] 1-All SA 225 (GP) para 167.

¹⁵ (CCT 121/21) [2022] ZACC 27; 2022 (10) BCLR 1267 (CC).

[72] This Court in *SABC*,¹⁶ described the provision as an important one, pointing out that the only qualification on the exercise of the power contained in section 173 was that the Court must take into account the interests of justice. This Court said in that context:

"Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power must take into account the interests of justice."

[73] This Court went on to state that:

[73] 'In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and [the Constitutional Court] in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly, and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution.'

The claims for compensation:

[43] In addition to the contempt order and compliance order, the applicant alleges that the Municipality, in acting in contravention of the deed of servitude, is contaminating the Farm and the wetlands /natural water resources on the Farm, rendering it useless for conservation and commercial farming. The applicant avers that it has been deprived of 50% of the surface area of the Farm; and 70% of Kenilworth as a result of the negligence and failures of the participating respondents to adhere to the terms of the servitude agreement

¹⁶ *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

and according to extensive enquiries made, the applicant determined that the market related rental for agricultural land in the area of the Farm and Kenilworth amounts to an average of R250 per hectare per year since 2020 when the flooding started, on which basis the applicant claims past compensation for damages in the amount of R625 000; and for future penalties in the amount of R125 000 per annum up until the participating respondents have fully complied with the March 2024 order.

[44] The participating respondents oppose the monetary claims of the applicant on the following basis:

44.1. The participating respondents deny that the Municipality has “completely flooded Kenilworth and that the Farm is rendered useless”;

44.2. The participating respondents also deny the amount of the quantum claimed on the basis that the reasonable market related rental for agricultural land is less than R250 per hectare;

44.3. The applicant is seeking to enforce a damages claim in the form of an application, which is not competent in view of the dispute of facts;

44.4. The flooding commenced five years ago, which renders a considerable part of the R625 000 claim expunged by prescription; and

[44] The participating respondents oppose the monetary claims of the applicant on 44.5. It is legally untenable to claim the future damages.

[45] In reply, the applicant confirms that it is not seeking the monetary claims for damages, but the imposition of a penalty for the participating respondents' failure to comply with the March 2024 order, the deed of servitude and the laws regulating the quality of water permitted to be deposited into a natural water source.

[46] I agree with Mr Volmink that the applicant moved the goalposts by first claiming damages, and then, later on, penalties.

[47] Both the claims for compensation involve disputes of fact pertaining to the merits as the participating respondents deny the complete flooding of

[47] Kenilworth and the allegations that it has been rendered useless. Neither party has provided me with sufficient and clear evidence in this regard or by what date the complete flooding occurred, which would have placed me in a position to reach any conclusion on the papers in this regard.¹⁷

[48] The award of monetary damages for a constitutional breach has been accepted in principle since the dawn of the Constitution.¹⁸ Mr Olivier, with reliance on *MEC, Department of Welfare v Kate* ("Kate")¹⁹ argued that this Court is entitled to apply the same principles to a claim of penalties.

[49] The question that remains is how to measure that loss in monetary terms. In *Kate*, the Court awarded damages equivalent to 15,5% (the prescribed rate of interest per annum) calculated from 1 September 1999, from the date the unlawful delay of payment commenced.

[50] In *casu*, the amended deed of servitude does not contain a penalty provision, and neither was I referred to any mechanism to measure the penalties for the constitutional breaches. In view of my finding that factual disputes exist that cannot be resolved on the papers, the amount of R250 per hectare per year does not assist the applicant in respect of the R625 000 claim.

[51] With regard to the future claims, the Court in *Coetzee v SA Railways & Harbours*,²⁰ stated:

[52] The cases go only to this extent, that if a person sues for accrued damages, he must also claim prospective damages or forfeit them. But I know of no case which goes so far as to say that a person who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future. Prospective damages may

¹⁷ See generally, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁸ *Fose v Minister of Safety & Security* 1997 (3) SA 786 (CC). See also *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, Amici Curiae); *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA) para 43; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* (Agri SA and Others, Amici Curiae) 2005 (5) SA 3 (CC) para 65-66; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA); *Minister of Safety & Security and Another v Carmichele* 2004 (3) SA 305 (SCA) paras 34 and 37.

¹⁹ [2006] JOL 17085 (SCA); [2006] 2 All SA 455 (SCA); 2006 (4) SA 478 (SCA) paras 20-23.

²⁰ 1933 CPD 565.

be awarded as ancillary to accrued damages, but they have no separate, independent force as ground of action.'

[52] In *SAsfin (Pty) Ltd v Jessop and Another*,²¹ quoting *Charlesworth & Percy* on Negligence, the Court confirmed that because negligence does not become actionable without proof of damage, it is only after damage has been suffered that the cause of action becomes complete, and time begins to run.

[53] For the above reasons, the future claims stand to be dismissed.

Costs:

[54] Despite my finding that the Municipality was not wilful or *mala fide*, the participating respondents have shown a careless and negligent disregard to the importance of the matter, not only to the applicant but also to the City of Kimberley and the members of their community. I reach this conclusion in view of the cavalier approach to the implementation of the March 2024 order. Even though they conceded that the application is of a serious nature, one would expect the participating respondents to have a robust approach to resolve the disaster and not only to wait until the eleventh hour to disclose to the applicant, and the court, what had transpired since the filing of the answering affidavit. Their conduct *vis-a-vis* the consent order and the manner in which they dealt with the two reports leaves much to be desired and also warrants censure. In the circumstances, it would be just and equitable that the participating respondents pay the costs of the application.

Order:

In the result, the following order is made: -

1. The relief for contempt of court against the first respondent is dismissed;

²¹ 1997 (1) SA 675 (W) at 694F-H.

2. The first and the second respondents are ordered to file, by no later than 12:00 on 30 May 2024, a report on the progress made in respect of the sewage/sewerage discharge on the farms and the Kamfersdam

3. The report must contain the following information: -

3.1. The steps taken as at 20 May 2025 to ensure that:

3.1.1. No untreated sewage/sewerage or waste water with an E. Coli content exceeding the legally prescribed limit (1000 CFU/100 megaliters) is discharged into any portion of the Kamfersdam or any part of the Farm or Kenilworth;

3.1.2. The amount of treated sewage/sewerage or waste water discharged into the Kamfersdam on the Farm is limited to 30 megaliters per day, alternatively to the extent that the water levels in the Kamfersdam should return to their 2015 levels;

3.1.3. The sewerage- and/or reticulation systems and infrastructure in and about the area of the Homevale Waste Water Treatment Works ("the HWWTW") are repaired and/or reinstated to be fully optimal and at full operational capacity in order to ensure that no spillage, irregular discharge or overflow of sewerage and effluent water occurs over or on to the land in the area surrounding the water resource;

3.1.4. To ensure that the HWWTW and the area around it are properly secured, including the installation of CCTV cameras;

3.2. The progress made in respect of the acquisition, delivery and installation of the 3km water line;

3.3. The progress made with regard to the Malu joint venture;

3.4. The progress made with regard to the Ekapa Mining and Kimberley Golf Estate project;

3.5. The report must be accompanied by a specified budget indicating the amount allocated to each action and the date on which the funds

3.5. The respondent to be charged to be a professional water engineer or a person qualified to assess water quality and the steps to be taken to ensure compliance; and what amount

were/would be made available to ensure compliance; and what amount has been expended up to the date of the report;

3.6. The report must be accompanied by an updated expert water analysis;

4. Thereafter, and on the last Friday of every following fourth month, on or before 12h00, the first and the second respondents are ordered to file a report on the progress made in respect of the sewage/sewerage discharge on the farms and the Kamfersdam to this Court by way of delivering it to the Registrar of the Court ("the further progress reports");

5. The further progress reports must contain the following information: -

5.1. The steps taken, including the commencement date thereof, during the previous four months to ensure that:

5.1.1 No untreated sewage/sewerage or waste water with an E. Coli content exceeding the legally prescribed limit (1000 CFU/100 megaliters) is discharged into any portion of the Kamfersdam or any part of the Farm or Kenilworth;

5.1.2 The amount of treated sewage/sewerage or waste water discharged into the Kamfersdam on the Farm is limited to 30 megaliters per day, alternatively to the extent that the water levels in the Kamfersdam should return to their 2015 levels;

5.1.3 The sewerage- and/or reticulation systems and infrastructure in and about the area of the Homevale Waste Water Treatment Works ("the HWWTW") are repaired and/or reinstated to be fully optimal and at full operational capacity in order to ensure that no spillage, irregular discharge or overflow of sewerage and effluent water occurs over or on to the land in the area surrounding the water resource;

5.1.4 To ensure that the HWWTW and the area around it are properly secured, including the installation of CCTV cameras;

5.2. The progress made in respect of the acquisition, delivery and installation of the 3km water line;

5.2. The progress made with regard to the repair of all three phases of the 33 36

5.3. The progress made with regard to the repair of all three phases of the 33
megaliters module;

5.4. The progress made with regard to the Malu joint venture;

5.5. The progress made with regard to the Ekapa Mine and Golf Estate venture;

5.6. Every further progress report must be accompanied by a specified budget
indicating the amount allocated to each action and the date on which the funds
were made available to ensure compliance with the March 2024 order;

5.7. Every report that is required to be delivered to this Court must be
accompanied by an updated expert water analyses report, reflecting: -

5.7.1. The faecal coliforms per 100 milliliters;

5.7.2. The Chemical Oxygen Demand (COD) per liter;

5.7.3. The pH;

5.7.4. The Ammonia (ionised and un-ionised) as Nitrogen per liter;

5.7.5. Nitrate/Nitrite as Nitrogen per liter;

5.7.6. Chlorine as Free Chlorine per liter;

5.7.7. Suspended solids per liter/l;

5.7.8. Electrical conductivity per milliSiemens per metre (mSm);

5.7.9. Ortho-Phosphate per liter;

5.7.10. Fluoride per liter; and

5.7.11. Soap, oil or grease per liter;

6. The first and second respondents' obligation to submit the further progress
reports will endure until the determination of the final date thereof by this Court;

7. The applicant's claim for payment of the amount of R625 000 is dismissed;

8. The applicant's claim for payment of the amount of R125 000 per annum until the first and second respondents have fully complied with the March 2024 order, is dismissed; and
9. The first and second respondent shall pay the applicant's costs on a party and party scale, scale C.



STANTON J

On behalf of the applicant:

Adv AD Olivier

On instruction of:

Adrian Horwitz and Associates

On behalf of the first and second respondents: Adv P Volmink

On instruction of:

Towell and Groenewaldt Attorneys

STANTON J