



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

**Not Reportable**

Case no: 708/2017

In the matter between

**J G L VAN WYK**

**APPLICANT**

and

**THE MUNICIPAL MANAGER MALUTI-A-PHOFUNG**

**LOCAL MUNICIPALITY**

**FIRST RESPONDENT**

**MALUTI-A-PHOFUNG LOCAL MUNICIPALITY**

**SECOND RESPONDENT**

*In re*

**THE MINISTER OF WATER AND SANITATION**

**PLAINTIFF**

and

**MALUTI-A-PHOFUNG LOCAL MUNICIPALITY**

**DEFENDANT**

**Neutral Citation:** *J G L van Wyk v The Municipal Manager Maluti-A-Phofung Local Municipality and Others* (708/2017) [2025] ZAFSHC 257 (22 August 2025)

**Coram:** Van Rhyn J

**Heard:** 5 June 2025

**Delivered:** 22 August 2025

**Summary:** Application for payment of percentage of equitable share paid by National Treasury in terms of written agreement. Legal point raised by municipality – such payment constitutes unauthorised use of equitable share – contrary to provisions of the Constitution and relevant legislation. Equitable share payment to municipality not conditional payment – principle of *pacta servanda sunt* restated.

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## ORDER

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1 The second respondent is ordered to make payment of 11% of its equitable share, paid by National Treasury, to the applicant, less an amount of R10 000 000. 00, in terms of the Memorandum of Agreement concluded between the applicant and the second respondent dated 11 March 2023.

2 The first respondent is held responsible, in his personal capacity, should the second respondent fail to make payment as in paragraph 1.

3 The second respondent shall pay the costs of the application on the attorney and client scale, which costs shall include the costs of two counsel (where so employed) on Scale C and Scale B respectively.

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## JUDGMENT

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### Van Rhyn J

[1] The Minister of Water and Sanitation (the Minister) instituted action against Maluti-A-Phofung Local Municipality (the Municipality), for the non-payment by the Municipality of its water use charges and water research levies, which charges and levies have accumulated to an astronomical amount in excess of R1 015 000 000 over decades. This is an application in terms whereof the applicant, Mr J G L van Wyk, appointed as Special Master (Special Master), seeks an order that the Municipal Manager of the Municipality, cited as the first respondent, make immediate payment of 11% of the equitable share, paid by National Treasury, to the Special Master in accordance with a written agreement concluded between the Special Master and the Municipality and that the first respondent be held responsible in his personal capacity should the Municipality fail to make such payment.

[2] The chronology of some salient events is of relevance to this application. During February 2017, the Minister, as the executive authority of the Department of Water and Sanitation, cited as plaintiff, instituted action against the Municipality (as the defendant in

the action proceedings), a Category B municipality as contemplated in s 155 of the Constitution read with s 9 of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) for payment of water use charges and water research levies imposed upon the Municipality in terms of s 2 read with ss 7(2), 152 and 195 of the Constitution and s 57(5) of the National Water Act 36 of 1998 (the National Water Act) as well as s 11(1)(b) of the Water Research Act 34 of 1971 (the Water Research Act).

[3] The Municipality defended the action and raised several special pleas. On 11 March 2023, the Special Master and the Municipality concluded an agreement, the Memorandum of Agreement, subsequent to a declaratory order by Daniso J made on the 7<sup>th</sup> of March 2023. By agreement between the parties, it was ordered that the Municipality's failure to pay water use charges under the National Water Act and water research levies under the Water Research Act were declared inconsistent with ss 1(a), (b), (c), 2, 7(2), 152, 195 and 237 of the Constitution and this failure threatens everyone's right to access to water guaranteed in s 27(1) of the Constitution. It was furthermore declared that the Municipality is liable to the Minister for payment of the water use charges for the period January 2005 to 7 March 2023 as well as water research levies for the period of January 2013 to 7 March 2023.

[4] The Special Master, appointed by the court on 7 March 2023, had to investigate and determine the true quantum of the indebtedness of the Municipality and to take appropriate remedial action in respect of payment of the water use charges and water research levies to the Minister. The Special Master was declared competent to conduct the investigation in any manner he deemed fit and was awarded the power to, *inter alia*, call for the production of all documents and material relevant to the dispute from the parties, call for witnesses to present evidence, examine the financial documents and information and was, furthermore, granted access to the parties' financial statements, records as well as accounting software programs. In addition, the Special Master had to determine the liquidity of the Municipality.

[5] It was ordered that the investigation and the quantification of the Municipality's liability towards the Minister shall be finalised within six months from date of the order. However, according to the Special Master, the date for the finalisation of the investigation to determine the quantum of indebtedness was extended on several occasions due to the

failure of the first respondent to cooperate with him in the execution of his duties and failure to engage with the Special Master in any meaningful discussions to resolve the issues.

[6] The application by the Special Master emanates from the Memorandum of Agreement entered into by the parties in terms whereof the parties, *inter alia*, agreed as follows:

- (a) after certification of the amount due and determining the liquidity of the Municipality, the Special Master must direct that the Municipality takes the necessary steps, including the adoption of a payment plan, to ensure payment of the certified amount;
- (b) all payments in respect of the Municipality's liability towards the Minister shall be paid into the Special Master's trust account where after the Special Master will pay the Minister the amounts payable within 60 days of the receipt of any amount;
- (c) should an amount which is certified by the Special Master remain unpaid for seven days, the Special Master shall direct that such payment be made forthwith and take any necessary action which deems to hold the chief financial officer and municipal manager of the Municipality responsible for compliance with his directives;
- (d) a failure to comply with any instructions issued by the Special Master may be deemed as contempt of the Special Master;
- (e) the Special Master has determined that the Municipality does not have sufficient liquidity to pay the full amount owed to the Minister in one single payment and will therefore periodically issue a determination as per the court order, which amount then becomes payable within seven days;
- (f) the Municipality declares that it intends to cooperate with the Special Master in an attempt to pay the outstanding debt as soon as possible and it declares that it enters into the agreement with the Special Master at free will;

[7] Relevant to the adjudication of this matter is the following provisions as contained in the Memorandum of Agreement:

### '3 PAYMENT OF DETERMINATIONS

#### 3.1 EQUITY SHARE

- 3.1.1 The parties acknowledge that an equity share gets paid to the Municipality on an annual basis by the National Department of Treasury which payment is made to the Municipality in 3 tranches.

- 3.1.2 The Municipality will pay 11% of each tranche of its equity share received to the Special Master as and when this share is paid to the Municipality.
- 3.1.3 The Municipality herewith authorises the Special Master to directly approach the National Department of Treasury to request them to pay the 11% of each tranche directly to the Special Master.
- 3.1.4 Should the National Department of Treasury for whatever reason not agree to pay the 11% of the equity share directly to the Special Master, the Municipality undertakes to inform the Special Master by notification, as soon as the Municipality receives communication from National Department of Treasury, to confirm the amount it will receive and the date on which the Municipality will receive payment of the equity share. The Municipality undertakes to pay within seven (7) days after receiving the tranches of equitable share to the Special Master.
- 3.1.5 The Special Master will then proceed to issue a determination equal to the 11% of the equity share, to the Municipality, which amount will become payable as determined by the court order.
- 3.1.6 The Municipality undertakes to immediately pay the 11% equity share to the Special Master on receipt thereof.
- 3.1.7 The Municipality and its representatives, as cited in the court application as referred to above, declares that they are fully aware that they will be in contempt of court and that the court could possibly make an order for the incarceration of the municipal officials for non-compliance of the said order.'

[8] The application by the Special Master was issued on 20 January 2025. In the founding affidavit deposed to by the Special Master it is stated that it was not possible to complete the investigation to determine the quantum of the Municipality's indebtedness within the period of six months, as provided for in the court order dated 7 March 2023, due to the non-availability of documentation, poor co-operation, the 'almost non-existent billing system' and poor collections by the Municipality. The first payment by the Municipality was made during 2024 in accordance with the Memorandum of Agreement and the next payment was due and payable at the end of November 2024. Notwithstanding several requests to make payment, the first respondent has failed to make any further payments and in the result, an order is sought in the following terms:

1. Ordering the second respondent to make immediate payment of 11% of the equitable share paid by National Treasury to the Special Master in terms of the written

agreement concluded between the Special Master and Municipality as per the Memorandum of Agreement.

2. That the first respondent be held liable in his personal capacity should the Municipality fail to make payment as per prayer 1;
3. Costs of the application.

[9] The application, referred to as the main application, is opposed by the first respondent and the Municipality, *inter alia*, on the grounds that the financial position of the Municipality is in such a dire situation that it does not have the capacity to pay over the 11% of its equitable share to the Special Master in accordance with the Memorandum of Agreement. Furthermore, if the parties were aware of the correct and precise liquidity position of the Municipality, the Memorandum of Agreement would not have been concluded on the terms as set out therein because if the Municipality is to be compelled to pay 11% of its equitable share to the Special Master, for payment to the Minister, it will result in the Municipality's financial ruin and its inability to discharge any of its constitutional obligations to the residents within its jurisdiction.

[10] The Municipality, cited as the first applicant and the Municipal Manager of the Municipality, cited as the second applicant, issued an application for a declaratory order (referred to as the counter application under the same case number) in terms whereof the following relief is sought:

- '1. Declaring the entire provisions of Clause 3.1 of the Memorandum of Agreement concluded by the First Applicant (Municipality) and the Respondent (Special Master) on the 7<sup>th</sup> of March 2024 is inconsistent with Paragraph 11 of the Court Order granted by this Honourable Court under Case Number 708/2017 on 7 March 2024;
2. Setting aside clause 3.1 of the Memorandum of Agreement referred to in Prayer 1 above; and
3. Directing the Respondent (Special Master) to comply with Paragraph 11 of the Court Order referred to in Prayer 1 above.
4. Costs only in the event of opposition by any party.'

[11] The replying affidavit by the Municipality in the counter-application was filed out of time, with the result that the Municipality's heads of argument was delivered late and not in accordance with the Practise Directives. Being out of time and not affording an opportunity for the filing of heads on behalf of the Special Master, the counter-application

by the Municipality and the first respondent was removed from the roll at the hearing of the main application and a punitive cost order was made against the Municipality. As a result, this judgment only deals with the main application (the application).

[12] The application was initially set down for hearing on the unopposed motion court roll for 13 March 2025 on which date the matter was postponed, by agreement between the parties, to the opposed roll of 8 May 2025. The respondents were ordered to file their answering affidavit and an application for condonation on or before 3 April 2025. On 4 April 2025, the respondents delivered a 'conditional answering affidavit' and failed to file their application for condonation in accordance with the court order by Naidoo J dated the 13<sup>th</sup> of March 2025. In terms of the order delivered by Naidoo J, the Municipality was ordered to pay the costs occasioned by the postponement.

[13] The application for condonation by the respondents was only delivered and filed on 23 May 2025. However, the original founding affidavit was not appended to the notice of motion. Of further significance is the order by Chesiwe J, made on 8 May 2025, in terms whereof a final postponement was granted to the 5<sup>th</sup> of June 2025 and the parties were called upon to comply with the court order dated 13 March 2025. The attorney for the respondents were furthermore ordered to file an affidavit, explaining what transpired since the order by Naidoo J was issued on 13 March 2025. The respondents accumulated a further costs order, this time on the attorney and client scale, including the costs of two counsel.

[14] In the affidavit deposed to by the Municipal Manager for the application for condonation the following contention was raised:

'36. I am also advised that the agreement between the parties to use 11% of the Municipality's equitable share to pay its debts to the DWS (the Department of Water and Sanitation), is itself also contrary to the regulatory framework as the equitable share is allocated to use for various other municipal obligations. The diversion of the allocated share (as is done in the memorandum on which this application is based) means that some constitutional obligations to be performed by the first respondent will suffer. This is untenable, it taints the agreement and borders on its legality.'

[15] At the hearing of the application on 5 June 2025, Ms Mutenga, counsel on behalf of the respondents, raised a legal point that the Memorandum of Agreement is not in

accordance with the applicable legislation on the basis that it is unlawful to enter into an agreement to divert funds received as an equitable share or a conditional grant from National Treasury to pay a debt. Having regard to the contents of para 4 of the Special Master's founding affidavit and as expounded upon in the heads of argument filed on behalf of the Special Master, the Special Master seeks payment of a percentage of the conditional grant paid by National Treasury to the Municipality, which is not legally permissible.

[16] With reference to the report in terms of s 54 of the Local Government: Municipal Finance Management Act 56 of 2003 (the MFMA) filed by the executive mayor for submission to the municipal council of the Municipality on the *Budgetary Control and Early Identification of Financial Problems*, of which a copy is appended to the conditional answering affidavit, Ms Mutenga argued the Municipality is operating on a deficit and is unable to make payment to the Special Master as agreed. The Municipality will, in due time, issue a self-review application on the basis that the Memorandum of Agreement has been concluded in contravention of the regulatory framework.

[17] Even though reference was indeed made to payment of a percentage of the conditional grant paid by National Treasury to the Municipality in the heads of argument dated 30 April 2025 as well as in para 4 of the Special Master's founding affidavit, it is evident that a bona fide error occurred when reference was made to payment of a percentage of the conditional grant and not the equitable share. The mistake was subsequently explained in the supplementary heads of argument submitted by Mr Lubbe SC, counsel on behalf of the Special Master, dated 29 July 2025. The Special Master is seeking an order in terms of prayer 1 of the notice of motion, being 11% of the equitable share, as agreed upon between the parties in the Memorandum of Agreement and not payment of a percentage of any conditional grant paid to the Municipality. I, therefore, do not deem it necessary to deal with the payment of conditional grants to local governments from the national share to which the national government may attach conditions.

[18] The right to be paid the equitable share arises from s 214 of the Constitution which provides as follows:

'Equitable shares and allocations of revenue:

(1) An Act of Parliament must provide for—

- (a) the equitable division of revenue raised nationally among the national provincial and local spheres of government;
- (b) the determination of each province's equitable share of the provincial share of that revenue; and
- (c) any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made.'

[19] National government has primary revenue-raising powers. On the other hand, provinces have limited revenue-raising capacity and the resources required to deliver provincial functions do not lend themselves to self-funding or cost recovery. Due to their limited revenue-raising potential and their responsibility to implement government priorities, provinces receive a larger share of nationally raised revenue than local government. Municipalities finance most of their expenditure through property taxes, user charges and fees. However, municipalities often fail to recover these taxes and charges. From the contents of the Special Master's report, it is evident that an evaluation team has been appointed to assist the Special Master, and this team is still in the process of evaluating the data available concerning water usage and municipal levies to obtain reliable data to calculate the debt owed to the Minister. The debt collection process is ongoing and includes existing debtors of the Municipality for whom no invoices were sent in the past for services rendered.

[20] The project implemented since the appointment of the Special Master, consists of the physical reading of selected water meters to obtain insight into the accuracy of water meter readings as reflected by the Municipality's available data. Due to the fact that many of the consumers within the Municipality's jurisdiction are consuming water but do not receive any account statements, major financial losses are experienced with a resultant negative impact on the Municipality's cash flow. Based on the findings, the Municipality's operations, service delivery and financial health are in a dire state due to 'self-inflicted' actions and lack of critical actions. A failure to manage and maintain the water infrastructure and the overall collapse of general and internal controls concerning income generation, water inventory management, debtors' management and related data integrity together with irregular and unauthorised expenses have caused the Municipality's inability to repay debt and operational inefficiency.

[21] In terms of the evaluation done by the Special Master the amount due to the Minister is R1 015 298 138. It is abundantly clear that the Municipality is unable to repay the outstanding debt, considering its current assets, liabilities and overall operational and financial position. As a result, alternative repayment options had to be considered by the Special Master and the Municipality. A payment plan was implemented during March 2024, which takes into account all of the facts listed in the report compiled by the Special Master and ensures minimum disruption to the Municipality's day-to-day operations. The Special Master will continue with the debtors' reconstructions to bill previous services not invoiced by the Municipality and to collect both the reconstructed debt and all outstanding debt older than 90 days to the benefit of the Municipality. According to the Special Master, this process is frustrated by the newly appointed municipal manager, the first respondent, who fails to provide any cooperation.

[22] The respondents contend that the equitable share received by the Municipality is earmarked for the provision of basic services. To divert a significant part of such equitable share in the face of the liquidity challenges, as set out in the answering affidavit, will sacrifice the provision of basic services and will leave the indigent residents of the Municipality without assistance. As a result, so the argument goes, to make an order in terms of the Memorandum of Agreement whereby the Municipality must pay 11% of its equitable share to the Special Master will be unlawful, unconstitutional and offending against the direct provisions of the MFMA.

[23] It is contended that the question whether the equitable share allocated to the Municipality by National Treasury may be utilised for purposes sought by the special Master, has to be adjudicated with reference to ss 15, 16 and 33 of the MFMA. Sections 15 and 16 provides that a municipality may, except where otherwise provided for, incur expenditure only in terms of an approved budget. The mayor of a municipality must table the annual budget at a council meeting at least 90 days before the start of the budget year and the municipal council must, for each financial year, approve an annual budget for the municipality.

[24] Section 33 provides that a municipality may enter into a contract which will impose financial obligations on the municipality beyond a financial year, but if the contract will impose financial obligations on the municipality beyond the three years covered in the

annual budget for that financial year, it may do so only if the municipal manager, at least 60 days before the meeting of the municipal council at which the contract is to be approved, has, in accordance with s 21A of the Local Government Municipal Systems Act 32 of 2000, made public a draft contract, invited the local community and other interested persons to submit comments in respect of the proposed contract, has solicited the views and recommendations of National Treasury, the relevant provincial treasury and the national department responsible for local government and, if the contract involves the provision of water, sanitation, electricity or any other service as may be prescribed, the responsible national department.

[25] The primary issue to be determined is whether the Special Master is entitled to the relief sought for payment of a percentage of the equitable share paid by National Treasury and thus to compel the Municipality and the first respondent to comply with the terms of the Memorandum of Agreement concluded between the parties. The question whether a party is entitled to such an order was adjudicated upon in *Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others*<sup>1</sup> (*Eskom*). The relevant facts are that Letsemeng Municipality's debt towards Eskom for its electricity supply had accumulated over a period of time to the amount of R41 094 530.19. Based on Letsemeng's recurrent failure to comply with its obligations pertaining to payment of its electricity supply account, Eskom issued a final notice to interrupt electricity supply which precipitated the launching of an urgent application by Letsemeng to interdict Eskom from implementing the interruption pending the review of the decision to interrupt electricity supply and the determination of the dispute between the parties to be referred to the National Energy Regulator of South Africa (Nersa).

[26] Eskom opposed the application and filed a counter application in which it sought, *inter alia*, to compel Letsemeng to comply with its obligations in terms of the electricity supply agreement, two acknowledgements of debt signed on behalf of Letsemeng and a certificate of balance issued by a senior manager of Eskom. Letsemeng contended that it had no funds with which to satisfy the debt. One of the prayers sought by Eskom in its counter-application was for an order directing Letsemeng to pay such portion of the

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<sup>1</sup> *Eskom holdings SOC Limited v Letsemeng Local Municipality and Others* [2022] ZASCA 26; [2022] 2 All SA 347 (SCA).

equitable share, as may be determined, to Eskom. The Supreme Court of Appeal held that local government is required to strive, within its financial and administrative capacity, to achieve its object of ensuring the provision of services to its community in a sustainable manner.

[27] It was held that the agreement concluded between Eskom and Letsemeng imposes reciprocal obligations upon the parties in that Eskom is obliged to supply bulk electricity to Letsemeng and Letsemeng is obliged to pay for this service. The MFMA places an obligation on Letsemeng to take all reasonable steps to ensure that money that it owes is paid within 30 days of receiving the relevant invoice or statement.<sup>2</sup> It was found to be common cause that Letsemeng is in default of its obligations to pay Eskom for electricity that has been supplied to it. Letsemeng undertook to pay the amount of its equitable share earmarked for electricity and to pay R5 million to Eskom that was advanced to it by National Treasury; however, it failed to honour the obligation. Regarding Letsemeng's defence that it was financially unable to pay the debt, the Supreme Court of Appeal held as follows:

'[22] Letsemeng's defence on the merits is no defence at all – that it should not be ordered to pay what it agreed to pay because it was unable, due to its financial weakness, to do so. To the extent that this may amount to the tacit raising of a defence of impossibility of performance, the position is clear: if a person promises to do something that can be done, such as delivering a thing or paying a debt, but which that person cannot do due to circumstances peculiar to themselves, they are nonetheless liable on the contract. The commercial mayhem that would result, if the rule was otherwise, is not difficult to imagine. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party'. (Footnote omitted.)

[28] Regarding the order sought by Eskom for payment of a portion of Letsemeng's equitable share that relates to electricity, it was held as follows:

'Local governments raise their revenue through rates and other charges but are also funded to varying degrees by grants from the national government. A municipality is entitled to an equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it. Steytler and De Villiers say that each municipality's equitable share is calculated according to a formula consisting of various components including a basic service component to enable municipalities to provide water, sanitation, electricity, refuse removal and

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<sup>2</sup> Ibid para 20.

other basic services.<sup>3</sup> The equitable share is intended to assist municipalities to provide services. The use of the equitable share falls within the discretion of the municipality.<sup>4</sup> Letsemeng exercised its discretion by undertaking to pay to Eskom that part of its equitable share that related to electricity, but failed to do so. In my view, this entitles Eskom to the order in respect of the equitable share.'

[29] Written contracts are an everyday occurrence in the commercial world. The object of reducing a contract to writing (whether voluntarily or required by statute) is normally to achieve certainty and to facilitate proof. The principle that the courts will enforce contracts, expressed in Latin as *pacta sunt servanda*, is obviously necessary as a general principle. The Supreme Court of Appeal reaffirmed the principle of privity and sanctity of contracts in *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotels Interests (Pty) Ltd*<sup>5</sup> and held as follows:

'[23] The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into consideration the requirement of a valid contract, freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract.'

[29] The Constitutional Court emphasised the principle of *pacta sunt servanda* in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*<sup>6</sup> [2020] ZACC 13 as follows:

'[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

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<sup>3</sup> N Steytler and J De Villiers 'Local Government' in *Constitutional Law of South Africa* 2 ed (2013) ch 22 at 107-108.

<sup>4</sup> Ibid ch 22 at 110.

<sup>5</sup> *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotels Interests (Pty) Ltd* [2017] ZASCA 176; 2018 (2) SA 314 (SCA).

<sup>6</sup> *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC).

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.'

[30] Public policy demands that contracts freely and consciously entered into must be honoured. The Municipality agreed to a structured means for paying its debt to the Minister by paying 11% of its equitable share to the Special Master. The Municipality undertook to pay a percentage of its equitable share, which it receives in three tranches each year, and has indeed complied with the terms of the Memorandum of Agreement prior to November 2024. On the day prior to the hearing of this application, a payment in the amount of R10 000 000 was made to the Special Master, hence the deduction of this amount as reflected in the order.

[31] There is no general principle of law of contract that absolves a debtor from liability if they are unable to pay. The Municipality has displayed bad faith by obstructing the task and obligations of the Special Master imposed upon him by the court, specifically after reaching an agreement, as embodied in the Memorandum of Agreement, to cooperate with the Special Master to pay the outstanding debt owed to the Minister. Notwithstanding its declaration in the Memorandum of Agreement that it entered into the memorandum willingly and the acknowledgment that an opportunity was availed to secure independent legal or other professional advice as to the nature and effect of all of the provisions of the agreement, the Municipality now raises a defence that it failed to comply with certain legislative provisions and cannot afford to pay its debt in accordance with the agreement.

[32] The Municipality concluded the Memorandum of Agreement for payment of 11% of its equitable share after lengthy negotiations between the then Municipal Manager, the Chief Financial Officer and the Special Master. Municipalities receive an equitable share of national revenue to fund basic services and operations. This equitable share can, therefore, be a source of funds for municipalities to pay off debts, as has been confirmed by the Supreme Court of Appeal. The defences raised on behalf of the Municipality during argument of non-compliance with legislative prescripts was not raised in the conditional answering affidavit nor in the heads of argument filed on the 2<sup>nd</sup> of June 2025. No shred

of evidence as to the non-compliance with the provisions of the MFMA during 2023 or thereafter, and prior to the appointment of the current municipal manager during November 2024, has been advanced by the Municipality. The defence and the contentions in this regard are without any substance. Municipalities are expected to meet their financial obligations, including payments to creditors.

[33] The purpose of an award of costs to a successful litigant is to indemnify him or her for the expense to which he or she has been put through having been compelled to initiate or defend litigation, as the case may be. The Special Master contended that a punitive cost order be made having regard to the numerous postponements, failure to comply with the rules of court pertaining to time periods for filing affidavits and for the delay to bring this matter to finality. By reason of special considerations arising from the circumstances which gave rise to this application by the Special Master and from the conduct of the respondents, it is deemed just, by means of a punitive costs order, to ensure that the successful party will not be out of pocket in respect of expenses caused by litigation.

[34] In the result the following order is made:

1 The second respondent is ordered to make payment of 11% of its equitable share, paid by National Treasury, to the applicant, less an amount of R10 000 000. 00, in terms of the Memorandum of Agreement concluded between the applicant and the second respondent dated 11 March 2023.

2 The first respondent is held responsible, in his personal capacity, should the second respondent fail to make payment as in paragraph 1.

3 The second respondent shall pay the costs of the application on the attorney and client scale, which costs shall include the costs of two counsel (where so employed) on Scale C and Scale B respectively.

  
VAN RHYN, J

**Appearances**

For the applicant:

J Lubbe SC

Instructed by:

Rosendorff Reitz Barry Attorneys  
Bloemfontein

For the respondents:

H Mutenga

Instructed by:

Peyper Attorneys  
Bloemfontein