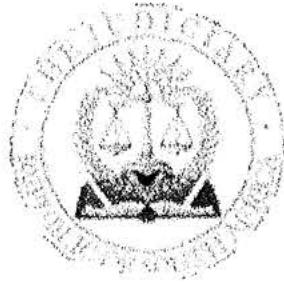


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: 2022-028499

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

DATE: 10 December 2025

SIGNATURE OF JUDGE:

In the matter between:

UNIQON DEVELOPER (PTY) LTD

First Applicant

UNIQON WONINGS (PTY) LTD

Second Applicant

and

TSHWANE METROPOLITAN MUNICIPALITY

1st Respondent

JUDGMENT

D van den Bogert AJ

- [1] This is a contempt of court application. The central issue in this application is whether the respondents produced evidence creating reasonable doubt that their non-compliance with the court order was not deliberate or in bad faith. This is so, because the existence of the court order and knowledge thereof is not in dispute. Although non-compliance is disputed, the defence is premised on allegations of partial compliance, which does not assist.
- [2] The secondary issue is whether this court can impose a sanction upon the municipal manager absent the latter having been joined personally.
- [3] The two applicants are property holding companies and specialise in commercial, residential and retail property developments in Tshwane and Johannesburg. The applicants have the same executive board and shareholding. The first respondent is the City of Tshwane Metropolitan Municipality. I shall refer to the first respondent herein as "*the municipality*" or "*the City*". The second respondent is the municipal manager of the municipality, cited in his official capacity as such.
- [4] On 16 October 2023, this court issued an order in the form of a structural interdict. It was declared that the municipality breached its statutory obligations in terms of section 27(1) of the *Local Government: Municipal Property Rates Act*, 6 of 2004 (herein "*the Rates Act*") and section 95 of the *Local Government: Municipal Systems Act*, 32 of 2000 (herein "*the Systems Act*"). These failures constitute the following conduct:

- 4.1. failing to provide the applicants with regular and accurate municipal accounts stipulating the amounts due and the calculation basis for the amount claimed.
- 4.2. failing to promptly reply and take corrective action on complaints submitted by the applicants regarding their municipal accounts.
- 4.3. failing to address and resolve disputes lodged by the applicants in terms of section 102 of the Systems Act, which complaints concern the applicants municipal accounts.

- [5] The municipality was ordered to give the applicants a list of municipal accounts opened in the name of the applicants. This had to happen within 10 days from the order. It was specifically ordered that the municipal account list of properties compiled in respect of each applicant must provide the municipal account number, property description, the date on which the municipal account was opened and the date the municipal account was closed, if applicable.
- [6] The third order is a declaratory order. It declares the municipality's transfer between accounts of rates and fees levied against the applicants' municipal accounts, absent formal consolidation in terms of section 102(1)(a) of the Systems Act, and the consequential debiting of another municipal account of the applicants with the transferred amount under 'miscellaneous charges' to be *ultra vires* and constitutionally invalid.
- [7] In terms of section 172(1)(b) of the Constitution, the following remedial relief is then granted:
 - 7.1. within ten days from the order the municipality must furnish the applicants with a list setting out all the debt transfers made by the municipality between the applicants' municipal accounts.
 - 7.2. the list must stipulate the municipal account number and the property description from which the alleged outstanding amount was transferred and the municipal account number as well as the property description for the applicants' municipal account that was debited.

- 7.3. the municipality is to reverse all debit transfers and other charges arising from such transfers within 30 days from the date of the order.
- 7.4. the municipality must process all "*application for refund of assessment rates/services overpaid on a clearance certificate*" submitted by the applicants within 30 days from the date of the order.
- 7.5. should the municipality contend that a refund requested is not due, the municipality must inform the applicants within 30 days from the date of the order.

[8] Order 5 is important for the purposes of this judgment. It stipulates that if the municipality cannot comply with the second order, whereby the list, as described in paragraph 5 above, must be delivered, or cannot comply with order 4 which is set out in paragraph 7 above, within the prescribed periods, the municipal manager, the second respondent is ordered to file an explanatory affidavit. The affidavit must be filed before the expiry of the specified period setting out the reason for the municipality's failure. The municipal manager's explanatory affidavit must address the following:

- 8.1. the name of the official/s whom the municipal manager tasked with ensuring the municipality's compliance with the said orders.
- 8.2. the reason why the municipality failed to comply with the order including what actions and measures the municipal manager took to ensure compliance with the order.
- 8.3. where the municipal manager delegated functions and duties to any official to facilitate compliance with the order, the municipal manager must state the nature of the task delegated to such official and provide reasons for the official's failure to comply with the municipal manager's instructions.
- 8.4. if the municipal manager relies on supporting documents in the explanatory document, the municipal manager is ordered to attach any such documents to the explanatory affidavit.

8.5. the municipal manager is ordered to provide in such affidavit a specific date, not longer than 30 days from the affidavit by which the municipal manager will comply with the court order.

[9] Order 6 stipulates that should both respondents fail to comply with their respective obligations in terms of the order, the applicants are granted leave to approach this court on the same papers duly supplemented for relief as circumstances permit. The municipality was ordered to pay the cost of the application on the scale as between attorney and client.

[10] I mention immediately that it is common cause that the second respondent, the municipal manager, did not file any explanatory affidavit. The municipal manager also did not depose to the answering affidavit. No affidavit, even up to the date of the hearing of this application, was filed, by the municipal manager.

[11] The court order constituted the culmination of many years of frustrations that the applicants experienced with the municipality, its officials and management. I do not repeat the factual basis upon which the court order was sought and granted, because it is immaterial for purposes of the determination of the contempt application. The contempt application is only concerned with the fact that the court order exists and has been disobeyed.

[12] Generally, an applicant seeking an order for contempt of court must prove that a) an order was granted against the alleged contemnor; b) that the alleged contemnor was served with the order or had knowledge of it; c) that the contemnor had failed to comply with the order, and d) the non-compliance must be wilful and *mala fide*.¹ Once the first three elements are established, wilfulness and *mala fides* are presumed and the respondents then attract an evidentiary burden to negate these presumptions.²

[13] The existence of the court order is not disputed. It is further common cause that both respondents have knowledge of the court order. Non-compliance with the

¹ *Fakie N.O. v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA); *Matjabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) at par 73

² *Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another* (1295/2021) [2023] ZASCA 37 (31 March 2023) par 22

court order and, secondly, that there was wilfulness or *mala fides* in disregarding the court order (should it be established that there was non-compliance), is in issue.

- [14] The registrar of this court uploaded the court order onto CaseLines on 18 October 2024. The respondents' legal representative had access to the court order and received notifications. As such, the respondents had to deliver the list of municipal accounts, opened in the name of the applicants, within ten days from the date of the order, being on or before Monday, 30 November 2023. They also had to provide a list of all transfers between the accounts made. I do not repeat what the court order required them to do.
- [15] In addition, the municipality had to reverse all debit transfers and charges arising from the transfers between the different accounts within 30 days of the order. The municipality was ordered to process all "*application for refund of assessment rates/services overpaid on a clearance certificate*" submitted by the applicants within 30 days from the date of the order. Compliance was therefore due by Monday, 27 November 2023.
- [16] The order provided therefore that should there be an impossibility to comply within the prescribed periods (i.e. that the municipality cannot comply), then the affidavit of the municipal manager should have been delivered to explain this. None of this happened.
- [17] Instead, the municipality on 2 November 2023, being prior to the expiration of the aforesaid periods, told the applicants that the municipality intended to rescind the court order. This also did not happen. What that message, however, conveyed is that both respondents were fully aware of the court order and appreciated the consequences thereof. They must have carefully considered it to issue the instruction to bring a rescission application.
- [18] The rescission application was not forthcoming, and on 27 November 2023, a director of the applicants emailed the municipality indicating the municipality's failure to comply with the order. On the same day the email was forwarded to the municipality's chief financial officer. The latter forwarded the email to other officials with the following message:

"Madam,

Are you aware of this? Have we implement it? Or have we appealed? Please provide the status of this matter. Office of the executive mayor is requested for feedback."

- [19] This demonstrates that there was no misappreciation within the corridors of the municipality about the impact of the order. A certain Mrs. Mankwana responded to the CFO on the same day where she confirmed that the municipality was aware of the order and that *"the team is finalising the response to the attorneys"*.
- [20] There was never such a response sent to the attorneys. On 14 February 2024, the applicants' attorneys sent a letter to the respondents' attorney, confirming the municipality's failure to comply with the order. The letter also threatened with this contempt application.
- [21] To avoid bringing another application the applicants' director virtually met with a certain Mr. Griffiths of the municipality on 15 February 2024. On 16 February 2024 Griffiths emailed the CFO and other officials expressing concern over the City's noncompliance with the court order. Important is the fact that the municipal manager was copied in the email. On 4 March 2024, another warning was sent to Mr. Griffiths. On 5 March 2024 a response was received that the matter would be escalated. On 12 March 2024, the applicants' attorneys sent a further letter of demand insisting on compliance with the court order.
- [22] Thereafter, on 27 March 2024 the municipality's attorneys responded by saying that the municipality was finalising the refunds. No explanation was provided about the failure to provide the list of municipal accounts and debits as required by the order. Instead, the municipality sought to get a refund list from the applicants.
- [23] To that the applicants responded and provided a document which listed the refunds and credits unlawfully written off, limited to that which fell within the applicants' knowledge. That obviously does not deal with all the orders. It was further confirmed that this application would be issued after ten days.

[24] On 4 April 2024, another letter was sent requesting urgent feedback. On 5 April a response was received by the municipality's attorney, explaining details of the efforts to process refunds and the expectation that this be completed by 12 April 2024. This did not happen and a further letter was sent on 16 April 2024, requesting urgent feedback by 19 April 2024.

[25] It should be common cause that until then there was no compliance with the court order. Not one single item of that which had been listed in the court order was addressed. As such, the contempt application was issued. To make matters worse, being faced with the contempt application, the municipality and the municipal manager did nothing at all. When the matter was eventually set down for hearing on the unopposed roll of 18 February 2025, a notice of intention to oppose was filed the day before that hearing. This court then had to issue an order directing the respondents to pay the costs on a punitive scale and to file papers within 15 days.

[26] The highwater mark of the municipality's defence is set out in the answering affidavit in the following words:

"In the present matter, it is common cause that the order was delivered on 16 October 2023, and this application was served on the respondents on 11 June 2024 during which time the respondents will argue and provide evidence that there were significant efforts made towards complying with the order."

[27] It is then claimed that such efforts were ongoing since February 2017 and then again more recently in February 2025. Premised on that vague assertion, this court is to infer that such efforts were genuine and not under threat of a contempt application. Whatever happened in 2017 is immaterial because the court order was issued in October 2023. The mere notion that efforts were ongoing since February 2017 until February 2025 demonstrates that it was not done to comply with this court's order, because the alleged dates for compliance precede the order. It does therefore not assist the respondents. In any event, efforts towards complying with an order do not constitute compliance. It is the antithesis of it.

[28] In respect of the lists that the municipality had provide, the following averments were made:

- 28.1. the respondents acknowledged that the spreadsheet detailing the affected accounts was not made available immediately due to resource constraints. The delay was alleged to be because of limited personnel and technological resources which impacted on the timely compilation of such a list.
- 28.2. that the applicants were not prejudiced "*from bringing this application by the delay*". I simply do not understand what was is meant by that.
- 28.3. when the list was provided, its content is not explained and the list, attached to the answer, is by no stretch of the imagination that what the court order envisaged. In that respect there is therefore until today still no compliance.

[29] In respect of the incorrectly debited amounts, it is merely alleged that refunds due to the applicants have been successfully processed and for purposes thereof, a refund report is claimed to have been attached to the answering affidavit.

[30] It is indeed true that a list was attached to the answering affidavit. It is the most unintelligible document. In this respect it is important to remark that the respondents were surely dutybound to explain to both the applicants and the court, that must make sense of the list, what the list of some 100 pages was supposed to indicate. It is not explained in the answering affidavit how that list would constitute compliance with the orders made. The list is not explained at all. All that is said about the list, is that, in compliance with the court order, all requested refunds have been made and therefore the court is to consider that list, which as I have explained, is unintelligible.

[31] In respect of wilfulness and *mala fides*, the respondents merely say that the applicants did not place before this court one single iota of evidence from its correspondence with the city officials, where the city either displayed a blatant refusal to comply or indicate directly that it had no intention to comply. That is a misconception of the legal principles. Once non-compliance has been established, it is for the respondents to rebut wilfulness.

- [32] What is conspicuously absent from the answering affidavit is this. There is not one single allegation made by the deponent to the answering affidavit who is employed as the Divisional Head: Revenue Management (Credit Control and Revenue Protection) within the group financial services of the municipality about the municipality's ability or inability to comply.
- [33] Vague assertions are made about resource constraints but nowhere is there any indication that the municipality, considering the seriousness of a court order, could, notwithstanding its importance, objectively not comply.
- [34] This brings me back to the fact that the court order made specific provision therefore that the municipal manager could file an affidavit explaining to this court that the municipality suffered constraints, as only belatedly raised in an answering affidavit. The municipal manager was in fact obliged to do so. The fact that this did not happen, is without doubt contemptuous. The court order gave the municipal manager a way in which he/she could come and explain difficulties that may have been experienced. Yet, that invitation is ignored. It makes the conduct increasingly egregious.
- [35] The municipal manager apparently did not regard the court of sufficient importance, notwithstanding that orders were directed at him/her specifically, to respond by means of an affidavit. The municipal manager did not provide a simple explanatory or confirmatory affidavit when faced with this contempt application. That both the municipality and its manager did not adhere is apparent.
- [36] Once non-compliance has been established, wilfulness and *mala fides* are presumed as against the respondents who then attract an evidentiary burden to negate these presumptions. Should the respondents fail to discharge this burden, contempt will have been established. In my mind, the respondents failed to discharge that burden. The mere notion that they were invited to explain themselves but deliberately ignored such gesture, demonstrates deliberate ignorance.

[37] Where a sanction for a committal to prison is sought, or a fine, the standard of proof must be beyond a reasonable doubt.³ In this case, contempt has been established on a balance of probabilities. Given my findings hereunder, the question whether the criminal onus of proof beyond reasonable doubt has been established, is not relevant, but it is apparent that that has also been demonstrated.

[38] Not only has the municipal manager chosen to ignore the court order prior to this contempt application, but there was an astonishing insistence in such ignorance after the application was served. Save for the fact that it is confirmed that there is presently only partial compliance:

38.1. the explanation why nothing happened lacks probity, since the resource capacity excuse, with little evidence, only came about when the shoe pinched; and

38.2. the fact that the municipal manager did not file an affidavit remains unexplained.

[39] It follows, that the applicant must be successful with its application insofar as an order for contempt is sought.

[40] This brings me to the next aspect. In prayer 2 an order is sought that the second respondent be ordered to pay a fine of R100,000.00 in his personal capacity. It is further requested that that fine be suspended for 30 days from the date of the order, subject thereto that the municipal manager complies with the obligations set out in paragraphs 2 and 4 of the court order of 16 October 2023.

[41] In this respect, I asked the parties to address me on paragraphs 102 and 103 of the Matjabeng case where the Constitutional Court held, and I quote:

"[102] When setting aside the Pretoria High Court's order and declaring Mr Mkhonto to be in contempt and sentencing him to imprisonment, the Supreme Court of Appeal took no pains to consider the prejudice that

³ See: *Matjabeng supra*: par 67. If no criminal sanction is sought, proof on the balance of probabilities is sufficient.

befell Mr Mkhonto – specifically to determine whether he had been personally joined as a party. The Supreme Court of Appeal convicted and sentenced Mr Mkhonto to imprisonment even though he was not a party to the contempt proceedings. In my view, the procedure followed by the Supreme Court of Appeal violated Mr Mkhonto's right 'not to be deprived of freedom arbitrarily or without just cause' in terms of s 12(1)(a) of the Constitution.

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

[42] In this respect it is relevant that the municipal manager was only joined in his official capacity and not in his personal capacity. I am, however, requested to issue a fine to the municipal manager personally, whose name has not been mentioned once. I expressed my doubts whether I could do so.

[43] The applicants counsel proposed that I issue an order that the municipal manager, in his personal capacity, must file papers within a specified period indicating why a fine should not be imposed on him. This was equated to cases where our courts allow officials a period to explain why a *de bonis propriis* cost orders should not be granted against them.

[44] In my view those examples do not assist the applicants. A *de bonis propriis* costs order does have a punitive element, but it cannot be equated to a criminal conviction and a sentence as one would find where a contempt order, coupled with a criminal sanction, is issued.

[45] A fine is also a sanction with a criminal element. This is not a mere administrative fine. It is a fine consequent upon a declaration of being in contempt. I am fortified in this view having regard to paragraph 67 of the Matjabeng judgment where the Constitutional Court described the contempt remedies of both committal and a fine as having material consequences on an individual. It is true that a fine does not violate the municipal manager's right not to be deprived of freedom arbitrarily or without just cause, but it constitutes a sanction with criminal elements.

[46] I have also no intention to impose a fine on the municipal manager in his official capacity, because then the taxpayer bears the brunt for his disobedience.

[47] There is, however, nothing that stops the applicant, bearing in mind this civil contempt finding to, should the municipal manager persist with this egregious conduct, bring another contempt application against the municipal manager in his personal capacity and seek a sanction against him personally. That will be fair, because then he can raise his own defences.

[48] Absent the joinder of the municipal manager in his personal capacity, however, this court cannot issue a criminal sanction (even if it is only a fine).

Costs:

[49] The applicants seek a punitive cost order against the municipality and the municipal manager in his official capacity. It does not matter whether it is granted against the municipality or the municipal manager in his official capacity. It will be the municipality that pays. As such, I intend to only grant a costs order against the first respondent.

[50] Section 165(5) of the Constitution makes the order of any court binding on all persons to whom and to organs of state to which it applies.⁴

[51] It is crucial to uphold the integrity of the judicial system and to ensure that contempt of a court order is not tolerated. Such conduct not only threatens the

⁴ See in this respect also *Phoko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) at par 26.

rule of law but erodes public trust in the judiciary. Continued non-compliance with court orders imperils judicial authority.⁵

[52] The disregard of judicial authority must be condemned and denounced in the strongest possible terms.

[53] It is against this backdrop that the applicants' counsel requested this court that the respondent pay costs on an attorney and client scale. It is a trite principle that where a court considers an order of costs, it exercises a discretion which must be exercised judicially. Having considered the circumstances of this case, I hold the view that the respondents are in flagrant disregard of this court's order.

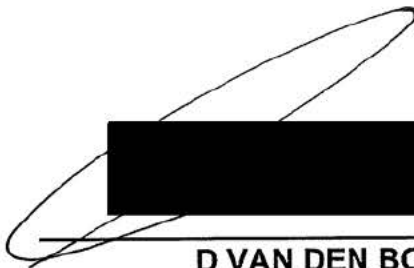
[54] Therefore, a punitive cost order is indeed warranted in this case.

[55] In the result, I issue the following order:

1. The first and second respondents are declared to be in contempt of this court's order dated 16 October 2023.
2. Both respondents are ordered to comply with this court's order of 16 October 2023 in full by 16 January 2026.
3. The municipal manager, the second respondent, is ordered to file an affidavit by 16 January 2026 wherein he/she must explain:
 - 3.1. why the municipal manager elected to disregard the court order of 16 October 2023.
 - 3.2. why the municipal manager refused to comply with the order of 16 October 2023 in not delivering an affidavit as envisaged in order number 5.
4. Should the municipality and the municipal manager persist with their failure to comply with the court order, the applicant is granted leave to join the municipal manager in his or her personal capacity and seek such relief against him/her personally as circumstances permit.

⁵ Matjabeng supra at par 48

5. The first respondent shall pay the cost of this application on the scale as between attorney and client.



**D VAN DEN BOGERT
ACTING JUDGE
HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 10h00 on 10 December 2025.

Appearances

Counsel for the Applicant: E van As
Instructed by: JJ Jacobs Attorneys Inc
Ref.: Jacobs/UNI300

Counsel for respondent: K Mvubu
Instructed by: Ncube Incorporated Attorneys

Date of Hearing: 26 November 2025
Date of Judgment: 10 December 2025