

SOUTH AFRICA / JUDGMENT

**Kgetlengrivier Concerned Residents and Another v
Kgetlengrivier Local Municipality and Others (CIV APP
FB 04/22; UM69/2021; UM79/2021) [2023] ZANWHC 29;
[2023] 2 All SA 452 (NWM) (17 March 2023)
[2023] ZANWHC 29**

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Petersen, Mongale

CASE / FILE NUMBER

CIV APP FB 04/22; UM69/2021; UM79/2021

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Source record

FLYNOTES:

WATER AND CONTEMPT OF MUNICIPAL MANAGER
CONSTITUTION

– Water – Municipality – Contempt – Raw
sewage flowing into rivers – Municipality
failing to comply
with interdictory orders and citizens taking over control of
sewerage works – Impunity of non-compliance
with court
orders cannot be condoned – However, due process must be
followed that accords with the letter of the law
– Diligence
required of judicial officers when faced with unopposed or ex
parte applications – Constitution,
ss 24 and 27.

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
CASE NO.: CIV APP FB
04/22

COURT A QUO CASE NO:

UM271/20
Reportable: YES
Circulate to Judges: YES

Circulate to Magistrates:

NO
Circulate to Regional
Magistrates: NO

In the matter between: KGETLENGRIVIER
CONCERNED CITIZENS
First Appellant
MR CAREL VAN HEERDEN
Second Appellant
and
THE KGETLENGRIVIER
LOCAL MUNICIPALITY
First Respondent

THE MUNICIPAL
MANAGER: JOSEPH MOGALE
Second Respondent

EXECUTIVE MAYOR: BOJANALA PLATINUM
DISTRICT MUNICIPALITY
Third Respondent
MEC: ENVIRONMENTAL
AFFAIRS,
NORTH WEST
Fourth Respondent
MINISTER OF HUMAN
SETTLEMENTS,
WATER AND SANITATION
Fifth Respondent
MINISTER OF
ENVIRONMENTAL AFFAIRS
Sixth Respondent
AND

COURT A QUO CASE NO: UM69/2021
MR CAREL VAN HEERDEN
Second Appellant
THE KGETLENGRIVIER
LOCAL
MUNICIPALITY
First Respondent
JOSEPH MOGALE
Second Respondent
DISTRICT MUNICIPALITY
Third Respondent
NORTH WEST
Fourth Respondent
WATER AND SANITATION
Fifth Respondent
MEC: COGTA, NORTH WEST
Seventh Respondent
MAGALIES WATER BOARD
Eighth Respondent

COURT A QUO CASE NO: UM79/2021
MEC FOR THE DEPARTMENT
OF
CO-OPERATIVE
GOVERNANCE,
HUMAN SETTLEMENTS AND
TRADITIONAL
AFFAIRS
First Applicant
KGETLENGRIVIER LOCAL
MUNICIPALITY
Second Applicant
MUNICIPALITY
Third Applicant
MAGALIES WATER BOARD
Fourth Applicant
KGETLENGRIVIER
CONCERNED CITIZENS
First Respondent
(Second
Appellant)
MR CAREL VAN HEERDEN
Second Respondent
(First
Appellant)
DISTRICT MUNICIPALITY
Third Respondent
NORTH WEST
Fourth Respondent
MINISTER OF
ENVIRONMENTAL AFFAIRS
Fifth
Respondent
WATER AND SANITATION
Sixth Respondent
PIONIER
DIENSTEMAATSKAPPY
(PTY) LTD
Seventh Respondent
(Third
Appellant)
CIVIL APPEAL
CORAM: HENDRICKS JP,
PETERSEN J AND MONGALE AJ
ORDER
(i)
The appeals under case numbers UM
270/21, UM 69/2021 and UM
79/2021 are dismissed.
(ii)
There is no order as to costs in UM

270/21.

(iii)

The first and second appellants in UM 69/2021 are ordered to pay the costs of the appeal including the costs of the application for leave to appeal, jointly and severally, the one paying the other to be absolved.

(iv)

The first, second and third appellants in UM 79/2021 are ordered to pay the costs of the appeal including the costs of the application for leave to appeal, jointly and severally, the one paying the other to be absolved.

JUDGMENT

PETERSEN J

Introduction

- [1] A sad reflection on our nascent democracy is the reality faced by the people of our Country brought about by the chronic absence of service delivery. The narrative which is replete in our media on a daily basis implicates service delivery at its core or basic level. The coalface of the absence of service delivery is more often than not at Municipal level, where Municipalities are failing our people. This appeal speaks to that sad reality and the endeavors of residents of a community to force their Municipality and its Municipal Manager into action to avert a human catastrophe which threatens the said community on a daily basis.
- [2] The right to water and a healthy environment free from the harmful effects of sewerage spills; and the breach by the Municipality and its Municipal Manager of such duties and the endeavors at holding them to account for such breaches, subject to due process of law being followed by affected parties, is central to this appeal.
- [3] The first appellant, the Kgetlengrivier Concerned Citizens (“the KCC”) comprising Koster and Swartruggens in the North West Province, approached this Court, the North West Division of the High Court, acting in the interests of the broader community falling under the municipal jurisdiction of the first respondent, the Kgetlengrivier Municipality (“the Municipality”) as represented by the second respondent, Joseph Mogale (“the Municipal Manager”), to assert their rights to water and a clean unpolluted environment.

- [4] For purposes of this appeal it suffices to say that the application was served on the Municipality and the Municipal Manager and not brought ex parte as the court a quo found. The application was further not opposed by the Municipality and the Municipal Manager.
- [5] The right to potable water is a basic human right entrenched in section 27(1)(b) read with section 27(2) of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) which provides that: “27. (1) Everyone has the right to have access to —(b) sufficient food and water; ... (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” In response to this basic human right, Parliament enacted the Water Services Act 108 of 1997. The purpose of the Water Act is to give effect to the right to basic water supply and basic sanitation services.
- [6] The right to a healthy environment is inextricably linked to the right to basic sanitation services. Section 24 of the Constitution provides that “24. 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.”

- [7] It has not been gainsaid at all material times during the litany of litigation between the parties, which ultimately culminated in this appeal, that the KCC as representing the broader community of Koster and Swartruggens, are entitled to live in a humane, healthy and eco clean environment, free of sewerage spillage and a reasonable supply of potable water.
- [8] In the litigation implicated in this appeal, the water issue considered broadly, is where the Municipality and the Municipal Manager have failed in their constitutional duties to the residents of the Kgetlengrivier Municipality. It has become commonplace in South Africa, when regard is had to the media reports and concomitant litigation, that certain municipalities fail to honour their constitutional duties and do so with impunity. That impunity sadly extends to court orders.
- [9] The declaratory order granted in the first application on 18 December 2020 (which is dealt with below), finding the Municipality and the Municipal Manager in breach of their constitutional obligations has never been challenged. In this Division alone, it has sadly become common place that Municipalities and Municipal Managers, would rather litigate at astronomical cost to ratepayers, more often than not to defend the indefensible, when they are in clear breach of their constitutional duties. It will be demonstrated below how the Municipality and the Municipal Manager failed to comply with the very first prohibitory and mandatory interdicts granted in this Court. This is demonstrative of a further sad reality when service delivery failures manifest itself and Courts are called upon to intervene within

the confines of their mandate. Court orders are simply not complied with.

- [10] The impunity with which no service delivery occurs coupled with the impunity of non-compliance with court orders, cannot be condoned and must be condemned in the strongest possible terms. The time has undoubtedly come in my view, that those who fail to honour their constitutional mandate in serving the people, must be dealt with decisively. That is what the KCC sought to do in the court a quo. However, in so doing, this Court must never lose sight that in seeking to bring to account offending behavior which flouts constitutional mandates, same must be done within the confines of the law by following due process which accords with the letter of the law. Two and sometimes more wrongs in a matter with serious implications do not unfortunately make a right, as will be demonstrated below.
- [11] This judgment will further seek to address the diligence required of judicial officers when ceased with applications brought on an unopposed basis and those brought on an ex parte basis. For it is in those circumstances that extra careful scrutiny of the relief sought in the Notice of Motion against the evidence set forth in the founding affidavit in support of the relief sought, is called for.

The present appeal

- [12] This is an appeal with leave of Mahlangu AJ (“the court a quo”) to the Full Court of this Division. It is brought in three (3) parts against the whole of the judgment and orders of the court a quo on 11 May 2021. Part 1 of the appeal is an appeal against the dismissal of the appellants’ application, to declare the Municipality and its Municipal Manager to be in wilful and mala fide contempt of a court order granted on 18 December 2020, “as amended and amplified” by a court order granted on 12 January 2021 under case number UM 271/2020 (“the Gura J orders”). It must be underscored that the MEC for Co-operative Governance, Human Settlements and Traditional Affairs (“the MEC for COGHSTA”) was not cited as a party in UM 271/20.
- [13] Part 2 of the appeal is an appeal against the dismissal of the KCC’s application under case number UM 69/2021 in which they sought, inter alia, payment of the costs of the application of 18 December 2020 from the “the MEC for COGHSTA”.
- [14] Part 3 of the appeal is an appeal by the seventh respondent (“Pionier”) in case number UM 79/2021 against a costs order granted against it by the court a quo, when it entered the fray and joined cause with the KCC, in opposing the relief sought by the MEC for COGHSTA and in moving a counter application to that relief.

Relevant litigation history – A chronological exposition and discussion

- [15] The genesis of what has given rise to persistent litigation against the Municipality and the Municipal Manager and ultimately the present appeal are the orders granted by Gura J on 18 December 2020, “as amended and amplified” (the phrase employed by the parties in the consent order) on 12 January 2021 under case number UM 271/2020. The dates, 18 December 2020 and 12 January 2021 are the two seminal dates for purposes of this appeal. All litigation

that followed has its origins in what transpired on these two dates. To appreciate and follow the reasons for the orders which will ultimately follow in this judgment it is apposite to have regard to the content of the aforesaid orders, to contextualise the orders granted on 11 May 2021 by the court a quo. No reasons were supplied for the granting of the initial order on 18 December 2020 nor the order of 12 January 2021.

The order of 18 December 2020 (UM 271/2020)

[16] The relief granted to the KCC in the unopposed application on 18 December 2020, reads as follows:

“HAVING HEARD ADV WIJNBEEK on behalf of the Applicant and having read the Notice of Motion and other documents filed of record;

IT IS ORDERED THAT:

1. The forms and service provided for in terms of the rules of the above Honourable court is condoned and that the matter is heard as an urgent application in terms of the provisions of rule 6(12) of the Uniform rules of Court.

PART A:

2. It is declared that raw sewerage from the sewerage works at Koster and Swartruggens are flowing into and is contaminating the Koster and Elands rivers respectively.
3. The First Respondent and Second Respondent are hereby ordered to immediately cease their usage of a raw sewer trench/ pipe or furrow to divert the flow of raw sewage into the Koster River.
4. It is declared that the Kgetlengrivier Local Municipality (“KLM”) is in breach of its obligations to prevent

contamination of the environment whilst allowing raw sewage to spill.

5. The First and Second Respondents are interdicted from allowing raw sewerage to overflow into the Koster and Elands rivers.
6. It is declared that the MEC for Environmental Affairs, despite a visit of the Provincial Government to the KLM, has not resolved the spillage of raw sewage.
7. The First and Second Respondents are compelled and ordered to urgently take remedial steps to stop the pollution by immediately

fixing the causes to the spillages and to remedy the effects of the pollution caused, and to rehabilitate the affected areas.

8. The Applicants are authorised to employ an expert(s) to monitor the sewerage works and waterworks from date of this order for a period of 10 weeks and to compile a comprehensive report for the court, with the First respondent being liable to pay all such reasonable costs of the said expert. To the extent that costs are disputed, is the taxing master to be approached for resolution thereof.
9. The Municipal Manager of the KLM is ordered to imprisonment for 90 days, suspended on the following terms:
 - a. That the spillage of raw sewage into the Elandsriver and the Koster river be cleared up within 10 week days from the date of the order and that the First Respondent, duly assisted by the Second to Fourth Respondents, is ordered to take all necessary steps to ensure that raw sewage is not discharged into the aforesaid rivers or onto land surrounding the respective sewerage works at Koster and Swartruggens;
 - b. That the First Respondent is ordered to immediately cease the usage of raw sewer trenches / pipes or furrows to divert the flow of raw sewer from Koster and Swartruggens that finds way to the Koster and/or Elands rivers respectively.
 - c. The Municipal Manager of the KLM is to file a report at Court 11 week days from the date of this order on steps taken to resolve the spillage of raw sewage and the prevention of similar incidents in the near future.
10. That, in the event that the spills are not resolved within 10 days of this order:
 - a. The order in 9 above be put into effect; and
 - b. The Applicant be authorised to take control of the sewerage works at Koster and Swartruggens, to appoint or employ suitably qualified

people to operate the sewerage works and that the reasonable costs for such work be paid jointly and severally by the MEC responsible

for Environmental Affairs, KLM and the Bojanala Platinum District Municipality (“Bojanala”).

PART B:

11. It is declared that the KLM fails to supply potable water sustainably to the residents of Koster and Swartruggens.
12. It is declared that the water purifying works at Koster and Swartruggens (“the water works”) are in states of disrepair and are mismanaged.
13. It is accordingly declared that Bojanala and the KLM are in breach of their constitutional obligations for providing potable water sustainably.
14. The Municipal Manager of the KLM is ordered to imprisonment for 90 days, suspended on the following terms:

- a. That the systems for the provision of clear potable water is repaired and clear potable water, in sufficient quantities, is sustainably supplied to the residents of Koster and Swartruggens within 10 week days from the date of this order;
 - b. The Municipal Manager of the KLM is to file a report at Court 11 week days from the date of this order on steps taken to resolve the issues with supply of potable water to residents in Swartruggens and Koster.
15. That, in the event that the KLM fails to continuously supply potable water to the towns of Koster and Swartruggens within 10 week days of this order, that:
- a. The order in 14 above be put into effect; and
 - b. The Applicant is authorised to take control of the water works, to appoint or employ suitably qualified people to operate the water works at Koster and Swartruggens and that the reasonable costs for such work be paid jointly and severally by the MEC for environmental affairs, KLM and Bojanala.
16. To the extent that the Court does not grant final orders aforesaid under Part A and Part B, that
- a. the prayers above per Part A and Part B to serve as interim order with immediate effect returnable on 1 March 2021, whereat the Respondents be called upon to show cause why the interim order should not be made final.
 - b. The Applicant be granted leave to supplement the papers prior to the return date.

Other:

17. The Respondents are, jointly and severally ordered to pay the costs of the Application on the attorney and client scale including the cost of one (1) counsel where so employed."

The order of 12 January 2021 (UM 271/2020)

[17] The order of 12 January 2021 "as amended and amplified" (by agreement) reads as follows:

"1. THAT: The interim order granted on 18th DECEMBER 2020 is hereby amended and amplified by this order on terms detailed hereunder.

2. THAT: The respondents shall appoint a suitable implementing agent to operate and manage the 1st Respondent's water provision and sanitation services by no later than the end of JANUARY 2021.
3. THAT: Upon the appointment of the implementing agent by the 1st Respondent, the parties agree that the Applicants shall hand over the operation of the plants to the implementing agent in accordance with the handover plan developed between the Applicants and the implementing agent.

4. THAT: The Responsibility of appointing contractors shall remain that of the implementing agent in consultation with the 1st Respondent.

5. THAT: The 1st Respondent shall be liable to pay the costs of the Applicants and their contractors for their monitoring, preparation to render

services and the actual costs of rendering services until the handover to a suitable provider.

5.1 Payment of invoices are to be made by the 1st Respondent within 30 days from the rendering thereof.

6. THAT: The 1st Respondent shall be liable to pay the legal costs incurred on a party and party scale, from 19 DECEMBER 2020 to date of order.

7. THAT: The costs up to and including 18 DECEMBER 2020 shall be paid as ordered on 18 DECEMBER 2020.

8. THAT: This order shall constitute a full and final settlement of the Application by the Parties.”

The contempt application under UM 271/2020

[18] Part 1 of the appeal as indicated above flows from the order sought by the KCC in the court a quo to find the Municipal Manager in contempt of the order granted on 18 December 2020, as “amended and amplified” on 12 January 2021. The relief sought was formulated as follows in the Notice of Motion seeking to find the Municipal Manager in contempt of court:

“1. Declaring that the Second Respondent is in willful and mala fide contempt of the Court orders granted on 18 December 2020 and amended and amplified on 12 January 2021.

2. That the sanction as contemplated in Part A and Part B of the order granted under CASE NO: UM271/2020 be put into effect in that the Municipal Manager, Mr. Joseph Mogale be committed to serve 90 days imprisonment;

3. The First and Second Respondents are jointly and severally ordered to pay the costs of the Application on the attorney and own client scale including the cost of counsel where so employed. No order as to costs are sought against the Third Respondent, Fourth Respondent, Fifth Respondent and the Sixth Respondent.”

The judgment of the court a quo in UM 271/2020

[19] The essence of the court a quo’s reasoning per Mahlangu AJ in dismissing the contempt application under case number UM 271/2020 was as follows:

“[16] A rule nisi is an order granted ex parte, as it happened in this particular matter at paragraph 16(a) of the court order, directing a particular person or persons calling on them to appear in court on a certain fixed date to show cause why the rule nisi should not be made final. In this case the KLM were called upon to show cause on 1 March 2021 why the interim relief should not be made final.

[17] I mention at this stage that in practice it has become a norm and a logical presumption that in instances where a rule nisi is the

subject matter or heart of the proceedings the postponement of the rule nisi automatically extends the life of the rule.

[18] This was supported in a case of *Crundell Brothers Ltd v Lazarus NO & another* 1991 (3) SA 812 (C) at 823H, where the court held that postponement of the rule nisi has automatic effect of extending the life of the rule.

[19] I hold a view that the rule nisi is primarily an interim order of the court and it has no independent existence, but it is conditional upon confirmation or discharge by the court.

[20] In the case of *MV Snow Delta Serva Ship Ltd v Discount Tonnage Ltd* 2000

(4) SA 746 (SCA) it was held that the court has no authority to *meru meto* extend the life of a lapsed order, irrespective of whether or not the relief sought is depended on the existence of the rule nisi.

[21] To me it means on the return date, when there is no court dealing with the life of the rule nisi, the rule then lapses and consequently the umbrella of protection afforded the applicant by the rule nisi falls away, leading to the discharge of the duty of compliance on the respondent or defendant post expiry of the rule.”

The grounds of appeal in UM271/2020 – the contempt application

[20] The grounds of appeal premised on the reasoning of the court *a quo* as aforesaid, are formulated as follows:

1. The Honourable Court erred in dismissing the committal application under case number 271/2021 with cost.
2. The Honourable Court with respect, misdirected itself in finding that the order, granted on 18 December 2020 with immediate effect returnable on 1 March 2021, lapsed and therefore the Second Respondent could not be held in contempt of court.
3. The Honourable Court with respect, further misdirected itself in finding that, since the return date has been anticipated and a settlement agreement was entered into on 12 January 2021, the first order was not confirmed nor dealt with and therefore it has lapsed (Reasons paragraph 15). We respectfully argue that a different court may find that the interim order did not lapse and was in fact amended and amplified in the 12 January order.
4. The Honourable Court erred in that the court failed to consider the existence of the interim court order granted on 18 December 2020 with immediate effect which order continued to have effect before and after it being amended and amplified on 12 January 2021.

5. With reference to paragraph 16 of the reasons for judgment the court accepted that the application was brought ex parte and with respect failed to consider that the first and second respondents were served with the papers and thus had knowledge of the applications.
6. The Honourable Court with respect, erred in concluding that the amplification of the order of 18 December 2021 does not embody the confirmation thereof, and therefore erroneously applied the principles of *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) SA 746 (SCA) at 752B (Reasons para 20). The court had to Page 14 find that the second respondent failed to comply with the order up until 12 January 2021.
7. The Honourable Court misdirected itself in that it placed an overemphasis on the legal principal regarding a rule nisi and failed to consider that an interim order, having immediate effect, was granted on 18 December 2020 and should have found that the Second respondent failed to comply with the said order (Reasons paragraph 21).
8. The Honourable Court with respect-erred in finding that the court on the return date (which was anticipated) failed to deal with the “life of the rule nisi” and that the rule accordingly lapsed (Reasons para 21). This, with respect, serves as no justification for the failure to comply with the applicable interim order granted on 18 December 2020.
9. The Honourable Court erred in finding that it is relevant that the rule nisi was not brought to the Court's attention on the return date and that it was accordingly not extended to a specific date and accordingly lapsed. The court with respect failed to acknowledge that even if accepted, which we deny, that the interim order lapsed and/or was replaced with the 12 January 2021 order, the Second Respondent had no justification for his failure to comply with the interim order granted on 18 December 2020. We argue that the there was no need to extend any return date as the 12 January 2021 order was in fact a final order that amplified the interim order.
10. The Honourable Court inter alia ignored the common cause evidence that the first and Second Respondents were in contempt of the order of 18 December 2020 by failing to act in accordance with the order in that the Second Respondent failed to file a report within 11 weekdays from the date of the interim order granted on 18 December 2020.
11. The Honourable Court with respect erred in failing to acknowledge that an anticipated date cannot absolve the obligations in terms of the interim order that were enforceable before the anticipated date. We submit that no factual justification was advanced by the second respondent to explain or mitigate his failure to comply with the order and therefore the second respondent failed to discharge this burden establishing the contempt.
12. The Honourable Court with respect erred in concluding that the interim order has “fallen away” whereas a mere reading of the words of the order of 12 January 2021 speaks of an amendment and amplification of the interim order rather than a lapsing thereof, leaving no room for an argument that the order is not immediately in force. A further dear and undisputed fact is the wording of the handover agreement, signed on 17 March 2021, which

speaks of a confirmation and expansion of the interim-court order granted on 18 December 2020. The Court, with respect failed to apply the rules regarding interpretation as developed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *Bothma-Batho Transport v Bothma & Seun Transport* 2014 (2) SA 494 (SCA). The Court further erred in ordering costs against the Appellants under case number 271/2021.

13. Although the argument of the applicant was correctly identified the Honourable court with respect failed to apply the argument to the facts and merely rejected the arguments on the basis that the rule nisi has lapsed.
14. The Honourable Court erred in that even If the rule nisi has lapsed on 12 January the second respondent is still in contempt of court as no justification has been advanced for his failure to comply with the court order granted on 18 December
2020. The Second Respondent failed to comply with his obligation in terms of the first order before 12 January 2021. It is with respect immaterial if the order lapsed or not (Reasons par 36 & 38).
15. We respectfully argue that the interim order did not lapse and was in fact amended and amplified in the 12 January order. The Court respectfully erred in finding that the Kgetlengrivier Local Municipality (“KLM”) complied with paragraphs 2 and 3 of the order of 12 January 2021 (Reasons paras 30). Of more relevance is that the second respondent failed to comply with the court order of 18 December 2020 and 12 January 2021.
16. The Honourable Court with respect erred -regarding the legal requirements of contempt in finding that the KCC could not proof that contempt was wilful and mala fide (Reasons par 38). We respectfully submit that the law is clear, “wilfulness and malafides are presumed...” and therefore the reasonable possibility exist that another court may interpret and implement the legal requirement for contempt of-court differently. We respectfully argue that the KCC has established the basic three requirements of contempt of court which burdens the Second Respondent (Municipal Manager) with an evidentiary burden to establish a reasonable doubt.
17. It is trite as set out by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) that the applicant who alleges contempt of court must establish that an order exists, the alleged contemnor was served with the order or had knowledge and the alleged contemnor failed to adhere to the order.
18. We respectfully argue that the court has accepted that the KCC has established the three requirements of contempt of the court order granted on 18 December 2020. Therefore, wilfulness and mala fides are presumed, and the second respondent bore an evidentiary burden to establish a reasonable doubt.

19. We submit that no factual justification was advanced by the second respondent to explain or mitigate his failure to comply with the order and therefore the second respondent failed to discharge this burden, thereby establishing contempt.
20. We respectfully submit that no new law or approach was established but the court succinctly in the Zuma at para 37 stated:

“As set out by the Supreme Court of Appeal in Fakie, and approved by this Court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established,

willfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.”

The interpretation of the orders granted on 18 December 2020 and 12 January 2021

[21] Before turning to the nature and implication of the orders granted by Gura J on 18 December 2020 and 12 January 2021, which is central to the appeal by the KCC, it would be prudent to consider how those orders are to be interpreted, since no reasons for the orders were supplied. This is necessary when regard is had to the essence of the ground of appeal, the conflicting submissions by Counsel before this Court and more importantly the interpretation by the court a quo of those orders.

[22] In *HLB International (South Africa) v MWRK Accountants and Consultants (112/2021)* [2022] ZASCA 52 (12 April 2022), the Supreme Court of Appeal dealt with the principles applicable to and the interpretation of a court order. Meyer AJA (as he then was) writes as follows in this regard:

“[24] I now turn to the relevant rules of interpreting a court’s judgment or order. In Firestone South Africa (Pty) Ltd v Genticuro A.G. [1977] 4 All SA 600 (A) this Court said this:

‘The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. See Garlick v Smartt and Another, 1928 A.D. 82 at

p. 87; West Rand Estates Ltd. v New Zealand Insurance Co. Ltd., 1926 A.D. 173 at

p. 188. Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no intrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. (cf. Postmasburg Motors (Edms.) Bpk. v. Peens en Andere, 1970

- (2) S.A. 35 (N.C.) at p 39F-H). Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise – see *infra*. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court’s granting

the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order

granted on an appeal is uncertain, the judgment or order of the court *a quo* and its reasons therefor, can be used to

elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. See Garlick’s case, *supra*, 1928 A.D. at p. 87, read with *Delmas Milling Co. Ltd. v Du Plessis*, 1955

- (3) S.A. 447 (A.D.) at pp. 454F-455A; *Thomson v Belco (Pvt.) Ltd. and Another*, 1960

- (3) S.A. 809 (D).’ (Footnotes omitted.)

[25] Since *Firestone* there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. The modern approach to interpretation was set out thus by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

‘Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the purpose of the document. . . . The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’...

[26] The now well established test on the interpretation of court orders is this:

‘. . . The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. . . .’ (*Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others* 2013

- (2) SA 204 (SCA) para 13 and endorsed by the Constitutional Court in *Eke v Parsons* 2016

- (3) SA 37 (CC) para 29).

[27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. (Cross-Border Road Transport Agency para 22, see also Speaker, National Assembly and Another v Land Access Movement of South Africa and Others [2019] ZACC 10 (CC); 2019

(6) SA 568 (CC) para 43.) For as was said in KPMG Chartered Accountants (SA) v Securefin Ltd and Another, ‘context is everything’.

[28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in Elan Boulevard (Pty) Ltd v Fnyn Investments (Pty) Ltd, in which it was said that ‘[a]n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole’, and-

‘. . . [a]s part of the “usual well-known rules” of interpretation, according to Olivier JA, is-

...

“One should not stare blindly at the black-on-white words, but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.”

(my emphasis)

Authorities on rules nisi and interim orders

[23] Having set out the authority on the interpretation of orders, it would be prudent to have regard to the authorities relevant to rules nisi and interim orders as background to the orders granted on 18 December 2020 and 12 January 2021 by Gura J. The orders in question are a combination of declaratory orders, interim orders and are phrased as rules nisi. The distinction between interim orders and rules nisi calls for careful consideration by this Court, considering the consequences for the Municipal Manager in particular.

[24] In National Director of Public Prosecutions v Mohamed NO and Others[1], the Constitutional Court provides a useful exposition of the historical development of ex parte applications, the granting of rules nisi and interim orders, pending the return day of a rule nisi (footnotes included):

“The historical development of ex parte applications, the granting of rules nisi and the making of interim orders

pending the return day of a rule nisi

[28] ... it is convenient to examine the common law practice relating to ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of the rules nisi, as well as the importance of the audi rule for procedural fairness. For the purposes of this case “an ‘ex parte application’ in our practice is simply an application of which notice was as a fact not given to the person

against whom some relief is claimed in his absence.”[2]

[29] Our common law has recognised both the great importance of the audi rule[3] as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule nisi calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule nisi should act immediately as a temporary order, pending the return day.[4] This practice has been recognised by the South African courts for over a century:

“The term ‘rule nisi’ is derived from English law and practice, and the rule may be defined as an order by a court issued

at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief

applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a ‘curious mixture of our practice with the practice of England’ took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict.”[5]

[30] The flexibility and utility of the rule nisi acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits. I would endorse the following passages from the judgment of Corbett JA, writing for a unanimous Appellate Division in the Safcor case:[6]

“The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl The Judicial Practice in South Africa 2nd ed at 355ff, 370-1; Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 89-90). This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons...”

[25] In VLG Accounting CC (Registration number: 2005/086279/23) and Another v Koloni Consulting Enterprise CC (Registration number: 2010/0173887/23) and Others[7], Lowe J provides a further useful and succinct exposition of the effect of a rule nisi, where he states:

“THE RULE NISI

“ ...

[20] Such interim order is temporary and provisional (Development Bank of Southern Africa Ltd v Van Rensburg NNO 2002

(5) SA 425 (SCA).)

[21] On the return day of the rule Applicant moves for it to be made final.

[22] The postponement of a rule nisi does not, so it has been held, of itself end the rule but automatically has the effect of excluding the rule according to Crundall Brothers (Pvt) Ltd v Lazarus NO and Another 1991

(3) SA 812 (ZH) 823 G – I.

[23] However, in my view as a rule nisi is an interim order, and in this matter given ex parte, it is conditional upon confirmation by the Court. It seems to me that a Court has no authority to mero motu extend the life of a lapsed order whether or not a rule (MV Snow Delta : Serva Ship Ltd v Discount Tonnage Ltd 2000

(4) SA 746 (SCA)).

[24] On the return day of a rule accordingly if a matter is postponed, or as in this case, removed from the roll with no extension of the rule and no date for the matter to be heard in the future, the rule must automatically lapse – discharging Respondents from the duty of compliance (National Director of Public Prosecutions v Walsh & Others 2009

(1) SACR 603 T

[24] and [25]).

[27] It was in order to address the issue of a lapsed rule nisi (in the absence of appearance by Applicant) that Rule 27(4) was inserted into the rules in 1987, and probably as a result of Fischer v Fischer (supra).

[28] The rule reads as follows:

“After a rule nisi has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.”

[29] The trigger is said to be in “default of appearance by the Applicant”. The first question is to consider whether this includes a situation where the parties appear but by agreement (or otherwise) the matter is removed by the Court, the file not being in order (as in this matter) but the Rule not extended. The rules are for the Court and not vice versa and in context the purpose of Rule 27(4) was to lessen the burden on an Applicant whose rule was discharged due to non-appearance (*Manton v Croucamp NO and Others* 2001

(4) SA 374 (W) 380I-381J).

[30] The rules are intended, inter alia, to expedite the decision of the Court (*SOS Kinderdorf International v Effie Lentin Architects* 1993

(2) SA 481 (NM) 491D-R; *Centre for Child Law v Hoërskool Fochville and Another* 2016

(2) SA 121 (SCA) 131G; *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017

(1) SA 236 (GJ).) They are interpreted and applied in a spirit that will facilitate the work of the Courts and enable litigants to resolve their differences in a speedy and inexpensive manner (*Herbstein & Van Winsen, The Civil Practice of the High Courts, Fifth Edition, Volume 1* page 30). The Courts do, of course, have inherent jurisdiction to grant relief should insistence on exact compliance with the Rules cause injustice – though exercised sparingly.

[31] In the result it seems to me that the removal from the roll without extension of the rule, in this matter, is such as to be essentially the type of issue which the rule envisages as being subject to revival on application in appropriate circumstances.

[32] If I am wrong in this respect that would be the end of the matter for Applicants, the rule not being capable of being simply revived

and the matter then to be such as to have to be brought afresh.

[33] If a rule nisi is such as to be revived, once discharged by default, the Court may so rule and direct that it need not again be served.

[34] This will only occur where there is no possible prejudice. Put differently if the interests of the parties may be affected, the rule

is unlikely to be revived.

[35] The provisions of Rule 27(4) was considered in *Ex Parte S & U TV Services (Pty) Ltd: In Re S & U TV Services (Pty) Ltd (In Provisional Liquidation)* 1990

(4) SA 88 (W). See also *Commissioner for the South African Revenue Services v Bachir and Others* (87306/2014) [2016] ZAGPPHC 251 (22 April 2016).

[36] Harms: Civil Procedure in the Supreme Court, LexisNexis provides that:

“B27.9 Revival of rule nisi If a rule nisi is discharged the court is in principle functus officio and a new application would be necessary for the same order. The object of the sub-rule is to lessen the burden on an applicant whose rule was discharged due to his failure to appear on the return date. The sub-rule does not disclose an intention to override or detract from the rights of other or third parties, and before the rule can be revived it is necessary to determine what the effect of the revival would be. A rule which lapsed because of the fulfilment of a resolutive condition, cannot be revived.”

[37] In S & U TV Services the Court held that:

“With no contrary indication gained from the said factors or from any other source, I conclude that Rule 27(4) discloses no intent to override or detract from rights or interests of a litigious opponent or of third parties. Neither does it diminish the need to care for such interests. The application of Rule 27(4) must therefore be strongly influenced by the particular instance before the Court.

Crucial to the said approach would be to determine what effect the revival of the rule nisi would have. Counsel suggested that the effect would be the same as if the rule had not been discharged on 6 January. This is what the Rule intended. Rule 27(4) does not mention a ‘new’ rule which is then or later confirmed.

[38] So what effect would the revival of the rule nisi have? Effectively the rule provides for re-instatement as to the original

return date (20 May 2021).

[46] The fact that the lapse of the rule nisi was due to no fault of Applicants cannot in my view change the issues referred to above in respect of Rule 27(4). The lapse of the rule nisi although, or so it was argued, due to Applicants’ legal representative’s error, cannot change the prejudice issue nor in such circumstances can Applicants rely hereon (See *Mabudsha v Commissioner for Conciliation, Mediation and Arbitration and Others* (JR33472010) [2014] zalcjhb 57 (9 January 2014). See further *Saloojee v Minister of Community Development* 1964

(2) SA 135 (A); *Xayiya v African National Congress* [2000] 4 BLLR 477 (LC); *First National Bank v CCMA* [2000] 12 BLLR 1429 (LC); *A Hardrodt (SA) (Pty) Ltd v Behardien* (2002) 23 ILJ 1229 (LAC); *Superb Meat Supplies CC v Maritz* (2004) 25 ILJ 96 (LAC); *GIWUSA obo Hyeneke v Klein Karoo Korporasie Bpk* (2005) 26 ILJ 1083 (LC)).

...”

[26] An interim order or interim interdict has specific legal consequences which may extend beyond a specified date as in the case of a return date for a rule nisi. It follows axiomatically that when a rule nisi is coupled with an interim order, the order will have interim effect until the return day, when same is either confirmed or discharged. Once the return day of a rule nisi coupled with an interim order passes without being extended, both the rule nisi and the interim order lapses/expires.

Discussion of the appeal under UM 271/2020

- [27] How are the Gura J orders of 18 December 2020 and 12 January 2021 to be interpreted? The order of 18 December 2020 slavishly follows the relief sought in the Notice of Motion and so too does the order of 12 January 2021. To re-iterate up until the date of this judgment, neither of those orders are accompanied by any reasons from Gura J. The only logical reason I surmise is that the order of 18 December 2020 was not opposed and the order of 12 January 2021 was by agreement. This Court is therefore at a disadvantage in understanding the reasoning or logic of the orders granted by Gura J on 18 December 2020 in respect of the sanction of imprisonment against the Municipal Manager and the basis of handing over the waterworks to the KCC. And similarly his endorsement of the consent agreement of 12 January
2021. It is left to this Court to unpack the effect and consequences of those orders against the authorities set out supra.
- [28] On 12 January 2021, the KCC reached an agreement with the Municipality and Municipal Manager. In that agreement which was made an order of Court by Gura J, the parties reiterated that the order granted on 18 December 2020 was an interim order and concluded that the order of 12 January 2021 “...shall constitute a full and final settlement of the Application by the Parties.” It should follow logically that if the order of 18 December 2020 was an interim order, no finality had been reached in the matter. In fact, if the return date was not anticipated by the respondents, they were only called upon to give reasons by 01 March 2021, why the interim order should not be made final.
- [29] On 12 January 2021, the interim order, whilst phrased as amending and amplifying the order of 18 December 2020, ultimately concludes in peremptory terms and in unequivocal language that this amended and amplified agreement, shall constitute a full and final settlement of the Application by the parties. Bearing in mind that the relief granted on 18 December 2020 was interim which the parties were mindful of in their agreement of 12 January 2021, and the agreement made an order of Court on 12 January 2021, brought to finality the interim order of 18 December 2020 (the Application), that logically signalled the end of the matter. I elaborate on this below.
- [30] In bringing an end to the application, one cannot ignore the content of the agreement of 12 January 2021 in respect of the interim orders granted on 18 December 2020, which were interdictory in nature and the consequences of not complying with the interdictory orders. In Part A of the application, the Municipality and Municipal Manager were interdicted as follows:
- “3. The First Respondent and Second Respondent are hereby ordered to immediately cease their usage of a raw sewer trench/ pipe or furrow to divert the flow of raw sewage into the Koster River.*
5. The First and Second Respondents are interdicted from allowing raw sewerage to overflow into the Koster and Elands rivers.

7. The First and Second Respondents are compelled and ordered to urgently take remedial steps to stop the pollution by immediately fixing the causes to the spillages and to remedy the effects of the pollution caused, and to rehabilitate the affected areas.”

[31] The consequences of non-compliance with the interdictory orders, within a period of “11 weekdays”, save for the sanctions of imprisonment of the Municipal Manager, was that the KCC would be authorised:

“... to take control of the sewerage works at Koster and Swartruggens, to appoint or employ suitably qualified people to operate the sewerage works and that the reasonable costs for such work be paid jointly and severally by the MEC responsible for Environmental Affairs, KLM and the Bojanala Platinum District Municipality (“Bojanala”).”

[32] It is common cause that the interdictory orders of 18 December 2020 were not complied with and the KCC took control of the sewerage works at Koster and Swartruggens. One cannot ignore that the content of the agreement was in full and final settlement of the application of 18 December 2020, bearing in mind that the sewerage works were now firmly in the hands of the KCC. The terms of the order are clear:

“2. THAT: The respondents shall appoint a suitable implementing agent to operate and manage the 1st Respondent’s water provision and sanitation services by no later than the end of JANUARY 2021.

3. THAT: Upon the appointment of the implementing agent by the 1st Respondent, the parties agree that the Applicants shall hand over the operation of the plants to the implementing agent in accordance with the handover plan developed between the Applicants and the implementing agent.

4. THAT: The Responsibility of appointing contractors shall remain that of the implementing agent in consultation with the 1st Respondent.

5. THAT: The 1st Respondent shall be liable to pay the costs of the Applicants and their contractors for their monitoring, preparation to render services and the actual costs of rendering services until the handover to a suitable provider.

5.1 Payment of invoices are to be made by the 1st Respondent within 30 days from the rendering thereof.

6. THAT: The 1st Respondent shall be liable to pay the legal costs incurred on a party and party scale, from 19 DECEMBER 2020 to date of order.

7. THAT: The costs up to and including 18 DECEMBER 2020 shall be paid as ordered on 18 DECEMBER 2020.”

[33] The agreement of 12 January 2021, settled the impasse in respect of the interdictory orders granted on 18 December 2020, where the Municipality and Municipal Manager did not comply with the said orders resulting in the take-over of the sewerage works by the KCC. The non-compliance by the Municipal Manager and Municipality with the order of 18

December 2020, resulted in the take-over by the KCC. This begs the question what the real reason was for the contempt application. The answer on a reading of the relief sought in UM 69/2021 is fairly straightforward. When one has regard to the fact that the KCC were aggrieved by non-payment of its invoices as agreed on 12 January 2021 and non-payment of the costs of 18 December 2020 as agreed on 12 January 2021, the contempt application and the relief sought under UM 69/2021 followed contemporaneously.

- [34] The authorities are clear in respect of the effect of an interim order coupled with a rule nisi. The KCC had to apply for the revival of the rule nisi which lapsed on 12 January 2021, if they wanted to have the allegation of contempt of court adjudicated. On a purely procedural basis, the court a quo (per Mahlangu AJ) was not vested with any powers to consider the contempt of court application and the dismissal of the application was justified.
- [35] I am, however, of the view that an order finding the Municipal Manager in contempt of the order of 18 December 2020, would not have been competent for another more compelling reason. The facts relied on in the application of 18 December 2020 were terse and the legislative provision relied on for the order of imprisonment in application proceedings was not legally tenable. I elucidate on this below.
- [36] It remains undisputed and I underscore the fact that the Municipality and the Municipal Manager were in breach of their constitutional duties. Whether or not the court a quo should have granted the orders in terms of which the Municipal Manager was summarily imprisoned, albeit that the operation of such sentences were suspended, is questionable. If the orders of imprisonment were not competent to grant in law on 18 December 2020, the question which then remains is whether or not the contempt application was in accordance with the salient guidelines set out in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).
- [37] The order in terms of which the sanctions of imprisonment were granted is predicated on the breach of the Municipal Manager and the Municipality of their constitutional duties. The rationale behind the order of imprisonment must be considered against the evidence presented by the KCC, justifying such an order in law. The only basis for such order, save for the common cause breach of constitutional duties, is found at paragraph [99] read with paragraph [42] of the founding affidavit in UM 271/2020.
- [38] The justification for the sanction sought against the Municipal Manager and holding him to account can only be predicated on reliance by the KCC on section 151 of the National Water Act 36 of 1998 (“the Water Act”). The content of paragraph
- [42] of the founding affidavit is apposite in this regard:

“42. In terms of the Water Act section 151, people are committing offences inter alia if they intentionally refuse to perform a duty, unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource; and unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource.”

(my underlining)

[39] What flows from paragraph [42] of the founding affidavit is a request for the imprisonment of the Municipal Manager. The content of paragraph [99] of the founding affidavit is apposite in this regard:

“99. The imprisonment of the municipal manager of KLM is sought. Such request is justified as he is the kingpin locally to have addressed the issues and to have called upon assistance had he not been able to resolve the issues of water supply and sewage treatment. Instead, is he resident in Rustenburg – protected against much of the effects that we, the residents, are faced with on a daily basis. The Municipal Manager has literally turned a blind eye to Residents and more specifically to the Applicants attempting to move the Municipality to give effect to their obligations.

99.1 Effective relief is necessary. And the Municipal Manager must accept his responsibility as the primary driver in the provision of services.”

(my underlining and emphasis)

[40] Chapter 16 of the Water Act deals with offences and penalties. The appellants appear to have relied in particular on the following provisions of section 151 of the Water Act, seeking the order

committing the Municipal Manager to imprisonment:

“CHAPTER 16 OFFENCES AND REMEDIES (ss 151-155)

In common with other Acts of Parliament which aim to make non-compliance a criminal offence, this Chapter lists the acts and omissions which are offences under this Act, with the associated penalties. It also gives the courts and water management institutions certain powers associated with prosecutions for these offences, such as the power to remove the cause of a stream flow reduction.

151 Offences

- (1) No person may-
 - (i) unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource;
 - (i) unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource;

(2) Any person who contravenes any provision of subsection (1) is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.”

[41] The introductory paragraph of Chapter 16 is clear, in that “...this Chapter lists the acts and omissions which are offences under this Act, with the associated penalties. It also gives the courts and water management institutions certain powers associated with prosecutions for these offences...”. The Water Act envisages prosecutions for specified violations or contraventions of the Water Act with specified penalties upon

conviction.

[42] The relief sought by the KCC on motion proceedings and granted an unopposed basis by Gura J on 18 December 2020 in terms of which a sanction was imposed for the common cause breach of the constitutional duties of the Municipal Manager, was not competent. Gura J respectfully should have been alive to this, irrespective of the fact that the application was moved on an unopposed basis.

[43] The relief sought in the contempt application under UM 271/2020, prayer 2: “That the sanction as contemplated in Part A and Part B of the order granted under CASE NO: UM271/2020 be put into effect in that the Municipal Manager, Mr. Joseph Mogale be committed to serve 90 days imprisonment.” was accordingly not competent. Gura J could not order that sanction in motion/application proceedings, on a mere request by the KCC, and contrary to due process of law. The only competent authority other than a possible private prosecution, is the National Prosecuting Authority (“NPA”). In fact, the relief sought in the contempt application is analogous to an application to put into operation a suspended sentence in a criminal matter, where there is a breach of a condition of suspension. It is trite that the audi alteram partem principle in matters such as these is trite and must be adhered to and applied. By way of analogy the following was said in *Stow v Regional Magistrate Port Elizabeth NO and Others; Meyer v Cooney NO & others* 2019 (1) SACR 487 (SCA):

“[31] In S v Sekotlong 2005 JDR 0190 (T) it was observed that the putting into operation of a suspended sentence was not merely an administrative function but part of a criminal trial. A court determining the issue of a person’s liberty was not only entitled to consider an appeal but ‘duty bound’ to do so. It would be unconscionable if a high court could not provide redress either by way of an appeal or review.” (my emphasis)

[44] That the Municipal Manager failed to comply with the order of 18 December 2020 cannot be disputed. To this end, it can safely be accepted as common cause, following the order of 12 January 2021 that he failed to ensure “...That the spillage of raw sewage into the Elandsriver and the Koster river be cleared up within 10 week days from the date of the order and that the First Respondent, duly assisted by the Second to Fourth Respondents, is ordered to take all necessary steps to ensure that raw sewage is not discharged into the aforesaid rivers or

onto land surrounding the respective sewerage works at Koster and Swartruggens; b. That the First Respondent is ordered to immediately cease the usage of raw sewer trenches / pipes or furrows to divert the flow of raw sewer from Koster and Swartruggens that finds way to the Koster and/or Elands rivers respectively;

- c. The Municipal Manager of the KLM is to file a report at Court 11 week days from the date of this order on steps taken to resolve the spillage of raw sewage and the prevention of similar incidents in the near future.”

[45] That the Municipal Manager’s failure along with the Municipality and the Second to Fourth Respondents to comply with the aforesaid order, would result in the imprisonment being put into operation is clear in paragraph 10 of the order of 18 December 2020: “10. That, in the event that the spills are not resolved within 10 days of this order: a. The order in 9 above be put into effect;...”

[46] I re-iterate that the Municipal Manager breached his constitutional duties as a Municipal Manager. I, however, respectfully have a problem with the fact that on a mere request an order was granted by Gura J that the Municipal Manager be imprisoned, in anticipation of any breach of the court order of 18 December 2020. To emphasize this point, what the KCC did was to make out a case for the “conviction and sentence” of the Municipal Manager by relying on section 151 of the Water Act on a request, which is procedurally wrong. That evinces a grave sense of unease.

[47] The order impacts on the constitutional right to liberty of the Municipal Manager in circumstances where he was “convicted and sentenced” without trial. To my mind, the sanctions granted by Gura J in following the relief sought in the Notice of Motion, was premature, untenable and not competent. The orders calling on the Municipal

Manager to give effect to remedying the complaints of the KCC as set out in the order of 18 December 2020 in itself should have sufficed at that time. As the KCC alleged in the contempt application that the Municipal Manager failed to comply with those orders, a case should only in that application have been made for finding the Municipal Manager in contempt of court with a request for the Court to consider a specific sanction. That would have given effect to the audi alteram partem principle and have been competent subject to the principles enunciated in *Fakie supra*, which was re-iterated in *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 v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 1992 (CC) (29 June 2021) (Zuma judgment). It is clear on reading of this Zuma judgment that the sanction imposed on the Municipal Manager was neither a coercive order nor a punitive order, having regard in the main to the fact that the order was granted at the same time as the mandatory and prohibitory interdicts on 18 December 2020, in anticipation of any breach:

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

The purposes of contempt orders

[47] I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are “marked and important”. A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic

is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.

[54] ...On numerous occasions, it has been confirmed that “the principal purpose of contempt of court proceedings when an order has been disobeyed has been the imposition of a penalty in order to vindicate the Court’s honour consequent upon the disregard of its order ... and to compel the performance thereof”. It is indeed the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same. In other words, committal is ordered for coercive purposes and made conditional upon non-compliance with a mandamus or interdict.

[55] In *Protea Holdings*, the Court held that, despite giving anxious consideration as to whether or not to order direct imprisonment –

“I must, however, bear in mind that a Court is loath to restrict the personal liberty of the individual in matters of this kind . . . and that, if a period of imprisonment in this type of case is imposed, it is usually or often suspended.”

To the extent that the second judgment stresses this, it is not wrong. Moreover, I cannot ignore the fact that I have yet to come across a case in which a solely punitive order of immediate committal has been made, or where punishment is not calculated to coerce the recalcitrant to comply with the initial order.”

[48] The appeal by the KCC in respect of the contempt application under UM 271/20 for reasons as aforesaid accordingly stands to be dismissed.

The costs of appeal in UM 271/2020

[49] The issues raised in the grounds of appeal under UM 271/20 are such that it involved a vexed question of interpretation of the orders of 18 December 2020 and 12 January 2021. In my view, therefore, the most appropriate and fair order would be no order as to costs.

The relief sought in UM 69/2021

[50] The relief sought under UM 69/2021, following the amended and amplified order of 12 January 2021 was formulated as follows:

“1. The forms and service provided for in terms of the rules of the above Honourable court is condoned and that the matter is heard as an urgent application in terms of the provisions of rule 6(12) of the Uniform rules of Court.

2. Declaring that the Seventh Respondent assumed joint liability for payment of the Applicants costs incurred under case number UM271/20.
3. Declaring that the First, Second and Seventh Respondents are in contempt of the orders under CASE NUMBER: UM 271/20 for failing to make payment of the amount of R15 785 067.09 ON OR BEFORE 18 March 2021, within 30 days of the Applicants rendering their interim account on 16 February 2021.
4. Directing to imprisonment for 30 days the Municipal Manager of the Kgetlengrivier Local Municipality, alternatively the aforesaid Municipal Manager together with the Acting Head of the Department of Co-Operative Governance, Human Settlements and Traditional Affairs of the North West Province for the aforesaid contempt.
5. The order in prayer 4 above is suspended for 48 hours to allow for payment of the amount of R15 785 067.09 representing the Applicants first initial amount to which the parties agreed to in their agreement dated 17 March 2021.
6. Upon payment as aforesaid, will the order lapse, save for the order on costs.
7. The First, Second and Seventh Respondents are jointly and severally ordered to pay the Applicants costs of suit on the attorney and client scale.
8. The amount of R15 785 067.09 together with the costs of suit to attract interest at the mora rate of 8.75% from date of issuing of the application to date of final payment.
9. Further and/or alternative relief.”

The judgment of the court a quo in UM 69/2021

[51] The judgment of the court a quo in respect of the liability of the MEC for COGHSTA was as follows:

“[41] The KCC brought an urgent application seeking relief finding, directing and ordering that the MEC, is liable for the costs incurred by the applicants under case number UM271/20, and that they are in contempt of the court order granted on 18 December 2020.

- [42] The MEC opposed this application. Adv Nondwangu raised a point in limine that the MEC was not a party to the application under UM271/2020 and therefore he cannot be in contempt of the court order. Adv Nondwangu argued that, the MEC took it upon himself to settle the invoices.
- [43] Adv Wijnbeek argued on behalf of KCC that, it is admitted that the invoices were settled, but the matter could not be withdrawn as the costs incurred were not paid. Adv Wijnbeek submitted that, MEC was indeed not a party to the proceedings under case number UM271/2020 but he assumed liability by settling the invoices on behalf of the Kgetlengrivier Local Municipality (the Municipality). Adv Wijnbeek submitted that, the KCC seek an order in terms of paragraphs 2, 3, 6 and 7 of the settlement agreement.
- [44] To succeed, the KCC bears the onus of proving not only the existence of the order and knowledge on the part of the respondents but also that noncompliance of the order was willful and mala fides. The only burden resting on the respondents is an extraordinary one as regards the last element.
- [45] The MEC had always informed the KCC about the predicament they have in settling the invoices. The amount to be paid by the MEC was big and, there were internal processes to be followed for the amount to be paid. Adv Nondwangu argued that, there was no transgression committed by the MEC, therefore the court cannot find that the payment made on 9 May 2021 was unlawful and malafide. He further submitted on behalf of the MEC that the MEC is not in contempt of court order and is not liable to any costs incurred by applicants under case number UM271/20.
- [46] Adv Nondwangu argued that the MEC was not a party to the proceedings and can therefore not be in contempt of a court order that he was not party to. Adv Wijnbeek submitted that, the MEC assumed liability by settling invoices and therefore he is liable for costs of this matter.
- [47] An applicant in contempt of court proceedings must establish the existence of the order, service or notice thereof on the respondents and their noncompliance with the order. It is my view that the applicants could not show that the MEC willfully and malafide disregarded the settlement agreement taking into consideration that was not even a party to the proceedings under case number UM271/2020.

Conclusion

- [48] It is my view that the MEC cannot be held liable for the costs incurred in the case number UM271/2020. He was not a party to the proceedings, but he settled the invoices on behalf of the Municipality. He can therefore not be held liable for the court order he was not part of.

[49] I am of a view further that, as per the requirement in *Fakie*, supra, the applicants could not prove beyond reasonable doubt that the MEC did not comply with the court orders beyond reasonable doubt.”

The relevant grounds of appeal in UM 69/2021

[52] The grounds of appeal relevant to a consideration of the appeal in UM 69/2021 are formulated as follows:

“1. *The Court erred in dismissing the application under case number 69/2021.*

2. The Court further erred in ordering costs against the Appellants under case number 69/2021.

14.13 The MEC assumed liability for the payment due to the Concerned

Citizens and the MEC bound it to the order of 12 January 2021.

14.14 Neither of the State Entities ensured payment due to the Concerned

Citizens on 24 March 2021 at variance with the undertaking to the Appellants reduced to writing in the handover agreement.

15. The Court further erred in failing to shield the Concerned Citizens and Pionier from any costs orders on the premise of the Biowatch-principle.

26. In dismissing the relief with reference to costs sought in the contempt application under UM69/21 (Reasons paras 48 & 49), the Court failed to consider inter alia –

26.1 paragraphs 2.1; 8.3 and 85 of the agreement signed on 17 March 2021 and that Mr S Ramagaga concluded on behalf of the Department of Cooperative Governance and Traditional Affairs;

26.2 that an indulgence for late payment was only sought after the payment was already due with the Department already in breach of its obligations; and

26.3 that the application for contempt was instituted before payment by the respective State Respondents was eventually made...”

Discussion of the appeal under UM69/2021

[53] The KCC submit that the order of the court a quo in dismissing the application with costs should be set aside and replaced with an order at the very least holding the Municipality and the Municipal Manager liable for the costs of the application under UM 69/2021. The submission is that the Municipality and Municipal Manager did not oppose the application under UM 69/2021; that the application was only opposed by the MEC for COGHSTA; and the court a quo in dismissing the application, dismissed it with costs, notwithstanding the fact that the Municipality and Municipal Manager did not oppose the relief sought.

- [54] The appeal before us is only in respect of the cost order in UM 69/2021. No appeal lies in respect of the dismissal of the application on the merits in respect of the MEC for COGHSTA. Bearing in mind that the Municipality and the Municipal Manager did not oppose the contempt application under UM 69/2021, it was imperative for the court a quo to deliver judgment in respect of the application to the said parties.
- [55] The judgment of the court a quo however deals only with the opposition of the application by the MEC for COGHSTA and is silent on the relief sought against the Municipality and Municipal Manager, who were not before Court.
- [56] A court of appeal will generally be very loath to interfere with an order as to the award of costs. Appeals against cost orders are therefore an exception rather than the norm. In *Hotz and Others v University of Cape Town* (CCT280/16) [2017] ZACC 10; 2017 (7) BCLR 815 (CC); 2018 (1) SA 369 (CC) at paragraphs [25] and [28], the Constitutional Court stated as follows in this regard:
- “[25] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa* [2015] ZACC 22; 2015
- (5) SA 245 (CC); 2015
- (10) BCLR 1199 (CC) this Court dealt with the power of an appellate court to interfere with the High Court’s order. It held that the proper approach on appeal is for an appellate court to ascertain whether the discretion exercised by the lower court was discretion in the true sense or whether it was a discretion in the loose sense. The distinction in either type of discretion, the Court held, “will create the standard of the interference that an appellate court must apply”. This Court remarked, per Khampepe J, that “[a] discretion in the true sense is found where the lower court has a wide range of equally permissible options available to it”. In such instances, the ordinary approach on appeal is that the “the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially ...”. This type of discretion has been found by this Court in many instances, including matters of costs ...”. The question
- remains whether the High Court, in considering the relevant circumstances and available options, judicially exercised its discretion in mulcting the applicants with costs.
- [28] It is established that a court of first instance has discretion to determine the costs to be awarded in light of the particular circumstances of the case. Indeed, where the discretion is one in the true sense, contemplating that a court chooses from a range of options, a court of appeal will require a good reason to interfere with the exercise of that discretion. A cautious approach is, therefore, required. A court of appeal may have a different view on whether the costs award was just and equitable. However, it should be careful not to substitute its own view for that of the High Court because it may, in certain circumstances be inappropriate to interfere with the High Court’s exercise of discretion.

[57] The approach to awarding costs is succinctly set out in *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others*

[1996] ZACC 27; 1996 (2) SA 621 (CC) at paragraph 3:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the

successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation...”

[58] For an appeal to succeed on costs, an appellant must demonstrate exceptional circumstances warranting interference with a cost order. In *Naylor and Another v Jansen* (508/05) [2006] ZASCA 94; [2006] SCA 92 (RSA); 2007 (1) SA 16 (SCA) at paragraph 10, the Supreme Court of Appeal stated as follows in this regard:

“[10] ... I had occasion in Logistic Technologies (Pty) Ltd v Coetzee to express the view that a failure to exercise a judicial discretion would (at least usually) constitute an exceptional circumstance. I still adhere to that view for if the position were otherwise, a litigant adversely affected by a costs order would not be able to escape the consequences of even the most egregious misdirection which resulted in the order, simply because an appeal would be concerned only with costs; and that obviously cannot be the effect of the section...”

[59] In *R v Zackey* 1945 AD 505 with reference to *Fripp v Gibbon & Co* 1913 AD 354 at 363, the Appellate Division said the following in respect of the exercise of the discretion on costs:

“Questions of costs are always important and sometimes difficult and complex to determine, and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of a Court of appeal to interfere with the honest exercise of his discretion.”

[60] The KCC do not appeal the dismissal of the application in respect of the MEC for COGHSTA. Notwithstanding the fact that the court a quo failed to deliver judgment in respect of the Municipality and the Municipal Manager, that should not obscure the real issue before this

Court which is whether the cost order against the KCC was justified. That the KCC have acted in the best interests of the community in its protracted litigation with the State powers, is not denied. But, in the context of the application under discussion, they did not enjoy *carte blanche* to seek costs from a party who was never a party to the litigation of 18 December 2020. The only basis on which the KCC sought to implicate the MEC for COGHSTA in the application is because the Provincial Government through the MEC for COGHSTA acted as *negotiorum gestio* for the Municipality to pay the costs agreed upon in respect of the KCC's implementing agent for the sake of good governance. The KCC's case against the MEC for COGHSTA is a classic example of no good deed goes unpunished.

- [61] In dismissing the application and awarding costs in favour of the MEC for COGHSTA, having regard to the merits on which it was dismissed and the fact that no appeal lies in respect of the merits, it cannot be overlooked that the MEC for COGHSTA was bound to oppose the application and was put to costs in doing so. The Biowatch principle as enunciated in *Biowatch Trust v Registrar Genetic Resources and Others* (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009), on the merits of the application in respect of the MEC for COGHSTA, unfortunately does not avail the KCC. The following sentiments expressed in *Biowatch* are apposite in this regard:

"[18] Thus in Affordable Medicines this Court stated that the ability to finance the litigation was not a relevant consideration in making a costs order. It held that the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs to the state should not be departed from simply because of a perceived ability of the unsuccessful litigant to pay. It accordingly overturned the High Court's order of costs against a relatively well-off medical practitioners' trust that had launched unsuccessful proceedings. Conversely, a party should not get a privileged status simply because it is acting in the public interest or happens to be indigent. It should be held to the same standards of conduct as any other party, particularly if it has had legal representation. This means it should not be immunised from appropriate sanctions if its conduct has been vexatious, frivolous, professionally unbecoming or in any other similar way abusive of the processes of the Court."

- [19] This is not to deny that vulnerable sectors of society are particularly dependent on the support they can get from public interest groups. A perusal of the law reports shows how vital the participation of public interest groups has been to the development of this Court's jurisprudence. Interventions by public interests groups have led to important decisions... Similarly, the protection of environmental rights will not only depend on the diligence of public officials, but on the existence of a lively civil society willing to litigate in the public interest. This is expressly adverted to by the National Environmental Management (NEMA) which provides that a court may decide not to award costs against unsuccessful litigants who are acting in the public interest or to protect the environment and who had made due efforts to use other means for obtaining the relief sought.
- [20] Nevertheless, even allowing for the invaluable role played by public interest groups in our constitutional democracy, courts should

not use costs awards to indicate their approval or disapproval of the specific work done by or on behalf of particular parties claiming their constitutional rights. It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard to whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken. Thus, a party seeking to protect its rights should not be treated unfavourably as a litigant simply because it is armed with a large litigation war-chest, or asserting commercial, property or privacy rights against poor people or the state. At the same time, public interest groups should not be tempted to lower their ethical or professional standards in pursuit of a cause. As the judicial oath of office affirms, judges must administer justice to all alike, without fear, favour or prejudice.

What the general approach should be in relation to suits between private parties and the state

[21] In *Affordable Medicines* this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs. In that matter a body representing medical practitioners challenged certain aspects of a licensing scheme introduced by the government to control the dispensing of medicines. Ngcobo J said the following:

“The award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule in constitutional litigation that an unsuccessful litigant ought not to be ordered to pay costs. The rationale for this rule is that an award of costs might have a chilling effect on the litigants who might wish to vindicate their constitutional rights. But this is not an inflexible rule. There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and the circumstances of the case...”

[24] At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not

unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.”

[62] The omission by the court a quo (per Mahlangu AJ) to deliver judgment in respect of the Municipality and the Municipal Manager is regrettable. It goes without saying that the application

in that regard, unopposed as it was, had merit and could in all probability have been granted. In the final analysis though, the cost order against the KCC in respect of the relief sought against the MEC for COGHSTA was merited.

[63] The appeal by the KCC under UM 69/2021 in respect of the issue of costs awarded to the MEC for COGHSTA, accordingly stands to be dismissed.

The costs of appeal in UM69/2021

[64] It follows axiomatically that the Biowatch principle does not avail the KCC before this Court on appeal in circumstances where its application against the MEC for COGHSTA was manifestly inappropriate. The KCC and the second appellant accordingly stand to pay the costs of appeal under UM 69/2021.

The relief sought and granted in UM79/2021

[65] The relief sought, inter alia, by the MEC for COGHSTA under UM 79/2021 was granted by the court a quo (per Mahlangu AJ) on 11 May 2021. The order followed the relief sought in the Notice of Motion and reads as follows:

“UM79/2021

“1. That such non-compliance with the rules relating to service and the time periods be and is hereby condoned and that this matter be heard as urgent in terms of Rule 6(12);

2. That the retake of the water treatment plants by the first respondent is unlawful;
3. That the first respondent must, immediately, hand over the water treatment plants to the applicants (or the fourth applicant) as the appointed implementing agent as contemplated in the court order issued by this Honourable Court on the 12 January 2021;
4. That the first respondent is interdicted from blocking the entrance and egress of the water treatment plants situated at Koster and at Swartruggens and must allow the applicant's employees and/or the fourth applicant's employees and/or the fourth applicant's employees access to the water treatment plants;
5. That the applicants are not liable for the operational costs incurred by the concerned citizens as a result of their unlawful conduct of retaking the water treatment plants;
6. That the Seventh Respondent pays the costs of this application.
7. That the counter application is dismissed.
8. Reasons for judgment will follow.”

The judgment of the court a quo in UM79/2021

[66] The judgment of the court a quo reads as follows:

“The retake of water treatment plants

- [51] This application was brought by the MEC seeking, amongst others, the retake of the water treatment plant from the Pioneer Company as they have complied with the settlement agreement. This application was opposed by the Pioneer Company.
- [52] The KCC, retook the water treatment plant of Koster on 24 March 2021 and Swartruggens on 30 March 2021 and appointed the Pioneer Company, as their agent. Mr Labuschagne SC argued that, MEC's failure to make payment on 23 March 2021 led to the lapse of the hand over agreement and therefore the respondents retook the plants and employed the Pioneer Company to manage the rendering of water and sanitation services. It should be noted that, the MEC explained to the KCC the reason for his failure to make the payment on 23 March 2021. The MEC even issued a letter to the KCC'S attorney Mr Peens reassuring him that the payment is going to be made. The payment was ultimately made on 9 May 2021.
- [53] It is therefore my opinion that, the MEC had the intentions of paying the respondents the amount of money, it was unfortunate that there are some departmental processes they had to follow before a payment could be made which delayed the payment of the money.

Legal principles

- [56] Section 139 of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that:

“(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking an appropriate steps to ensure fulfilment of that obligation, including-

- (a) Issuing a directive of the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
- (b) Assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
 - (i) Maintain essential national standards or meet established minimum standards for the rendering of a service;
 - (ii) Prevent Municipal Council from taking unreasonable action that is prejudicial to the interest of another municipality or to the province as a whole; or
 - (iii) Maintain economic unity; or
- (c) dissolving the Municipal Council and appointing an administrator until newly elected Municipal Council has been
- (d) declared elected, if exceptional circumstances warrant such step.

[57] The KCC took the matter in their own hands by retaking the water plants from Koster and Swartruggens. They could have reported their unsatisfactory service delivery of the Municipality to the Provincial Office, North West Province, where steps could have been taken to assist the Municipality should there be a need.

[58] Section 127(1) of the Constitution provides that:

“When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national

legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent,

competitive and cost-effective.

[59] The Pioneer Company was not appointed in terms of section 127 mentioned above. Therefore, its operations are unlawful and not in accordance of the law.

Counter application

[60] On 10 May 2021 the Pioneer Company filed and served the counter application to this application in which he seeks the following order:

“2. That the rule nisi be issued calling upon the applicants and first to sixth respondents to advance reasons on the return date why the following order should not be made final:

2.1 It is declared that the conduct of the applicants, failing to ensure, promote and fulfil the fundamental rights of residents to a safe environment and to sufficient water by providing efficient water and sanitation services in the municipal area of Koster and Swartruggens, unconstitutional and in breach of sec 24 and sec 27(1)(b) of the Constitution;

2.2 The applicants are directed to report to this court within 30 days what steps the propose, or have taken, to remove the causes of complaint leading to the aforesaid declaration above and to avoid a repeat of the aforesaid breaches, and in such reports to demonstrate the capacity to give effect to any proposals made;

2.3 The applicants are directed to serve copies of such reports on all parties when filling the reports with the Court;

2.4 Any party has the right to comment on such report filed by the applicants within five days of service of the report.

2.5 Costs of the application including costs of two counsel;

2.6 Further and alternative relief.

3. Pending the final determination of proceedings at the return date referred to above, an interim interdict be issued interdict and restraining the fourth applicant and/or the second applicant or their officials from interfering with the seventh respondent's operation of the water and sanitation plants at Koster and Swartruggens.
- [61] Adv Nondwangu submitted that, they no longer seek a return date but a final order as the matter has been ventilated between the parties.
- [62] Adv Labuschagne SC argued that the Pioneer Company is the suitable service provider for the operation and management of water plants, as it has vast expertise as compared to the Magalies Water Board.
- [63] Adv Nondwangu argued that the Magalies Water Board was appointed in terms of the settlement agreement and would be able to operate and manage the water plants should it be given the opportunity to do so, without the interference of the KCC.

CONCLUSION

- [64] It is my opinion that the Pioneer Company is unlawfully operating the water plants. The Magalies Water Board was appointed in terms of the settlement agreement as an implementing agent to operate and manage the water provision and sanitation services.
- [65] It is also my view that the MEC-COGTA did not deliberately make the payment of the amount of money on the 9 April 2021. There was communication between the parties about the glitches the MEC-COGTA encountered to can make the payment on time.
- [66] The Pioneer Company continued to operate the water plants after 23 March 2021 and it has incurred costs. I am of a view that, the MEC are not liable for the costs incurred by the KCC and the Pioneer Company from 23 March 2021 to the date of the hearing of this matter, for the upkeep of the water treatment plant as they unlawfully operated it.
- [67] I am of the view that the KCC could have referred the dispute of the late payment of the amount of money to the Alternative Dispute Resolution (ADR) in terms of paragraph 10.5 of the hand over agreement. The ADR could have resolved the dispute without incurring unnecessary costs at the

Court.

- [68] It is therefore my opinion that there are no justifiable reasons for the KCC to retake the water treatment plant and therefore the retake was unlawful.
- [69] The counter application therefore stands to be dismissed."

The grounds of appeal in UM 79/2021

- [67] The relevant grounds of appeal under UM 79/2021 relied on by the KCC, in support of Pionier, are as follows:

“5. The Court further erred in finding that the application before her under case number 79/2021 was urgent, alternatively that it succeeded on urgency.

6. The Court further erred in granting the main application before her under case number 79/2021 with costs against Pionier.
7. The Court further erred in declaring, in the order of 79/2021, that the First Appellant's (Concerned Citizens) management of the water works, described by the Court as "retake", was unlawful. The Court had to find that the handover agreement lapsed and that the Appellants lawfully operated the respective works in terms of an order of court.
8. The Court further erred in declaring that the Concerned Citizens were to hand the water treatment plants to the State Applicants under case number 79/2021, alternatively to Magalies Water, absent a finding on the competency of Magalies Water and effectiveness of service delivery when the latter was in control of the respective works. Premised on the evidence before the court, the, court could not find that Magalies Water was a suitable implementing agent.
9. The Court further erred in finding or declaring that Magalies Water was duly appointed as implementing agent as contemplated in the Court order issued on 12 January 2021. Absent a consideration of the competence of Magalies Water and having regard to the evidence of mismanagement, neglect and abscondment by Magalies Water could the court not hold that Magalies Water was appointed as suitably qualified implementing agent.
10. The Court further erred in declaring that the Concerned Citizens were blocking entrances to plants situated at Koster and Swartruggens and that the Concerned Citizens refused the State Applicants (Case number 79/2021) and/or Magalies Water's employees' access to the water treatment plants, where the court were to find that the Appellants were in lawful possession.
11. The Court further erred in declaring that the State Applicants (Case number 79/2021) are not liable for the operational costs incurred by the Concerned Citizens since the latter retook responsibility of the respective water works from 24 March 2021 and/or 30 March 2021, in an instance where the Appellants delivered basic services to citizens where the state Respondents failed their obligations.
12. The Court further erred in ordering the Seventh Respondent (Case number 79/2021) ("Pionier") to pay the costs of the State's application under case number 79/2021.
13. The Court further erred in dismissing Pionier's counter application in 79/2021.
31. The Court erred in finding that there were no justifiable reasons for the relevant Appellants to take responsibility for the respective works from 24 March 2021 in an instance where –
 - 31.1 The agreement that provided for handover lapsed and did not revive;

31.2 Clear evidence placed on record which proved that the respective plants were neglected from 18 March 2021 to 23 March 2021 with spillages again into the Koster and Elands rivers and the immanent risk of water outages and contaminated potable water (with more evidence at this stage of blatant disregard of Constitutional obligations and of poor management with the residents of Koster and Swartruggens frequently and continuously be left without potable water and with raw sewage continuously flowing into the Koster and Elands rivers);

31.3 Clear evidence recorded that Magalies Water and Municipal employees abandoned sites; and

31.4 The State Entities failing to present any evidence that suitable, duly qualified employee were on site from 18 March 2021.

32. The Court accordingly erred in dismissing the counter

[68] Pionier formulates its grounds of appeal under UM 79/2021 as follows:

“1. The Honourable Court erred in granting the relief sought by the Applicants in the main application under case number UM79/2021 and in dismissing the counter-application brought by the Seventh Respondent.

2. The Honourable Court erred in not adopting an approach that would lead to the effective realisation of the Constitutional rights, especially to an adequate water supply and environmental rights, of the residents of Kgetlengrivier Local Municipality.
3. The Honourable Judge erred in not finding that the First Respondent merely took over abandoned / vacant municipal waterworks and that it had not ejected anyone from the relevant waterworks (this version was advanced by the First, Second and Seventh Respondents and is especially relevant since final relief was sought by the Applicants).
4. The Honourable Judge erred in finding that the late payment of the relevant amounts by the First Applicant can be overlooked /excused because the delays were occasioned by departmental processes. In our law the element of fault is irrelevant when it comes to breach of contractual terms.
5. The Honourable Court erred in not finding that the handing over agreement had lapsed because of the late payment in terms of clause 8.5 thereof. Consequently, no party could also be forced into alternative dispute resolution.
6. The Honourable Court erred in not finding that because of the lapsed handing over plan there had not been a proper hand over to Magalies Water Board or a proper appointment of this entity.
7. The Honourable court erred in not finding that the delivery of water and sanitation services had collapsed again shortly after the waterworks came into possession of the Fourth Applicant and that this would require urgent intervention to realise important constitutional rights.

8. The Honourable Court erred in holding that Section 139 of the Constitution of the Republic of South Africa, 1996 provides an alternative mechanism, especially in circumstances where the relevant Municipality had been placed in administration before and the First Applicant became involved in the matter.
9. The Honourable Judge erred in finding that the Seventh Respondent's appointment was unlawful in the light of Section 127(1) of the Constitution. The Seventh Respondent was not appointed by the Municipality or any organ of State. It was merely appointed by the First Respondent as its agent and it also acted as negotiorum gestor. Accordingly, section 127(1) finds no application.
10. The Honourable Court erred in finding that the First and/or Seventh Respondents should not be remunerated for work done at the relevant plants, especially in circumstances where they acted to render the most basic services to the community.
11. The Honourable Court erred in not sufficiently-considering that the relief sought in the counter-application would at least lead to a situation where the important Constitutional rights of the relevant community are protected and they enjoy sufficient municipal water supply pending the finalisation of final litigation in relation to the appointment of the Fourth Applicant or a suitable service provider.
12. The Honourable Court erred in granting a costs order against the Seventh Respondent in circumstances where the litigation relates to important constitutional rights and the Biowatch-principle should have been applied. The Honourable Court also incorrectly held that only the Seventh Respondent was opposing the relevant application. The application was opposed by the First, Second and Seventh Respondents. Only the Seventh Respondent pursued a counter-application."

Discussion of the appeal under UM79/2021

- [69] The nub of this appeal is that Pionier stepped into a battle which was not its battle. The high watermark of Pionier's appeal is that it acted as a negotiorum gestor. In other words, it stepped in, on its argument, on behalf of its principal the KCC, but without the KCC's prior consent. Pionier not only stepped in but filed a counter application to the application brought by the State applicants under UM 79/2021. The relief sought in the counter application was a repetition of the relief sought in the initial application of 18 December 2020, with due regard to the order of 12 January 2021 and subsequent orders in which agreements were reached between the KCC and certain relevant State respondents. Pionier should have abided by the mandate of its principal the KCC and not entered the fray. The principles applicable to a negotiorum gestor unfortunately do not avail Pionier.
- [70] The cost order against Pionier insofar as the main application was granted and the counter application dismissed, was justified. There is no basis to find that no order as to costs should have been granted against Pionier or that its counter application should have been upheld.

Costs of appeal in UM 79/2021

- [71] As with the KCC, the Biowatch principle does not avail the first appellant, the KCC or Pionier in the appeal before this Court. Pionier, the first appellant and the KCC accordingly stand to pay the costs of appeal under UM 79/2021, jointly and severally, the one paying the other to be absolved.
- [72] The endeavours of the KCC in seeking to advocate for potable water and a clean environment for the residents resorting under the jurisdiction of the Kgetlengrivier Municipality is undoubtedly noble and commendable. However, the grounds on which the appeals, particularly under UM 69/2021 and UM 79/2021 have been brought were unmeritorious. The KCC retains its rights to take appropriate action within the prescripts and confines of the applicable legislation in respect of the Municipal Manager and the Municipality.
- [73] In the final analysis, I sum up, that the appeals under case numbers UM 270/21, UM 69/2021 and UM 79/2021 stand to be dismissed with the appropriate orders as discussed supra.

Order

- [74] In the result, the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION OF THE HIGH COURT

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT

K MONGALE

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

UM 271/2020

For the Appellant : Adv GC Nel with Adv P Vorster

Instructed by : Andreas Peens Attorneys

c/o Maree & Maree Inc.

11 Agaat Avenue

Riviera Park

MAHIKENG

For 1st & 2nd Respondents : Adv Nondwango

Instructed by : Mosire Tsiane Attorneys

c/o Kgomo Attorneys

56 Shippard Street

UM 69/2021

For 1st & 2nd Appellants : Adv DH Wijnbeek with Adv E Nhutsve

Instructed by : Andreas Peens Attorneys

For the 3rd Appellant : Adv Lamey

Instructed by : Hunter Spies Attorneys

c/o Smit Stanton Inc.

For the Respondents : Adv Nondwango

Instructed by : Mosire Tsiane Attorneys

UM 79/2021

For the 3rd Appellant : Adv Lamey

For the Respondents : Adv Nondwango

DATE OF HEARING: 07 OCTOBER 2022

DATE OF JUDGMENT: 17 MARCH 2023

[1] (CCT44/02)

[2003] ZACC 4; 2003 (1) SACR 561; 2003 (5) BCLR 476 ; 2003 (4) SA 1 (CC) (3 April 2003).

[2] Simross Vintners (Pty) Ltd v Vermeulen 1978

(1) SA 779 (T) at 783B.

[3] The High Court rightly cited the judgment of R v Ngwevela 1954 (1) SA 123 (A) at 131B-C in which Centlivres CJ referred to the audi rule as “a sacred maxim.”

[4] See, for example, Erasmus Superior Court Practice B1-52-3 (Juta Service 17, 2002); Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa (Juta 1997) 4ed 232-3 and Network Video (Pty) Ltd v Universal City Studios Inc and Others 1984 (4) SA 379 (C) at 381F-H.

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- [5] Erasmus id B1-53; Van Zyl Judicial Practice vol I 3ed (Juta Cape Town 1921) 450 and following; Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A) at 18J-19B.
- [6] Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A) at 674H to 675A.
- [7] (95/2021) [2021] ZAECELLC 22 (7 September 2021).
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Prepared on 11 October 2026 · Esheria