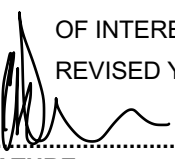


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

Case No: 023913/2022

(1)	REPORTABLE: YES/NO	<input checked="" type="checkbox"/>
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	<input checked="" type="checkbox"/>
(3)	REVISED YES/NO	<input checked="" type="checkbox"/>
SIGNATURE		DATE
		10/8/2023

In the matter between:

**VINCEMUS INVESTMENTS (PTY) LTD**

First Applicant

**THE BODY CORPORATE OF PONTE  
(SECTIONAL TITLE SCHEME NO.: 160/1985**

Second Applicant

and

**THE CITY OF JOHANNESBURG**

First Respondent

**BRINK N.O., FLOYD (cited in his capacity as municipal  
Manager of the City of Johannesburg)**

Second Respondent

**BRINK, FLOYD**

Third Respondent

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**JUDGMENT**

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**DODSON AJ**

[1] This is an application in which the applicants seek a declarator that the city and its city manager are in contempt of two prior orders granted by this Court on 7 September and 7 December 2022. The City manager is joined in both his official and personal capacity, because there is an order sought for a suspended sentence of imprisonment and because an order of costs *de bonis propriis* (out of his own pocket) is sought against him. The backdrop to the matter is a dispute between the applicant and the city about its entitlement to claim for water and sewerage charges that arose more than three years ago. The dispute pertains to the well-known Ponte Building. On 7 September 2022 Makume J made an order, the relevant parts which read as follows:

- “1. In respect of municipal service charges raised on or reflected under account number 440147893 (“the account”), for services rendered by the first respondent to the property situated at 29 Hatfield Road, Berea also known as Erf 1509, Berea Township, Johannesburg (“the property):
  - 1.1 It is declared that the first respondent’s claim against the applicants, for water consumption charges, together with Value Added Tax, interest, and ancillary charges raised thereon (“the disputed water charges”), incurred at the property more than 3 years prior to the date of this order, has prescribed.
  - 1.2 It is declared that the first respondent’s claim against the applicants for sewer availability charges, together with Value Added Tax, interest and any further ancillary charges raised thereon (“the disputed sewer charges”), incurred at the property more than 3 years prior to the date of this order has prescribed.
  - 1.3 The three-year prescription period referred to in paragraphs 1.1 and 1.2 above, is to be determined with the reference to the month that the charges arose, irrespective of when the charges were raised on or reflected in the account statements or invoices (“invoice/s”) rendered by the first respondent;
  - 1.4 The charges (amounts) which have prescribed in terms of the declaratory order above (“the prescribed charges”), are to be excised

from the account and account records of the first respondent, in accordance with the procedure delineated at prayer 1.6 below, and may not be levied raised or reflected in any future invoice on the account.

- 1.5 The account and invoices are to be corrected through reversals, deletions, and amendments on the account and account records ('the reversals'), and the first respondent is to render a reconciled statement or invoice applying the following procedure:

1.5.1 ...

1.5.6 the first to third respondents are to compile and render a reconciled statement or invoice in respect of the account ('the reconciled invoice'), reflecting the reversals of the prescribed and unlawful charges, within 14 court days from the date of service of this order on the respondents, or the respondents' attorneys, if represented, which is to be dispatched via email to the applicant's attorney at michael@bmw-inc.co.za and sandra@bmw-inc.co.za ('the notice address').

- 1.6 The first respondent, be and hereby is interdicted and restrained, from levying, claiming, demanding payment of, allocating payments to, initiating enforcement procedures including Court proceedings for, payment of the prescribed charges and unlawful charges, on the account."

[2] In respect of the city manager's predecessor in title, the order provided as follows:

"5. The second and third respondents are to advise the relevant officials of the first respondent of the content of this order and the obligations imposed by same, via email and copy the applicant's attorney into such email, to the notice address, and in the following manner:

5.1 the aforesaid e-mail is to be sent, within 3 days of service of this order on the respondents or the respondents' attorney;

5.2 the second and third respondents are to render a progress report to the applicant's attorney, on every Friday, following the expiry of the 14 court day period specified in this order, to the notice address, detailing the steps taken, to ensure compliance with this order, and should it not be

possible to comply with this order within the prescribed time frames, written reasons for such non-compliance is to be provided, to the notice address.”

- [3] The order was granted unopposed. Notwithstanding the order, on 14 October, the City invoiced the applicants on the basis that the prescribed charges were still claimed.
- [4] When the applicants queried this, the City wrote on 20 October 2022, apologising for the delayed response and saying: “we confirm that our clients have taken steps to rectify the account and that they have requested Joburg Water to conduct an investigation into the account in order to assist the billing department in complying with the order; the turnaround time provided to Joburg Water is seven days and billing department will attend to the necessary changes thereafter.”
- [5] The first applicant responded on 1 November 2022 saying ‘that it accepted that the City is a quite large enterprise, which has many moving parts’, and sought compliance by 3 November 2022. Nothing further was done by the City, save for a letter from their attorney saying that they were taking instructions.
- [6] The account was not rectified. This led to the applicants approaching this Court again on an urgent basis for a contempt order. The application was opposed. Notwithstanding opposition’ on 7 December 2022, His Lordship Mudau J made the following order:
- “1. The first and second respondents are declared to be in contempt of the court order of the Honourable Mr Justice Makume of 7 September 2022 (“the order”).
  2. The first and second respondents are ordered and directed to comply with the order within 14 (fourteen) days of this order, and such time periods as are set out in the order would apply *mutatis mutandis* to this order.
  3. The sheriff of this Honourable Court, or his lawfully appointed Deputy, is authorised and directed to serve the notice of motion, and any and all further processes and notices, including any order of this Honourable Court herein, on the second and third respondents, on a designated representative of his office, situated at 3<sup>rd</sup> Floor, Block A, 158 Loveday Street, Braamfontein,

Johannesburg, alternatively on a person appointed by the first respondent for the purposes of accepting service.

4. Service in the above manner is thereby condoned.
5. The first respondent is ordered and directed to pay the costs of this application on the scale as between attorney and client.”

[7] The order was made in the presence of the respondent's legal representatives. It was brought to the attention of the respondents by email on 9 December 2022, and it was served by the sheriff and the senior legal advisor on 12 December 2022. Still there was no compliance in response.

[8] The applicant's attorneys sent an email again on 31 March 2023 to the newly appointed City manager, who is the current incumbent, Mr Brink Floyd. The letter explained the history of the matter and made express reference to the two orders granted against the City. It reminded him that, “as City manager, you are the person that bares the ultimate responsibility to ensure the City complies with orders of court. Accordingly, any non-compliance may result in a punitive order being issued by court against you, both in your *nomine officio* and your personal capacity.” The letter proposed a meeting and went on to say, “should you fail to accede to this request and should this correspondence be ignored, we are instructed to launch further contempt proceedings, seeking a fine against the City and appropriate punitive relief against you, which may include your committal to prison.”

[9] Notwithstanding the two orders and the extensive correspondence addressed by the applicant's attorneys, including the letter on 31<sup>st</sup> March 2023, the respondents have simply ignored both orders and continue to invoice the applicants on the basis that the orders do not exist, incorporating prescribed charges in the amount due.

[10] On 14 June 2023, the City took the matter a step further and served a pre-termination notice based on the full amount, including the charges that had prescribed. Further correspondence was exchanged but to no avail.

- [11] This application was then launched on 13 July 2023. In this application, the applicant seeks a declarator to the effect that the matter was urgent, a declaration that all three respondents are in contempt, an order that the City manager be committed to imprisonment for contempt for three months, an order that the imprisonment be suspended subject to compliance with the Makume J order of 7 September within 14 days, along with ancillary relief.
- [12] The respondents were served on 14 July 2023 and afforded a generous period of 10 court days to file their answering affidavit by 27 August 2023. No answering affidavit was forthcoming within the period, notwithstanding judgments that point to the importance of parties in urgent applications complying with the timetable set by the applicant. Eventually, on 6 August 2023, an unsigned answering affidavit was filed, which has subsequently been replaced by a signed one. In regard to the late filing of the answering affidavit, the respondents seek condonation, which is not opposed and I grant it.
- [13] The City and the City manager in his official capacity have also brought an urgent counterapplication. The counterapplication of the City and the City manager in his official capacity, seek the following relief: firstly, that the applicants be directed to give the respondents access to the Ponte Building for purposes of reading a water meter; secondly, that the contempt application be stayed, pending an application by the respondent to rescind the order of Makume J, of 7 September 2022.
- [14] In their answering affidavit, the respondents admit the first three requirements for establishing contempt. Those are firstly, the existence of the order, knowledge of the order on the part of those against whom it is directed, and thirdly, non-compliance with the orders. This is subject to the respondent's argument that the City manager only had knowledge of the orders in his official capacity, not in his personal capacity, because he was not served personally with the earlier orders and he was not City manager at the time of the earlier order. The point is also raised that he has never been substituted as a party in terms of Rule 15.

[15] The suggestion that personal service is required to satisfy the second requirement can be dealt with briefly. The Constitutional Court in *Mncwabe*<sup>1</sup> required that the order must be duly served on or, and I emphasise, brought to the notice of, the alleged contemnor. I have already referred to the letter of 31 March 2023, where this is exactly what was done, and the risk of contempt proceedings in the event of non-compliance with the orders made clear. The City Manager would have been reminded of the earlier orders when the papers in this contempt application were served on him. It does not avail him that he was not City manager at the time of the earlier applications. The Supreme Court of Appeal made it clear in *Meadow Glen Home Owners*<sup>2</sup> that the municipal manager is the person ultimately responsible for the execution of court orders against a municipality. It would be chaos if every time there was a new municipal manager appointed, the consequence was that there was no ultimate responsibility vesting in anyone to comply with orders before his or her appointment. No substitution was required where this is an application distinct from the previous two applications. Rule 15 contemplates substitution in ongoing proceedings.

[16] I am accordingly satisfied that the initial three requirements for contempt are established in respect of all three respondents. As pointed out by the Constitutional Court in *Secretary of the Judicial Commission of Inquiry v Zuma*<sup>3</sup>, “once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt.” This is against the backdrop of the applicants bearing the ultimate onus of proof beyond reasonable doubt, because they seek a suspended sentence of committal. The respondents insist, however, that the non-compliance with the order is neither wilful nor *mala fide*. In this regard, I note that the requirement

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<sup>1</sup> *Mncwabe v President of the Republic of South Africa and Others; Mathenjwa v President of the Republic of South Africa and Others* [2023] ZACC 29; 2023 JDR 3058 (CC); 2023 (11) BCLR 1342 (CC).

<sup>2</sup> *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA).

<sup>3</sup> *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC).

laid down by the Constitutional Court in *Matjhabeng*<sup>4</sup> of citation of the official in his or her personal capacity where committal is sought, has been satisfied.

[17] Before dealing with whether or not the evidentiary burden has been satisfied by the respondents, I must consider the question of urgency, which the respondents dispute, and certain additional points that have been raised by them. Dealing with urgency, the other respondents rely on the judgment of this division per Wilson J in *Volvo Financial Services*<sup>5</sup> where he says that, “it cannot be true as a general proposition”, that contempt of court proceedings are inherently urgent. The judgment dealt with the question of whether a *rei vindicatio* was inherently urgent. To the extent that the learned Judge went further and dealt with the inherent urgency of contempt proceedings, the judgment was clearly *obiter*. Therefore, it does not preclude a finding of urgency in this matter.

[18] More to the point in my view is the following extract from the judgment of the Constitutional Court in *Secretary for the Judicial Commission of Inquiry for State Capture v Zuma*:

“[31] It is not insignificant that his assaults and his alleged contempt are ongoing and relentless, as this underscores the urgency. In *Protea Holdings*, the court said: “if there was no continuing contempt of court...then the hearing of this application as a matter of urgency in the in the court vacation would not be justified”. It held that—

‘the element of urgency would be satisfied if, in fact, it was shown that the respondents were continuing to disregard the order. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.’

[32] A similar point was made in the *Victoria Park Ratepayers’ Association*, in which it was said that —

‘[c]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which

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<sup>4</sup> *Matjhabeng Local Municipality v Eskom Holdings Limited; Mkhonto v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC).

<sup>5</sup> *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading* CC 2023 JDR 2806 (GJ).



it is alleged that a party has wilfully and in bad faith ignored or otherwise fail to comply with the court order. This added element provides to every such case an element of urgency.’

[33] In that case, the Court went further to state that—

‘it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.’

[34] Accordingly, I am enjoined to take stock of the relentlessness of the alleged contempt at issue. It cannot be gainsaid that the longer that Mr Zuma’s recalcitrance is allowed to sit in the light, and heat, of day, so the threat faced by the rule of law and the administration of justice, curdles. The ongoing defiance of this Court’s order, by its very nature, renders this matter urgent. In fact, rarely do matters arrive at the door of this Court so deserving of decisive and urgent intervention.”<sup>6</sup>

[19] This matter too, is a complaint of ongoing contempt, and I am accordingly satisfied that the matter may be enrolled for urgent hearing.

[20] In opposing the contempt order sought and in support of their case that the evidentiary burden has been satisfied, the respondents have raised certain points. The respondents argued that I am precluded from adjudicating the issues raised in the application in the applicant’s notice of motion because they were disposed of in the order of Mudau J of 7 December 2022. The upshot they say, is that this Court is *functus officio*. The point is in essence the same as the raising of a plea of *res judicata*. The requirements for a plea of *res judicata* are that there is already in place a judgment, (a), between the same parties, (b), on the same cause of action, (c), for the same relief.

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<sup>6</sup> *Secretary of the Judicial Commission* above n 3 at para 31-4.

- [21] In this application, although the incumbent of the position of City manager has changed, I am prepared to accept that the same parties are involved in both this and the prior application. The first element is therefore satisfied.
- [22] As far as it concerns the cause of action being the same, the difficulty for the respondents is that, as appears from the judgment of the Constitutional Court in *Secretary of the Judicial Commission*, for as long as the orders are not complied with, there is a continuing violation of the rule of law. For each day following the order of Mudau J, there is a new factual matrix that forms the basis for the relief now sought which did not form part of the cause of action and basis for the granting of relief by his Lordship Mr Justice Mudau. Of particular importance is that in the application before Mudau J, civil contempt was at issue, in which only declarators of contempt on the part of the respondents were sought, along with an order compelling compliance.
- [23] In this application, by contrast, committal is sought which is essentially based on a criminal infringement. To succeed, the applicants must prove guilt on the part of the respondents beyond reasonable doubt. The second element is, therefore, not satisfied.
- [24] As regards to the relief sought, this too is substantially different. As pointed out in relation to the second requirement, a suspended committal is sought for the first time to ensure compliance with the order. That renders the relief sought substantially different from the application that was served before Mudau J. The third element is, therefore, not satisfied. This Court is accordingly not precluded from adjudicating the matter on the basis of the *functus officio* doctrine.
- [25] In any event, as was pointed out by the applicants, it would make no sense if an order of contempt was the final word on the matter and an applicant was precluded from applying to court a second time if the contempt continued.
- [26] The respondents argue further that the order of Makume J was incompetent and unclear. The respondents contend that the order of Makume J was so lacking in clarity that it was not capable of implementation. It was contended that in the absence of identification of specific monetary amounts that were required to be reversed, the order could not be implemented. There is no merit in this ground

of opposition. The respondent has not come forward with the evidence of any accountant or auditor, internal or independent, to support this contention. It is a mere assertion made by a legal advisor in the City who demonstrates no qualifications to make it.

[27] In any event, perusal of the order shows that it has been carefully crafted by Makume J with detailed provisions as to how it is to be interpreted. No evidence is put up of any attempt to implement the order, which has for any reason failed on account of its wording. The applicants demonstrate in reply that the order is quite capable of implementation by referring to a separate case involving a similar order which was seemingly implemented by the City with no difficulty.

[28] The next point relates to the argument that the orders before Makume J were erroneously sought and granted. The point to be made in this part of the judgment in relation to this argument is that it is trite that an order must be obeyed, even if it has been erroneously made. In saying this, I am not saying that the order was erroneously made. The *Clipsal*<sup>7</sup> judgment in the Supreme Court of Appeal and the *Tasima*<sup>8</sup> judgment of the Constitutional Court confirm this. In paragraph 186, the Constitutional Court in *Tasima* said:

“Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.”

[29] The next point, which was advanced in argument, but not raised in the answering affidavit, is that this was a money judgment, which distinguishes the matter and precludes the finding of contempt. In this regard the respondents sought to rely on *Matjhebeng* at paragraph 56, which reads:

“the common law drew a sharp distinction between orders *ad solvendam pecuniam*, which related to the payment of money and orders *ad factum*

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<sup>7</sup> *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* [2009] ZASCA 49; 2010 (2) SA 289 (SCA).

<sup>8</sup> *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC).

*praestandum*, which called upon a person to perform a certain act or refrain from specified action. Indeed, failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was.”<sup>9</sup>

[30] The difficulty is that neither the order of Makume J nor Mudau J is an order to pay money. On the contrary, both orders require the respondents to perform certain acts, namely to reverse charges on the applicant's account that had prescribed and render a reconciled account along with additional declaratory and mandatory relief. In those circumstances, there is no merit in the submission.

[31] I then move to the question whether the evidentiary burden was satisfied by the respondents. The main basis upon which the respondents contend that there was no wilfulness or *mala fides* is the argument that the order of Makume J was incompetent and so lacking in clarity that it was not capable of implementation. It was contended that in the absence of identification of specific monetary amounts that were required to be reversed, the order could not be implemented. However, as I have already pointed out, the respondent has not come forward with the evidence of any accountant or auditor, internal or independent, to support this contention. It is a mere assertion made by a legal advisor in the City who demonstrates no qualifications to make it. No evidence is put up of any attempt to implement the order, which has for any reason failed on account of its wording.

[32] Of particular importance in this regard is that there is no affidavit whatsoever from the City manager in either his official or personal capacities. He is the appropriate person to put up evidence to satisfy the evidentiary burden. It was for him to say why the order was not capable of implementation, what he had done in attempting to comply, and how he had come to the conclusion that the order was incapable of implementation. Yet there is complete silence from him. There is not even an assertion in the answering affidavit deposed to by the legal advisor that he advised the City manager that the order was incapable of

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<sup>9</sup> *Matjhebeng* above n 4 at para 56.

implementation. In any event, the applicants demonstrate in reply that the order is quite capable of implementation, as I have already pointed out.

[33] In these circumstances, there is simply no evidence before the Court to satisfy the evidentiary burden imposed on the respondents. Indeed, on a conspectus of the answering affidavit put up by the City, and as argued by the applicants, it cements rather than avoids a finding of contempt. And it reflects a most unfortunate level of disdain for court orders and the rule of law. Symptomatic of this malaise, is paragraph 16.3 of the answering affidavit, which reads as follows:

“[T]he terms therein [and here reference is made to the order of Makume J] encroach on the exclusive terrain of the Municipality and offends the Municipality's rights to implement its obligation as obliged to do so by number of statutes and the bylaws (sic).”

[34] This suggests a right on the part of the municipality to exercise its powers free of constitutional scrutiny by the courts. This is a deeply problematic attitude that manifests wilfulness and bad faith. To the contrary of the assertions here made, the courts are duty bound where called on to do so to apply constitutional scrutiny to the exercise by municipalities of their powers under statutes and bylaws, and municipalities are bound by Section 165(4) of the Constitution to “assist and protect the courts to ensure the independence, impartiality, dignity, accessibility, and effectiveness of the courts.” Central to meeting its constitutional obligation is scrupulously complying with court orders. In this case, the City has failed dismally to comply with its duty of constitutional support. In the circumstances, the respondents have not satisfied the evidentiary burden imposed on them to demonstrate absence of wilfulness and *mala fides*. The ineluctable conclusion is that all three of the respondents are guilty of contempt of court beyond reasonable doubt.

[35] However, before that can translate into an order in favour of the applicants, consideration must be given to the respondent's counterapplication. The first issue to be considered in relation to the counterapplication is whether urgency is satisfied in relation to it. Whilst attacking the urgency of the relief sought by the applicants, the respondents did not set out any case whatsoever for urgency of their own application in their affidavit in support of the counterapplication. It

certainly does not follow from my findings of urgency in relation to the applicant's application that the respondents' counterapplication is urgent. I will nevertheless assume in favour of the City and the remaining respondents that urgency is satisfied and shall consider the remaining points raised.

[36] As regards the prayer for access to the water meter for the building, I am bound by the applicant's version (here as respondent in the counterapplication and therefore benefitting from *Plascon*<sup>10</sup>) that the meters are located outside the building, so that there is no denial of access. The correspondence relied upon by the respondents in support of this prayer does not relate to the prayer in the notice of motion in the counterapplication; it relates to access for what is variously described as "technical fact finding" and "fresh tests". The relief sought has nothing to do with this. It is not possible to conclude from the correspondence that there has been a refusal to allow access. Agreement could not be reached on mutually convenient dates, when attempts were made to meet to access the building. The City took up the attitude that the file was closed. It is so that the applicants impose what might be considered burdensome preconditions for a site meeting. This does not cure the fact that this exchange had nothing to do with either the relief sought in the main application or the counterapplication.

[37] As regards the application for a stay of the present application, pending the institution of an application for rescission of the order of Makume J, the respondents needed to prove that it would be in the interest of justice to grant such a stay. This requires some consideration of the potential sustainability of such a rescission application. The first difficulty that is faced by the respondents is that they have delayed hopelessly in bringing such an application as it is close on a year since the order of Makume J was granted. The second difficulty is that no error of the particular kind required by Rule 42 for a rescission was identified. Argument presented in this regard was more in the nature of an appeal or request for reconsideration. It was rejected by the Constitutional Court as a basis for rescission in *Zuma*.<sup>11</sup> The third difficulty is that scrutiny of the order of Makume

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<sup>10</sup> *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623.

<sup>11</sup> *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others* [2021] ZACC 28; 2021 (5) SA 1 (CC); 2021 (11) BCLR 1263 (CC).

J demonstrates that it is carefully crafted and anything but erroneous. If there was genuine uncertainty about any aspect of the order, then the appropriate remedy that is available to an applicant is to apply to court to seek an interpretation or clarification of the judgment. No such steps have been taken and no explanation has been given for the failure to do so.

[38] In the circumstances, it is difficult to avoid the conclusion that the application for a stay was a *mala fide* strategy for avoiding an unanswerable case and that the respondents are guilty of contempt. In the circumstances, it is not in the interests of justice to grant the stay and the counterapplication stands to be dismissed.

[39] In conclusion, it follows that the applicants have made out a case for the relief sought in the reduced form pressed for when the matter was argued. As far as costs are concerned, it is clear that a punitive order of costs on the attorney and client basis is appropriate.

[40] The applicants argue that, as a deterrent, the City manager should be ordered to pay 50 percent of those costs, *de bonis propriis* or out of his own pocket. In *Public Protector v The South African Reserve Bank*<sup>12</sup>, the Constitutional Court held as follows at paragraph 158:

“The imposition of a personal costs order on a public official, like the Public Protector, whose bad faith or grossly negligent conduct falls short of what is required, vindicates the Constitution.”

[41] The Supreme Court of Appeal in *Gauteng Gambling Board*<sup>13</sup> opined that public officials who act improperly, in flagrant disregard of constitutional norms, should be personally liable for legal costs incurred by the State. The Supreme Court of Appeal reasoned that the imposition of personal liability “might have a sobering effect on truant public office bearers” and would avoid the taxpayer ultimately having to bear those costs.

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<sup>12</sup> *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC).

<sup>13</sup> *Gauteng Gambling Board v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA).

[42] In my view, similar considerations apply in this case and my order will provide for the *de bonis propriis* costs order sought.

[43] I accordingly make the following order:

- [1] It is declared that the first, second, and third respondents are in contempt of the orders of the Honourable Mr Justice Makume of 7 September 2022, and the Honourable Mr Justice Mudau of 7 December 2022.
- [2] The third respondent is committed to prison for a period of 30 days.
- [3] Paragraph 2 is wholly suspended for a period of 12 months, subject to the second and third respondents' compliance with the order of the Honourable Mr Justice Makume of 7 September 2022 within 21 calendar days of this order.
- [4] The applicants are authorised to approach the court on the same papers, duly supplemented, in order to bring paragraph 2 into effect in the event of non-compliance with paragraph 3.
- [5] The respondents are ordered and directed to pay the costs of this application on a scale as between attorney and client.
- [6] Save in respect of the prayer for condonation, the counterapplication is dismissed with attorney and client costs.
- [7] The third respondent, in his personal capacity, is ordered and directed to pay 50 percent of the applicant's costs of the application and the applicant's costs in opposing the counterapplication, from his own pocket.



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AC DODSON AJ  
Acting Judge of the High Court  
Gauteng Division, Johannesburg

Counsel for the Applicant: A. McKenzie

Instructed by: Vermaak Marshall Wellbeloved Inc.



Counsel for the Respondents: E Sithole

Instructed by: Kunene Ramapala Inc.

Date of hearing: 10 August 2023

Date of Judgment: 10 August 2023