IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

[redacted]

SIGNATURE DATE: 4 December 2024

Case No. 2024-024479

In the matter between:

THE DEMOCRATIC ALLIANCE	Applicant
and	
CITY OF JOHANNESBURG	First Respondent
COUNCIL OF THE CITY OF JOHANNESBURG	Second Respondent
CITY MANAGER, CITY OF JOHANNESBURG	Third Respondent
FLOYD BRINK	Fourth Respondent
EXECUTIVE MAYOR, CITY OF JOHANNESBURG	Fifth Respondent
KABELO GWAMANDA	Sixth Respondent
SPEAKER, CITY OF JOHANNESBURG	Seventh Respondent
MARGARET ARNOLDS	Eighth Respondent
MEC FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, GAUTENG	Ninth Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFARIS	Tenth Respondent

Summary

A municipal council's rules of procedure adopted under section 160 (6) (b) of the Constitution, 1996 are binding. A municipal council that adopts a resolution in breach of its own rules acts inconsistently with section 1 (c) of the Constitution, 1996.

A court order is not to be interpreted in isolation from the reasons given for it or from the circumstances surrounding its issuance.

When criticising a judicial decision, organs of state have a heightened duty to ensure that their criticism is reasonably related to the facts surrounding the decision and the text of the decision itself. While not necessarily contemptuous, gratuitous, ill-tempered or unfounded criticism of court decisions by organs of state will often be inconsistent with an organ of state's duty under section 165 (4) of the Constitution to "assist and protect the courts" and to ensure the courts' "independence, impartiality, dignity, accessibility and effectiveness".

JUDGMENT

WILSON J:

1 On 7 November 2023, Budlender AJ, sitting in this court, handed down an order which declared invalid a resolution of the second respondent, the City Council, taken on 23 February 2023. Under that resolution, the City Council appointed the fourth respondent, Mr. Brink, to the post of City Manager of the first respondent, the City of Johannesburg Metropolitan Municipality ("the City"). Budlender AJ also declared another resolution invalid. The City Council took that resolution on 22 February 2023. The resolution reversed the City Council's previous resolution (taken on 10 August 2022) to re-advertise the post of City Manager in terms of section 54A (5) of the Municipal Systems Act 32 of 2000 ("the Systems Act"). The City Council took the 10 August 2022 resolution because it had reached the conclusion that a previous effort to recruit a City Manager had not produced an appointable candidate.

2 The nett effect of Budlender AJ's order was to reverse Mr. Brink's appointment. Realising this, Budlender AJ declared that, notwithstanding the fact that Mr. Brink had been unlawfully appointed, his official decisions and acts would not be rendered invalid merely because of the unlawfulness of his appointment. Budlender AJ also, in paragraph 4 of his order, suspended his declarations of invalidity for ten days "in order to allow for the appointment of an Acting City Manager" (see *Democratic Alliance v City of Johannesburg Metropolitan Municipality* [2023] ZAGPJHC 1374 (7 November 2023), paragraph 56 (4)).

3 This case is about what the City Council did to comply with Budlender AJ's order. Instead of causing Mr. Brink to vacate his office, and appointing an Acting City Manager, the City Council purported to comply with Budlender AJ's order by passing another resolution. That resolution was adopted on 29 November 2023. Its effect was, in substance, to re-adopt the resolutions that Budlender AJ had declared unlawful. In consequence, Mr. Brink did not vacate his office. An Acting City Manager was not appointed, and things carried on more or less as if Budlender AJ's order had never been given.

4 The applicant, the DA, which is an opposition party on the City Council, now impugns the lawfulness of that outcome and the process the City Council adopted to reach it. The DA's case is, first, that the outcome breached the terms of Budlender AJ's order itself. The DA contends that Budlender AJ's order created a vacancy in the office of the City Manager. That meant that Mr. Brink had to leave his post, that an Acting City Manager had to be appointed,

and that the permanent vacancy had to be readvertised, as was required by the City Council's own 10 August 2022 resolution.

5 Secondly, the DA contends that the manner in which the City Council went about readopting the resolutions Budlender AJ had declared unlawful was itself procedurally flawed. It did not comply with the City Council's own standing rules. Nor did it comply with section 20 of the Systems Act, which regulates the conduct of the City Council's meetings.

6 On these bases, the DA asks me to review and set aside the resolution that the City Council passed in the aftermath of, and in purported compliance with, Budlender AJ's order.

7 The DA then goes a step further. It says that, by failing to ensure that Mr. Brink left his post, and by essentially readopting the invalidated resolutions, the City Council, and its officers, acted in contempt of Budlender AJ's order. It asks me to declare that this was so. It also asks me to impute that contempt to the City's principal officers, who are joined to these proceedings in their personal and in their official capacities. The City's Executive Mayor is cited as the fifth respondent, and the former occupant of that office, Mr. Gwamanda, is cited as the sixth respondent. The City Council's Speaker is cited as the seventh respondent, and the former occupant of the Speaker's office, Ms. Arnolds, is cited as the eighth respondent.

8 The DA asks that I declare that these respondents' conduct in preparing and passing the 29 November 2023 resolution was contemptuous of Budlender AJ's order. It asks me to commit Mr. Gwamanda and Ms. Arnolds to prison in consequence of that contempt.

9 The DA's application is opposed by City itself, by the City Council, and by the offices of the City Manager, the Speaker and the Executive Mayor (the third, fifth and seventh respondents). Nothing turns on these distinctions though, and, where I need to refer to these respondents collectively, I shall refer to them as "the City".

10 The City says that the City Council was perfectly entitled to readopt the resolutions appointing Mr. Brink, and that it did so lawfully. The City calls attention to what it claims was the purely procedural effect of Budlender AJ's judgment and order. The City says that Budlender AJ's judgment went no further than to criticise the City Council for acting under rule 64 of its standing rules to adopt the resolutions he declared invalid. Rule 64 allows a matter to be placed before the City Council urgently. There was, Budlender AJ found, no warrant for acting under rule 64. The appointment of a City Manager is not an inherently urgent matter, and there was no basis on which to conclude that the circumstances under which the 22 and 23 February 2023 resolutions were adopted justified the use of rule 64.

11 It follows, the City argues, that the invalid resolutions could be readopted without engaging rule 64, which is exactly what the City Council did. There was nothing in Budlender AJ's order that required the City either to remove Mr. Brink from office, or to readvertise his post, so long as the City Council corrected the procedural defect Budlender AJ identified. Because of this, the City says, there can be no question that it, or any of its organs or office bearers, are in breach, let alone contempt, of Budlender AJ's order.

12 In my view, Budlender AJ's judgment and order went further than a mere critique of the City Council's choice of a rule under which to adopt the invalid resolutions. He criticised the haste with which the City Council did so. He emphasised the need for careful deliberation over the appointment, and the need to ensure that all the material relevant to the appointment was before the City Council when it adopted the resolution. In addition, Budlender AJ's order clearly left a vacancy in the office of the City Manager. The effect of Budlender AJ's order was to revive the 10 August 2022 resolution to advertise the post as vacant. It follows that the only way in which the order could have been complied with was by removing Mr. Brink and appointing an Acting City Manager in terms of paragraph 4 of the order.

13 The City Council tried to avoid these consequences by quickly re-adopting the invalid resolutions during the period for which Budlender AJ suspended his order. But all that did was to replicate the haste and the absence of relevant material that led Budlender AJ to invalidate the resolutions in the first place. Although the City Council purported to adopt the resolutions under the rules applicable to ordinary, non-urgent, motions, the speed with which it had to act to pass them during the suspension period meant that it was forced to breach those rules. In particular, it ignored the fourteen-day notice period for new motions being placed before the City Council required by rule 94 (1).

14 It follows that the City acted neither in compliance with Budlender AJ's judgment and order, properly construed, nor in terms of its own binding standing rules. The resolutions it adopted to cure the defects Budlender AJ identified are themselves invalid, and must be set aside. Mr. Brink must leave

his post, and an Acting City Manager must be appointed while the City deliberates on how to fill the vacancy Mr. Brink will leave behind him.

15 Nevertheless, while I am satisfied that the City breached the terms of Budlender AJ's order (at least by readopting the resolutions he invalidated in breach of its own rules, by failing to cause Mr. Brink to vacate his office and by failing to appoint an Acting City Manager), I cannot say that it has acted in contempt of that order. The City was wrong to construe Budlender AJ's order as it did, and the measures it took in purported compliance with that order were insufficient. But there is nothing before me to suggest that its conduct, or that of its officers, was born of wilful and *mala fide* determination to disobey or circumvent Budlender AJ's order, rather than an unseemly and perhaps self-serving haste to negotiate the complications the order presented for the City's administration.

16 In what follows, I give my reasons for reaching these conclusions. I turn first to the DA's review application.

The review

17 The DA asks me to review and set aside the 29 November 2023 resolution under section 1 (c) of the Constitution, 1996. That provision, it has long been held, requires the exercise of all public power to be consistent with the rule of law.

18 The DA's case is that the 23 November 2023 resolution was adopted in breach of two sets of fairly basic rules binding on the City Council. The first set of rules was that imposed on the City Council by Budlender AJ's order. The second

set of rules is embodied in the City Council's own standing rules governing the conduct of its proceedings.

19 I deal first with Budlender AJ's order.

Budlender AJ's order

The interpretation of court orders

20 There was a dispute between the parties about the proper approach to the interpretation of Budlender AJ's order. Mr. Ngcukaitobi, who appeared for the City, submitted that the proper approach to the interpretation of a court order is that set out in *Firestone South Africa v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H ("*Genticuro*") and in *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) at 716B-C ("*Ntshwaqela*"). In *Genticuro*, the Appellate Division held that the meaning of a court order is to be determined by reference to the language it deploys read in light of the judgment that preceded it. If, on such a reading, the meaning of the order is unambiguous, then no extrinsic evidence is admissible to interpret the order. In *Ntshwaqela*, the Appellate Division added a further qualification: that a court's order, being the "executive part" of the judgment, must be interpreted on its own terms, and those terms, if unambiguous, may not be restricted or extended by the reasons given in the rest of the judgment.

21 Ms Steinberg, who appeared for the DA, argued that this approach to interpretation has now been overtaken. The proper approach is that spelled out in *Democratic Alliance v Electoral Commission* 2021 JDR 2070 (CC) at paragraphs 12 and 13 ("*Democratic Alliance*"). *Democratic Alliance*, it was

submitted, makes clear that the “modern approach” to interpretation is not to separate a judgment from its order – only having regard to the judgment if the order is ambiguous – but to construe the order by reference to the reasons given for it in the judgment, whether or not the order seems unambiguous on its face.

22 It seems to me that Ms. Steinberg’s submission is the correct one. It is correct not only because it is derived from a decision of the Constitutional Court which binds me. It is also correct because it makes more sense than the approach of carving up a document, assigning a hierarchy to each part of that document, and then only moving down the hierarchy where a more important piece of writing seems “ambiguous” unless read with a less important one.

23 The “modern approach” to interpretation to which the Constitutional Court referred in *Democratic Alliance* takes the document in which a word or phrase appears as the ordinary frame of context in which to determine that word or phrase’s particular meaning. How a document is construed depends both on the grammatical meaning ordinarily attached to the words or phrases used, and the context in which they are deployed. Assigning meaning to a word or phrase can become trickier if there is something about the circumstances surrounding the production of the document itself that is critical to its meaning, but the interpretive exercise always starts with the words used in their documentary setting – the text and its structure. The facts surrounding the production of the document are relevant if they can tell us something useful about what those words mean (*Capitec Holdings Ltd v Coral Lagoon Investments* 194 (Pty) Ltd 2022 (1) SA 100 (SCA), paragraphs 46 to 51). The

exercise is not a hierarchical one. It is one which gives weight to textual and circumstantial context where they are needed to determine the meaning of the words or phrases a document uses. Meaning and context are inseparable, but neither fully determines the other.

24 In discerning the impact of the modern approach on this case, I need do no more than return to what the Appellate Division first said in *Genticuro*: that the meaning of an order is to be construed, at least in part, by reference to the reasons given for it. As *Democratic Alliance* confirms, the meaning of an order may also be construed by reference to any judgment given on an application for leave to appeal against it (*Democratic Alliance,* paragraph 13. See also *Transasia 444 (Pty) Ltd v Minister of Mineral Resources and Energy* [2024] ZASCA 145 (23 October 2024)).

25 The point is not to restrict or extend the meaning of the order, but to read the order in light of its supporting reasons to give it the meaning it always had. The problem with the decision in *Ntshwaqela* is that it can be read to assume that a court order read in isolation is capable of bearing a pre-existing, a-contextual and purely grammatical meaning which can then illegitimately be extended or restricted by too readily construing the order in light of the reasons given for it. I am not sure that this is what *Ntshwaqela* in fact concludes, since the decision itself acknowledges that an order must be read in light of the reasons given for it. But this sharp interpretive separation between judgment and order was the approach that Mr. Ngcukaitobi urged. For that reasons I have given, I do not think it is the correct one.

The text of Budlender AJ's order

26 Budlender AJ's order had four relevant paragraphs. The first paragraph declared the City Council's resolution of 22 February 2023 invalid. The 22 February 2023 resolution rescinded the Council's 10 August 2022 resolution to readvertise the position of City Manager. The second paragraph of Budlender AJ's order declared the Council's 23 February 2023 resolution invalid. That resolution approved Mr. Brink's appointment as City Manager, and authorised the Executive Mayor to offer Mr. Brink a five-year contract, and to negotiate the terms and conditions of that contact with Mr. Brink. The third paragraph of Budlender AJ's order declared invalid "any employment contract and/or performance contract" concluded between the Executive Mayor and Mr. Brink pursuant to the 22 and 23 February 2023 resolutions.

27 The effect of the first three paragraphs of Budlender AJ's order was accordingly to declare the offer of the appointment to Mr. Brink invalid, to declare any contract concluded pursuant to that offer likewise invalid, and to require the City Manager's post to be advertised as vacant. That tends to create the impression that Budlender AJ intended to cause Mr. Brink to vacate his office.

28 Paragraph four of the order suspended paragraphs 1 to 3 of the order for ten court days "to allow for the appointment of an Acting City Manager". On its face, this also tends toward the view that Budlender AJ's intent was to cause Mr. Brink to vacate his office, at least insofar as he occupied it on a permanent basis.

The proper interpretation of Budlender AJ's order

29 The City applied for leave to appeal against Budlender AJ's order. The effect of that application was to suspend the whole order pending appeal. On 24 November 2023, Ms. Arnolds asked the City Council's programming committee to place an item on the Council's agenda for its 29 November 2023 meeting. That item was described as "[a] Report for Council to Review its Previous Resolutions Which Remedied the Obstruction of the Recommended Appointment of Mr. Floyd Brink to be the City Manager in Accordance with Section 59(3)(a) of the Municipal Systems Act and Judgments of the Johannesburg High Court (No-041913/2023) and Eastern Cape High Court (No-862/2022)". This item was to become the vehicle for the readoption of the resolutions Budlender AJ had declared invalid.

30 Budlender AJ dismissed the application for leave to appeal on 27 November 2023. At that point, his order became final. Two days later, on 29 November 2023 the City Council adopted the resolutions that the DA now asks me to invalidate. The City Council did so under the heading of the item placed on the City Council's agenda at Ms Arnolds' behest five days earlier.

31 It seems clear that the City Council's approach was that nothing at all needed to change in consequence of Budlender AJ's order, so long as resolutions replacing those Budlender AJ declared invalid could be passed during the ten day suspension Budlender AJ placed on the declarations of invalidity he issued. This much is clear from the report laid before the Council on 29 November 2023, when it adopted the replacement resolutions. Paragraph 3.1.1. of that report states that Budlender AJ declared the 22 and 23 February

resolutions invalid “only on the basis that when the Council resolved to approve the resolutions . . . it did not comply with its Rules. [Budlender AJ] found Council did not follow Rule 64 (3) when such resolutions were tabled” Budlender AJ’s judgment, the report continued, “does not preclude the resubmission of the resolutions”. At paragraph 3.2.2. the report states that, but for the procedural defect Budlender AJ identified, “the resolutions remain factually correct and legally competent”. It followed that all the Council needed to do was readopt them under the correct rule. This is what the Council then said it did, purportedly curing the procedural defect that Budlender AJ identified.

32 The report laid before the City Council was mistaken. What Budlender AJ’s judgment identified was not just a technical defect in the procedure the Council adopted, but an inappropriate haste to adopt the 22 and 23 February 2023 resolutions in circumstances where lengthier consideration was necessary, using the ordinary notice periods and procedures provided for in the standing rules. At paragraph 29 of his judgment, Budlender AJ noted that those rules would ordinarily require fourteen days’ notice be given to the secretary of the City Council of a motion to be placed before it; that such a motion must be considered by the programming committee of the City Council before it is placed on the City Council’s agenda; and that notice of any City Council meeting must be given to every councillor at least three days in advance.

33 It was the departure from these rules that Budlender AJ disallowed. He was specifically critical of the use of the urgent procedures provided for in rule 64 to engineer that departure (see paragraphs 35 to 37). But his judgment is not

limited to that criticism. Properly construed, Budlender AJ's judgment makes the positive assertion that the appointment of the City Manager is so "substantive" an issue (see paragraph 34) that the use of the urgent procedures in rule 64 could not be justified on the facts before him, and that the ordinary rules, particularly rule 94 (1), which provided for a 14 day notice period for new motions to be placed before the City Council, should have been followed.

34 Construed in this light, the meaning of Budlender AJ's order is clear. The City Council was sent back to the drawing board. Mr. Brink's appointment was reversed. The decision to readvertise the post of City Manager was revived. Mr. Brink would have to vacate his permanent appointment as City Manager, and an Acting City Manager would have to be appointed to replace Mr. Brink while the Council considered what to do next. It was, in other words, not open to the City Council to readopt the 22 and 23 February 2023 resolutions with the same unseemly haste that undercut their validity in the first place.

35 Mr. Ngcukaitobi argued that I cannot interpret Budlender AJ's order as creating a vacancy in the office of the City Manager, because Budlender AJ declined explicitly to order Mr. Brink to vacate his office and because he also declined to order the readvertisement of the City Manager's post. This was despite the fact that the DA asked for relief in those terms before him. For the reasons I have given, I think that Budlender AJ's order does explicitly reopen a vacancy in the office of the City Manager. If it did not, there would be no point in paragraph 4 of the order, which specifically provides for the appointment of an Acting City Manager. It is true that Budlender AJ did not

order that the post be readvertised, but the effect of the order is to revive the 10 August 2022 resolution, which does require readvertisement. Accordingly, the variance between the relief the DA sought in its notice of motion and the relief Budlender AJ actually granted does not materially change the meaning of Budlender AJ's order.

36 It follows that the 29 November 2023 resolution was taken in breach of Budlender AJ's order, and is invalid at least for that reason.

Breach of the standard rules

37 Ms. Steinberg submitted that haste with which the City Council acted once Budlender AJ's order became final also resulted in a number of other illegalities. I need only deal with one of these illegalities in any detail.

38 If the City Council wanted to readopt the resolutions Budlender AJ had declared invalid, it would have to do so using the ordinary procedures for placing business before the Council. This would have entailed compliance with rule 94 (1), which requires any motion to be placed before the Council to be signed and submitted to the Secretary of Council fourteen days before the Council meeting at which it is to be considered.

39 It is common cause that rule 94 (1) was not complied with when the City Council adopted the 29 November 2023 resolution. In its papers, the City originally contended that rule 94 (1) does not apply, because the resolution was introduced by the Speaker, not "a councillor". Wisely, that contention was not persisted with in oral argument. Rule 94 (1) requires a "councillor" who wishes to introduce a motion to do so by submitting a signed draft resolution

to the Secretary of Council 14 days before the meeting at which it is to be considered. The Speaker is a “councillor”. There is no indication that I can see in the standing rules that suggests that the Speaker is not a “councillor” for the purposes of rule 94 (1).

40 In oral argument Mr. Ngcukaitobi instead submitted that the City is not bound by its own standing rules. For that reason rule 94 (1) presented no barrier to the Council considering a motion filed beyond its strictures if the Council chose to do so. In support of this proposition, Mr. Ngcukaitobi referred me to rule 1 (3) of the standing rules, which states that “[t]hese rules are not intended to diminish or restrict the Council’s powers, privileges and immunities”. That, however, simply begs the question of what power, privilege or immunity authorised the Council to act outside its own standing rules.

41 Section 160 (6) (b) of the Constitution is the foundation of the City Council’s power to make rules governing its “business and proceedings”. It follows that the Council’s standing rules derive their legal force from the Constitution itself, and that the Council has the right and the obligation to govern its business and proceedings in terms of those constitutionally authorised rules. It was not argued that the City Council had any specific right to depart from its rules save insofar as the standing rules themselves provide. Mr. Ngcukaitobi could identify no power, privilege or immunity that would allow the Council to do so. I can think of none. Nor was it argued that the rules themselves provide a basis on which the Council was entitled to dispense with the requirements of rule 94 (1).

42 It has long been established that a legislative body is bound by its own internal rules and procedures, and that it cannot act to limit its members' rights and privileges in the absence of a constitutionally valid internal rule or procedure that authorises it to do so (see, for example, *Speaker of the National Assembly v De Lille* 1999 (4) SA 863 (SCA)). By the same token, I do not think that it is open to the City Council to arrogate an unspecified power, privilege or immunity to depart from its rules whenever expedient, especially when those rules confer rights on its own members. It seems to me that at least one of the purposes of Rule 94 (1) is to give councillors adequate notice of motions that have been proposed and submitted to the Secretary of Council. It accordingly confers a right on any councillor who wishes to preview those motions to do so.

43 It follows that rule 94 (1) was binding on the City Council, and the admitted non-compliance with it is fatal to the validity of the 29 November 2023 resolution.

Other alleged illegalities

44 Aside from non-compliance with rule 94 (1), it was contended that the 29 November 2023 was invalid because the City Council's programme committee did not have the resolution before it when it accepted the agenda item under which the resolution was adopted; because the programme committee could not reasonably have inferred from the material before it that a motion to adopt the resolution would be moved; and because the City Council impermissibly considered the resolution after it unlawfully excluded the media and the general public.

45 Having reached the conclusion that the resolution was invalid for non-compliance with Budlender AJ's order, and for non-compliance with rule 94 (1), it is not necessary for me to address these further grounds of invalidity. The facts surrounding these grounds are to some extent contested. For example, while there can be no doubt that the programme committee was, at least initially, very confused about what it was being asked to put on the City Council's agenda for the 29 November 2023 meeting, the extent to which the confusion was ultimately resolved at the programme committee meeting is in dispute. Resolving that dispute would require me to engage with the transcript of the meeting, which is in several respects obscure.

46 In addition, the question of whether the resolution should have been adopted in public seems to me to depend on a value judgement, to be made in the context of the City's own bylaws, about whether it is reasonable to do so having regard to the nature of the business to be transacted and the circumstances in which the resolution is to be taken (see section 20 (1) of the Systems Act). It is not necessary for me to decide whether that judgement was properly made to resolve this case, and I do not wish to speculate on whether the City Council might in future be entitled to deliberate on the appointment of its City Manager in a closed session.

47 Section 20 (2) (f) of the Systems Act states that the City Council must consider any matter "prescribed by regulation" in open session. Ms. Steinberg submitted that the City Manager's recruitment and appointment is a matter "prescribed by regulation", in the sense that it is a regulated process, which is required to be dealt with in public. It is true that the process of appointing a

City Manager is governed by statute and regulation, but it does not necessarily follow that this means that section 20 (2) (f) requires it to be debated in public. It seems to me that section 20 (2) (f) might instead mean that regulations must prescribe a list of matters to be dealt with in open session. I was not taken to such a list, and I heard insufficient argument on the proper interpretation of section 20 (2) (f), which is an issue I prefer to leave open.

48 Nevertheless, for the reasons I have given, the 29 November 2023 resolution cannot stand. It must be declared unconstitutional and invalid, because it was adopted in breach of Budlender AJ's order, and in breach of the City Council's own standing rules. It was, accordingly, adopted in breach of section 1 (c) of the Constitution.

49 Before I turn to the remedy that follows from this finding of invalidity, I shall deal with the DA's contention that the City and its officers acted in contempt of Budlender AJ's order when they brought about the adoption of the 29 November 2023 resolution.

The contempt proceedings

50 I have found that the City Council adopted the 29 November 2023 resolution in breach of Budlender AJ's order. Properly construed, that order required Mr. Brink to leave his post. The City Council would then ordinarily have been bound by the 10 August 2022 resolution to readvertise the post. Assuming it was open to the City Council to rescind the 10 August 2022 resolution, then Budlender AJ's order required the City Council to follow its own standing rules before doing so. That entailed compliance with rule 94 (1).

51 None of this happened. The DA contends that the City and its officers instead rushed through the 29 November 2023 resolution in a deliberate and bad faith attempt to frustrate these consequences of Budlender AJ's order.

52 That, if true, would ordinarily mean that the City, and those of its officers who deliberately sought to frustrate the implementation of Budlender AJ's order, would be in contempt of court. This is because wilful and *mala fide* violation of a court order is a species of contempt.

53 During argument, Ms. Steinberg submitted that, once I am satisfied, as I must be, that the City and its officers had notice of Budlender AJ's order, and that they had acted in breach of it, I have no reason on the facts before me not to conclude that the City's breach of the order was contemptuous. This is because, once notice and breach of a court order has been established, it is for the alleged contemnor to adduce evidence that their breach of the order was not wilful, or that, though wilful, the conduct that breached the order was undertaken in good faith.

54 Ms. Steinberg contended that no such evidence has been produced. Ms. Steinberg submitted that what I have before me is evidence that the City and its officers knew about the order, and that they acted in breach of it. I have nothing before me that would allow me to conclude that the breach was inadvertent or in good faith.

55 The two officers the DA seeks to commit for contempt are Mr. Gwamanda and Ms. Arnolds. They have submitted affidavits in which they deny that they acted in breach of Budlender AJ's order, but nevertheless assert that any breach was inadvertent and *bona fide*. Ms. Steinberg submitted that these affidavits

are inadmissible because they have been filed out of time and out of sequence, and my leave has not been sought to admit them. Mr. Ngcukaitobi submitted that the Deputy Judge President of this court has already granted leave to file these affidavits while he was case managing this matter, and that the affidavits are properly before me.

56 I would have been hard-pressed to refuse to consider affidavits submitted by alleged contemnors facing committal solely on the technical basis that they have been filed in breach of the rules of court. I need not, however, resolve the controversy about their admissibility in order to conclude that neither the City nor Mr. Gwamanda nor Ms. Arnolds acted in wilful and *mala fide* breach of Budlender AJ's order.

57 As must be abundantly clear by now, the City adopted and then acted under an erroneous construction of Budlender AJ's order. That construction was that the 22 and 23 February 2023 resolutions were perfectly valid, but for the use of rule 64 of the standing rules to adopt them. On the basis of that construction, the City rushed through the readoption of those resolutions without engaging the urgent procedures for which rule 64 provides. But nor did it bring itself within the provisions of its standing rules that did apply.

58 The process the City adopted was sloppy and self-serving. It did not bespeak a nuanced appreciation of Budlender AJ's judgment and order. At times, the process may have involved a degree of deceit, especially insofar as the City Council's programme committee appears, at least initially, to have been told that the agenda item under which the 29 November 2023 resolution was

merely a “report back” to the Council rather than a substantive motion introduced to readopt the resolutions Budlender AJ declared invalid.

59 Be that as it may, in order to commit Ms. Arnolds and Mr. Gwamanda for contempt, I must be convinced of their wilfulness and bad faith beyond reasonable doubt. I must, in other words, be satisfied that the only reasonable inference from the proven facts is that they wilfully and in bad faith sought to transgress what they knew to be the clear strictures of Budlender AJ’s order. The facts do not bear this out. The City, Ms. Arnolds and Mr. Gwamanda had clearly been advised that the consequences of Budlender AJ’s order were purely procedural, and that the order could be complied with by merely readopting the 22 and 23 February 2023 resolutions without engaging rule 64. That advice is recorded in the report to the City Council under which the 29 November 2023 resolution was adopted. There is nothing before me to suggest that this advice was itself contrived to subvert Budlender AJ’s order. In addition, the advice, though clearly wrong, was not so poor as to constitute a bad faith effort to breach the terms of the order. Nor was it suggested that Mr. Gwamanda or Ms. Arnolds had the specialist legal knowledge necessary to second-guess this advice.

60 At best for the DA, the undisputed facts support two equally likely interpretations. The first is that the City ineptly and self-servingly read Budlender AJ’s order down to mean what the majority coalition on the City Council wanted it to mean. The second is that several City officials and office bearers contrived what those involved knew to be a wholly erroneous interpretation of the order as a way of subverting its true effect. I incline toward

the first interpretation, but even if there was nothing to choose between these two possibilities, I still could not hold the City, Ms. Arnolds or Mr. Gwamanda in contempt, even on the civil standard of a balance of probabilities which would apply if Ms. Arnolds' and Ms. Gwamanda's committal to prison was not sought.

61 Accordingly, I must refuse the DA's application to hold the City in contempt, and to commit Ms. Arnolds and Mr. Gwamanda to prison, on the basis that they did not wilfully and *mala fide* violate the terms of Budlender AJ's order.

62 This conclusion renders it unnecessary for me to consider the City's primary line of defence against the contempt application: that Budlender AJ's order was merely declaratory in nature, and not one which imposed specific obligations on the City to do, or to refrain from doing, anything in particular. Mr. Ngcukaitobi submitted that it is not possible – or at least that it has never been held that it is possible – to act in breach of a declaratory order. It was submitted that only judgments *ad factum praestandum* – that is, judgments that impose specific mandates or prohibitions on particular people – are capable, in principle, of being contemptuously breached.

63 However, as Ms. Steinberg pointed out, Budlender AJ's declaratory orders were orders *in rem*. In other words, they were declarations to the whole world that the resolutions he declared invalid were null and void (or at least would be null and void once the suspension he placed on them expired). Orders of that nature require all those who have had notice of them to act on the basis that the acts they declare void are of no force or effect. Accordingly, it could have been and in fact was contemptuous of the City and its officers to revive

the nullified resolutions, especially as they did so in a manner inconsistent with the terms of the order that required the City to appoint an Acting City Manager, and to refrain from adopting the same botched procedure that rendered the 22 and 23 February 2023 resolutions invalid in the first place.

64 For the reasons Ms. Steinberg gave, I incline toward the view that a declaratory order of the nature Budlender AJ granted might in principle provide a basis on which to pursue a claim of contempt against an officer of state who wilfully and *mala fide* ignores it. The most obvious example of such conduct in this case would have been if the City had repudiated Budlender AJ's declarations, and continued to carry out official acts on the basis that the 22 and 23 February 2023 resolutions remained valid.

65 In any event that is not what the City did. It in fact purported to comply with Budlender AJ's order – albeit on the basis of a mistaken construal of what that order meant. For the reasons I have given, the City's construal of the order cannot, on balance, be characterised as a wilful and *mala fide* attempt to disobey it. It is accordingly unnecessary for me to finally resolve the question of whether the form of Budlender AJ's order made it impossible for anyone to act in contempt of it.

<u>The press release of 29 November 2023</u>

66 The DA alleges one further form of contempt. That allegation relates to a press release the City issued on 29 November 2023, in which it announced that it had readopted the 22 and 23 February 2023 resolutions. The press release is noteworthy in at least two respects. First, the City confirms its understanding of Budlender AJ's order: viz. that the order declared no more than that "Council

had failed to follow its own procedures in relation to urgent matters requiring Council consideration and approval".

67 The second notable portion of the press release is the opinion it expresses of the way Budlender AJ decided the case before him. Budlender AJ was criticised as having "failed to independently and without bias, consider the valid and substantial legal arguments presented before [him] on the process enlisted by Council in approving the report to appoint the City Manager in February 2023".

68 The source of this criticism appears to have been Budlender AJ's own disclosure, made shortly before the matter was argued before him, that, as a practicing advocate, he had represented both the DA and the City Council in a number of other matters. At paragraph 8 of his judgment, Budlender AJ records that neither the DA nor the City asked for his recusal on that, or on any other, basis.

69 Strictly speaking, Budlender AJ need not have disclosed his role representing both parties as counsel in other matters. At the time of his acting appointment, he was a practicing advocate. Practicing advocates and attorneys make up the bulk of the acting judiciary. It is near inevitable that an acting Judge will, sooner or later, preside over matters involving parties they have represented or acted against as legal practitioners. Most litigants – especially those who use the courts as frequently as the DA and the City – know this. They also know that, when a legal practitioner takes up an acting appointment, they leave their adversarial role behind, and are presumed to be impartial merely by virtue of their acting appointment.

70 Of course, an acting Judge may have special knowledge of the affairs of a litigant before them which they acquired while representing that litigant. That knowledge may affect, or might reasonably be perceived to affect, their approach to the case they must decide as an acting Judge. In that event, the acting Judge will recuse themselves whatever the parties want, since they would be unable to hear the case detached from the parties and innocent of the facts on which they will have to deliver judgment. However, this was not one of those cases. It was not suggested that Budlender AJ had special knowledge of either party's affairs that might affect his impartiality.

71 The DA was rightly critical of the City's choice to question Budlender AJ's impartiality. The City did not ask for Budlender AJ's recusal when given an opportunity do so. It did not raise any complaint of bias during the proceedings. It did not criticise Budlender AJ's conduct of the case in its application for leave to appeal. In those circumstances, the suggestion that bias tainted Budlender AJ's decision was wholly unfounded. It was, in my view, a gratuitous attempt to pour scorn on a decision the City did not like, but which it could find no legitimate ground to challenge.

72 Both the City and Mr. Gwamanda issued the press release in their capacities as organs of state. When criticising a judicial decision, an organ of state, as a "role model *par excellence*" (*S v Williams* 1995 (2) SACR 251 (CC), paragraph 47) has a heightened duty to ensure that its criticism is reasonably related to the facts surrounding the decision and the text of the decision itself. While not necessarily contemptuous, gratuitous, ill-tempered or unfounded criticism of court decisions by organs of state will often be inconsistent with an organ of

state's duty under section 165 (4) of the Constitution to "assist and protect the courts" and to ensure the courts' "independence, impartiality, dignity, accessibility and effectiveness". In choosing to make such an unfounded and ill-tempered attack on Budlender AJ's decision, the City and Mr. Gwamanda acted inconsistently with that obligation. Mr. Ngcukaitobi could not argue that a declaratory order to that effect would be inappropriate. I intend to make such an order.

73 The question of whether the press release also constituted contempt of court is more difficult. The species of contempt the DA alleges is that of scandalising the court. Contempt of court in that form is committed whenever a person intentionally utters or publishes such "words as tend, or are calculated, to bring the administration of justice into contempt" (*In re Phelan* 1877 Kotze 5 at 7). I do not think that the press release either tended or was calculated to achieve that end.

74 Litigants frequently accuse judges of bias. Generally, they mean no more than that their case did not turn out the way they wanted. The City and Mr. Gwamanda meant more than that. As organs of state and as frequent litigators, they must have known what bias really meant. They must also have known that that they had no reasonable basis on which to contend that Budlender AJ was biased. Still, the reasonable reader of the City's press release would have understood the imputation of bias as the empty rhetoric of a sore loser. The reader would have found the suggestion that Budlender AJ was biased wholly incredible, in light of the facts, also set out in the press release, that the City had abandoned its appeal against Budlender AJ's order,

and that it had purported to comply with that order. In those circumstances, the press release did not tend to bring the administration of justice into contempt.

75 Was the press release nevertheless calculated to do so? I think not. The tenor of the document is that of a face-saving device. Both the City and Mr. Gwamanda had been told that they had presided over an illegality. What is more, they must have been convinced that there was no prospect of persuading a court of appeal otherwise. Were there any such prospect, the City's appeal would not have been abandoned. The City and Mr. Gwamanda thumbed their noses at Budlender AJ while accepting that his judgment had to be complied with. That was obviously petulant, but it was not contemptuous.

76 In a constitutional democracy, judges exercise enormous power. The way that we exercise that power will inevitably be criticised. Because judges make mistakes, some of that criticism will be accurate. At other times, criticism of judges will be inaccurate but nonetheless valuable, because, though wrong, it is made in good faith and illuminates important points of law, or encourages public debate about the judiciary and our role. Criticism of the judiciary will also sometimes be ill-informed, inaccurate or downright nonsensical. However, given the power we exercise, that will not in itself make the criticism contemptuous. What is required, in addition, is that the criticism be made with the intent to denigrate the judiciary as an institution, and thereby to impede its effectiveness. Criticism of that kind is actionable because it is, in essence, an attack on the Constitution itself.

77 A press release issued in a fit of pique by a losing litigant will seldom rise to that level of seriousness. In this case, the City's press release certainly did not. Accordingly, I cannot find that the press release was contemptuous in the relevant sense.

Remedy

78 The upshot of all this is that the 29 November 2023 resolution was adopted in breach of Budlender AJ's order and in breach of the City Council's own standing rules. For those reasons, it is invalid, and must be set aside. Much of the argument before me concerned the question of what must happen then. The DA says that the effect of such an order would be that Mr. Brink must vacate the post of City Manager, and that the post must be readvertised.

79 I agree that, if the resolution is invalid, then so is Mr. Brink's permanent appointment as City Manager. That means that Mr. Brink's permanent appointment must be reversed, and Mr. Brink must be ordered to leave his post. The only basis on which I would have been inclined to exercise my remedial discretion against that outcome would be if some disastrous consequence might befall the City and its inhabitants unless Mr. Brink were left in post. None has been identified.

80 The question of whether I should order that the post be readvertised is more complex. Certainly, the effect of invalidating the 29 November 2023 resolution is that the 10 August 2022 resolution which required such readvertisement stands, and must be implemented. Ms. Steinberg argued that the 10 August 2022 resolution was in effect a decision under section 54A (5) of the Systems Act to readvertise the post because, as the resolution itself states, there was

"no suitable candidate who complie[d] with the prescribed requirements". That decision having been taken in terms of a statutory provision, the City Council is *functus officio* on the issue, and may not ignore, rescind or set aside its own previous decision to readvertise the post.

81 The question of the extent to which a City Council may revisit or rescind its own resolutions was not dealt with in any depth before me. As Mr. Ngcukaitobi pointed out, the Supreme Court of Appeal has held, *obiter*, that a City Council has the general power to "rescind or alter" its own resolutions (see *Manana v King Sabata Dalindyebo Municipality* (2011) 32 ILJ 581 (SCA) at paragraph 22). That *dictum* notwithstanding, it seems to me that there is a distinction to be drawn between a resolution in discharge of a statutory obligation on the one hand and a resolution in the exercise of a more plenary legislative or policy-making power on the other. In the same way that organs of state are not entitled to ignore or reverse their own administrative decisions without court oversight, it seems to me that municipal councils may not be entitled to revisit resolutions which have been adopted in discharge of a statutory obligation unless they demonstrate to a court that there are grounds on which to conclude that the resolution was adopted unlawfully.

82 Section 54A (5) of the Systems Act states that a "municipal council must re-advertise the post [of City Manager] if there is no suitable candidate who complies with the prescribed requirements". The 10 August 2022 resolution recorded the City Council's conclusion that there was no such suitable candidate. It also constitutes a decision to take the action section 54A (5)

requires the City Council to take if and when it reaches that conclusion: the post of City Manager must be readvertised.

83 The 22 and 23 February 2023 and 29 November 2023 resolutions are, at their core, attempts to revisit that conclusion. In their over-wordy way, they each constitute the City Council's attempt to change its mind: to conclude that Mr. Brink was in fact a "candidate who complies with the prescribed requirements"; that he should be offered the post; and that readvertisement was not necessary, because section 54A (5) does not apply after all.

84 Almost no argument was advanced before me about whether the City Council was entitled, in principle, to change its mind in that way. The main issue before me was whether Budlender AJ's order had been complied with. I have held that it was not, but I think that it would be stretching Budlender AJ's order too far to conclude that it forbade the City Council from ever revisiting the 10 August 2022 resolution to readvertise the City Manager's post as vacant. The City Council may not in any event be entitled to do so, but nothing in Budlender AJ's order had any bearing on that entitlement, if it exists.

85 It follows that the appropriate remedy at this stage of the proceedings is to declare the 29 November 2023 resolution invalid, and to allow the City Council to consider its position. It may decide to let the 10 August 2022 resolution stand, in which case there will be no need to consider whether that resolution can be rescinded. If left to stand, it clearly requires the readvertisement of the City Manager's post. If the City attempts to rescind the resolution again, then the question of whether it is entitled to do so may well arise in future litigation. But that question is neither properly before me nor ripe for determination.

86 Whatever might happen next, everyone before me accepted that section 59 (3) (a) of the Systems Act does not provide the City Council with a general power to alter or rescind its previous resolutions. That provision, which appears to have been the vehicle through which the City Council thought that it could readopt the 22 and 23 February 2023 resolutions, allows the City Council to "review any decision taken by . . . a political structure, political office bearer, councillor or staff member in consequence of a delegation or instruction". It applies only to delegated powers exercised on the City Council's behalf by its officials or office bearers. It does not apply to the City Council's own resolutions.

Costs

87 Mr. Ngcukaitobi accepted that costs must follow the result in the event that the DA achieves substantial success. I think that the invalidity and the setting aside of the 29 November 2023 resolution is success, and that it is substantial enough to justify an award of costs in the DA's favour. The complexity of this case justifies taxation of counsel's costs on the "C" scale.

Order

88 For all these reasons –

88.1 The following decisions of the second respondent, taken on 29 November 2023, are declared unconstitutional, unlawful and invalid, and are set aside –

88.1.1 The decision to approve the "Report for Council to Review its Previous Resolutions Which Remedied the Obstruction

of the Recommended Appointment of Mr. Floyd Brink to be the City Manager in Accordance with Section 59(3)(a) of the Municipal Systems Act and Judgments of the Johannesburg High Court (No-041913/2023) and Eastern Cape High Court (No-862/2022)" ("the report").

88.1.2 The decision to readopt the following resolutions –

88.1.2.1 that "the documented evidence reaffirms the evidence of acts of obstruction of the recommended appointment of Mr. Brink in the reports in annexure C and D [to the report], and remedies in the procedurally challenged resolutions in annexure E and F [to the report]";

88.1.2.2 that "in light of such reaffirmed evidence, the resolutions in annexure E [to the report], which addressed the acts of obstruction of the recommended appointment of Mr. Brink in the report of the Speaker be readopted and implemented in terms of legislation";

88.1.2.3 that "in light of such reaffirmed remedies, the resolutions in annexure F [to the report], which remedied the acts of obstruction of the recommended appointment of Mr. Brink in the report of the Mayor be readopted and implemented in terms of legislation";

88.1.2.4 that "the terms of reference of investigations that were approved pursuant to the resolutions in annexure E and F [to the report] be amended to include the allegations and evidence that is contained in this report;

88.1.2.5 that "the Executive Mayor be authorised to issue a new appointment to Mr. Brink and also conclude a new contract of employment with him in accordance with applicable legislation"; and

88.1.2.6 that "in the event of unforeseen delays and/or challenges in implementing the above resolutions, the Executive Mayor be authorised to comply with the court order of 07 November 2023, and employ any of the remedies in section 54A of the MSA, and appoint Mr, Brink who is the recommended qualifying candidate by the Selection Panel, to be an Acting City Manager until resolution 2.5 is implemented, and his new appointment is issued, and his new contract is concluded".

88.2 Any employment contract and/or performance contract any of the respondents may have concluded with the fourth respondent pursuant to the invalid resolutions are declared unconstitutional, unlawful and invalid, and is set aside.

88.3 Decisions taken, and acts performed, by the fourth respondent in his official capacity will not be invalidated by reason only of these declarations of invalidity.

88.4 The fourth respondent is directed to relinquish his permanent appointment as the first respondent's City Manager within ten days of the date of this order, or as soon as an Acting City Manager is appointed, whichever occurs first.

88.5 It is declared that, in publishing the press release "City of Johannesburg confirms appointment of City Manager" on 29 November 2023, the first and sixth respondents breached their obligations under section 165 (4) of the Constitution to "assist and protect the courts" and to ensure the courts' "independence, impartiality, dignity, accessibility and effectiveness".

88.6 The first respondent is directed to pay the costs of this application, including the costs of two counsel. Counsels' costs may be taxed on scale "C".

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 4 December 2024.

HEARD ON: 12 November 2024

DECIDED ON: 4 December 2024

For the Applicant:	C Steinberg SC D Sive D Mutemwa-Tumbo Instructed by Minde Shapiro and Smith Inc
For the First, Second, Third, Fifth and Seventh Respondents:	T Ngcukaitobi SC R Tulk T Mpulo-Merafe Instructed by Malebye Motaung Mtembu Inc