THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 767/2013

In the matter between:

MEADOW GLEN HOME OWNERS ASSOCIATION **FIRST APPELLANT**

MEADOW RIDGE HOME OWNERS ASSOCIATION **SECOND APPELLANT**

MORELETA PARK EXTENSION 44 RESIDENCE ASSOCIATION **THIRD APPELLANT**

MOOIKLOOF EIENAARSVERENIGING **FOURTH APPELLANT**

WOODHILL HOME OWNERS ASSOCIATION **FIFTH APPELLANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **FIRST RESPONDENT**

FANIE FENYANI **SECOND RESPONDENT**

Neutral citation: *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* (767/2013) [2014] ZASCA 209 (1 December 2014)

Coram: CACHALIA, WALLIS and ZONDI JJA and SCHOEMAN and DAMBUZA AJJA

Heard: 11 November 2014

Delivered: 1 December 2014

Summary: Contempt of court — suspended sentence — whether there was substantial compliance with court order — wilful default required — appropriateness of incarceration of municipal official for failure by municipality to comply with court order — whether contempt of court appropriate means for enforcing a structural order

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ORDER

On appeal from: North Gauteng High Court, Pretoria (Kubushi J sitting as court of first instance):

1 The costs order in the high court is set aside and replaced with an order that each party pay their own costs.

2 The appeal is otherwise dismissed

3 Each party is to pay their own costs of appeal.

JUDGMENT

Wallis JA and Schoeman AJA (**Cachalia and Zondi JJA and Dambuza AJA concurring**)

[1] Since some time prior to 2006, a property owned by the City of Tshwane Metropolitan Municipality (the Municipality) in Moreleta Park has been occupied by poor people who have constructed rudimentary homes for themselves out of corrugated iron, wood, plastic and similar materials. They call the settlement Woodlane Village. The appellant home owner associations, have concerns arising from the proximity of this settlement to their own properties. They wish to prevent it from expanding from the present nearly 900 homes and to arrive at a situation where a more formal residential area is established for the residents of the settlement. To that end they have instituted various proceedings against the Municipality contending that the settlement exists in conflict with town planning regulations and seeking broad-ranging relief in the form of what

have come to be called structural orders.[1] Several such orders have been granted in their favour against the Municipality, usually by consent. All have lacked the usual feature of such orders that the process set out therein is supervised by means of reports and the court retaining jurisdiction to deal further with the case.

[2] The appellants have consistently complained that the Municipality makes no proper attempt to comply with the terms of these orders. This appeal arises from an attempt by them to have Mr Fanie Fenyani, the Municipality's Director: Housing Resource Management, committed to prison for contempt of court arising from an alleged failure by the Municipality to comply with one of those orders. The attempt failed before Kubushi J in the high court and the appeal is with her leave.

[3] A number of issues arise in the appeal. First, there is the fact that the Municipality consented to the court making the orders giving rise to a dispute and implicitly agreed that it had not complied with those orders. In a country based on the rule of law that is a situation that cannot be countenanced particularly when it involves an organ of state at the third tier of government. But whether the incarceration of one of its employed officials is the way in which to address this problem lies at the heart of the case. Second, we must consider the basis upon which courts are asked to make these structural orders and whether their terms are sufficiently definite to form a foundation for a citation for contempt. Third, one must question whether the blunt instrument of contempt of court is the appropriate means of securing enforcement of orders directed at resolving complex social issues. Those issues in this case involve the provision of housing and other basic amenities for the desperately poor and vulnerable, while being sensitive to the interests of those more fortunate in our

[1] They are sometimes referred to as structural interdicts but that is often a misnomer in relation to an order that combines elements of an interdict and a mandatory order.

society, whose interests in terms of health, security and the protection of their property are also valued and protected under the Constitution.

Background

[4] It is convenient to commence a description of relevant events on 31 March 2006, when the Municipality, together with other public entities, unlawfully evicted the occupants from the area in and around this property and destroyed their homes. This court, in the matter of *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*,[2] inter alia ordered the municipality:

'… to construct for those individual applicants who were evicted on 31 March 2006, and who still require them, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed, and which are capable of being dismantled, at the site at which their previous shelters were demolished.'

[5] Thereafter the settlement was established in Woodlane Village within a demarcated, fenced area. From an early stage there appear to have been attempts to limit the number of residents and prevent the expansion of the settlement. This included issuing residents with identity cards to determine their entitlement to reside in Woodlane Village. Whatever the Municipality did in this regard it did not satisfy the appellants. They sought and obtained a number of court orders. Those that are relevant to the present matter are the following.

[6] On 21 August 2009 Hartzenberg J ordered by consent:

'1. …

2. THAT the first respondent [the municipality] maintain the fence which has been erected around the demarcated area in a condition suitable to prevent free access into and egress from the demarcated area, save at the two existing gates.

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[2] *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).

3. THAT the first respondent [the municipality] employ and maintain the presence of a security officer on a full-time basis at each of the two gates which permit access into and egress from the demarcated area in order with effect from 1 September 2009 to prevent any persons, other than those to whom the first respondent has already issued access cards in respect of the demarcated area as at date of this order, to enter upon the demarcated area; provided that persons wishing to visit occupiers of the demarcated area may be allowed reasonable temporary access.

4. THAT the first respondent takes all such steps as are reasonable and necessary to prevent any persons other than those to whom the first respondent has already issued access cards in respect of the demarcated area as at date of this order, to enter upon or take occupation of the demarcated area.

5. THAT the first respondent continue to provide sufficient potable water and a sufficient number of portable chemical toilets and a sufficient number of refuse bins (which are to be emptied by the first respondent on a regular basis) for the use of the persons who occupy the demarcated area.

6. THAT the first respondent is interdicted from allocationing (sic) to any person any stand in the demarcated area, other than the 916 stands already allocated.

7. THAT the first respondent is interdicted with effect from 1 September 2009 from permitting any persons, other than those who already occupy one of the 889 shacks in the demarcated area and in respect of whom the first respondent has issued access cards in respect of the demarcated area as at date of this order, to enter upon or occupy the demarcated area, provided that persons wishing to visit occupiers of the demarcated area may be allowed reasonable temporary access.

8. …

9. …

10. THAT the applicants and the fourth respondent shall within one month of date of this order nominate not more than two persons each to serve on a committee with which the first respondent shall consult in regard to the plan, as contemplated in paragraph 8 above, and which committee shall monitor the implementation of the plan and compliance by the first respondent with the terms of this order.

11. …

12. THAT the applicants, the first respondent and the fourth respondent shall be entitled, on good cause shown, to apply to the Court on the same papers, supplemented as may be necessary, for the variation or amplification of any of the terms of this order.'

[7] No doubt when it agreed to an order in these terms the Municipality intended to carry it out. However, the generality of its terms was such as would, almost inevitably, lead to disputes between the Municipality and the appellants. Some of these should be highlighted. What, for example, was meant by the obligation in para 1 to maintain the fence in a condition to prevent free access to the settlement? When counsel for the appellants was asked this in the course of argument his answer was that it should be patrolled throughout the day and any breaks in the fence repaired within a day of them occurring. Counsel for the Municipality contended for a far less onerous regime. If the Municipality employed the requisite number of security guards specified in para 2, would it nonetheless be in breach of the order if they were slack in performing their duties? What steps would be reasonable and necessary in order to prevent people from entering and occupying the settlement? There was simply no clear-cut answer to these questions. Accordingly the terms of the order provided fertile grounds for future disputes and that is precisely what happened.

[8] Having said that, the Municipality consented to the court making an order in those general terms. That obliged it to make serious good faith endeavours to comply with it. That is what we are entitled to expect from our public bodies. If they experienced difficulty in doing so then they should have returned to court seeking a relaxation of its terms. If there was a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the Municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated.

[9] On 15 September 2011, and by consent, Muller AJ ordered that Mr Fenyani be committed to imprisonment for a period of one month for contempt for failing to comply with the order granted in this matter by Hartzenberg J on

21 August 2009. This committal order was suspended on condition that the Municipality complied with paragraphs 2, 3 and 4 of that order pending the final determination of an application to amend and supplement it. The paragraphs relevant to the suspension related to the maintenance of the fence; the employment and presence of security guards at the two gates of the demarcated area; the control of the gates to restrict entrance into and egress from the property; and finally to prevent the occupation of the property or access of persons who were not in possession of access cards.

[10] On 5 June 2012 Van der Byl AJ substantially varied the order of Hartzenberg J, and in the course of doing so amended the conditions of the suspension order. He ordered that the order for committal to imprisonment imposed on Mr Fenyani be further suspended on condition that the Municipality complied with paragraphs 2-7, of the order by Hartzenberg J. The order of Van der Byl AJ continued to oblige the Municipality to provide basic services to the occupiers of the demarcated area; to ensure the Municipality did not allocate further stands to any other person within the demarcated area; and to prohibit the entry of persons without access cards who were not occupiers of the 889 shacks. However, it went further in that it obliged the Municipality to establish a township in respect of the area of the settlement and adjacent land; to allocate serviced residential erven to certain residents (described as 'qualified persons') and to bring proceedings to evict the remaining residents (described as unlawful occupiers). If a township was not established by 30 November 2013, within about 18 months of the order, they were obliged to evict everyone from the settlement. How it was thought that this was to be achieved in the light of the established jurisprudence of this Court[3] and the Constitutional Court[4] in regard to evictions is difficult to see. Furthermore, it is difficult to see on what basis,

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[3] *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA) and *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* 2014 (3) SA 23 (SCA).

[4] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC). The leading cases are collected in footnote 127 in *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC).

consistent with a proper appreciation of the separation of powers,[5] it was permissible for a court to order the Municipality to establish a township or evict people to whom it owed obligations to provide access to housing. However that is typical of the problems that these orders posed.

[11] Matters came to a head when in November 2012 the appellants brought an application for the committal of Mr Fenyani to prison for a period of one month, thereby seeking the implementation of the suspended sentence imposed by Muller AJ and extended by Van der Byl AJ. The application was based on the Municipality's alleged failure to comply with paragraphs 2 and 3 of the order by Hartzenberg J, in that the fence was not maintained and the security guards that were stationed at the gates, did not monitor the persons entering and exiting the property. As noted above the application failed and this appeal is the result.

[12] The events giving rise to the application happened some time ago. Accordingly, this court requested affidavits from the parties in the following terms:

'1 The Tshwane Municipality is to deliver an affidavit by 31 October 2014 deposed to by the municipal manager, setting out in detail the steps it has taken to comply with the order of Hartzenberg J, as amended by the order of Van der Byl AJ, since the delivery of its answering affidavit in the present proceedings. The affidavit must identify all officials charged with responsibility for securing compliance with the order and their superiors responsible for ensuring that they comply with their obligations in that regard.

2 The Appellants are to deliver an affidavit by 31 October 2014 detailing any respects in which they say (if at all) that there has been further or continued non-compliance with that order since the delivery of their replying affidavit in the present proceedings.

3 Both parties are to deliver supplementary heads of argument, no longer than 10 pages in extent, on the source, nature and extent of the Court's power to enforce orders *ad factum praestandum,* such as the one in this case, by way of committal of an official of a local

[5] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) paras 63-71.

authority arising from the local authority's failure to comply with the terms of such an order. The heads must deal with the appropriateness of committal as a remedy in this type of case and whether in our constitutional dispensation it is open to the courts to grant such an order. The parties are referred to *Nyathi v MEC for Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) paras 75, 76 and 78.'

[13] The municipal manager of the Municipality and a director of the first appellant deposed to affidavits. Further heads of argument were filed. None of the parties addressed the question of the 'appropriateness of committal as a remedy in this type of case and whether in our constitutional dispensation it is open to the courts to grant such an order', or referred to *Nyathi.* They did, however, provide a considerable amount of further information about what had occurred in the interim. Consistent with the stand-off that has characterised their relationship, they disagreed about the nature and extent of, and reasons for, the problems. The appellants contended in vigorous terms that the Municipality was guilty of on-going non-compliance and that the Municipality had 'no respect for the orders granted'. For its part the Municipality complained that the problems with the fence were due to residents breaking it at a particular point in order to obtain easier access to their homes and that the access cards given to residents had been duplicated and forged so that the security guards could not do what was expected of them.

[14] These further affidavits revealed that there had been further and subsequent court proceedings. On 3 February 2014 Webster J issued an order (again by consent). The salient terms were:

'1. …

2. On or before 28 February 2014 the First Respondent [the municipality] shall repair the fence around the demarcated area in a condition suitable to prevent free access into and egress from the demarcated area; and thereafter maintain such fence in good order.

3. The First Respondent [the municipality] shall from date of this order employ and maintain the presence of 8 security officers on a full time basis, at the demarcated area working in two shifts with each shift having four security guards present. These security

guards will patrol the demarcated area on a 24 hour basis, which shall include the monitoring of the fence and to permit access into and egress from the demarcated area solely to qualified persons and to prevent access into and egress from the demarcated area of and persons not qualified [or] entitled to reside within the demarcated area as well as occasional trespassers.'

[15] This order led to another contempt of court application. On 2 April 2014 Pretorius J found the municipality and Mr Fenyani guilty of contempt of court. They were ordered to pay a combined fine of R60 000, which was suspended on condition that both the Municipality and Mr Fenyani comply with the orders of Webster J within 30 days. As Mr Fenyani had not hitherto been under any personal obligation to comply with the earlier orders and it was manifest that he did not have it within his power to comply with many of their provisions, that was a remarkable extension of his potential liability. According to the affidavit filed on behalf of the appellants, the Municipality has not complied with all the conditions of the suspension of the order of Pretorius J.

Contempt of court

[16] Although some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders. The foundation and bases for a conviction of contempt of court have been authoritatively set out in *Fakie NO v CCII Systems (Pty) Ltd*:[6]

'To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

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[6] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[17] The goal of a suspended sentence in contempt of court proceedings bears some resemblance to a suspended sentence imposed in terms of the Criminal Procedure Act 51 of 1977:

'A suspended sentence is generally used as a weapon of deterrence against the reasonable possibility that a convicted person may again fall into the same error (or at least one substantially similar).'[7]

In other words there is the element of coercion to compel the transgressor to comply with the court order.

[18] Furthermore, in *Fakie NO* Cameron JA stated that:[8]

'… there is no true dichotomy between proceedings in the public interest and proceedings in the interest of the individual, because even where the individual acts merely to secure compliance, the proceedings have an inevitable public dimension - to vindicate judicial authority. Kirk-Cohen J put it thus on behalf of the Full Court:

"Contempt of court is not an issue *inter partes*; it is an issue between the court and the party who has not complied with a mandatory order of court." [*Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education Gauteng* 2002 (1) SA 660 at 673D-E]

Elaborating this, Plasket J pointed out in the *Victoria Park Ratepayers* case [(511/03) [2003] ZAECHC 19 (11 April 2003)] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government: There is

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[7] *S v Gardener & another* 2011 (1) SACR 570 (SCA) para 75; see also *S v Beyers* 1968 (3) SA 70 (A) at 76E-G.
[8] Para 38.

thus a public interest element in every contempt committal. He went on to explain that when viewed in the constitutional context

"it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system … That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[19] In *Fakie* the court was concerned with the onus of proof in cases of civil contempt. It held that an order could only be made on proof of the contempt on the criminal standard of proof beyond a reasonable doubt. We think it follows inevitably that bringing a suspended order of committal into operation requires proof of a wilful breach of the conditions of suspension to a similar standard. Was that standard met in this case? One of the difficulties we face is that the committal order in relation to Mr Fenyani was made by consent. We accordingly do not know on what factual basis the order was made. Indeed we do not even know whether the two acting judges who made these orders formed an independent view on the subject. Consent orders are not usually the subject of extended judicial scrutiny in the environment of a busy motion or opposed application court. Whilst it would perhaps go too far to say that a contempt order cannot be made by consent, it will ordinarily be desirable for the judge to be satisfied that there is adequate proof of the contempt and to set out, albeit briefly, the nature and extent of the contempt and the reasons for suspending the order. That will enable a court that is subsequently asked to bring the order into operation to understand fully the case before it. That was not possible in this case.

The citation of Mr Fenyani

[20] A further difficulty is that we do not know on what basis Mr Fenyani became the subject of this order in the first place. There is a disquieting letter in the supplementary affidavits in which the attorneys representing the appellants wrote to the Municipality's attorneys, recording that they understood that Mr Fenyani was no longer in the employ of the Municipality and asking that they 'nominate a successor in title' to Mr Fenyani. The clear inference is that Mr Fenyani was simply the nominee of the Municipality to be the scapegoat for any shortcoming in its compliance with the order of Hartzenberg J. If that is so, it is necessary to say immediately that there is no basis in our law for orders for contempt of court to made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings.

[21] Mr Fenyani is the Director: Housing Resource Management of the Municipality. According to the supplementary affidavit by the municipal manager, he is the person responsible for seeing to the maintenance of the fence and the provision of basic services. The other obligations of the Municipality, brought about by the various court orders, must be performed and attended to by other officials. However, according to the conditions attached to the suspension of the order for his imprisonment he would also be subject to incarceration if the Municipality did not, inter alia, take the necessary steps to prevent people other than those with access cards entering the demarcated area; issue and deliver access cards; bring eviction proceedings against all persons on the property; and if the Municipality were to fail to establish and proclaim a '… township with serviced residential erven … in terms of the Town Planning and Townships Ordinance 1986 by no later than 30 November 2013'.[9] According to the

[9] Paragraph 2 of the order of Van der Byl AJ.

affidavit by the municipal manager, it is the 'land invasion department' of the Municipality that should ensure that no further residential units are erected or added to existing ones within the demarcated area. In similar vein, it is the Director: Metro Police who is responsible for the control of access and the appointment of security officers. Mr Fenyani is not responsible for the appointment of security guards but under this order he is nevertheless held accountable for the non-compliance of others with those duties.

[22] On that ground alone the imprisonment of Mr Fenyani for the inadequacies in the Municipality's compliance with the order of Hartzenberg J, a non-compliance that, notwithstanding the difficulty of knowing precisely what they had to do to comply with it, they acknowledged when the consent contempt order was granted, would be inappropriate. We do not hesitate to endorse what Nugent JA said in this court in *Kate*,[10] that 'there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles'. However, it must be clear beyond reasonable doubt that the official in question is the person who has wilfully and with knowledge of the court order failed to comply with its terms. Contempt of court is too serious a matter for it to be visited on officials, particularly lesser officials, for breaches of court orders by public bodies for which they are not personally responsible.

[23] There are numerous legislative provisions regarding the person or persons responsible for the administration of local authorities. Section 82 of the Local Government: Municipal Structures Act 117 of 1998 determines that the municipality must appoint a municipal manager as the person responsible for the administration of the municipality and such person will also be the accounting

[10] *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) para 30.

officer of the municipality. In terms of s 56(3) of the same Act, the executive mayor, in performing his duties must monitor the management of the municipality's administration in accordance with the direction of the municipal council (s 56(3)(*d*)) and oversee the provision of services to communities in the municipality in a sustainable manner (s 56(3)(*e*)). Section 54A of the Local Government: Municipal Systems Act 32 of 2000 also provides that the municipal council must appoint a municipal manager as the head of administration of the municipal council. Furthermore, s 55 sets out the responsibilities of the municipal manager as head of the administration, subject to the policy directions of the municipal council. Section 55(1)(*b*) determines that the municipal manager is responsible and accountable for the management of the municipality's administration. Section 60 of the Local Government: Municipal Finance Act 56 of 2003 provides that the municipal manager is the accounting officer of the municipality.

[24] From the abovementioned provisions it is clear that the municipal manager is, so far as the officials of a municipality are concerned, the responsible person tasked with overseeing the implementation of court orders against the municipality. The municipal manager would know, as the accounting officer, what is feasible and what is not. The municipal manager cannot pass responsibility for these administrative duties to a manager or director who is not directly accountable in terms of their duties. It is unacceptable that a person is 'selected' by the municipality to be liable for imprisonment, when that person is clearly not the one who has control over all the facets and terms of the order and it is clear that they are being made the scapegoat. The municipal manager is the official who is responsible for the overall administration of the municipality and the logical person to be held responsible. Even if, as must necessarily be the case, the municipal manager delegates tasks flowing from a court order to others it remains his or her responsibility to secure compliance therewith. It may be

that certain of the political office bearers may also be liable for a contempt but it is unnecessary to traverse the possible ambit of such responsibility here.

Was there non-compliance?

[25] The appellants' approach to this matter was to take the order as their starting point and then seek to establish that the conditions on which the order had been suspended had not been fulfilled. There is certainly justification in the evidence for many of their complaints. It is clear, for example, that the damage to the fence is a persistent problem. Under those circumstances it was argued, on behalf of the appellants, that the municipality is required to inspect the fence and effect repairs daily. That seems excessive but it can be accepted that weekly inspections were considered reasonable as gauged from the appellants' founding affidavit, and the fact that it is what Mr Fenyani attested to doing, according to the respondents' affidavits. However, if his reports are considered it is clear that he inspected the fence irregularly. He filed inspection reports on 1 August 2012, 14 September 2012, 16 October 2012, 16 November 2012 and 4 December 2012. The report of 14 September 2012 and all further reports given by him are in a more or less standard form and state that 'During my inspection, the Northern fence a hole is opened for illegal access. Jacaranda fencing company will be requested to repair the damage'. However, according to his affidavit he only contacted the contractor on 20 December 2012 to effect the repairs, after this application was served. The fence was subsequently repaired in January 2013. That was clearly an insufficient effort to comply with the order.

[26] In regard to the provision of security guards to monitor access to the settlement it appears that the Municipality contracted with external firms to provide this service. The regular reports furnished to the appellants by a representative of a different security firm paint a picture of an inadequate service being rendered in this regard. There is little indication that the

Municipality did anything to oversee the work of these contractors, whether by explaining to them the exact nature of the duties required of them, or by regular inspections to ascertain whether they were performing their contractual duties adequately. Although this was drawn to the attention of the Municipality there is no indication that they did anything about it. This was not of course Mr Fenyani's responsibility.

[27] There were undoubtedly challenges facing the Municipality in giving effect to these orders. The evidence that the holes in the fence were cut by residents at the same place on a regular basis in order to provide them with a more convenient point of access to the settlement was not disputed. The Municipality's suggestion that a further gate should be fitted at that point manned by security guards received the unhelpful response from the appellants that this would be a breach of the court's order. In regard to access cards these have been duplicated and it is difficult to control the access due to such duplication. Whilst a further consent order required new access cards to be issued within four weeks of the order, this does not appear to have taken into consideration the safeguards against duplication, which needed to be built into the access cards and the costs and general feasibility involved in such re-issue.

[28] Overall the impression is that the Municipality was less than diligent in seeking to comply with these orders. Even if allowance is made for the broad terms in which they were couched it does not seem that the Municipality and its officials, of whom Mr Fenyani was one, exerted any vigour to secure compliance. The municipality's affidavits are replete with statements that it is a 'challenge' to give effect to the order; the residents make it 'difficult' to maintain the area; it is not 'practically possible for second respondent … constantly to monitor the fence'; '… it is difficult for the respondents to control and maintain the behaviour of the residents of the demarcated area'. And 'It is unfortunate that the first respondent is not able to control the behaviour of the

residents of the demarcated area'. Paragraph 12 of the order of Hartzenberg J envisaged that the Municipality could apply for the variation or amplification of any of the terms of the order. In spite of the obstacles faced by the Municipality and Mr Fenyani, no application was brought to vary the orders. Van der Byl AJ recorded that an application for the variation of the earlier order was withdrawn, but we know nothing of its terms or the reason for not proceeding with it. However, all of this was insufficient in the light of the considerations set out above to hold Mr Fenyani – and the order sought was directed at him personally – in wilful non-compliance with the provisions of the order warranting his imprisonment.

Events have overtaken this appeal.

[29] One further aspect of the matter cannot be allowed to pass without mention. The current application was brought during November 2012, nearly two years ago. There have been two subsequent court orders dealing with the same issues. In one, made by consent, Webster J inter alia refined and established time frames within which the fence had to be repaired, increased the number of security guards that had to be employed and increased their duties. His order made paragraphs 2 and 3 of the original order obsolete. The appellants were asking that Mr Fenyani be committed to prison based on paragraphs of an order that had been superseded by a subsequent court order. Non-compliance with Webster J's order was the subject of the proceedings before Pretorius J. That could not be justified on any basis.

Costs

[30] The court below should have found that there was culpable non-compliance by the Municipality. However, as set out above, Mr Fenyani was not the correct person to hold accountable, as he was not responsible for the implementation of all of the terms of the order by Hartzenberg J, nor was the order made against him. Indeed it could not have been. In this court, although

the applicants were substantially successful in contending that there had been non-compliance their remedy was ill chosen and they should have realised that events had overtaken the appeal. In those circumstances the correct costs order in both this court and the court below should be that each party pay their own costs. That requires an amendment of the order granted by Kubushi J.

Conclusion

[31] It is apparent that in spite of the numerous court orders (stretching over a period of at least eight years) and applications for contempt of court; the application for the committal of Mr Fenyani to imprisonment; and an order that the Municipality launch eviction proceedings against all the occupiers of the property, the problems of neither the neighbouring landowners nor the residents of Woodlane Village have been solved.

[32] The Municipality is obliged to respond to people's needs and encourage the public to participate in policy making and the administration must be accountable.[11] Furthermore, the Municipality must adhere to the principles of Schedule 2 of the Systems Act dealing with the code of conduct for municipal staff members, and specifically s 3(*b*) and (*c*) thereof, which reads thus:

'Commitment to serving the public interest —

A staff member of a municipality is a public servant in a developmental local system, and must accordingly—

(*a*) …

(*b*) foster a culture of commitment to serving the public and a collective sense of responsibility for performance in terms of standards and targets;

(*c*) promote and seek to implement the basic values and principles of public administration described in section 195 (1) of the Constitution;'

[11] The Constitution 1996, s 195(1)(*e*) and (*f*). *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others* [2014] ZACC 31 paras 1, 9 and 12.

[33] In *Nyathi v MEC for Department of Health, Gauteng*[12] dealing with the issue whether the provision of s 3(1) of the State Liability Act 20 of 1957 that '(n)o execution, attachment or like process … may be issued against the defendant or respondent in any action or legal proceedings or against property of the State' is constitutional, Madala J said:

'The English Courts have looked at the possibility of holding officials responsible for wrongs that they have committed in their official capacity. They proceed on the premise that, in committing the wrongs, such officials are stepping outside of the realm of protection afforded to public officials under the Crown Proceedings Act. The possibility of a similar route in South Africa is, however tempting, impractical. The committal of public officials would only result in the "naming and shaming" of such officials and would produce no real remedy for the aggrieved litigant who is primarily concerned with the payment of the judgment debt. The potential disruption of already overburdened State departments is also a result which should be avoided.'

and

'Secondly, State administration is inefficient and ineffective. The conduct of State officials undermines the legitimacy of both the judiciary and the State. Generally, relevant State departments are in the best position to assess the magnitude of the problems faced by their personnel and are similarly in the best position to address the systemic failure of State officials to perform their duties. These State institutions need to look at these failings holistically and consider the best manner in which to deal with the problems at hand. This court is not in a position at this stage to assess the problems faced.'

[34] The question of injunctive relief against the State was addressed in *Minister of Health & others v Treatment Action Campaign & others (No 2)*[13] After discussing the jurisprudence in foreign jurisdictions on the permissible scope of court orders the court said in para 112:

'… The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the State's obligations are not performed diligently and without delay.'

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[12] *Nyathi v MEC for Dept of Health, Gauteng* 2008 (5) SA 94 (CC) paras 76 and 78.
[13] *Minister of Health & others v Treatment Action Campaign & others (No 2)* 2002 (5) SA 721 (CC).

And it was held by the court in para 113:

'South African Courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must – use their wide powers to make orders that affect policy as well as legislation.'

[35] Both this Court[14] and the Constitutional Court[15] have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. There is considerable experience in the United States of America with orders of this nature arising from the decision in *Brown v Board of Education*[16] and the federal court supervised process of desegregating schools in that country. The Constitutional

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[14] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 42; *Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA) para 87.

[15] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36 (per Sachs J): 'The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make.'

[16] *Brown v Board of Education 347 US 483 (1954).*

Court referred to it with approval in the *TAC (No 2)* case.[17] Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders.[18]

[36] When these matters were raised with them counsel for both parties indicated that they would endeavour to find a workable solution. This is imperative, as the residents of Woodlane Village have been living in squalid conditions over the past eight years without any solution in sight. Indeed their hopes for a solution have been repeatedly dashed. The report of the Tswelopele Non-Profit Organisation[19] makes it clear that the residents have formed a community. Examples of this are that 85 per cent of the households have at least one person in the formal employment sector; the dwellings are numbered which enable the occupants to access medical facilities; the people have elected an executive committee and in addition to the five members of the committee there are also 31 block leaders. There is a real likelihood of the parties finding a workable solution if there is the will to do so, even under the authority of an independent overseer that could hold all parties accountable. In this instance the parties must find innovative methods to resolve the competing interests of the different factions of the community.

Order

[37] The following order is made:

1 The costs order in the high court is set aside and replaced with an order that each party pay their own costs.

2 The appeal is otherwise dismissed

3 Each party is to pay their own costs of appeal.

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[17] Para 107.

[18] See Geoffrey F Aronow 'The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation' 7 *Hastings Constitutional Law Quarterly* 739, (Spring1980).

[19] A poverty alleviation and social development organisation that has been involved with the occupiers of the property since the establishement thereof.

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M J D WALLIS

JUDGE OF APPEAL

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I SCHOEMAN

ACTING JUDGE OF APPEAL

Appearances:

For the Appellant:	N G D Maritz SC (with him A P J Els) Instructed by: Salomé Le Roux Attorneys, Pretoria Symington & De Kok, Bloemfontein
For the Respondent:	L G Nkosi-Thomas SC (with her N Ntuli) Instructed by: Kunene Ramapala & Botha Inc, Pretoria Lovius Block Attorneys, Bloemfontein