REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **4341/2014**

Dates heard: **5, 6 and 7 May 2016**

Date delivered: **15 June 2016**

In the matter between:

KENTON ON SEA RATEPAYERS ASSOCIATION First Applicant

BUSHMAN'S KARIEGA ESTUARY CARE MANAGEMENT FORUM Second Applicant

NATURES LANDING HOMEOWNERS ASSOCIATION Third Applicant

And

NDLAMBE LOCAL MUNICIPALITY First Respondent

CACADU DISTRICT MUNICIPALITY Second Respondent

DEPARTMENT OF WATER AFFAIRS Third Respondent

DEPARTMENT OF ECONOMIC DEVELOPMENT ENVIRONMENTAL AFFAIRS AND TOURISM Fourth Respondent

THE TRUSTEES OF THE BUSHMAN'S REST TRUST Fifth Respondent

SIPHO TANDANI Sixth Respondent

ROLLY DUMEZWENI Seventh Respondent

NOMBULELO BOOYSEN-WILLY Eighth Respondent

BUSHMAN'S RIVER RATEPAYERS ASSOCIATION Ninth Respondent

JUDGMENT

LOWE, J

Introduction:

[1] This matter, to say the least, sets out a sad tale of frustration and anxiety on the part of the residents of Kenton on Sea and Busman's River Mouth, both situated close to one another, relevant particularly to their complaints about:

1.1 the First Respondent's perceived neglect of their sewage reticulation and the condition of the Marselle sewage works, and the consequential impact on the Bushman's River estuary; and

1.2 The condition of the Marselle waste dumpsite which is situated approximately 1.2 km from the Bushman's River estuary itself and in close proximity to property owned by the Fourth Respondent and the New Rest settlement.

[2] It raises issues relevant to the local residents' entitlement to basic essential municipal services and the maintenance thereof to a reasonable standard,

particularly relating to sewage reticulation, sewage works and an adequate and functioning refuse removal system and waste dumpsite, properly maintained in accordance with regulatory standards.

[3] This application was issued on 30 October 2014, and eventually, after several postponements, was argued on 5, 6 and 7 May 2016 after the exchange of affidavits and papers some 943 pages in extent.

[4] The commencement of the application was preceded by an earlier application in 2009 brought by the Ninth Respondent in this matter against First Respondent which eventuated in an order given by Mr Justice Froneman, on 30 January 2009, (Case 40/2009). The order, amongst other things, interdicted First Respondent from allowing raw sewage to flow into the Bushman's River from its sewage conservancy tank situated on Erf 636, Rivers Bend, and Bushman's River Mouth.

[5] In terms of the order First Respondent was to file a written report with the Registrar by 8 February 2009 on the steps taken, and future steps to be taken, to comply with the orders concerning the sewage reticulation to the extent set out in the order. The report made it clear in due course that the steps that were being taken immediately related to the maintenance of the said conservancy tank and its emptying from time to time, it being envisaged that a permanent solution would lie in the construction of a permanent pump house whereby the sewage could be pumped from the conservancy tank to the Bushman's sewage ponds.

[6] The report continued to set out that a service provider would be appointed to effect a comprehensive assessment of the issues referred to in the report, which were extremely limited having regard to the problem presented, and undertook to secure a recommendation of a permanent solution. It is important to note that the report itself under "Immediate Solution" stated as follows "The second step towards a permanent solution would be to construct a pump house and pump on ERF 636 whereby the sewage can be pumped to the Bushman's ponds".

[7] By the time this application was launched and whilst First Respondent had by then, installed a pump station at the conservancy tank, the pump attached thereto was not operational due to the absence of an electricity connection for the pump, this due to the electricity provider's failure to make this available. During this time sewage had been observed overflowing the conservancy tank and into the Bushman's River estuary on numerous repeated occasions and at that time most recently on 7 September 2014. It was thus that the Notice of Motion sought relief relevant to First, Sixth and Seventh Respondents, alternatively First Respondent: being in contempt, so it was alleged, of the court order referred to above; together with an order compelling First Respondent to comply with that order by rendering the pump station operational and keeping this maintained; the filing of various reports to the above Honourable Court relevant to the sewage issue; a mandamus relevant to the upgrade of the sewage works and the discharge of effluent into the Bushman's River and consequential relief.

[8] By the time the matter was finally ready for argument things had moved on, and electrical supply had been made available and the pump station and its pump were operational. The sewage works had been upgraded albeit without, so Applicants allege, the necessary environmental authorizations.

[9] By the time the matter was argued in respect of the sewage issue Applicants persisted in the relief claimed relevant to contempt of court but accepted that the pump station was operational and, correctly, abandoned the relief relevant thereto insofar as this related in the original order, seeking that the First Respondent take the steps necessary to keep the pump station operational.

[10] The second issue that was addressed, being the Marselle waste dumpsite, raised the issues that this had been allegedly illegally established; that a license to conduct this dumpsite had been objected to; that the dumpsite was overfull and had no more capacity; that there was no time limit established to decommission the dumpsite; that there was an excessive volume of waste; that the dumpsite was prone to catching fire causing extensive pollution by smoke across nearby areas and a fire hazard to local residents; that the failure of First Respondent to manage, supervise and control the dumpsite caused, amongst other things, waste and plastic packets to spread and be

blown over a large area; that First Respondent had failed to identify any alternative sites for the deposit of waste at a newly created waste dumpsite.

[11] In this regard the relief sought centred around orders compelling First Respondent to take steps: to extinguish all burning at the dumpsite and control same; to confine rubbish to within the dumpsite; to take all steps necessary to collect waste within a stipulated radius of the dumpsite; together with a structural order relevant to interim and final steps to be taken by First Respondent to acquire, commission and manage a new waste disposal plan and site.

[12] The last aspect of the relief sought related to an order compelling First Respondent to comply with its statutory duty in terms of section 5 (1) (b) of the Local Government: Municipal Systems Act 32 of 2000 (The Systems Act) to answer correspondence, it being apparent from the relief sought, and the papers, that First Respondent had failed to respond to reply to correspondence from various parties addressed to it, relevant to the issues referred to above, during the period 9 November 2011 to 8 September 2014.

[13] In addition to the above Applicants sought an order directing Sixth, Seventh and Eighth Respondents to pay the costs of the application jointly and severally *de bonis propriis,* alternatively, First Respondent to pay the costs of the application.

[14] The above summary expresses the deep frustration of the Applicants which had accumulated over the years, commencing at least as long ago as 2009.

[15] In short, and after filing of all the affidavits and annexures in this matter, the following are the remaining issues between the parties for decision:

15.1 The contempt order sought arising from case 40/2009 mainly due to the alleged failure by First Respondent to comply with the order referred to above, it being common cause that there was, by the time the matter was argued, compliance;

15.2 Whether Applicants are entitled to an order "To keep the pump station fully maintained, in good working order and operational at all times";

15.3 Whether Applicants are entitled to a mandamus compelling First Respondent to furnish a report to the court of the particulars of the steps taken by First Respondent in terms of section 30 of the National Environmental Management Act 1998 in respect of each discharge of sewage into the Bushman's River from the First Respondent's conservancy tank from 1 January 2013 to the date of the report;

15.4 Whether there is authorization for the alleged continuous discharge of treated sewage into the Bushman's River;

15.5 The issues arising relevant to the closure and relocation of the Marselle waste dumpsite, it's continued use and the current management thereof, the persistent fires at the dumpsite, and whether it is appropriate and established that a structural interdict be granted in this respect;

15.6 Whether a mandamus should be issued relevant to First Respondent being compelled to answer the list of an answered correspondence referred to in the Notice of Motion.

Municipal Responsibility:

[16] The relief sought by the Applicants is founded on the fundamental right expressed in Section 24 of the Constitution of the Republic of South Africa, 1996 (The Constitution) which provides as follows:

"Everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;
(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

This is significant because it affects the approach of the court to the nature and the relief that can be granted. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) 223 (C), Moseneke DCJ at paragraph [46] of the judgment noted that in giving consideration to the principle of separation of powers, "…one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more of the fundamental rights warranted by the Bill of Rights."

[17] The Constitution places the obligation in respect of air pollution, waste water and solid waste on the First and Second Respondents. Part B of Schedules 4 and 5, provide for Municipal responsibility as follows:

PART B: of Schedule 4:

"The following local government matters to the extent set out in section 155 (6) (a) and (7):

Air pollution …
Fire-fighting services …
Water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems"

Part B of Schedule 5 provides for Municipal responsibility as follows:

"The following local government matters to the extent set out for provinces in section 155 (6) (a) and (7):

Cleansing
Control of public nuisances …
Refuse removal, refuse dumps and sold waste disposal …"

[18] Section 38 of the Constitution authorises Applicants to "… approach a competent court, alleging that a right in the Bill of Rights has been infringed, and the

court may grant appropriate relief …" The same section prescribes that "… (t)he persons who may approach a court are:

(a) anyone acting in their own interest;
(b) …
(c) …
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members"

[19] The Constitutional imperatives that direct the duties of organs of State must be read with Sections 83 and 84 of the Local Government: Municipal Structures Act 117 of 1998 (The Structures Act) which divides this responsibility between First and Second Respondents. Section 84 states as follows:

"Division of functions and powers between district and local municipalities. (1) A district municipality has the following functions and powers…

(d) Domestic waste-water and sewage disposal systems.
(e) Solid waste disposal sites, insofar as it relates to –

(i) the determination of a waste disposal strategy;
(ii) the regulation of waste disposal;
(iii) the establishment, operation and control of waste disposal sites, bulk waste transfer facilities and waste disposal facilities for more than one local municipality in the district…

(m) Promotion of local tourism for the area of the district municipality.

(n) Municipal public works relating to any of the above functions or any other functions assigned to the district municipality…"

[20] In terms of Section 83 of The Structures Act:

"(1) A municipality has the functions and powers assigned to it in terms of sections 156 and 229 of the Constitution.

(2) The functions and powers referred to in subsection (1) must be divided in the case of a district municipality and the local municipalities within the area of the district municipality, as set out in this Chapter.

(3) A district municipality must seek to achieve the integrated, sustainable and equitable social and economic development of its area as a whole by –

(a) ensuring integrated development planning for the district as a whole;
(b) promoting bulk infrastructural development and services for the district as a whole;
(c) building the capacity of local municipalities in its area to perform their functions and exercise their powers where such capacity is lacking; and
(d) promoting the equitable distribution of resources between the local municipalities in its area to ensure appropriate levels of municipal services within the area."

[21] Section 84 (2) of The Structures Act provides that: "A local municipality has the functions and powers referred to in section 83 (1), excluding those functions and powers vested in terms of subsection (1) of this section in the district municipality in whose area it falls."

[22] In the result, the Constitutional responsibility of First Respondent in this matter arises from the Bill of Rights, the provisions of section 156 of the Constitution as read with Sections 83 and 84 of the Structures Act.

[23] Solid waste is controlled in terms of a variety of Acts, Ordinances, By-laws and Regulations. In addition, the Environment Conservation Act 73 of 1989 (The EC Act) empowers the Minister of Environmental Affairs to make regulations relating specifically to the management of waste and the control of the dumping of litter. National norms and standards for the assessment of waste landfill disposal have been published in terms of the National Environmental Management: Waste Act 59 of 2008 as of 23 August 2013.

[24] In Constitutional Law of South Africa: Second Edition, Volume 2: JUTA, the following appears in the commentary on municipal services: "The provision of services by the Municipality is not merely a matter of defining competences. Rather it is an issue that defines and constitutes the very nature of this state institution. Of

all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government. Not only is the role of the Municipality that of service provider, but also, very distinctively that of developer of the community. The notion of developmental local government should therefore be the leitmotif in interpreting the constitutional mandate with regard to municipal services."

[25] A Municipal Service is defined in the Systems Act as "A service that a Municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether… fees, charges or tariffs on leave it in respect of such service or not." This suggests correctly that municipal services are primarily determined by the general powers of the Municipality as demarcated and protected in Schedules 4B and 5B of the Constitution. Not only are the services confined to what the Municipality may legally do but the activity is directed to or for the benefit of the local community. Constitutional Law of South Africa (*supra*) 22 – 67, point out that some socio-economic rights clearly intersect with Local Government competencies. It is pointed out that as these rights are limited, a limited number of municipal services can be reinforced through socio-economic rights. It states the following: "Both the… Constitution and the dicta from the Constitutional Court suggest that there is an obligation to provide basic municipal services, an obligation that is broader than the focus in the application of socio-economic rights. First, one of the objects of local government is to ensure the provision of services to communities in a sustainable manner- Constitution S152 (1) (b). Whilst this is an object and not a function obligation, the developmental duty of the municipality includes giving priority to the basic needs of the community by structuring and managing its administration and budgeting planning processes to this end. (Constitution S153(a))."

[26] The authors continue to point out that the language of the Constitution, sections139 (5) and 227(1) (a) is much clearer and to the point, both sections working on the assumption that there is a duty to provide services but that such services are limited to those that can be labelled as basic. This view, it is suggested, reflects the very purpose of the Municipality standing in the service of its community and, counter, to any notion of a Municipality being able to claim that the provision of water, electricity, refuse removal or road maintenance is a matter of discretion. The authors point out that the notion of a basic municipal service is a recurrent theme in local government legislation.

The conclusion is that both individual claims and communal claims can be made for the provision of basic service provision and that such claims are justifiable. It is finally pointed out that the Municipality's duties in relation to the realization of socio-economic rights are circumscribed by its defined areas of competence. The question is raised as to whether there is an intersection between socio--economic rights and the particular functional area of the Municipality. In this matter, in my view, the provision of waste removal and waste management thereafter at a suitable dumpsite, being a function deliverable directly to residents on a daily basis that meets the necessities of life, falls fairly and squarely within Schedules 4B and 5B referred to above, and constitutes a direct intersection between socio-economic rights as referred to above and the realization thereof falling within the Municipality's functional areas.

[27] Whilst the question of contempt of court need not traverse this issue, being a discrete inquiry as to what was ordered by the court in question in 40/2009, the issue does arise, in respect of a major portion of the remaining relief sought as to First Respondent's municipal responsibility in respect of solid waste disposal sites, such as the waste disposal site at Marselle.

[28] It seems clear to me from the above that the issues raised in this matter fall within First Respondent's discrete municipal powers and responsibilities - it is a functional area, and in addition intersects with the socio-economic rights in the Bill of Rights. This has obvious consequences for the kind of relief which may be granted and the considerations associated therewith as will be referred to later in this judgment.

[29] As I understand the legislation, whilst the District Municipality has the function and powers relating to solid waste disposal sites in respect of their establishment and operational control, that relates to those District Municipalities whose waste dumpsite services more than one Local Municipality, which is not the case in this matter. This leaves First Respondent with the Constitutionally established obligation relevant to "refuse removal, refuse dumps and solid waste disposal", and more particularly solid waste disposal sites within its jurisdiction as to their establishment, operation and

control with waste disposal facility, this including the Marselle solid waste disposal site, the subject matter of this application.

[30] It is further clear that there is otherwise a shared responsibility of powers and functions as described in the Structures Act to be exercised between the Local and District Municipality.

[31] It must also be accepted, that First Respondent, at all times in the papers relevant to this matter, accepted that it bore responsibility in respect of all the matters raised, at no time suggesting that anything that was raised, whether relating to sewage or solid waste dumpsite fell outside its jurisdiction. This must accordingly, and against the background set out above, be accepted.

The Contempt Order:

[32] The commencement of this inquiry necessitates a careful reading and understanding of the order arising from case 40/2009:

> "1. THAT the Court dispense with the forms and service prescribed by the Rules of Court and dispose of this matter as one of urgency in terms of Rule 6(12).
>
> 2. THAT the Respondent be and is hereby interdicted from allowing raw sewage to flow into the Bushman's River from its sewage to flow into the Bushman's River from its sewage conservancy tank situated on Erf 636, Riversbend, Bushman's River Mouth.
>
> 3. THAT a *mandamus* be issued compelling the Respondent to properly maintain its conservancy tank situated on Erf 636, Riversbend, Bushman's River Mouth in order to ensure that there is no spillage or overflow of sewage into the Bushman's River.
>
> 4. THAT a *mandamus* be issued compelling the Respondent to routinely clear the conservancy tank situated on Erf 636, Riversbend, and Bushman's River Mouth in order to ensure that there is no spillage or overflow of sewage from it.

5. THAT the Respondent pay the costs hereof.

6. THAT the Respondent to file a written report with the Registrar on or before 12 noon, Friday 6th February 2009, on the steps taken, and future steps to be taken, to comply with the orders made in terms of prayers 2, 3 and 4 of the Notice of Motion.

7. THAT the report is to be placed before the duty judge, in chambers, on receipt thereof by the Registrar."

[33] The contempt of court application must relate strictly to the terms of this order and the alleged non-compliance therewith, and have regard to the date of the order being 30 January 2009.

[34] As to the contravention of this order it is now common cause that the conservancy tank issues have finally been resolved. The remaining complaint concerns the delay in installing the new pump station system, and on occasions spillage from the conservancy tank pending the pump station being put in proper working order, and the continued maintenance thereof.

[35] It will be noted that order 40/2009 specifically interdicted Respondent from allowing raw sewage to flow into the Bushman's River from its sewage conservancy tank referred to; and provided further that the tank had to be properly maintained to ensure no spillage or overflow of sewage into the Bushman's River; the conservancy tank to be routinely cleared to ensure that no spillage or overflow of sewage occurred from it.

[36] As to the delay in putting the new pump system in place, First Respondent in argument points to the general nature of the order which, at paragraphs 3 and 4, went to maintenance and emptying of the existing conservancy tank, and points out that this did not of itself pertinently require a pump station to be installed. In this regard paragraph 2 of the order is in extremely general terms requiring First Respondent to prevent raw sewage from flowing into the Bushman's River from the said conservancy tank. In principle, First Respondent argues that the order itself is insufficiently detailed for one to reach the conclusion that it was necessary or required of First Respondent to

put in place a pump station relevant to the conservancy tank, and that any delay in so doing cannot therefore be in contempt of court.

[37] It must be remembered, in this regard, that the entire purpose of the order 40/2009 was to prevent the flow of sewage from the conservancy tank into the Bushman's River. In my view and having regard to the duty to report to the court as to the steps taken, and future steps to be taken to comply with the order, it is clear that the order envisages that whatever steps were necessary would be taken to prevent raw sewage flowing into the Bushman's River from the conservancy tank, incorporating the maintenance of that tank and its regular emptying. The report which followed, and which was presumably presented to a Judge in chambers, detailed very limited remedial steps mostly aimed at examining the houses and sewage reticulation connected to the conservancy tank, with the promise that the service provider would undertake this and recommend a permanent solution. This must, however, be read against the introductory portion of the report to the court which explained carefully that the conservancy tank was too small for the purpose it had originally been intended, being designed for 10 houses, at least 60 houses now being connected thereto, the report stating that "a second step towards a permanent solution will be to construct a pump house to pump on ERF636 whereby the sewage can be pumped to the Bushman's ponds".

[38] It seems to me, that the order was sufficiently wide to compel First Respondent in this matter, Respondent in the previous matter, to take all necessary steps to prevent the spillage of sewage which clearly, on its own report, included the permanent solution of constructing a pump house, and in the interim maintain and empty the tank so that there would be no overflow. It is clearly apparent, and must have been more than apparent to First Respondent, that to simply empty the conservancy tank was not an adequate and only a temporary solution, and that what would be required of the Municipality in order to comply with paragraph 2 of that order, as read with the remaining parts of the order, required expeditious provision of a permanent functional pump station.

[39] It would seem to me, that the permanent solution envisaged and referred to in the report which was prepared and filed in February 2009, bore no fruit in

respect of the construction of a pump house until 2014 some four or more years later. In contravention of the order and on occasions sewage was observed spilling over the top of the conservancy tank into the coastal wetlands that leads directly to the Bushman's River estuary a short distance away.

[40] Applicant set out that First Respondent continued to depend on the use of vacuum extraction trucks to clear the tank but applied no rigid schedule in this regard (at that time), and that the practice of First Respondent in this regard was totally inadequate and did not come close to compliance with the terms of the order more especially at peak holiday and other times.

[41] This was said to have been raised in writing with the First Respondent on 19 February 2009, but on my understanding of the letter this was rather vague, complaining of "numerous occasions" that "other sewage conservancy tanks regularly overflowed in the town", again on 6 March 2012 this complaining of the fact that despite the order the overflowing situation, as it was called, had been going on for some time and that the conservancy tank continued to overflow intermittently allowing sewage to flow into the River observed by residents. By December 2012 the problem of sewage flowing into the Bushman's River reached crisis point. Applicants argued further that raw sewage was discharged into the River on 9 December 2012. In 2012 First Respondent carried out a substantial upgrade of the Marselle sewage works expanding the pond network. Thereafter and between January 2013 and February 2013 there were written exchanges between the parties concerning what was described as the ongoing and often repeated discharge of raw foul-smelling sewage from the conservancy tank and other locations into the Bushman's River. This says Applicants only came to an end when the pump house was finally operational on a permanent basis in December 2014, it being Applicants' argument that First to Sixth and Seventh Respondents had willfully failed to comply with the order referred to above.

[42] Applicants also complain of the flow of so-called treated effluent from the Marselle sewage treatment works directly into the Bushman's River with, it is alleged, no authorization in terms of section 69 of the National Environmental Management: Integrated Coastal Management Act 24 of 2010. This is clearly

not a matter with which I can deal, as to contempt, not being the subject of the Order 40/2009.

[43] In the answering affidavits, Seventh Respondent, the Municipal Manager of First Respondent, deposes to an answering affidavit in both capacities. He denies any contempt of court, says he has no direct knowledge of the circumstances of the giving of the order 40/2009, that he was appointed Municipal Manager in September 2009 in an acting capacity and later permanently. He says the order was referred to in correspondence from at least March 2012 but says that he was at all times aware of the issues relating to the maintenance of the conservancy tank and the need to develop remedial action in that regard. Sixth Respondent was appointed Mayor of First Respondent in May 2011, the deponent saying that he cannot say whether the Mayor became directly aware of order 40/2009. Referring to the report to the court, it is accepted that the pump house was a second step towards a permanent solution and that a service provider required to be appointed to make a comprehensive assessment and recommend a permanent solution. Seventh Respondent says that First Respondent employed vacuum truck operators to empty the conservancy tank daily seven days a week with strict instructions to ensure this and that at the time First Respondent began the process of procuring funds to construct a pump house appropriate. He explains that such new projects take a considerable amount of time, the first step being to secure funding. This he said, could not be funded from the general infrastructural grant and required a specific application. He says, this without detailing when, where and how this was undertaken. He says that the Third Respondent "eventually" provided funding for the 2013/2014 year for the project. On 3 July 2013 an entity was appointed as a professional service provider to design and manage the project, a tender was advertised on 20 July 2013, at the conclusion of which the contractor was appointed. A closing out report for the tender was submitted by the Project Manager in April 2014 but the finalization was held up with a failure by the electricity provider to provide the necessary connection point. Due to this failure a generator was installed and eventually replaced by the permanent connection.

[44] Applicants contend, in reply, that this explanation is inadequate and that there is no explanation as to compliance with the order covering the period for February 2009 to 29 April 2013 beyond the very general explanation summarized above.

[45] In argument for First Respondent it was suggested that in fact there may have been spillages but that the Municipality had done its best in good faith and had not acted *mala fide*. An example is the spillage on 6 March 2012 reported to First Respondent by Ninth Respondent, whereafter it was attended to, the deponent saying that the process of emptying the conservancy tank fully and effectively failed but he cannot say why this happened. This seems to me on the face of it an insufficient response, as this ought to have been carefully investigated as being in breach of the order and documented. There were further spillages in December 2012 and September 2014 when the conservancy tank was again seen to be overfull and raw sewage was observed to be spilling into the Bushman's River estuary. This was brought to the attention of First Respondent in writing, without response. First Respondent says that it investigated this overflow, and that it appeared that the pump was not working; this being checked as a matter of urgency, the conservancy tank having overflowed due to vacuum truck operators having failed to comply with standing orders upon which disciplinary procedures were instituted. In short, First Respondent admits limited, what he calls, isolated incidents of the tank overflowing after the granting of the court order which had been overcome by regular pumping into vacuum trucks and the installation of the pump house. First Respondent alleges that it attempted to ensure that not only had the conservancy tank been pumped regularly but that regular inspections were made and when required extra vacuum trucks brought from Bathurst and Port Alfred.

[46] In my view the explanation given both in respect of the pump house and the continued leakage, which goes mostly unanswered, is indeed inadequate. There is no detail as to when, where and how steps were taken to secure the pump house funding, what delays were occasioned and why, and inadequate explanation tended in respect of the delay from February 2009 to at least March 2014, more than five years. As I have already said I consider the pump

house issue to be one sufficiently covered in the order, and accordingly there was a breach thereof. Similarly the issue of leaking sewage there being an inadequate answer in this regard. There is real merit, on a reading of the papers, in Applicants' argument that until the installation of the pump house and the time that this was rendered operational, the measures employed by First Respondent to cope with the overflow from an inadequate conservancy tank were themselves inadequate, and that this ought not to have occurred in the face of the order, and further ought to have raised the considerable urgency of the pump house urgent solution, which it seems elicited an entirely inadequate expenditure of effort and action. This is of course as appears hereafter not the end of the contempt inquiry.

[47] To succeed in an application for committal for contempt of court an Applicant has to establish the original order, knowledge of the order, non-compliance and wilfulness and *mala fides* beyond reasonable doubt. Once an Applicant has established knowledge and non-compliance, an evidential burden rests upon the Respondent to establish reasonable doubt as to the wilfulness and *mala fides*.

[48] The above forms the factual basis upon which the contempt application is argued for Applicants. The matter must be determined on Respondents' factual allegations. *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634-5; *Fakie NO v CCII Systems (PTY) Ltd* 2006 (4) SA 326 (SCA) at [55].

[49] As held in *Fakie* (*supra*) at [55] Applicants' must live with the consequences of the affidavits read for their own sake:

> "[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit a non-virtuous Respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a Respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the Applicant its order.

There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a Respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[50] At the end of the day the question is whether Applicants have shown beyond reasonable doubt that the First and Seventh Respondents' non-compliance was wilful and *mala fide*, against Respondents' evidential burden in relation thereto.

[51] On these papers and in the absence of oral evidence, the question is whether the Second Respondent's assertion as to his honest belief can be rejected on the affidavits as either "fictitious" or as demonstrably uncreditworthy? In this regard in reply the Applicants simply noted the allegation.

[52] Disobedience of a court order constitutes contempt if committed deliberately and in bad faith. This is dealt with in *Fakie* (*supra*) as follows at [10] – [12]:

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not

constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[53] At [42] the court went on to say:

"[42] 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.

(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."

[54] In this matter as the order, service, notice and non-compliance have been proved by Applicants; the question is whether Respondents have advanced evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*.

[55] It is clear from the judgment in *Meadow Glen Homeowners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 SCA [16] and following, that there is no true dichotomy between proceedings in the public interest and in proceedings in the interest of the individual, because even when the individual acts merely to secure compliance, the proceedings have an inevitable public dimension – to vindicate judicial authority. It is a matter between the court and the party who has not complied with the order of court. Put otherwise it is not merely a mechanism for the enforcement of court orders but has as its real foundation the effectiveness and legitimacy of the judicial system – as endorsed in *Meadow Glen* (*supra*) the court also acts as guardian of the public interest.

[56] The existence of the order has been established, while service of the order took place on First Respondent on 2 February 2009 by service on Howard Dredge in his capacity as Acting Manager as appears from the Sheriff's return of service. It seems clear that service notice and non-compliance have been proved by Applicant, the question is whether the particular Respondents beyond First Respondent became subject to that order in the first place. It is clear that there is no basis in our law for orders for contempt of court to be made against officials of public bodies nominated or deployed for that purpose, who were not themselves, personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings. *Meadow Glen Homeowners Association* (*supra*) [20]. Whilst there was clearly service upon the First Respondent, Seventh Respondent was appointed as Municipal Manager in September 2009 as pointed out above, he said he cannot say when and how he became aware of the court order. He says it was referred to in correspondence from March 2012 but that he was aware of the issues relating to the maintenance of the conservancy tank and the need to develop remedial action, he failing to set out how this came to his attention in what context and whether this was as a result of the court order. In my view this should be dealt with much more fully by Respondent certainly relevant to wilfulness. Sixth Respondent was appointed as Mayor of First Respondent in May 2011, there being a supporting affidavit which confirms the contents of the main deponent, the Municipal Manager,

making it clear that Sixth Respondent is still the Executive Mayor of First Respondent. There is not a word by Six Respondent as to his state of knowledge relevant to the court order or the entire matter.

[57] As pointed out above there is no basis for orders for contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, not themselves personally responsible for the wilful default in complying with the court order that lies at the heart of contempt proceedings. It was stated in *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 SCA [30] that there is "... 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 willfully 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."

[58] As was pointed out in *Meadow Glen* (*supra*) from the statutory provisions relating to Municipalities it is clear that the Municipal Manager is, insofar as the officials of the Municipality are concerned, the responsible person whose duty is to oversee and implement court orders against the Municipality. The Municipal Manager would know, it was said, 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 his/her duties. The court held that the Municipal Manager is the official who is responsible for the overall administration of the Municipality and the logical person to be held responsible. This is so even if he delegates the tasks flowing from a court order to others.

[59] As conceded (correctly) in argument, First Respondent admits to knowledge of the order, although attempting to shift the probable date of such knowledge forward beyond his appointment as Municipal Manager (and Acting Municipal Manager) to early 2012, but conceding that he was at all times aware of the issues relating to the maintenance of the conservancy tank the need for immediate action.

[60] The Sixth Respondent, as the Executive Mayor, simply does not deal with this and in argument it is said that Sixth Respondent is "equivocal on this point". I agree however the mere fact that Sixth Respondent is the Executive Mayor does not fix him with knowledge of the court order this resting within the responsibility of the Municipal Manager.

[61] It seems to me, to follow from the above analysis, that both as representative of the Municipality, and as separately cited, the responsibility for carrying out the court order in this matter vested in Seventh Respondent from the date of his appointment as Acting Municipal Manager in September 2009.

[62] There is more than sufficient on the affidavits in this matter sensibly viewed, to establish the requirement of notice and knowledge in the hands of First and Seventh Respondents from that date.

[63] The question which follows is whether or not there was a breach of the order against the facts more fully set out above.

[64] In respect of the analysis of the court order, and the Municipality's acceptance (correctly) that this included the need for a permanent solution, not to mention the need in the interim to empty the conservancy tank so that it did not overflow, or find some other alternative, my distinct impression is that he, and the municipal officials, were less than diligent in seeking to comply with the order. The answering affidavits avoid furnishing any real detail in this regard, as pointed out above, this leading to the conclusion that the Municipality failed to exert any vigour to secure compliance. The solution was not particularly difficult to accomplish either in the short or long-term, and the failure to do so, and to appreciate that this was an extremely serious issue which required constant attention and monitoring, let alone a speedy remedy in the form of a permanent solution, cannot be gainsaid. This occurred predominantly within the Seventh Respondent's period of office. I should mention, that I did not find counsel's argument to have merit that the correspondence attached demonstrated by any means that First Respondent had proceeded with sufficient speed and vigour (on the contrary) relevant to the establishing of the pump house.

[65] I should add that in the event of First and Seventh Respondents finding that in the face of the order referred to above, they simply could not comply with the relevant obligations, or were not able to do so timeously, they were entitled to, and should have, approached the above Honourable court to explain this and seek a variation thereof. They did not do so, and no explanation is tendered therefore.

[66] The final question is whether there is sufficient to hold Seventh Respondent in wilful non-compliance with the provisions of the order warranting his imprisonment.

[67] In this regard, there is no real attempt beyond the short and in my view inadequate explanation put up by First Respondent to justify what happened. I have dealt with this factually above, and reach the conclusion that this failure has been demonstrated beyond reasonable doubt to have been, in the context of these papers, wilfull and *mala fide*. This of course relates only to Seventh Respondent and not to Sixth Respondent.

[68] In *Lan v OR Tambo International Airport Department Of Home Affairs Immigration Admissions and Another* 2011 (3) SA 641 (GNP) the following appears at [70] and following:

> "[70] It appears from, inter alia, *Fakie NO v CII Systems (Pty) Ltd* that a private litigant, who has obtained a court order requiring an opponent to do or not do something, may approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court and imposing the sanction. It appears to me that a purpose of the sanction is aimed at inducing compliance with the court order.
>
> [71] However, the question arises whether a court can simply ignore the fact that a person, for a specific period of time, acted in contempt of a court order, and then, thereafter, through much force and persuasion, changed his mind to then comply with the court order. Should such a person be regarded as not having committed the offence, should a court order be sought against him in that regard? I do not think so. Once the A requirements of the offence have been established to have existed at a certain period in time, and once it is found that no valid defence has been raised in that regard, a positive finding should follow.

[72] It must be kept in mind that contempt of court proceedings are not only directed towards the perpetrator, but are directed towards the protection of the courts, respect towards the courts and court orders, and the protection of the integrity of the court system. Non-compliance at a specific period in time cannot therefore simply be ignored because compliance did in fact occur at a later stage.

[73] Regarding the procedure followed, I must point out that all those concerned were given the opportunity to file whatever papers they wanted, in the exercise of their right to give reasons why they should not be found guilty of contempt of court. They knew exactly what the allegations were that were levied against them, as these were set out in the application for committal. There is therefore, in my view, no question of anyone not having had proper knowledge of the complaints against him, nor has anyone not been given a fair and reasonable opportunity to explain himself.

[74] Opposed to the foregoing, there are decisions in the Natal Provincial Division, namely *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others*, followed by *Naidu and Others v Naidoo and Another*, where the courts came to the conclusion that a litigant has no locus standi to seek an order for contempt arising out of a breach of an order obtained, in a proceeding where the punishment is not calculated to cause compliance with the order, but is brought at a later stage, after compliance had been attained.

[75] I am, however, of the view that non-compliance with a court order, at a specific, given period in time, constituting an offence that has been committed at that time, cannot or should not be ignored by a court simply because of the fact that there was at a later stage compliance with the court order. That renders the remedy only applicable to a situation where a person has refused, and continues to refuse, or failed and continues to fail to obey a court order, and the court is requested to strengthen its court order by way of a threat of a guilty finding of contempt, and a suitable order ensuring compliance.

[76] Such a procedure may lend itself to the eventual enforcement of court orders, but there seems to be no element of protection of the integrity of the courts and the enforcement of respect towards the courts, and court orders. I respectfully, therefore, differ from the approach in the Natal Provincial Division referred to above, and I come to the conclusion that, once a party to any proceedings has shown that there was at

any given time non-compliance with a court order, that was wilful and mala fide, a finding of contempt of court can be made, although that non-compliance was remedied. Obviously, later compliance with a court order will have a substantial effect on the penalty flowing from such a finding. It should, however, not preclude the granting of such an order, should it be requested, and be appropriate in the circumstances.

[77] In the O R Tambo matter an order was requested and asked for, that Mr Mogale, Mr Kgoale and Mr MacKay be found guilty of contempt of court. I have already given my reasons why the first two mentioned persons should not be found guilty of contempt of court. However, in the case of Mr MacKay, I am of the view that his approach to the original court order, and also the second order issued by me during the course of the Saturday, showed a clear and unarguable disdain and disrespect towards the courts. There was a wilful and mala fide disregard of this court's orders. I therefore come to the conclusion that the application should succeed in respect of Mr MacKay, but that the later compliance with my two court orders justifies a sanction of a warning only."

[69] In Matjhabeng Local Municipality v Eskom Holdings Soc Ltd and Others, Case No.: 9242013, Daffue J held that:

"[29] A municipality is under a constitutional duty to comply with court orders and to lead by example. Upon non-compliance of a court order, complaints of contempt may be proceeded with against the functionaries of the Municipality responsible for ensuring compliance with the order. See **Mchunu v Executive Mayor, Ethekwini Municipality** 2013 (1) SA 555 KZD at 560I – 561B and 561F – 562B and 563D – E and **Meadow Glen Home Owners Association** *loc cit* at para [32] where a municipality's obligations and that of its staff members, inter alia to serve the public interest, is referred to.

[30] The Supreme Court of Appeal made it clear in **Meadow Glen Home Owners Association** *loc cit* at para [3] that in a country based on the rule of law it cannot be countenanced, particularly when it involves an organ of state at the third tier of government, that court orders are not complied with.

[31] The following is stated at para [8] of **Meadow Glen Home Owners Association**:

"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. …, it was not appropriate for the Municipality to wait until the appellants came to court complaining of non-compliance in contempt proceeding. 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."

[32] The court continued at Para [16] and further, relying on the judgment in Fakie NO loc cit, that although some punitive element is involved in contempt of court proceedings, the main objectives thereof are to vindicate the authority of the court and to cause litigants into complying with court orders.

[33] Plasket AJ (as he then was) pointed out in **Victoria Park Ratepayers' Association v Greyvenouw CC** [2004] 3 ALL SA 623 SE at paras [19] and [23] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government and that there is a public interest element in every contempt committal. Viewed in the constitution context, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the high 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. These dicta were referred to with approval in **Meadow Glen Home Owners Association** *loc cit* at Para [18].

[34] The Supreme Court of Appeal eventually concluded in **Meadow Glen Home Owners Association** *loc cit* at Para [35] as follows:

"…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."

With reference to **Brown v Board of Education**, a United States of America case, the SCA concluded:

"Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders."

Again, I do not understand the judgment to say that it will never be appropriate to make use of contempt of court procedure to deal with recalcitrant public servants. In fact, the SCA endorsed the *dictum* of Nugent JA in **MEC, Department of Welfare, Eastern Cape v Kate** 2006 (4) SA 478 (SCA) Para [30] 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."

[35] The municipal manager, including the acting municipal manager, of a municipality is the accounting officer of the municipality. His responsibilities are tabulated in section 55 of the Local Government: Municipal Systems Act 32 of 2000. As such he is inter alia responsible and accountable for all income and expenditure of the municipality, all assets and the discharge of all liability of the municipality and the proper and diligent compliance with the Municipal Finance Management Act. See section 55(2) of the Systems Act and also section 82 of the Local Government: Municipal Structures Act, 117 of 1998. In **Mogale City Municipality v Fidelity Security Services (Pty) Ltd** 572/2013 [2014] ZASCA 172 (19 November 2014) the SCA quoted with approval the following warning expressed by that court in **Gauteng Gambling Board and Another v MEC for Economic development, Gauteng** 2013 (5) SA 24 SCA at Para 54: "It is time for courts to seriously consider holding officials who behave in a high-handed manner described above, personally liable for costs incurred. This might have a sobering effect on truant public office bearers." In my view this is a clear indication of the frequency of not too dissimilar incidents across the country and the SCA's disapproval of such behaviour.

[36] …

[37] I agree with the sentiments expressed in **Laubscher v Laubscher** 2004 (4) SA 350 (T) at Para [25] that if the judiciary cannot function properly, the rule of law must die. In order to prevent this, special safeguards have been in existence for many years, one of them being civil contempt of court."

I refer also to the article by Plasket J "*Protecting the public purse – appropriate relief and costs orders against officials*" – 2000 SALJ 151

[70] In this matter, I am constrained to agree completely with the above, and in the circumstances as set out above, and accepting that the issue relevant to the conservancy tank and the pump station have now been remedied, nevertheless agree that the First Respondent, and thereby Seventh Respondent were in contempt of court for a considerable period, to the extent set out above, this in the circumstances of the matter warranting a finding accordingly with the sanction of a warning only, and a duty to report to the court as to what steps have been taken, will be taken and are in place or will be put in place to ensure the continued maintenance and operation of the pump station. The latter issue is in my view, sufficiently established in the papers against First Respondent's serial failure to comply with its obligations on many occasions, and its failure to respond to relevant correspondence in respect thereof.

[71] Finally in argument Mr Paterson, in an attempt to avoid the above argued that the original order had been given in favour of Ninth Respondent in this matter and that this being the case, and as Applicants did not obtain the original order, and were not involved in that matter they do not have standing to seek a contempt order in the public interest, based thereon. In my view, this submission has no merit. It is clear from what I have set out above, and the authorities referred to, that contempt of court is not an issue *inter partes* but between the court and the party who has not complied with a mandatory order of court. As was pointed out by Plasket J in *Victoria Park Ratepayers* (*supra*) there is a public interest element in every contempt committal as the issue of contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of Government. The court is not dealing only with the individual interest or the frustrated successful litigant but also, as importantly, as guardian of the public interest. It would, in my view, be absurd to suggest that in a matter such as this in which the original order was given very much in the public interest and in that of the residents surrounding, to suggest that they do not have *locus standi* to bring the proceedings in contempt matters such as this. In addition to this, in this matter, the original litigant which obtaining the order, Ninth Respondent, whilst cited as a Respondent, not only did not enter appearance to defend, but

would have clearly supported Applicants' contentions given the history of the matter.

[72] In the circumstances, an order is issued in the terms set out at the end of this judgment, First and Seventh Respondents being found in contempt. The remaining issue in this regard is the question of costs, relevant thereto, which Applicants' suggest should *de bonis propriis* be paid, amongst others, by Seventh Respondent, not only in respect of the contempt application but in respect of the entire matter. I will return hereto in due course.

[73] In so far as prayer 3.2 is concerned I am satisfied that Applicants have established a claim for relief in a lesser form as appearing in the order.

The Marselle Waste Dump Issue:

[74] In this regard Applicants contend that: the dumpsite is illegal having been established without compliance with any statutory formalities and in respect of the method of construction; that applications were made in the early part of 2014 of its intention to apply to license the dumpsite; that objections were presented, the application being abandoned and notice being given later, (and approved) for the closure of the dumpsite; that the dumpsite is over full with no more capacity; that the dumpsite will only be closed over the next several years; that the dumpsite is often subject to extensive fire and air pollution with acrid and toxic smoke drifting across the nearby areas posing a fire risk; that First Respondent fails and has done so for a considerable period of time to manage, supervise and control the dumpsite with waste and plastic packets blowing over a large area; that it has failed to identify any alternative sites.

[75] The answering affidavit is very short and deals essentially with the prayers sought in this regard, in summary setting out:

75.1 That the dumpsite was established long ago and has for a long time been operated beyond the terms originally provided for, this now falling under the National Environmental Management: Waste Act 59 of 2008 section 43 (1) providing that the Minister is the licensing authority and

that the license is required for the establishment, operation, cessation or decommissioning of waste facility;

75.2 That well before the complaints of the Applicants, First Respondent was fully aware of the compromised status of the dumpsite, that an integrated waste management plan was drawn up in 2007 estimating that the dumpsite had a capacity of only a further 3 to 4 years i.e. 2010/2011; that the management plan (2007) recommended that First Respondent obtain a short-term operational license for that dumpsite , whilst First Respondent identified and obtained a new site, First Respondent stating through Seventh Respondent that it was not sure why that plan was not acted upon at the time – with no explanation;

75.3 That "more recently" (no detail being given) First Respondent had made application for funding for the funds to commission a further report whereupon IKAMVA was appointed in early 2014 to investigate and make application for a waste management license for the dumpsite;

75.4 That IKAMVA investigated the matter from 14 January 2014 to May 2014 presenting its findings in June 2014 and its final report very recently;

75.5 That the report reports "support many of the complaints of Applicants'" and that there has been, and to some extent will continue to be "a problem"; that the report sets out that the present dumpsite cannot be licensed for its present usage, a license is required to decommission the site, and that the process of establishing an alternative site will not be easy or quick;

75.6 That as a result of the report a decommissioning license was applied for (and granted in March 2015), that the present dumpsite should become a transfer site, and that temporary policies include that the staff at the site have been instructed to report any recurrence of fire;

75.7 That water trucks are constantly available to put water on parts of the dump which threatened to reignite;

75.8 That the fire engines come from Port Alfred (20 km away);

75.9 That attempts (unspecified) are being made to regularize the informal pickers at the dumpsite by drawing them into recycling programs;

75.10 That an *ad hoc* program has been started to casual labour to deal with plastic packets and other rubbish which blow away from the site;

75.11 That it has never been a policy of First Respondent to burn rubbish at the dump although fires erupt from time to time as the dump is "internally smouldering" and that it is not possible to put this out as the ambient heat together with the wind causes the smouldering to break out into fires;

75.12 That water trucks stand by to attend to this and there is no other facility to do this kind of work;

75.13 That there are fences at the dump but high winds make it impossible to prevent some of the plastic from escaping and it is not possible to take any further effective methods to prevent this (no detail being given as to why this is so);

75.14 That there is no funding for the renewal of fencing which was renewed in 2011;

75.15 That the final basic assessment report (October 2014) advised that further steps should be taken in relation to fencing at the dumpsite which "still needs to be reported to First Respondent's council so that action can be taken on the recommendation" – there being no further detail in this regard or explanation as to why this has not yet been reported;

75.16 That it appreciates the waste disposal problem and has commission consultants and "begun the process of identifying alternatives", that it has submitted an application to the department relating to the decommissioning of the site (since granted), but that "It is not possible at this point in time to develop the plans further because every new plan involves money which requires to be budgeted for and obtained from the relevant national or provincial budget. These policy issues lie outside the control of the courts and orders by the court in this regard would only produce further problems";

75.17 That it is not possible to presently stop the use of the dumpsite there being no alternative available;

75.18 That unplanned cessation of dumping will cause immense dislocation to waste disposal and that First Respondent simply does not have the trucks required to transport waste from the area to other sites which would be at enormous cost.

[76] In due course Applicant replied to this as follows:

76.1 That the extent of the problem had been well known to First Respondent since at least 2007, it being manifestly obvious that it had taken no meaningful steps to address the problem;

76.2 That only in 2014 was there a suggestion that the dumpsite be closed despite the many years of problems and the failure to seek meaningful alternatives, this is especially in the light of the fact that First Respondent knew already in 2007 that the site had a very limited lifespan and yet did nothing;

76.3 That there are no fire engines on standby to fight fires on the contrary; that it is common cause that there is no recycling process in place;

76.4 That there has been an utter failure by First Respondent to carry out its duties in this regard;

76.5 That it is not acceptable for First Respondent to simply say that it is not possible to take any further effective steps to prevent the dissemination of plastic and has no funds for renewed fencing;

76.6 That it was not acceptable that this fact still needed to be reported to council;

76.7 That the First Respondent's allegations are vague and devoid of substance and logic;

76.8 That there is no plan for an alternative solution in place or details of what is being done in this regard;

76.9 That it is not understood how the dumpsite can still be operational for a further two years as it has reached capacity.

[77] In argument, Applicant stepped back from the suggestion that First Respondent was deliberately burning rubbish at the rubbish site, and emphasized that this was a spontaneous combustion problem due to overloading at the site, the failure in all probability to build and manage this as it should have been managed, let alone covered it with sand from time to time.

[78] It was argued for First Respondent that in respect of plastic escaping from the site, budgetary issues play a role. In respect of the structural interdict sought it was argued that there should be no infringement of the separation of powers and that the Applicants had failed to make out a case that the First Respondent has failed to and does not intend to fulfil its duties; that the rights involved in the matter do not demand such interference by this court; that the order is an inappropriate means of achieving the fulfilment of the rights infringed.

[79] In support of this argument it was suggested that First Respondent was aware of the difficulties associated with the dumpsite, had applied and been granted a decommissioning license, and had consultants working in relation to the identification of the new site and was also applying for the necessary funding;

that the discomfort was from debris and smoke and was not life-threatening and that what was being done to contain the fires was adequate. Finally it was argued that this court was not in a position to monitor the complex process of compliance which required to take place within the complex world of municipal funding and should not enter into that arena.

[80] In a supplementary affidavit First Respondent draws attention to the fact that the decommissioning license for the dumpsite was granted on 16 March 2015 a copy thereof being annexed. This license approves the decommissioning with associated infrastructure and orders /authorizes the rehabilitation of the area subject to various conditions and provides that waste already on the site must not be allowed to burn, and that suitable measures must be implemented to prevent fires that may arise on the site. It requires a public participation process which First Respondent said would be attended to, but has not as at 28 August 2015 commenced to do so as First Respondent was seeking details from the Department of Environmental Affairs as to how to proceed. The license referred to, states that construction and rehabilitation activities may not commence within 20 days of the date of signature of the license; and that after 20 days had expired in respect of the appeal, referred to in the notice, a written notice must be given to the department that the activity would commence. It provided that the activity "must commence within a period of three years from the date of issue. If commencement does not occur within that, the validity of the license lapses and a new application must be undertaken".

[81] First Respondent states that the commencement of the decommissioning should take place within the three years towards which First Respondent has identified the steps that will be required in the budget relating to the decommissioning that has been prepared for the 2015/2016 budget.

[82] In a supplementary reply Applicants point out that it is unsatisfactory that the public participation process had not yet commenced and points out that since the institution of proceedings there had been several fires at the dumpsite (this is uncontested). It points out that the current state of affairs is absolutely unacceptable at the dumpsite and that it appears that the Municipality is comfortable with the prospect that the decommissioning work may commence within three years, not giving any indication of when this would be, or how

long it would take. Applicants justifiably point out that this would seem to indicate , without doubt, that the over utilized dumpsite will continue to be overloaded, mis-managed, unfenced, continued burning, and contribute to ongoing environmental pollution for several years hence. It is pointed out that there is a difference between cessation of use and closure which entails rehabilitation. It argues that the overfull dumpsite should not be utilized at all pending closure and rehabilitation. It points out that no details have been given of the budget application and that this is no more than window dressing.

[83] A further affidavit was filed in late January 2016, by Applicants, in which the deponent pointed out that on 23 November 2015 the dumpsite had been locked and closed having reached a point of being overfull and unable to accept any for the dumping. The next day a bulldozer was seen working at the dumpsite pushing rubbish back to form a high amount to create capacity and it was reopened. On 1 December 2015 the dumpsite was on fire which continued to burn on a daily basis through the Christmas holiday, and only came to be extinguished when rain fell on 7 January 2016.

[84] It was pointed out that on 30 December 2015 First Respondent's sewage vacuum extraction truck 505 was seen dumping sewage into an open water course near the wastewater treatment works and that this happened at least on four occasions during that day.

[85] The First Respondent's reply expands on the decisions taken by First Respondent in relation to decommissioning, which sets out that it had been decided to move volumes of the landfill from the dumpsite to the landfill site in Port Alfred, tenders had been awarded, this process being a prelude to the actual decommissioning as more landfill was being removed and deposited. That a trip had been made by an authorized official to another Municipality to observe the process of decommissioning, being assisted by outside consultant, it was said that First Respondent would in all likelihood not be able to obtain finances for the decommissioning, to be done by an outside consultant and would have to do the task itself. It is set out that the decommissioning has to take place simultaneously with the establishment and licensing of an alternative site, and that it was necessary to find a new site within the vicinity of Bushman's River mouth. The deponent states that he had

made contact with the owner of the land adjacent to the present site and was to have a meeting to negotiate the possibility of acquiring land for this purpose. I note that this affidavit is dated 20 April 2016, which indicates, it would seem, that up until that date no steps have been taken to seriously identify an alternative site, notwithstanding the fact that First Respondent had been aware from 2007, that this would be required by at least 2011. This is, to say the least, astonishing, and is again a clear indication that First Respondent has been less than diligent in its attention to the difficulties which have been apparent for many years in respect of the dumpsite and it seems once again that no vigour, to put it mildly, has been exerted to secure an alternative site or to deal adequately with the problem that was clearly foreseeable and warned against many years ago, and which caused and continues to cause considerable risk, discomfort, nuisance and frustration to the surrounding residents.

[86] To make this even worse it is said that if the negotiations are not fruitful First Respondent has various "parcels of land in the vicinity" which it had been intending to sell. It is said that one of these pieces of land "will be identified" and the process for applying for the necessary licenses to establish a new site will commence. It is said that this process should be underway by mid 2016 which would, the deponent says, give First Respondent sufficient time to acquire the necessary license and commission the new site during 2018.

[87] Put otherwise, it would seem clear that First Respondent has, since being aware of the problem in 2007, done almost nothing to achieve the commissioning of a new dumpsite, which was anticipated would be required at latest 2011. It has not even taken the first steps in identifying that site save to refer to the neighbouring property and intended negotiations with an intended identification of alternative municipal land. That this process will take approximately two years indicates that if this had been commenced in 2009 the problem would in all probability not have arisen. It is alleged that First Respondent has submitted a business plan to the relevant department for an amount of R2 600 000.00 for the 2016/2017 financial year to procure further funding for access control and site management of all landfill sites

including this dumpsite, there being no detail as to what portion thereof will be available relevant to this matter.

[88] It is clear from this affidavit that there is no dispute as to the continued burning of the dump. On my reading of the First Respondent's affidavits, there is no convincing or sensible explanation of this complete failure by the First Respondent of its duties to the residents of the surrounding areas.

[89] In argument it was conceded by First Respondent that the fires referred to occurred on 1 December 2015 and 18 January 2016, the issue being the extent of First Respondent's response. Respondent contends that there have been seven incidents of fire at the rubbish dump between 1 December 2015 and 18 January 2016 (this admission illustrating Applicants' complaints). First Respondent says that it dispatched fire-fighters to extinguish the fires on each occasion. First Respondent concedes that the dump was closed on 23 November 2015 and that a bulldozer was present saying this was routine, referring to the remaining contentions by First Respondent summarized above. As to the dumping of sewage by truck 505 this is denied.

[90] As was pointed out in *Meadow Glenn* (*supra*) the Municipality is obliged to respond to people's needs and encourage the public to participate in policymaking and the administration must be accountable. The municipal staff are public servants as described in Schedule2 of the Systems Act dealing with the code of conduct for municipal staff members requiring a staff member to foster a culture of commitment to serving the public and a collective sense of responsibility for performance in terms of standards and targets promoting and seeking to implement the basic values and principles of public administration described in section 195 (1) of the Constitution.

[91] In argument counsel for First Respondent , whilst pointing out certain factual issues and sequences on the papers, adopted a technical approach to the relief sought in some instances, and in others simply contesting the appropriateness of the relief as set out in the Notice of Motion.

[92] An examination of the National Norms and Standards for the Storage of Waste discloses that a waste storage facility of this nature must meet certain

standards and criteria and must be free from odour or omissions at levels likely to cause annoyance. It must be operated within its design capacity amongst other things. Applicants point out that these requirements are breached in every respect as appears already above.

[93] Applicants argue that the First Respondent has manifestly failed to execute its responsibilities. It does not seem to me, that it is necessary to traverse the separation of powers argument raised by First Respondent in any detail having regard to what I have set out above, and the fact that this matter involves First Respondent's failure to carry out its statutory and constitutional duties, and the order that I propose to make, does not seem to me, to straighten the separation of powers in any way. The order that I propose to give in this matter, against the background of the intersection between the socio-economic rights and the particular functional areas of the Municipality, goes towards ensuring that the First Respondent provides the basic services within its area of jurisdiction relating to waste management and in no way, infringe the separation of powers in any objectionable way.

Structural Interdicts:

[94] A question raised in argument correspondence was whether a structural interdict such as is sort by Applicant is appropriate.

[95] In *LAWSA* volume 4: Para 59, it is pointed out that apart from mandatory interdicts which direct the repository of power to act in a particular way, and prohibitory interdicts, which prohibit the repository of power from acting in a particular way, the Constitutional Court has also held that a structural interdict may be an appropriate remedy when a breach of the Constitution has been alleged and proven.

[96] As its name suggests, a structural interdict is one in which the violator is instructed to take steps to comply with its constitutional obligations and then report back to the court on the extent to which it has complied with the court's order. It thus involves the continued participation of the court in the implementation of its orders.

[97] The Constitutional Court has shown itself willing to grant structural interdicts, in appropriate circumstances and in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC), the court stated that a remedy in the form of a structural interdict or supervisory order may be very useful. This is because, the court stated further, it advances constitutional justice by ensuring that the parties themselves become part of the solution.

[98] A structural interdict consists of five elements. First, the court declares the respects in which the violator's conduct falls short of its constitutional obligations; second, the court orders the violator to comply with its constitutional obligations; third, the court orders the violator to produce a report within a specified period of time setting out the steps it has taken; fourth, the Applicant is afforded an opportunity to respond to the report; and finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court. See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 8 BCLR 837 (CC) pars 67 70; *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) pars 101–114 124–133; *Pheko v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of SA as Amicus Curiae)* 2012 4 BCLR 388 (CC) par 50. 2010 3 BCLR 177 (CC) Par 97.

[99] And in *LAWSA* Volume 10 (1) the following appears: A court

> "May grant appropriate relief, including a declaration of rights", when a right in the Bill of Rights has been breached. This relief is typically invoked when government "policy" is inconsistent with the Constitution. Structural interdicts are particularly suited to remedying systemic failures or inadequate compliance with constitutional duties. The purpose of a structural interdict is to compel an organ of state to perform its constitutional duties and to report from time to time on its progress in so doing. This order involves requiring an organ of state to revise an existing policy and to submit the revised policy to the court to enable the court to satisfy itself that the policy is consistent with the Constitution."

[100] In *Fose v Minister of Safety & Security* 1997 7 BCLR 851 (CC); 1997 3 SA 786 (CC) par 100, Kriegler J stated: "There is no reason, at the

outset, to imagine that any remedy is excluded. Provided the remedy serves to vindicate the Constitution and deter its future infringement, it may be 'appropriate relief".

[101] The Constitutional Court held that: "Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights".

Prayer 6:

[102] I am satisfied from what has gone before that the relief referred to in respect to the entitlement to compel the relief in prayer 6 in relation to the Marselle sewage works is not established on these papers, inasmuch as amongst other difficulties faced by Applicants in this regard, I am not satisfied that they have established *locus standi* to raise the point at all. It does not seem to me that in specific regard to environmental authorization in terms of section 24G of the National Environmental Management Act, 1998, the facts disclosed in this matter entitle Applicants to the relief sought. Applicant did not first exhaust their domestic remedies, as argued for First Respondent, (put otherwise that before a member of the public may invoke statutory remedies in order to prevent injury to his personal property, all other remedies are first required to be exhausted). The above-mentioned Act sets out carefully the specialist nature of the inquiry required and the powers given to inspectors, and it seems to me that on the relevant authorities, that if First Respondent failed to act in accordance with its statutory duty in respect of the licensing of the extended sewage works, or environmental authorizations, the relevant official could in terms of the said Act have been compelled by Applicants to take the necessary steps to sanction First Respondent or compel it to do the necessary.

[103] Applicants have not demonstrated that they are suffering damage by reason of the operation of the upgrade of the sewage works without the appropriate environmental authorizations, or that they have in this matter, as a ratepayer, such entitlement. *Patz v Green* 1907 TS 427; *Roodeport Maraisburg Town Council v Eastern Properties (PTY) LTD* 1933 AD 87. In addition, as to the second possible basis, Applicants representing ratepayers, I do not consider that the mere fact that some municipal funds were spent in managing and operating a waste disposal site can afford Applicant in an entitlement to interdict what they regarded as an illegality.

Prayers 7 to 12:

[104] In respect of the relief sought in paragraphs 7 to 12 of the Notice of Motion I comment as follows.

[105] The relief referred to in prayers 9 and 12 is not appropriate in the context of the relief which I intend to give in respect of 7, 8, 10 and 11. In my view, the relief sought in this regard, is aimed at, and relevant to, addressing the immediate difficulties in respect of the waste dumpsite. I will deal with this at the appropriate place in this judgment in respect of the Marselle waste dump site as is referred to in the order as granted, an entitlement to which is more than sufficiently established, from what has gone before. In essence this relates to the burning of the waste dump issue, the need to clean up plastic and other waste outside the dump within a particular radius; the need to take steps as are required to see to it that the rubbish and packets and other plastic generally is retained within the confines of the waste dumpsite. This is all relief, which falls properly, in my view to be dealt with by way of a mandamus, and is a breach by First Respondent in respect of its constitutional obligations as discussed above. The First Respondent has failed sufficiently to deal with these issues and Applicants have established all the elements of the relief sought as set out belows.

Prayer 13:

[106] As this creates the need to address these issues in a structured form, at the appropriate place in this judgment it is necessary to declare the respects in which First Respondent's conduct falls short of its constitutional obligations; secondly, an order that First Respondent comply therewith; thirdly that the First Respondent produce a report to be filed with the court and Applicants, setting out the steps it has taken in this regard, and the further steps it intends to take with the timeline relevant thereto, this timeline to be an expedited response affording the interim relief required as set out in the order; the Applicant to be afforded an opportunity to respond thereto; , the matter is to be enrolled for hearing and, if the report is satisfactory, this to be made an order of court, alternatively the court to make such order as it deems fit having considered the report, the response thereto and the submissions and argument made at the hearing, relevant thereto, and which is to be on a date when I am available to hear the matter accordingly, and finally, that continued reports be made at regular intervals to the court as to the progress that has been made against the timeline stipulated. The structure of this order, is not only required as a matter of usual form and practice but will also afford both Applicants and First Respondent an opportunity of commenting on the form of the order and the time limits that they consider should be applicable thereto. At the earlier hearing, I suggested, during argument that such an opportunity may well require to be afforded the parties in this regard in any event.

[107] In respect of the relief sought in paragraph 13 of the Notice of Motion , on what has gone before, I am satisfied that a good and proper case has been made out for the relief sought adjusted as this appears in the order below as a structural/supervisory interdict.

The Correspondence Relief (Prayers 14 – 16) and the Relief Sought in Prayers 4 and 5:

[108] In this regard, as I have already partially set out above, Applicants seek that the First Respondent be compelled to furnish relevant to the various letters addressed to the First Respondent which remain unanswered, and to be compelled to furnish this court with particulars of the steps taken by First

Respondent in respect of each and every fire at the Marselle dumpsite from 9 November 2011 to 23 August 2014, a list of 40 occasions. It seems to me, that the events have long overtaken the efficacy of making any order in these terms at all, and when put to Applicants' attorney, in argument; he was hard-pressed to make any compelling response in this regard. He was also unable to point to any of the correspondence which still related to a live issue between the parties. It seems to me further that the relief sought in prayers 4 and 5 has not been established alternatively has no purpose.

[109] In the result, I propose to dismiss the relief referred to in paragraphs 14 to 16 of the Notice of Motion.

[110] It would, however, be highly remiss were I not to state clearly that the First Respondent's failure to respond to correspondence in many instances (although not every instance, several of the letters being extravagant), constituted an egregious dereliction of the First Respondent's duty to reply to correspondence which required a reply.

[111] In my view, however, this aspect of the matter can be dealt with by way of a costs order, such order indicating that whilst relief at this stage is not afforded in this respect, this in no way indicates that the relief was not initially properly sought, and demonstrating this court's displeasure at the persistent failure of the First Respondent in this regard, in the face of live, urgent issues relevant to many of the aspects referred to above, most of which were serious matters relating to sewage and the relevant waste dump and the consequences of this being a considerable nuisance, and inappropriate in the extreme, with potential serious hazard to both property and health.

Costs:

[112] An order for costs *de bonis propriis* is unusual and applies only to a person who litigates in a representative capacity. There must be good reasons for such an order such as improper or unreasonable conduct or lack of *bona*

fides. It is suggested that the rational for such an order is a material departure from the responsibility of office. In respect of municipal and government officials, they may be ordered to pay such costs under limited circumstances particularly where the actions were unlawful or where this causes the litigation and the costs in respect thereof. This also applies to unreasonable, reckless or dishonest conduct. See Plasket: *Protecting the public purse* (*supra*) .

[113] In my view, in this matter, there is only one part of the application relief sought which warrants serious consideration of the granting of such order. This relates, in my view, to the contempt application, and in the manner in which First Respondent, guided by Seventh Respondent acted or failed to act. That is Seventh Respondent has escaped with a warning, in this regard, is due only to the passing of time, and it seems to me, that First Respondent and Seventh Respondent personally should be jointly and severally liable for the costs occasioned only in relation to the relief given relevant to paragraphs 1 and 2 of the Notice of Motion.

[114] I, however, wish to make it clear, that I consider Applicants to have been substantially successful in respect of the entire matter, and in that event, First Respondent must be found to be liable for the Applicants' costs in this regard. Indeed, First Respondent's counsel accepted in argument (and correctly so) that in the event of my finding Applicants to have been substantially successful cost would inevitably follow the result in their entirety.

<u>The Orders</u>:

[115] It follows from the above, that a structural interdict, or otherwise referred to as a supervisory order is appropriate to certain of the relief in this matter. I am of the view that to the extent that the orders are supervisory this will not be a long drawn out process of supervision of the First Respondent but a temporary supervision for a defined time. I accept that successful supervision requires that detailed information be placed at the disposal of the court; it entails a careful analysis and evaluation of the details provided; it cannot succeed without the full cooperation of others in the process; there must be

flexibility exercised by the court in the supervisory process. *Sibiya and Others v DPP*, *Johannesberg High Court and Others* 2006 (2) BCLR 293 (CC) [22]; *S v Z* and "27 *Similar Cases* 2004 (4) BCLR410 (E). In addition to this, the Constitution of South Africa (*supra*) points out at 9 – 189 that there are three factors which would play a role in determining whether supervisory intervention is appropriate. The first is whether there is reason to believe that the government (municipality) will not comply completely with the order, very much an issue in this matter it having previously failed to comply with its constitutional obligations; the consequence of non-compliance with the order – the more severe the consequences the more likely a court will be to supervise to ensure that it is complied with, again applicable in this matter; a consideration of how clear it is what steps should be taken to fix the problem. If it is clear, a simple mandamus may be sufficient, if unclear, then supervision may be necessary to determine in consultation with all stakeholders what the appropriate relief is. See the order in *Grootboom* 2003 3 277 (C); 2001(1)SA 46 (CC).

[116] In the result, the following order issues:

113.1 Contempt Of Court and Prayer 3.2:

A. Seventh Respondent, Rolly Dumezweni, is found guilty of contempt of court, and is warned;

B. The costs occasioned in respect of paragraphs 1 and 2 (only) of the Notice of Motion, relevant to the contempt proceedings, shall be paid by First and Seventh Respondents jointly and severally the one paying the other to be absolved;

C. The First and Seventh Respondents are to report to this Court, on affidavit by no later than 14 July 2016, as to the steps First Respondent intends to take relevant to the further maintenance and continued functioning of the pump station at the conservancy tank situated at Fourth Avenue, Rivers Bend, Bushman's River;

D. The Applicants may, should they wish to do so, within 15 days of the filing of the First and Seventh Respondents' report, lodge affidavits in response to the report;

E. In respect of the above orders relevant to sub-paragraphs C to D above, once the First and Seventh Respondents' report has been filed and Applicants' response thereto (insofar as they may wish to do so), as envisaged above, Applicants are to set the matter down on notice to First and Seventh Respondents, in order that the report and affidavits may be considered by the above honourable Court and addressed in argument, before the Presiding Judge.

F. Insofar as may be necessary, that report will form the basis of an order of this court, in this matter, subsequent to receipt of the report and affidavits aforesaid, at the hearing of the matter to be convened before the Presiding Judge.

113.2 Prayers 7, 8, 10 and 11:

G. A mandamus hereby issues:

(i) directing and compelling the First Respondent to immediately, and in future, take all reasonable steps to prevent any and all burning of any rubbish or other deposits of solid waste at the landfill waste site situated at Marselle, Bushman's River ("the Marselle dumpsite");

(ii) directing and compelling the First Respondent to take all reasonable steps to immediately, and in the future, extinguish any and all burning of any rubbish or other deposits of solid waste at the Marselle dumpsite;

(iii) directing the First Respondent to immediately, and in the future, take all reasonable steps to ensure that solid waste at the Marselle dumpsite in the form of plastic packets and plastic

generally is retained within the confines of the Marselle dumpsite;

(iv) directing the First Respondent to immediately, and in the future, take all the steps reasonably necessary to collect any and all plastic packets and plastic generally that becomes dispersed from the Marselle Dumpsite, within a radius of 1.5 km from the said site.

113.3 Prayer 13:

H. The First Respondent is declared to have breached its constitutional and statutory obligations in respect of refuse removal, refuse dumps and solid waste disposal at the Marselle dumpsite and further in having failed, notwithstanding a full opportunity to do so, to identify and take timeous steps to decommission the Marselle dumpsite, and find, make available, and commission an alternative suitable and appropriate site to establish a new waste dumpsite, in place thereof, for the purposes of the Kenton-on-Sea and Bushman's River Mounth, Bushman's Industrial Townships, Ekhupumleni, Marselle, Klipfontein, Riversbend, Merry Hill, Nature's Landing and New Rest;

I. The First Respondent is ordered to comply with its constitutional obligations referred to in the previous sub-paragraph;

J. The First and Seventh Respondents are to report to this Court, on affidavit by no later than 14 July 2016, as to the steps First Respondent intends to take relevant to the proper maintenance and continued functioning of the Marselle dumpsite, in accordance with its constitutional and statutory obligations in this regard, pending the decommissioning thereof, and the establishment of a new replacement dumpsite;

K. The First and Seventh Respondents are to report to this Court, on affidavit, by no later than 14 July 2016, as to the steps First Respondent intends to take relevant to the decommissioning of the

Marselle dumpsite, together with an appropriate timeline relevant to each step, to commence on the date of the report;

L. The First and Seventh Respondents are to report to this Court, on affidavit, by no later than 14 July 2016, as to the steps First Respondent intends to take relevant to the acquisition and commissioning of a new replacement dumpsite, in place of the Marselle dumpsite, to service the Kenton on Sea and Bushman's River and the areas referred to in H above, in accordance with its constitutional and statutory obligations in this regard, together with an appropriate timeline relevant to each step, to commence on the date of the report;

M. The Applicants may, should they wish to do so, within 15 days of the filing of the First and Seventh Respondents' report, lodge affidavits in response to the report;

N. In respect of the above orders relevant to sub-paragraphs H-M above, once the report has been filed by First and Seventh Respondents, and by Applicants in response thereto (insofar as they may wish to do so), as envisaged above, Applicants are to set the matter down on notice to First and Seventh Respondents, in order that the report and affidavits may be considered by the above honourable Court and addressed in argument, before the Presiding Judge.

O. Insofar as may be necessary, that report and affidavits will form the basis of an order of this Court, to be given in this matter, subsequent to receipt of the reports and affidavits aforesaid, at the hearing of the matter to be convened before the Presiding Judge.

P. Further, and once the order envisaged in O above has been made an order of this court, the First and Seventh Respondents are to report to this court, by affidavit, at intervals of 90 days, as to the continued progress in respect of the action to be undertaken in terms of the order envisioned in paragraph O above, these reports also to

be served on Applicants, who shall have an opportunity within 15 days of service thereof commenting thereon in an affidavit to be filed, should they wish to do so , the reports to be filed until the decommissioning of the Marselle site and the commissioning of a new replacement site has been accomplished, as envisaged above.

113.4 The reports, affidavits and set downs are to be placed before and heard by the Presiding Judge in this matter.

113.5 The remaining relief sought in the Notice of Motion is dismissed.

113.6 In addition to the costs order given in respect of sub-paragraph B above, First Respondent shall pay Applicants costs occasioned in this matter both in respect of the relief granted and in respect of the relief dismissed.

M.J LOWE
JUDGE OF THE HIGH COURT

For Applicant:	Adv Paterson
Instructed Attorney:	Haydock Attorneys GRAHAMSTOWN
For First, Sixth, Seventh and Eight Respondents:	Adv van Huysteen
Instructed Attorney:	Whitesides Attorneys GRAHAMSTOWN