IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27/03/23
DATE

SIGNATURE

Case Number: 30085/09

In the matter between:

KOSMOS RIDGE HOMEOWNER'S ASSOCIATION **APPLICANT**

and

PAUL MASEKO **TENTH RESPONDENT**

PAUL MASEKO N.O. **ELEVENTH RESPONDENT**

JOSEPH RATLOI **TWELFTH RESPONDENT**

NOKO SEANEKO **THIRTEENTH RESPONDENT**

In Re:

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 30085/09

In the matter between:

KOSMOS RIDGE HOMEOWNER'S ASSOCIATION	**APPLICANT**
And	
MADIBENG LOCAL MUNICIPALITY	**FIRST RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL: LOCAL GOVERNMENT [NORTH WEST PROVINCE]	**SECOND RESPONDENT**
MINISTER OF WATER AFFAIRS & FORESTRY	**THIRD RESPONDENT**
SF MOLOKOANE-MACHIKA	**FOURTH RESPONDENT**
P M MAPULANE	**FIFTH RESPONDENT**
MINISTER FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**SIXTH RESPONDENT**
THE EXECUTIVE MAYOR OF THE FIRST RESPONDENT	**SEVENTH RESPONDENT**
THE MUNICIPALITY MANAGER OF THE FIRST RESPONDENT	**EIGHTH RESPONDENT**
MINISTER OF FINANCE	**NINTH RESPONDENT**

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MINISTER FOR CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS	**SIXTH RESPONDENT**
ERICK MATLAWE	**SEVENTH RESPONDENT**
HD MAKOBE	**EIGHTH RESPONDENT**
MPHO POPPY MAGONGOA	**NINTH RESPONDENT**

JUDGEMENT

MNYOVU A J:

INTRODUCTION

[1] This is an application to seek relief holding the First, the Seventh, the Eighth, the Tenth, the Eleventh, the Twelfth and Thirteen respondents in contempt of court order dated 18 July 2019.

[2] The First, the Seventh, the Eighth, the Tenth, the Eleventh, Twelfth and Thirteenth Respondents are opposing this application and launched a counter-application for rescission and setting aside of court orders, and declaratory relief. The respondents also seek condonation for the late filing of its rescission.

BACKGROUND

[3] The applicant initial launched the first notice of motion application under the case number 20810/2004, the 2004 application which was heard before Judge Hartzenberg as (*he was then)* on 25 February 2005. By consent between the parties the Court issued Court Order which was offer of settlement in terms of Rule 34 (2) and (5) made by the first respondent in the form of a written settlement offer dated the 4th November 2004, the applicant named it ("***Hartzenberg Order***") directing the first respondent the first respondent to erect water reticulation system, the drainage and processing of domestic water and sewerage waste according to the plans and directives of the conditions of establishment and service agreement; construct five cul-de-sacs in the township according to General Plan No. A14405/98 as the aforesaid conditions and service agreement, and plant two hundred indigenous trees on the side walk in front of the township, and first respondent to pay costs of the applicant. The applicant also seek committal of the first respondent's incumbents to prison should the first respondent fail to comply with the order.

[4] Since the granting of the Hartzenberg Order, the first respondent and its officials and the applicant's representatives engaged in discussions on the implementation of the Order. Although the fourth and fifth respondents having been appointed to the management and resumed their office duties in 2006 and 2007, and personally get knowledge of the ***Hartzenberg Order***. On 1 March 2007 they were involved in the discussions various meetings relating to implementation of court order. Due to lack of progress the applicant looked for other suppliers to perform services of the first respondent as per Court order. Be as it may, from 2005 to 2009 the applicant's attorney wrote thirteen letters to the first respondent about the implementation of the court order.

[5] On or about February 2009, the applicant launched an application to Court to sought an order directing the fourth and fifth respondents to join the first respondent in the proceedings in their official and personal capacity, to comply with the order due to non-compliance of the ***Hartzenberg Order***. On 21 May 2009, the respondents were served with an application by the sheriff. The respondents opposed the application and filed its late answering affidavit, stating the reasons as to why it cannot be able to implement the ***Hartzenberg Order*** as per service agreement, and the steps they undertook to satisfy the order. The progress they have made in implementing the order, their legislative framework, timeframes that regulate the municipal legislation. On or about 24 November 2009 the application was postponed *sine die* directing the respondents to obtain environmental authorisation before construction of the sewerage plant and report to the applicant's attorney and to compensate it for claim of damages it suffered by engaging services of suppliers to erect sewerage and install plants.

[6] On or about 2011, the applicant entered into an agreement with the newly-elected first respondent's executive mayor and municipal manager by way of undertaking to comply

with the ***Hartzenberg Order.*** On 12 October 2011 the applicant obtained a second Order which was heard by Acting Judge Van der Bijl as *he was then*, based on a solemn undertaking to comply with the ***Hartzenberg Order.*** The respondents failed to comply with 2011 order, namely ***Van der Bijl Order*** as well including the obligation to file progress reports.

[7] On 14 February 2012 the applicant filed a further application requesting for the newly executive mayor and the municipal manager to be joined in the 2009 application, however, the first respondent opposed the application. On 07 March 2012 the first respondent's officials held meeting with applicant's attorneys to provide proof of budgetary approval and tender process, and no results forthcoming from those meetings. On or about 2013 the applicant sued the first respondent for damages emanating from its failure to comply with the court orders including monthly rental of the sewerage plant, on 06 June 2014 the court grant the applicant relief on the civil claim for damages against the first respondent in monetary claims to the sum of R1 064 052, 20 plus costs.

[8] Despite successfully obtaining the relief from the court, on 12 November 2014 the applicant further wrote letters to the ministers including the ninth respondent fully explaining its plight and the environmental risks caused by the first respondent's refusal to comply with orders of court and due to the quick succession of office bearers and provincial intervention to this matter, and how it has been difficult to prove a case of *(mala fide)* contempt and to enforce compliance under the threat of imprisonment.

[9] The first respondent with its officials kept on attending meetings with the applicant to address the impasse, however, no progress with the implementation of court orders until the first respondent was put under administration in January 2016.

[10] On 30 November 2016, the Auditor -General issued an unfavourable report on the affairs of the first respondent, which caused the applicant on 16 June 2017 to institute second claim of damages against the first respondent where the parties agreed to a meeting to settle the matter. On 30 June 2017 the Auditor -General reported that the first respondent had an unresolved balance of irregular expenditure to the amount of R 9 000 000.00 as such the key projects such as water infrastructure and sanitation were affected.

[11] On 15 December 2017 the applicant instructed its attorneys to address a letter to the National Treasury to ringfence R15 000 000.00 of the funds allocated to the first respondent in terms of Division of Revenue Act 3 of 2017 (DORA) in order to ensure that the first respondent fulfils its obligations in terms of ***Hartzenberg Order*** and ***Van der Bijl Order.*** Without success the applicant could not get relief as it was advised on 12 January 2018 that the Deputy -Director was not legally competent to accede to its request.

[12] On 22 January 2018 the default judgement against the first respondent in the second civil claim to the amount of R874 700.00 plus interest and costs was granted, which meant that the first respondent failed to fulfil the agreement. This led to the applicant to file a supplementary application relief on 12 February 2019 including to join Seventh, Eighth and Ninth respondents, the Ninth respondent opposed the application, however, the Court order 18 July 2019 to join them was issued by the court.

[13] On the same breath on 18 July 2019 the proceedings between the applicant and ninth respondent was postponed *sine die* by Judge Neukircher.

THE ISSUES REQUIRING DETERMINATION

[14] Whether the relief sought in prayers 1,2,3,4,5, (with its sub-paragraphs), 6,7,8 (with its sub-paragraphs), 9 and 10 of the Applicant's application dated 5 May 2021 must be granted

[15] Whether the relief sought by the Respondents in the counter-application, must be granted, namely the setting aside of the Court Orders and the dismissal of the Contempt application dated 5 May 2021.

MAIN APPLICATION : 5 MAY 2021

[16] As alluded in paragraph 1 above, this application is intended to exact compliance with 2019 Court Order.

[17] "……the corollary duty borne by all members of South Africa -lawyers, laypeople and politicians alike- is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function" [1]

[18] The applicant contends on his founding affidavit that this application is brought in terms of Paragraph 14 of an ***Neukircher order*** which states that:

" *The applicant will at anytime be entitled to approach this court under this case number on the same papers suitably amplified, any supplementary relief that it*

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[1] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State v Zuma and Others* 2021(5) 327(CC), para 1 Khampepe ADCJ [SJCI v Zuma]

may regard necessary and such supplementary relief may include seventh and eighth respondent to appear before this court and to advance reasons why they should not be imprisoned pending compliance with the court order".

[19] This matter concerns the question whether the opposing respondents are guilty of contempt of court for failure to comply with the order made on 18 July 2019 by Neukircher J, referred as ***("Neukircher order")***. this order was preceded by two other orders namely that ***Hartzenberg Order*** , the 2005 order and ***Van der Bijl***, the 2011 order.

[20] The applicant contends that the common factor in respect of these orders is that the first respondent was ordered to erect sewerage treatment station in applicant's township. Both the 2005 and 2011 orders were issued by agreement between the applicant and the first respondent, and the first respondent did not oppose the issuing of *Neukircher order*. Until to date the first respondent and its accountable senior office bearers have not complied with these three court orders.

[21] The applicant initiated these summary contempt proceedings against the respondents as a result of failure to comply with the 2019 July court orders, and further contends in founding affidavit that, the *Neukircher order* in paragraph 3 declares the first respondent to be in contempt of the orders of 2005 and 2011. Then paragraph 4 places obligations on the Seventh, Eight, Twelfth and Thirteenth respondents, and paragraph 5, 7 to 13 place obligations on the first respondent. All these obligations place matters on the first respondent 's council and mayoral executives committee, to file progress reports to the allocation of funds, apply for the required water licence, environmental authorisations before the erection of the treatment plant start. However, the opposing respondents denied being in contempt of this 2019 order.

CONDONATION

[22] The respondents have launched an counter -claim application to set aside the court orders on behalf of the first respondent, they seek condonation of the late filing of counter application, to rescind the 2005, 2011 and 2019 court orders that form the subject of this application.

[23] The applicant opposes the condonation of the late filing of the rescission and counter-claim application, on the basis for the past sixteen years, the first respondent disregarded the applicant's correspondences, and would not honour its obligations. It was contended by the applicant that the first respondent since the inception was aware of the 2004 application together with the respondents, and decided not to oppose the application, the first respondent never took any action to have the court orders rescinded, the applicant contended that a distinction must be drawn between the first respondent and the opposing respondents, the first respondent indeed will be prejudiced if condonation is not granted but such prejudice will be justified and no complex and weighty issued involved in counter-claim as the respondents misunderstood the 2005 order. Therefore, condonation application should be dismissed with costs as they were no reasonable reasons for the respondents to revisit the 2005 and 2011 orders.

[24] The thirteenth respondent, Mr Noko Seanego, an Acting Municipal Manager at first respondent's employ deposed the answering affidavit on behalf of the first, seventh and eighth respondents in which he explained the reasons for delay. The thirteenth respondent contended that the first respondent was put under administration, as soon the previous officials became aware they then immediately held meetings with the applicant with the view to resolving this matter, as their predecessor's during investigations discovered in the Service Agreement that the terms imposed to first

respondent the duty to erect the sewerage system were on the Developer. They sought consultations with the applicant on that issue and invited the applicant to make representations why the first respondent should be liable for the construction of the plant, in the light of the Service Agreement, and that such critical information will be canvassed to seek legal opinion.

[25] The thirteenth respondent further submitted that the first respondent will suffer great prejudice if the late filing of the rescission application will not be condoned, as the applicant will not suffer any prejudice, the respondents will have to ventilate to this court their constitutional authority and how to use their resources, a determination of the duties and functions of the first respondent be made. The refusal of the condonation will force the first respondent to incur millions of rands for the benefit of private estate, in circumstances where the majority of the inhabitants of the first respondent do not have water and sanitation

[26] The counsel for the respondents argued that when the new administrator was appointed in December 2020, and the thirteenth respondent was appointed in January 2021 they became aware of the existence of the 2019 court order. The applicant was aware of the date the new officials commenced their duties and they accepted that in this regard, in view of the late stage at which the tenth to thirteen respondents have commenced their duties 7 December 2020, 9 April 2021 and January 2021 respectively, the court should focus on respondent's non-compliance with the 2019 order and that it acutely aware of the fact that the opposing respondents have been in the office for a relatively short period. On this basis, the opposing respondents arranged for a rescission to be filed on 27 January 2021 as part of counter-claim in the damages claim, in response to the claim of rescission, the applicant filed an exception and contended that such relief should be

sought by way of an application not an action, and explanation for delay should be set out on an affidavit.

[27] The counter-claim was then launched in June 2021 pursuant to the determination of the exception. The counsel then submitted that this application was brought within a reasonable time, as represented by the current administration, should the court find that there was an unreasonable delay they submit that such delay stands to be condoned having regard to the invalidity of court orders issued, the interest of justice, and that the matter raises importance of a constitutional nature. It is thus necessary that the merits of the matter be determined on full facts and correct pronouncement of the law, the counsel relied on the case of ***Van Wyk v Unitas Hospital & Another*** 2008 (2) SA 472 (CC) in that the standard for condonation is the interest of justice and depends on the facts and circumstances of each case.

[27] The counsel for the respondents further submitted that the rescission is sought as a reactive challenge, as the applicant seek to enforce the court orders, which are unenforceable due to provisions of governing prescripts, the first respondent has good prospect of success to challenge the lawfulness of the court orders and the rescission seeks to ensure that the rule of law is upheld and that the first respondent exercises its powers in accordance with the empowering provisions, the respondents submitted that for these reasons set above, the first respondent has good prospects of success in this matter, particularly, having regard to the legislative scheme and absence of legal foundation for the court orders.

[28] Although the explanation could be rightly criticised for degree of lateness, it is my view that the respondents do explain the delay, the question is whether the delay was reasonable or not. Applicants for condonation are required to meet two requisites of

good cause shown before they can succeed in such an application. The first entails establishing a reasonable and acceptable explanation for the non-compliance with the rule(s) in question and secondly satisfying the court that there are reasonable prospects of success on merits of the case, that the applicant must show that his *bona fide* defence is not patently unfounded and that it is based upon facts proved, if proved , would constitute a defence, and the grant sought must not prejudice other litigants as a result of the non-compliance, last but not least, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. The application must be lodged without delay, and must provide a full detailed and accurate explanation for it[2]

[29] It is my considered view that since the first respondent has been under administration for quite a long time from 2016 until now, this raise a concern as they have been many succession of official bearers controlling the first respondent's administration, its duties and powers have been compromised, due to short time they have been occupying the offices, in light of the nature of these proceedings and the serious consequences, one of the factors that must be considered whenever the condonation is sought is the applicant's prospects of success on the merits, it must be borne in mind that the grant or refusal of condonation is not a mechanical process but one that involves the balancing of often competing factors. The first respondent's prospects of success on merits are strong in the services agreement, that must be guided by the legislative governing prescripts, the first respondent as an organ of the state is constrained by the course and scope of governing prescripts, the interest of justice in the light of first respondent's prospects of success, require condonation be granted, and the issues pertaining to this matter be placed before court and be ventilated on the doctrine of

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[2] *Arangies t/a Auto Tech v Quick Build* 2014 (1) NR 187 (SC) at para 5

legal principles.

CONTEMPT OF COURT and LAW

[30] The requirements for contempt of court are trite and are the following:

30.1 the existence of the order,

30.2 the order must be duly served on, or brought to the notice of the alleged offender;

30.3 there must be non-compliance with the order; and

30.4 the non-compliance must be wilful and *mala fide*[3]

[31] The standard of proof which must be applied in applications for contempt of court order was stated by the Constitutional Court in *Matjabeng Local Municipality v Eskom Ltd and others* 2018 (1) SA 1 (cc) as that for an order of contempt where committal is sought the standard of proof beyond reasonable doubt applies.

[32] In *Fakie N.O v CC11 Systems (Pty) Ltd,* the requirements for wilful and *mala fide* were stated thus :

"[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 infaction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of faith; [10] These requirements -that the refusal to obey should be both wilful and mala fide,*

[3] *Pheko and others v Ekurhuleni City* 2015 (5) SA 600 (cc) paragraph 32

and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt-accord with the brander definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence 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 intent".

[33] In *casu,* it is common cause that the order of 18 July 2019 is in extant and ordering the respondents to be joined in these proceedings, be declared that they are in contempt of 2019 court order, and should they fail to comply the incumbent be committed to prison. I am of the view that for the respondents to be joined in the proceedings by this court where committal is sought, the standard of proof beyond reasonable doubt should apply as well their wilful and *mala fide* should be demonstrated after the 2019 order was served on them.

ARE THE REQUISITES OF CONTEMPT ESTABLISHED

[34] Save for a denial of contempt of court orders, for reader's convenience, the applicant's summary is as follows: -

34.1 The first and opposing respondents fail and refused to comply with prayers 4, 7, 7.1, 11, 13, 13.1 ,13.2 and 13.3 of the **Neukircher order**, the 2019 Court order, the first respondent has breached it legal duty in terms of services agreement and ordinances.

34.2 The first respondent's officials acted wilful and *mala fidei* and adopted cavalier attitude towards court orders, it is conspicuous that the aforesaid respondents have deliberately disobeyed the 2019 court order and their conduct undermines

the Constitution of SA and rule of law. As much the applicant is aware that the opposing respondents have the short term in the office and the high frequency of senior office bearers, this is a problem that frustrated the applicant in its attempt to enforce the court orders by instituting contempt proceedings against certain individuals, in this instance matters are coming to a head, albeit, under threat of punishment.

[35] According to the applicant, he found it necessary to state events of what happened after the *Neukircher order* was granted, in that on 30 August 2019 the first respondent and its senior office bearers were formally served respectively, and on 13 September 2019 the applicant's attorney dispatched letter to the first respondent summarising the contents and obligations of the order, and the consequences should they fail to comply with the order. Despite several letters addressed to the first respondent and its official, applicant received no response. On 09 November 2019 the applicant put attention to the first respondent prayer 4 of the order, that they must put the three orders to their agenda on the next meeting, the first respondent's office bearer confirmed that the three orders would be placed on the agenda for the next council meeting of 25 February 2020, however, with the reasons unknown to the applicant, the three orders were never placed in any agendas as required by *Neukircher order* , and not any attempt since 2019 order to comply with the most basic and non-financially impacting on the prayers By so doing, the first respondent and its officials place itself in wilful and *mala fide.*

[36] The applicant further contended that on 11 December 2019 a meeting was held between the parties, for the purposes of considering the matter and it was agreed that the respondents will file interim report by mid-February 2020 and the final report by no later than 20 March 2020. The meetings did not go further as the respondents addressed

the letter to the applicant about "*Discovery*" on the service agreement. The applicant's counsel submitted that it was the third contempt application against the first respondent following its persistent failure to comply with 2005 and 2011 orders.

[37] The counsel for the applicant submitted that the opposing respondents have shown their *mala fide,* even though the tenth and thirteenth respondents had been in the office for a short period the frequency in changes among the first respondent's senior personnel had been frustrating factor in contempt proceedings, the applicant cannot accept that office bearers of their seniority and presumed experience are serious in presenting an argument of voidness of court orders which is so absurd. They have failed to place the 2019 order on the agendas of the council and the mayoral committee, the first respondent has been notorious for its poor service delivery, and financial and administrative incompetence. It was argued that the first respondent and its opposing respondent's failure to comply with the 2019 court order is unconstitutional conduct and that the contemptuous nature thereof was even more so unconstitutional as intended in s172(1)(a) of the Constitution.

[38] The counsel for the applicant submitted that the officials such as opposed respondents as they are targeted for contempt relief, must be joined in their personal capacities and not in their nominal official capacities, the applicant relied on ***Matjhabeng-supra*** at para 103, and further relied at p46-55 and 67, which states that:- for civil remedies for contempt of court such as declaratory relief, mandamus or a structural interdict that do not have the consequences of depriving an individual of their right to freedom and security of person, the civil standard of proof, namely, proof on a balance of probabilities applies, and where civil contempt remedies of committal or a fine is the relief sought, it has material consequences for an individual's freedom and security of

person. For such relief the criminal standard of proof, namely beyond reasonable doubt always applies. Therefore, in this case the counsel for applicant submitted that the requirements of an order, service or knowledge thereof and non -compliance have been proved, accordingly the respondents herein carry the evidentiary burden to establish a reasonable doubt regarding wilfulness and *mala fides* -***Zuma-supra*** at par 37.

[39] It was argued by the applicant's counsel that the respondent's defences cannot create a reasonable doubt, as its functionaries cannot create a *bona fide* defence raised herein. He further argued that their longwinded explanations of attempts to negotiate with applicant clearly are intended to raise doubts and are clearly moulded upon the findings regarding municipal officials in their positions as discussed in ***Matjhabeng*-supra,** and further it was clear that in contempt of court applications against officials occupying the positions of the tenth and thirteen respondents, must be cited in their personal capacities in contempt proceedings, the lack of *bona fides* and showing the *mala fide* and intentional non-compliance with specifically 2019 order, when they failed to place the 2005, 2011 and 2019 orders on the agenda of the mayoral committee and the council of the first respondent. Instead, the officials alleged that the first respondent was in financial constraint, the counsel argued that if there were issues with non-compliance or inability on grounds of financial difficulties, the opposed respondents would have approached the court for relief, the purported ground of avoiding compliance with the 2019 order based on constraints is a fallacy and not a defence.

[40] The respondents denied to be in contempt of the ***Neukircher order***, in the founding affidavit, their contentions are that the requirements for contempt of court were not met by the applicant, the first respondents summary is as follows:-,

4.1 No Valid and Binding order because the court orders are not in conformity with the law, the 2019 order is *void ab initio* a party cannot be in contempt of such order.

40.2 No *Mala Fide* conduct by the respondents in that, the counsel of the first respondent submitted that the first respondent was placed under administration since March 2010, and new officials were elected pursuant to local government elections of May 2021. The thirteenth respondent presented the tabling report by Tebogo Mothlashuping (an ex -official) with the officials who occupied the first respondent's office prior his appointment in January 2021, the thirteenth respondent mentioned that there have been 5 Municipal Managers who occupied the office. Therefore, it cannot be said that its administration was *mala fide.*

40.3 The counsel further submitted that during the periods October 2019 and December 2020 the first respondent was led by Administrator Motlogelwa, Mr Church the Acting Technical Director and Mr Maape, the Acting Municipal Manager, they were served with 2019 order and were bound to investigate this matter and to consider the services agreement and the governing prescripts, the administrators together with a new intervention team comprising of technical, financial, governance and administration experts conducted its investigation and then discovered that the service agreement imposes the duty to erect the sewerage system on the Developer and not on the Municipality. The applicant was informed of the developments on 14 February 2020 and invited to make representations.

40.4 Upon the thirteenth's respondent appointment in January 2021, the opposing respondents contended that they were made aware of the 2019 order, and that the 2019 order *inter alia* replaced the orders set out in the 2005 and 2011orders, which meant that any alleged contempt will be assessed on 2019 onwards. The 2019 order stated that the first respondent should follow the prescripts of its supply chain management policy to procure the erection of sewerage plant. Despite this when the opposing respondents filed the counterclaim seeking clarity on an important issue of the law, it was submitted that on this basis there is no or have never been *mala fide* conduct on the opposing respondent.

[41] The counsel for the respondent argued that the applicant has failed to prove its case beyond reasonable doubt for the contempt of court, it is trite that, an applicant must establish that an order was granted against the alleged contemnors, and the contemnor was served with the order and had knowledge of it, the alleged contemnor failed to comply with the order.

[42] It was further argued by the counsel in its arguments that in the present case, the July 2019 court order which the applicant seeks to enforce was never granted to any officials which are alleged to being in contempt, all the individuals sought to be joined commenced their duties with the first respondent after court orders had been issued. As such neither of them were cited on the May 2021 application and others have left the first respondent's employ, therefore no proper case has been made out for the joinder of the respondent in their personal capacities, that the respondents concerned are present incumbers charged with obligation to ensure the first respondent 's compliance with the court order, as well no proper case has been made out for the contempt of court order

[43] The counsel for the opposing respondents further submitted that the respondent's *bona fides* were indicated by the fact that there has at all material times been a change in the leadership of the first respondent as a result of multiple provincial interventions.

[44] This application was brought by the applicant as supplementary relief granted on the July 2019 order which supplementary relief may include seventh and eighth respondent to appear before this court and to advance reasons why they should not be imprisoned pending compliance with the court order. It is for these reasons that the respondents have to demonstrate standard of proof beyond reasonable doubt in applications for contempt of court, should the respondents fail to discharge standard or evidentiary burden, contempt will have been established.

[45] The applicant has proved to this court that he served the 2019 order to the first respondent and the previous officials who are no longer in the employ of the first respondent on 30 August 2019 , the applicant admits that the present official whom they want to join in this application were not personal served with the 2019 court order, further does not dispute that the present official whom they want to join in these proceedings, they resumed their duties from December 2020 and January 2021 and they did attend the meetings immediately they get knowledge of the 2019 court order.

[46] The opposing respondents whom are to be joined in these proceedings and be held liable for being in contempt of the 2019 order did establish beyond reasonable doubt that their conduct as from resumption of their duties December 2020 and January 2021 until to date was not wilful and *mala fide* , the counsel for the respondents submitted that from the onset, the respondents did not simply ignore the court orders, but that at all material times they were engaged with the applicant, and taken necessary steps to assist the

applicant in ensuring that the developer performs its duties in accordance with the services agreement.

[47] In law , civil contempt is a form of contempt outside of the court, it refers to contempt by disobeying a court order[4]. Civil contempt is a crime. Civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal, but committal for civil contempt can also be ordered in civil proceedings for punitive or coercive reasons[5].

[48] Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the court order granted in its favour, when the contempt occurs, a court may also initiate a contempt proceedings *mero motu*[6]

[49] Typically, a coercive contempt order calls for the compliance with the original court order that has be breached as well as the terms of the subsequent contempt order.

A contemnor [the person in breach of complying with the court order] may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable.

[50] Contempt of court is not an issue between the parties, but rather an issue between the court and the party who has not complied with a mandatory order of court[7].

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[4] *Pheko //* para 31 and *SJCI v Zuma* para 61
[5] *Pheko //* para 30;
[6] *Pheko //* para 30.
[7] *Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng* 2016 (4) SA 546 at 637C-D; and SJCI v Zuma para 61.

[51] In *Victoria Park Ratepayer's Association Greyvenouw CC* 2004 *JDR* 0498 (SE) at paras 5, 26-27 the apex Court explained that:

"[C]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has a wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency". And

"it is only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency".

[52] This is my view, is the starting point: all matters in which an ongoing contempt of an order is brought to an attention of a court must be dealt expeditiously as the circumstances, and the dictates of fairness, allow". The coercive order only incidentally vindicates the court's honour.

[53] "Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey the order he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest

[54] I am persuaded by the respondent's counsel's submissions that the applicant did not satisfy all the requirements, neither of the opposing respondents were personally served

with the 2019 court order. The 18 July 2019 order is in extant, it was served to the first respondent on 30 August 2019, it cannot be denied that at the time the first respondent was under administration in terms of section 139 (1) (b) of the Constitution, same is supported, by notice of provincial intervention. It is unfortunate that the applicant decided to launch the application which was never opposed by the first respondent . The same order was attended to but not fully with complied by the then first respondent's officials as at the time, it was alleged to be unenforceable by the first respondent, in terms of Section 19(1) of the Municipal Finance Act 56 of 2003.

[55] It is the above circumstances that this court could not find the alleged contemnors to be in contempt of the 2019 order, in their duties and in their personal capacity. The non-compliance cannot be said it was intentionally deliberate to ignore the 2019 court order, they refused to obey the 2019 order, in all fairness their participation from the onset the had the knowledge of the 2019 , from December 2020 they acted accordingly to the governing prescripts with the knowledge of the applicant, it should be borne in my mind that these respondents are acting on behalf of the organ of the state, which is being govern by the rule of law, the applicant also admits that there was compliance partly on the 2019 Order, however, some could not be achieved because the first respondent being the organ of the state governed by its statutory rules, and was under administration, this court cannot find any unconstitutional conduct on the alleged contemnors in terms of section 172(1) (a) of the Constitution.

RESCISSION IN TERMS OF RULE 42 (1) (a)

[56] The opposing Respondents in the main action are the Applicants and the Applicant is the respondent in this rescission of court orders, for the sake of convenience the parties the parties in reconvention will be referred to as they are in convention.

[57] In terms of common law, and or/Rule 42 (1)(a) of the Uniform Rules. This rule refers only on judgements or orders in which there was a procedural error and where a party was absent, when the order was granted on summons that did not disclose a cause of action, it was legally incompetent for the court to make the order, a judgement to which a plaintiff is procedurally entitled in the absence of the defendant, cannot be said to have been granted erroneously, in light of subsequent disclosed defence[8].

[58] Once it is shown that the order was erroneously sought or erroneously granted, the court will usually rescind or vary the order. A party need not show good cause, this rule may be invoked in circumstances where material facts were withheld from, or deliberately misrepresented to the court or where an order was sought without notice to the interested party[9]

[59] The opposing respondents submit that the 2005, 2011 and the July 2019 Court orders must be rescinded they were erroneously granted in a number of aspects, the court orders cannot be complied with without determination of merits and they are in contravening the governing prescripts and thus falling foul of the rule of law, further the Constitution and the Rule of law prohibits the court from issuing court orders that are contrary to/or violate the law, the three orders were unlawfully, improperly and irregular granted, and the counsel for the respondents further submitted that there is an exception to the general rule that advocates for finality of orders to be rescinded under the Rule 42.

[60] It is trite that an application for rescission of court order must succeed under Rule 42(1)

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[8] *Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty)Ltd* 2007 (6) 87

[9] *Naidoo and Another v Mahlala No and Others* 2012 (1) SA 143

(a) if an applicant can establish an error in the proceedings, the applicant does not require to establish good cause and a *bona fide* defence. Whether a court is confined to the record of proceedings in deciding whether a judgement or order was erroneously granted, the court is entitled to consider facts not on the record, and of which the court granted the order had been unaware, the court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary, an order or judgement is erroneously sought or erroneously granted in the absence of any party affected thereby[10].

[61] In *Bakoven Ltd v GJ Howes (Pty) Ltd* 1999 (2) SA 466 (E) Erasmus J (*as he was then)* held at 471F-H *that Rule 42 (1)(a) of the Uniform Rules of Court is a procedural step designed to correct expeditiously an obviously wrong judgement or order. He stated that an order or judgement is "erroneously granted" when the court commits an "error" in the sense of a "mistake in a matter of law appearing on the proceedings of the court of record."*

[62] It is also important for this court to have regard to the averments contained in the affidavits filed of record in deciding whether the orders were erroneously granted. The respondents contended that at the time when the court orders were made, the court was unaware of the facts and the governing prescripts, that the first respondent was obliged to comply with empowering provisions relating to sections 118(1)(a) and (b), s118 (2)(a) and s119(1) Ordinance, the Notice and the Services Agreement, s1(c) of the Constitution, s19(1)(a) of the MFMA and the SCM policy. And should the court that granted the orders was aware, it would have seen that the obligations which it imposed

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[10] *Great Kei Municipality v Danmist Property CC* [2004] 4 All SA 298 E

on the first respondent in terms of services agreement violated the governing prescripts, and court's powers to issue court orders are constrained by the rule of the law.

[63] The thirteenth respondent submitted that the applicant failed to disclose the ordinances, material facts in the 2004 application, the applicant failed to disclose in its founding affidavit the duties and responsibilities of the first respondent and those of the developers that arise from the development of private estate such as Kosmos Ridge. The court order was contrary to the governing prescripts, they were issued without determination of the merits in that following, upon the proclamation of township, section 116 of the Ordinance provides for necessary internal and external engineering services in a development. The internal services, which are the responsibility of the development, are those inside the boundary of the development such as road, storm water, water and sewerage. The respondent further submitted that the first respondent should have never consented to the 2005 order regard inter-alia, to the fact that, services agreement provided that the developer has to install the sewerage treatment plant, and the township is private initiative by the developer who became township owner and therefore remains responsible towards the applicant members to have complied with its obligation. In the premises, the applicant's omission of those facts in its founding affidavit violated the governing prescripts as per services agreement, the plaintiff simply demand services without the obligation to pay for the same, such demand is unconstitutional and bad in law. The project thus fall under capital project as they demand the first respondent to budget for their private estate which is against the law.

[64] The thirteenth respondent further contended that the 2011 order should be rescinded, it is invalid and in contrary to governing prescripts, as the first respondent's powers and functions are accordingly constrained by the course and scope of these prescripts , it

cannot do anything that is in conflict with these prescripts , as these accords with the principle of legality, the respondents further submitted that the previous mayor and the manager undertook to signed the undertaking that was made an order of the court without the authority of the first respondent's Council, the latter who is the functionary that has the authority to decide whether to undertake the capital project based on its budget. The respondents denied that the first respondent gave its attorney an authority to make an offer of settlement in terms of Rule 34(2), there was no acceptance of the offer by the applicant, and is not incorporated into the Order, the respondents submitted to this court that Offer was based on error of law and incorrect legal advice. The respondent further submitted that the first respondent's delegation of authority lies with the Council, unless specifically delegated. In the premises neither the attorney, nor Manager and the Mayor were delegated in this matter.

[65] The respondents then relied on the case of ***Valor IT v Premier , North West Province And Others*** 2021 (1) SA 42 (SCA) where a settlement agreement was concluded by an organ of state in contravention of the governing prescripts, such agreement was made an order of the court, when the *Valor IT* sought to enforce the court order the Department applied for a counter-application to rescind the court order, on the basis that the agreement was inconsistent with Constitution and the governing prescripts. The court rescinded the order.

[66] The respondent's counsel on its argument further relied on the recent case delivered on 11 March 22 under Case No. 3782/ 2020 at LMPHC, of ***Minister of Justice v Limpopo Legal Solutions*** where rescission of a consent order in such circumstances was recently considered, however, it is disputed as it was argued by the applicant that the first

respondent was represented by the attorneys who made an offer of settlement with the consent of the first respondent.

[67] The counsel for the respondents argued that all these orders must be set aside as they were granted without the determination of merits as such this matter falls under the exceptions to the general rule that advocates for finality of orders, as the Rule 42 accordingly creates that exception, and relied on the case of ***Freedom Stationery (Pty) Ltd & Others v Hassam & Others*** which in summarily stated that *such a judgement can only be set aside on the ground of fraud or , in exceptional circumstances, on the grounds of Justus error or the discovery of new documents.....A default judgement, on the other hand, may be set aside in terms of Uniform 31(2)(b), rule 42 or the common law.*

[68] The counsel for the respondent argued that the first respondent has never accepted the validity of the court orders as indicated by the applicant in its replying affidavit of the counterclaim, the respondent stated that contrary to the answering affidavit filed by Mr Mapulane in 2009 application, he strenuously submitted that 2005 court order was contrary to governing prescripts, and that it was ought not to have been issued in the first place. The Mapulane's answering affidavit did challenged the validity of the court order as the previous administrators were incorrectly advised as such the order was to be revisited at the belated stage, the counsel argued that the first respondent explored ways in which it could resolve this matter, by appointing administrative intervention teams to analyse the needs of the first respondent and to decide how best to resolve them, not the decision of the erstwhile administrators. but not accepting the validity of the court orders, the counsel further submitted that this is where it was decided that arbitration proceedings should be conducted with the developer in terms of the services

agreement. The respondent denies that the arbitration proceedings were for the first respondent to erect a sewerage plant, as this was for the developer's duty and the capital project.

[69] The counsel for the respondents concluded that having regard to the fact that the court orders in question were erroneously granted as pleaded, and submitted that the first respondent does not have to show good cause for the orders sought, on the other hand, it has shown cause for rescinding the court orders, and be set aside. The interest of justice and policy considerations applicable to the matter warrants that this court should rescind the court orders. Last but not least, the respondent submitted that for reasons set out above relating to invalidity of the court orders, the first respondent does have a *bona fide* defence on the merits of the main application brought against it, having regard to the fact that that there is no statutory or contractual obligation on the first respondent to erect a sewerage system on the private development, the applicant has failed to formulate source of duty, no case is made out in the 2004 applicant's founding affidavit for the relief that was granted by the court.

[70] However, the applicant denied that 2005 order was granted erroneously and improperly, based on the fact, that the 2004 proceedings were instituted and the first respondent was held liable because of having breached its legal duty in terms of Ordinance and services agreement, the 2005 order was granted as a result of an offer of settlement in terms of Rule 34(2) and (5) made by the first respondent in the form of a written settlement offer dated the 4th November 2004. In that breath the applicant submits to this court that the whole defence and whole counterclaim of opposing respondents are spurious, *mala fide* and devoid of any merit at all, the respondents are attacking the validity of the 2005

court order instead of complying with it, which is against the law, as such its opposition should be dismissed with punitive costs.

[71] The applicant contends that in terms of 2011 court order first respondent's attorney, had an authority to make such a undertaking as a result the applicant accepted the offer and order was made by the agreement between the parties, therefore, there is a casual link between the representation and the detriment, as such the first respondent is estopped or barred from doing the opposite. The applicant's counsel submitted that the attack on the orders was irreconcilable with the steps taken by the first respondent and its functionaries in giving effect to the orders, those steps, such as instituting the arbitration order of court, budgeting for the erection of the sewerage plant, all show acquiescence in the orders and their attempt to revisit 2004 application by criticising the applicant's founding affidavit for lack of essential averments is seen as fallacious, neither did the opposing respondents address the fact that the first respondent made a formal tender in terms of Rule 34(2) and (5) that constituted the 2005 court order, same it was fallacious to attack the 2011 order as the thirteenth respondent submitted that the first respondent's previous office bearers had no authority to bind the first respondent with their undertaking. The applicant contended that answer to the attack of the 2011 court order, the applicant's attorney acquired a better copy of the document that shows that in terms of Council delegation 0436, the Council delegated the municipality authority in section 109(2) of the Municipality Systems Act , 2000 to compromise or compound any action, claim or proceedings to the municipal manager, which is what exactly what the municipal manager as co-signatory of the undertaking did, therefore, the opposing respondent's attack on the validity of the 2011 orders should be dismissed.

[72] The counsel for the applicant further submitted that the respondent's objections against the 2019 court order are based on the false premise as their objection to the 2005 court order, namely that it is illegal being contrary to what is provided by the "legal prescripts", their attack on the validity should fail. It was further submitted by the counsel of the applicant that the respondents as they refer to their tenure of the office as a "new administrator" they are bound by the actions and failures of the first respondent in respect of the orders of 2005, 2011 and 2019, they are not at liberty to distance themselves from the said orders as if they do not exist, they are estopped from denying the validity of the 2005 order.

[73] The counsel for the applicant argued that back 2006, 2007, 2009 up to 2020, the first respondent never attacked the validity of the 2005 court order but executed part of the order relating to indigenous trees and water reticulation, instituted proceedings against the developer as a result of the 2005 order, applied for and obtained an postponement on 24 November 2009 and an authorisation which was a prerequisite for the implementation of the order, and when two civil claims were instituted against the first respondent, it never contested the 2005 and 2011 court orders but paid damages close to R2 000 000.00 and costs to the applicant.

[74] The counsel for the applicant submitted that the first respondent partially implemented the orders by appointing a consultant, compiling bid papers and budgeting for the treatment plant to be erected, the applicant acted accordingly to its own detriment, as such the executive mayor and the municipal manager that gave undertakings in 2011 were acting with actual or ostensible authority. It was further argued that the fact that the first respondent did not oppose the 2019 application also denies it opportunity to

now contest the validity of orders based on discovery of an agreement dating back 1999 and the existence of which was fully aware

[75] The counsel for the applicant further submitted that in addition to the respondents to being estopped from claiming that the orders are invalid, the court should also refer to the doctrine of peremption, the first respondent will either had to approbate or reprobate as it did not challenge the 2005 order, the first respondent had clearly acquiesced or approbated. Counsel further argued that the respondent's application for rescission in terms of rule 42(1) (a) should fail, in that, if a party is procedurally entitled to judgement it cannot be erroneously granted in the absence of another party, the party that reconcile itself with the reasonable prospect that the relief could be granted is not entitled to rescission on grounds thereof that such relief was erroneously granted. The respondents are in wilful default. The counsel relied on the case of *Freedom Stationery (Pty) Limited and Others v Hassam and Others* 2019 (4) SA 459 (SCA).

[76] The counsel for the applicant further submitted that even in cases where an applicant is able to make out a case within the confines of the rules, the court retains the inherent jurisdiction to refuse the application for variation or rescission of judgement, same the applicant relied to the case of *Colyn v Tiger Food Industries* 2003 (6) SA 1 SCA – where the court said the following:- "Court generally expect an applicant to show good cause (a) by giving reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing the has a *bona fide* defence to the plaintiff's claim which was *prima facie* has some prospect of success.

[77] The counsel for the applicant in his arguments further submitted that the respondent's did not make a proper case, apart from the requirements for rescission of judgement which are not complied with, the rescission cannot be granted to the

inordinate and unreasonable delay on the parts of the respondents, apart from the time of delay, it is clear that, the first respondent is acquiesced in the order and that order cannot be rescinded. The applicant relied to various cases which court also took into consideration, namely, *Dabner v South African Railways and Harbours* 1928 AD 583 at 594; *Tswetele Non Profit Organisation v City of Tswane Municipal Manager* 2007 (6) SA 511 (SCA) at para 10; *Nkata v First Rand Bank Ltd and Others* 2014 (2) 412 (WCC) par 30 and 31; *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) at para 25 and *SARS v CCMA* 2017 (1) SA 549 (CC) [at 26-28] and *Promedia Drukkers en Uitgewers (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C).

[78] It was further argued by the applicant's counsel that the purported invalidity of orders, as based on the ground that the "governing prescripts" allegedly do not allow the first respondent to pay for the installing of engineering services (which the sewerage plant is) in a private development is incorrect, as this not a capital project, the first respondent can be liable for such services as envisaged in terms of s116 to 118, 120 and 122 of the Town Planning and Townships Ordinance 15 of 1986. The counsel pointed out that the provision of engineering services are extremely important requirements in the development of a township as envisaged in terms of s67,70, 97 and 113 of the Town Planning and Townships, it is in these circumstances that it is important to the constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon, as it is the constitutional duty of the first respondent to ensure that townships are developed in accordance with the prescripts of the law, and if it fails to do so, the first respondent is obliged to rectify its own mistake either willingly, or if unwillingly, then in terms of a perfectly law order of court. The counsel

relied in these cases *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 58 and *Minister of Public Works and Others v Kylami Ridge Environmental Association and Another (Mukhawevho Intervening)* 2001 (3) SA 1151 (CC)

[79] The counsel for the applicant in his closing arguments submitted that the proper reading of the "governance prescripts" (the service agreement, the council authorisation and the applicable ordinance) as well as the papers in the 2004 application and the 2005 order, make it clear that the 2005 order as well as consequent orders based thereon, are valid, and the 2011 order is valid because the undertaking given by the executive mayor and the then municipality fall squarely within the delegated authority and powers of the latter. The first respondent's counter-application must be dismissed with costs, including costs of two counsel.

[80] In reply, the counsel for the opposing respondents submitted that first respondent has partially complied with the 2005 order but could not be competent enough to perform the developer's duties because of governing prescripts. However, the respondents denied that there is a causal link with the detriment and the first respondent is estopped in rescinding the orders, it was argued by the counsel that the impugned agreement cannot be validated through the doctrinal device of estoppel, as the peremptory provisions of the governing prescripts, including s 19 of MFMA were not complied with,

[81] The counsel for the respondents submitted that the applicant contends that steps taken by various administration of the first respondent constitute peremption, it thus disentitled first respondent from changeling the validity of court order, it is in these circumstances where the court can use its discretion to overlook or disregard the

acquiescence where broader interest of justice would otherwise not be served, dictum applies to this matter, as the new administration decided to challenge the validity of the court orders after considering governing prescripts, services agreement based on legal advice, if the court does not exercise its discretion, the first respondent will be prejudicially compelled to spend much needed public funds on private estate and prohibited from exercising its constitutional rights and obligations.

[82] The counsel for the respondents submitted that the Constitutional Court rejected the argument that delay in challenging the lawfulness of the agreement disentitles an applicant to relief, and held that:-

"Whilst I agree with the criticism levelled against the Municipality for its inordinate delay in taking steps to deal with its conduct in concluding an invalid agreement, this has no bearing on the eventual outcome of the matter. The unexplained long delay in reviewing its unlawful conduct does not cure the invalidity and unenforceability of the agreement. Inexcusable as it is, the long delay and failure by the Municipality too review its unauthorised conduct also does not automatically deprive it of the option of a reactive challenge. Since the Merafong and Tasima, it is now clear that a reactive challenge " should be available where justice requires it to be" and that an organ of the state is "not disqualified from raising a reactive challenge merely because it is an organ of state"[11]

[83] The applicant for the respondents further submitted on its reply that in this the matter, the respondents do not have to show good cause, in the sense of an explanation for the first respondent's default and a *bona fide* defence,

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11. *Merifon CC, para 38,39,43 and 45*

the counsel relied to the case of *Great Kei Municipality v Danmist Properties CC,* 2004 (4) All SA 298 page 301-302.

[84] The counsel for the respondents further argued and relied to the authorities, namely, *De Sousa v Kerr*[12] where it was held that: -

"De Wet and Others v Western Bank Ltd 1977 (4) SA 770 (T) at 777, *if the requisites of Rule 42(1) are present, a Court is empowered to grant the relief of setting aside a judgement, notwithstanding the fact that good cause is shown. As I understand the judgement this would include good cause in regard to default. If the learned trial judge granted the judgement on the basis that the defendant personally knew of the trial date and yet had not appeared, it might well be that the judgement was erroneously granted. This might be argued as a matter of probability and, while a Court should not decide probabilities on paper, I certainly cannot determine probabilities on unresolved disputes of fact.*

[85] Other authorities relied upon were the case of *Phakathi v Ndlovu and Others*[13]the counsel for the respondents argued that these authorities are in good in law.

[86] The counsel for the respondent further submitted that the applicant contends that the installation of the sewer system is not a capital project, the first respondent can be liable for such services as envisaged in terms of s116 to 118, 120 and 122 of the Town Planning and Townships Ordinance 15 of 1986.

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[12] [1978] 2 All SA 654 (W) page 657. *Hardroad (Pty) Ltd v Oribi Motors (Pty) Ltd* [1977]
[13] 2021 JDR 2728 (GJ) para 21-23

[87] The counsel in reply argued that s19 of MFMA does apply to the transaction under consideration in this matter, as it prohibits an agreement to procure a capital asset in the absence of approved budget and without Council's resolution, therefore, any agreement entered into by the first respondent is impermissible, the counsel submitted to this court, such an argument were not in papers before this court, it is tantamount to raising an argument from the bar, as such our courts do not allow that and counsel supported its argument by relying :

[88] To the case of *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) 324 F-G on the impermissibility of raising points contained only in annexures, it was held that:-

> *"Regard being had to the function of affidavits; it is not open to an applicant or respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met"*
>
> It is on these basis, that the counsel submit that the counter-application stands to be granted.

[89] The counsel for the applicant on its arguments replied and submitted to this court that there is no proper case made out for the rescission of court orders, the agreement between the parties is about essential services, the respondent cannot withdraw that now as steps were taken and budgeted for because of Orders , the whole issue that there is no proper authority is simply incorrect, the main concern the 2005 is in existence, the

first respondent cannot run away from installing those sewerage plants. The counter application must be dismissed.

[90] As a general rule, a court has no power to set aside or alter its own final order, as opposed to an interim or interlocutory order. The reason for this age old rule are twofold. First, once a court has pronounced a final judgement, it becomes *functus officio* and its authority over the subject matter has ceased. The second reason is the principle of finality of litigation expressed in the maximum *interest rei publicae ut sit finis litium;* it is in the best interest that litigation be brought to finality. See *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 306F-G and 309A, *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) paras 22 and 29; *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 para 28.

[91] There are exceptions to this rule. I am encouraged by the case of *Freedom Stationery (Pty) & Others v Hassam & Others* , on 465, at [17] where it was stated that the requirements for relief under these exceptions depend on whether the judgement was given on merits of the disputes between the parties after evidence had been led or whether the order was made in default of appearance of the party that seeks to have it rescinded. In respect of the first category the test is stringent, such judgement can only be set aside on the ground of fraud or, in exceptional circumstances, on the grounds of *justus error* or the discovery of new documents. See *Childerley Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163 at 168 and *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1040E-1041B.

[92] In the present case, the respondents submitted to this court that at the time the 2005 order was granted, the court was unaware of the facts and the governing prescripts, that the first respondent was obliged to comply with empowering provisions relating to

sections 118(1)(a) and (b), s118 (2)(a) and s119(1) Ordinance, the Notice and the Services Agreement, s1(c) of the Constitution, s19(1)(a) of the MFMA and the SCM policy, and should the court that granted the order was aware, it would have seen that the obligations which it imposed on the first respondent in terms of services agreement violated the governing prescripts the applicant failed to disclose the ordinances, material facts in the 2004 application, the applicant failed to disclose in its founding affidavit the duties and responsibilities of the first respondent and those of the developers that arise from the development of private estate such as Kosmos Ridge., the orders were issued without determination of the merits,

[93] Based essentially only on these allegations, the respondents claimed that 2005, 2011 and 2019 orders granted against the first respondent are invalid, this matter falls under the exceptions to the general rule that advocates for finality of orders, The applicant disputes these allegations on the basis that the first respondent was legally represented by its erstwhile legal representative who made an offer of settlement on its behalf, therefore, the respondents cannot attack the validity of 2005 order.

[94] This court took into consideration of the fact that at the time this 2005 order was granted, the services agreement and its governing prescripts were in existence, in the fact that the first respondent being the organ of the state being the party affected in these proceedings, the question as invoked in paragraph [25] of *Freedom Stationery (Pty) & Others v Hassam & Others*, is whether the party that obtained the order was procedurally entitled thereto. If so, the order could not be said to be erroneously granted in the absence of the affected party. An applicant would be procedurally entitled to an order when all affected parties were notified of the relief that may be granted in their absence, the relief need not necessary be expressed stated. In my view it suffices that

the relief granted can be anticipated in the light of the nature of the proceedings, the relevant disputed issues and the facts of the matter.

[95] In this regard it would be useful to enquire whether the relief could have been granted without the determination of the merits, If so, the steps the affected litigant took to protect its interests by joining the fray, ought to count for the court to rescind its judgement under Rule 42 (1) (a), in these proceedings the first respondent's official participation entitles the first respondent to relief under Rule 42(1)(a) *mero meto* it accords with fundamental principle of finality of litigation. See *Ex parte Mason* 1981 (4) SA 648 (d) at 651 C-D, it is my view that the relief was indeed granted without the determination of the merits, the court made an error in law by granting the order that was unenforceable in terms of the governing prescripts as discovered in the services agreement, in deciding whether the judgement was granted erroneously, the court confined itself to the records of the proceedings. It is clear that the judge was not aware of the existing governing prescripts which precluded the granting of the judgement and which have induced him, if he had been aware of them, not to grant judgement.

[96] It is trite that an order of court law stand still until set aside by a court of competent authority, until set aside, the court order must be obeyed, despite whatever reservation one might have, it is my view that the 2005 order if it is allowed to stand in its present format will cause grave injustice to the first respondent as certain orders are unenforceable, no determination on merits, the fundamental values of constitutional democracy prevent organ of the state or public official to act contrary or beyond powers as laid down by the law, In *S v S* at paragraph 58 Nicholls AJ said:-

"there may be exceptional cases where there is need to remedy a patently unjust and erroneous order and no changed circumstances exist, however expansively interpreted,

in those circumstances a court may exercise its inherent power in terms of section 173 to regulate its own process in the interest of justice".

[97] In this case at hand the respondents in its counterclaim did seek an order declaring the 2005, 2011 and 2019 orders invalid and be set aside as they were granted in contravention of governing prescripts. The respondents in its counter application then relay merits for determination, this court need not to repeat the averments as alluded in this judgement, as it was established by the respondents that the Court orders cannot be compiled with without contravening the governing prescripts and thus falling foul of the law. Their application relied on the case of *Merifon (Pty) Ltd v Greater Leteba Municipality and Another* (1112/2019) [2021] ZASCA 50 (22 April 2021), for the relief it seek. I am persuaded by the *Merifon's case* decision in that no court can compel a party to flout the law and, more fundamentally, the principles of legality which is the cornerstone of our constitutional democracy, and sight should never be lost of the fact that in exercising their judicial functions, courts are themselves constrained by the principle of legality,

[98] From the above, in terms of section 173 of the Constitution, this Court has inherent power to protect and regulate their own process in the interest of justice, in this present case, the claim for constitutional issue was raised, in order for that constitutional issue to arise, the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter[14]

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[14]*General Council of the BAR of South Africa v Jiba* [2019]ZACC23;2019(8)BCLR 919 (CC) at para38.

[99] In relation to first respondent's plea and counterclaim the applicant denies that the orders are unenforceable and put the first respondent to the proof of its allegations, the applicant further denied that the section 19 of MFMA is applicable as this was not a capital project, the first respondent can be liable for agreement procured through Supply Chain Management System in a periodical review, it is the constitutional duty of the first respondent to ensure that townships are developed in accordance with the prescripts of the law, I am encouraged by the case of *Valor IT* , at para 74, in that the Court considered the effect of an unlawful settlement agreement and was correctly rescinded by it. Because in signing the settlement agreement that was made an order of the court had committed the Department to a liability for which no money had been appropriated and thus in contravention *inter alia* of PMA. In *casu* the counsel for the respondents submitted that facts on *Valor IT* are similar to this matter, as previous administrators had committed the first respondent to liability for which it had no funds and also to the erection of project in contravention of governing prescripts, that resulted to the first respondent to be in administration after being followed by civil suites.

[100] Is it in the interest of justice to grant order to rescind the orders, that cause grieve prejudice to the first respondent, it was argued that the 2005 Court order declaring the first respondent to erect and/or install a sewerage reticulation within a private estate and its own costs does not accord with the law, the first respondent's powers and functions are constrained by the course and scope of these prescripts as the doctrine of legality and the rule of law lie at the heart of Constitution. The respondents relied on the case of ***Merifon (Pty) Ltd v Greater Letaba Municipality and Another*** which stated that the exercise of public power must therefore comply with Constitution and the doctrine of legality. The respondents argued that the court orders are contrary to the governing

prescripts and not accord with the constitution as they are unlawful, invalid, unenforceable.

[101] It is my view that it will be in the interest of justice to grant order to rescind the 2019 Order. It must be borne in mind that from on set and in terms of Services Agreement, the applicant and first respondent did not have an agreement, they are bound by the developer to establish the township. Only the developer and first respondent are bound by the service agreement. The developer failed its obligation to develop the township as agreed, the applicant instituted legal proceedings against the first respondent enforcing it to fulfil the developer's obligation under the service services agreement.

[102] The first respondent could not comply with its statutory obligation to enforce such fulfilment. the interest of justice and policy considerations applicable to this matter warrants that this court should rescind the 2019 court order, regardless of the steps that might have been previously taken by the Administration governed by the municipality at the time, its long delay and failure to review its unauthorised conduct does not deprive it of the option of a reactive challenge. I am of the view that the Mapulane's affidavit make a case for setting aside of the 2005 and 2011 orders. Since *Merifong* and *Tasima*[18] it was clear that a reactive challenge should be available where justice requires it to be[19] and that an organ of the state is not disqualified from raising a reactive challenge merely because it is an organ of the state[20]

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[18] *Department of Transport v Tasima (Pty)Ltd* [2016] ZACC39,2017(2) sa622(CC);2017(1)BCLR 1 (CC)

[19] *Merafong* above n26 at para 55

[20] *Tasima* above n 31 at para 140

[103] I am satisfied with the findings of the Supreme Court of Appeal and Constitutional Court of Appeal in *Merifon supra* it would be in the interest of justice that the 2019 order be rescinded, on the basis of the doctrine of legality in that "no court can compel a party to flout the law and, more fundamentally, the principle of legality which is the cornerstone of our constitutional democracy".

CONCLUSION

[104] In the result, I make the following order:

104.1 Condonation for late filing of rescission of 2019 order is granted.

104.2 The applicant's application for contempt of court is dismissed with costs.

104.3 The respondent's application for rescission of orders in terms of Rule 42(1)(a) is granted.

104.4 The 2019 Order is set aside.

104,5 The respondents must file a plea to the applicant's particulates of claim within 20 (twenty) days of this order.

B.F MNYOVU

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel on behalf of Applicant	:	Adv A J Louw SC
		Adv M.F. ACKERMANS
Instructed by	:	Mr Christo Van Der
	:	Len Dekker Attorney
Counsel on behalf of Respondents	:	Adv L Kutumela
		Adv N Tshabalala
Instructed by	:	Gildenhuyd Kalatji Inc Attorneys
Date heard	:	12 October 2022
Date of Judgement	:	27 March 2023