REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 21099/2017

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

22-01-2024 DATE

PD. PHAHLANE SIGNATURE

In the matter between:

SOUTH AFRICAN HUMAN RIGHTS COMMISSION
1st APPLICANT

VICTORIA MONOSI
2nd APPLICANT

MARY ARENDS
3rd APPLICANT

BOITUMELO MASHAPU
4th APPLICANT

MODJADJI MASHOPA
5th APPLICANT

KARABO MASHIGO
6th APPLICANT

FRANS **THULARE**
7th APPLICANT
ANNAH **MASHABELA**
8th APPLICANT
LYDIA **NTIA**
9th APPLICANT
MATTHEWS **KHUMALO**
10th APPLICANT
EXEKIAL **MATLOU**
11th APPLICANT
IVY **KHAYINGANA**
12th APPLICANT
SOPHY **MABUSE**
13th APPLICANT
JOHANNES **MASUTHU**
14th APPLICANT
LUBENGU **LELETHU**
15th APPLICANT
MASUKU **MOPHEFO**
16th APPLICANT
MASUKU **DAVID**
17th APPLICANT
GEORGE **MKHWANAZI**
18th APPLICANT
JOHANNES **MAKHUBELA**
19th APPLICANT
KAGISO **MOGALE**
20th APPLICANT

And

MADIBENG LOCAL MUNICIPALITY **1st**
RESPONDENT

BOJANALA PLATINUM DISTRIC MUNICIPALITY 2nd RESPONDENT

MEC FOR LOCAL GOVERNMENT & HUMAN SETTLEMENT 3rd RESPONDENT

MINSITER OF WATER AND SANITATION 4th RESPONDENT

MINISTER OF HEALTH 5th RESPONDENT

MINISTER OF CO-OPERATIVE GOVERNANCE 6th RESPONDENT

The judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by her secretary. The date of this judgment is deemed to be 17 January 2024

JUDGMENT

PHAHLANE, J

Introduction and background

[1] This is an opposed rescission application in which the Municipality and the MEC seek an order rescinding the order granted by Prinsloo J, on 09 May 2017 ("the Prinsloo Order") and the Contempt Order granted by this court on 10 January 2022. The application is made in terms of Rule 42(1)(a) of the Uniform Rules of Court, alternatively the common law on behalf of the Municipality, and in terms of Rule 42(1)(a) on behalf of the MEC. The Municipality further seeks condonation for the late commencement of this rescission application. For the sake of convenience, I will refer to the parties as they appeared in the previous proceedings, with the respondents in the rescission application being referred to as the applicants.

[2] The rescission application emanates from an application brought by the applicants structured in two parts.

2.1 **Part A** of the application was heard on an urgent basis where the applicants sought a *mandamus* against the Municipality (enforcing its undertaking made in a letter dated 8 November 2016) to provide the residents of Klipgat C with adequate and safe water supply - having expressly acknowledged that the provision of water to the residents of Klipgat C did not meet the applicable norms and standards, and that it had also infringed upon their constitutional rights[1].

2.2 Part A of the application was an interim relief, pending the determination of the final relief to be claimed in **Part B**:

[3] It is common cause that both the Municipality and the MEC failed to file papers before the hearing of the matter on 09 May 2017. It is further common cause that Part A application was served on the Municipality and the MEC as confirmed by the return of service filed of record and further confirmed in paragraph 3.2 of the Joint Practice Note[2] which states that "*there is no dispute that the first and third respondent were properly served*". Accordingly, Prinsloo J granted the order in Part A on an unopposed basis because neither the Municipality nor the MEC opposed the application.

3.1 The order granted by Prinsloo J, reads as follows:

"1. The forms and service and ordinary time periods provided for in the rules are dispensed with and this application is dealt with as one of urgency in terms of Rule 6(12)

2. Pending the determination of Part B, the Municipality, alternatively the MEC, is directed to take the following steps within 10 days of the date of this order:

[1] Applicants' answering affidavit to the first respondent's rescission application at para 5, Caselines 037-6 and para 21.6, Caselines 037-16. See also annexure "MM21" to the founding affidavit at Caselines 023-218.

[2] Caseline 046-7

2.1 Increase the number of water deliveries to Klipgat C to three times a week in order to meet the required volumes (translating to 4 truckloads three times a week); and

2.2 Disinfect the water trucks and JoJo tanks on site once a month.

3. There is no order as to costs in Part A".

[4] On 10 January 2022, the applicants brought an application for contempt of court as they were of the view and remain of the view that the Municipality and the MEC failed to adhere to the Prinsloo Order. This court granted the order declaring the Municipality and the MEC to be in contempt of court for failing to deliver water and disinfect the JoJo tanks in accordance with the direction of the Prinsloo Order made in Part A of the main application.

[5] The factual background and the circumstances which led to an undertaking being given by the Municipality to the applicants are common causes between the parties and accordingly, there is no need to restate same.

Issues for determination.

[6] In respect of the Municipality, it is whether the jurisdictional requirements in terms of Rule 42(1)(a) or the common law have been met to have the Prinsloo order and the Contempt order rescinded. In respect of the MEC, it is whether the requirements as set out in Rule 42(1)(a) to have the Contempt order rescinded have been met.

Rescission in terms of Rule 42(1)(a)

[7] The Rule provides that "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 judgment **erroneously sought or erroneously granted** in the **absence** of any party affected thereby". Generally, a judgement/order would have been erroneously granted if there existed **at the time of its issue**, a fact which the court was not aware of, which would have precluded the granting of the judgement/order and which would have induced the court, if aware of it, not to grant such a judgement/order. The purpose of Rule 42(1) is to correct expeditiously and obviously a wrong judgement/order. When relying on this rule, both requirements must be shown to exist and once that is done, the court is merely endowed with a discretion which must be exercised judicially and influenced by considerations of fairness and justice, and it is not compelled to rescind the judgment/order[3].

The Municipality's rescission application against the Prinsloo Order

[8] In order to succeed in their application, the Municipality and the MEC must satisfy the requirements that the Prinsloo Order was "***erroneously sought and granted***", and that such an Order was granted in their "***absence***".

[9] The Municipality contends that at the time when the Prinsloo Order was granted, there existed facts which had the court been made aware of, would have persuaded the court not to grant the Order. In this regard, it raised a few defences. I do not intend dealing in detail with all the defences raised, but they are as follows:

9.1 The existence of a '**Reviewed Indigent households Policy 2021/2022** and **2022/2023 Financial Year'** ("the Policy") which relates to, *inter alia*, the "qualification criteria" and "the extent of indigent support" in respect of the minimum standard for basic water supply services **-** which is dependent upon a

[3] Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021) at para 53.

household making an application to be classified as indigent. In this regard, the municipality avers that the applicants are not members of the households classified and registered as indigent in terms of the policy and have not proven their indigency so as to qualify to receive free water services. Thus, the municipality is not obliged to provide free basic water to the Klipgat C residents.

9.1.1 Along with this defence is the argument that the quantity of water to be delivered to the Klipgat C residents as per the Prinsloo Order, is in excess of what is regulated in terms of the policy. This defence is not raised in the Municipality's founding affidavit nor was it ventilated in its heads of argument but was raised for the first time in oral argument.

9.2 Budgetary constraints in that the Municipality relies on the national fiscus and its internal sources for funding, both of which depend on the amount allocated for a particular financial year. The Municipality avers that compliance with the Prinsloo Order will impact it financially as it relates to the procurement of trucks[4].

9.2.1 Accordingly, its budgetary constraints prevent the implementation of the Prinsloo Order (ie. the delivery of water to the Klipgat C residents).

9. 3 The applicants did nothing for five years after being granted the Prinsloo Order.

[10] Mr Manala submitted on behalf of the Municipality that although the policy was not available during the proceedings when the Prinsloo Order and Contempt Order were granted, leave should be granted to have the policy brought before court to enable the court to apply its mind in the determination of the issues contained in the policy because Prinsloo J granted the order not being aware that the applicants did not qualify and were not registered as indigent in terms of the policy.

[11] Not only did the municipality attempt to have the policies for 2021/2022 and 2022/2023 financial year placed before the court in an attempt to argue the merits of

[4] Issues relating to the pprocurement, delivery processes, and the service of the trucks are raised in the Municipality's report dated 8 July 2022.

the case, but counsel on behalf of the municipality submitted that there are other "earlier policies" which the municipality would want to make available for the court to consider. The Municipality alleges that that was an inadvertent omission on its part that it did not attach the earlier policy in support of its application for rescission. Surprisingly, no mention is made of an 'earlier policy' in the founding affidavit, or the replying affidavit filed by the municipality in support of its application for rescission. It was argued that the applicants failed to inform the court in 2017 that there was already an 'earlier policy' in existence, which had the court been made aware of, would have also persuaded the court not to grant the Order.

[12] The Municipality's attempt to have its 'earlier policy' accepted by the court during this late stage of the proceedings – considering that this aspect is not even addressed in any of its affidavits – was met with an objection for the simple reason that there are proper procedures which the Municipality should have followed, and the requirements to be complied with.

[13] It is inconceivable that the Municipality would simply ignore the rules of court, particularly that it has to bring a proper application to file a further affidavit in respect to any aspect it wishes to raise and allow the applicants an opportunity to reply thereto – while being mindful that the applicants should not be prejudiced by this latest move. In this last-minute attempt, the Municipality had ignored the fact that it had actually relied on the 2020/2021 policy and not the 'earlier policy', alternatively it was not aware of this alleged 'earlier policy', otherwise it would have mentioned its existence at the first opportunity before relying on the 2020/2021 policy in its rescission application.

13.1 In a bizarre twist, the Municipality also tried to blame the applicants for not pointing out that the Municipality had relied on the 2020/2021 policy and not the earlier policy. Strange as it may seem, it is inconceivable that the Municipality would expect the applicants to inform it of its own policy which is at their disposal, and which was not in existence in 2017. This is completely

impermissible, and the Municipality cannot simply supplement its case on the day of trial with factual material by handing out its policies.

13.2 Having regard to the foregoing, an attempt to present a case in ignorance and disregard of the rules of court will not be entertained.

[14] It is on this basis that Ms. Webber appearing for the applicants argued, and correctly so, that a rescission application is not an application for the rehearing on the merits, and this is exactly what the court stated in ***Zuma***[5]**.**

[15] Ms. Webber further argued that the undertaking given by the Municipality (which led to the granting of the Prinsloo Order) was without any conditions attached to it – such as the one requiring the applicants to first register under the indigent policy in order to qualify and be provided with free basic water'. Referring to the decision in ***Zuma*** *supra*, she submitted that the Municipality's reliance on the policy is misplaced because the specific policy which the municipality relies upon in its affidavit and heads of argument is for the year 2021/2022 and did not exist at the time when the Prinsloo Order was sought and granted.

[16] She submitted that the Municipality raised new defenses for the first time in the rescission application and that those defenses are not sustainable. Consequently, that the requirement that the Prinsloo Order was granted erroneously has not been met. The court in ***Zuma*** gave content to the requirement of erroneously granted and stated that:

> *"[62] to demonstrate why the order was erroneously granted, an applicant seeking to do this must show that the judgment against which they seek a rescission was erroneously granted because "**there existed at the time of its issue** a fact of which the Judge was unaware, which would have precluded the granting of the judgment and*

[5] The court held at para 69 that: "One cannot seek to invoke the process of rescission to obtain a rehearing on the merits". See also: Naidoo v Matlala N.O. 2012 (1) SA 143 (GNP) at para 4.

which would have induced the Judge, if aware of it, not to grant the judgment". (underling added for emphasis)

[17] As indicated above, the Municipality was fully aware of the date on which the Part A application was set down for trial because it was properly served -- but it elected not to oppose the application and participate in the proceedings. Had there been a policy in place at the time when the matter was heard in 2017, one would have expected the Municipality to, at the very least, oppose the application, because it knew then, what the application was all about and what relief the applicants were seeking - rather than wait six years after the Prinsloo Order was granted - to apply to rescind the Order and ask the court to reopen the case to allow it to present its policies which were not even in existence at the time.

[18] Over the years, our courts have recognized that in a case where the applicant is procedurally entitled to a judgment/order in the absence of the respondent, the judgment/order if granted, cannot be said to have been granted erroneously in the light of a subsequently disclosed defence. A court which grants a judgment by default does not grant the judgment on the basis that the respondent does not have a defence, but it grants the judgment on the basis that the respondent has been notified of the applicant's claim as required by the rules, that the respondent, not having given notice of an intention to defend, is not defending the matter and that the applicant is in terms of the rules entitled to the order sought. Consequently, the existence or non-existence of a defence on the merits is an irrelevant consideration and, if subsequently disclosed, cannot transform a validly obtained Order into an erroneous Order[6].

[19] In my view, the policy which the Municipality relies upon is irrelevant to the period which the Municipality seeks to dispute the Prinsloo Order. Consequently, it would be

[6] Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd [2007] ZASCA 85; 2007 (6) SA 87 (SCA) at para 27.

absurd to conclude that the defenses raised would have persuaded Prinsloo J not to grant the order, considering that the policy which the Municipality seeks to rely on specifically relates to the issues falling within the 2021/2022 financial year, and did not exist when the Prinsloo Order was sought and granted.

[20] Based on the above principles and having regard to the grounds for rescission in respect of the first requirement under Rule 42(1)(a), I am inclined to agree with the applicant's submission that the Prinsloo Order was not erroneously granted. Consequently, I find that the Municipality did not make out a case that the Prinsloo Order had been erroneously granted.

[21] The applicants contend that the requirement of "absence,**"** has also not been satisfied because the Municipality chose not to participate in the proceedings despite being properly served. Thus, failing to once again, meet the requirements of Rule 42(1)(a) for the rescission of the Prinsloo Order.

[22] The Court in ***Zuma*** held that the requirement and meaning of the word "absence" in Rule 42(1)(a) exist[s] to protect litigants whose presence was precluded, not those whose absence was elected". The court further held that "a decision by a party not to participate in proceedings where they have received notice of those proceedings and being given the opportunity to do so does not qualify as that party having been absent for the purposes Rule 42(1)(a). The position was previously stated by the SCA in ***Freedom Stationery (Pty) Limited v Hassam***[7] when it held that "where an affected party took the considered decision not to participate, they reconciled themselves to the reasonable prospect that a court could make an adverse order against them".

[23] Mr. Manala argued that the meaning of the word "absence" as applied in the decision Zuma, cannot be given the same meaning as it relates to the Municipality because

[7] 2019 (4) SA 459 (SCA).

unlike Mr. Zuma who has specifically refused to participate in the court proceedings, the Municipality did not refuse to participate.

[24] It may very well be that the Municipality was not vocal like Mr. Zuma, but the fact of the matter is that having been properly served and given the opportunity to participate in the proceedings, the Municipality elected to be absent from the proceedings, and accordingly, the Prinsloo Order was granted in the absence of any defence. This does not mean and must not be interpreted to mean that the Prinsloo Order was granted erroneously. In the circumstances, I am of the view that the Municipality's absence where it elected not to participate in the proceedings does not constitute "*absence*" for purposes of Rule 42(1)(a). Consequently, the rescission application in terms of Rule 42(1)(a) falls to be dismissed.

The Municipality's rescission application under the Common Law

[25] The Prinsloo Order may also be set aside under the common law if the Municipality satisfies the two common law requirements. These are encapsulated in the requirement that "sufficient or good cause" for rescission must be shown. This involves two essential elements: the Municipality **must** (1) give a reasonable and satisfactory explanation for its default or absence; and (2) show that on the merits it has a *bona fide* defence which, *prima facie*, carries some prospect of success[8]. Both requirements must be met.

[26] It is clear from the above principle that the Municipality **must** provide a reasonable and satisfactory explanation for its absence and failure to oppose the Part A application.

[27] It was submitted on behalf of the applicants, and correctly so, that the Municipality does not meet these requirements because, not only does the Municipality **not**

[8] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 SCA at paragraph 11.

provide a reasonable and satisfactory explanation for its absence or default, but it provides no explanation at all.

Condonation: Late filing of rescission application and answering affidavit

[28] The first principle that applies in an application for rescission under Rule 42(1) and the common law is that the application must be bought without delay and within a reasonable time. Even more so is the principle applicable to applications for condonation where a party essentially seeks the court's indulgence. Significant with a determination of such applications is that condonation cannot be had for the mere asking, and a party seeking condonation must make out a case entitling it to the court's indulgence by showing sufficient cause and giving a full detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default[9]. (underling added for emphasis)

[29] Having said that, the court should also consider the prospects of success, and where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However, despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive; the explanation is non-existent; and granting condonation would prejudice the other party.

[30] In expressing the importance of providing a reasonable and satisfactory explanation for the delay when applying for condonation, the court in ***Nair v Telkom SOC Ltd and Others***[10] stated that:

[9] Nair v Telkom SOC Ltd and Others (JR59/2020) [2021] ZALCJHB 449 at para 19 (7 December 2021).
[10] (JR59/2020) [2021] ZALCJHB 449 (7 December 2021)

"[14] Without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused. In this regard, in ***National Union of Mineworkers v Council for Mineral Technology 1998] ZALAC 22*** at para 10. *the court held as follows:*

> *"The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Among the facts usually relevant are the degrees of lateness, the explanation therefore, the prospects of success and the importance of the case. These facts are interrelated; they are not individually decisive. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. There is a further principle which is applied and that is that without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused".*

[31] It has been five (5) years since the Prinsloo Order was granted, and it took an additional seven (7) months after the Contempt Order was granted **-** for the Municipality to apply for the rescission of these Orders. This is so because the Municipality launched its rescission application on 12 August 2022.

[32] The deponent to the Municipality's founding/answering affidavit stated that she is "unable to proffer a reasonable explanation for the delay in the institution of the rescission application but that the court should nonetheless grant condonation for the

delay and entertain the rescission application[11]". The Municipality makes a bald statement that 'there is good explanation for its absence and delay' without sufficient justification for condonation to be granted. All that is contained in the Municipality's affidavits are defences raised which in my view, are irrelevant and immaterial as far as the Prinsloo Order is concerned because none of the defences raised, and the policy relied upon by the Municipality were in existence at the time when the Prinsloo Order was made. (underling added for emphasis)

[33] I am in agreement with the submission made on behalf of the applicants that the Municipality failed to provide a reasonable and satisfactory explanation for its delay in bringing this rescission application. It was submitted that the five (5) years and seven (7) months period of delay in bringing the rescission application is unreasonable and not justified, particularly because the Municipality was served with the main application and the Contempt Order after it had been granted.

[34] In my view, the Municipality's delay is unacceptably excessive and there is not even a single attempt to give an explanation, at the very least, for the Municipality's absence or default during the Part A application. I align myself with the decision in ***Nair v Telkom*** *supra* that condonation cannot just merely be about asking for an indulgence from the court because a party seeking condonation must make out a case entitling it to the court's indulgence by showing sufficient cause and giving a full detailed and accurate account of the causes of the delay. It follows that in the absence of a reasonable explanation in bringing the rescission application, and having failed to explain its absence as at the time when the Prinsloo Order was granted, the application for condonation cannot succeed.

[35] Having regard to the above, I am of the view that the Municipality has failed to satisfy the requirements of a rescission application under the common law, in that (1) it failed

[11] Caselines 036-25 at para 66.

to provide a reasonable and satisfactory explanation for its absence as stated in the previous paragraph, and (2) it also failed to show that on the merits, it has a *bona fide* defence which *prima facie* carries some prospect of success in challenging the Prinsloo Order, taking into account that the defences raised are based on the policy which did not exist at the time the Prinsloo Order was granted - and which I have already ruled that it was irrelevant as it relates to time when the Order was granted. Consequently, the Municipality's rescission application under the common law falls to be dismissed.

The MEC's rescission application against the Prinsloo Order

[36] Counsel on behalf of the applicants submitted that as far as the Prinsloo Order is concerned, the MEC has complied with the requirements of Rule 42(1)(a) and that the applicants accepts and acknowledges that the MEC was correct in his application for rescission because **(a)** the Notice of Motion in Part A of the application only sought relief against the Municipality and not the MEC; and **(b)** the argument advanced by the MEC in explaining his "absence" is that had he known that the relief was sought against him, he would have opposed the application, and in this regard, the requirement of "absence" in Rule 42(2)(a) has been met.

[37] With regards to the requirement that the order was "erroneously granted", the applicants further accepts that the Prinsloo Order was erroneously sought and stated that – had the court known of this fact as stated above, it would not have granted the order.

[38] It was further submitted on behalf of the applicants that the inclusion of the MEC on the Notice of Motion was based on the provisions of section 139(1) of the Constitution[12] because the applicants had in their Founding Affidavit mistakenly thought that the municipality was under the administration of the municipal manager, and the MEC would ultimately take over the obligations of the municipal manager, and therefore be responsible for obeying Court Orders. Further that the applicants

[12] The Constitution of the Republic of South Africa Act 108 of 1996.

accept and concede that – had the court known of this fact, it would not have granted the Order**,** and as such, the Order was erroneously granted. It was then submitted that the application to rescind the Prinsloo Order should be granted. Accordingly, it was submitted that the Prinsloo Order should be corrected or varied by excising the words "***alternatively the MEC"***[13] from paragraph 2 of that Order.

[39] Extensive arguments and submissions were also made on behalf of the MEC for the rescission of the Prinsloo Order, and having considered the submissions made by both parties, I concur with the parties, and I find it appropriate that the relief sought by the MEC should be granted and accordingly, the Prinsloo Order stands to be rescinded. In the circumstance, the words: "alternatively the MEC" in paragraph 2 of the Prinsloo Order are hereby removed.

<u>The rescission application against the Contempt Order</u>

[40] The applicants contend that the application on behalf of both the Municipality and the MEC in terms of Rule 42(1)(a) and the common law should be dismissed because the requirements have not been met.

[30] With particular refence to the MEC, the applicants argued that the rescission of the Prinsloo Order does not automatically make the Contempt Order rescindable. It was further argued that despite having been properly served, the MEC did not meet the requirement of "absence" because he chose not to oppose the contempt application or participate, and therefore the Contempt Order was not erroneously granted. With regards to the common law requirement, it was submitted that the MEC failed to give a reasonable explanation for his failure to oppose the contempt application and show that he has a *bona fide* defence with *prima facie* prospects of success. It was further submitted that the MEC also failed to explain the delay in launching the rescission application because it took him over nine months before launching the application.

[13] See paragraph 3 of this judgment.

[31] On the other hand, the applicants contend that, as much as they conceded that the Prinsloo Order should be rescinded in favour of the MEC, the Contempt Order should not be rescinded because this current "application is not about whether the MEC should be liable to pay a fine or be subjected to prison because that is a separate issue which is distinct from the question of rescission of the existing court order", and that the MEC will be personally served in future when an application for his committal is made.

[32] As a point of departure the argument presented on behalf of the MEC was that since the applicants have conceded and submitted that the Prinsloo Order should be rescinded, it follows that the Contempt Order should also be rescinded because it flows from the Prinsloo Order, meaning that - had it not been for the Prinsloo Order, the MEC would not have been included in the Contempt Order. Relying on the Supreme Court of Appeal decision in ***Motala v The Master of the North Gauteng High Court Pretoria***[14] and stressing the importance of the "Searle Principle", Mr Maelane submitted, and correctly so, that the Contempt Order should be rescinded and the MEC be extricated from paragraph 3 of the Contempt Order. It was further submitted that the Contempt Order if not rescinded, will have the legal effect on the MEC considering that the MEC was not included in the contempt application because he was not joined and served in his personal capacity. The court in ***Motala*** confirmed the "Searle Principle" and stated that:

> *"[93] .... if the first act is set aside, the second act that depends for its validity on the first act must be invalid as the legal foundation for its performance was non-existent"*[15].

[14] (92/2018) [2019] ZASCA 60; [2019] 3 All SA 17 (SCA) (17 May 2019).

[15] Seale v Van Rooyen NO & others; Provincial Government, Northwest Province v Van Rooyen NO & others 2008 (4) SA 43 (SCA) para 13.

[32] Having regard to the above principle, I agree with Mr Maelane's submission that had it not been for the Prinsloo Order granted against the MEC, the Contempt Order would not have been granted against him. Having said that, the applicants' submission that the current application is unrelated to issue of personal service on the MEC is misplaced. In my view, to refuse the MEC's application would be an injustice because it would be illogical to allow the Contempt Order hanging over his head while it is clear that there is no 'contemptuous act' on his part. This rings true to, and more relevant to the 'Searle Principle' that must be complied with.

[33] Another important aspect raised on behalf of the MEC in support of the submission that the Contempt Order was erroneously sought and erroneously granted in terms of Rule 42(1)(a) is the fact that there existed at the time of its issue, a fact which had the court been aware of, would have induced the court not to grant the Contempt Order. This relates to the fact that when the applicants applied for the Contempt Order, they did not disclose to the court that the MEC had already filed his answering affidavit in respect of **Part B** of the application. This answering affidavit is dated 11 July 2017, and it was served on the applicant's attorneys on the same day and stamped with the attorney's office stamp as proof of service.

[34] The importance of bringing to the attention of the court an important fact or information which would have have induced the court not to grant Court Orders erroneously, had it been made aware of it, was expressed by the court in ***Sheffryk v MEC for Police, Roads and Transport, Free State Province***[16] where Opperman J, referring to article by DJP Suttherland in addressing the duty of legal practitioners in taking the court into their confidence, and stated that:

> *"[3] Roland Sutherland, Deputy Judge President of the Gauteng Local Division of the High Court wrote in December 2021*[17] *that:*

[16] [2022] JOL 53933 (FB)

The primary duty of legal practitioners is to the court rather than to the client and thus legal practitioners are obliged to actively support the efficacy of the court process. One aspect of this dependence is illustrated in this article: the duty of legal practitioners to respect and support the process of court by making proper disclosure and not mislead the court. It is argued that the culture of contemporary litigation must be more respectful of this interrelationship between the judge and the legal practitioner to produce efficient and fair litigation".

[35] The above authority shows the importance of the duty which the applicants had in disclosing to the court that the MEC had already filed an answering affidavit on 11 July 2017, when they made the contempt application. In my view, had the applicants disclosed this fact, this court would not have granted the Contempt Order.

[36] It is on this basis that counsel on behalf of the MEC argued that had the court been aware of the existence of the MEC's answering affidavit, which - it was submitted that it had an impact on the Contempt Order, the court would have also realized that not only does this answering affidavit opposes the Part B application, but the prayers in the Part B application are similar to the prayers in the Contempt Order, which flows from the Prinsloo Order.

[37] With regards to the requirement of "absence" which the applicants says has not been met, the MEC explained in his affidavit in support of the rescission application that he did not oppose Part A of the application because no relief was sought against him in Part A, and that being the case, his absence during the contempt proceedings was justified because a party can only be in contempt of court if there was an Order made

[17] The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure, SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL, (2021) 4 (1) at page 47, ISSN: 2616-7999.

against them. Furthermore, he explained that his absence from the contempt proceedings was due to the fact that he knew that he had an answering affidavit in place which the applicants were under a duty to disclose to the court and submitted that had the contempt court been made aware of this fact, it would not have granted the Order.

[38] Having gone through all the motions and in light of the circumstances surrounding the Contempt Order against the MEC, Ms Webber finally conceded and submitted that the Contempt Order against the MEC should be rescinded, and that paragraph 3.2 of the Contempt Order may be varied to exclude the MEC because the MEC was not personally served. I am also satisfied that the MEC succeeded in making out a case for the Contempt Order to be rescinded. Consequently, the Contempt Order stands to be rescinded as it was erroneously sought and erroneously granted.

[39] With regards to the rescission application on behalf of the Municipality insofar as the requirement of 'absence' is concerned, Mr Manala appearing for the Municipality submitted that there is no basis to conclude that the Municipality was aware of the contempt proceedings when the matter came before the court. Thus, there was no service of the application, and no notice of set down on the Municipality. He further argued that the service of the contempt application is defective in that the only service of the application available on the papers filed of record is the stale one that was served on the Municipality on 17 August 2020 at its offices in Brits. The notice of set down was served via email dated 21 December 2020 and it was sent to **customercare@madibeng.gov.za** ; M[...]MB@cogta.gov.za and M[....]@justice.gov.za The covering message read as follows:

> *"Kindly find attached the notice of set down for the unopposed contempt of court application. The matter has been provisionally set down for 7 July 2021 and an application has been made by the Applicants to enrol the matter on the final roll"*.

[40] There are two more emails addressed to the State Attorney representing the MEC, which also relates to the date of the application being 7 July 2021. It was argued that the Municipality is represented by 'Malatji & Co Attorneys' and the applicants are aware of this. It was further argued that there is no service of the contempt application and set down which relates to the date of 10 January 2022 which is the date when the contempt application was heard and the date on which the order was ultimately granted. The court was taken through all the returns of service filed of record including the correspondences in an attempt to indicate to the court that the Municipality was never served with either the contempt application or notice of set down for that application.

[41] There is a letter addressed to the State Attorney in an email dated Friday, 6 January 2022 at 13:04 in which the State Attorney is informed of the date of 10 January 2022, but no such letter has been made available to the Municipality. The letter reads as follows:

1. *"The above matter and our email dated 23 November 2021 has reference.*
2. *Kindly note that the above matter was set down for hearing on 17 December 2021, as a preferential date awarded by the Deputy Judge President, before the Judge Phahlane.*
3. *Three days prior to the hearing, the matter was frozen on Caselines without prior notice to the Applicants. This prevented the Applicants from timeously uploading the relevant updated practice note and draft orders onto Caselines. Although the relevant documents were emailed to the judge' registrar, the matter was removed from the roll despite the presence of previous draft orders and a practice note which were not materially different from the updated practice note.*
4. *As the Applicants attorneys of record we recorded this to the Deputy Judge President and requested a new hearing date.*

5. *We write to inform you that Justice Phahlane has since confirmed that the matter will be heard next week Monday, 10 January 2022, at 09h00 via MS Teams. Kindly note that the matter is still being heard on an unopposed basis*".

[41] Having regard to the fact that there was no proof service on the Municipality, it was submitted that the Municipality application for rescission should be granted.

[42] Mr. Manala correctly pointed out that it should be noted that in our adversarial system (ie. the adversarial doctrine of litigation), if a party is not opposed, then the court would normally accept whatever the other party appearing in court says, and in this regard, the court will not have regard to the other issues which a party appearing before court is not disclosing to the court, -- leading the court to proceed to hear the matter on an unopposed basis.

[43] In light of the aforesaid circumstances and having considered the submissions made by both parties, I am bound to agree with Mr. Manala that the Contempt Order against the Municipality was erroneously sought and granted. Consequently, that Order stands to be rescinded.

Costs

[44] The applicants contend that in the event the Municipality fail in its rescission application, it should pay the costs including the costs of two counsels. Ms Webber submitted that in the event that the Municipality succeed in its rescission applications, the Biowatch principle should apply because this litigation has been brought by the applicants with the intention of vindicating their constitutional rights, including their right of access to water and the award of costs against the Municipality would have a chilling effect on public interest litigation of this nature.

44.1 Mr. Manala on the other hand submitted that if the Municipality succeeds in its application, it does not wish to press for costs, but that if it fails, the court has to determine whether the Biowatch principle apply.

[45] In respect of the MEC, it was submitted that with regards to the Prinsloo Order, each party should bear its own costs because the MEC delayed in bringing the rescission application and has not justified that delay. It was further submitted that in the event that the MEC fail in his application for the rescission of the Contempt Order, then the MEC should pay half of the costs of the applicants, including the costs of two counsel, but he succeeds, each party should bear their own costs.

45.1 Mr Maelane submitted that if the MEC become successful in his application for the rescission of the Contempt Order, then each party should pay their own costs, and if the MEC is not successful, then each part should still pay their own costs because the MEC has been successful with the Prinsloo Order.

[46] The basic rule is that an award of cost is a matter within the discretion of the court and such a discretion must be exercised judicially having regard to all the relevant considerations. One such consideration is the general rule relating to costs in constitutional matters laid down by the Constitutional Court in ***Biowatch Trust v Registrar, Genetic Resources and Others***[18] that in constitutional litigation, an unsuccessful litigant ought not to be ordered to pay costs to the state. The rule applies in every constitutional matter involving organs of state and it seeks to shield unsuccessful litigants from the obligation of paying costs to the state. This court held that the underlying principle is to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights[19].

[18] [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)

[19] See also: Harrielall v University of KwaZulu-Natal (CCT100/17) [2017] ZACC 38; 2018 (1) BCLR 12 (CC) (31 October 2017).

[46] The Supreme Court of Appeal in ***Helen Suzman Foundation v The Speaker of the National Assembly and Others***[20] restated the principles underlying the Biowatch rule and stated that:

> *"[8] There is no suggestion that the Biowatch principle has abolished the discretion vested in courts with regard to costs orders. Courts must, however, commence a consideration of a costs award from the premise that in constitutional litigation an unsuccessful private litigant in proceedings against the State ordinarily ought not to be ordered to pay costs. The principle, however, must be considered holistically. In Biowatch Trust v Registrar, Genetic Resources and Others,*[21] *the principle was articulated thus:*
>
> > *'If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way the responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door".*
>
> *[13] The judicial discretion of a court on costs has not been abolished by the Biowatch principle. In public interest cases, however, the exercise of that discretion is guided first and foremost by Biowatch together with the traditional guiding principles, including the conduct of the parties in the litigation and success on merits".*

[47] Having considered that the applicants in this matter brought this litigation with the intention of vindicating and asserting their constitutional rights, including their right of access to water which the Municipality have expressly acknowledged and stated that the limited water supply to the applicants was an infringed upon their constitutional

[20] (484/2021) [2023] ZASCA 6 (3 February 2023)

[21] Biowatch Trust v Registrar, Genetic Resources and Others [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) para 23. See too Affordable Medicines Trust and Others v Minister of Health and Another [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) para 138.

rights[22], I find that this matter is based on "genuine constitutional issues" and accordingly, the Biowatch principle does apply.

[48] Ms Webber and Mr. Maelane representing the applicants and the MEC respectively, submitted that if the MEC become successful in his rescission application in respect of both the Prinsloo Order and the Contempt Order, each party should pay their own costs.

[49] The Municipality's application for the rescission of the Prinsloo Order and the Contempt Order was unsuccessful. In terms of the Biowatch principle, the Municipality should pay the costs. Nonetheless, the applicants contended that in the event the Municipality fail in its rescission application, the costs should include the costs of two counsels. Considering that an award for cost is a matter for the discretion of the court, equally trite is the principle that a court has a discretion whether to allow the fees for the employment of more than one counsel. In ***Koekemoer v Parity Insurance Company Ltd and Another***[23] the court stated that:

> *"The enquiry in any specific case is whether in all the circumstances, the expenses incurred in the employment of more than one counsel were "necessary or proper for the attainment of justice or for defending the rights of the parties", and were not incurred through ''over-caution, negligence or mistake. If it was a wise and reasonable precaution to employ more than one counsel, the cost incurred in doing so are allowable as between party and party. But they are not allowable if such employment was merely luxurious."*

[22] See para 2.1 above.
[23] 1964 (4) SA 138 (T) at 144.

[50] This matter has a long history. Mr Manala correctly pointed out during his closing address that "this court has been case managing this case and is fully aware of the complexity or otherwise the intricacies involved, and that there are hundreds if not thousands of documents involved". Consequently, I am of the view that it was necessary for the applicants to employ more than one counsel.

[51] In the circumstances, the following order is made:

1. In respect of the Municipality:
   1.1 Condonation for the late commencement of the rescission/variation application is refused.
   1.2 Application to rescind/vary the Court Order granted on 09 May 2017, and the subsequent Contempt Order granted on 11 January 2022 is dismissed.
   1.3 The Municipality is ordered to pay the costs of these applications on a party and party scale, such costs to include the costs of the employment of two counsels.
2. In respect of the MEC:
   2.1 Application to rescind/vary the Court Order granted on 09 May 2017, and the subsequent Contempt Order granted on 11 January 2022 succeeds to the following extent:
      2.1.1 The Court Order granted on 09 May 2017, and the subsequent Contempt Order granted on 11 January 2022 against the third respondent are rescinded and set aside in their entirety.
      2.1.2 The words: "*Alternatively the MEC*" in paragraph 2 of the Court Order granted on 09 May 2017 are hereby deleted.
      2.1.3 The words: "*Third respondent*" in paragraph 3 of the Contempt Order granted on 11 January 2022 are hereby deleted.
      2.1.4 The applicants and the third respondent are ordered to pay their own costs.

PD. PHAHLANE
JUDGE OF THE HIGH COURT

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Date of Hearing	: 9 and 10 March 2023