Reportable: YES/**NO**
Circulate to Judges: YES/**NO**
Circulate to Magistrates: YES/NO
Circulate to Regional Magistrates: YES/NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NUMBER: 2101/2021

In the matter between:

SAMEX CONSULTING (PTY) LTD	Applicant
and	
DEPARTMENT OF ROADS AND PUBLIC WORKS: NORTHERN CAPE	First Respondent
ACTING HEAD OF THE DEPARTMENT NORTHERN CAPE	Second Respondent
RAMONA GREWAN	Third Respondent
CHIEF FINANCIAL OFFICER DEPARTMENT OF ROADS AND PUBLIC WORKS: NORTHERN CAPE	Fourth Respondent
MEC: DEPARTMENT OF ROADS AND PUBLIC WORKS NORTHERN CAPE	Fifth Respondent
FUFE MAKATONG	Sixth Respondent

Heard: 10 August 2022

Delivered: 28 October 2022

JUDGMENT

Phatshoane DJP

[1] This is an application for contempt of this Court's order dated 23 November 2021 issued under Case No: 2101/2021 by Samex Consulting (Pty) Ltd (Samex) against the Department of Roads and Public Works, Northern Cape (the department), its Acting Head of Department (the HOD), its former HOD Ms Ramona Grewan, in her personal capacity, its Chief Financial Officer (CFO), and its Member of the Executive Council (MEC), Ms Fufe Makatong, in her official and personal capacity. These parties are cited as the first to the sixth respondent. For convenience, they are collectively referred to as the respondents. The urgency in respect of which the application was initially brought has somewhat abated.

[2] On 23 November 2021, by agreement between the parties, this Court, *per* Mamosebo J, made an order which is central to the present application (the Mamosebo J order). The relevant part reads:

> '2. The first respondent's [department's] termination of the applicant's [Samex's] appointment as a consultant to provide professional services for the management and implementation of maintenance in hospitals and community healthcare facilities in the Northern Cape Province for a period of three years on turnkey basis is unlawful.
>
> 3. The first respondent's termination letter dated 31 August 2021, signed by the second respondent, is set aside;
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> 4. Within 10 days of receipt of this order, the first and second respondent must deliver to the applicant the terms of reference;
>
> 5. Within 5 days of receipt of the terms of reference from the first and second respondent, the applicant shall respond to the terms of reference;

6. Once the applicant has responded to the terms of reference as stated in 5 above, the first respondent is directed to perform its obligations in terms of the written agreement concluded between the applicant and the first respondent on 30 November 2020.

7. In the event the parties do not agree on the terms of reference, the respondents are interdicted from appointing another service provider to render the service in terms of the agreement concluded with the applicant on 30 November 2020 pending the agreement on the terms of reference.

[3] I first consider Samex's preliminary point that the respondents' second answering affidavit, filed when all the required number of affidavits had been exchanged, be disallowed. The present application was filed with the registrar of this Court on 02 March 2022. What followed naturally was the filing of the respondents' answering affidavit (the first answering affidavit) on 11 March 2022 deposed to by their attorney, Mr N Gqadushe. On 17 March 2022 Samex filed its replying affidavit. In this, it took issue, correctly so in my view, that it was not the attorney for the respondents that had been called upon to show cause why the respondents should not be held in contempt. As a consequence of this, it was submitted, that the respondents had failed to show cause for their want of compliance with the court order. Approximately 4 months later, on 14 July 2022, the respondents filed the second answering affidavit attested to by Mr Vuyani Mhlauli, the second respondent who, for a certain period of the alleged contempt (approximately 6 months), had been employed by the department as the acting HOD and a successor of Ms Ramona Grewan, the third respondent.

[4] Samex argued that the second answering affidavit was filed out of sequence. Relying on *Hano Trading CC v J R 209 Investments (Pty) Ltd*[1], it was contended, for Samex, that it was not for the respondent to simply slip in the second answering affidavit into the court file which severely prejudices Samex, who had to meet a case based on those facts.

[1] [2012] ZASCA 127; 2013 (1) SA 161 (SCA); [2013] 1 All SA 142 (SCA) at para 13.

[5] Mr Mhlauli points out that the delivery of the second answering affidavit was necessitated by Samex's assertion that the first answering affidavit, insofar as it was deposed to by the respondents' attorney, did not exonerate the respondents of contempt and did not constitute admissible evidence that would assist the court in determining whether the respondents have acted in wilful disobedience of the Court order. Mr Mhlauli further states that the second affidavit was settled following receipt of counsel's advice that, as a sign of fidelity to the Constitution[2] and its injunction, the respondents were obliged to set out facts, on oath, to show cause why their respective conduct did not amount to contempt of the Mamosebo J order. It was contended for the respondents that failure to afford them an opportunity to state their case in full would result in grave injustice and prejudice to the department as an institutional structure. To this end, they seek condonation for the belated filing and admission of the second answering affidavit.

[6] In *Grootboom v National Prosecuting Authority*[3]*,* the Constitutional Court held that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. This requires a party to give a full explanation for the non-compliance with the rules. Crucially, the explanation must be reasonable enough to excuse the default.

[7] The attestation of the first answering affidavit by the respondents' attorneys, is susceptible to criticism. In general, it is undesirable for an attorney to depose to an affidavit on matters which can with equal or more appropriateness be deposed to by his or her client[4] just as he or she cannot give evidence instead of his or her client. The respondents do not state when they received advice from counsel that awakened them to file a fresh answering affidavit. The fact that the respondents remained inert for a period of approximately four months, prior to filing the second answering affidavit, is lamentable.

[2]The Constitution of the Republic of South Africa, 1996.
[3]*Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC); (2014 (1) BCLR 65; [2013] ZACC 37) para 23.
[4]*Mazibuko v Singer* 1979 (3) SA 258 (W) at 264F.

[8] The sufficiency of the explanation given for the delay is not wholly determinative of whether condonation should be granted.[5] Civil contempt has not divested itself of its criminal dimension.[6] The convictions following the proceedings are very serious in nature whereas the remedies of committal or a fine have material consequences on an individual's freedom and security of the person.[7] The nature of the application implicates the fair trial rights of the alleged contemnors as set out in s 35(3) of the Constitution and the right not to be detained without a fair trial.[8] The respondents raised and ventilated their defence in their second answering affidavit. The evidentiary burden reposes on them to demonstrate that the disobedience was not deliberate and *mala fide.* They do have the right to state their case in full and to challenge evidence. To prevent them from placing evidence before court would be an affront to the Constitution and is certainly not in the interest of justice. To remedy any resultant prejudice, which I can conceive of none at this stage, I have afforded Samex the opportunity to file an additional replying affidavit in answer to the second answering affidavit, should they be so inclined, which they did. Accordingly, late filing of the second affidavit is condoned and it is admitted into the record.

[9] On or about 18 August 2020, Samex received a letter from the department informing it that it had been nominated to provide professional services for the management and implementation of maintenance work in hospitals and community healthcare facilities in the Northern Cape Province for a period of three years. The extent of the services required from Samex was set out in Section G and Annexure A to the contract. Samex accepted the nomination and furnished the department with a 15% discount rate for the services it had been nominated to provide. On 09 September 2020, through a letter signed by Ms Grewan, the department appointed Samex to perform the mentioned

[5] *S v Ndlovu* 2017 (2) SACR 305 (CC) para 32.
[6] See the remarks by Cameron JA in *Fakie No v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 11- 17.
[7] *Matjhabeng Local Municipality v Eskom Holdings Ltd and others* 2018 (1) SA 1 (CC).
[8] Section 12(1)(b) of the Constitution.

services for a period of 3 years on a turnkey approach. It was also provided with a written agreement on 13 November 2020. Pursuant to this, the department never gave Samex any instruction to commence work.

[10] As a consequence of the department's rebuff, Samex directed a letter to the department on 22 January 2021 to confirm the status of Samex's anticipated instructions from the department to perform and the time-schedule for the instructions in question during the contractual period. In reply, the department notified Samex that it was appointed on an "as and when required" basis. On 31 August 2021, the department informed Samex that its appointment was irregular in that it was too vague as it did not stipulate which facilities were to be maintained. Samex was further advised that in terms of clause 1.6.2 of the contract:

> "(T)he client [the department] reserves the right to cancel if instructions, necessary for you to continue with the work after a delay or deferment instructions, are not received from client within 6 months after such instructions were requested by you. Since your appointment there has not been further instructions to you on the project.
>
> There are no funds available to cover the total envisaged expenditure for these services."

[11] The delivery of a letter above culminated into Samex bringing an urgent application on 12 October 2021 in which it sought to, inter alia, set aside the termination of its appointment on the basis that it was unlawful. The respondent did not resist the application but adopted a position in terms of which it would undertake a process of redefining Samex's scope of work for purposes of carrying out its obligation under the contract. As already stated, the parties agreed on 23 November 2021 to the order that was subsequently issued by Mamosebo J declaring the termination of Samex's appointment unlawful and setting it aside.

[12] Approximately two weeks following the granting of the Mamosebo J order, Samex's attorneys dispatched a letter to the respondents on 07 December 2021 to secure their compliance with the order. On 17

December 2021, Samex lodged the first contempt application because the department and the HOD had failed to submit the terms of reference as set out in the Mamosebo J order. On that same date, the department and the acting HOD submitted the revised terms of reference. On 20 December 2021, Samex voiced its objection to the revised terms of reference and made further proposals on them. On 10 January 2022, Samex requested the respondents to respond to Samex's reply to the terms of reference. On 11 January 2022, the date in respect of which the first contempt application was to be heard, the respondents' current attorneys placed themselves on record and undertook to reply to Samex's response to the terms of reference by no later than 13 January 2022. On the basis of this undertaking, the first contempt application was withdrawn. However, the department's attorneys failed to act in accordance with their undertaking.

[13] Samex's sole director and its deponent, Mr Nyakale Qhojeng, states that through his investigative work, he visited Dr Harry Surtie Hospital, Upington, in February 2022 and discovered that the department had appointed an entity trading as Mekan Engineering (Mekan) to render the services akin to those which Samex was appointed to execute. In view of this, Samex's attorneys directed a letter to the respondents' attorneys on 21 February 2022 to apprise them that the department was acting in contempt of the Mamosebo J order, in particular para 7 thereof, in that it had appointed a contractor to perform the work that Samex had been contractually assigned to do. Samex contends that until such time as the agreement on the terms of reference would have been reached between itself and the department, no service provider ought to have been appointed to perform the services that were contractually meant for it to execute as set out in the Mamosebo J order. To the extent that the respondents appointed Mekan, it was argued, they acted in wilful disrespect of the authority of the court and thus made themselves guilty of contempt of court.

[14] By means of a letter dated 21 February 2022, the department was placed on terms to engage Samex to commence with the execution of the work by 24 February 2022. The department did not revert to Samex which precipitated the launching of the present second contempt application by Samex against the respondents.

[15] The department version, from the date of the withdrawal of the first contempt application, is slightly different. According to it, there had been ongoing settlement negotiations between the parties. It came as a complete surprise to it that on 26 May 2022 Samex's attorneys intended to proceed with the hearing of the application on 27 May 2022. However, the application was not heard because the presiding judge directed the parties to endeavour to settle the matter. The application was postponed to 3 June 2022. On 2 June 2022, the eve of the hearing, Samex's attorneys provided the department with another proposal on the revision of the terms of reference. There was an objectionable term which the department states it could not accede to which resulted in a breakdown in the negotiations. The result was that no terms of reference were concluded. The department contends that it attempted to comply with the Mamosebo J order but for the impasse. There had been no term in the agreement and/or the Mamosebo J order on how to resolve the stalemate.

[16] The respondents further contend that the settlement agreement, which is the substratum of the court order, was concluded on the basis of the advice received from their erstwhile attorneys and made an order of this Court. The said agreement, it was argued for the respondents, constitutes *pactum de contrahendo,* an agreement to contact, which is unenforceable as parties are given absolute discretion to agree to disagree. Its unenforceability is compounded by the conspicuous absence of a deadlock mechanism, in the event of an impasse. Consequently, so it was argued, the settlement agreement and by extension, the Court order, which Samex seeks to vindicate the authority of the Court, is not underpinned by a lawful substratum and an

insistence on its compliance would result in an egregious miscarriage of justice.

[17] It was further argued for the respondents that the agreement defies the Constitution[9] and the law. To this end, it was submitted that sufficient basis existed for the respondents to be excused from its compliance. The respondents urged the Court, to the extent that they may be found to have contravened para 7 of the court order, in having appointed a different service provider other than Samex, to exonerate them because, they claim, their conduct was excusable.

[18] Apparent from the exposition which I have sketched, four issues arise for consideration. The first, concerns the status of the Mamosebo J order. The respondents put it bluntly that it is unlawful and ought to be disregarded as it is not supported by a lawful substratum. Samex holds a different view. Secondly, it should be considered whether the respondents acted mala fide and or in wilful disregard of the Mamosebo J order. Thirdly, should it be determined that there had been wilful non-compliance with the order, each of the respondent's complicity would have to be determined. Lastly, the criminal sanction or civil penalties to vindicate the court's honour should be considered. I propose to deal sequentially with these issues.

The Status of the Mamosebo J order

[19] One of the characteristics of a punitive order of contempt, similar to that sought by the Samex, is that it is influenced by the need to assert the authority and dignity of the court to set an example for others.[10] The broader public has an interest in the obedience to court orders since disregard sullies the authority of the courts and detracts from the rule of law.[11] I am reminded in this context of the following important exhortation

[9]The Constitution of the Republic of South Africa, 1996.
[10]*Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and others (Helen Suzman Foundation as amicus curiae)* 2021 (5) SA 327 (CC) para 47; 2021 (9) BCLR 992 (CC).
[11]*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 8.

by the Constitutional Court in *Municipal Manager OR Tambo District Municipality & another v Ndabeni*:[12]

'[23] Trite, but necessary it is to emphasise this court's repeated exhortation that constitutional rights and court orders must be respected. An appeal or review — the latter being an option in the case of an order from the Magistrates' Court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be '*patently* at odds with the rule of law'. Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.

[24] This court in *State Capture* reaffirmed that irrespective of their validity, under s 165(5) of the Constitution, court orders are binding until set aside. Similarly, *Tasima* [*Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC)] held that wrongly issued judicial orders are not nullities. They are not void or nothingness, but exist in fact with possible legal consequences. If the judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.'

[20] It was argued for Samex that a court order is binding until set aside. That the Mamosebo J order is unlawful, it was argued, was an afterthought; and a challenge made at the behest of the respondents designed to frustrate Samex.

[21] It is so that the respondents did not assail the correctness of the judgment or the validity of the Mamosebo J order by way of an appeal nor was the department's decision to appoint Samex impugned by means of a review. There rested a public duty on the respondents to pursue the appeal to correct the illegality.[13] If it is so that the Mamosebo J order is not supported by any lawful substratum, then this Court would not be bound by what is legally untenable.[14] As stated earlier, the respondents attack the order principally on the basis that it comprises an agreement to agree and thus unenforceable.

[22] Samex letter of appointment at para 1.8 states:

[12](2022) 43 ILJ 1019 (CC) paras 23-24.
[13]*Municipal Manager OR Tambo District Municipality & another v Ndabeni* (2022) 43 ILJ 1019 (CC) para 41.
[14]*Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA) para 19.

‘1.8 Agreement

1.8.1 The conditions, as set out in this letter, together with Sections mentioned herein, as listed in Section A, together with your letter of acceptance in terms of item 2 below, constitutes the entire agreement between you and the client [department]. No variation thereto will be of any force and effect unless agreed to in writing and signed by the duly authorised representatives of both parties..’

[23] Section A of the agreement sets out the settlement of disputes clause in these terms:

‘26.1 If *any dispute or difference of any kind whatsoever* arises between the Client [department] and Consultant [Samex] in connection with or arising out of the agreement, the parties shall make every effort to resolve amicably such dispute or difference by mutual consultation.

26.2 If, after thirty (30) days, the parties have failed to resolve their dispute or difference by mutual consultation, then either of the parties may give notice to the other party of his intention to commence with mediation. No mediation in respect of this matter may be commenced unless such notice is given to the other party.

26.3 Should it not be possible to settle a dispute by means of mediation, then such dispute may be settled in a South African court of law’.

[24] The value of certainty in commercial contracts requires protection. What lies at the heart of this, is the principle of *pacta sunt servanda*, that contracts should be complied with, which is recognised for that reason. Thus, bargains struck by parties should in principle be observed. That is foundational to our law of contract. Indeed, there may be exceptions where public policy determines that the bargain is unconscionable as far as any party to it is concerned.[15] Generally, courts will not enforce 'an agreement to agree'.[16] The proper approach in that form of an enquiry depends upon the construction of the particular agreement.[17] Having carefully traversed the position obtaining in other jurisdictions, on an

[15] *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC); *See also*, *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); Lewis “*The Uneven Journey to Uncertainty in Contract*” 2013 (76) THRHR, Page 82.

[16] *Shepherd Real Estate Investment (Pty) Ltd v Roux Le Roux Motors CC* 2020 (2) SA 419 (SCA) at para 16.

[17] Ibid para 17.

agreement to negotiate and an agreement to agree, such as Canada, New Zealand and, Australia in *Shepherd Real Estate Investment (Pty) Ltd v Roux Le Roux Motors CC*[18], Ponnan JA concluded as follows on this aspect:

'[18] In *Southernport* [*Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA)] (para 16) reference was made to the three situations adverted to by Kirby P in *Coal Cliff* [*Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*] (1991) 24 NSWLR 1, namely:

(i) 'In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties. . . . But even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain. . . . In that event the court will not enforce the agreement.'

(ii) 'In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory.'

(iii) 'Finally, in many cases, the promise to negotiate in good faith will occur in the context of an "arrangement" (to use a neutral term) which, by its nature, purpose, context, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable.'

[19] *Southernport* added: 'The principles enunciated in *Coal Cliff Collieries* accord with our law. The first and third situations alluded to by Kirby P are covered, respectively, by *Letaba Sawmills* and *Firechem*.' The agreement in *Southernport* fell into the first category…'

[25] The agreement with which I am here concerned (as foreshadowed in the Mamosebo J order) cannot be read separately from the first main agreement which largely regulates all the contractual obligations between the parties. As I have shown, the main agreement contains the dispute resolution mechanism. *In Southernport Developments (Pty) Ltd v Transnet Ltd*[19] the agreement to negotiate the terms in good faith had

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[18] Ibid paras 18-19.

[19] 2005 (2) SA 202 (SCA).

been linked to an arbitration clause which provided that, in the event of a dispute's arising between the parties in respect of any of the terms of conditions of the lease agreement, the dispute would be referred to arbitration and the decision of the arbitrator would be final and binding on the parties. There, Ponnan AJA (as he then was) held that:

‘(T)he arbitrator was entrusted with putting the flesh onto the bones of a contract already concluded by the parties… For what elevates this agreement to a legally enforceable one and distinguishes it from an agreement to agree is the dispute resolution mechanism to which the parties have bound themselves. The express undertaking to negotiate in good faith in this case is not an isolated edifice. It is linked to a provision that the parties, in the event of their failing to reach agreement, will refer such dispute to an arbitrator whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable, what would otherwise have been an unenforceable preliminary agreement.’ [20]

[26] *Southernport,* which was cited with approval by the Constitutional Court in *Makate v Vodacom Ltd,*[21] resonates with the present setting. The dispute on the settlement of the terms of reference between Samex and the respondents is “of any kind whatsoever” as envisaged in clause 26.1 (the dispute settlement) of the main agreement referred to above. On 9 September 2021, almost two months prior to the Mamosebo J Order, Samex invoked clause 26 and directed a request to the respondents to provide an undertaking that they would not appoint another service provider until the mediation process was finalised. Surely, on the basis of clause 26, it cannot be argued that the parties had no ‘deadlock-breaking mechanism’ in the event they could not agree on the terms of reference. To the extent that there was an impasse, on the terms of reference, the parties had the means of resolving such. The mediation process itself, as I see it, may have yielded to the meeting of minds and assisted the parties to carve out the terms of reference. It follows that the ‘agreement to agree’ on the terms of reference, properly construed in

[20] Ibid para 17.
[21] 2016 (4) SA 121 (CC) para 97.

this instance, cannot be said to be illusory or void for vagueness and unenforceable as the respondents sought to argue.

[27] The respondents' further attack on the order is predicated on the Constitution. They invoked the Constitutional Court's decisions in *Eke v Parsons*[22] and *Buffalo City v Asla Construction*[23] in support of their argument that it did not follow that anything agreed to by the parties ought to be accepted by a court and made an order of court. The order should be competent and proper. The court must not be mechanical in its adoption of the terms of a settlement agreement.[24] It was submitted, that when Mamosebo J made the settlement agreement an order of court, she simply acted in a mechanical fashion without ensuring that the order that was sought conformed with the Constitution and the law. This, so it was argued, resulted in non-compliance with the order which is excusable as to insist on its compliance would be inimical to the Constitution.

[28] The respondents' contention that the order offends against the Constitution and the law, is premised on their submission that the order was unenforceable as it finds its roots in the invalid agreement. I have already said the agreement was not void. Much more on the tangential side, the respondents' deponent, perfunctorily, states that he had been advised that the agreement was not compliant with s 217 of the Constitution and therefore susceptible to review in terms of the principle of legality. He states that Samex's nomination as a contractor does not appear to have been made pursuant to a process that is fair, transparent, competitive and cost-effective as contained in our procurement statutory architecture. It may well be, but this is not a review application nor its determination. In any event, in my view, it is simply insufficient for the respondents to make allegations that are unsubstantiated. It is also a bit disquieting that such a review, as at the

[22]2016 (3) SA 37(CC).
[23]2019 (4) SA 331(CC).
[24]See para 34 fn 22 (*Eke v Parsons*) and para 23 (*Buffalo City v Asla Construction*) fn 23.

date of the hearing of this application, had not been brought. It bears repeating that already on 31 August 2021, more than a year ago, the respondents informed Samex that its appointment was irregular in that it was too vague because it did not stipulate which facilities Samex had to service. But still, it did nothing to correct the irregularity. On the aforegoing analysis, I am of the view that the respondents did not make out a case that the Mamosebo J order is without any force. I now turn to the question whether the respondents acted mala fide and or in wilful disregard of the Mamosebo J order.

Compliance with the Mamosebo J order

[29] The jurisdictional requirements for an order of civil contempt are well-established. The applicant must prove the existence of the order; service or notice; and wilfulness and mala fides beyond reasonable doubt.[25] Once the applicant has proved the order, notice and non-compliance, the respondent's conduct is presumed to be both wilful and mala fide and it bears an evidential burden to rebut that presumption. For an act to constitute civil contempt, there must have been an intention to defeat the course of justice.[26]

[30] In the respondents' say-so, there is no dispute with regard to the existence of the court order; its delivery on the respondents; and the alleged non-compliance. From the background facts, during the period 17 December 2021 to 2 January 2022, various attempts were made by the parties to settle the terms of reference, including the preparation and exchange of several draft proposals for such terms. This was at a glacial pace because the respondents' attorneys took time to respond to correspondence. In the end, the drafting of the terms of reference came to naught. Where there had been various attempts to settle the dispute,

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[25] *Mashamaite and others v Mogalakwena Local Municipality and others; Member of the Executive Council for Coghsta, Limpopo and another v Kekana and others* [2017] 2 All SA 740 (SCA).

[26] *Multichoice Support Services (Pty) Ltd v Calvin Electronics and another* 2021 JDR 2529 (SCA) para 20.

the officials cannot be said to have been in willful disobedience of the court order.[27] To the extent that the Mamosebo J order stipulated that the parties must agree on the terms of reference, regard being had to the various letters exchanged with a view to crafting such terms, it cannot be said that the respondents were in complete wilful defiance of the order. However, there is more. Para 7 of the Mamosebo J order states that in the event the parties do not agree on the terms of reference, the respondents are interdicted from appointing another service provider to render the service in terms of the agreement concluded with the applicant on 30 November 2020 pending the agreement on the terms of reference. The department nonetheless appointed Mekan. The question is whether in so doing their conduct was excusable.

[31] According to Mr Mhlauli, the department appointed Mekan on 27 August 2015 as a consultant to provide mechanical engineering services for the supply, installation, servicing/maintenance of HVAC equipment for a period of three years. That contractual period would have ended in August 2018. On 16 May 2019, Mekan was appointed to render services on back-up/standby generators for the healthcare facilities for a period of three years whereas Samex was appointed on 9 September 2020 to provide the same services that Mekan had previously been appointed to perform in term of the contract that expired in 2018. On 22 June 2020, Mr Mhlauli says that Mekan's services were suspended due to budgetary constraints. More than a year later, on 15 December 2021, during the subsistence of the contractual relationship between Samex and the department, the Department of Health issued an instruction to the department requesting an urgent appointment of an electrical/mechanical engineer for repairs and maintenance of HVAC at Dr Harry Surtie Hospital. On that same date, the third respondent, the then acting HOD, Ms Ramona Grewan, appointed Mekan.

[32] Mr Mhlauli states that the instruction to appoint a service provider to attend to Dr Harry Surtie Hospital above was transmitted during the

[27] *Matjhabeng Local Municipality v Eskom Holdings Ltd and others (*above fn 7 and fn 29*)* para 78.

builders' holiday and required execution by a contractor which was experienced in the maintenance of HVAC. He further says that the urgency of retaining their services was occasioned by the need to ensure that surgical procedures were undertaken to facilitate the treatment of patients, thus a matter of life and death. Mr Mhlauli says that Samex was not deemed to have the requisite skill possessed by Mekan. It was out of the circumstances of necessity which required that the department appoint Mekan and therefore ought to be excused from liability for contempt.

[33] As already alluded to, on 15 December 2021, contrary to the terms of the Mamosebo J's order, the department appointed Mekan to perform the same work which was meant to be executed by Samex in terms of the contractual arrangement between Samex and the department. At that stage Mekan, as said, was engaged by the department to conduct maintenance of the back-up /standby generator and not the repairs of the HVAC (heating, ventilation and air conditioning) system (said to be an air conditioning system) which it was instructed to perform.

[34] The contention to the effect that Samex had no experience to attend to the repairs and maintenance of the HVAC system is problematic. It is hard to imagine that the department would have appointed Samex during November 2020 to perform this type of work without having determined its adequacy and competency to execute it. No sufficient evidence was adduced to demonstrate that Samex would have been unable to perform the work that Mekan was called out to do on an urgent basis. In my view, the respondent's averment that it acted out of necessity in not complying with the Mamosebo J order is wanting and cannot serve as an excuse. It bears emphasis that the department agreed to the terms of the Mamosebo J order. No plausible reason has been provided why Samex as the appointed contractor ought not to have been engaged to render the services while the negotiations on the terms of reference were afoot. Consequently, there had been a partial wilful breach of the Mamosebo J order. Put differently, to the extent that the

respondents appointed a service provider conflictual to the terms of the Mamosebo J order, they acted deliberately and mala fide.

The respondents' complicity.

[35] It is settled that contempt of court is not an issue *inter partes*; it is an issue between the court and the party who has not complied with a mandatory order of court.[28] So far, when evaluating the issues, I have generally referred to the respondents jointly without distinction. However, it is important that each of their complicity be established. In light that the relief sought is one of committal, the criminal standard of proof, beyond reasonable doubt, is applicable.[29] Stated otherwise, it must be clear beyond reasonable doubt that an official implicated is the person who has wilfully and with knowledge of the court order failed to comply with its terms.[30]

[36] Samex imputes non-compliance with the order on all the respondents. The respondents countervailed that the first respondent, the department, as a juristic person cannot be held in contempt. With regard to Ms Grewan (HOD of the time) and Ms Makatong (MEC of the time), it was argued that for them to be held in contempt, in their personal capacity, they ought to have personally and deliberately acted in defiance of the Mamosebo J order. It was further contended that the CFO, the fourth respondent, and the MEC both in her personal and representative capacity, had nothing to do with the contempt proceedings and did not make common cause with anyone to defy the authority of the Court. In any event, it was submitted, the Mamosebo J order was against the department and the HOD, in her representative capacity and had nothing to do with any of the other respondents.

[28] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 38; See also *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 673D-E.
[29] *Matjhabeng Local Municipality v Eskom Holdings (Pty) Ltd* 2018 (1) SA 1 (CC) para 73.
[30] *Meadow Glen Home Owners Association v Tshwane City Metropolitan Municipality* 2015 (2) SA 413 (SCA) at 422H–423A and 424E–H.

[37] A deliberate non-compliance or disobedience of a court order by the State through its officials amounts to a breach of its constitutional duty to obey court orders.[31] Therefore, the argument that the department, the first respondent, cannot be held in contempt must falter. Orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the court.[32] The fifth respondent's stance (the MEC), that she had no role to play is equally problematic in the face of s 165(5) of the Constitution which provides that an order or decision by a court binds all persons to whom it applies. It may well not have been her responsibility to take steps necessary to comply with the order. However, she ought not to have been an innocent bystander in the midst of flagrant disobedience of the order. She clearly did nothing to impress upon the officials of her department to act as they were enjoined to do by this Court's order. After all, in terms of s 125(6)(a) of the Constitution the provincial executive, must act in accordance with the Constitution whereas s 125(2) (e) places an obligation on the Premier to exercise the executive authority, together with the other members of the Executive Council, by amongst others, co-ordinating the functions of the provincial administration and its departments.

[38] A reminder of the remarks by Jafta J in *Mjeni v Minister of Health and Welfare, Eastern Cape*[33] is apposite:

> "It is certainly not in the interest of justice to deny successful litigants the only option available for enforcing judgments or orders against the State. Nor is it in the interest of justice to refuse upholding the rule of law and effectively thereby placing certain public officials above the law. That, in a sense, would be inimical to the ethos and values contained in the Constitution, which creates a democratic state founded upon the 'Supremacy of the Constitution and the rule of law'."

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[31] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (TkH) at 452H.
[32] *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC); (2015 (6) BCLR 711; [2015] ZACC 10) at para 1.
[33] 2000 (4) SA 446 (TkH) at Page 455H.

[39] The Second respondent, Ms Grewan, was the acting HOD of the department and its accounting officer when the Mamosebo J order was issued. She is presently employed by the department, albeit in a different capacity, as a Chief Director EPWP. She personally issued a letter to Mekan appointing it contrary to the terms of the order. That in appointing Mekan, she acted out of necessity which provided sufficient basis that she be exculpated cannot avail her for reasons already stated.

[40] The respondents' deponent, Mr Mhlauli, as already alluded to, also acted as the Head of the Department and took over from Ms Grewan. He stated, in no unequivocal terms, that at all relevant times to the present contempt application, he was the accounting officer responsible for the overall management and day-to-day running of the affairs of the department. Clearly, when he took over from Ms Grewan, he did not see to it that the department complied with the terms of the order and ought to be held accountable.

[41] The position of the Chief Financial Officer (CFO), the fourth respondent, on the question of compliance with the Mamosebo J order, is a bit obscure. Apart from the fact that the CFO was not cited as a party to the proceeding before Mamosebo J, nothing was placed before court to show how he or she, in his or her representative capacity, had been complicit in defying the order. In the circumstances, He/she is exonerated. As Wallis JA and Schoeman AJA pointed out in *Meadow Glen Home Owners Association v Tshwane City Metropolitan Municipality (Meadow Glen)*:[34]

> '[20]..(T)here is no basis in our law for orders for contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings…
>
> [22]…Contempt of court is too serious a matter for it to be visited on officials, particularly lesser officials, for breaches of court orders by public bodies for which they are not personally responsible.'

[34] *Meadow Glen Home Owners Association v Tshwane City Metropolitan Municipality* 2015 (2) SA 413 (SCA) at para 20.

[42] I conclude that the department, its MEC and the two acting HODs, Ms Grewan and Mr Mhlauli, did not cover themselves with glory in ensuring that the Mamosebo J order was executed.

The Sanction

[43] One of the key objectives of contempt proceedings is to coerce litigants into complying with court orders and to vindicate the rule of law rather than to punish the transgressors, although the Court may show its displeasure by means of punishment.[35] The committal order, in this case, may well turn brutum fulmen (ineffectual) because the two acting HODs, instrumental to the disobedience, have already vacated their office. The current incumbent is not before this court. In order to coerce compliance, I am of the view that the department be afforded a further limited opportunity to comply with the Mamosebo J order through its current HOD.

[44] The applicant achieved substantial success and ought not be out of pocket. In light of the constitutional obligations that rested on the respondents, already stated in this judgment, this litigation could have been avoided. Consequently, I can conceive of no reason why costs should not follow the results on a punitive scale as a mark of this court's displeasure. As to the wasted costs, in respect of the proceedings of 22 July 2022, the respondents could have also prevented the wanton delay by deposing to the first answering affidavit. Insofar as their second answering affidavit was delivered late, which resulted in a postponement to afford Samex the opportunity to respond, the respondents submitted that any resultant prejudice could be ameliorated by an appropriate costs order. I agree and make the following order.

<u>ORDER</u>

[35] *Mjeni v Minister of Health and Welfare, Eastern Cape (*above fn 30) at 456B.

1. The Department of Roads and Public Works, Northern Cape, the first respondent, is to comply with the consent order of this Court handed down on 23 November 2021 under Case No: 2101/21 within 30 days from the date of this order.

2. Should the first respondent not comply with para 1 of this order, the applicant may, if so advised, approach this court on same papers, duly supplemented where necessary, for any appropriate relief including but not limited to an order declaring the respondents, including the current serving HOD, to be guilty of contempt.

3. The first, second, third, fifth and sixth respondents shall, jointly and severally, the one paying the other to be absolved, pay the costs of this application including the costs occasioned by the postponement of 22 July 2022 on attorney and client scale.

4. A copy of this judgment and order is to be served upon all the respondents including the current Head of the Department of Roads and Public Works, Northern Cape, and/or his/her successor in accordance with the uniform rules of this Court.

5. The Registrar of this Court is directed to forward a copy of this judgment and order to the Premier of the Northern Cape Province.

MV PHATSHOANE

Appearances:

For the applicant:	Mr X Mofokeng
Instructed by:	RAMS Attorneys, Johannesburg
	Mkhokeli Pino Attorneys, Kimberley.
For the respondents:	Mr T Sibeko SC (with Mr L Bomela)
Instructed by:	Gqadushe Attorneys, Kimberley.