IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

CASE NUMBER: **6435/2022**

In the matter between:

MAFUBE BUSINESS FORUM	1st APPLICANT
AFRIFORUM NPC	2ND APPLICANT
JOHAN ALEXANDER ANTHONIE UNGERER	3RD APPLICANT
and	
THE PREMIER OF THE FREE STATE PROVINCE	1ST RESPONDENT
MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS – FREE STATE	2ND RESPONDENT
MEC OF FINANCE FREE STATE	3RD RESPONDENT
THE MEC OF ECONOMIC, SMALL BUSINESS DEVELOPMENT, TOURISM, AND ENVIRONMENTAL AFFAIRS, FREE STATE PROVINCE	4TH RESPONDENT
THE EXECUTIVE COUNCIL OF FRE STATE PROVINCE	5TH RESPONDENT
THE ADMINISTRATOR: MAFUBE LOCAL MUNICIPALITY	6TH RESPONDENT
THE MAFUBE LOCAL MUNICIPALITY	7TH RESPONDENT
THE MUNICIPAL MANAGER: MAFUBE LOCAL MUNICIPALITY	8TH RESPONDENT
THE MAYOR: MAFUBE LOCAL MUNICIPALITY	9TH RESPONDENT

THE FEZILE DABI DISTRICT MUNICIPALITY	10TH RESPONDENT
THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	11TH RESPONDENT
THE MINISTER OF FINANCE	12TH RESPONDENT
THE MINISTER OF WATER AND SANITATION	13TH RESPONDENT

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: **25 MAY 2023**

DELIVERED ON: **03 OCTOBER 2023**

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[1] These are contempt of court proceedings brought against the Respondents for alleged collective and individual disobedience of the Court orders of Opperman, J of 29 July 2021 and one of Van Rhyn, AJ (as she then was). In essence, the Applicants seek, firstly, a declaration that the First to Fifth Respondents are in contempt of the order of Van Rhyn, AJ in case number 1969/2021; secondly, a declarator that the first, sixth, seventh, and eighth respondents are in non-compliance with the order of Opperman, J in case number 333/2021. The Applicants further seek the imprisonment of the First Respondent and a structural interdict to ensure compliance. For convenience, the two Judges aforementioned will collectively and conveniently be referred to as the 'two Justices'.

[2] On 21 July 2021, Opperman, J. granted the following orders:

1. " …

2. *The first and second respondent, jointly and severally, are to implement the following steps immediately;*
    a. *To properly maintain and operate all the pumps at the Namahadi Pump House and Namahadi Sewage works situated on the Remaining Extent of the Farm Palsiey no 73, District Frankfort (Collectively referred to as "the works").*
    b. *To effect any repairs that may be required at the works.*
    c. *Inspecting the works on a regular basis.*
    d. *Attending to any operational crises at the works promptly and without undue delay when it arises.*
    e. *Specifically, to prevent any sewage spillages which may affect the Wilge River.*
    f. *To make available to the applicant samples of effluent produced at the works, upon request.*
    g. *To make timeous payment to ESKOM in order to ensure continuous functioning of the works.*
3. *First and Second respondents, jointly and severally, are ordered to report back to the applicant's attorney (Ms van Schalkwyk) in writing regarding the progress made with the required steps set out in the previous paragraph every two (2) weeks for 6(six) months from the date of this order. In the event of noncompliance by the respondents the applicant is granted leave to approach this court on the same papers for an order of contempt of court against the first and second respondents.*
4. *…"*

[3] Almost a year later, on 28 April 2022 Van Rhyn, AJ granted the following orders:

"1. It is declared that:

1.1 The First Respondent the Mafube Local Municipality (hereinafter referred to as "the Municipality") together with the Second to Fifth and Sixteenth Respondents (collectively referred to as "the Local Respondents") are in breach of the constitutional, legislative and regulatory obligations towards their residents.

1.2 The conduct of the First Respondent, (including the Second to Fifth and Sixth Respondents), in failing to ensure the provision of services to its community in a sustainable manner; in failing to promote a safe and healthy environment for its community; in failing to structure and manage its administration, budgeting and planning processes; in failing to give priority to the basic needs of its community; and in failing to promote the social and economic development of its community, is inconsistent with the Constitution of the Republic of South Africa, 1996; is in breach of s 152(1) and s 153(a) of the Constitution, as read with its supporting legislation in terms of the Local Government: Municipal Finance Management Act of 56 of 2003 (hereafter: "the LGMFMA") and the Local Government: Municipal Systems Act 32 of 2000 (hereafter: "the LGMSA"), and is declared invalid to the extent of these inconsistencies.

1.3 In terms of the provisions of section 139(1)(b) and s 139(4), read with s 139(5) of the Constitution, and read further with sections 139 and 140 of the LGMFMA, it is declared that the Provincial intervention by the Sixth to Tenth Respondents has failed to ensure that the Municipality and the rest of the Local Respondents meet the obligations to provide basic services and to meet their financial commitments.

1.4 The conduct of the Sixth to Tenth Respondents, in failing effectively to carry out their mandate in terms of section 139 of the Constitution and the LGMFMA, to intervene and resolve the issues of the First and the rest of the Local Respondents, is inconsistent with the Constitution and is declared invalid to the extent of these inconsistencies.

1.5 The jurisdictional facts for mandatory Provincial intervention in the affairs of Mafube Local Municipality in terms of s 139(4) and (5) of the Constitution, as read with s139, s140, s 146 to 149 of the LGMFMA are now present and have consistently been present in the past; as a result of the failure of the First to Fifth and Sixteenth Respondents, as well as the Sixth to Tenth Respondents, to ensure that the First Respondent meets its constitutional obligations.

2. In terms of the provisions of s139(4) and (5) of the Constitution, read with the aforementioned provisions of the LGMFMA, Sixth to Tenth Respondents ("the Provincial Respondents") are directed forthwith to undertake a mandatory provincial intervention into the affairs of the First Respondent by exercising the powers conferred by section 139(4) and (5) of the Constitution, as read with sections 139, 140 and 146 to 149 of the LGMFMA. The Sixth to Tenth Respondents are specifically directed:

2.1 to approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the Financial Recovery Plan detailed in paragraph 2.2 below, to provide for the continued functionality of the Municipality.

2.2 to implement a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the Financial Recovery Plan already developed for Mafube Municipality (the plan is attached to the Founding Affidavit as Annexure "JJS26").

2.3 to take immediate action to ensure that any and all pollution of the Vaal River or any other water sources in the Municipality's vicinity – by the Municipality's sewage works - ceases immediately.

2.3…"

[4] Mafube Local Municipality consists of the small towns of Frankfort, Villiers, Tweeling, and Cornelia. The dire state of affairs of the said towns compelled the Applicants to, inter alia, seek orders against the First, Second, Third, and Fifth Respondents (the Provincial Respondents) to undertake a mandatory provincial intervention into the affairs of the Municipality by exercising the powers conferred by sections 139(4) and (5) of the Constitution. Of further importance, Van Rhyn, J ordered the Respondents to approve a temporary budget or revenue-raising measures intended to give effect to the financial recovery plan; to implement a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments and to take immediate action to prevent pollution of the Vaal river or any other waste sources in the vicinity of the Municipality.

[5] The Applicants contend that six months after the order of Van Rhyn, J, the situation of Mafube has largely remained the same as there is no improvement. Numerous meetings were held between the officials of the First Applicant and those of the Municipality and the Provincial Respondents as well as the Administrator. On 30 May 2022 a certain Mr Jansen Van Vuuren, acting on behalf of the First Applicant, forwarded a document entitled *"The Dawning of the New Day"* to the Administrator. This document, according to the First Applicant, provided some background to the effect of the First Applicant to engage the Municipality and the Provincial Departments with the aim of assisting in the recovery of the affairs of the Municipality.

[6] On 14 June 2022, the Second Applicant forwarded two letters to the Administrator in which it highlighted issues pertaining to 'service delivery' in Mafube, and a synopsis of the service delivery challenges still experienced by the Mafube community was annexed to the letter. The Second Applicant also raised the alleged non-compliance with the orders of the Justices

aforementioned as well as the pollution of the Vaal river. A point was also made that the service delivery challenges experienced by the Mafube community remained unresolved by either the Municipality or the First Respondent (the Premier) as mandated by the two Court orders. I will deal with other submissions of the Applicants later in this judgment.

[7] It is necessary, as a starting point to refer to the concepts of judicial authority and the binding effect of Court orders. In this regard, in *Matjhabeng local Municipality v Eskom Holdings Limited and Others: Mkhonto*[1] *and Others v Compensation Solutions (Pty) Ltd* the Court said the following:

> "[47] Section 165 of the Constitution, indeed, vouchsafes judicial authority. This section must be read with the supremacy clause of the Constitution. It provides that courts are vested with judicial authority, and that no person or organ of state may interfere with the functioning of the courts. The Constitution enjoins organs of state to assist and protect the courts to ensure, among other things, their dignity and effectiveness.
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> [48] To ensure that courts' authority is effective, section 165(5) makes orders of court binding on "all persons to whom and organs of state to which it applies". The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority."

[8] It is trite that the Applicant who alleges contempt of court must establish the following requirements in order to succeed with this kind of application; (a) that an order was granted against the alleged contemnor;(b) that the alleged contemnor was served with the order or had knowledge of it and (c) that the alleged contemnor failed to comply with the court order.

[9] If the Applicant manages to prove the above-mentioned three requirements, a presumption then arises that the Respondent's non-compliance is wilful and mala fide. The evidentiary burden will then shift to the Respondent to

[1] 2018(1) SA 1 (CC)[footnotes omitted].

show reasonable doubt. Failure on the part of the Respondent to discharge this burden will result in contempt being established[2].

[10] With regard to wilfulness and mala fides, it is necessary to refer to *Fakie v CCII Systems (Pty) Ltd*[3] where the Court held as follows where the conduct of the contemnor is said to undermine the authority of the Court and adversely affect the public interest:

> "While the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the public interest in obedience to its orders since disregard sullies the authority of the courts and detracts from the rule of law."

[11] In *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*[4] (*the State Capture*)the court also observed as follows:

> " It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs.. The corollary duty borne by all members of South African society-lawyers, laypeople and politicians alike- is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of the State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function."

[12] The Applicants seek a criminal sanction, which is punitive in nature, against the First Respondent and a coercive order against the Second to Ninth Respondents. The Court in the *State Capture* decision said the following with reference to a coercive order:

> "A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made

[2] Pheko v Ekhurulenu City[2015] ZACC 10; 2015(5) SA 660(CC);2015(6) BCLR 711(CC) at para 36.
[3] [20060] SCA 54.
[4] 2021(5) SA 327(CC).

primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed…"[5]

[13] Upon establishment of contempt, the sanction which the court may impose may take various forms bearing in mind that the ultimate aim of the enforcement of the order is to vindicate the rule of law. Nkabinde ADCJ puts it in this way in *Matjhabeng*[6]:

"Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory order, mandamus and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as sanction for past non-compliance. This is necessary because breaching of a court order, wilful and mala fides, undermines the authority of the courts and thereby adversely affects the broader public interest."

[14] The Applicant in their founding affidavit set out in detail and with applicable timelines the events from granting of the orders of the two Justices. It is in my view unnecessary to traverse the contents of each and every document, correspondence or meeting held as set out by the Applicants in their founding affidavit. For the purpose of this application, reference will only be made to the allegations necessary to the adjudication of this dispute.

[15] The Applicants, in their replying affidavit, criticize and lament the approach of the Respondents in the answering affidavit in how they dealt with the allegations of the Applicants in the founding affidavit. The Respondents specifically indicated that they would not deal with the Applicant's allegations "*paragraph by paragraph but as a whole*." The Applicants point out that it was irregular not to deal with every particular paragraph in the answering affidavit. The Applicant points out that this conduct of the Respondents demonstrates non-compliance with Rule 6 of this Court.

[5] Para 8.
[6] Para 54.

[16] The Applicants chose not to invoke the procedure and mechanism set out in Rule 30. The opposition by the Respondent appears to have been structured in such a way as to give a version intended to demonstrate what steps were taken by the Respondents in alleged compliance with the orders of the two Justices. The Applicant managed to reply to the answering affidavit and I could not discern any prejudice on their part. While I take note of the remarks of the Applicants, in my view nothing much turns on this.

[17] The essence of the case of the Applicants is that the Respondents did not comply with the peremptory court orders of the two Justices by virtue of not complying with the requirements pertaining to the intervention as envisaged in section 139 of the Constitution and the empowering municipal legislation as well as preventing the sewerage spillage. The Applicants also hold the view that the intervention by the Respondents was belated, reactionary and lackluster.

[18] The Applicants contend that the spillage of sewerage into the Vaal River has not been attended to. As an illustration, on 13 June 2022, the First Applicant, Dr Ntili from the Department of Water Services held a meeting to address, inter alia, the sewerage crisis. Prior to the said meeting, the Administrator had indicated that the Municipal Manager and the intervention team member for technical services would attend the meeting. The latter member did not attend. This, according to the Applicant is indicative of a lack of urgency especially on the part of the intervention team from the onset.

[19] On 5 August 2022 the Applicants, through their legal representatives wrote to the Municipality with reference to the orders of the two Justices. In the letter, it is averred that the Municipality had continuously failed to comply with the order of Opperman J and that the issue of the sewerage spillage had not been addressed sustainably.

[20] In the above-mentioned letter, reference is also made to the Green Drop Report in which the following is said:

"Wastewater infrastructure and treatment processed are largely dysfunctional in Mafube, as is evident by a 0% Green Drop audit score. The Regulator notes the dreadful state of negligence, lack of management commitment, effort, or duty to maintain public assets. Mafube leaves an impression of disregard for the environment and serviceability to the communities that Mafube is tasked to serve. The lack of compliance to mandatory standards and absence of accountable governance trigger regulatory invention with immediate effect. Drastic changes will have to be made to effect turnaround, as the situation has already reached a critical low point.

Going forward, the municipality is urged to start planning towards a full refurbishment and upskilling programme, to ensure that qualified skilled persons, functional systems and streamlined processes are in place to address the basics of wastewater services. This would involve Process Controller registration, training and appointments, plant classification, compliance, and operational monitoring, as well as flow measurement. The staff are keen to improve and understand the process to meet compliance standards. Regrettably, the current state does not bode well for immediate and sustainable wastewater services in the Mafube municipal area, and the regulator will prioritise urgent interventions. A drastic intervention from national and provincial government would be required."

[21] A request was made to the Municipality to provide an indication of its plan to address the problems in the Green Drop report and further, whether any steps had been taken to act on the findings of the report.

[22] On 15 August 2022, the Municipality replied to the letter of the Municipality and I quote the relevant parts as it appears to form the basis of the defence of the Respondents as will later appear:

" 3. Our instructions are inter alia as follows:

3.1The Provincial Government has invoked Section 139(5)(a), and (c).

3.2 An intervention team has been appointed and has reported to the Municipality;

3.3 The intervention team and National Treasury is in the process to Draft a financial recovery plan;

3.4 The 2022/2023 budget of Mafube Local Municipality has been Approved by the Municipal Council.

3.5 Department of Water and Sanitation is assisting the Municipality And compiling reports on the municipal water treatment works.

3.6 The report will ultimately assist in resolving spillage –related problems.

3.7 The intervention team has approached local stakeholders in an Attempt to resolve various issues/ problems.

3.8 The Municipal Council has adopted a resolution to dissolve the Audit Committee and appoint a new Committee, which will ultimately Play a positive role to get local shareholders to participate in resolving

Various issues.

3.9 The Premier arranged a gala dinner in May 2022. The purpose was To outline the Provincial Government's plans to assist Mafube Local Municipality in solving its issues which will ultimately enable them to Comply with the Court Order.

3.10 The Free State Provincial Department of COGTA has in its letter Of 12 August 2022 informed the Municipality that they will be giving financial Assistance in the amount of R5 000 000 subject to certain conditions. These monies will be used for construction of emergency

overflow ponds in Namahadi/ Frankfort.

[23] It appears that a meeting was held on 30 August 2023 between the Applicants and various government representatives about the issues forming the subject matter of the orders herein. On 9 September 2022, the Applicants responded to the letter of the Respondents and decried the inadequacy of the response from the Municipality representatives. According to the Applicants, the Municipality failed to address the immediate problem of sewerage spillage. The Applicants highlighted their view that according to them, an emergency overflow pond would not resolve the spillage. The Applicants also questioned the failure to explain what should happen in the meantime.

[24] The Department of Water Affairs and Sanitation also compiled a report for the Municipality. This report was commissioned almost a year after the order of Justice Opperman. The report paints a disturbing picture. It highlights dysfunctional pump stations and the discharging/channelling of raw water into water resources including the Vaal, Wilge and Liebenbergvlei rivers.

[25] The Applicants also contend that the Municipality has failed to implement the financial recovery plan as ordered.

[26] The following issues are to be adjudicated in this application:

1. Whether the Respondents are in non-compliance with the orders of the two Justices;
2. Whether the Applicants have made out a case for contempt and/ or relief as sought;
3. Whether the First Respondents should be ordered to pay the costs of this application on an attorney and client scale.

[27] It is without doubt that the orders of the two Justices are in existence. The Respondents do not contend that the said orders are in existence. The body of evidence as well as the minutes and correspondence between them,

prove that all parties are *ad idem* that the orders are in existence. It is undisputed that the Respondents in this matter had knowledge of the orders that also is not in dispute. The Applicants seek a criminal sanction against the Premier by way of imprisonment. The return of service of this application indicates that the application was served on 09 January 2023 on the Registry Clerk. In my view, where committal of a person is required, then in that case, the personal service of the application seeking the committal must be effected.

[28] In *Mjeni v Minister of Health and Welfare, Eastern Cape*[7] the court held;

"Contempt of court proceedings can only succeed against a public official or person if the orders have been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order refuses to comply with the court order"

[29] This issue of the joinder of the public officials in contempt of court proceedings was authoritatively laid to rest *in Matjhabeng*, where the court said:

"Bearing in mind, that the persons targeted were the officials concerned – the Municipal Manager and Commissioner in their official capacities – the non-joinder in the circumstances of these cases, is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their personal capacities- by name- and not in their nominal capacities. (my emphasis) They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in offing. Is it thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the circumstances, be said to have been in contempt and be committed to prison."

[7] 2000(4) SA 446(TkHC) 454 G-H.

[30] It is undisputed that the Premier was not personally served with this application which seeks to curtail his personal liberty. Failure to serve him with this order and to cite him in his personal capacity and *"by name*" and not only in his nominal capacity, is fatal to the Applicant's case in so far as he is concerned. On this point alone, the application cannot succeed against the First Respondent.

[31] It is the case for the Applicants that the mandatory intervention by the Respondents was belated, reactionary, lackluster and did not comply with the requirements inherent in Section 139 of the Constitution

[32] On 10 June 2022 the Provisional Executive Committee, Free State resolved to place Mafube Local Municipality under Section 139(5) of the Constitution. The following officials were appointed in terms of section 139 of the Constitution. Mr Mkhaza (The local administrator); Mr. Ntoyi (to assist with technical services) both Mesdames Xulunga and Lepesa to assist in financial matters. The Applicants are aware of the appointment of the intervention team as indicated in their replying affidavit.

[33] On 9 September 2022, the Provincial Government gazetted the terms of reference for the intervention team. The Applicants also confirm that they were aware of the terms of reference

[34] It took about five months from the order of Justice Van Rhyn for the terms of reference of the intervention team to be gazetted. Much as this is worrying, the fact of the matter is that the terms of reference were gazetted in pursuance and compliance with the order of Justice Van Rhyn.

[35] Following the appointment of the intervention team, the Council of the Municipality resolved to dissolve the existing audit committee and a need then arose for the appointment of a new audit committee. Various meetings were also held between Mr Mkhaza and the First Applicant. It is common

cause that the holding of the meetings and the subsequent conclusion of the agreements were aimed at ensuring compliance with the court orders.

[36] The Municipality issued an advertisement for the appointment of individuals who possessed a relevant degree in Financial Management and Auditing, strong personal, dynamic leadership skills, and people of integrity, to serve as members of the selection panel for the audit committee.

[37] On 13 October 2023, the Municipal Council resolved to appoint 5 members as Audit and Performance Committee members. I am unable to comprehend the dissatisfaction of the Applicants with the appointment of the Audit Committee. The Applicants' complaint is captured as follows in the replying affidavit;

"9.2. insofar as an advertisement was required for the Audit Committee, it did not help that the Municipality chose to publish the advertisement (Annexure "AA5") in the Sowetan, which is a national and not a regional newspaper.

9.3. The First Applicant and several other community structures were willing to participate, but were effectively barred from doing so due to this obscure and irrational advertisement placement.

9.4. The Municipality and the Administrator (Sixth Respondent) are therefore to blame that no applications for the ad hoc committee from "organized formations as required" were received.

9.5. It is difficult to resist drawing the inference that such unknown newspaper (relative to the local community) was chosen deliberately by the Municipality to thwart First Applicant's attempts at participatory governance in local

government, as mandated by the Constitution and the law.

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…Applicant repeats that it and its members were effectively excluded from this process due to the manner of advert placement and the Municipal Manager's failure to transparent about the process."

[38] The above excerpt clearly indicates the dissatisfaction of the Municipality to advertise in the Sowetan newspaper as opposed to the Frankfort Herald, which is the local newspaper. In my view, there was no obligation on the Municipality to place an advert in the local Regional Newspaper. The Sowetan, being a national newspaper surely reaches more people than a local/regional newspaper. It cannot be expected of the Municipality to second guess which members of the Mafube community prefer to read which newspaper(s). It is not contended that the Sowetan does not circulate in Mafube. The important thing is that the appointment of the audit committee was made in a transparent manner in that calls were made for interested people on a larger medium, a national newspaper. To say that a newspaper of the stature of the Sowetan is 'unknown' to the local community boggles one's mind. How the Applicants even come to this inference is even more difficult to fathom owing to the "national" status of the newspaper. The advertisement did not spell out that the members of the Applicants were barred from serving on the audit committee. It was also not said that they were not to read the newspaper in which the advertisement was placed. Consequently, it is difficult to comprehend why an assertion is made that the Applicants were barred from participating in the selection process of the audit committee by virtue of advertising in the Sowetan.

[39] According to the Respondents, in May 2022 the Municipality approved a budget. The Applicants deny the veracity of the document attached to the answering affidavit as "AA7" as being an accurate reflection of the final

medium-term revenue and expenditure Forecast for 2022/2023. According to the Applicants, “AA7” differs considerably from the “Final MTREF 2022/2023” [JJS 37] as published on the Municipality’s official website. “AA7” is unsigned while JJS 37 is signed. The question now arises can it be inferred from this discrepancy that there is no budget approved. If anything, such budget is either of the two documents admitted into evidence. In my view, an inference cannot be drawn that the budget had not been approved. I accept that there is a budget in place.

[40] The other gripe of the Applicants is that there is no mandatory financial recovery plan in place. According to the Respondents, this plan falls within the powers and domain of the Department of National Treasury. According to the Respondents, the Municipal Financial Recovery Unit has already started with the process and was considering the Status Quo Assessment of the Mafube solution. The latest Status Quo Assessment was submitted to the Municipality on 4 April 2023. It is the case of the Respondents that Mr. Mkhaza, crafted a plan of action that focuses on financial recovery, Governance and Institutional Capacitation as well as service delivery. The purpose of the Financial Recovery Plan is to assist the Mafube Municipality in the funded programs.

[41] It is the case for the Respondents that in order to address the pollution of the Vaal River and other sources the Municipality sought the assistance of other Departments within the National and Provincial Government. It is common cause that the Department of COGTA acceded to a request by the Municipality to grant funding to the tune of five million Rands. These funds were to be used exclusively for the construction of emergency overflow ponds in the Namahadi/Frankfort area.

[42] The Respondents aver that the Municipality has constructed emergency ponds where sewerage could flow, instead of the river. In the same breath, the Municipality contradicts itself and avers that the emergency ponds could

not be constructed immediately as procurement processes had to be fulfilled. A tender was advertised for this purpose. That tender was not responsive. A new tender was issued. It appears that the procurement is still ongoing. What is important for me is that the Department of COGTA came to the assistance of the Municipality. Clearly, approval and funding by COGTA is not in the hands of the Municipality. Like the Municipality, COGTA also has to follow its internal processes and conform to its financial prescripts in order to assist the Municipality.

[43] The Applicants confirm that they are aware that there is a 50% progress made relating to the sewerage crisis and that the estimated project completion date is the end of 2023. The Applicants also contend that it is not a matter of being aware as the order regarding this spillage was to the effect that sewage spillage had to be arrested immediately. I agree with the Applicants. On the other hand, I also further agree with the Respondents that certain processes have to be embarked upon in order to ensure compliance with the two orders.

[44] In my view, the Respondents have embarked on measures to get the necessary funding in order to comply with the orders. The view of the Applicants that an amount of five million Rands is not enough in order to arrest the situation does not detract from the fact that steps have been taken to comply with the orders of this court. The Department of Water and Sanitation has also brought in Rand Water and Bloem Water Boards to assist this ailing Municipality.

[45] In terms of the agreement between the Municipality and the Rural Free State, the latter is responsible for the payment of the bills of Eskom. This agreement is in place and the Applicants are aware of it. The parties to the agreement*, to wit,* the Municipality and Rural Free State agreed to the review of the agreement. The Applicants are not part of the agreement and it is

axiomatic that they cannot involve themselves in the agreement of which they are not part.

[46] There is a measure of overlap between the orders of the two Justices. The Respondents have clearly acted without due diligence to comply with the orders of the two Justices. The order of Opperman J was obtained on an urgent basis and it was expected of the Respondents to comply with same on an urgent basis. Almost a year later, Justice Van Rhyn also gave a similar order with regard to the sewerage spillage demonstrating the snail's pace the Municipality has taken to deal with the spillage. The First and Second Respondents were ordered by Justice Opperman to implement the steps aimed at preventing the sewerage spillage 'immediately." That did not happen. At the end of the day, this illustrates a measure of non-compliance with the orders of the two Justices. This notwithstanding, when one looks at the steps the Municipality took to comply with the orders I am unable to find that the Respondents wilfully failed to comply with the orders.

[47] It is undisputed that the Municipality has sought the assistance of COGTA and such Departments as Water and Sanitation in order to comply with the orders of the two Justices. There is no doubt that there is a delay in the implementation of the orders. Such delay should however be seen in its proper context. Mafube Municipality is a small Municipality with serious financial problems. Much of the obligations imposed by the orders cannot be performed by the Municipality alone. The Municipality is dependent on other organs of state in order to comply with the orders. This then goes to the heart of whether the non-compliance was wilful or not.

[48] Apart from the sewerage spillage of which I dealt with above, the undisputed evidence is that a mandatory provincial intervention was done in compliance with s139 of the Constitution. The terms of reference of this team were also gazetted. The Council of the Municipality resolved to appoint a five-member Committee member. A budget was approved and Treasury was involved in

the process of the Financial Recovery Plan. In the meantime, the Administrator initiated a plan of action which focusses on Financial Recovery. The only criticism that can be levelled against the Respondents is the failure to address the issues raised in the orders with the urgency they deserve.

[49] In my view, however, the dispute amongst the parties could have been resolved with openness had the Municipality played open cards with the Applicants and kept them abreast with all that the Municipality was busy with. I am unable to find that the Respondents are in contempt of the orders of the two Justices. This application must thus fail.

[50] With regard to costs, the Applicants seek to vindicate their constitutional rights. It would not be in the interest of justice that they be burdened with costs.

[51] I accordingly make the following orders

1. The application is dismissed.
2. Each party is to bear its own costs.

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P. E. MOLITSOANE, J

Counsel on behalf of Applicant: ADV F J ERASMUS SC
ADV P EILERS

Instructed by:	Hendre Condradie Inc **BLOEMFONTEIN**
Counsel on behalf of Respondents:	ADV MENE SC ADV T.M NGUBENI
Instructed by:	State Attorney **BLOEMFONTEIN**