CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/11

In the matter between:

NTHABISENG PHEKO First Applicant

OCCUPIERS OF BAPSFONTEIN INFORMAL SETTLEMENT 776 Further Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA Amicus Curiae

Neutral citation:	*Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10
Coram:	Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J.
Judgments:	Nkabinde J (unanimous)
Heard on:	12 August 2014
Decided on:	7 May 2015
Summary:	contempt of court — requisites for contempt — judicial authority — court initiating proceedings *mero motu* — state's duty to comply with court orders — joinder — costs *de bonis propriis* —

right to have access to adequate housing — service requisite not met — respondent not in contempt of court

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ORDER

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1. The Ekurhuleni Metropolitan Municipality (Municipality) and Mr Bongani Khoza, the Municipality's attorney, are not held in contempt of this Court's orders of 6 December 2011 and 12 March 2014.
2. The rule *nisi* issued on 28 August 2014, in respect of the Executive Mayor and the Municipal Manager, is discharged.
3. The Executive Mayor and the Municipal Manager are joined as parties to the proceedings in relation to *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko I*) for the purpose of implementing the supervisory order.
4. The Member of the Executive Council for Human Settlements, Gauteng is joined as a party to the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in paragraph 3 above.
5. Mr Devraj Chainee, the Head of Department for Human Settlements for the Municipality, is joined in his official capacity as a party to the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in paragraph 3 above.
6. Mr Khoza and the Municipality are each ordered to pay 50% of the applicants' costs in the contempt proceedings. Mr Khoza is ordered to pay costs *de bonis propriis*.

JUDGMENT

NKABINDE J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring):

Introduction

[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, 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 courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.

[3] These contempt proceedings are a sequel to the supervisory relief granted by this Court on 6 December 2011.[1] The Court decided that: (1) the respondent violated the applicants' rights under section 26 of the Constitution; (2) the respondent had a duty to provide the applicants with suitable temporary accommodation; (3) the

[1] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko I*).

respondent must meaningfully engage with the applicants in identifying alternative land in the immediate vicinity of Bapsfontein, from which area the applicants had been unlawfully removed; and (4) this Court should exercise its supervisory jurisdiction to enable the respondent to report to the Court about "whether land has been identified and designated to develop housing for the applicants".[2]

[4] The principal issue is whether the respondent, its attorneys and certain functionaries performing public functions or exercising public power in terms of the Constitution or any legislation have shown good cause why they should not be held in contempt of court for not complying with this Court's orders.

Parties

[5] The parties in these contempt proceedings are as cited in *Pheko I*.[3] For completeness and ease of reference, they are briefly described here. The applicants are the former residents of Bapsfontein Informal Settlement (Bapsfontein Settlement)

[2] The order reads:

> "In the event, the following order is made:
>
> 1. Condonation is granted.
> 2. Leave to appeal directly to this Court is granted.
> 3. The appeal is upheld.
> 4. The order of the North Gauteng High Court, Pretoria, under Case No 5394/11 is set aside.
> 5. It is declared that the removal of the applicants from their homes, the demolition of the homes, and their relocation by the Ekurhuleni Metropolitan Municipality were unlawful.
> 6. The Municipality must identify land in the immediate vicinity of Bapsfontein for the relocation of the applicants and engage meaningfully with them on the identification of the land.
> 7. The Municipality must ensure that the amenities provided to the applicants and people resettled in terms of this order are no less than the amenities and basic services provided to them as a result of the relocation of March 2011.
> 8. The Municipality must file a report in this Court confirmed on affidavit by no later than 1 December 2012 regarding steps taken in compliance with para 6 of this order to provide access to adequate housing for the applicants.
> 9. The applicants may, within 15 days of the filing of the Municipality's report, lodge affidavits in response to the report.
> 10. The Municipality is ordered to pay the applicants' costs in this court and in the High Court, including, where applicable, costs of two counsel."

[3] *Pheko I* above n 1 at para 4.

who, having been unlawfully removed from their demolished homes, remain with no secure tenure but only with temporary housing. The respondent is the Ekurhuleni Metropolitan Municipality (Municipality), in whose area Bapsfontein Settlement is situated. The Municipality authorised the relocation of the residents and the demolition of the applicants' homes. The Socio-Economic Rights Institute of South Africa (SERI) was admitted in *Pheko I* as *amicus curiae* (friend of the Court) and continues to be of assistance to this Court.

Background

[6] *Pheko I* concerned the lawfulness of the relocation by the Municipality of hundreds of families that resided in Bapsfontein Settlement. This action was triggered by investigations that the Municipality had commissioned into the land on which Bapsfontein Settlement is situated after complaints were made about the formation of sinkholes in the area. The investigations concluded that the land was dolomitic and that the residents of Bapsfontein Settlement should be relocated to a safer area. Subsequently, Bapsfontein Settlement was declared a disaster area under the Disaster Management Act.[4]

[7] When the residents resisted relocation, they were forcibly removed and their homes were demolished at the instance of the Municipality. The residents launched urgent interdictory proceedings in the North Gauteng High Court, Pretoria (High Court). The High Court dismissed the application with costs, stating that the applicants could not be allowed "to stay in a danger zone" where they could be "swallowed by the earth".[5] It further held that the application lacked urgency[6] and that PIE[7] did not apply in the circumstances.[8] The applicants then sought leave to appeal directly to this Court, where they effectively vindicated their rights under

[4] 57 of 2002.

[5] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZAGPPHC 130 (High Court judgment) at 5.

[6] Id at 6.

[7] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

[8] High Court judgment above n 5 at 4.

sections 10 and 26 of the Constitution. A crucial element of the relief granted was to enable the parties to contribute meaningfully to discussions aimed at finding an equitable solution. This included the submission of reports from both sides at varying stages of the process.

[8] Having been ordered to file a report detailing the steps it had taken to secure adequate housing for the applicants, the Municipality consulted with the applicants. The applicants organised themselves into two groups: the N12 Community and the Mayfield Community. The Municipality filed its report on 30 November 2012. The report indicated that the N12 Community applicants were willing to relocate to the Daveyton Farm and parts of Putfontein and Mayfield Extension, and that adequate provision of basic services would be made available to them. This community confirmed that it was adequately consulted and its members were satisfied to move to the identified land. The report further indicated that the Mayfield Community applicants would only occupy the proposed land on condition that they are allocated permanent houses with running water and sewerage. Provision of these facilities was, at that time, problematic for the Municipality as a result of, among other things, land use planning concerns. The report concluded that "[t]he Municipality shall await the direction of the [C]ourt prior to embarking on a process to have the [N12 Community applicants] moved to the land identified by the Municipality, as per their wishes". The report failed to suggest a solution for the Mayfield Community applicants.

[9] The Mayfield Community applicants were unhappy with the conclusions drawn by the report and the quality of the consultations that occurred between them and the Municipality. As a result, in their 24 December 2012 response to the report, the Mayfield Community applicants requested to file an expert report detailing why they were dissatisfied with the relocation plans of the Municipality. This Court acceded to their request and directed that the expert report be filed by 3 June 2013. The date passed without any submissions to this Court. After a successful condonation

application, the expert report was to be filed on 25 October 2013.[9] This Court received the expert report only on 7 July 2014. It was attached to an application to admit a further affidavit.

[10] On 21 November 2013 this Court directed the Municipality to file a second report by 29 November 2013, detailing: (1) the issues surrounding the relocation of the N12 Community applicants, and (2) progress on its obligation to find suitable land for the Mayfield Community applicants.[10] These directions were made on the understanding that, by agreement, land had already been identified in respect of the N12 Community applicants to the satisfaction of both the N12 Community applicants and the Municipality. The Municipality failed to report back to this Court.

[11] A later order of this Court, dated 12 March 2014, yet again required that the Municipality's report be filed, on this occasion providing for a deadline of 14 April 2014. The order reads as follows:

[9] Condonation was granted on 16 September 2013.

[10] The directions read:

> "The Chief Justice has issued the following directions:
>
> 1. The [Municipality] is directed to file, by no later than Friday, 29 November 2013, a report on the progress made in respect of the [N12 Community applicants] regarding its undertaking towards the community set out in the report dated 30 November 2012. The report must indicate steps taken to ensure that—
>
> a) permanent housing will be provided to the community;
>
> b) the land utilised is suitable for occupation;
>
> c) bulk and link engineering services will be available with sufficient capacity for the proposed densities;
>
> d) all erven have access to roads; and
>
> e) all erven are connected to the internal water and sewer infrastructure network.
>
> 2. The [Municipality] is directed to report also on the progress made in respect of its obligation to find suitable land for the Mayfield Community applicants. The report must address *inter alia*—
>
> a) progress regarding the acquisition of alternative land; and
>
> b) the processes to be completed before such land is acquired.
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> 3. Further directions may be issued."

"Following the [Municipality]'s failure to comply with the Court's directions dated 21 November 2013, the Court makes the following order:

1. The [Municipality] is ordered to file, by no later than Monday, 14 April 2014, a report on the progress made in respect of the [N12 Community applicants] regarding its undertaking towards the community set out in the report dated 30 November 2012.

2. The report must indicate steps taken to ensure that—
   a) permanent housing will be provided to the community;
   b) the land utilised is suitable for occupation;
   c) bulk and link engineering services will be available with sufficient capacity for the proposed densities;
   d) all erven have access to roads; and
   e) all erven are connected to the internal water and sewer infrastructure network.

3. The [Municipality] is ordered to report also on the progress made in respect of its obligation to find suitable land for the Mayfield Community applicants. The report must address, *inter alia*—
   a) progress regarding the acquisition of alternative land; and
   b) the processes to be completed before such land is acquired."

[12] Once more, the Municipality tendered no response. Due to the Municipality's non-compliance, this Court issued further directions on 15 May 2014 setting the matter down for contempt proceedings on 12 August 2014. The Municipality was directed to "show cause . . . why it should not be held in contempt of this Court for failing to report to it in accordance with the Court's order dated 12 March 2014 on the progress made in fulfilling its undertaking to the [N12 Community applicants] that is set out in the report to this Court dated 30 November 2012".

[13] During the hearing, the Municipality explained that it was not made aware of this Court's directions and orders by its attorneys of record (Khoza & Associates Inc.). It said that Mr Khoza (its attorney) believed that the matter was no longer active and was in the midst of relocating offices. On 29 August 2014 further directions were issued calling upon the Municipality's attorneys to show cause why they should not:

(1) be held in contempt of this Court for failing to make the Municipality aware of the directions and order, and (2) jointly and severally with the Municipality, be ordered to pay costs of the applicants and the Municipality from their own pocket (*de bonis propriis*).

[14] Before the hearing, SERI sought to have the Executive Mayor (Mayor) and Municipal Manager joined to these proceedings.[11] The joinder was intended to ensure that the relevant responsible officials of the Municipality comply with the future orders of this Court.

[15] On 28 August 2014 this Court declared the Municipality to be in breach of its constitutional obligations by failing to abide by the orders of this Court dated 6 December 2011 and 12 March 2014. In addition, this Court issued an interim order (rule *nisi*) calling upon the Mayor and Municipal Manager to show cause why they should not be joined and indicate if there were any other responsible office bearers who should also be joined. The Court ordered the Municipality to take steps to ensure the relocation of the N12 Community applicants and to file a progress report canvassing the main issues in the order of 6 December 2011.[12]

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[11] This interlocutory application was lodged under rule 31 of the Rules of this Court. The rule provides:

> "(1) Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
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> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

[12] The order reads:

> "1. It is declared that the [Municipality] is in breach of its constitutional obligations by failing to abide by the orders of this Court dated 6 December 2011 and 12 March 2013.
>
> 2. The [Mayor] and [Municipal Manager] are ordered to show cause on affidavit by no later than Monday, 15 September 2014, why they should not be joined to these proceedings.
>
> 3. The [Municipality] is ordered to identify any other office bearers and/or officials of the [Municipality] who are responsible for compliance with orders of this Court and give notice of such office bearers and/or officials by no later than Monday, 15 September 2014.

[16] The Mayor, Mr Mondli Gungubele, deposed to an affidavit in response to the order granted after the hearing. He acknowledged the statutory powers and functions bestowed upon him as the political head of the Municipality. He asserted that he is not responsible for the day-to-day administrative functions of the Municipality. Instead, the Municipal Manager and heads of various departments of the Municipality responsible for various specialised functions like the provision of adequate housing, should be held responsible. The Mayor stated further that he had asked to be furnished with reports related to these proceedings and that he was so furnished in line with his responsibilities in terms of the Local Government: Municipal Structures Act.[13] However, the Mayor asserted that the contents of the reports did not raise "any alarm bells". It was only after he was furnished with the most recent court order that he established that there had been a lack of progress on the part of the Municipality. The Mayor expressed his regret at the Municipality's non-compliance. He undertook to monitor the matter "in [his] role as the political head of the [Municipality]" while surprisingly stating that if he were joined to the proceedings he would, in any event, rely on the Municipal Manager and the Head of the Municipality's Department for

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4. The [Municipality] is ordered forthwith to give effect to its agreement with the [N12 Community applicants] and to take the steps necessary to ensure relocation of the [N12 Community applicants].

5. The [Municipality] is ordered to file, by no later than Thursday, 27 November 2014, a progress report detailing steps taken to—

   (a) purchase the land identified by it in its report of 30 November 2012 with a view to relocating the [N12 Community applicants] to such land as agreed to by them in their report dated 28 December 2012;

   (b) provide permanent housing to the [N12 Community applicants];

   (c) ensure that the land utilised is suitable for occupation;

   (d) ensure that bulk and link engineering services are available with sufficient capacity for the proposed densities;

   (e) ensure that all erven have access to roads; and

   (f) ensure that all erven are connected to the internal water and sewer infrastructure networks.

6. The applicants and the amicus curiae may respond to the contents of the progress report referred to in paragraph 5 above by no later than Monday, 29 December 2014."

[13] 117 of 1998.

Human Settlements (regional department), Mr Devraj Chainee, to do that which the Court may direct him to do.

[17] The Municipal Manager, Mr Khaya Ngema, also deposed to an affidavit which generally mirrored the affidavit of the Mayor. The Municipal Manager offered two new points. First, he suggested that it is the Gauteng Department of Human Settlements (Provincial Department) that is accountable for the current predicament. He stated that the Municipality's officials have, on several occasions, made contact with the Provincial Department for the purposes of compliance with the court order of 6 December 2011, but that these efforts have not been successful. The Municipality intends to apply for the joinder of the relevant persons in the Provincial Department to these proceedings as they "will unlock the process of moving the community to their permanent houses". Further, the Municipal Manager stated that joinder of those officials "will go a long way to ensure that the officials not only take their administrative functions seriously but that they also learn to appreciate the necessity of complying with Court orders timeously and ensure that Court orders are complied with without unnecessary delay". The Municipal Manager made the point that the relevant officials in the Provincial Department – for which the Member of the Executive Council for Human Settlements (MEC) is responsible – should be joined because "they are ultimately responsible for providing the financial resources and support required by the [Municipality] in order to comply with the Court orders". This was the first time, throughout the history of this matter, that an argument relying on the financial constraints of the Municipality was brought to the attention of this Court.

[18] Second, the Municipal Manager identified Mr Chainee as the functionary responsible for "ensur[ing] that the [Municipality] fulfils its obligation to provide adequate housing to its inhabitants". He alluded to a forthcoming affidavit by Mr Chainee wherein he would explain that he is "the appropriate person, in so far as he has the relevant delegations of authority and responsibility, who shall assume responsibility for ensuring that the Court's orders and directions are adhered to".

Even if the Municipal Manager were joined to these proceedings, he asserted that he would rely on Mr Chainee to do what this Court directs him to do since his office "does not have nor is it designed to have the capacity (of officials) to perform functions relating to the provision of adequate housing".

[19] In response to the order of 28 August 2014 and the affidavits deposed to by the Mayor and Municipal Manager, the Municipality applied for an order: (a) joining the MEC; (b) directing the MEC to provide it with the financial resources and delegations necessary to enable it to comply and give effect to this Court's order of 6 December 2011; and (c) directing the MEC to devise and implement a comprehensive plan to provide the Municipality with financial resources and file a report detailing that plan with the Registrar of this Court. The Municipality stated that the facts related to the joinder application were better known by Mr Chainee, who deposed to the supporting affidavit.

[20] Referring to the MEC's statutory obligations,[14] Mr Chainee supported the joinder of the MEC and motivated for his own joinder. However, shortly thereafter,

[14] See the Housing Act 107 of 1997, specifically sections 7 and 9 thereof which provide:

> "7. Functions of provincial governments
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> (1) Every provincial government, through its MEC, must, after consultation with the provincial organisations representing municipalities . . . do everything in its power to promote and facilitate the provision of adequate housing in its province within the framework of national housing policy.
>
> (2) For the purposes of subsection (1) every provincial government must through its MEC—
>
> (a) determine provincial policy in respect of housing development;
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> . . .
>
> (c) take all reasonable and necessary steps to support and strengthen the capacity of municipalities to effectively exercise their powers and perform their duties in respect of housing development;
>
> (d) co-ordinate housing development in the province;
>
> (e) take all reasonable and necessary steps to support municipalities in the exercise of their powers and the performance of their duties in respect of housing development;
>
> (f) when a municipality cannot or does not perform a duty imposed by this Act, intervene by taking any appropriate steps in accordance with section 139 of the Constitution to ensure the performance of such duty; and

the Municipality withdrew the joinder application. The Municipality did so on the

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. . .

(3) An MEC must—

(a) administer every national housing programme and every provincial housing programme which is consistent with national housing policy and section 3 (2) (b), and for this purpose may, in accordance with that programme and the prescripts contained in the Code, approve—

(i) any projects in respect thereof; and

(ii) the financing thereof out of money paid into the provincial housing development fund as contemplated in section 12 (2);

. . .

(5) The MEC may, subject to any conditions he or she may deem appropriate in any instance—

(a) delegate any power conferred on him or her by this Act; or

. . .

. . . Provided that the delegation or assignment does not prevent the person who made the delegation or assignment from exercising that power or performing that duty himself or herself.

. . .

9. Functions of municipalities

(1) Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

(a) ensure that—

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

(ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;

(b) set housing delivery goals in respect of its area of jurisdiction;

(c) identify and designate land for housing development;

(d) create and maintain a public environment conducive to housing development which is financially and socially viable;

(e) promote the resolution of conflicts arising in the housing development process;

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

(g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and

(h) plan and manage land use and development."

basis that the issues pertaining to provision of the necessary financial resources and delegations to enable it to give effect to the order of 6 December 2011 had been resolved through a series of collaborative meetings with officials of the Municipality and Provincial Department. In addition, the parties had since come to agree on the implementation of a comprehensive plan to provide the Municipality with financial resources.

[21] Nevertheless, the MEC, based on his obligations under the Housing Act, was directed by this Court on 5 December 2014 to show cause why he should not be joined to the contempt proceedings. Ms Xoliswa Mkhalali, the regional head of the Provincial Department, deposed to the affidavit responding to the directions on behalf of the MEC. She assured this Court that, in principle, the MEC has no objection to being joined but did not think that the joinder was necessary. This, she stated, was because, up until the moment of the joinder application, the MEC and the Provincial Department had no knowledge of the happenings in Bapsfontein Settlement. She pointed to certain inaccuracies in the Municipality's papers – for example, that there was no evidence of the Provincial Department being requested for assistance in December 2012.

[22] In the ordinary course, Ms Mkhalali explained, the Provincial Department's involvement would only begin at the point of housing construction. Ordinarily, she said, a municipality would apply for approvals during the pre-planning stage so that the Provincial Department can budget and plan for the development. Yet in this instance, no such application was tendered to the Provincial Department. A letter, allegedly sent to the Provincial Department requesting assistance, was discussed at the meetings that came of the joinder application. However, the Municipality acceded to the fact that this letter may not have actually been sent to the Provincial Department. Ms Mkhalali also confirmed that the Municipality does not require any delegations or authorisations to commence the work required by the order of 6 December 2011, nor does it rely on the Provincial Department for conducting feasibility studies; further,

the bulk and internal services are generally done prior to the Provincial Department's involvement.[15]

[23] Despite the recalcitrance imputed to the Provincial Department because of its inaction, Ms Mkhalali reassured this Court that—

> "[n]otwithstanding the fact that the MEC was not previously notified of the Court Order or of the Municipality's failure to engage with the [Provincial] Department on this issue, of primary importance is the fact that there is a need for government to respond to the housing needs of the Applicants."

The genuineness of this acknowledgement is supported by evidence of the resolutions adopted at the meetings that took place between the Municipality and the Provincial Department. These resolutions demonstrate that it has been collaboratively decided that: (a) the Municipality and the Provincial Department are to work together to give effect to the Court's directives; (b) officials in both offices are to jointly develop a plan to identify land and resolve the N12 Community applicants' housing backlog; (c) the Provincial Department is going to budget for the purchasing of land, the provision of services and housing construction; and (d) the Municipality, too, will budget for these costs through the Urban Settlements Development Grant.[16]

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[15] These statements as to the allocation of functions find support in the National Department of Human Settlement's publication *National Housing Policy and Subsidy Programmes*, specifically Section One: "Simplified Guide to the National Housing Code", Part B: "Overview of the Current National Housing Programmes" which explains the various housing subsidy instruments that are available to assist low income households to access adequate housing. Under the heading of "Housing Assistance in Emergency Circumstances" it is explained, at para 4.5, that—

> "[t]he projects will be undertaken on the basis of a partnership of cooperative governance between the relevant municipality, the Provincial Department, and the National Department.
>
> *The developer role will be fulfilled by municipalities*.
>
> The Provincial Department can assist the municipality *if the municipality lacks capacity*, and can assume the role of the developer if the municipality cannot meet the project commitments." (Emphasis added.)

[16] The Urban Settlements Development Grant (USDG) was created under Schedule 4 of the Constitution. Its purpose is to upgrade informal settlements – either by creating formal housing or by upgrading services to informal settlements – where the urban population is growing, with an increasing number of poor people. There has historically been a misalignment of powers and functions between the different spheres of government and the USDG would make it more affordable for metropolitan municipalities to acquire land. (Ms Moore, Chief Director: Urban Development and Infrastructure, National Treasury "National Treasury briefing on Urban

Issues

[24] It is against this backdrop that the following issues must be determined—

(a) whether the Municipality has shown good cause why it should not be held in contempt of the order of 12 March 2014;

(b) whether the Municipality's attorney was in contempt;

(c) whether that attorney should pay the costs of the contempt proceedings from his own pocket;

(d) whether the Mayor and Municipal Manager should be joined to these contempt proceedings; and

(e) whether the MEC should be joined to these contempt proceedings.

Contempt of court orders

[25] Before I deal with these issues, it is important to outline the current status of our law regarding contempt of court orders with reference to the decision of the Supreme Court of Appeal in *Fakie.*[17] I do so while keeping in mind the difficulties inherent in compelling compliance from recalcitrant state parties in a manner that displays the courts' discontent with disregard for the rule of law.

[26] The starting point is the Constitution. It declares its own supremacy and this supremacy pervades all law.[18] Section 165 vouchsafes judicial authority. It provides

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Settlements Development Grant" *Meeting of the Budget Committee on Appropriation* (12 September 2012), available at https://pmg.org.za/committee-meeting/14853/.)

See also Ms Ndlovu, Director of Human Settlements, Ekurhuleni Metropolitan Municipality "Ekurhuleni Presentation" *Minutes of the Committee Meeting of Human Settlements: Urban Settlements Development Grant 3rd quarter spending for 2012/13 by Johannesburg, Tshwane and Ekurhuleni Metros* (19 June 2013), available at https://pmg.org.za/committee-meeting/16074/ – where challenges facing the Municipality were mentioned and specific attention was paid to Bapsfontein Settlement:

> "The City did not have planned relocations, and when it happened in Bapsfontein it had been just a once off. There were people who lived in environmentally sensitive areas, and when the situation was critical, those people were moved."

[17] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*).

[18] Section 1(c) of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .

that courts are vested with judicial authority and that no person or organ of state may interfere with the functioning of the courts.[19] The Constitution explicitly enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness.[20] In order to ensure that the courts' authority is effective, section 165(5) makes an order of court binding on "all persons to whom and organs of state to which it applies". These obligations must be fulfilled. It is significant that this subsection specifically mentions organs of state, for "justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences".[21] These sections, read alongside the interpretive injunction of the supremacy clause, demonstrate why continual non-compliance with court orders and decisions would, inevitably, lead to a situation of constitutional crisis.

[27] Notwithstanding this clear constitutional imperative that the authority of our courts is to be respected and upheld, certain state parties have, on occasion, displayed a troubling disregard for judicial orders. It is not difficult to reference examples of cases involving contempt, by state organs, of court orders where, most troublingly, constitutional rights are in issue.[22] The cases are by no means exhaustive of state

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(c) Supremacy of the Constitution and the rule of law."

[19] Section 165(1) and (3).

[20] Section 165(4).

Under section 239 of the Constitution, "organ of state" is defined to mean—

"(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution—

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer."

[21] Du Plessis "Interpretation" in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2014) 2 at 32-99.

[22] See, for example, *Nyathi v MEC for the Department of Health, Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) (*Nyathi*); *N and Others v Government of South Africa (No 3)* 2006 (6) SA 575 (D) (*N and Others*)*; City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C); and *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) (*Federation of Governing Bodies*).

parties' non-compliance with the orders and decisions of our courts; they are included merely to illustrate the extent and nature of this phenomenon. What they show is not merely that state parties are failing, in a very serious way, to meet their constitutional obligations, but that these failures have real and serious consequences for those whose interests they are there to serve.[23]

[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity.[24] This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders.[25] This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil

[23] The extent of state parties' non-compliance and the harm that it can cause not only to the authority of the courts but to the public is illustrated the following cases:

In *Nyathi* id, the applicant had obtained an unopposed High Court judgment against the state respondent for negligent and improper care administered to him at two hospitals. That care had resulted in a stroke and severe left hemiplegia, thereafter requiring full time care and medical treatment. The respondent admitted liability, leaving only the issue of quantum to be addressed. Unable to obtain an interim payment from the respondent to cover his medical and legal fees, the applicant obtained an unopposed order from the High Court obliging the respondent to make an interim payment. The respondent failed to comply with that order, however, requiring the applicant to launch proceedings in the High Court challenging the constitutionality of a provision of the State Liability Act, 20 of 1957, which prevented execution against state property. The respondent did not respond to the notice of motion. It was only when the matter was set down in this Court for contempt proceedings that the respondent made the payment, nearly two years after the unopposed action had been commenced. The applicant died two months after the payment was made.

Federation of Governing Bodies id, concerned the rights ancillary to the proper running of the school system and provision of quality education. Having obtained a consent order, which in effect required that the respondent comply with the relevant statutory prescripts, the applicant brought contempt proceedings contending that steps were being taken to close pre-primary schools without engaging the affected parties. The High Court found for the applicants, holding that the respondent had failed to comply with its obligations under the consent order.

Similarly, in *N and Others* id, the applicants, who were prisoners of Westville Correctional Centre whose HIV status had deteriorated to and below a CD4 count of 200 cells/ml, had successfully sought an order compelling the state correctional facility to provide them with immediate antiretroviral (ARV) treatment. That order included the requirement that the respondents lodge with the court Registrar an affidavit setting out the manner in which it would comply. The respondents failed to file such a report. The reprehensibility of the state parties' conduct in relation to this matter, which on the evidence included denying public interest groups the ability to enter the prison to consult with the prisoners regarding their medical well-being, is brought home by the fact that one of the prisoners lost his life shortly after the initial court order was granted.

[24] *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others* 1956 (1) SA 105 (N) (*Cape Times*) at 106A-B.

[25] Further, any interference with the administration of justice would constitute a basis for a finding of contempt of court. Id at 106A.

proceedings is both contemptuous and a criminal offence.[26] The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.[27]

[29] The courts' treatment of contempt has been developed over the years. Under the common law, there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court).[28] The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord (*mero motu*).[29]

[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order.[30] Civil contempt is a crime,[31] and if

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[26] *Fakie* above n 17 at para 6. Prior to the pronouncement of *S v Beyers* 1968 (3) SA 70 (A) there was uncertainty about the ability of a civil order to attract public prosecution. That case provided that even where a litigant seeking a coercive civil contempt order abandons their cause of action that does not, depending on the nature and seriousness of the contempt, preclude the court from enforcing a criminal sanction such as committal, (see *Fakie* above n 17 at para 11).

[27] Cilliers et al *Herbstein and Van Winsen The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta, Cape Town 2009) volume 2 at1100.

[28] *Cape Times* above n 24 at 106C-D; Fakie above n 17 at para 11.

[29] Id at 110C.

Comparable foreign jurisprudence is helpful in this regard:

In the United States, "it is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders". See *Young v United States ex rel Vuitton et Fils SA* 481 US 787 (1987) at 793. By comparison, in Canada, courts may institute contempt proceedings *ex mero motu*—

> "[b]ut it is a drastic procedure which should be used cautiously only to uphold the authority of the Court and its process, or to enable justice to be properly administered, or to maintain the authority of the law. It ought not to be used merely to uphold and vindicate the processes of the law for the benefit of one of the litigants." (*R v UFAW* [1967] 65 D.L.R. (2d) 579 (BCCA) at 591.)

And in the United Kingdom, civil contempt is understood to vindicate the public's interest in the enforceability of court orders. See Lowe and Sufrin, *The Law of Contempt* 3 ed (Butterworths, London 1996) at 559. Therefore when contempt takes on a public dimension, "particularly if the offender is deliberately pursuing a policy of challenging a court's authority", British courts are empowered to initiate contempt proceedings *mero motu* (id at 559, 659). See also *Churchman v Joint Shop Stewards' Committee of the Workers of the Port of London and others* [1972] 3 All ER 603 (CA) at 608.

[30] See Burchell *Principles of Criminal Law* (Juta & Co Ltd, 3rd ed) at 955.

[31] Above n 26.

all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons.[32] Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order.[33] By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable.[34] At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.[35]

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities:

(a) the must order exist;

(b) the order must have been duly served on, or brought to the notice of, the alleged contemnor;

(c) there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or *mala fide*.[36]

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[32] *Fakie* above n 17 at para 71.

[33] Id at para 74. There are divergent views between the majority and the minority as to the distinction to be drawn between these two classifications. However, the characterisation presented by Heher JA, of the minority, appears to accurately capture the common law position in this regard.

[34] Id at para 75.

[35] *York Timbers Ltd v Minister of Water Affairs & Forestry and Another* 2003 (4) SA 477 (T) (*York Timbers*) at 506D and *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 456A-B. As explained id. See also section 1(c) of the Constitution.

[36] *Fakie* above n 17 at para 12.

The import of Fakie

[33] The question for consideration in *Fakie* was whether it was acceptable, in the light of the constitutional protections afforded to "accused persons", to commit someone to prison found guilty of contempt where reasonable doubt exists as to any one element of the crime.[37] The majority in *Fakie* noted that with our Constitution coming into force, the need has arisen to ensure that the principles of contempt accord with constitutional dictates.[38]

[34] In an instructive judgment the majority, per Cameron JA, outlined the history of contempt in South African law and how it has been dealt with by other courts. The majority observed that the application for committal is a "peculiar amalgam", as it is a civil proceeding that has in its arsenal the threat or consequence of criminal sanction.[39] Though the successful litigant's interest is in compelling compliance, the courts are able to grant the sanction of committal because there is a public interest being protected[40] – that is, the obedience to court orders and the maintenance of the rule of law.[41] Acknowledging this amalgam leads to the question of whether the distinction

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[37] Id.

[38] Id. See also sections 2, 12, 35 and 39(2) of the Constitution.

[39] *Fakie* above n 17 at para 8.

[40] Id at paras 34 and 38-9.

This, as *Fakie* points out, is acknowledged by incorporation in the test for contempt itself that the contempt must have been committed wilfully and with *mala fides*. Said differently, having the requirements of *mala fides* and wilfulness within the test for contempt acknowledges the fact that contempt is an act done on purpose much like the intentional component in other crimes (id at paras 11, 23 and 40). The corollary of this is that good faith avoids the infraction. This is because such a sanction cannot be lawfully imposed for a mere disregard of a court order but should be for the "deliberate and intentional violation of the court's dignity, repute or authority". Therefore, the honest belief, even if mistaken, that there is a justification for non-compliance does not accord with that level of intent (id at paras 9-10).

By comparison, courts in Canada and the United Kingdom require proof beyond a reasonable doubt that the contemnor intended to commit an act disallowed by a clear and unequivocal order of which the contemnor had notice. However, they do not require a showing that the contemnor intended to disobey the order or interfere with the administration of justice. See *TG Industries Ltd. v Williams* 2001 NSCA 105; [2001] 196 NSR (2d) 35 (*TG Industries*) at para 16-7; *Attorney-General v Times Newspapers Limited* [1991] 1 AC 191 at 217; [1991] 2 All ER 398 at 414b; and Lowe and Sufrin above n 29 at 565-7.

[41] Compare Lowe and Sufrin above n 29 at 656 where the same is said about English law:

> "[I]t is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice."

between civil and criminal contempt orders exists.[42] The Supreme Court of Appeal concluded that in reality there is not as strict a distinction as previously believed and, in fact, the Constitution demands that the common law be amended to protect the rights of those upon whom the sanction of imprisonment may be visited on being unsuccessful in contempt proceedings.[43]

[35] After surveying the remaining case law, international sources and the arguments of either side, *Fakie* concluded that this standard for a finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt.[44] Despite the fact that it is acknowledged that this mechanism (especially when employed by civil litigants) retains its civil character, the possibility of imprisonment requires the importation of protections.[45]

[36] These protections are mandated by the Constitution. However in importing them we must be cognisant of the context of contempt proceedings: a respondent in contempt proceedings, *Fakie* said, is not an "accused person" as envisioned by section 35 of the Constitution, and the protections afforded to a contemnor should not

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Compare *International Union, United Mine Workers of America v Bagwell* 512 US 821 (1994) (*Bagwell*) at 828 (noting that the imposition of fines both vindicates the court's legal authority, associated with criminal contempt, and coerces the contemptuous party to comply with the court's orders, associated with civil contempt).

[42] See *Fakie* above n 17 at paras 11-6 for the Supreme Court of Appeal's exposition of the civil and criminal dimensions of contempt in the common law. For comparison with other jurisdictions, compare Miller *The Law of Contempt in Canada* (Carswell, Scarborough 1997) at 13:

> "Because all alleged contempts must be proved beyond a reasonable doubt, at the end of the day there is little practical distinction between criminal contempts (summarily, those that have a public character and offend against the administration of justice generally) and civil contempts (those that bear on litigation among private parties, such as disobedience of orders or rules of procedure in such litigation)."

For a discussion of the distinction between civil and criminal contempt in American law, see *Bagwell* id at 827-31.

For an English criticism of the maintenance of the distinction between civil and criminal contempt, see *A-G Newspaper Publishing plc* [1988] Ch 333 at 362; [1987] 3 All ER 276 at 294.

[43] *Fakie* id at paras 34-41.

[44] Id at paras 19, 29 and 39.

[45] Id at para 24.

supersede the capacity of a non-state litigant who may not have the administrative might to establish motive.[46] Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence.[47] Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.

[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief,[48] a mandamus demanding the contemnor to behave in a particular manner,[49] a fine[50] and any further order that would have the effect of coercing compliance.[51]

[38] I now deal with the above issues.

Should the Municipality be held in contempt?

[39] The key issue is whether, in the circumstances of this case, the Municipality has shown good cause why it should not be held in contempt of this Court's orders. There can be no doubt that the Municipality has not complied with this Court's directions and orders.[52] However, the service of the order upon the Municipality, an essential element to a finding of contempt, is wanting.

[46] Id at paras 41 and 42.

[47] Id at para 41.

[48] See, for example, *York Timbers* above n 35 at 506C-D.

[49] See, for example, *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) and *Kate v MEC for the Department of Welfare Eastern Cape* 2005 (1) SA 141 (SE) at para 21.

[50] See, for example, *Jeebhai v Minister of Home Affairs and Another* 2007 (4) SA 294 (T) at para 54 and *S v Mkize* 1963 (3) SA 218 (N).

[51] Some of the mechanisms employed in other jurisdictions include community service, striking a written submission, an order that the contemnor tender security for compliance and sequestering the contemnor's property. See, Lowe and Suffrin above n 29 at 557; Miller above n 42 at 129.

[52] See above [10] to [12] and n 2.

[40] The Municipality submitted that it did not receive the directions and order of this Court due to its attorney's change of fax number and email address, and that it was an oversight not to furnish this Court with a notice of the change of address. This much was confirmed by the attorney, who allegedly became aware of the directions and order only on 14 June 2014, once he was contacted by the Deputy Registrar of this Court. The Municipality submitted that there was no wilful default on its part and that the applicants suffered no prejudice. The Registrar had transmitted the directions and order to an e-mail address and fax number that had been changed during the period preceding transmission. But the Municipality neither specified the dates on which the addresses were changed nor explained why it was necessary for the attorney to change his e-mail address and not provide any forwarding service addresses. The Municipality simply said that it only became aware of the order of 12 March 2014 and the set down direction *in casu* on 14 June 2014.

[41] The applicants contended that the explanation is inadequate. They could not, nonetheless, refute the averments regarding the Municipality's non-receipt of the directions and order. They urged us to order the Municipality to take steps to move the N12 Community applicants and pay costs on a punitive scale. SERI submitted that the Municipality should be held in contempt and that a declaration should be granted to safeguard the Court's institutional authority and ensure compliance. It submitted that, in addition to a rule *nisi* being issued for joinder of the Mayor and Municipal Manager, we should draw an inference that the Municipality was served or had become aware of the order. SERI also sought a punitive costs award against the Municipality.

[42] While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority.[53] On whether this Court should make a civil contempt order against the Municipality, it is necessary to

[53] Cape Times above n 24 at 106A-B.

consider whether, on a balance of probabilities, the Municipality's non-compliance was born of wilfulness and *mala fides*.

[43] One has to accept readily that the Municipality's explanation may not be adequate. However, the undisputed evidence, confirmed under oath by its attorney, in particular that the order was not served and the Municipality was not made aware of it, negates a finding that proper service is established. This Court cannot, in the circumstances, draw an inference of wilfulness and *mala fides*. As a result one cannot safely conclude that the Municipality is in contempt of the order. It follows that the Municipality has shown good cause why it should not be held in contempt.

[44] This conclusion does not, however, detract from the fact that the Municipality has breached its constitutional obligations by failing to abide by the orders dated 6 December 2011 and 12 March 2014. The source and scope of these obligations are found in the Constitution: section 152 which deals with the objects of local government provides:

> "(1) The *objects of local government* are —
>
> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the *provision of services to communities* in a sustainable manner;
>
> (c) to promote social and economic development;
>
> (d) to promote a safe and healthy environment;
>
> . . .
>
> (2) *A municipality must strive*, within its financial and administrative capacity, *to achieve the objects* set out in subsection (1)." (Emphasis added.)

[45] In addition, section 73 of the Municipal Systems Act[54] outlines the general duty placed on municipalities. It provides:

[54] 32 of 2000.

"(1) A municipality must give effect to the provisions of the Constitution and—

(a) give priority to the basic needs of the local community

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

(2) Municipal services must—

(a) be equitable and accessible;

(b) be provided in a manner that is conducive to-

(i) the prudent, economic, efficient and effective use of available resources; and

(ii) the improvement of standards of quality over time;

(c) be financially sustainable;

(d) be environmentally sustainable; and

(e) be regularly reviewed with a view to upgrading, extension and improvement."[55]

[46] The effect of *Pheko I*, in terms of these obligations, entitled the applicants to relief.[56] Also, *Pheko I* clearly outlined the exact steps to be followed in order to effect that relief.[57] All of these obligations served as a basis for the Court's order of 28 August 2014. The obligations continue to form the basis of the Municipality's ongoing responsibilities toward the applicants.

Should Mr Khoza be held in contempt?

[47] When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable.[58] The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put,

[55] In addition, section 9(1) of the Housing Act, quoted in full above n 14, makes it obligatory for every municipality, as part of the municipality's process of integrated development planning, to take all reasonable and necessary steps within the framework of legislation to ensure access to adequate housing and living conditions.

[56] *Pheko I* above n 1 at paras 49-50.

[57] Id at para 53. In particular, see paras 6-8 of the order (for the full text see above n 2).

[58] *Cape Times* above n 24 at 106D-E.

the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.[59]

[48] The attorney confirmed that he did not inform the Municipality of the directions and order. This, he said, was because he did not receive them since they were transmitted to a fax number that was no longer linked to his changed e-mail address. He said that the e-mail address was changed on or about August 2013 because it had become unreliable. In addition, in July 2012, his offices were relocated to new premises, which resulted in the change of telephone numbers and fax numbers.

[49] The attorney explained that before the relocation he enquired from the Registrar of this Court whether further directions had been issued. He asked because, he said, "the applicants themselves had been in contempt of this Court by failing to comply with the directions issued by the Court". As a result he "gained the impression that the applicants no longer intended to proceed with the matter". And he did not therefore "inform the Registrar of the change of address". He acknowledged that "[t]his . . . was incorrect as the applicants later applied for condonation for the late filing of the reports which they were directed to file". The attorney also made the enquiry because the Municipality was itself waiting for this Court to issue further directions as to whether it should commence with the process of relocating the N12 Community applicants.

[50] The standards of proof are those set out in *Fakie*: a balance of probabilities in respect of civil remedies and a reasonable doubt in respect of a committal order. While the existence of the order and non-compliance have been established, the requisite of service has not. It follows that without one of the requisites being established, no inference of wilfulness and *mala fides* can be drawn. The attorney's undisputed evidence dispels any notion of wilfulness and *mala fides* on his part. I conclude therefore that contempt on the part of the attorney has not been established.

[59] Id. See also *Fakie* above n 17 at paras 6 and 8.

Should the attorney pay costs from his own pocket?

[51] Costs *de bonis propriis* are costs which a representative[60] is ordered to pay out of his or her own pocket as a penalty for some improper conduct, for example, if he or she acted negligently or unreasonably.[61] Whether a person acted negligently or unreasonably must be decided in the light of the particular circumstances of each and every case.[62]

[52] The attorney submitted that this costs award is punitive and awarded against attorneys only in exceptional circumstances where, for example, the court finds that a legal representative did something out of the ordinary and of an unusual nature. He submitted that his failure to inform the Municipality of the directions and order of this Court was not as a result of gross negligence. I disagree.

[53] Mr Khoza is not only an attorney of record for the Municipality but also an officer of this Court. He knew that the matter was pending and there was no basis for him to believe that the applicants no longer intended to pursue the matter. Furthermore, he knew that the Municipality was awaiting further directions regarding its obligations to the N12 Community applicants; indeed, that was one of the reasons he proffered for making enquiries with the Registrar. His conduct is all the more concerning in the light of the importance of the interests at stake and the harm that the extensive delay has already caused to the applicants. It follows that his conduct has been egregious.

[54] While the evidence may not establish wilfulness or *mala fides*, it does establish a gross disregard for his professional responsibilities. At the very least, the attorney

[60] See *Zalk v Inglestone* 1961 (2) SA 788 (W) at 795A.

[61] *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 54.

[62] *Grobbelaar v Grobbelaar* 1959 (4) SA 719 (A); [1959] 4 All SA 439 (A) at 725B-C. For the difference between costs *de bonis propriis* and costs on an attorney and client scale see *Pieter Bezuidenhout-Larochelle Boerdery (Edms) Bpk en Andere v Wetorius Boerdery (Edms) Bpk* 1983 (2) SA 233 (O) at 236F-H.

had an obligation to notify the Registrar of this Court and his clients of any change of address.[63] It is proper that he accepted that he inappropriately failed to inform the Registrar of the change of his address. This was plainly not done. The failure to notify the Registrar does, indeed, constitute gross negligence on his part.[64]

[55] Accordingly, Mr Khoza must be ordered to pay the costs from his own pocket to mark this Court's displeasure at his gross negligence, particularly as an officer of this Court. Next, is whether the Mayor, Municipal Manager and MEC should be joined to these proceedings.

Joinder of the Mayor, Municipal Manager and MEC

[56] The test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the Court.[65] This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts.[66]

[57] In the light of my finding that contempt of this Court's order on the part of the Municipality has not been established, no purpose would be served by joining the Mayor, Municipal Manager and MEC to these contempt proceedings.

[58] However, by virtue of their constitutional and statutory responsibilities, the joinder of the Mayor and Municipal Manager in respect of this Court's continuing supervision of the implementation of the orders in *Pheko I* is appropriate. The general

[63] Rule 1(8) of the Constitutional Court Rules, read with rules 4, 4A and 16 of the Uniform Rules of Court.

[64] Above n 61. See also *Machumela v Santam Insurance Co. Ltd* 1977 (1) SA 660 (AD); [1977] 2 All SA 53 (A) where similarly an attorney cost the applicant money for not having obeyed the rules of court, see 663H-664D.

[65] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

[66] See, for example, *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* [2014] ZACC 35; 2015 (2) BCLR 182 (CC); (2015) 36 ILJ 363 (CC) at paras 186-7; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at paras 11-2; *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008 (6) SA 522 (SCA) at para 9; and *Ex Parte Body Corporate of Caroline Court* [2001] ZASCA 89; 2001 (4) SA 1230 (SCA) at para 9.

duty imposed on municipalities in respect of the provision of municipal services includes giving effect to the Constitution by prioritising the basic needs of the community, promoting the development of the community and ensuring that there is access to at least the minimum level of municipal services.[67]

[59] The Mayor and the Municipal Manager are tasked with the oversight and management, respectively, of the provision of services by municipalities to the local community in a sustainable and, in the case of the Municipal Manager, equitable manner.[68] In addition to these responsibilities, the Municipal Manager is also tasked with the implementation of national and provincial legislation applicable to the municipality, like the Housing Act.[69] Thus, despite Mr Chainee's efforts to exonerate the Mayor and the Municipal Manager, they nonetheless have Constitutional and statutory obligations in relation to the supervisory orders of *Pheko I*.[70]

[60] As regards the joinder of the MEC, section 7 of the Housing Act makes it obligatory for him to take all reasonable and necessary measures to support and strengthen the capacity of the Municipality in its provision of adequate housing.[71] When the Municipality fails to do so, the MEC is obliged to intervene by taking appropriate steps.[72] Based on the evidence before us, the MEC's office, in the latest collaboration with the Municipality, has identified personnel in its ranks that will become directly responsible for the implementation of steps to comply with this Court's orders. In the light of the MEC's statutory obligations in relation to the provision of housing and his role in the implementation of the order of 6 December 2011, these steps are appropriate. Those same obligations mean that he

[67] Section 73(1) of the Municipal Systems Act above at n 54.

[68] Section 56(3)(e) of the Local Government: Municipal Structures Act 117 of 1998 and section 55(1)(d) of the Municipal Systems Act above n 54 respectively.

[69] Municipal Systems Act above n 54 at section 55(1)(p).

[70] Above n 72-5 and sections 152 and 156 read with Schedule 4, Part A of the Constitution.

[71] Above n 15.

[72] Section 7(2)(f) of the Housing Act read with 139 of the Constitution and see also above n 16.

should be joined as a party having substantial interest in the execution of the supervisory orders in *Pheko I*. Accordingly an order to that effect will be made.

Concluding remarks

[61] Finally, it needs to be stressed that the Constitution enjoins organs of state, like the Municipality, to adhere and give effect to its principles and provisions, as they must to the court orders issued thereunder.[73] Where an organ of state fails in its duty, a court must assume an "invidious position of having to oversee state action",[74] to address and correct the failures.

[62] In response to the rule *nisi* calling on the Mayor and Municipal Manager to show cause why they should not be joined to the proceedings, the Mayor, Mr Gungubele, disclaimed all responsibility for the fact that his Municipality had failed to carry out the Court's orders. He sought to do so on the basis that he was not responsible for what he called the "day to day administrative functions" of the Municipality. Instead, he pointed to a junior official, Mr Chainee (himself a new appointment) whom he said was responsible.[75] For his part, the Municipal Manager, Mr Ngema, engaged an identical disclaimer.[76]

[63] These disclaimers were unseemly and highly inappropriate. Who in a local authority, if not the Mayor and Municipal Manager, is responsible for its failings of function? The offices they hold exist for the purpose of oversight in the interests of

[73] Contempt of court in all cases is to be prohibited and condemned, but much more so where the order with which the state is unwilling to comply concerns the provision of basic human rights. What is more, the situation begins to look dire when the affidavits deposed to by state parties contain bureaucratic babble that is clearly aimed, not at assisting the judiciary to arrive at a just result, but rather at avoiding their constitutional obligations. Often constraints on state parties, particularly financial ones, that may limit or delay their capacity to achieve certain results, are acknowledged and moderated by courts through reporting requirements. In crafting the reporting mechanisms that accompany declarations of positive obligations, not only are courts being sensitive to the very real resource constraints of the state, they are engaging in a collaborative process in which different branches of government take ownership over their respective constitutional obligations. Courts in such circumstances serve primarily to ensure that the state parties are working to meet those obligations, while enabling them to explain any difficulties or delays that they may encounter in doing so.

[74] *Nyathi*, above n 22 at para 85.

[75] As set out above at [16].

[76] As set out above at [17] to [18].

the community they serve. It is wrong for them to shrug off responsibility when their own municipal structure, the one at whose symbolic and operational head they stand, conspicuously fails to fulfil a duty imposed by a court order. Nor can or should they be able to plead ignorance. The order this Court issued on 6 December 2011 affected hundreds of families and households, perhaps thousands of people. Their daily living, human dignity and security and comfort were directly at stake. It is precisely because of the leadership entrusted to the Mayor and the Municipal Manager, that they have a duty to undertake responsibility for implementing Court orders.

[64] This is not to say that they have to be involved in the minutiae of executing the order and overseeing the practicalities of its realisation. But what they must do is to ensure that the municipal structures, for which they carry ultimate legal and moral responsibility, respond appropriately. This they owe to the courts. But, much more importantly, they owe it to the residents, those who put them in power and who depend on their responsible exercise of that power, to act diligently and expeditiously.

[65] It bears repeating that courts shall not hesitate to enforce their orders.

[66] The remarks of Justice Brandeis in *Olmstead et al v United States*[77] which have been endorsed by this Court,[78] remain apposite here:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . [G]overnment is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a law-breaker, it *breeds contempt* for the law; it invites every man [or woman] to become a law unto himself [or herself]; it invites anarchy." (Emphasis added.)

[77] 277 US 438 (1928) at 485.

[78] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 68.

[67] The Municipality, as an organ of state, is duty-bound to comply with the orders of this Court, as it is with all of its obligations under the Constitution.

Order

[68] The following order is made:

1. The Ekurhuleni Metropolitan Municipality (Municipality) and Mr Bongani Khoza, the Municipality's attorney, are not held in contempt of this Court's orders of 6 December 2011 and 12 March 2014.
2. The rule *nisi* issued on 28 August 2014, in respect of the Executive Mayor and the Municipal Manager, is discharged.
3. The Executive Mayor and the Municipal Manager are joined as parties to the proceedings in relation to *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) (*Pheko I*) for the purpose of implementing the supervisory order.
4. The Member of the Executive Council for Human Settlements, Gauteng is joined as a party to the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in paragraph 3 above.
5. Mr Devraj Chainee, the Head of Department for Human Settlements for the Municipality, is joined in his official capacity as a party to the proceedings in *Pheko I* for the purpose of implementing the supervisory order referred to in paragraph 3 above.
6. Mr Khoza and the Municipality are each ordered to pay 50% of the applicants' costs in the contempt proceedings. Mr Khoza is ordered to pay costs *de bonis propriis*.

For the Applicants:	C R Jansen, M Dewrance and N Muvangua instructed by Gilfillan Du Plessis Inc.
For the Respondents:	K Tsatsawane instructed by Khoza & Associates Inc.
For the Amicus Curiae:	T Ngcukaitobi instructed by the Socio-Economic Rights Institute of South Africa.