CONSTITUTIONAL COURT OF SOUTH AFRICA

Case: CCT 217/15 and CCT 99/16

CCT 217/15

In the matter between:

MATJHABENG LOCAL MUNICIPALITY	Applicant
and	
ESKOM HOLDINGS LIMITED	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL, LOCAL GOVERNMENT, FREE STATE PROVINCE	Second Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
MINISTER OF MINERALS AND ENERGY	Fourth Respondent
MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT	Fifth Respondent

CCT 99/16

In the matter between:

SHADRACK SHIVUMBA HOMU MKHONTO	First Applicant
COMPENSATION COMMISSIONER	Second Applicant
DIRECTOR-GENERAL, DEPARTMENT OF LABOUR	Third Applicant
MINISTER OF LABOUR	Fourth Applicant

and

COMPENSATION SOLUTIONS (PTY) LIMITED Respondent

Neutral citation	*Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35
Coram:	Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J.
Judgments:	Nkabinde ADCJ (unanimous)
Heard on:	2 March 2017
Decided on:	26 September 2017
Summary:	contempt of court — requisites for contempt — standard of proof in civil and criminal contempt proceedings — appropriateness of summary procedure in contempt proceedings — non-joinder — duty to comply with court orders.

ORDER

On appeal from the High Court of South Africa, Free State Division, Bloemfontein (CCT 217/2015) and the Supreme Court of Appeal (CCT 99/2016).

Under CCT 217/2015 (*Matjhabeng Local Municipality v Eskom Holdings Limited and Others*), the following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. Paragraphs 1 and 2 of the order of the High Court of South Africa, Free State Division, Bloemfontein are set aside and are replaced with an order dismissing the application.

5. Each party is to pay its own costs in this Court.

Under CCT 99/2016 (*Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited*), the following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. Paragraphs (a) and (b) of the order of the Supreme Court of Appeal are set aside.
5. Each party is to pay its own costs in this Court.

JUDGMENT

NKABINDE ADCJ (Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ, and Zondo J):

Introduction

[1] At their core, these applications raise procedural and substantive issues concerning the requirements of contempt of court, specifically when allegations of contempt *ex facie curiae* (occurring not in the presence of the court while sitting), are made. Frequently, the resultant committal to prison violates the right to freedom and security of the person − which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial − in terms of section 12(1) and the fair trial rights in terms of section 35(3) of the Constitution.

[2] Cases concerning contempt of court are now brought to our courts with more frequency. There is a widely held view that contempt of court is neither criminal nor civil. As a result, the standard of proof required in contempt has become somewhat blurred. Not only that. Courts often employ summary contempt procedures followed

by imprisonment in motion proceedings. It is thus necessary for this Court to reflect on and clarify the applicable principles in the process of determining the two matters before us.

[3] The applicants seek leave to appeal the decisions of the High Court of South Africa, Free State Division, Bloemfontein[1] (Free State High Court) and the Supreme Court of Appeal[2] in terms of which Messrs Mothusi Frank Lepheana (Mr Lepheana) and Shadrack Shivumba Homu Mkhonto (Mr Mkhonto), respectively, were declared in contempt of court. They were convicted and sentenced to suspended imprisonment terms. The primary issue for determination is whether the orders of contempt and imprisonment sentences against them are just and equitable.

[4] The two applications for leave to appeal were heard at the same time. Before I deal with the law regarding contempt of court, it is expedient to set forth, for clarity, the parties, background, submissions, and to identify the issues, first, in respect of CCT 217/2015 (*Matjhabeng*) and, second, in respect of CCT 99/2016 (*Mkhonto*).

Matjhabeng

Parties

[5] The applicant, Matjhabeng Local Municipality (Municipality), is the second largest municipality in the Free State. The contempt order was issued against its Municipal Manager, Mr Lepheana (Municipal Manager). The first respondent is Eskom Holdings Limited (Eskom). The second to fifth respondents, collectively referred to as the respondents, are the Member of the Executive Council for Local Government in the Free State (MEC), the National Energy Regulator of South Africa, the Minister of Minerals and Energy, and the Minister of Provincial and Local

[1] *Matjhabeng Local Municipality v Eskom Holdings Limited* unreported judgment of the High Court of South Africa, Free State Division, Bloemfontein, Case No 924/13 (19 February 2015) (Free State High Court judgment).

[2] *Compensation Solutions (Pty) Ltd v Compensation Commissioner* [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA) (Supreme Court of Appeal judgment).

Government. The second to fifth respondents have not participated in these proceedings.

Background

[6] Eskom has been embroiled in a protracted effort to force the Municipality to pay its electricity bills. It threatened to terminate the electricity supply to the Municipality if its arrears remained unpaid by 31 March 2013. In response to the threatened termination, the Municipality launched urgent proceedings to interdict Eskom from cutting its electricity supply pending the finalisation of the dispute concerning the arrear amounts. This resulted in a deed of settlement in terms of which the Municipality agreed to pay an amount of R145 404 733. The deed of settlement was made an order of court, by Daffue J, on 28 March 2013 (first consent order). Because of the dispute between the Municipality and Eskom regarding the amount which was due and payable, the consent order regulated the monthly payments to Eskom in order to liquidate the arrears.[3]

[7] A year later, the Municipality had not complied with the first consent order. Eskom then launched an application to set aside the first consent order and to place, in its stead, a structural interdict to enforce payment. On 31 July 2014, another order was granted, by Kruger J, also by agreement between the parties (second consent order). In terms of this order, the Free State High Court directed, among other things, that the first consent order be set aside; that parties enter into consultations; and that the Municipality would resume payments from July 2014, failing which the Municipal Manager would report to the Court, setting out the reasons for its failure.[4] This is the order in respect of which Mr Lepheana was held, in

[3] The first consent order incorporates the deed of settlement.

[4] For completeness, the second consent order reads:

> "1. The court set aside the order granted on 28 March 2013 by the Honourable His Lordship Daffue.
>
> 2. The [Municipality] to provide [certain copies and documents set out in 2.1 to 2.11] by 6 August 2014;

his personal capacity, to have been in contempt, and for which he was sentenced to imprisonment. Although Eskom was not provided with all the documents in terms of the second consent order, the parties did meet. An agreement could not be reached in all aspects, but the Municipality undertook to pay the future monthly account in full when same became due and payable. Notwithstanding this, the Municipal Manager did not report the reasons for the failure to make the payments, as required by the second consent order.

[8] The Municipality still failed to discharge its obligations in terms of the second consent order, as it had undertaken. Eskom applied to the Free State High Court to enforce the terms of that order. On 18 September 2014, Kruger J ordered, on an *ex parte* basis, the Municipality to pay its electricity bill (rule *nisi* order). The rule *nisi* order called on the Municipal Manager, in his official capacity, to file a report setting out—

. . .

3. The parties to enter into consultations commencing on 12 August 2014, to be concluded on 19 August 2014, and to report to the above Honourable Court on or before 11 September 2014 the position of the disputes between the parties, including the [interest] rate to be charged on arrears.

4. The [Municipality] to resume payments of the current account for electricity supplied during July 2014 and thereafter on due date, failing which, the municipal manager is directed to report to the above Honourable Court reasons therefor within 14 calendar days of the default.

5. The [Municipality] to pay arrears that have accrued since June 2013, together with interest *a tempore morae* [interest running from the date of judgment], on payment terms to be agreed between the parties in terms of the provisions of clause 3 of this order, failing such agreement or payment, first respondent shall be entitled to terminate the supply of electricity after following due procedure in terms of the Promotion of Administrative Justice Act 3 of 2000.

6. The [Municipality] to pursue payment of whatever amount it expects from SARS [South African Revenue Service], to keep first respondent informed of such steps and to make payment to the first respondent within 3 days of the applicant receiving it.

7. The [Municipality] to disclose to the first respondent and the above Honourable Court the status of money collected from end users, in lieu of electricity usage, from June 2013 to present, and what it has been utilised for before or on 6 August 2014.

8. The [Municipality] pay interest of 15.5% *a tempore morae* on all amounts for electricity consumption effective July 2014.

9. Any one of the parties shall be entitled to approach the court for any unresolved dispute within 120 days of the conclusion of the consultations contemplated in paragraph 3 of this order.

10. Costs are reserved."

(a) the reasons why the Municipality had not kept up with payment of its electricity account;

(b) what steps the Municipality had taken to address its default;

(c) why the outstanding arrears should not be payable by 31 March 2015 given the Municipality's history of non-compliance with the first and second consent orders; and

(d) why the Municipal Manager should not be held in contempt of court for non-compliance with the reporting and disclosure obligations set out in the second consent order.

[9] The Municipality was given until 6 October 2014 to file its report and Mr Lepheana was ordered to be present in person in Court on 6 November 2014. As directed, in terms of the rule *nisi* order, Mr Lepheana filed an explanatory affidavit on behalf of the Municipality setting out why the orders had not been complied with. In particular, the affidavit sets out the various attempts made by himself and senior personnel of the Municipality to settle the dispute with Eskom.

[10] On 6 November 2015, Mr Lepheana was present at Court. The Court outlined facts to illustrate that the order was not obeyed. Counsel for Eskom was asked to confirm the correctness of those facts. The invitation was not extended to counsel for the Municipality or to Mr Lepheana himself. Whilst counsel for the Municipality was addressing the Court, the Court[5] ordered Mr Lepheana to enter the witness box. He was sworn in. It is evident from the transcript of the proceedings that Mr Lepheana was subjected to lengthy questioning by the Judge and counsel for Eskom. In its judgment, declaring Mr Lepheana to be in contempt of court, the Free State High Court remarked:

> "I allowed Mr Lepheana the opportunity to testify under oath on the 6 November 2014 when I heard oral argument on behalf of the parties. Unfortunately

[5] Per Daffue J who had granted the first consent order.

> his evidence was not helpful and did not go any further than the generalisations and hearsay evidence contained in his written explanation. He has not provided sufficient evidence to displace the evidentiary burden that rested upon him. His non-compliance was not only wilful and *mala fide*, but an indication of the high-handed approach adopted by so many senior public officials . . . . His attitude throughout is baffling and his conduct undermines the esteem in which the office of the Municipal Manager ought to be held."[6]

[11] Further, the Court said:

> "Wilful disobedience of an order of court made in civil proceedings is a criminal offence. Applications on notice of motion are often brought in the High Court for committal for contempt of court in order to bring about a proper discharge of obligations under an order *ad factum praestandum* [for the performance of or abstinence from performing specific acts] or under a prohibitory interdict."[7]

[12] The Court convicted Mr Lepheana of contempt of court and sentenced him to six months' imprisonment, wholly suspended.[8]

[13] The application for leave to appeal in the Free State High Court was unsuccessful[9] and so was the petition to the Supreme Court of Appeal, hence this application for leave to appeal.

Parties' submissions

[14] The Municipality, relying on *Mansell*, contends that it only breached the agreement between the parties and not an order of court.[10] It submits that the

[6] Free State High Court judgment above n 1 at para 49.

[7] Id at para 27.

[8] Id at para 54.

[9] The grounds of appeal included non-joinder and inappropriateness of the conviction and sentence in respect of monetary debt – in a situation where the judgment could be enforced through execution in terms of the applicable Uniform Rules of Court. Further, it was contended that Eskom failed to make a case that the Municipal Manager willingly and in bad faith disobeyed the second consent order and was therefore guilty of contempt. Mr Lepheana implored the Court to consider his affidavit appended to the application for leave to appeal.

procedure *a quo* violated the precepts of fairness, justice, and the rule of law. This is so, it submits, because the process was not served on nor brought to the notice of Mr Lepheana personally. Ordinarily, the person targeted is the official concerned in his official capacity. The Municipality submits that Mr Lepheana should have been joined. Although the Municipality accepts that the Municipal Manager is its responsible official, it contends that non-compliance with a court order by itself did not automatically attract contempt of court on the part of Mr Lepheana without a substantive application. The Municipality argues that the contempt proceedings did not provide Mr Lepheana with appropriate protections and that the proceedings led wholly to a misapplication of the evidentiary burden during the 6 November 2014 hearing which, allegedly, had all the features of undesirable summary contempt proceedings.

[15] Eskom opposes the application for leave to appeal. It maintains that there was proper notice of the second consent order because the Municipality's attorneys brought that order to the attention of the Municipal Manager. It submits that, based on the meeting held with Eskom's officials, Mr Lepheana was aware of the obligations imposed upon him by the second consent order. Eskom argues that, as an accounting officer, Mr Lepheana drafted and approved the payment plan. Additionally, Eskom submits that Mr Lepheana was aware of the rule *nisi* and was present in court on 6 November 2014 to deal, specifically, with the issue of contempt against him. Eskom submits that the submission that the issuing of the rule *nisi* violates the

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[10] *Mansell v Mansell* 1953 (3) SA 716 (N) at 721B-F where the Court held:

> "Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an Order of Court it must, in my opinion, look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusal to grant its prayer."

Constitution is not supported by the facts, the law, or the decisions in *Mamabolo*,[11] *Fakie*,[12] and *Pheko II*.[13]

[16] As to non-joinder, Eskom accepts that "no court can make a finding adverse to any person's interests, without that person first being a party to the proceedings before it," but contends that this does not mean that *personal* service need be made on the official before they are committed for contempt. It contends that formal joinder of the person at risk of contempt is not invariably necessary. Eskom argues that the order imposed a positive obligation on Mr Lepheana "personally".

[17] Eskom disputes that the procedure followed was summary in effect and unfair. It submits that *Mamabolo* is distinguishable from this case because the impugned conduct of scandalising the court occurred after the conclusion of the proceedings and did not involve non-compliance with a supervisory interdict.

Issues

[18] Preliminary issues in *Matjhabeng* involve whether leave to appeal and condonation should be granted. The principal issue is whether the requisites of contempt of court were established. The further issues concern the non-joinder of Mr Lepheana in his personal capacity to the contempt proceedings and the appropriateness of the summary contempt procedure. I revert later to determine these issues after clarifying the law on contempt of court.

Mkhonto

Parties

[11] *S v Mamabolo* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (*Mamabolo*).

[12] *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*).

[13] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*).

[19] The first applicant is Mr Mkhonto. When the dispute arose, he was the Commissioner of the Compensation Fund established under the Compensation for Occupational Injuries and Diseases Act (COIDA).[14] The second applicant is the Compensation Commissioner (Commissioner). The Commissioner was cited as the first respondent throughout the proceedings – as well as when the contempt proceedings were initiated against him. As a Commissioner, he administered payment of medical claims for employees. He resigned from his position on 1 June 2015 and was thus no longer the Commissioner when the appeal was heard before the Supreme Court of Appeal. The third and fourth applicants are the Director-General of the Department of Labour (Director-General)[15] and the Minister of Labour (Minister). These applicants allegedly support the application for leave to appeal. They have not participated in the proceedings. The Director-General delegated the day-to-day performance of the activities in terms of COIDA to the Commissioner.

[20] The respondent, Compensation Solutions (Pty) Limited (CompSol), conducts a business of purchasing medical claims at face value minus a factoring fee. In that way, it becomes the legal holder of the medical aid accounts and is entitled to enforce the claims against the Commissioner, Director-General, and Minister.

Background

[21] The matter of *Mkhonto* shows that the compensation system established under COIDA has not functioned as it should because of delays in processing, validating, and paying medical accounts.[16] The delays have resulted in severe backlogs in

[14] 130 of 1993. COIDA entitles employees injured on duty to claim compensation for their incurred medical costs.

[15] The Director-General's role in terms of section 4(1)(j) of COIDA is to determine the tariffs of fees according to which consultation fees can be recovered.

[16] Employees injured on duty submit their claims for compensation to the Compensation Fund (Fund) established in terms of section 2(1)(a) of COIDA. The Fund adjudicates the claims and either rejects or accepts them. Once the Fund has accepted liability for a claim, the employee is entitled to be compensated for all medical expenses (medical accounts) related to his or her injury, provided that the Fund finds these expenses to fulfil the tariff and other legal requirements. To that effect, the Fund verifies each medical account individually and processes the account for payment, if the account is accepted.

payment of the accounts. After various unsuccessful efforts to obtain payment for outstanding compensation on behalf of its clients, CompSol ultimately resorted to litigation in which Mr Mkhonto was cited in his official capacity, as the Commissioner.

[22] In June 2009, and related to the unresolved medical accounts at the time, CompSol instituted proceedings in the High Court of South Africa, Gauteng Division, Pretoria (Pretoria High Court) against the Commissioner, Director-General, and Minister for declaratory relief and *mandamus* to address payment of outstanding accounts. The parties reached a settlement agreement. This agreement was signed by the Commissioner, on behalf of the applicants, and was made an order of court on 31 July 2009 (consent order). This is the order in terms of which Mr Mkhonto is held, in his personal capacity, to have been in contempt. The consent order regulated the processing of medical accounts by the Commissioner within a reasonable time, that is to say, 75 days after their submission.[17]

[17] For completeness the consent order reads, in relevant parts:

> "1. The [Commissioner] shall process medical accounts submitted to him in relation to medical aid provided to employees by medical practitioners, as envisaged in [COIDA] within a reasonable time from the submissions of such accounts.
>
> 2. In respect of the submission of a medical account relating to a claim which has been accepted (i.e. the [Commissioner] has accepted liability for the claim), and in respect of a medical account submitted after such acceptance, a reasonable time for the [Commissioner] to process, validate and effect payment of such validated medical accounts is within 75 days of the acceptance of a claim, or where this occurs after acceptance of the claim, the date of submission of such accounts. For avoidance of doubt, it is recorded that in respect of medical accounts submitted before acceptance of a claim, the 75 days will be calculated from the date of the acceptance of the claim.
>
> 3. The [Commissioner] shall process the backlog of medical accounts referred to in Annexure JL12, at page 88 of the record in this application, by 30 October 2009.
>
> 4. The [Commissioner] shall pay [CompSol] interest at the current legal rate of interest (being 15.5 per cent per annum) on all currently outstanding medical accounts to which the letter of demand dated 25 March 2009 (record, pages 88-9) relates, from such date of demand to the date of payment of each such respective account.
>
> 5. [CompSol] will submit a CD to the [Commissioner] on a fortnightly basis containing a list of claims, and the [Commissioner] shall provide the status of each claim, and where the claim has been accepted, the date of such acceptance, to [CompSol] within 7 (seven) days of receipt of the CD.
>
> 6. The parties record their mutual commitment to a functional process in relation to claims and medical accounts submitted to [CompSol], a good working relationship in that regard. Accordingly to resolve any queries, disputes or discrepancies in relation to medical accounts

[23] In terms of the consent order a claim had to be accepted as valid at the date of submission of the account within 75 days after acceptance of liability for the claim, in terms of paragraphs 1 and 2 of the order; the processing of backlog accounts in terms of paragraph 3 of the order; the payment of interest on all outstanding medical accounts from the date of demand to the date of payment in terms of paragraph 4 of the order; submission by CompSol of a CD with a list of claims for each of which the Commissioner has to provide the status within seven days of receipt of the CD in terms of paragraph 5 of the order; and weekly meetings to ensure a functional process, in terms of paragraph 6 of the order.

[24] The Commissioner and other applicants failed to comply with the consent order. CompSol applied, in November 2009, for an order declaring the Commissioner to be in wilful contempt of the consent order. It also instituted three action proceedings against the Commissioner. When the Commissioner entered an appearance to defend the actions, CompSol applied for summary judgment. At the hearing of the applications for summary judgment,[18] the Commissioner accepted liability for the amounts claimed plus interest.

[25] In February 2010, CompSol lodged a second contempt application in which similar relief was sought.[19] This application was similarly settled during August 2010.

> submitted for payments, [CompSol] and the [Commissioner] or his designated representatives shall meet weekly at the latter's Port Elizabeth offices.
>
> 7. This agreement shall apply equally to the [Director-General] as the party principally responsible for compliance with the obligation in performance of the functions set out in the Act.
>
> 8. The Respondents [Commissioner, Director-General, and Minister] shall pay the party and party costs of this application as taxed or agreed, including the costs of two counsel.
>
> 9. The Respondents [Commissioner, Director-General, and Minister] consent to this agreement being made an order of court.
>
> 10. The parties accept the above undertakings in settlement of the above application.
>
> 11. This agreement and its contents are confidential to the parties."

[18] The applications were heard on 19 January 2010.

[19] In terms of that application, CompSol sought an order to hold the Commissioner in contempt and for committal to prison for his failure to process and pay assessed and validated medical accounts within 75 days in

The Commissioner thereafter and once again persisted in refusing to make payment in terms of the consent order. CompSol's attorneys addressed a letter, on 18 April 2013, to the Director-General and the Minister asking for a workable solution to payments and threatening legal proceedings. In July 2013, CompSol applied for an order declaring the Commissioner to be in contempt of paragraphs 1, 2, 5, and 6 of the consent order.[20] The relief sought related to the Commissioner's failure to process medical accounts within a reasonable time, 75 days for accounts relating to accepted claims, his failure to provide the status for each claim contained on the CD submitted to his office by CompSol, and his failure to ensure that the weekly meetings effectively served the functional processing of accounts.[21] CompSol contended that the Commissioner, wilfully and *mala fide* (in bad faith), breached the consent order. It said that delays in the processing of claims resulted in doctors refusing to treat patients and in CompSol's looming closure of its doors if payment was not received.

[26] The Commissioner opposed the application, explaining that there were five different solutions to the backlog problem,[22] including an advance payment agreement (APA), which was later cancelled.[23]

[27] CompSol filed further papers to provide an update of the outstanding amount. The Commissioner, Director-General, and Minister were afforded an opportunity to

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terms of paragraph 2 of the consent order, as well as his lack of cooperation regarding the weekly meetings required to be held in terms of paragraph 6 of the consent order.

[20] Above n 17.

[21] Id.

[22] The five solutions were: the acquisition of software to process the claims; the conclusion of an advance payment agreement; the outsourcing of the processing of accounts to a medical service company; a tender to perform a forensic audit of the Fund and design a turnaround strategy; and the appointment – on an interim basis – of Rand Mutual Assurance Company Limited (RMA), a non-profit mutual assurance company licensed under COIDA to process mining and forestry COIDA compensation claims, to assist the Fund in processing the backlog.

[23] In terms of this agreement: CompSol would compile lists containing details of each medical aid account; the Commissioner would pay the full amount within ten days of receipt of the lists; the Commissioner would make payment in the course of the normal process, thereby ending up paying twice; and CompSol would thereafter reimburse the Commissioner where double payments were made. The APA was cancelled by the Commissioner because the Auditor-General had advised him that the agreement was unlawful and in breach of the Public Finance Management Act 1 of 1999. Subsequently, in a letter dated 18 April 2013, CompSol suggested a reinstatement of the APA as a viable solution to the dispute.

file answering papers by 26 August 2013. They didn't. On 5 September 2013, the Commissioner was ordered to pay R127 152 278 by 16 September 2013. By 3 September 2013, the answering affidavit had not been filed. This prompted CompSol to enrol the application for hearing on 12 February 2014. Although there seems to be confusion about dates, it appears that certain amounts were paid by December 2013, seemingly in relation to new claims.

[28] On 12 February 2014, an answering affidavit was filed. It was deposed to by Mr Masalesa, the Senior Practitioner: Medical Payments in the office of the Fund. The Commissioner filed an unattested affidavit without the Court's leave. That affidavit was struck out and, according to Mr Mkhonto, a subsequent affidavit by the Commissioner was rejected by the Pretoria High Court because it was late. In his founding affidavit, Mr Mkhonto explains that Mr Masalesa was the official who dealt with claims and was best placed to deal with difficulties experienced in relation to CompSol's claims. Notably, Mr Mkhonto said that he had no personal knowledge of the daily activities surrounding the processing and payment of claims. According to him, he relied on officials who performed these functions, including Mr Masalesa.

[29] In the answering affidavit, Mr Masalesa disputed the amount allegedly owing, including the interest claimed. He stated that claims had to be considered in the light of the volumes of claims submitted monthly and that CompSol had not made out a case for contempt. Mr Masalesa averred that the Commissioner had been continuously implementing measures to ensure that payments were made within a reasonable time; that the backlog was neither wilful nor *mala fide*; that the offices of the Fund had examined the claims submitted on the CD and found that the amount approved was less than the amount CompSol had claimed; and that CompSol had not complied with the notice requirements in terms of section 4 of the Institution of Legal Proceedings against Certain Organs of State Act.[24] Further pleadings were filed.

[24] 40 of 2002.

[30] On 18 February 2014, the Pretoria High Court – per Jansen J – issued an order in terms of which: CompSol and the Commissioner would appoint representatives who would meet to reconcile the lists of outstanding accounts; the parties would prepare a joint report in relation to the accounts on which agreement had been reached; and CompSol would process those accounts for immediate payment. However, the parties failed to prepare a joint report. Finally, the joint report was filed on 17 September 2014. The report indicated, among other things, the figure of the sums that remained unpaid – amounting to R93 903 293.08. The reason for the failure to pay was, allegedly, logistical problems in the systems of the financial division of the Fund. The said amount increased to R127 152 278.22, by virtue of the time lapse itself as regards the 75 day accounts. CompSol attempted to convene a meeting with the respondents without success.

[31] Mr Masalesa explained that, when the respondents agreed to the consent order, it had not been revealed to them just how many claims would be submitted at a time nor did they anticipate that the flood of claims would be a hindrance to the obligation assumed in the consent order. He explained that the Commissioner committed to fulfilling his legislative mandate and had continually been implementing measures to ensure that payments were made within a reasonable period. This, he said, is illustrated by the employment of companies like the Medical Service Organisation SA Pty Limited (MSO) and EOH Holdings Limited (EOH) – to eliminate the backlog in processing medical accounts.

[32] The Pretoria High Court, per Hughes J,[25] mentioned that at the commencement of the contempt proceedings, the respondents requested time to settle the dispute. The Court said that this "proved fruitful in that the monetary aspect sought in the order . . . was resolved". The Court went on to determine whether the Commissioner was in

[25] *Compensation Solutions (Pty) Ltd v Compensation Commissioner* unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No. 43830/13 (17 December 2014) (Pretoria High Court judgment) at para 3.

contempt. It held that the Commissioner was aware of the consent order.[26] Relying on *Federation*,[27] the Court concluded that the consent order should be categorised as one that is between the parties (*inter partes*), and that contempt proceedings are between the non-compliant party and the court and not between the parties themselves. The Court concluded that contempt proceedings cannot be initiated in those circumstances. It nonetheless considered whether CompSol had proven the requisites of contempt of court, in case it was wrong.

[33] Having found that the first three requisites of contempt of court were established, the Pretoria High Court held that the Commissioner's failure to perform the specific tasks in terms of the consent order was not wilful and *mala fide*.[28] This was so, the Court held, because the disobedience was between the parties and not contemptuous of the Court.[29] The Court dismissed CompSol's application to declare Mr Mkhonto in contempt of the consent order of 31 July 2009 and ordered costs of the applications in favour of the applicants (respondents *a quo*).[30] These costs included costs of the employment of senior counsel, where used. CompSol appealed to the Supreme Court of Appeal.

[34] In determining whether Mr Mkhonto was guilty of contempt, the Supreme Court of Appeal said the following:

> "The question which then arises is whether the appellant proved that the Commissioner's failure to comply with the [consent order] amounted to civil contempt of court, beyond a reasonable doubt to secure his committal to prison. An

[26] Id at para 17.

[27] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) (*Federation*).

[28] Pretoria High Court judgment above n 25 at para 26.

[29] As to the counter-application – that the consent order was unlawful and should be set aside – the Court held that the issue was academic because the Commissioner had complied and made payment during the course of the proceedings of the contempt applications. It thus dismissed the counter-application with costs. The Court also dismissed CompSol's application for contempt of court with costs.

[30] Pretoria High Court judgment above n 25 at para 31.2 included an order that the counter-application of Mr Mkhonto be withdrawn with costs.

> applicant for this type of relief must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and *mala fides* beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and *mala fide*.
>
> Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him."[31]

[35] The Supreme Court of Appeal considered the Commissioner's affidavit in which he mentioned:

> "[A]part from [CompSol's] claims, the Fund receives on a daily basis claims from medical practitioners as well.
>
> The flood of [CompSol's] claims and because priority has to be given to them, the claims submitted by other medical practitioners suffer. I have suggested earlier that what [CompSol] seeks to impose, is unconstitutional. [CompSol] seeks preferential treatment and that breaches the equality clause in the Bill of Rights.
>
> When the [Minister], the [Director-General] and I committed ourselves to the [consent order] it was not revealed to us just how many claims will be submitted at a time nor did we anticipate that the flood of claims would be a hindrance to the obligations assumed in the court order."[32]

[36] The Supreme Court of Appeal's observations regarding these undisputed averments was that the applicants—

> "clearly viewed [CompSol's] claims as a nuisance and the [consent order] itself one which they could ignore because the obligations it imposed upon them regarding the manner in which [CompSol's] claims were to be paid were unlawful. But then court orders must still be obeyed even if they are considered to be wrong."[33]

[31] Supreme Court of Appeal judgment above n 2 at paras 15-6.

[32] Id at para 17.

[33] Id at para 18.

[37] The Court identified the "only issue" for determination as "whether the Commissioner rebutted the evidential burden resting on him" which, according to Mr Mkhonto, is too narrow. It relied on *Fakie*,[34] and held that the existence of the first three requisites of contempt – order, service of notice, and non-compliance – were common cause. As to the fourth requisite – wilfulness and *mala fides* – the Court took into account the following considerations:

(a) The joint report established breaches of the consent order.

(b) The Commissioner failed to personally explain the non-compliance but instead relied on the affidavit of Mr Masalesa.

(c) The Commissioner had filed an unsworn affidavit and maintained that the agreement preceding the consent order was unlawful.

(d) The Commissioner had brought an unsubstantiated counter-application which he later withdrew.

[38] The Supreme Court of Appeal upheld CompSol's appeal, with costs, including costs of two counsel. In upholding CompSol's appeal, the Supreme Court of Appeal held that the Commissioner failed to place facts to establish reasonable doubt of his wilfulness and *mala fides*.[35] The Court remarked that the Commissioner's behaviour was scandalous and deserved the strictest censure possible.[36] It considered the question raised by the Pretoria High Court regarding the status of the consent order. The Court held that CompSol proved its case beyond reasonable doubt, warranting Mr Mkhonto's committal to prison.[37]

[39] The Court set aside the Pretoria High Court's order and replaced it with an order declaring Mr Mkhonto in contempt of paragraphs 1, 2, 5, and 6 of the consent order. As mentioned earlier, these orders related to the Commissioner's failure to

[34] *Fakie* above n 12.

[35] Supreme Court of Appeal judgment above n 2 at para 20.

[36] Id.

[37] Id.

process medical accounts within a reasonable time; his failure to pay accounts related to accepted claims within 75 days after their submission or acceptance of the liability of the claim; the failure by the Commissioner to provide the status of each claim contained in the list of claims submitted by CompSol, within seven days after receipt of that list; and his failure to provide necessary guidance for the weekly meetings to fulfil their purpose of resolving queries, disputes, and discrepancies in relation to the submitted medical accounts. The Supreme Court of Appeal convicted the Commissioner of contempt of court and sentenced him to three months' imprisonment suspended on condition he was not convicted of contempt committed during the period of suspension.[38] Mr Mkhonto now seeks leave to appeal that decision.

[40] In this Court, Mr Mkhonto has deposed to the founding affidavit in support of the application for leave to appeal. He explains that he was the Commissioner when the proceedings commenced in the Pretoria High Court until the end of May 2015 and that he became the Chief Operations Officer in the Department of Labour from 1 June 2015. As mentioned above, he explains why his affidavit was unattested and why Mr Masalesa was best placed to depose to the answering affidavit in the Pretoria High Court.[39] Save for stating that Mr Masalesa could not speak for the Commissioner, the specific averments about Mr Masalesa's deposition to the answering affidavit remain uncontroverted.

Parties' submissions

[41] Mr Mkhonto supports the Pretoria High Court's dismissal of CompSol's contempt application. He argues that contempt proceedings were inappropriate because the settlement agreement − made an order of court − did not impose obligations towards the Court. He submits that there was no need for a declaratory order to enforce a money order as there were other remedies available to CompSol.[40]

[38] Id at para 21.

[39] Above at [37].

[40] Reliance is placed on what this Court said in *Pheko II* above n 13 at para 37.

[42] It is submitted that Mr Mkhonto was not informed of the charge and was not afforded the procedural safeguards ordinarily afforded an accused person to embrace a concept of substantive fairness as stated in *Mamabolo*.[41] It is argued that the Commissioner's office, including those of its officials, deals with multitudes of claims and is bound to assess the veracity of the claims when settling them in terms of the regulatory framework.[42] It is argued that the Supreme Court of Appeal's identification of the issue was too narrow and that the declarations of contempt and committal were inappropriate. Mr Mkhonto submits that, having regard to the content of the affidavits, it was apparent that there was no wilful default or malicious conduct on his part. His responsibilities as the Commissioner, he submits, must be measured against the statutory prescripts embodied in COIDA.

[43] CompSol opposes the application for leave to appeal. As to whether the consent order was susceptible to contempt proceedings at all as opposed to a writ of execution, CompSol submitted, at the hearing, that while it was possible to issue a writ of execution in respect of medical accounts related to accepted claims that have not been processed and paid within 75 days,[43] the issuance of a writ was not a viable option for medical accounts related to claims that had not even been accepted by the Commissioner.[44] This is so because they could not be quantified.

[44] CompSol submits that there are no prospects of success. It submits that the legal and factual bases for the findings of the Supreme Court of Appeal are unassailable and that the legal basis conforms to the jurisprudence of this Court. As to the status of the order incorporating the consent order, that is to say the 75 day agreement, CompSol relied on the decision of this Court in *Eke*,[45] where this Court

[41] See *Mamabolo* above n 11 at para 53.

[42] COIDA above n 14 sections 38 and 43.

[43] In terms of para 2 of the consent order.

[44] In terms of para 1 of the consent order.

[45] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

held that "[o]nce a settlement agreement has been made an order of Court, it is an order like any other. It will be interpreted like all court orders".[46]

Issues

[45] Similarly to *Matjhabeng*, preliminary issues that arise concern whether leave to appeal and condonation should be granted. The key issue that arises in *Mkhonto* is whether the requisites for contempt of court were established against Mr Mkhonto. The further issues relate to—

(a) the non-joinder of Mr Mkhonto in his personal capacity;
(b) the status of the settlement order – whether the consent order constitutes a court order susceptible to contempt, in particular, whether the Supreme Court of Appeal was correct in invoking *Eke*; and
(c) whether monetary claims may be enforced by way of contempt.

The law on contempt of court

[46] Before I deal with the issues in both cases, it is necessary to discuss, briefly, the constitutional provisions on judicial authority and those regarding the binding nature of court orders; the law regarding contempt with reference to case law (including the general distinction between civil and criminal contempt); and the applicable standard of proof.

[47] Section 165 of the Constitution, indeed, vouchsafes judicial authority.[47] This section must be read with the supremacy clause of the Constitution.[48] 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

[46] Id at para 29.

[47] *Pheko II* above n 13 at para 26.

[48] Section 2 of the Constitution.

to assist and protect the courts to ensure, among other things, their dignity and effectiveness.

[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.[49] Discernibly, continual non-compliance with court orders imperils judicial authority.

[49] Although our courts have dealt with the law of contempt over the years, the approach on certain aspects regarding this form of crime remains unclear. A formulation of a coherent approach is thus necessary. This is particularly so because a certain means of enforcement for non-compliance, including committal to prison, may violate certain rights of the alleged contemnor, including the right to freedom and security of the person in terms of section 12 of the Constitution, which includes the right "not to be deprived of freedom arbitrarily or without just cause"[50] and the right "not to be detained without trial".[51]

[50] It is important to note that it "is a crime unlawfully and intentionally to disobey a court order".[52] The crime of contempt of court is said to be a "blunt instrument".[53] Because of this, "[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence".[54] Simply put, all contempt of court, even civil contempt, may be punishable as a crime.[55] The clarification is important because it

[49] See *Mamabolo* above n 11 at para 24.

[50] In terms of section 12(1)(a).

[51] In terms of section 12(1)(b).

[52] *Fakie* above n 12 at para 6. See also *S v Beyers* 1968 (3) SA 70 (A) (*Beyers*).

[53] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (*Meadow Glen*) at para 35.

[54] *Pheko II* above n 13 at paras 28 and 30.

[55] Id.

dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not.

[51] The Full Court in *Burchell*[56] elucidates the criminal and civil features that can be intertwined in contempt proceedings and serves as an example of how the distinction can exist.[57] In that case, Froneman J (as he then was) confirmed that committal for civil contempt remains a form of a crime under the Constitution, but also reaffirmed its purely civil character:

> "Civil contempt proceedings have always had a dual nature and the discussion thus far has focused only on its criminal aspect. In my judgment the perceived difficulties associated with its continued treatment as a criminal offence should not prevent attention being given also to its purely civil character and the possible development of the common law in that regard. In addition to its retention as a criminal offence, albeit with a stricter standard of proof, the potential effectiveness of issuing a (civil) declaratory order that an offending litigant is in contempt of a court order should not be underestimated. Such a declaration would have as its purpose to uphold the rule of law too, but even if shorn of its criminal sanction or punishment there is, in my view, no reason why other civil sanctions may not attach to such an order."[58]

[52] Although contempt is part of a broader offence, it can take many forms, even though its essence "lies in violating the dignity, repute, or authority of the Court".[59] Traditionally, contempt of court has been divided into two categories according to whether the contempt is criminal or civil in nature.[60] These types of contempt are distinguished on the basis of the conduct of the contemnor. Criminal contempt brings the moral authority of the judicial process into disrepute and as such covers a multiplicity of conduct interfering in matters of justice pending before a court. It

[56] *Burchell v Burchell* [2005] ZAECHC 35.

[57] See also *Fakie* above n 12 at paras 16-7.

[58] *Burchell* above n 56 at para 27.

[59] *Fakie* above n 12 at para 6.

[60] Miller *Contempt of Court* 3 ed (OUP, New York 2000) at 1.04.

thereby creates serious risk of prejudice to the fair trial of particular proceedings. This was the case in *Mamabolo*, which involved publication of scandalous remarks against a judicial officer.[61]

[53] Civil contempt, in contrast, involves the disobedience of court orders. The continued relevance of the distinction between civil and criminal contempt also seems to lie, on occasion, in the ability to settle the dispute and to waive contempt.[62]

[54] Not every court order warrants committal for contempt of court in civil proceedings.[63] The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, *mandamus*, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings.[64] 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 a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with *mala fides*, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in *Fakie*:

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[61] *Mamabolo* above n 11. In this case the Department of Correctional Services disobeyed an order granted by the High Court for the release of Mr Terre'Blanche, who was the leader of the Afrikaner Weerstandsbeweging (AWB). The Department's spokesperson was reported in a newspaper article as having said that the order was erroneously granted. Having seen the article, the Judge who had granted the order issued a rule *nisi* calling upon the Director-General and the spokesperson to appear before him, on a particular date, together with their legal representatives. The two officials appeared and were represented by a senior and junior counsel. They had also filed affidavits explaining why they failed to comply with the order. The inquiry commenced with the Judge outlining facts and showing that the order was not complied with. He then asked counsel for the applicant to confirm the correctness of those facts but did not extend the invitation to counsel for the officials. In assessing the constitutionality of the procedure, this Court remarked that the two accused persons enjoyed the fair trial rights in section 35(3) of the Constitution.

[62] In some instances, the prevailing public interest may justify that a court initiates civil contempt procedures *mero motu* (of its own accord). This was, for example, the case in *Pheko II*, where the contempt proceedings were a sequel to the supervisory relief that the Court had previously granted. See *Pheko II* above n 13 at para 3.

[63] See *Burchell* above n 56 at para 34. See also *Cape Times Ltd v Union Trades Directories (Pty) Ltd* 1956 (1) SA (NPD) at 120A-C.

[64] *Burchell* above n 56 at para 34. See also *Fakie* above n 12.

> "[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."[65]

[55] In *Fakie*, the Supreme Court of Appeal had occasion to consider the nature of an application for contempt of court where the Auditor-General had partly failed to comply with an order of the Pretoria High Court.[66] He was later held in contempt of court[67] and was sentenced to imprisonment, wholly suspended.[68] This is an example of the use of committal as a remedy and effective sanction for contempt of court.

[56] The common law drew a sharp distinction between orders *ad solvendam pecuniam*, which related to the payment of money, and orders *ad factum praestandum*, which called upon a person to perform a certain act or refrain from specified action. Indeed, failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was.[69]

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[65] *Fakie* above n 12 at para 8. See also *Pheko II* above n 13 at para 1.

[66] By Hartzenberg J, in which he issued an order requiring the Auditor-General to provide the respondent, CCII with specified records within 40 court days. Part 1.1 of the order required the Auditor-General to provide draft versions of the report that was prepared and submitted to Parliament. The second part of the order required the Auditor-General to furnish CCII with certain files the disclosure of some of which he did not object to. This part of the order was complied with only after the CCII contempt application was filed.

[67] By De Vos J.

[68] The dispute originated from a Cabinet decision to procure military equipment that included four corvettes. CCII was a partially successful bidder for the sub-contract. The widespread claims regarding the irregular procurement process resulted in the Parliamentary Standing Committee on Public Accounts appointing the Auditor-General, Public Protector, and National Director of Public Prosecutions (the joint investigating team) to investigate the allegations of corruption. The joint investigating team presented a joint report to the President. The report was accepted by Parliament. Dissatisfied with the report, CCII unsuccessfully asked for certain documentation that was considered by the joint investigating team. It then instituted proceedings as a result of which the Auditor-General was ordered to provide the specified records within 40 days. When it failed to do so, CCII launched successful contempt proceedings with the resultant conviction and wholly suspended imprisonment.

[69] See *Coetzee v Government of RSA; Matiso v Commanding Officer, Port Elizabeth Prisons* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) (*Matiso*) at para 61.

[57] In *Mjeni*,[70] Jafta J (as he then was) endorsed the long line of judicial authority that an order must be *ad factum praestandum* before the Court can enforce it by means of committal. The Court, correctly in my view, endorsed that the objective of declaratory relief for contempt, for instance, is to vindicate the rule of law rather than to "punish the transgressor".[71] This does not, however, mean that a civil remedy of committal may not be imposed against a contemnor for contempt of court because, as pointed out in *Fakie*, "disregard sullies the authority of the courts and detracts from the rule of law".[72]

[58] The procedure and processes for contempt proceedings seeking committal should deviate from criminal prosecutions only to the extent necessary to make allowance for its unique status. In *Pheko II*,[73] this Court endorsed the holding in *Fakie* that, because contempt proceedings resulting in committal combine civil and criminal elements, "it seems undesirable to strait-jacket it into the protections expressly designed for a criminal accused under section 35(3) [of the Constitution]".[74] Instead, the rights of a respondent where civil contempt is sought are grounded in section 12(1)[75] of the Constitution which affords the alleged contemnors both substantive and procedural protections.[76] I do not understand this to suggest that the

[70] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk HC) at 451D-E.

[71] Id at 456B-C.

[72] *Fakie* above n 12 at para 8.

[73] *Pheko II* above n 13 was about an order granted in favour of applicants whose homes had been demolished at the behest of the Ekurhuleni Metropolitan Municipality (Ekurhuleni). The parties were ordered to submit reports to this Court for it to supervise progress made towards securing adequate housing for them. Initially, the case only concerned contempt proceedings against Ekurhuleni for failing to comply with the order directing it to file a second progress report by a certain deadline. Further issues arose before the hearing when an application for the joinder of Ekurhuleni's mayor and municipal manager was lodged. When submissions were made at the hearing that Ekurhuleni was not made aware by its attorney of the order and directions, further directions were issued calling upon the attorney to show why they should not be held in contempt and responsible to pay costs *de bonis propriis* (out of one's own pocket). The Mayor and municipal manager were also called upon to show cause why they should not be joined to the contempt proceedings and to indicate if there were any other responsible office bearers who should be joined. The Member of the Executive Council, Gauteng Department of Human Settlements was also called upon to show cause why he should not be joined in the contempt proceedings.

[74] *Fakie* above n 12 at para 26, relied on in *Pheko II* above n 13 at para 36.

[75] See *Fakie* above n 12 at para 24. Compare the discussion in *Burchell* above n 56 at para 8, and *Mamabolo* above n 11 at para 53.

rights of a respondent where civil contempt resulting in committal is sought cannot be grounded in section 35(3).

[59] Because of its grounding in civil process, civil contempt is indeed peculiar. Some writers suggest that there may be reasons, therefore, for relaxing the requirements ordinarily expected of criminal proceedings in order to accommodate its hybrid status.[77] This is so because a finding of contempt, may, for instance, be made even in motion proceedings and the rules of evidence may take a shape unlike those in criminal prosecutions. These adaptations of form do not, however, alter the constitutional imperative that a person's freedom and security must be protected.

[60] In relation to the proper standard of proof applicable in contempt of court proceedings, there are divergent views on which further reflection and clarity are necessary. One view is that the criminal standard of proof – beyond reasonable doubt – applies *always*. The other view is that the standard of proof is not always of a criminal standard. The minority in *Fakie* hinted that the material difficulty in separating coercive/remedial orders of imprisonment made in civil contempt proceedings from punitive orders is a challenge which recurs in judgments in many jurisdictions.[78] It opined, and this is endorsed in *Pheko II*,[79] that the extension of the criminal standard in civil proceedings would have harmful consequences.[80] In the following discussion I reference *Fakie* more extensively because it is an instructive

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[76] See *Fakie* above n 12 at paras 24-6.

[77] Id at para 26.

[78] Id at para 72 (minority judgment of Heher JA).

[79] *Pheko II* above n 13 at para 36.

[80] Referencing what this Court said in *Bannatyne v Bannatyne* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) as an example, the minority in *Fakie* remarked:

> "In my experience the ordinary litigants (often indigent women) find it difficult enough under present procedures to pin down a party who is determined to avoid the consequences of a judgment. Absence of wilfulness and *mala fides* are frequently highly subjective and the respondent's protestations often serve to carry the day, particularly as these are matters within his own ken and the applicant seldom has the means to pursue the enquiry with the necessary vigour. If the onus were to be increased to one beyond reasonable doubt the efficacy of the remedy, (and within it the worth of a civil judgment) would be reduced, to the detriment of justice."

judgment in which Cameron JA has ably outlined the law on contempt and how courts have dealt with it.

[61] The issues before the Supreme Court of Appeal in *Fakie* included whether the standard of proof in those civil proceedings, in determining whether the Auditor-General was in contempt, was that of a balance of probabilities or beyond reasonable doubt.[81] The majority considered the test for disobedience of a civil order and dealt with the constitutional characterisation of contempt of court.[82] It held that the conclusion on what onus is applicable "cannot be deduced as a matter of simple typology from the fact that a public prosecution is competent".[83] Relying on the common law principle in *Beyers*,[84] it held that civil contempt has not divested itself of a criminal dimension. But, the Court stated, the question requires a broader approach. According to the majority:

> "Looming over the debate about the typology of contempt committal is the more important question of constitutional characterisation, which the Eastern Cape decisions address: Does the fact that imprisonment may be sought in committal proceedings purely for enforcement so affect the nature of the means employed that a lesser standard of proof can be justified? Differently put, do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view, they do not, and the Eastern Cape decisions that the criminal standard of proof applies whenever committal to prison for contempt is sought are correct."[85]

[62] The majority further held:

> "It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the

[81] *Fakie* above n 12 at para 5.

[82] Id at para 9.

[83] Id at para 17.

[84] *Beyers* above n 52 at 80D-H.

[85] *Fakie* above n 12 at para 19.

three requisites . . . have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and *mala fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.

There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as *punishment* for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an 'accused person' for the purposes of section 35 of the Bill of Rights. On the contrary, with respect to the careful reasoning in the Eastern Cape decisions, it does not seem correct to me to insist that such a respondent falls or fits within section 35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only 'not to be detained without trial' but 'not to be deprived of freedom arbitrarily or without just cause'. This provision affords both substantive and procedural protection, and an application for committal for contempt must avoid infringing it.

And, in interpreting the ambit of the right's procedural aspect, it seems to me entirely appropriate to regard the position of a respondent in a punitive committal proceedings as closely analogous to that of an accused person; and therefore, in determining whether the relief can be granted without violating section 12, to afford the respondent such substantially similar protections as are appropriate to motion proceedings. For these reasons, the criminal standard of proof is appropriate also here.

. . .

These expositions seem to me compelling. A court in considering committal for contempt, can never disavow the public dimension of its order . . . . The punitive and public dimensions are therefore inextricable: and coherence requires that the criminal standard of proof should apply in all applications for contempt committal."[86]

[86] Id at paras 23-5 and 39-40.

[63] In summation, the majority affirmed the availability of civil contempt, and that it passes constitutional muster in the form of a motion court application adapted to constitutional requirements.[87] It stated that the respondent is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings.[88] The majority held that an applicant in contempt proceedings must prove all the requisites of contempt beyond reasonable doubt.[89] However, it stated that, "once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*".[90]

[64] Undeniably, *Fakie* has been followed in many decisions of our courts because of its authoritative direction, sometimes in a somewhat nuanced approach especially regarding the question of the standard of proof. By way of an example, this Court in *Pheko II* endorsed *Fakie* and held that, when the sanction is committal, the standard of proof must be "beyond a reasonable doubt".[91] However, *Fakie* also endorses *Burchell*, in that civil mechanisms designed to induce compliance, short of committal to prison, are competent even when proved only on a balance of probabilities.[92]

[65] Indeed, this Court held in *Pheko II* that where a court finds on a balance of probabilities that an alleged contemnor acted *mala fide*, civil contempt remedies, other than committal, may still be employed.[93] This Court remarked:

> "[W]here 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, a *mandamus*

[87] Id at para 42(a).

[88] Id at para 42(b).

[89] Id at para 42(c).

[90] Id at para 42(d).

[91] *Pheko II* above n 13 at paras 35-6.

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

[93] *Pheko II* above n 13 at para 37.

> demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.
>
> . . .
>
> 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. On whether this Court should make a civil contempt order against the Municipality, it is necessary to consider whether, on a balance of probabilities, the Municipality's non-compliance was born of wilfulness and *mala fides*."[94]

[66] By way of illustration, a sanction that may be employed in a finding of civil contempt on a balance of probabilities is that an offending litigant be prohibited from using civil courts in pursuing other claims.[95] *Burchell* offers an example of an order that "attempts to develop ancillary civil sanctions" where contempt is established on a balance of probabilities.[96] In that case, the applicant sought the committal of her ex-husband for non-compliance with his court-ordered maintenance and associated obligations toward her and their children. Although the contemnor was not found to have acted in a wilful or *mala fide* manner, beyond a reasonable doubt, the Court was of the view that the respondent was in contempt of court on a preponderance of probabilities.[97] He was therefore declared in contempt and granted 10 days from the date of the judgment to purge the contempt, failing which the applicant could set the matter down, calling upon the respondent to show cause why he should not be prohibited from proceeding in any other litigation in which he may be involved, while in contempt.[98]

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[94] Id at paras 37 and 42.

[95] *Burchell* above n 56 at para 27.

[96] Id.

[97] Id at paras 33-4.

[98] Id at para 35. The Court further ordered that:

> "The applicant may . . . within 10 days of the date of this judgment, set the matter down . . . for argument on whether the matter should be referred to oral evidence on the issue of whether the respondent wilfully disobeyed the court order of 3 June 2004, for the purpose of determining whether the respondent should be committed to gaol for the crime of contempt of court."

[67] Summing up, on a reading of *Fakie*, *Pheko II*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies − for example, declaratory relief, *mandamus*, or a structural interdict − that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.

Issues

Preliminary issues

[68] Back to the issues. I determine first the preliminary issues applicable to both *Matjhabeng* and *Mkhonto*. Those issues concern leave to appeal and condonation applications by Eskom and CompSol, and will be disposed of quickly.

Leave to appeal in Matjhabeng and Mkhonto

[69] The applicants in both matters seek leave to appeal the decisions of the Free State High Court and the Supreme Court of Appeal, respectively, on various grounds.[99] The two matters raise constitutional issues as the rights in terms of

[99] These include that cases for contempt of court were not established and that the summary procedure (in *Matjhabeng*) utilised by the courts *a quo* did not have the minimum features necessary to satisfy the requisites of a fair trial.

sections 12(1) and 35(3) of the Constitution are implicated. Since the matters relate to the enforcement of court orders, that too, is a constitutional issue.

[70] The rights of state officials alleged to be in contempt in their personal capacities for actions they have allegedly taken or allegedly omitted to take, in their official capacities, are important not only for the individual alleged to be in contempt, but also for the effective management of public administration, as well as the rule of law.[100] Further reflections are necessary to clarify the law regarding contempt of court post-1994. The prospects of success are good. It is thus in the interests of justice to grant leave to appeal, in both applications.

Condonation application (Matjhabeng)

[71] Eskom seeks condonation for the late filing of its opposing papers. It is alleged that the attorney involved became indisposed. Also, Eskom contends that there was an error in the Municipality's notice of motion. The delay is short and the Municipality does not oppose the application. The explanation is acceptable and there is no prejudice to the Municipality. It is in the interests of justice to grant condonation.

Condonation application (Mkhonto)

[72] Mr Mkhonto applies for condonation for the late filing of the application for leave to appeal. He submits that he required additional time to seek the advice of his legal representatives as to whether it would be advisable to proceed with the appeal. He further contends that because he is no longer the Commissioner he was wary of incurring further legal costs. CompSol opposes the application on the basis that Mr Mkhonto failed to disclose when the judgment of the Supreme Court of Appeal came to his attention; when he contacted his legal representatives to seek their advice;

[100] See *Pheko II* above n 13 at para 1 and *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 31.

or when he actually consulted with them in this regard. While Mr Mkhonto's explanation for the delay is not stated clearly, the interests of justice demand that condonation be granted, particularly because CompSol has not demonstrated that it has suffered prejudice. The two day delay is minimal.

Key issues

Were the requisites of contempt established in Matjhabeng?

[73] Against the above backdrop, I now determine whether the following requisites of contempt of court were established in *Matjhabeng*: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and *mala fide*.[101] It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof − beyond reasonable doubt − was applicable.

[74] The first and third requirements in relation to the second consent order in *Matjhabeng* are not seriously disputed. Mr Lepheana's contention that failure to comply with the terms of the second consent order is not non-compliance with a court order, but merely a breach of contract, is not sound.

Notice

[75] It is not disputed, in relation to the Municipal Manager, that he is the accounting officer, "tasked with overseeing the implementation of court orders against the [M]unicipality" and the "logical person to be held responsible" for the overall administration of the Municipality.[102] There can be no doubt that, in that official capacity, the Municipal Manager was aware of the obligation imposed on him by the second consent order. That order was brought to the attention of the Municipal

[101] *Pheko II* above n 13 at para 32.

[102] *Meadow Glen* above n 53 at para 24.

Manager by the attorneys of the Municipality. The Municipal Manager also participated in meetings with the officials of Eskom and, as the accounting officer, drafted and approved the payment plan. From the facts, it is clear, that the Municipal Manager was aware of the relevant orders. But it cannot safely be said that the order imposed any obligations on Mr Lepheana in his personal capacity.

Wilfulness and mala fides

[76] The next issue for determination is whether the non-compliance on the part of Mr Lepheana was wilful and *mala fide*. The reason for these requirements lies in the nature of the contempt proceeding and its outcome. In order to give rise to contempt, an official's non-compliance with a court order must be "wilful and *mala fide*".[103] In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply. As the Supreme Court of Appeal has held, "there is no basis in our law for orders for contempt of court to [be] made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings".[104]

[77] In the second consent order in *Matjhabeng*, the Municipality was ordered to resume payments from July 2014, as agreed, failing which the Municipal Manager was ordered to report to the Court, setting out the reasons for its failure to do so.

[78] The Free State High Court seemed not to have considered the explanatory affidavit by the Municipality, addressing instead only the issues raised by the Court in

[103] *Pheko II* above n 13 at para 32.

[104] *Meadow Glen* above n 53 at para 20.

the rule *nisi*[105] − explaining why the orders had not been complied with. In particular, the Court did not consider various attempts made by the Municipal Manager and other senior personnel of the Municipality to settle the dispute with Eskom. In my view, no case for wilfulness and *mala fides* on the part of Mr Lepheana was established. The order of the Free State High Court should be set aside. That order should be replaced with an order dismissing the application.

Appropriateness of summary procedure in Matjhabeng

[79] The appropriateness of the summary contempt procedure in *Matjhabeng* also requires this Court's attention. The common law procedure for the commencement of contempt proceedings, in cases of contempt while a court is not sitting (*ex facie curiae*)[106] − like in the present cases – contrasts with contempt that occurs in or near a court. The former has been described as follows by the Appellate Division in *Keyser*:

> "[I]n every case of contempt *ex facie curiae* dealt with by our courts without a criminal trial, the proceedings were commenced by an order, served upon the offender, containing particulars of the conduct alleged to constitute the contempt of court complained of, and calling upon the offender to appear before the court and to show cause why he should not be punished summarily for the alleged contempt of court. Sometimes the order has been issued on the application of the

[105] Specifically:

> "(a) Why [the Municipality] has not kept up with payments for the current electricity consumption as contemplated in paragraph 4 of the Court order of 31 July 2014 [second consent order];
>
> (b) Having regard to the reports in the [Municipality's] possession and contained in pages 407 to 437 of the application, when and what steps the [Municipality] has taken to address the issues raised in those reports;
>
> (c) Why the amount in paragraph 1 should not be payable no later than 31 March 2015 having regard to the [Municipality's] history of non-compliance with the Court orders of March 2013 [first consent order that was set aside in the second consent order] and July 2014 [second consent order]; and
>
> (d) Why the municipal manager should not be held in contempt of Court for non-compliance with the order of 31 July 2014 [second consent order]."

[106] That is to say, contempt of court that does not occur in the presence of the court while it is sitting is contempt *ex facie curiae*, in contrast to contempt that occurs in or near the court. See *R v Magerman* 1960 (1) SA 184 (O) at 189.

> Attorney-General, sometimes it has been issued by the court *mero motu* [of its own accord], but in every case it has informed the offender of the case he has to meet, and in every case it has allowed him sufficient time to consult counsel, to prepare his defence and to decide whether he will give evidence on oath or not."[107]

This general approach is constitutionally compliant. It affords the respondent procedural safeguards while ensuring that the authority of the court is vindicated.

[80] It needs to be stressed that *Matjhabeng* was a case of contempt *ex facie curiae*, dealt with by the Free State High Court without a criminal trial. The rule *nisi* was granted on an *ex parte* basis and called on the Municipal Manager – Mr Lepheana – to appear before the Court. He had not been cited in his personal capacity nor was he joined as a party in that capacity. Mr Lepheana was cross-examined by the Judge and counsel for Eskom without evidence being led. He was not afforded an opportunity to comment on the allegations that were outlined by the Judge before he was cross-examined and yet, the invitation was extended to counsel for Eskom. Mr Lepheana was not personally represented and had not been forewarned that committal to prison could be imposed. Had Mr Lepheana known of the charge against him and understood that he might face committal, he might have asked for a postponement so that he could consult with counsel, prepare his defence, and even consider whether he would testify or not.

[81] The procedure followed by the Free State High Court clearly deprived Mr Lepheana of the hallmarks of procedural fairness in terms of section 35(3) of the Constitution. At the risk of repetition, he was arbitrarily deprived of his rights in terms of section 12(1)(a) of the Constitution. The circumstances in *Matjhabeng* did not warrant the summary procedure. This procedure may be invoked in exceptional circumstances,[108] where there is a "pressing need for firm or swift measures to

[107] *R v Keyser* 1951 (1) SA 512 (A) (*Keyser*) at 518E-H, followed in *S v Mabaso* 1990 (1) SACR 675 (T) at 678.

[108] For example, *In re: Chinamasa* 2000 (12) BCLR 1294 (ZS), in which the exceptional circumstances involved a scenario where ordinary prosecution at the instance of the prosecuting authority was deemed to be impossible or highly undesirable.

preserve the integrity of the judicial process".[109] This will be the case also where ordinary prosecution at the instance of the prosecuting authority is impossible or highly undesirable. But even then, and to the extent possible, the contemnor must be accorded his or her fair trial rights. Otherwise, as this Court cautioned in *Mamabolo*:

> "The alternative is constitutionally unacceptable: It is inherently inappropriate for a court of law, the constitutionally designated primary protector of personal rights and freedoms, to pursue such a course of conduct."[110]

Were the requisites of contempt established in Mkhonto?

[82] The requisites are set out above.[111] Likewise, in respect of *Mkhonto*, the standard of proof beyond reasonable doubt is applicable, because the relief sought is committal.

[83] In *Mkhonto*, the Pretoria High Court rightly observed that the Commissioner had denied non-compliance with the consent order of 31 July 2009. The denial is, in my view, in contrast with the joint report of 6 August 2014. This is where the Commission and the applicants admitted that they owe CompSol R93 903 293.08.[112]

Notice

[84] There can be no doubt that the Commissioner was aware of the consent order as well as the obligations the order imposed on him, as he personally signed that order. But it cannot safely be said that the order imposed any obligations on Mr Mkhonto in his personal capacity. The question remains whether the non-compliance was wilful and *mala fide*.

[109] See *Mamabolo* above n 11 at para 57.

[110] Id at para 58.

[111] Above at [73].

[112] Pretoria High Court judgment above n 25 at para 9.

Wilfulness and mala fides

[85] The Supreme Court of Appeal did consider the affidavits filed on behalf of the Fund including the affidavit of Mr Masalesa in which it was explained, among other things, that the Fund receives many claims on a daily basis from medical practitioners, apart from CompSol's claims, but that priority had to be given to the flood of CompSol's claims. Other claims suffered as a result. When the applicants committed to the consent order, CompSol had not revealed the multiplicity of the claims to them. As a result, the Commissioner did not "anticipate that the flood of the claims would be a hindrance to the obligations assumed in the [consent order]".[113] It was explained further that the reason for the failure to pay was because of the logistical problems in the systems of the financial division of the Fund. CompSol persists that Mr Mkhonto should have deposed to the affidavit himself. CompSol does not, however, refute that Mr Masalesa − who was also responsible for the daily activities regarding the processing and payments of claims − was better placed than the Commissioner to deal with the difficulties experienced in relation to claims submitted by CompSol. Moreover, CompSol does not deny that the Commissioner relied upon Mr Masalesa and other officials dealing with claims.

[86] In dealing with the explanation by Mr Masalesa, the Supreme Court of Appeal merely remarked that the applicants "clearly viewed [CompSol's] claims as a nuisance and the [consent order] itself one which they could ignore".[114] The observation, contrasted with the explanation given by Mr Masalesa, seems speculative. In my view, the averments made in the explanatory affidavit are telling and should have been investigated by the Supreme Court of Appeal before committing Mr Mkhonto to prison.

[87] In upholding CompSol's appeal, the Supreme Court of Appeal also held that the Commissioner's behaviour was "scandalous" and deserved the "strictest censure

[113] Supreme Court of Appeal judgment above n 2 at para 17.

[114] Id at para 18.

possible".[115] In my view, the observation that the Commissioner's behaviour was "scandalous" overlooks the evidence. Although the Court was asked to measure the Commissioner's responsibilities against the statutory prescripts embodied in COIDA, it does not appear to me that the Supreme Court of Appeal considered this plea. Indeed, section 43 of COIDA regulates claims for compensation. The Court held further that the Commissioner failed to place facts to establish reasonable doubt on his wilfulness and *mala fides*. It then concluded that CompSol proved its case beyond reasonable doubt.

[88] In the light of the explanation given by Mr Masalesa, I do not agree that CompSol proved its case beyond reasonable doubt. I think that the explanation proffered does create doubt regarding wilfulness and *mala fides* on the part of the Commissioner − against whom the relief was sought.

[89] In conclusion, no case for wilfulness and *mala fides* on the part of Mr Mkhonto in his personal capacity has been made. Consequently, the order of the Supreme Court of Appeal should be set aside. The effect of the setting aside of the order of the Supreme Court of Appeal is that the order of the Pretoria High Court, per Hughes J, stands.

Non-joinder of Messrs Lepheana and Mkhonto

[90] A question of non-joinder was also raised. On 3 December 2015, the Chief Justice issued directions inviting parties to file written submissions on "whether municipal managers who fail to give effect to court orders can be found guilty of contempt in the absence of their joinder to the proceedings". It is common cause that both Messrs Lepheana and Mkhonto were convicted and sentenced without having been joined as parties to the proceedings.

[115] Id at para 20.

[91] At common law, courts have an inherent power to order joinder of parties where it is necessary to do so even when there is no substantive application for joinder. A court could, *mero motu*, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected.[116] This is consistent with the Constitution.

[92] The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it.[117] The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.

[93] The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent decision in *Lushaba*,[118] where the Court, per Jafta J, endorsed principles stated by Ackermann J in *De Lange*:

> "[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that . . . the other side should be heard [*audi alterem partem*], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. . . . Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must

[116] *Occupiers of ERF 101, 102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] ZASCA 80; 2010 (4) BCLR 354 (SCA) at paras 11-2.

[117] This was stressed in *Mjeni* above n 70 at 454G-H where Jafta J held:

> "[C]ontempt of court proceedings can only succeed against a particular public official or person if the order has 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 but he wilfully and contemptuously refuses to comply with the court order."

[118] *Member of the Executive Council for Health, Gauteng v Lushaba* [2016] ZACC 16; 2017 (1) SA 106 (CC); 2016 (8) BCLR 1069 (CC) (*Lushaba*) at para 15.

> be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation."[119]

[94] It follows that the objection of non-joinder by the Municipality in *Matjhabeng*, specifically where the potential contemnor's section 12(1) rights are in the balance, is not a purely idle or technical one − taken simply to cause delays and not from a real concern to safeguard the rights of those concerned. There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation where joinder is unnecessary, for example, when a rule *nisi* is issued, calling upon those concerned to appear and defend a charge or indictment against them. Undeniably, in appropriate circumstances a rule *nisi* may be adequate even when there is a non-joinder in contempt of court proceedings. This means that the rule is not inflexible.

[95] Eskom invokes *Insamcor,*[120] *Meadow Glen,*[121] *Hlophe,*[122] and *Pheko II*[123] in support of its argument that the rule *nisi* either effected joinder or was sufficient to give rise to waiver in this context. I do not agree. None of these cases vindicate its contention. *Insamcor* arose in a markedly different context. There, the question was whether third parties who have a substantial and peculiar interest in an order of restoration in terms of section 73(6) of the Companies Act[124] should be joined to proceedings of that sort.[125] The Supreme Court of Appeal found that joinder was

[119] *De Lange* above n 100 at para 131.

[120] *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* [2007] ZASCA 6; 2007 (4) SA 467 (SCA) (*Insamcor*).

[121] *Meadow Glen* above n 53.

[122] *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] ZASCA 16; [2015] 2 All SA 251 (SCA) (*Hlophe*).

[123] *Pheko II* above n 13.

[124] 61 of 1973.

[125] *Insamcor* above n 120 at para 27.

necessary, but where the number of affected parties was substantial, the issuing of a rule *nisi* was sufficient to effect joinder. In those instances, because of the sheer volume of parties who could be affected, the failure to respond could be taken to equate to a waiver of the right to be joined.[126] Even so, Brand JA cautioned:

> "[S]ince failure to react to the rule *nisi* will give rise to deemed consent, proper care should be taken in issuing directions as to service of the rule. Where a particular third party can be identified *a priori* as a necessary party . . . service of the rule on that party should be directed, while notice to unknown potentially interested parties can be ensured through publication of the rule."[127]

[96] In the present case, not only was a criminal sanction in the offing rather than a civil remedy to ensure compliance, but there is also no legitimate apprehension over the number of parties cited. In each of the present matters there was only one person – Mr Lepheana in *Matjhabeng* and Mr Mkhonto in *Mkhonto* – who should have been joined in their personal capacities so that they could properly defend the indictments or charges against them. *Insamcor* is thus no authority for the proposition that a rule *nisi* can in general be used as a substitute for joinder in contempt proceedings.

[97] In *Meadow Glen*, a group of residence associations unsuccessfully sought to have the Municipality's Director of Housing Resource Management imprisoned for failing to maintain a fence and to ensure that there were adequate security guards to monitor access to a settlement that had been established in response to unlawful evictions.[128] But in that case, the Director in question, Fanie Fenyani, was directly cited by name and was served.[129] *Meadow Glen* is thus no apposite authority for the proposition that an order of contempt and committal to prison can be made against an official who is *not* cited in their personal capacity.

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[126] Id at para 28.

[127] Id at para 29.

[128] *Meadow Glen* above n 53 at paras 2, 11, and 13-5.

[129] Id at para 25.

[98] The reliance by Eskom on *Hlophe* is also misconceived.[130] *Hlophe* involved an eviction order with which the state had failed to comply. The Supreme Court of Appeal[131] held that for a finding to be made against state functionaries, in their official capacities, there was no need for their offices to be cited from the outset.[132] However, the Mayor, City Manager, and Director had been joined as parties when the *mandamus* was issued. What's more, no order for contempt nor for committal were made against any of the officials in their personal capacities.

[99] Finally, Eskom relies on *Pheko II*. This reliance is misguided, not least because the Court declined to make an order of contempt as "the service of the order upon the Municipality, an essential element to a finding of contempt" was absent.[133] While the Court did issue a rule *nisi* seeking submissions on why the Mayor and Municipal Manager "should not be joined" to the proceedings, this is a far cry from ordering committal in the absence of joinder.[134] Indeed, as the Court noted, joinder was sought "to ensure that the relevant responsible officials of the Municipality comply with the future orders of this Court", not to hold them in contempt for past non-compliance.[135] The Court did issue directions calling on the Municipality's attorney individually to show cause why he should not be held in contempt.[136] The conduct at issue was spelt out. No doubt was left about who was at risk of a finding of contempt.

[100] The issue of non-joinder, in relation to *Mkhonto*, was raised by this Court at the hearing *mero motu*. It had not been raised *a quo* and as a result CompSol had not

[130] *Hlophe* above n 122.

[131] Per Van der Merwe AJA.

[132] *Hlophe* above n 122 at para 22.

[133] *Pheko II* above n 13 at para 39.

[134] Id at para 15.

[135] Id at para 14.

[136] Id at para 13.

dealt with it in its written submissions. Resulting from the questions at the hearing, CompSol filed further submissions. It is in the interests of justice to allow the further submissions.

[101] The further submissions do not, however, help CompSol's case because they, in point of fact, bolster the case of the applicants regarding non-joinder. CompSol correctly submits that, in its notice of motion, it did not seek an order directed against Mr Mkhonto personally. The order sought, it maintains, was against the first respondent – the Commissioner. CompSol therefore asks that the order of the Supreme Court of Appeal be substituted with an order declaring the Commissioner (and not Mr Mkhonto) to be in contempt of court and that an appropriate sanction be imposed.

[102] When setting aside the Pretoria High Court's order and declaring Mr Mkhonto to be in contempt and sentencing him to imprisonment, the Supreme Court of Appeal took no pains to consider the prejudice that befell Mr Mkhonto − specifically to determine whether he had been personally joined as a party. The Supreme Court of Appeal convicted and sentenced Mr Mkhonto to imprisonment even though he was not a party to the contempt proceedings. In my view, the procedure followed by the Supreme Court of Appeal violated Mr Mkhonto's right "not to be deprived of freedom arbitrarily or without just cause" in terms of section 12(1)(a) of the Constitution.

[103] 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. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is 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.

[104] Additionally, on this ground, the Free State High Court and the Supreme Court of Appeal ought not to have declared Messrs Lepheana and Mkhonto, respectively, in contempt and to have sentenced them to imprisonment. The convictions and sentences must therefore be set aside.

Further issues in Mkhonto

[105] In the view I take of the matter, particularly given that the enquiry is limited to the appropriateness of the remedy of contempt of court and the sanction of committal in the circumstances of these applications, it is not necessary to deal with the further issues in *Mkhonto* regarding the status of the settlement order and whether monetary claims may be enforced by way of contempt proceedings.

Costs

[106] Although the applicants in both cases are successful, the manner in which the officials concerned dealt with their obligations following their undertakings, *vis-à-vis* the consent orders, leaves much to be desired. This Court's displeasure should be marked by depriving them, as successful litigants, of their costs in this Court. In the circumstances, it will be just and equitable for each party to pay its own costs.

Order

[107] Under CCT 217/2015 (*Matjhabeng Local Municipality v Eskom Holdings Limited and Others*), the following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. Paragraphs 1 and 2 of the order of the High Court of South Africa, Free State Division, Bloemfontein are set aside and are replaced with an order dismissing the application.
5. Each party is to pay its own costs in this Court.

[108] Under CCT 99/2016 (*Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited*), the following order is made:

1. Leave to appeal is granted.
2. Condonation is granted.
3. The appeal is upheld.
4. Paragraphs (a) and (b) of the order of the Supreme Court of Appeal are set aside.
5. Each party is to pay its own costs in this Court.

For Matjhabeng Local Municipality (in CCT 217/15):	W R Mokhare SC and A E Ayayee instructed by Majavu Attorneys
For Eskom Holdings Limited (in CCT 217/15):	M Khoza SC and N Moloto instructed by Phatshoane Henney Incorporate
For Shadrack Shivumba Homu Mkhonto, Compensation Commissioner, Director-General, Department of Labour, and Minister of Labour (in CCT 99/16):	N A Cassim SC, S K Hassim SC, and M A Dewrance instructed by the State Attorney, Pretoria
For Compensation Solutions (Pty) Limited (in CCT 99/16):	P G Robinson SC instructed by Quiryn Spruyt Attorneys