IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. 2219/2024

In the matter between:

MAYFIELD CLAYS (PTY) LTD	**Applicant**
and	
MAKANA LOCAL MUNICIPALITY	**First respondent**
MUNICIPAL MANAGER OF MAKANA MUNICIPALITY *NOMINE OFFICIO*	**Second respondent**
THE EXECUTIVE MAYOR OF MAKANA MUNICIPALITY	**Third respondent**

JUDGMENT

LAING J

[1] This is an application for leave to appeal against the judgment and order handed down in an application for the respondents to be declared in contempt of court. The parties will be described in the same way as they were previously.

[2] The context of the matter concerns an agreement reached between the parties on 9 September 2021 in relation to the enforcement and maintenance of a buffer zone between the applicant's kaolin mining operations and informal settlements that have developed on adjacent land. On 31 October 2023, Pakati J granted an order that directed the respondents to comply with the agreement. It was not disputed that, on 12 December 2023, the sheriff served a copy of the order on each of the respondents. Despite the applicant's requests for compliance, an inspection *in loco*, and the respondents' promise to furnish a report on the implementation of the order, nothing came about. This prompted the applicant to institute contempt proceedings on 28 May 2024. The matter eventually reached the uncontested opposed roll, culminating, on 30 July 2024, in the decision that forms the subject of the present application.

[3] A full description of the background facts and the proceedings that took place on 30 July 2024 appears in the judgment of the court. This will not be repeated, save to remark that the conduct of the respondents was entirely unacceptable.

[4] For purposes of the present matter, the respondents relied on several grounds of appeal during argument. These comprised the following: (a) the applicant's failure to join the second and third respondents in their personal capacities, and the applicant's lack of standing; (b) the failure to establish wilful disobedience and *mala fides*; (c) the imposition of unreasonable or conflicting time periods for compliance; (d) the failure to have transferred the matter to the opposed motion court roll; (e) the failure to have permitted the respondents to bring a postponement application; and (f) the lack of a proper basis for the award of costs on a punitive scale.

[5] Under 17(1)(a) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where a judge is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard. In

S v Smith,[1] the court held that more is required to be established than the mere possibility of success, that the case is arguable on appeal, or that the case cannot be categorized as hopeless.[2] The provisions of section of section 17(1)(a) ensure that the threshold for the granting of leave is higher than what it was previously under the Supreme Court Act 59 of 1959. In *Pretoria Society of Advocates v Nthai*,[3] the court held that there must now be a measure of certainty that another court will differ from the court in relation to whose judgment leave to appeal is sought.[4]

[6] The present matter pertains to a judgment granted in relation to contempt of court proceedings. The respondents focused, in that regard, on the Constitutional Court's decision in *Matjhabeng Local Municipality v Eskom Holdings Ltd*.[5] This requires closer examination.

[7] The Constitutional Court dealt with two applications for leave to appeal, each involving a declaration to the effect that an official had been in contempt of court for the disobedience of a court order, as well as the imposition of a period of imprisonment that was wholly suspended. Nkabinde ADCJ reiterated, with reference to *Pheko and others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as amicus curiae) (No 2)*,[6] the requirements for contempt of court.[7] The learned judge stressed that, because the relief sought was committal, the criminal standard of proof (beyond reasonable doubt) applied.[8] Regarding whether non-compliance was wilful and *mala fide*, this was held to mean that the official, personally, must have deliberately defied the order; in other words, the official him- or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply.[9]

---

[1] 2012 (1) SACR 567 (SCA).
[2] At paragraph 7, with reference to *S v Mabena* 2007 (1) SACR 482 (SCA), at paragraph 22.
[3] 2020 (1) SA 267 (LP).
[4] At paragraph 5, with reference to *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC), at paragraph 6.
[5] 2017 (11) BCLR 1408 (CC).
[6] 2015 (6) BCLR 711 (CC) (*Pheko II*), at paragraph [32].
[7] The learned judge summarized these as: (a) the existence of an 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*. At paragraph [73].
[8] *Ibid*.
[9] At paragraph [76].

[8] Nkabinde ADCJ proceeded to deal with the question of non-joinder. It was common cause that the officials in question were convicted and sentenced without having been joined to the proceedings. The learned judge observed that courts have an inherent power to order the joinder of parties where necessary, even in the absence of a substantive application to that effect. In that regard:

> '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. 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.'[10]

[9] The caveat added to the above, however, was that joinder was not always necessary. This would be a situation where, for example, a rule *nisi* was issued, calling upon a person to appear and defend a charge or indictment against him or her. Nkabinde ADCJ went on to hold that, in appropriate circumstances, a rule *nisi* could be adequate even where there was a non-joinder in contempt of court proceedings. The principle was not inflexible.[11] The learned judge stated, further, as follows:

> '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[12] should this 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

[10] At paragraph [92].
[11] At paragraph [94].
[12] The individuals named were the officials in question; Mr Lepheana was the Municipal Manager for the Matjhabeng Local Municipality, Mr Mkhonto was the Commissioner of the Compensation Fund.

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.'[13]

[10] Returning to the present matter, the respondents argued that the non-joinder of the second and third respondents, in their personal capacities, was fatal. Leave to appeal should be granted on that basis alone. It was argued, too, that personal service on the individuals in question had been imperative, especially considering the relief sought by the applicant, i.e. committal. This was never done.

[11] The applicant contended that the present matter was distinguishable from *Matjhabeng* because the Constitutional Court had dealt with situations where the officials in question were convicted and sentenced to periods of direct imprisonment, wholly suspended. In the present matter, the notice of motion in the contempt application had clearly indicated that the applicant sought committal; this had prompted the respondents to file a notice of opposition. They had, in all, at least five weeks to prepare themselves adequately in the knowledge that there were personal consequences, including committal, for non-compliance. They did nothing. The applicant also contended that the order, as granted, required the applicant to approach the court, again, on supplemented papers where necessary, for the implementation of the order; the committal of the second and third respondents could not take place without the completion of this step.

[12] In terms of section 12(1)(a) of the Constitution, everyone has the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. Notwithstanding the applicant's submissions, it could well be said that, despite the safeguard of requiring the applicant to complete the extra step described, the court has already convicted and sentenced the second and third respondents. The extra step is merely for the implementation of the finding and the sanction imposed. The contempt application was not brought against the incumbent senior administrative official and senior public office bearer of the first respondent in their personal capacities. They

[13] At paragraph [103].

were cited in their official capacities. The notice of opposition indicates nothing to the contrary. The argument can indeed be made that, because the nature of the relief sought and how it would entail the potential deprivation of personal freedom, the applicant was required to have ensured the joinder of the second and third respondents in their personal capacities, alternatively, at the very least, personal service of the contempt application. Neither factor exists in the present matter.

[13] The court considers itself bound by the principles enunciated in *Matjhabeng*; it is satisfied that the respondents would have a reasonable prospect of success on appeal based on the ground of non-joinder alone. Regarding the remaining grounds, however, the court stands by its findings.

[14] Consequently, the following order is made:

(a) leave to appeal to a full bench of the Eastern Cape Division is granted; and

(b) the costs of the application are those in the appeal.

_____

JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant:	Mr Tarr
Instructed by:	De Jager & Lordan Inc. 2 Allen Street MAKHANDA Tel: 046 622 2799 Email: stuart@djlaw.co.za Ref: SA Tarr/cb/M498
For the respondent:	Adv Rawjee SC with Adv Masiza
Instructed by:	McWilliams & Elliot 152 Cape Road Mill Park GQEBERHA Ref: AHlongwane/W95708 Email: aandrea@mcwilliams.co.za wade@mcwilliams.co.za c/o N N Dullabh & Co 5 Bertam Street MAKHANDA Ref: Mr Dullabh Email: naran@dullabhs.co.za
Date heard:	02 December 2024.
Date of delivery:	05 December 2024.