FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 924/2013

In the matter between:

MATJHABENG LOCAL MUNICIPALITY	Applicant
and	
ESKOM HOLDINGS SOC LTD	1st Respondent
MEMBER OF THE EXECUTIVE COUNCIL, LOCAL GOVERNMENT, FREE STATE PROV	2nd Respondent
NATIONAL ENERGY REGULATOR OF SA	3rd Respondent
NATIONAL MINISTER OF MINERALS AND ENERGY	4th Respondent
THE MINISTER OF PROVINCIAL AND LOCAL GOVERNMENT, RSA	5th Respondent

JUDGMENT BY: DAFFUE, J

HEARD ON: 6 NOVEMBER 2014

DELIVERED ON: 19 FEBRUARY 2015

INTRODUCTION

[1] An unsavoury battle is being fought by two public bodies with money coming from the public purse. Matjhabeng Local Municipality, ("Matjhabeng") the second largest municipality in the Free State Province, owes Eskom Holdings Soc Ltd, ("Eskom") millions of Rands which amount increases every month as the municipality is unable to settle its debts. In company law parlance Matjhabeng, being unable to pay its

debts and commercially insolvent, would be a suitable candidate to be wound up in terms of section 344 of the Companies Act, 61 of 1973.

II THE PARTIES

[2] Matjhabeng is cited as the applicant in a so-called notice of motion: interlocutory application filed on behalf of Eskom who is cited in the application as first respondent. The MEC for Local Government, Free State Province, the National Energy Regulator of South Africa, ("Nersa"), the National Minister of Minerals and Energy of South Africa and the Minister of Provincial and Local Government of South Africa are cited as second, third, fourth and fifth respondents respectively. These last mentioned four respondents do not feature at all in the application as the main protagonists are Matjhabeng and Eskom. Adv N.H. Moloto appeared for Eskom and adv M.C. Louw for Matjhabeng.

[3] The parties are incorrectly cited. Eskom as applicant should have applied for substantive relief in a new application instead of using the citation of the parties and the same case number allocated to Matjhabeng's 2013 application referred to *infra*. However this matter has been dealt with finally by Kruger J and does not require any further comments, save for the reference thereto *infra*.

III The relief sought by Eskom

[4] Initially Eskom sought several orders, *inter alia* that the order granted by me by agreement between the parties on 28 March 2013 be set aside and a structural interdict intended to ensure payment of the amounts due to it by Matjhabeng and several other related relief be granted. The relief contained in the notice of motion is not set out now to prevent duplication, but the reader is referred to paragraph 11 *infra* for the order eventually granted by Kruger J on 31 July 2014.

[5] At this stage of the proceedings I have to adjudicate whether or not Matjhabeng's acting municipal manager should be convicted of contempt of court, bearing in mind the aforesaid order of 31 July 2014 and the further order by Kruger J on 18 September 2014, both which are quoted fully *infra*.

IV The factual and undisputed background

[6] Eskom supplies electricity to Matjhabeng which incorporates the Free State towns of Allanridge, Hennenman, Odendaalrus, Riebeeckstad, Ventersburg, Virginia, Welkom and Whites. Eskom as the dominant player in the business of generating, transmitting and distributing electricity in the Republic of South Africa entered into an electricity supply agreement with Matjhabeng in 2004 which agreement was effective from 26 March 2000 and would endure for an indefinite period unless terminated by either party upon three months' written notice. It was agreed that Matjhabeng would purchase electricity for the purpose of distributing it to its

customers within its licensed area of supply and that Eskom would furnish Matjhabeng with a reliable and continuous supply of electricity in bulk. Matjhabeng would be liable to make monthly payments on due dates reflected on statements provided by Eskom to it at Eskom's standard prices applicable from time to time and approved by Nersa in terms of the applicable laws. Matjhabeng did not pay the full monthly account of Eskom prior to July 2012, but during that month all arrears were paid in full. However, it then failed to comply with its obligations again and in January 2013 the arrears amounted to about R145 million.

[7] Eskom indeed threatened to disconnect electricity supply to Matjhabeng if the arrears were not paid in two instalments, the last instalment to be paid on the 31st March 2013. However it is clear from the papers filed on behalf of Matjhabeng that Eskom intended to make use of a public participation process in terms of the Promotion of Administrative Justice Act, 3 of 2000, in terms whereof all stakeholders, affected parties and the public were invited to participate in such process. The deadline for submissions was 28 March 2013.

[8] During that time Matjhabeng raised certain disputes and even indicated to Nersa that an arbitration process should be instituted to iron out the disputes. Nothing further transpired in this regard.

[9] On 7 March 2013 Matjhabeng issued a notice of motion, (its 2013 application bearing the same case number – 924/2013), intending to apply on an urgent basis on 28 March 2013 for an order in terms whereof Eskom be interdicted from terminating electricity supply to Matjhabeng pending the finalisation of the dispute between the parties. Eskom was cited as first respondent and the parties referred to *supra* were cited as second to fifth respondents respectively. Second, fourth and fifth respondents indicated their intention to oppose the application, but withdrew their opposition eventually and filed a notice indicating that they would abide the judgment of the court. Eskom opposed the application, but did not file any answering affidavits. On 28 March 2013 the legal representatives of the parties approached me as duty judge in chambers with a deed of settlement which I made an order of court by agreement. In terms thereof Matjhabeng *inter alia* had to pay the arrears of just over R145 million in instalments. Costs of the application were to stand over.

[10] On 7 March 2014, exactly one year after the launching of Matjhabeng's 2013 application, Eskom caused its so-called notice of motion – interlocutory application to be issued by making use of the same case number, case 924/2013 and citing the parties as in the original application of Matjhabeng. Eskom sought several orders, *inter alia* an order setting aside the order granted by me on 28 March 2013 by

agreement as well as orders that can be labelled a structural interdict.

[11] Matjhabeng opposed the application, but instead of filing an answering affidavit, relied on a notice in terms of rule 6(5)(d)(iii), raising two questions of law which were eventually adjudicated in favour of Eskom by Kruger, J on 31 July 2014 who then also made the following order by agreement:

> "1. The court set aside the order granted on **28 March 2013** by the Honourable His Lordship Daffue.
> 2. The applicant to provide the following information by **6 August 2014**:
>
> 2.1 Copies of the delegated powers of the Municipal Manager from 1999 until present;
>
> 2.2 Copies of the agendas, minutes and resolutions of all committees and council with regards to the approval of Council's budgets and in particular Council's electricity tariffs.
>
> 2.3 Copies of all correspondence and submissions to NERSA with regards to approval of Matjhabeng's electricity tariffs between the period of 1999 until present.
>
> 2.4 Copies of the agendas, minutes and resolutions of Council that relate to the alleged discrimination against Matjhabeng.
>
> 2.5 A copy of resolution of Council or any committee authorizing the municipal Manager to bring the application that was instituted against Eskom.

2.6 Matjhabeng's recovery rate of bad debt relating to electricity supply to all categories of consumers for the last 10 years.

2.7 Should the recovery rate be less than 90%, the reasons or factors affecting the recovery rate.

2.8 The percentage or amount that the Matjhabeng Municipality budget has made provision for in terms of bad debt related to electricity supply for the last 10 years.

2.9 If Matjhabeng Municipality's recovery rate is less than the amount budgeted for in terms of bad debts, what steps have been taken to rectify the problem, and when they were carried out.

2.10 Copies of all the reports or recommendations by committees or consultants, internal or external, as well as resolutions which have been taken by committees and council regarding the recovery of bad debts in Matjhabeng Municipality's jurisdiction.

2.11 All resolutions taken by Council or any committee regarding the electricity supply agreement form (sic) the date of amalgamation of Welkom and Virginia Municipalities to form Matjhabeng Municipality, until present.

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 internet (sic) rate to be charged on arrears.

4. The applicant 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 with 14 calendar days of the default.

5. The applicant to pay arrears that have accrued since June 2013, together with interest *a tempore morae,* 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 applicant to pursue payment of whatever amount it expects from SARS, 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 applicant 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 utilized for before or on 6 August 2014.
8. The applicant 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 disputes within 120 days of the conclusion of the consultations contemplated in paragraph 3 of this order.
10. Costs are reserved."

[12] Paragraphs 2, 4 and 7 of the order of 31 July 2014 are of particular importance for the purposes of the adjudication of the application presently before me. Matjhabeng was supposed to provide numerous documentation and information to Eskom by not later than 6 August 2014 to enable the parties to enter into meaningful consultations to commence on 12 August 2014 and to be concluded on 19

August 2014 where after the parties had to report to the court on or before 11 September 2014. Furthermore, Matjhabeng had to resume payment of the current electricity account in respect of electricity supply during July 2014 and thereafter on due date, failing which the municipal manager was directed to report to the court reasons for the default within fourteen days of such default. In terms of paragraph 7 Matjhabeng was directed to provide information to enable the court to establish how monies collected by it from consumers for electricity usage was utilised during the relevant period.

[13] When the matter was heard on 31 July 2014 the arrears outstanding in respect of the supply of electricity amounted to R335 495 358,34.

[14] Although Eskom was not provided with all the documents and information set out in the order of 31 July 2014 consultations were held with Matjhabeng officials. No agreement could be reached in respect of various aspects, but the minutes of the meeting reflect that Matjhabeng committed itself to pay the future monthly accounts in full when they become due and payable. This is in line with paragraph 4 of the 31 July 2014 order.

[15] Eskom reported to the court in accordance with the court order of 31 July 2014. No report from Matjhabeng was forthcoming which caused Kruger J to make the following

order on 18 September 2014 (the matter having been postponed from 11 September to 18 September 2014):

"1. The applicant pay the arrear amount outstanding in respect of electricity supplied for the period June 2013 to July 2014 in the sum of R371 908 124;
2. The applicant to pay interest at the prevailing a *tempore morae* rate when the amounts making up the debt fell due;
3. The applicant institute legal proceedings aroung (sic) issues it has relating to the urgent application under case number 924/2013 within 120 days from date of this order, failing which the applicant's right to do shall lapse and the supply agreement shall be enforceable, and the applicable rate of interest on the amount payable in terms of paragraph 1 of this court order shall be the prime plus 5% as charged by First National Bank;
4. The applicant, as represented by the Municipal Manager, is to be called to give reasons why they have not complied with the court order of 31 July 2014, specifically:-
   a. Why it has not kept up with payments for current electricity consumption as contemplated in paragraph 4 of the court order of 31 July 2014;
   b. Having regard to the reports in the applicant's possession and contained in pages 407 to 437 of the application, when and what septs (sic) the applicant has taken to address the issues raised int hose (sic) reports;
   c. Why the amount in paragraph 1 should not be payable no later than 31 March 2015 having regard to the applicant's history of non compliance with the court orders of March 2013 and July 2014;
   d. Why the municipal manager should not be held in contempt of court for non compliance with the order of 31 July 2014;

5. The applicant, as represented by the Municipal Manager, provide such reasons and explain its conduct by way of an affidavit to be served and filed with the Registrar no later than 6 October 2014 and to be present in person in court on 6 November 2014;
6. The first respondent to reply, if any, by no later than 13 October 2014. Any heads that may be necessary, to be filed the following week.
7. Costs of suit of the urgent application of March 2013 and this application to be paid by the applicant, such costs to include the costs of junior and senior counsel, on an attorney and client scale."

The dates in paragraphs 5 and 6 of the order should have been 13 October 2014 and 24 October 2014 respectively.

[16] The arrears have by then increased to R371 908 124 and judgment was granted against Matjhabeng for payment of this amount together with interest at the prevailing *a tempore morae* rate when the respective amounts making up the debt fell due.

[17] It is apparent from the court order that the municipal manager of Matjhabeng was called upon to give reasons why there was no compliance with the court order of 31 July 2014 and why he shall not be held in contempt of court for such non-compliance. The matter was to be heard on 6 November 2014.

[18] Thereafter the acting municipal manager of Matjhabeng, Mr Mothusi Frank Lepheana, appointed as such effectively from 1 July 2014, filed an explanatory affidavit, albeit late, as well as an affidavit in support of a condonation application. In his affidavits he tries to explain why he should not be convicted of contempt of court and I shall deal with his reasons *infra*.

[19] Notwithstanding the court order in terms whereof judgment was granted by Kruger J in favour of Eskom against Matjhabeng in the amount of R371 908 124 and interest, which order has not been set aside or appealed against, Eskom indicated that it would be prepared to accept down payments of this amount on the basis that the full arrears are paid by not later than 31 March 2015. Matjhabeng, on the other hand, caused a so-called payment plan to be adopted by its council in terms whereof provision was made for down-payments of the arrears in instalments with the final payment to be made at the end of September 2015 only.

[20] Notwithstanding the undertaking to pay the monthly account timeously Matjhabeng failed to pay the August account and paid only R15 million towards the September account.

V LEGAL PRINCIPLES

[21] The orders granted by Kruger J have become known as structural orders and are sometimes referred to as structural interdicts, but as pointed out by the Supreme Court of Appeal in **Meadow Glen Home Owners Association v City of**

Tshwane Metropolitan Municipality (767/2013) [2014] ZASCA 209 (1 December 2014) the reference to structural interdicts is often a misnomer in relation to an order that combines elements of an interdict and a mandatory order.

[22] A major challenge that courts are facing nowadays is the emergence of a trend of non-compliance with judgments and particularly money judgments against the State and other public bodies. A structural order/interdict has rich potential to facilitate an interactive process in order to solve disputes between parties. A mandamus combined with a structural interdict and contempt of court proceedings are therefore often resorted to by parties. It is accepted that money judgments cannot be enforced against the State through contempt of court proceedings, but courts are not powerless to ensure compliance with court orders. It is therefore possible to call upon a particular functionary to advance reasons why he shall not be held to be in contempt of court and to explain to the court why he has not complied with the order and how he intends to comply.

[23] A court issuing a structural interdict seeks to control compliance with its order and thereby an organ of state can be ordered to perform its constitutional obligations and to report on its progress in doing so from time to time. In the process the court exercises some form of supervisory jurisdiction to ensure that its order is implemented. See **LAWSA**, volume 11, 2nd edition, para 411.

[24] Madala J, writing for the majority in **Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another** 2008 (5) SA 94 CC commented as follows in para [80]:

> "Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view means at the very least that there **should be strict compliance with court orders**." (emphasis added.)

[25] In regard to the possibility of contempt of court proceedings being instituted against State functionaries in cases where the State fails to pay the monies owed to a judgment creditor and bearing in mind section 3 of the State Liability Act, 20 of 1957 which prevented attachment of State assets, Madala J suggested that the committal of public officials would only result in "naming and shaming" of such officials and would produce no real remedy for the aggrieved litigant who is primarily concerned with the payment of the judgment debt. See **Nyathi** *loc cit* at para [76]. It must be emphasised that the court concluded that section 3 of the particular Act was inconsistent with the Constitution and in finding such it tried

to alleviate the burden placed on a successful litigant seeking payment of the judgment debt. The court continued at para [78] as follows:

> "Secondly, State administration is inefficient and ineffective. The conduct of State officials undermines the legitimacy of both the judiciary and the State. ... These State institutions need to look at these failings holistically and consider the best manner in which to deal with the problems at hand. ..."

In para [79] the following remark is made:

> "However, contempt of court proceedings do not put money in the pocket or food on the table."

In para [83] the court found that it was necessary for it to oversee the process of compliance with court orders (there were about 200 odd unresolved cases against the State for payment of judgment debts) and to ensure ultimately that compliance is both lasting and effective. Consequently a structural interdict was issued as well. In my view the Constitutional Court did not find that contempt of court orders can never be made against State functionaries, but it is apparently so that meaningless orders should be avoided.

[26] Conradie JA mentioned in **Jayiya v MEC for Welfare Eastern Cape** 2004 (2) SA 611 SCA at para [17] the following: "Wholesale non-compliance with court orders is a distressing phenomenon in the Eastern Cape that has caused the

Courts in that province to try to devise ways of coming to the assistance of social welfare applicants whom the provincial government has failed." The court eventually found that the application for committal for contempt of court was misconceived in a number of respects and the appeal was consequently dismissed. The judgment is not authority that recalcitrant public officials may never be convicted of contempt of court.

[27] 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* or under a prohibitory interdict. See Farlam *et al*, **Erasmus, Superior Court Practice**, B1-58F-3. The requirements have been crystallised and the position summarised as follows in **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 SCA at para [42]:

> "(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
>
> (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
>
> (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But 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: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[28] Even if it appears that the defaulting party might have been wilful, he may yet escape liability if he can show that he was *bona fide* in his disobedience, i.e. that he genuinely, although mistakenly, believed that he was entitled to commit the act or the omission alleged to be a contempt of court. **Fakie NO** *loc cit* at 333B – E. There must be a deliberate and intentional violation of the court's dignity, repute or authority. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[29] A municipality is under a constitutional duty to comply with court orders and to lead by example. Upon non-compliance of a court order, complaints of contempt may be proceeded with against the functionaries of the Municipality responsible for ensuring compliance with the order. See **Mchunu v Executive Mayor, Ethekwini Municipality** 2013 (1) SA 555 KZD at 560I – 561B and 561F – 562B and 563D – E and **Meadow Glen Home Owners Association** *loc cit* at para [32] where a municipality's obligations and that of its staff

members, *inter alia* to serve the public interest, is referred to.

[30] The Supreme Court of Appeal made it clear in **Meadow Glen Home Owners Association** *loc cit* at para [3] that in a country based on the rule of law it cannot be countenanced, particularly when it involves an organ of state at the third tier of government, that court orders are not complied with.

[31] The following is stated at para [8] of **Meadow Glen Home Owners Association**:

> "Having said that, the Municipality consented to the court making an order in those general terms. That obliged it to make serious good faith endeavours to comply with it. That is what we are entitled to expect from our public bodies. If they experienced difficulty in doing so then they should have returned to court seeking a relaxation of its terms. ..., it was not appropriate for the Municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings. It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated."

[32] The court continued at para [16] and further, relying on the judgment in **Fakie NO** *loc cit,* that although some punitive element is involved in contempt of court proceedings, the main objectives thereof are to vindicate the authority of the court and to coerce litigants into complying with court orders.

[33] Plasket AJ (as he then was) pointed out in **Victoria Park Ratepayers' Association v Greyvenouw CC** [2004] 3 ALL SA 623 SE at paras [19] and [23] that contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the legal arm of government and that there is a public interest element in every contempt committal. Viewed in the constitutional context, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the high courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. These *dicta* were referred to with approval in **Meadow Glen Home Owners Association** *loc cit* at para [18].

[34] The Supreme Court of Appeal eventually concluded in **Meadow Glen Home Owners Association** *loc cit* at para [35] as follows:

> "...Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order."

With reference to **Brown v Board of Education**, a United States of America case, the SCA concluded:

> "Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders."

Again, I do not understand the judgment to say that it will never be appropriate to make use of contempt of court procedure to deal with recalcitrant public servants. In fact, the SCA endorsed the *dictum* of Nugent JA in **MEC, Department of Welfare, Eastern Cape v Kate** 2006 (4) SA 478 (SCA) para [30] that "there ought to be no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act, and fails to do so, is liable to be committed for contempt, in accordance with ordinary principles."

[35] The municipal manager, including the acting municipal manager, of a municipality is the accounting officer of the municipality. His responsibilities are tabulated in section 55 of the Local Government: Municipal Systems Act 32 of 2000. As such he is *inter alia* responsible and accountable for all income and expenditure of the municipality, all assets and the discharge of all liability of the municipality and the proper and diligent compliance with the Municipal Finance Management Act. See section 55(2) of the Systems Act and also section 82 of the Local Government: Municipal Structures Act, 117 of 1998. In **Mogale City Municipality v Fidelity Security Services (Pty) Ltd** 572/2013 [2014] ZASCA 172 (19 November 2014) the SCA quoted with approval the following warning expressed by that court in **Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng** 2013 (5) SA 24 SCA at para 54: "It is time for courts to seriously consider holding officials who behave in a high-handed manner described above, personally

liable for costs incurred. This might have a sobering effect on truant public office bearers." In my view this is a clear indication of the frequency of not too dissimilar incidences across the country and the SCA's disapproval of such behaviour.

[36] The duties of municipalities pertaining to electricity reticulation are set out in section 27 of the Electricity Regulation Act, 4 of 2006. In terms thereof a municipality is *inter alia* obliged to keep separate financial statements, including a balance sheet, of the reticulation business.

[37] I agree with the sentiments expressed in **Laubscher v Laubscher** 2004 (4) SA 350 (T) at para [25] that if the judiciary cannot function properly, the rule of law must die. In order to prevent this, special safeguards have been in existence for many years, one of them being civil contempt of court.

VI EVALUATION OF THE EVIDENCE AND APPLICATION OF THE LEGAL PRINCIPLES

[38] Matjhabeng's acting municipal manager, Mr Lepheana, filed an explanatory affidavit in general and almost meaningless terms, relying in several instances on inadmissible hearsay evidence. Affidavits from people with first-hand knowledge of the relevant facts were conspicuously absent. In some instances bare or unsubstantiated denials are relied upon. The objective facts submitted by Eskom cried out for an

answer, but unfortunately Mr Lepheana imperilled his position by failing to put up any cogent explanation as to why he should not be found to be in contempt of court.

[39] I find that he was informed of the terms of the court order of 31 July 2014 on that day as this order was made by agreement.

[40] Contrary to what was expected of a municipal manager in his position, he failed to ensure that all the documents and information set out in paragraph 2 of the order of 31 July 2014 were provided to Eskom by 6 August 2014. If this was impossible I would have expected him to report this immediately instead of waiting for contempt of court proceedings. On his version he only appeared to react to the order on 11 August 2014, a day before consultations were to be commenced as set out in paragraph 3 of the order. I find his explanation for not complying satisfactorily with the order totally improbable and indicative of the lackadaisical approach adopted by Matjhabeng over a long period of time which probably started before 2012, judging from the disputes between the parties. Several documents and information are still outstanding. The Matjhabeng Municipality is a mendacious litigant and the same applies to its acting municipal manager who not only wilfully disregard two court orders, but made conflicting and mutually contradictory statements. The acting municipal manager, a duly admitted advocate, also failed to comply with paragraph

4 of the order of 31 July 2014. The July 2014 current account was not paid in full, no payment was made in respect of the August current account and part payment was made in respect of the September 2014 current account. He cannot be found to be in contempt of court based on Matjhabeng's failure to pay, but he did not report to court the reasons for the default as he was obliged to do.

[41] The order of 18 September 2014 issued by Kruger J gave a further opportunity to Matjhabeng and its acting municipal manager to comply with the court order of 31 July 2014 as is evidenced by paragraph 4 thereof. Mr Lepheana was given another opportunity to provide reasons and to explain his or his municipality's conduct or inaction by way of an affidavit to be filed not later than 13 October 2014. He did not only miss the deadline, but eventually presented an inadequate response. I shall deal with some of his allegations in the next paragraphs.

[42] Mr Lepheana was not a newcomer on the scene although he was appointed as acting municipal manager from 1 July 2014 only. He was appointed Director: Corporate Services of Matjhabeng the previous year and in that capacity had to lead and direct the legal services of the municipality, provide legal services and ensure compliance with all municipal legislation. Surely, in his position he should have been aware of the application brought by Matjhabeng in March 2013, if not actively involved, the ensuing litigation, and the

consequent agreements and court orders referred to *supra*. I am not prepared to accept that he was not aware of the full extent and nature of the litigation.

[43] His version that he was informed that it was doubtful whether Matjhabeng would be able to pay the July 2014 electricity account in full is contradicted by the minutes of the meeting between the delegates of Eskom and Matjhabeng on 12 August 2014 and also flies in the face of the agreement made an order of court a few days earlier. His version that he believed that it would be "unnecessary" to burden the court with unnecessary affidavits and reports are unbelievable. He had to comply with a court order and that is the long and short of it. It is furthermore unbelievable that Matjhabeng, led by its acting municipal manager could agree to a court order on 31 July 2014 and a few days later breached the terms thereof as "the municipality could simply not meets its obligations". Instead of reporting to the court as he was supposed to do in terms of the court order he wilfully and *mala fide* failed to respond. When he was called upon to respond to the contempt of court proceedings, he belatedly replied in an inadequate manner.

[44] The vague averments in respect of the financial bailout from either the provincial or the national government cannot be accepted. These are firstly hearsay and secondly not sufficient response to satisfy the evidentiary burden placed upon Mr Lepheana. It would be easy to explain in a written

report the failure to pay the monthly accounts, the reasons for the failure and the remedial steps taken or to be taken to rectify the default. He goes so far to seek an indulgence from the court in not having to report in future on a monthly basis the reasons for Matjhabeng's non-payment and thus the non-compliance of its obligations towards Eskom in terms of the existing court order. He is apparently asking the court to condone in advance future non-payment of the monthly bills due and payable to Eskom from time to time. This is nothing but an unreasonable request.

[45] Mr Lepheana placed no acceptable evidence before me pertaining to the alleged discussions between him and the relevant MEC's and other government officials, the nature of the negotiations and whether or not Matjhabeng will be bailed out financially, and if so, when. His primary duty to explain Matjhabeng's failure to comply with the court order rested with the court, but he dismally failed. In any event, his explanations had to be made in terms of the court order and not belatedly and whilst confronted with contempt of court.

[46] He relies on hearsay pertaining to the allegations that Nersa rejected applications for tariff increases in the past. It was these very applications by Matjhabeng and the responses of Nersa that were requested and that Matjhabeng was supposed to make available in terms of the court order of 31 July 2014. Mr Lepheana failed to attach any documentary or other admissible evidence to his response. His version that

recovery of amounts by Matjhabeng was eventually less than that billed by Eskom based on the rejection of Matjhabeng's applications is in total contrast with the reports of the expert employed by Matjhabeng who made it clear that Matjhabeng deliberately charged lower tariffs than agreed to by Nersa to certain end suppliers.

[47] While knowing that the proposed new tariffs for the 2014/2015 year which were supposed to be implemented from 1 July 2014, are being contested in the high court, Mr Lepheana states under oath that the introduction of the new tariff structure will help to address Matjhabeng's problem. This is uncertain to say the least and one does not know what the outcome of that application will be. I have reason to believe that he deliberately tried to mislead the court. The reference to annexure "ML1", an application to Nersa, is uncertain. There is no indication when the application was made and what the outcome thereof was. There is also no indication why these documents were not provided to Eskom in accordance with the aforesaid court order.

[48] Mr Lepheana's allegations pertaining to the monthly obligations of the municipality of just over R10 million and the average monthly income of just over R64 million, based on a document by an unidentified author attached as "ML2" which is undated does not make any sense. If the monthly obligations are just over R10 million there cannot be a massive shortfall as the alleged average income exceeds the

monthly obligations by far. This is a clear indication that Mr Lepheana relies on incorrect hearsay information, that the information is far-fetched, false and cannot be relied upon, but Mr Lepheana apparently fails to recognise this at all.

[49] 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 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 lack of interest in being of assistance to the court is apparent from the very moment when Matjhabeng failed to comply with the dealine of 6 August 2014, his failure to attend the meeting ordered by the court for the full duration thereof, his shifting of the goal posts in that meeting and his failure to report to the court as directed on 31 July 2014. His attitude throughout is baffling and his conduct undermines the esteem in which the office of municipal manager ought to be held.

[50] Under the circumstances I am satisfied that it has been proven beyond reasonable doubt that Mr Lepheana, the acting municipal manager of Matjhabeng, is guilty of contempt of court and I shall make such an order. The

whole purpose of the structural order was defeated by Mr Lepheana's recalcitrant attitude. Both counsel conceded that a sentence of six months' imprisonment would be a suitable and reasonable sentence, although Mr Louw requested me to rather postpone the sanction pending compliance with the court order. I am not prepared to adhere to his request as I believe that such order would have less deterrent value than a suspended sentence.

[51] Bearing in mind the disastrous financial situation of Matjhabeng who would probably stand in for the payment of any penalty to be imposed in this case, I have decided against issuing a fine. In my view the seriousness of the matter is such that Mr Lepheana should be sentenced to imprisonment and I am of the view that a period of six months would suffice. However I am mindful of the fact that his absence of office will cause further disruption in the administration of Matjhabeng and therefore the sentence will be suspended on certain conditions as set out in the order. A suspended sentence will also be a weapon of deterrence against the reasonable possibility that Mr Lepheana will fall into the same error. Such element of coercion will hopefully compel him to comply with this court's order.

[52] Matjhabeng has been delaying payment of its dues to Eskom over a considerable period of time. Under normal circumstances I would not be in a position to act as a court of appeal or on review in respect of a judgment made by a

colleague of mine, but in so far as a structural interdict was issued and bearing in mind the purpose of structural interdicts, I am inclined to allow Matjhabeng time to settle the arrears. As the order of Kruger J stands as this stage, the amount is due and payable immediately and Eskom would be entitled to either issue a writ for the full amount, alternatively to carry on with procedures to have the electricity reticulation to Matjhabeng terminated. The last option will have a devastating effect on law-abiding citizens within the municipal area who pay their bills as they fall due. Business in the Goldfields will come to an abrupt halt. Eskom seeks full payment of the arrears by the end of March 2015 whilst Matjhabeng seeks an extension until 30 September 2015 in terms of a payment plan adopted by its council. I am of the view that in so far as Eskom is also to be blamed for allowing the arrears to accumulate, and in so far as Matjhabeng would in any event not be in a position to pay such huge amount in full by the end of March 2015, it would be fair to both parties to grant an extension and this will be set out in more detail in my order. I intend to do this whilst mindful of the authorities relied upon by Mr Moloto which I believe are not on all fours with the facts *in casu*. Matjhabeng seeks leniency from the court and I shall oblige. However this will probably be its last opportunity to get its house in order.

[53] On 18 September 2014 Kruger J made a costs order and also in respect of all costs that were reserved earlier. There

is no reason why Mathjabeng shall not be held liable for the costs since then.

VII ORDER

[54] Therefore the following orders are issued:

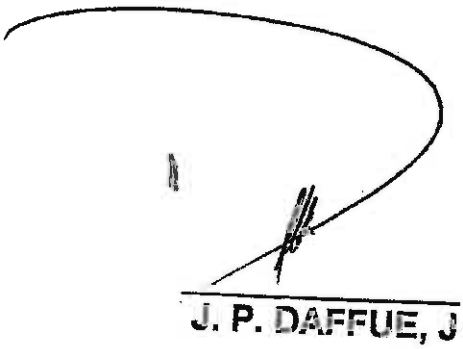
1. Mr Mothusi Frank Lepeana is convicted of contempt of court for failing to comply with the court orders dated 31 July 2014 and 18 September 2014 under the above case number.
2. Mr Lepheana is sentenced to six months' imprisonment, wholly suspended on the following conditions:
   (2.1) he shall in future strictly comply with paragraph 4 of the order of 31 July 2014 by reporting in writing to the court, with a copy simultaneously provided to Eskom, within fourteen calendar days of Matjhabeng's failure to pay its monthly account due to Eskom in full, the reasons for such default;
   (2.2) he shall disclose in writing the status of money collected from end users in lieu of electricity usage from June 2013 to 31 March 2015 on or before 30 April 2015;
   (2.3) he shall report in writing to the court, with a copy simultaneously provided to Eskom, within fourteen calendar days, the reasons for any default in respect of the monthly instalments payable relating to the arrears mentioned in paragraph 3 *infra*.
3. Matjhabeng is granted an extension to pay the full arrears, including interest, as at the date of this order in

eight equal instalments, starting on 28 February 2015 with a final payment on 30 September 2015, but in the event of failure to pay any instalment on due date the full outstanding amount at that stage will become due and payable, entitling Eskom to terminate Matjhabeng's electricity supply after following due procedure in terms of the Promotion of Administrative Justice Act, 3 of 2000.

4. Matjhabeng shall be obliged to pay the future monthly accounts for electricity supply in full on due date, failing which Eskom shall be entitled to terminate its electricity supply in the manner prescribed in paragraph 3 *supra*.

5. Matjhabeng shall pay Eskom's costs of the application incurred since the order of 18 September 2014 on an attorney and client scale.

6. This application is postponed to 8 October 2015, but leave is granted to either party to enrol the application with 14 days written notice, indicating in detail the factual and legal bases for any relief sought and/or the reasons for the set down.



J. P. DAFFUE, J

On behalf of applicant: Adv. M. C. Louw
Instructed by:
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On behalf of respondent:	Adv. N.H.Moloto Instructed by: Phatshoane Henney Inc. BLOEMFONTEIN

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