IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No: 511/03

Date Delivered: 11 April 2003

In the matter between:

VICTORIA PARK RATEPAYERS' ASSOCIATION **APPLICANT**

and

GREYVENOUW CC **FIRST RESPONDENT**

CHARLES MELVILLE **SECOND RESPONDENT**

NELSON MANDELA METROPOLITAN MUNICIPALITY **THIRD RESPONDENT**

JUDGMENT

PLASKET AJ:

[1] The applicant, a voluntary association, brought an urgent application that I heard on the afternoon of Friday 28 March 2003 in which it sought a rule nisi calling on the first and second respondents to show cause why they should not be committed for contempt of an order that I had made on 21 February 2003 in the case of *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others*.[1] I made an order in the terms set out below and undertook to provide my reasons later. Those reasons follow. On 4 April 2003,

1 SECLD 21 February 2003 (case no 3263/02) unreported. The Nelson Mandela Metropolitan Municipality, the first applicant in the initial application, has taken no part in the committal proceedings. It has, however, been cited as the third respondent. When I refer to the respondents in my judgment, such a reference is intended, unless the context indicates otherwise, to be a reference to the first and second respondents.

I heard the application for the committal of the first and second respondent. I reserved judgment. My judgment on the merits follows the reasons for the issue of the rule nisi.

[A] THE RULE NISI

[2] The order that I made on 28 March 2003 was in the following terms:

1) a rule nisi is issued calling upon the first respondent and the second respondent to show cause on Friday 4 April 2003 at 09h30 or as soon thereafter as the parties may be heard why an order in the following terms should not be made –

1.1. that the first and second respondents are in contempt of the order of court of Plasket AJ made on 21 February 2003 under case reference no. 3263/02;

1.2. that a fine, such as is deemed appropriate by this court, be imposed upon the first and second respondents in regard to such contempt;

1.3. that a period of imprisonment, such as is deemed appropriate by this court, be imposed on the second respondent by this court, such period of imprisonment to be suspended on conditions deemed appropriate by this court;

1.4. alternative relief;

1.5. that the costs of this application on the scale as between attorney and client be paid by the first and second respondents jointly and severally, the one paying the other to be absolved;

2) the matter is postponed to Friday 4 April 2003 and –

2.1. the first and second respondents are directed to file their answering papers, if any, by not later than noon on Tuesday 1 April 2003;

2.2. the applicant is directed to file its replying papers, if any, by not later than noon on Thursday 3 April 2003;

3) the issue of costs is reserved.

[3] Mr Friedman, who appeared for the respondents, argued that I should exercise my general discretion to withhold a remedy[2] and decline to issue the rule nisi. In essence, his argument was that, even if a rule nisi does not operate as an interim interdict, it nonetheless has an effect adverse to the interests of a respondent and, in this case, which was brought on about 24 hours notice, the respondent had not been able to place its version before the court.

[4] As against this proposition, Mr Mouton SC for the applicant argued that it is practice to launch applications for committal for contempt of court by way of seeking a rule nisi without necessarily seeking any additional, substantive, interim relief.

[5] It appears to me that the main purpose of the practice of seeking a rule nisi in cases such as this is to regulate how the matter is to proceed. Contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order.[3] This added element provides to every such case an element of urgency.[4]

[6] It has been held that, particularly in matters of urgency, the utilisation of the rule nisi procedure is to be encouraged. In *Safcor Forwarding*

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2 On the discretion to withhold remedies, Baxter *Administrative Law* Cape Town, Juta and Co: 1984, 678 states the position as follows: 'With the exception of the interdict de libero homine exhibendo (habeas corpus), which is available as of right, all are subject to the discretion of the court so that, even if one has established that the action in question was unlawful, the court might still refuse to grant the remedy prayed, though it will usually only refuse where the applicant is undeserving.'

3 This principle has recently been articulated by a full bench in *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T), 673D-E, in which Kirk-Cohen J held that '[c]ontempt of Court is not an issue inter partes; it is an issue between the Court and the party who has not complied with a mandatory order of Court'. This aspect is dealt with more fully below.

4 In support of the proposition that the continuing disregard of court orders is per se urgent, see *Protea Holdings (Pty) Ltd v Wriwt and another* 1978 (3) SA 865 (W), 868H-869A; *Wright v Saint Mary's Hospital, Melmoth and another* 1993 (2) SA 226 (D), 228E-F.

(Johannesburg) (Pty) Ltd v National Transport Commission[5] Corbett JA stated:

> 'The Uniform Rules of Court do not provide substantively for the granting of a rule nisi by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law. … This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule nisi is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, prima facie, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons. The rule nisi procedure must be considered in conjunction with the provisions of Rule 6(12) which, in the case of urgent applications, permits the Court to:
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> > "dispense with the forms and service provided for in these Rules and (to) dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet".
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> (And see in this connection *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 781H-782G.) In fact, the rule nisi procedure does make it possible for the application to come before the Court for adjudication more speedily than the usual procedures for the set down of applications or trials, and it does, in a proper case, permit of the granting of interim relief.'

[7] There is authority for the proposition that, in contempt of court cases, the

5 1982 (3) SA 654 (A), 674H-675C.

party alleged to be in contempt because he or she has failed or refused to obey an order is not automatically entitled to be heard while he or she remains in default.[6] While courts will obviously be loath to refuse to hear a party's defence, and it will only be in the most exceptional of cases that a party may be barred in this way from defending himself or herself, the rule nisi procedure allows the court to regulate the respondent's access to court, set the bounds of the dispute in the rule so that the respondent is in no doubt as to the case he or she must meet, and set the procedural rules for the further conduct of the matter.

[8] Flowing from the above, I am of the view that, from a procedural point of view, the application for a rule nisi as a first step in the committal application was a sensible expedient, especially when it is borne in mind that the matter was an urgent application.[7] In these circumstances, and on the basis of the applicant's papers only, the applicant established a prima case of contempt of court. As a result, it was entitled to the rule nisi that it sought: that relief, it seems to me, was the minimum needed to protect its interests and, at the same time, give recognition and protection to the rights of the respondents, who, after all, had not been heard on the merits at that stage.

[9] Mr Friedman urged me to decline to issue a rule nisi because of the harm it could do to the reputation of the respondents in the public eye. They would, he said, be found guilty of contempt of court before they were even heard. While one can accept that orders that have no formal legal effect, such as a rule nisi without interim relief, may nonetheless have informal effects in the public domain, one must be careful not to take this argument too far.

[10] The truth of the matter is that an application was launched against the

6 See *Clement v Clement* 1961 (3) SA 861 (T), 867A-C; *Byliefeldt v Redpath* 1982 (1) SA 702 (A), 714E-F; *Di Bona v Di Bona and another* 1993 (2) SA 682 (C), 688A-689J. See too Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (4ed by Van Winsen, Cilliers and Loots) Cape Town, Juta and Co: 1997, 827-828 (hereafter referred to as Herbstein and Van Winsen).

7 See Herbstein and Van Winsen, 379-380.

respondents for their committal for contempt of court. If erroneous assumptions are made about the import of a rule nisi, or about the mere launching of an application, for that matter, the respondents are free to take steps to correct those assumptions through statements to the media and so on. If the considerations raised by Mr Friedman are taken too far, the functioning of the courts would be unduly and unjustifiably hampered to the public detriment. The remedy available to the respondents lies in the exercise of the right to freedom of expression, rather than in seeking the curtailment of the applicant's rights when it has made out a prima facie case for the relief that it has sought.

[11] As a result, I was of the view that no good grounds existed for me to exercise a discretion against the granting of the relief that the applicant had sought and for which it had made out a case. I accordingly issued the rule nisi.

[B] THE COMMITTAL APPLICATION

(a) The Background

[12] During December 2002, the Nelson Mandela Metropolitan Municipality brought an urgent application against the respondents, the proprietors of a bar and restaurant known as the Crazy Zebra, in which it sought to interdict them from carrying on business in contravention of the zoning conditions applicable to the premises upon which the Crazy Zebra is situated, and from causing a nuisance by making excessive noise. The present applicant was cited as the fourth respondent in that matter. It made common cause with the municipality. In due course, four members of the present applicant applied for, and were granted, leave to intervene as applicants. In addition to the relief sought by the municipality, the additional applicants sought certain declaratory relief.

[13] The matter was heard in late January 2003 and I delivered my judgment on 21 February 2003. The order that I made was in the following terms:

a) restraining the first and second respondents from utilising or causing to be used erf 1882, Walmer, Port Elizabeth, situated at 1, 3rd Avenue, Walmer, Port Elizabeth (hereafter referred to as erf 1882), for any purpose other than residential 1 use, in accordance with the current zoning of this property;
b) restraining the first and second respondents from in any manner conducting the business known as the Crazy Zebra, or any other business, from erf 1882 until such time as the erf is appropriately rezoned to authorise such use;
c) directing the first and second respondents to take such steps as may be required to abate the noise nuisance occasioned by their use of erf 1883, Walmer, Port Elizabeth, situated at 3, 3rd Avenue, Walmer, Port Elizabeth (hereafter referred to as erf 1883);
d) declaring that zoning condition (xiv) applicable to erf 1883 does not authorise the first and second respondents to cause a noise nuisance;
e) directing the first applicant to pay the costs of the second, third, fourth and fifth applicants and the fourth respondent occasioned by the application for a postponement on 30 January 2003;
f) directing the first and second respondents, jointly and severally, the one paying, the other to be absolved, to pay the costs of the second, third, fourth and fifth applicants, occasioned by its opposition to their application to intervene;
g) directing the first and second respondents, jointly and severally, the one paying, the other to be absolved, to pay the costs of the main application.'

[14] The applicant alleges that not much has changed since I made the above order: erf 1882 continues to be used in contravention of the order and the noise that emanates from the Crazy Zebra continues to constitute a noise

nuisance. Based on these complaints, the applicant brought the present proceedings. The respondents, who admit knowledge of the order, deny that they are in contempt of court and they also argue that the matter was not urgent and ought to be dismissed on that basis alone. Before turning to the issue of urgency and the merits, I shall deal with the law on contempt of court.

(b) Contempt of Court

[15] Contempt of court is a criminal offence. It is committed, generally speaking, when a person unlawfully and intentionally violates the 'dignity, repute or authority of a judicial body' or interferes in the administration of justice in a matter pending before such a body.[8] It serves three important purposes, namely to protect the rights of everyone to fair trials, to maintain public confidence in the judicial arm of government and to uphold the integrity of orders of courts.[9]

[16] Contempt of court may take a number of forms, being descriptive of 'a broad variety of offences that have little in common with one another save that they all relate, in one way or another, to the administration of justice'.[10] As a result, a number of categorisations have been developed to conveniently pidgeon-hole the various manifestations of this offence. The form of contempt of court that is involved in this matter is usually referred to as contempt ex facie curiae because it is not alleged to have been committed during the course of judicial proceedings. It is also, rather inaccurately, referred to as civil contempt because the committal of the respondents has been sought by a party to civil proceedings on notice of motion, and not by way of a charge at

8 Milton *South African Criminal Law and Procedure* (Vol II: Common Law Crimes) (3ed) Cape Town, Juta and Co: 1996, 164 (hereafter referred to as Milton), cited with approval in *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC), para 13. See too Herbstein and Van Winsen, 815 who say: 'Criminal contempt may be constituted by conduct that is disrespectful to the court, such as wilful insult, the interruption of court proceedings or other conduct of that nature amounting to misbehaviour, and is punishable at common law.'
9 Milton, 165.
10 *S v Mamabolo* supra, para 13.

the instance of the Director of Public Prosecutions.[11] Thirdly, it takes the form of a failure or a refusal to obey a court order, as opposed to such forms of contempt as scandalising the court or publishing material that tends to prejudice pending judicial proceedings.

[17] Although usually brought by way of notice of motion, 'civil' contempt cases remain criminal in nature. This has led to a re-assessment of the issue of onus. In *Uncedo Taxi Service Association v Maninjwa and others*[12] Pickering J held that the fundamental right to a fair criminal trial guaranteed by s35(3) of the Constitution requires that, in order for an applicant in contempt proceedings to succeed, he or she must prove the elements of the offence beyond reasonable doubt. I am in agreement with this statement of the law.

[18] The elements of the offence that the applicant must establish are set out and discussed as follows by Baker AJ in *Consolidated Fish Distributors (Pty) Ltd v Zive and others*:[13]

> 'Contempt of Court, in the present context, means the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction. … In *Southey v Southey*, 1907 E.D.C. 133 at p.

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11 See Milton, 174 who says: 'Following English law terminology, it is customary to classify contempt of court into two broad categories: "civil" and "criminal". This division serves a useful purpose, for in the case of "civil" contempt, where X disobeys an order made against him in a civil case, the sanctions of the court are usually invoked at the instance of the other litigant, not the Attorney-General, and the punishment which is imposed is coercive in nature, designed primarily to secure compliance with the civil court's order. However, the terminology is misleading in so far as it suggests that, as in English law, "civil" contempt is not a criminal offence.' See too *S v Beyers* 1968 (3) SA 70 (A), 80C-G; *Uncedo Taxi Service Association v Maninjwa and others* 1998 (3) SA 417 (E), 420F-421A.

12 Supra, 427H-428C.

13 1968 (2) SA 517 (C), 522C-H. One gloss is necessary in respect of the above-cited dictum: in the light of the *Uncedo Taxi Service* Association case supra, discussed above, the onus is no longer the civil onus but the criminal onus. See too *Protea Holdings (Pty) Ltd v Wriwt and another* 1978 (3) SA 865 (W), 868A-H; *Cape Times Ltd v Union Trade Directories (Pty) Ltd and others* 1956 (1) SA 105 (N), 124C-F; *Noel Lancaster Sands (Edms) Bpk v Theron en andere* 1974 (3) SA 688 (T), 691A-D; *Culwerwell v Beira* 1992 (4) SA 490 (A), 493D-J. See further, Herbstein and Van Winsen, 815 who refer to the failure to obey an order as 'civil' contempt. They state that this form of contempt is committed by the 'wilful and mala fide refusal or failure to comply with an order of court'. They also make the important point that orders are to be obeyed and cannot be ignored even if the party against whom an order was made believes it to be wrongly made.

137, it was said that applicant for an attachment had to show a wilful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases, however, probably for the reason that in 99 per cent of these cases the whole order was disobeyed, which is obviously a "material" non-compliance. It is reasonable to suggest that where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the Court would take the substantial compliance into account, and would not commit for the minor non-compliance.

An applicant for committal needs to show -

(a) that an order was granted against respondent; and

(b) that respondent was either served with the order … or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and

(c) that respondent has either disobeyed it or has neglected to comply with it.

(In this instance it is undisputed that the order was duly served).

Once it is shown that an order was granted and that respondent has disobeyed or neglected to comply with it, wilfulness will normally be inferred … and the onus will then be on respondent to rebut the inference of wilfulness on a balance of probabilities.'

[19] The principal purpose of contempt of court proceedings when an order has been disobeyed has been held to be 'the imposition of a penalty in order to vindicate the Court's honour consequent upon the disregard of its order … and to compel the performance thereof'.[14] This purpose must, however, be viewed in a wider context. The Constitution, in which the judicial authority of the State is sourced, is founded, inter alia, on constitutional supremacy and

14 *Protea Holdings Ltd v Wriwt and another* supra, 868B. See too Herbstein and Van Winsen, 817-818.

the rule of law.[15] At the heart of the rule of law is the idea, foundational in civilised society, that the law must be administered by independent courts and that, as Dicey expressed it, 'no man is above the law' and 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.[16]

[20] As part of what may be termed a parcel of kindred fundamental rights designed to give expression to the founding value of the rule of law, s34 of the Constitution provides that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. In *Chief Lesapo v North West Agricultural Bank and anther*[17] Mokgoro J set out the purpose of s34 and its relationship to the rule of law. She held:

> 'A trial or hearing before a court or tribunal is not an end in itself. It is a means of determining whether a legal obligation exists and whether the coercive power of the State can be invoked to enforce an obligation, or prevent an unlawful act being committed. It serves other purposes as well, including that of institutionalising the resolution of disputes, and preventing remedies being sought through self-help. No one is entitled to take the law into her or his own hands. Self-help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by s 1(c) of our Constitution. …Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.'

[21] The learned judge proceeded to hold that an 'important purpose of section 34 is to guarantee the protection of the judicial process to persons

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15 Section 1(c).

16 *An Introduction to the Study of the Law of the Constitution* (10ed) London, MacMillan Press: 1959, 193. See too Mathews 'The Rule of Law – A Reassessment' in Kahn (ed) *Fiat Justitia: Essays in Memory of Oliver Deneys Schreiner* Cape Town, Juta and Co: 1983, 294, 301-302.

17 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC), para 11.

who have disputes that can be resolved by law'[18] and that the right of access to court is 'foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance'.[19]

[22] The right guaranteed s34 would be rendered meaningless if court orders could be ignored with impunity:[20] the underlying purposes of the right -- and particularly that of avoidance of self-help -- would be undermined if litigants could decide which orders they wished to obey and which they wished to ignore. The Constitution recognises this in s165, the section that creates the judicial authority. Section 165(3) provides that '[n]o person or organ of state may interfere with the functioning of the courts' and s165(5) provides that a any order issued by a court 'binds all persons to whom and organs of state to which it applies'.

[23] When viewed in the constitutional context that I have sketched above, it is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior 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. In this sense, contempt of court must be viewed in a particularly serious light in a constitutional state such as ours that is based on the democratic values listed in s1 of the Constitution, particularly those of constitutional supremacy and the rule of law. Contempt of court is not merely a means by which a frustrated

18 Para 13.
19 Para 22. See too *Concorde Plastics (Pty) Ltd v NUMSA and others* 1997 (11) BCLR 1624 (LC), 1644G-1645G; *Beinash and another v Young and others* 1999 (2) SA 116 (CC); 1999 (2) BCLR 125 (CC), para 17; *Moise v Transitional Local Council of Greater Germiston and others* 2001 (4) SA 491 (CC); 2001 (8) BCLR 765 (CC), para 23.
20 This point was made forcefully by Jafta AJP, albeit in a slightly different context, in *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk), 453A-D.

successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest. The contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution.[21] This principle was, it appears to me, what Kirk-Cohen J had in mind when he held, in *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng*[22] that contempt of court was an issue 'between the Court and the party who has not complied with a mandatory order of Court'.

(c) The Issues

(i) Urgency

[24] Mr Friedman argued that the application should be dismissed on the basis that it was not urgent. As I understand his argument, it is that the urgency that there may have been was self-created: the applicant was in a position to launch the proceedings by about 3 March 2003, when it wrote to the municipality's attorneys about the non-compliance with the order I granted on 21 February 2003. Yet, he argued, the applicant only launched its application on 26 March 2003, setting the matter down for the rule nisi on 28 March 2003.

[25] There are two bases upon which I take the view that Mr Friedman's argument cannot be upheld. The first is a legal issue and the second is factual.

21 It is worth noting that judicial officers take an oath of office in which they swear or affirm that they will 'uphold and protect the Constitution and the human rights entrenched in it'. See item 6(1) of Schedule 2 to the Constitution.
22 2002 (1) SA 660 (T), 673D-E.

[26] The legal point is that ongoing contempt of a court order, by its very nature, is urgent. In *Protea Holdings Ltd v Wriwt and another,*[23] Nestadt J held that as 'one of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element or urgency would be satisfied if in fact it was shown that respondents were continuing to disregard the order of 3 August 1977. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed'.

[27] I agree with the above-quoted statement of the law. I would add that it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances, and the dictates of fairness, allow.

[28] I turn now to the factual point. Even though contempt of court proceedings are by their nature urgent, an applicant may nonetheless misconceive the extent of the urgency or may not act with due haste and in this way abuse the provisions of the rules of court that permit urgent applications to be brought. There are, after all, different degrees of urgency. Mr Friedman argued that in this matter, the applicant has not acted with due haste and in this sense has sought to create its own urgency.

[29] The order that is at the heart of this dispute was issued on 21 February 2003. In order to determine whether the applicant has acted with due haste, it is necessary to consider what steps it has taken since then. Those steps are,

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23 1978 (3) SA 865 (W), 868H.

by and large, not put in dispute by the respondents. In the period between the granting of the order and the launching of these proceedings, it is clear from the papers that the applicant's members spent a great deal of time monitoring what was happening at the Crazy Zebra in order to gather evidence of the respondents' alleged contempt of court. Efforts were also made on more than one occasion to serve the order on the second respondent personally.

[30] On the day the order was granted, a copy of my judgment was supplied to a Captain Schnetler, who had previously dealt with complaints about the Crazy Zebra. Events at the Crazy Zebra were also monitored and it was observed that erf 1882 was used as an entrance to and exit from the Crazy Zebra. Loud music was played until the early hours of the following morning. This pattern was repeated on following evenings.[24]

[31] On 28 February 2003, a week after the order was granted, complaints were made to the police about the noise and about the fact that erf 1882 was being used for business purposes. Nothing appears to have been done by the police about these complaints.[25] Efforts were also made to obtain the services of Mr Jacobus Slabbert to conduct a noise survey, but he was unable to do so at that stage.[26] On I March 2003, further complaints were made to the police. On this occasion, the police responded to the complaint by visiting the house of the Lovemores who had made the complaint but they informed the Lovemores that there was nothing that they could do.[27]

[32] On 3 March 2003, the applicant's attorney wrote a letter to the municipality in which the municipality was informed of the results of the monitoring of the Crazy Zebra by members of the applicant and was requested to take action in the interests of residents of the area around the

24 Affidavit of Lovemore, paras 18-22 (pages 16-18).
25 Affidavit of Lovemore, para 23 (page 18).
26 Affidavit of Lovemore, para 24 (pages 18-19).
27 Affidavit of Lovemore, paras 27-28 (pages 19-20).

Crazy Zebra.[28] On the following day, and again on 7 March 2003, the applicant's attorney received letters from the municipality's attorney to the effect that no instructions had been received from the municipality to do anything to enforce the order but that the applicant was free to do so if it wished.[29] On 11 March 2003 the applicant's attorney wrote directly to the municipal manager. This letter, which was hand-delivered on the following day, demanded that the municipality take action against the respondents and that it undertake to do so by 14 March 2003. No response to this letter was received.[30]

[33] Complaints were again made to the police on 14 March 2003 about the noise emanating from the Crazy Zebra but, once again, nothing appears to have materialised from these complaints. During the course of the afternoon of 14 March 2003, a Mr Jan Hendrik Rossouw took photographs that depict the entrance to the Crazy Zebra, traffic outside it and various other aspects of its operation.[31] On that evening, however, Mr Slabbert conducted a noise survey from the Lovemore's home. On the following evening more complaints were lodged with the police, once again with no apparent result.[32]

[34] Attempts were also made to have the order of 21 February 2003 served personally on the second respondent. The order was served on an employee on 7 March 2003 but the sheriff's return of service states that 'Mr Melville has left for George and is not often at the business.'[33] On counsel's advice, it was decided to take further steps to try to ensure that the second respondent had actual knowledge of the order. To this end, the sheriff attempted to serve the order on the second respondent on 24 March 2003, when an auction took

28 Affidavit of Lovemore, para 35 (page 22) and annexure 'HL8' thereto (pages 79-80).
29 Affidavit of Lovemore, paras 36-39 (pages 22-24) and annexures 'HL9' and 'HL10' thereto (pages 81 and 82-83 respectively).
30 Affidavit of Lovemore, paras 40-41 (page 24) and annexure 'HL11' thereto (pages 84-86).
31 Affidavit of Jan Hendrik Rossouw, para 3 (page 97) and annexure 'A'-'J ' (pages 98-102).
32 Affidavit of Lovemore, paras 42-47 (page 24-26).
33 Affidavit of Lovemore, para 16.5 and 16.6 (page 13) and annexures 'HL4' and 'HL5' (pages 75 and 76 respectively).

place at the Crazy Zebra. The second respondent could not be located but the sheriff apparently spoke to him telephonically.[34] The following is recorded in the return of service:[35]

> 'I duly attempted service of the process in this matter but after diligent search and enquiries made, the Charles Melville could not be found at the given address. A telephone call was made – spoke to Mr Charles Melville. He said I will have to find him and does not want to disclose where he is. He wants to know why must he make our job easy. I told him we cannot get hold of him at the Crazy Zebra and that is why I am phoning – Mr Charles Melville hang up. I phoned Robert Blignaut – wanted to know when Mr C Melville will be at their offices. He said he is also struggling to get hold of Mr C Melville but will advise us when Mr Melville will be at their offices. Phoned Mr Martindale and advised him of same. He said I must send this document back to his offices. Attempts: 24/3/03 at 11h15 -- 3 – 3rd Avenue Walmer -- absent.'

[35] This chronology is not consistent with an applicant that has dragged its heels. It is clear from the facts that I have set out above, that the applicant, even if it may be accused of over-caution, can certainly not be accused of reliance on self-created urgency, as that term is understood in cases such as *Schweizer-Reneke Vleis Maatskappy (Edms) Bpk v Die Minster van Landbou en andere*.[36] This is also not a case, whether factually or legally, in which it can be said, to quote Kroon J in *Caledon Street Restaurants CC v D'Aviera*,[37] that 'the use that the applicant made of the procedure relating to matters of urgency, was a misuse, indeed an abuse, of the process of the court'. In the circumstances, I am of the view that the respondents' challenge based on urgency must fail.

(ii) The Merits

34 Affidavit of Lovemore, para 16.7 (pages 14-15).
35 Annexure 'HL7' to the affidavit of Lovemore (page 78).
36 1971 (1) PH F11 (T), F11-12.
37 [1998] JOL 1832 (SE), 21.

[36] The applicant alleges that the respondents are in contempt of the first three of the orders that I issued on 21 February 2003, namely orders:

a) restraining the first and second respondents from utilising or causing to be used erf 1882, Walmer, Port Elizabeth, situated at 1, 3rd Avenue, Walmer, Port Elizabeth (hereafter referred to as erf 1882), for any purpose other than residential 1 use, in accordance with the current zoning of this property;
b) restraining the first and second respondents from in any manner conducting the business known as the Crazy Zebra, or any other business, from erf 1882 until such time as the erf is appropriately rezoned to authorise such use;
c) directing the first and second respondents to take such steps as may be required to abate the noise nuisance occasioned by their use of erf 1883, Walmer, Port Elizabeth, situated at 3, 3rd Avenue, Walmer, Port Elizabeth (hereafter referred to as erf 1883)'

[37] I turn now to the evidence upon which these allegations are based. For convenience, I shall deal with the allegations relating to erf 1882 and then the allegations relating to erf 1883.

[38] The applicant alleges that, on the evening of 21 February 2003 and continuously thereafter, erf 1882 has been used as the entrance to the Crazy Zebra. For instance, Mr Lovemore says the following:[38]

> 'On Friday evening, 21 February 2003, activities at the Crazy Zebra carried on as it has in the past. Because I anticipated this, I gave Captain Schnetler of the SAPS, with whom I had previously laid complaints about the activities of the Crazy Zebra, a full copy of the judgment of Plasket AJ. The entrance from Union Road, which ptovides access to Erf 1882, was open and I observed members of the

38 Affidavit of Lovemore, para 18 (pages 16-17).

> public proceeding through it onto the premises of both erven. From before 17h00 patrons of the Crazy Zebra parked their cars in Union Road on the pavement that adjoins that adjoins Erf 1882 and also on the opposite pavement adjoining the Victoria Park High School premises. There were in excess of 50 cars at any one time. Cars continuously arrived and left and car guards patrolled along the lines of cars. The people that alighted from the cars proceeded through the Union Road entrance to Erf 1882 and likewise patrons leaving the Crazy Zebra left the premises via the same entrance. This all took place next to and in front of my premises, which is situated next door to the Crazy Zebra. In this regard, I respectfully refer to photograph A taken by Jan-Hendrik Rossouw, who has made an affidavit in these proceedings. It is clear that Erf 1882 continues to be used as before. It is not used for residential purposes at all, but is used as the entrance, and an integral part, of the Crazy Zebra business on both erven. I should also point out that the buildings on the two erven are contiguous and form a unit.'

[39] Photograph A, referred to by Mr Lovemore, was according to the affidavit of the photographer, taken on 14 March 2003.[39] It depicts five people and two cars parked outside a building identified by the photographer as the 'Union Road bar entrance to Crazy Zebra erf 1882'. On the wall to the right of what appears to be an entrance are the words 'Bar Entrance'.

[40] Mr Melville has responded to these allegations. He denies that he is in contempt of court and says the following – which I quote in full -- in respect of the activities mentioned above concerning his use of erf 1882:[40]

> '15.1. All activities on Erf 1882, in regards to the business of the Crazy Zebra, ceased with immediate effect upon the granting of the Order by the Honourable Plasket AJ.

39 Affidavit of Jan Hendrik Rossouw, para 3 (page 97). Photograph A is at page 98.
40 Affidavit of Melville, paras 15.1-15.11 (pages 111-113).

15.2. The First Respondent had constructed an entrance to the Crazy Zebra from Union Road, in order to facilitate the easy flow of traffic. Moreover, taking into account that both properties were being used for the conduct of the business of the Crazy Zebra at the time (prior to the Order), it was deemed expedient to have an additional entrance on that side.

15.3 All business activities pertaining to the Crazy Zebra on Erf 1882 ceased from date of Court Order and that remains the case to date.

15.4. As far as I understand, there is nothing prohibiting Erf 1882 as a thoroughfare. It is only used for that purpose. I reiterate that no business activities take place on Erf 1882. The patrons of the Crazy Zebra have always parked in Union Road and whether or not they use that entrance, makes no difference to the flow of traffic whatsoever.

15.5. The patrons can walk around or enter through Erf 1882. It really makes no difference.

15.6. I respectfully aver that to permit an entrance via the Union Road entrance, is not in breach of the Court Order. It is nothing more and nothing less than a thoroughfare.

15.7. I have no desire to be in breach of a Court Order. I have and intend to comply. I am of the view (with respect) that walking over Erf 1882 in order to access the Crazy Zebra is not a contemptuous activity and does not warrant an Application of this nature.

15.8. The patrons of the Crazy Zebra have always parked their cars in Union Road, whether they entrance from Union Road, alternatively, the other side. The entrance is on the corner and is as far (or virtually) from Lovemore's property as the other entrance (which is also used).

15.9. If Erf 1882 was a vacant plot (I am fully entitled to demolish the buildings) the patrons of the Crazy Zebra would be fully entitled to park their cars on the vacant plot and to walk over the vacant plot to access the Crazy Zebra from the side.

15.10. I reiterate that it is used only as a thoroughfare and no business

> activities whatsoever are conducted on Erf 1882, nor do I believe (respectfully) that utilising it as a thoroughfare is in breach of the zoning regulations.
>
> 15.11. As I understand zoning regulations, any property owner is entitled to utilise his property for a thoroughfare. Nothing would prohibit the Deponent, Mr Lovemore, from allowing people to access the Crazy Zebra from his property. This remains my understanding of the matter.'

[41] Later he stated that his view was that 'leaving the Union Road entrance open for a thoroughfare, would create a better flow and less of a nuisance. The thoroughfare is not necessarily part of the conduct of the business of the Crazy Zebra and was left open for convenience purposes only'.[41] He also stated that his attorneys 'have now explained to me that my approach in regards to the thoroughfare may be wrong. I do not agree with them. In this regard, if ordered, I will of course close the thoroughfare so that patrons can only access from the other side'.[42]

[42] It is clear from the evidence of the applicant, when read with the explanation of Mr Melville, that erf 1882 is used as an integral part of the business of the Crazy Zebra. No amount of linguistic gymnastics alters that fact. It is used and was intended to be used, as photograph A depicts in the clearest of terms, as the entrance to the bar, and hence for a purpose other than a residential purpose and as part of the business of the Crazy Zebra.

[43] To categorise Mr Melville's response as disingenuous would be to flatter it. It displays, in my view, a disturbing level of disdain for the court that issued an order in clear and unambiguous terms and for the rights of others, particularly of members of the applicant. It displays an utter lack of respect for the law. I view his explanation in a very serious light: it amounts to an admission that he has, as alleged by the applicant, proceeded with wilful

41 Affidavit of Melville, para 38.4 (page 117).
42 Affidavit of Melville, para 39 (page 117).

disregard for the order that prohibited him from utilising or causing erf 1882 to be used for any purpose other than residential 1 use, and that restrains him from 'in any manner conducting the business known as the Crazy Zebra, or any other business, from erf 1882 until such time as the erf is appropriately rezoned to authorise such use'.

[44] His wilfulness and bad faith are palpable in his explanation. This is especially true of his statement that he has disregarded the advice of his attorneys. His statement that he will 'close the thoroughfare' if ordered to do so is also instructive of his wilfulness and bad faith: he was ordered to 'close the thoroughfare' on 21 February 2003 but now says that he will only do so if he is ordered to do so once again.

[45] The evidence of the respondents' failure to comply with the order that interdicted them from causing a noise nuisance rests on two pillars, namely, the direct evidence of the inconvenience caused by the noise that emanates from the Crazy Zebra and the expert evidence of Mr Slabbert. As against this, the explanation of Mr Melville must be assessed.

[46] The affidavit of Mr Lovemore, supported by other members of the applicant is that the noise levels emanating from the Crazy Zebra are still unacceptably loud and that not much has changed since the order of 21 Fevbruary 2003 was granted.

[47] According to Mr Lovemore, on 21 February 2003, the 'crowd noise increased as the number of people inside increased. A band started playing from 17h15. The music was unbearably loud and undoubtedly caused a nuisance. The loud band noise went on until 22h00 and, thereafter, recorded music was played which could be heard from my premises. The noise went on until 02h00 on Saturday morning'.[43] On the following day the 'music and

43 Affidavit of Lovemore, para 19 (page 17).

crowd noise were very loud and disturbed the peace'[44]

[48] Mr Lovemore stated that 'Wednesday nights, Friday nights and Saturday afternoons and evenings are the times when the noise is at its loudest and the crowds at their biggest'.[45] He complained about loud music being played on 28 February 2003 that 'disturbed the residential amenity of neighbouring residents, including myself' and that this was both a common law nuisance and a statutory noise nuisance;[46] that the crowd that evening was particularly big and that this resulted in 'substantial noise and traffic congestion as well as wheel spinning in Union Road from patrons leaving Crazy Zebra via the exit from Erf 1882'.[47]

[49] Much the same pattern appears throughout the period covered by the affidavit of Mr Lovemore. So, for instance, he says of the events of Friday 7 March 2003 that the 'activities of the Crazy Zebra continued in the same way as described hereinbefore in regard to the previous weekend. The worst problems occurred from 17h00 to 22h00 when the pavements were again full of vehicles. Patrons constantly used the Union Road (Erf 1882) entrance. A band played very loud music and the crowd noise increased in intensity and caused a disturbance and a nuisance'.[48]

[50] The following weekend was much the same, with Mr Lovemore describing the music played by the band as 'loud and intolerable'.[49] He proceeded to state that '[l]iving next door to a loud band and knowing that there was a Court order against the owners of the Crazy Zebra prohibiting them from creating such a noise nuisance made our lives hell'.[50]

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44 Affidavit of Lovemore, para 20 (page 17).
45 Affidavit of Lovemore, para 21 (page 18).
46 Affidavit of Lovemore, para 22 (page 18).
47 Affidavit of Lovemore, para 25 (page 19).
48 Affidavit of Lovemore, para 32 (page 21).
49 Affidavit of Lovemore, para 42 (page 24).
50 Affidavit of Lovemore, para 43 (pages 24-25).

[51] This evidence of the level of the noise supports the expert evidence of Mr Slabbert who conducted a noise survey on the evening of 14 March 2003 from the home of Mr Lovemore. His conclusions are contained in a report attached to his affidavit. They are two-fold: first, he concluded that his results indicate 'that the Crazy Zebra Restaurant and Bar is still in breach of the Noise Control Regulations R638 in that the noise levels exceeded the ambient sound level with 7Db(A) and more, therefore causing a disturbing noise'; and secondly that the 'music emanating from the Crazy Zebra premises disturbs or impairs the convenience of the residents in the vicinity and therefore also constitutes a noise nuisance in terms of the Noise Control Regulations'.[51]

[52] Mr Melville appears to raise two defences. The first, dealt with in his affidavit, is a denial that a nuisance has been caused by the noise that emanates from the Crazy Zebra. The second, advanced in argument, is that, even if the noise is still over acceptable limits, it is better than it was prior to 21 February 2003, indicating a lack of wilfulness and bad faith on the respondents' part.

[53] When one views the nature of Mr Melville's denial, one is struck by the paucity of detail that he provided as to the steps that he says have been taken to reduce the noise levels. In paragraph after paragraph he denies that a nuisance has been caused but his denial never goes beyond a bare denial. Accordingly, it cannot be said that a genuine dispute of fact has been created and, in terms of the test set out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,[52] the version of the applicant can be accepted on the papers.

[54] Some examples will illustrate the point. In answer to the averment that, on the evening of 21 February 2003, the music was unbearably loud, Mr

51 Affidavit of Slabbert, para 10 (page 127) and annexure 'JS1' thereto (page 130).
52 1949 (3) SA 1155 (T), 1165. See too *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), 634I-635C.

Melville denied this and added that there 'has been a continued effort to reduce the sound in order not to create a private nuisance. As the Deponent will have it, he wants the Crazy Zebra to close. The First Respondent has complied with the terms of the Court Order in regard to noise'.[53] Nothing is said about what these efforts were to reduce the noise. Without that, Mr Melville's conclusion that the first respondent has complied with the order is meaningless.

[55] To similar effect, Mr Melville dealt with the allegations of noise on the next day by stating that the music 'was not unbearably loud. It has been completely toned down, so as to avoid a public nuisance'.[54] In response to the averments of disturbingly loud music being played on 28 February 2003, Mr Melville simply denied that the music was loud and stated without further explanation that it 'has been substantially toned down in order to comply with the restraints of the court order'.[55]

[56] In response to the statement that, on 14 March 2003, Mr Slabbert conducted a noise survey that indicated that a noise nuisance was still being caused at the Crazy Zebra, Mr Melville said the following:[56]

> 'I am unable to respond to this allegation, save to deny it. Every single attempt has been made to reduce the sound. I contend that the Deponent is being malicious. On his version, the neighbour's dogs should have bark reduction surgery. However, the Deponent has four dogs which bark incessantly. He is creating a public nuisance and has more dogs than permitted by law.'

[57] I conclude on the basis of the evidence concerning the level of noise that

53 Affidavit of Melville, para 16 (page 113).
54 Affidavit of Melville, para 17 (page 113).
55 Affidavit of Melville, para 19 (page 113). See too para 34 (page 116) and para 37 (page 116) in which he stated that the music had been 'substantially toned down' and that a 'one man band is used and we have constantly ensured that the sound is reduced not to exceed permitted decibel levels'.
56 Affidavit of Melville, para 40 (page 117-118).

has emanated from the Crazy Zebra that a noise nuisance continued to be caused after the order of 21 February 2003 was issued and that Mr Melville's version that the levels of noise do not constitute a noise nuisance must be rejected. He has not met the case of the applicants and has not even told the court what steps he took to reduce the levels of the noise. If he had done this, it would have been possible to assess the reasonableness of his efforts. In the absence of such detail – and particularly when he turns to the type of snide and irrelevant response set out in the paragraph above to detailed and serious allegations – he can hardly be heard to complain when it is found that his version cannot gainsay the wilfulness and bad faith on his part that is so evident from the uncontested evidence of Mr Slabbert and Mr Lovemore. The second string to his bow – that there has been progress in reducing noise levels – fails for the same reason: the evidential foundation for such a conclusion is lacking in the absence of an explanation of precisely what steps were taken by Mr Melville to reduce the noise levels.

(iii) Conclusions on the Merits

[58] On the view that I take of the evidence, and on the basis that the onus rests on the applicant to establish the respondents' contempt of court beyond reasonable doubt, it has been proved: that the respondents had knowledge of the order of 21 February 2003 and what it prohibited; that they disobeyed the order by using erf 1882 for a purpose other than a residential purpose and used it, instead, for the purposes of conducting the business of the Crazy Zebra; that they continued to cause a noise nuisance on erf 1883 and took no steps to abate that nuisance as they were ordered to do; that their conduct was wilful in that they proceeded with a contemptuous disregard for the order and for the rights of others; and that, from the nature of their conduct, and the explanations of the second respondent, it can be inferred that their conduct was mala fide.[57]

57 Note that knowledge of the order as well as wilfulness and bad faith in respect of its disobedience of the order is imputed to the first respondent on the basis of the knowledge,

[59] In the result, the first and second respondents are guilty of contempt of court. The next issue is the sanction that must be imposed in order to meet the purposes of the court's jurisdiction to commit for contempt of court those who disobey orders.

[60] It was argued by Mr Friedman that, if I reached the conclusion that I have, I ought to postpone judgment on the sanction so that the situation can be monitored over time and, in this way, the respondents can purge their contempt. As with the merits, no evidential foundation has been laid for such an order to be made: Mr Melville has not informed the court of any problems he may face in complying immediately with the order that he abate the noise nuisance created by his business; and I cannot imagine why he may require time to comply with the order that requires him to stop using erf 1882 as he has.

[61] I view the respondents' contempt in a very serious light. It is brazen and disdainful of the rights of others. It seeks to bring the administration of justice into disrepute by undermining one of the most important foundations of an ordered and civilised society, respect for, and obedience to, the law. I would have considered sentencing Mr Melville to a term of imprisonment, without the option of a fine and without suspending it, but for the fact that the applicant did not seek such a sentence in their notice of motion. I intend to impose a fine on the first and second respondents, jointly and severally, and to impose a term of imprisonment on the second respondent if either he or the first respondent do not pay the fine within a specified time. In addition, I intend to impose a period of imprisonment on the second respondent but it will be suspended on suitable conditions. I shall set out the details in the order I make in due course.

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wilfulness and bad faith of the second respondent, an officer of the first respondent for whose conduct it can be held liable. See *Höltz v Douglas and Associates (OFS) CC en andere* 1991 (2) SA 797 (O), 802G. Herbstein and Van Winsen, 816.

(iv) Costs

[62] The applicant seeks an order that the respondents pay its costs on the scale of attorney and client. This is based on four cumulative considerations, namely: that the conduct of the respondents that is complained of – the failure to comply with zoning conditions and the causing of a noise nuisance -- is not only unlawful conduct but also criminal conduct and thus is deserving of a punitive costs order; that the nature of the proceedings – to preserve and maintain the dignity, authority and effectiveness of the courts calls for such a costs order; that the applicant who, after all, has an order in its favour, was forced to approach the court again because of non-compliance with that order likewise militates in favour of a departure from the usual party and party costs order; and that 'it is just and fair that the applicant should, as far as practically possible, not be out of pocket in an application of this nature, especially where the Municipality, which has much greater resources at its disposal, declined to come to the assistance of the residents and ratepayers falling under its jurisdiction'.[58]

[63] I am of the view that there is merit in the submissions of the applicant and that those factors entitle it to a costs order on the attorney and client scale.[59] This will be reflected in the order that I make below.

(d) The Order

[64] The following order is made:

a) The first and second respondents are in contempt of the order issued in *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and others* SECLD 21 February 2003 (case no. 3263/02)

58 Affidavit of Lovemore, paras 61.1-61.4 (pages 30-31).
59 See *Martin v French Hairdressing Saloons Ltd and others* 1950 (4) SA 325 (W), 330G-H.

unreported.

b) The first and second respondents are directed to pay a fine of R10 000.00 jointly and severally, the one paying, the other to be absolved, by not later than 15h00 on Friday 25 April 2003, such fine being payable at the office of the Registrar of this court.

c) The second respondent is sentenced to three months imprisonment in the event of the fine mentioned above not being paid timeously, fully or at all.

d) The second respondent is sentenced to three months imprisonment, wholly suspended for three years, on condition that he not again be committed for contempt of the order in the above-named case during the period of suspension.

e) The first and second respondents are directed to pay the costs of the applicant jointly and severally, the one paying, the other to be absolved, including the costs that were reserved on 28 March 2003, on an attorney and client scale.

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C Plasket

Acting Judge