IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO. 6957/2010

In the matter between:

THE NATIONAL MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	1ST APPLICANT
THE NATIONAL MINISTER OF FINANCE	2ND APPLICANT
and	
ETHEKWINI MUNICIPALITY	RESPONDENT

In re:

INDEPENDENT SCHOOLS ASSOCIATIONS OF SOUTHERN AFRICA	APPLICANT
and	
ETHEKWINI MUNICIPALITY	1ST RESPONDENT
THE NATIONAL MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	2ND RESPONDENT
MINISTER OF FINANCE	3RD RESPONDENT
STELLENBOSCH MUNICIPALITY	4TH RESPONDENT

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INTRODUCTION

[1] The first applicant is the National Minister of Co-operative Governance and Traditional Affairs and the second applicant is the National Minister of Finance (the Ministers).

[2] The respondent is the Ethekwini Municipality (Ethekweni). I shall refer to the parties as the Ministers and Ethekwini.

[3] The relief sought in the original application that was filed in the office of the Registrar on 18 June 2012 is for the court order dated 10 May 2011 to be rescinded and or varied and or set aside, together with costs against those parties who oppose the application and such further and or alternative relief.

[4] On 17 July 2013 the notice of motion dated 18 June 2012 was amended by inserting prayers 1 and 2 and placing in the alternative the main prayer 1 in the original notice of motion. In the amended notice of motion the Ministers seek in the main a declaratory order. They seek that this Court should declare that the court order dated 10 May 2011 must be interpreted to exclude the following documents from the record required to be dispatched by the Ministers to the Registrar of the Court~~.~~:

[4.1] Study to assist the Department of Local Government ("DPLG") to determine appropriate levels of ratios and limits;

[4.2] Counsel's opinion given to the first applicant on:

4.2.1 the prospects of success (in relation to the case in the North Gauteng High Court between the DPLG and Independent Schools Association of Southern Africa); and

4.2.2 how the Department may re-introduce ratios's should the Minister decide.

[5] Ethekwini has opposed the application and has filed a counter application whereby Ethekwini it seeks an order that the Ministers' opposition to the review application instituted by Ethekwini, be struck out and in addition thereto, that both the Ministers should be declared to be in contempt of the court order of 10 May 2011 and to be sentenced to such punishment as the Court deems appropriate which shall be suspended provided they comply with the court order of 10 May 2011 within five days.

[6] The court order of 10 May 2011 issued by MURUGASSEN J reads as follows:

"It is ordered:

1. That the National Minister for Co-oporative Governance and Traditional Affairs and Minister of Finance are directed to dispatch to the Registrar of this Honourable Court, within 10 days of the date of this order, the correct and complete record of all of the documents relating to the decisions which the

Ethekwini Municipality seeks to review and set aside in the counter-application and to notify the Ethekwini Municipality that they have done so.

2. That in the event the National Minister for Co-operative Governance and Traditional Affairs and/or National Minister of Finance fail to comply with the terms of Prayer 1 above, the Ethekwini Municipality is granted leave to apply to this Court on the same papers, supplemented as far as may be necessary, for an order striking out their opposition to the counter application.

3. That the National Minister for Co-operative Governance and Traditional Affairs and National Minister of Finance are directed to bear the costs of this application jointly and severally.

~~[7]~~ BACKGROUND FACTS

[7.1] Independent Schools Association of Southern Africa (ISASA) brought an application before this court against Ethekwini under case number 6957/2010. The application was a sequel to an application brought by the same ISASA in the North Gauteng High Court under case number 59133/09 against the Minister of Co-operative Governance and Traditional Affairs and the Minister of Finance. The North Gauteng High Court application was subsequently settled between ISASA and the Ministers. In terms of the settlement which was made an order of court on 15 March 2010 by MAKGOKA J, it was ordered that the Ministers concerned shall pursuant to the provisions of section 19(1)(b) and 83 of the Local Government Municipality Property Rates Act No 6 of 2004 ('the Rates Act') publish regulations in the Government Gazette prescribing an upper limit rate ratio of 1:0:25 for properties owned by public benefit organisations as contemplated in section 8(2)(q) of the Rates Act (the regulations).

[7.2] In terms of paragraph 2 of the order the Ministers were required to publish the regulations by no later than Tuesday 30 March 2010.

[7.3] ISASA then brought an application before this court. The application by ISASA and the orders sought in the amended notice of motion are to the effect of a declaration that Ethekwini may not, with effect from 1 July 2010, levy rates in excess of certain percentages on non-residential properties owned by public benefit organisations such as schools, alternatively reviewing and setting aside certain resolutions taken and directing the Ethekwini to pay to the schools listed in annexure X ~~are~~ amounts received pursuant to the rates already levied and further or alternative relief.

[7.4] The application by ISASA was opposed by Ethekwini. In response to the aforesaid application by ISASA, Ethekwini filed a counter application in terms whereof it sought to set aside the regulations issued by the Ministers. An application to join both the Ministers as respondents to the application was granted by an order dated 25 February 2011. In terms of the counter application, which was brought as a review in terms of Rule 53 of the Uniform Rules of Court, the Ministers were required to dispatch the record of the decisions or proceedings sought to be

reviewed within 15 days after receipt of the notice of the counter application.

[7.5] The record was dispatched on behalf of the Ministers by the office of the State Attorney. After the record was dispatched, Ethekwini brought an application in terms of Rule 30A and 35(11) to compel the Ministers to produce the full record, as in their opinion the Ministers had failed to comply with Rule 53(1)(b) of the Uniform Rules of Court.

[7.6] In terms of the notice of motion the Ministers were called upon to produce the correct and/or complete record within 10 days of the date of the service of the notice, failing which Ethekwini ~~will~~ would apply to court for an order compelling compliance therewith and/or such ancillary relief as is appropriate, including an order dismissing the Ministers' defence.

[7.7] It is necessary for the purpose of this judgment to record the relief sought in the notice of motion to compel which reads as follows:

7.7.1 In Part B of the notice of counter application, Ethekwini seeks to review and set aside the decision of the second respondent, concurred in by the third respondent, to amend regulations promulgated in terms of the Local Government: Municipal

Property Rates Act 6 of 2004, published in the Government Gazette on 1 March 2010 (No R195)(the amended regulations).

7.7.2 It is the record relating to these decisions which the second and third respondents are obliged under Rule 53(1)(b) to furnish.

7.7.3 On 22 March 2011, and in an attempt to comply with Rule 53(1)(b), the second and third respondents delivered to Ethekwini's attorneys a bundle of documents.

7.7.4 The bundle of documents provided does not constitute the complete record relating to the decisions sought to be reviewed.

7.7.5 The decision to promulgate the amended regulations was taken in 2010 following on the settlement of an application instituted by the applicant in the main application (Independent Schools Association of South Africa referred to as ISASA) against the second and third respondents in the North Gauteng High Court.

7.7.6 The record that has been provided does not contain any documents relating to the decision to promulgate the amended regulations during March 2010. All of the documents in fact relate to the people at 2007 to 2009 and none relate to 2010 when the decision to promulgate the amended regulations was taken.

7.7.7 Ethekwini has no knowledge of the documents considered by the second and third respondents in taking the decisions which are sought to be reviewed but from the allegations made by the second and third respondents under oath and the documents

which have been provided, the record would necessarily have included (but not be limited to) the attachments to the submission to the Minister of Provincial and Local Government prepared to during September 2007 (which attachments included, *inter alia*, the study to assist the DPLG to determine appropriate levels of ratios and limits and other documents), the papers in the application brought by ISASA referred to in paragraph 5 hereof, the advice received from counsel in regard to the settlement of ISASA's application, the settlement agreement, the order taken, counsel's opinion that publication was not necessary, the communications to obtain the second respondent's approval for the settlement, the second respondent's request to the third respondent to concur in the decision to promulgate the amended regulations, the third respondent's acknowledgement and notification to the second respondent that he concurred in the decision and the communications between the second respondent and SALGA before publishing the amended regulation.

7.7.8 None of the documents referred to in paragraph 7.7.7 form part of the bundle furnished to Ethekwini. The second and third respondents would also reasonably have relied upon further documents the description and nature of which is within their exclusive knowledge.

7.7.9 The record that has been furnished accordingly does not constitute a proper or a complete record and the second and third respondents have failed to comply with Rule 53(1)(b).

[7.8] It was the aforementioned application which led to the order which was granted on 10 May 2011 to the effect that the Ministers should within 10 days of the date of the order dispatch to the Registrar (of this Court????) the correct and complete record of all the documents relating to the decisions which Ethekwini seeks to review and set aside in the counter application (my underlining). In that order, Ethekwini was granted leave to apply to Court on the same papers supplemented as far as may be necessary for an order striking out the opposition to the counter application.

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[8] The Ministers now seek in the main a declaratory order that this Court should declare that the court order by MURUGASEN J dated 10 May 2011, must be interpreted to exclude documents from the record required to be dispatched by the Ministers to the Registrar of the Court, based on the argument that they are privileged and/or confidential and/or are internal memos or tools designed to assist the Ministers in their decision-making.

[9] The matter was argued before me on 4 August 2014.

[9.1] In their heads of argument and in oral argument counsel for the Ministers, Mr *Mokhari* SC, contended that the declaratory order sought will resolve the pending dispute between the parties in terms whereof whether the record to be dispatched to Ethekwini includes all documents including privileged and confidential documents and documents which are irrelevant to the subject matter of the review. Mr *Mokhari* argued that the Ethekwini does not require such documents in order to prosecute the review application. Furthermore, a party who brings a review application is not entitled to conduct a fishing expedition. In the alternative to the declaration and in the event that this Court was not inclined to grant the declaration of rights in this regard, Mr *Mokhari* argued that this Court should vary the order or rescind it. In respect of the counter application by Ethekwini to strike out the defence of the Ministers and to hold them in contempt of the court order, Mr *Mokhari* argued that these were drastic remedies and that Ethekwini had failed to discharge the onus upon it. Furthermore, there could not be both applications at the same time and, in any event, they are premature.

[9.2] In the heads of argument filed by Ethekwini, there was no reference to the declaratory order being sought. Mr *Pammenter* SC, counsel ????
for Ethekwini, indicated in court that the amended notice of motion that the Ministers now sought, together with the supplementary affidavit that

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had been filed, was never served on Ethekwini. However, he made no objection in court to the amendment now being sought or the supplementary affidavit filed. He further indicated that he was prepared to argue the matter and did so. During oral argument he contended that the intention of the court order granted by MURUGASEN J was clear and unambiguous. The intention was that ALL documents including those now sought by the Ministers to be excluded, be dispatched. He referred the Court to the authority~~ies~~ of *Firestone South Africa (Pty) Ltd v Genticuro A G*[1] dealing with interpretation of court orders and judgments.

[9.3] In respect of variation of the order, or rescission (ie the alternative prayers), Ethekwini, in their heads of argument and Mr *Pammenter* in oral argument, contended that no case had been made by the Ministers. The argument was based on the facts that the order granted by MURUGASEN J is a final order and is not susceptible to variation or rescission.

[9.4] Moreover, the Ministers have not established any grounds for rescission under Uniform Rule 42 or the ~~C~~common ~~L~~law as the Ministers did not oppose the application to compel, neither did they raise the contention that they now seek to raise, i.e. that the documents are irrelevant and

[1] 1977 (4) SA~~S~~ 298 (A)

privileged. Furthermore, they are precluded from raising such contentions now as Ethekwini's entitlement to the production of the documents is *res judicate*.

[9.5] In respect of the counter application to strike out the defence/opposition of the Ministers and the contempt of court charges, Mr *Pammenter* argued that they are not premature. Leave was granted to bring the striking out application in the order that was granted by MURUGASEN J in the event that the Ministers failed to comply with the court order. Furthermore, the Ministers have recklessly disregarded their obligations and are in contempt of the court order.

[9.6] Both parties have referred the Court to a list of authorities which will be dealt with later in the judgment. The Court reserved judgment.

[9.7] On 11 August 2014, whilst in chambers, I received a letter of complaint by hand from the office of Linda Mazibuko and Associates (the instructing attorneys for Ethekwini) directing my attention to Rule 4.13 of the Uniform Rules of Professional Ethics of the General Council of the Bar of South Africa. The complaint was that during the course of argument, Counsel for the Ministers made reference to and relied on an amended notice of motion and a supplementary affidavit which was never served on their client, neither was any application instituted for

leave to deliver the affidavit as contemplated in Rule 6(5)(e) of the Uniform Rules of Court.

[9.8] Pursuant to the letter I gave a direction that the letter must be filed with the Registrar of this Court and served on the office of the State Attorney. Further, that the amended notice referred to in the correspondence, is also to be served~~filed~~. In view of the above, the parties were invited to furnish supplementary heads of argument by 19 August 2014 which they did.

[10] Supplementary heads of argument were received by both parties.

[10.1] In its supplementary heads of argument, Ethekwini contended that the application by the Ministers for rescission closed when Ethekwini delivered its replying affidavit during December 2012. On 11 March 2014 the Ministers set the application down for hearing on 4 August 2014 on the opposed roll. The supplementary affidavit was disposed to on 22 July 2013 which constituted a “further affidavit” and the Ministers required leave of the Court to deliver it which they failed to do. Further, the amended notice of motion was delivered after the hearing of the application only on 13 August 2014 to Ethekwini. The Ministers did not employ the procedures in Rule 28(1) of the Uniform Rules to seek the amendment. Hence, they argued that the amended notice of motion and the supplementary affidavit be disallowed.

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10.2] The Ministers in their supplementary heads of argument, indicate that besides ~~from~~ the objection being misplaced, it is a late objection which should not be allowed. They base their contention that firstly, to amend a notice of motion one does not require the formalities of Rule 28 of the Uniform Rules which is applicable to the amendment of pleadings. Furthermore, the Ministers did request leave of the Court to grant the amendment in the supplementary affidavit, which was not opposed in court.

~~[11]~~ LEGAL POSITION

[11.1] The contention by the Ministers that Rule 28 ~~(~~of the Uniform Rules~~????)~~ is applicable to amendment of pleadings only is misplaced.

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[11.2] Rule 28 of the Uniform Rules ~~(delete these words Uniform Rules????)~~ governs amendments to pleadings and documents and sets out succinctly the procedure to be followed. The Rule is not confined to pleadings only, it includes all documents and even includes affidavits. The language of the Rule is clear and unambiguous.

[11.3] At the date of the hearing the Ministers had not given notice of its intention to amend their notice of motion to Ethekwini. In fact, the

amended notice was not properly filed in the papers before court either. Neither did the Ministers made a substantive application to amend the notice of motion in court. The application to amend the notice of motion was found in the supplementary affidavit that was filed in the papers. This supplementary affidavit was also filed without any substantive application being made by the Ministers either.

[11.4] It is clear that there is merit in the argument that an irregular step has been taken by the Ministers in this regard and Ethekwini is fully justified in noting an objection to this irregular step which is well founded on the papers and in law.

[11.5] However, Rule 28(10) of the Uniform Rules empower the Court at any stage before judgment to grant leave to amend any pleadings or documents on such terms as to costs or other matters as it deems fit. In other words, the Court has a discretion whether or not to grant the amendment which discretion must be exercised judicially taking into account various factors, including but not limited to prejudice that would be suffered should the amendment be allowed or disallowed and it depends on the facts in any particular case.

[11.6] It is trite and has been stressed by the Appellate Division that a litigant who seeks to add a new ground of relief at the eleventh hour does not

claim such amendment as or matter of right but rather seeks an indulgence.[2]

[11.7] In *Trans-African Insurance Co Ltd v Maluleka*[3] (which dealt with cancellation of a summons), it was held

> 'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules of Court, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits.'

[11.8] When the matter was argued before me on 4 August 2014 the Ministers' case was mainly based on a cause of action premised on a declaratory order. It was common cause between the parties during argument that the issue is that of interpretation of the court order of 10 May 2011 and for the Court to make an order whether or not a declaratory order should be granted in the light of the documents which Ethekwini states are included to be dispatched by the Ministers in the order of 10 May 2011.

[11.9] During argument Mr *Pammenter* never objected to the proposed amendment. He indicated that he was prepared to continue to argue fully in response to the submissions that were made by Mr *Mokhari*.

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[2] *MINISTER VAN DIE SUID AFRIKAANSE POLISIE EN 'N ANDER v KRAATZ EN 'N ANDER* 1973 (3) SA 490 (A) at 512 E - H

[3] 1956 (2) SA 273 (A) ~~HEADNOTE~~ at 278

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~~counsel for the Ministers (You have already referred to him previously as "counsel for the Ministers. Do you want to repeat it here???).~~ Mr *Pammenter* sought clarity as to what case his clients were required to meet. He summarised it correctly that the issue was whether on the interpretation of the court order of 10 May 2011, documents such as the study referred to and the opinion of counsel are included in the court order.

[11.10] Both parties argued the matter, and both parties were invited to file supplementary heads of argument which they did. Furthermore, the original heads of argument filed on behalf of the ministers clearly deals with the declaratory order sought in the amended notice of motion. No issue was raised in objection to the relief that was argued in the heads of argument. Ethekwini knew what case to meet in court, and although somewhat taken by surprise in court, Mr *Pammenter* did argue fully against the case on its merits.

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[11.11] Moreover, his argument did indeed go to the merits of the application and he was able to refer this Court to the relevant authorities dealing with declaratory orders. Although not stated in its heads of argument (which is understandable in light of the amended notice of motion not being served on Ethekwini ~~filed in the papers~~), Mr *Pammenter* argued that the relief sought for a declaratory order be dismissed.

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[11.12] NMoreover, notwithstanding this irregular step taken by the Ministers, the application before me is part of a protracted litigation battle, not only involving the Ministers and Ethekwini, but also involving ISASA, the main applicant in proceedings in this court. It was against this background that this Court is prepared to condone the Ministers' non-compliance of the Rules, and grant an indulgence in an attempt to obviate any further protraction and to expedite the ligation. However, such irregular steps taken will not be without consequence which will be dealt with later in this judgment.

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[12] THE MERITS OF THE APPLICATION

Interpretation of the court order dated 10 May 2011

[12.1] Mr *Mokhari* in argument, referred the Court to a list of authorities mainly dealing with relevancy, as well as privileged and confidential information. He further argued that as the court order of 10 May 2011 does not list the documents which must be dispatched by the Ministers., Tto read the court order to be construed to enjoin the Ministers to dispatch privileged, confidential and irrelevant documents would be absurd as it would be a direct infringement of attorney and client privilege. Furthermore, the release of the study will have detrimental

implications for future policy making and regulations relating to property rating, and it could have an adverse impact on governance as far as property rating is concerned. Furthermore, the "study" was a mere internal tool or internal memorandum prepared specifically to assist in the decision making and was not intended for public consumption.

[12.2] Mr *Pammenter* in argument, referred the Court to a list of authorities and argued that the order granted by MURUGASEN J was that all documents relating to the decision taken be filed by the Ministers with the Registrar of this Court. This would include those documents. Furthermore, this matter is *res judicate* and it is not for this Court to make a declaratory order or variation order. Furthermore, the application to compel the discovery of these documents was not opposed when the order was granted. The Ministers, who were represented at the time, sought an adjournment which was refused. Furthermore, the order is clear and unambiguous. Mr *Pammenter* basically stated that the Ministers were attempting an appeal through the "back door" in the wrong forum. Furthermore, it was precisely these documents and others that were mentioned in the notice filed by Ethekwini on 10 May 2011 and the Court should have regard to these facts. In the event that the Court is inclined to clarify the order, then the documents must be included.

~~[13]~~

THE LEGAL POSITION

[13.1] Application may be made by one of the parties upon notice to the other, for an interpretation by the Court of a judgment or order made. It is not necessary that the application should come before the same judge but it has been held that the proper court to determine the interpretation to be placed upon an order, is a court of the division that made it.[4]

[13.2] The basic rules for interpreting the order of a court are not different from those applicable to the construction of documents. The Court's intention has to be ascertained primarily from the language of the judgment or order as construed according to the usual well known rules.

[13.3] The judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.[5] This ~~Rule~~ is a rule of law and not merely a rule of evidence that can be waived by the parties.[6]

[4] CILLIERS et al HERBSTEIN & VAN WINSEN CIVIL PRACTICE OF THE HIGH COURTS AND THE SUPREME COURT OF APPEAL OF SOUTH AFRICA 5 ED p 936
[5] CILLIERS et al HERBSTEIN (supra)
[6] *POSTMASBURG MOTORS (EDMS) BPK v PEENS EN ANDERE* 1970~~9~~ (2) SA 35 (NC) at 39

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[13.4] It is only if any uncertainty in meaning emerges, that the extrinsic circumstances surrounding or leading up to the courts grant of the judgment or order may be investigated and taken into account in order to clarify it.[7]

[13.5] In *Firestone SA (Pty) Ltd v Genticuro A* G (*supra*) TROLLIP JA held at 304 D - H that once a Court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*. There are however, ~~basically~~ four exceptions to that rule: ~~and that is:~~

a. The judgment or order may be supplemented in respect of accessory or consequential matters, for example costs;

b. The Court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous, or otherwise uncertain, so as to give effect to its true intention;

c. The Court may correct a clerical or arithmetical error; and

d. Relating to costs IF not argued.

However, on the assumption that the Court has this discretionary power, this should be sparingly exercised and the Court is not

[7] *FIRESTONE SA (PTY) LTD v GENTICURO AG* 1977 (4) SA 298 (A) at 304 D – H; *ENGELBRECHT and ANOTHER NNO v SENWES LTD* 2007 (3) SA 29 (SCA) at 32 – 33

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empowered to alter the "sense and substance" of the judgment or order (my abbreviations).

[13.6] In *Administrator, Cape and Another v Ntshwaqela and Others*[8] NICHOLAS AJA held at ~~p716~~ 706 that:

> "The order with which a judgment concludes has a special function: it is the executive part of the judgment which defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it.
>
> It may be said that the order must undoubtedly be read as part of the entire judgment and not as a separate document, but the Court's directions must be found in the order and ~~not elsewhere~~ nowhere else. If the meaning of an order is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment."

[13.7] It is important to note that only the order of MURUGASEN J is before me and not the judgment or reasons for judgment. The Ministers did not seek reasons from MURUGASEN J for granting the order as they initially brought an application to vary or rescind the order. In support thereof, they filed the necessary affidavits.

[13.8] It was argued by both counsel that the wording of the order is clear and unambiguous. However, the Ministers contend the intention of the order was to exclude the documents referred to earlier whereas Ethekwini contends that the intention was to include them.

[8] 1990 (1) SA 705 (A)

[13.9] The legal authorities suggest that the Court may clarify its order if on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain so as to give effect to its true intention, provided it does not thereby alter the sense and substance of the judgment or order.[9]

[13.10] Mr *Mokhari* submitted that it could never have been the intention of the Court to require the Ministers to dispatch as a record, irrelevant, privileged and confidential information. He based this contention on *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others*[10] where the Court held that legal professional privilege constituted a reasonable and justifiable limitation on a party's right of access to information enshrined in the Constitution.

[13.11] Mr *Pammenter's* contention was that the Court's intention was clearly to include these documents. He submitted that the words used in the order must be given their correct literal meaning. He further argued that this Court does not have the power to revisit the contentions claimed regarding privilege and confidentially as this is not a Court of Appeal. ~~I, I can find no fault in this contention.~~

[9] *MARKS v KOTZE* 1946 AD 29; *WESTRAND ESTATES LTD v NEW ZEALAND INSURANCE CO LTD* 1926 AD 173 at p186 – 187; *FIRESTONE S.A.* (*supra*); *Administrator, Cape and Another v Ntshwagela and Others* ~~ADMINISTRATOR – CAPE & ANOTHER~~ (*supra*).

[10] 1995 (2) SA 433 (SE)

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[13.12] He further argued Ethekwini has a right, in terms of section 33 of the Constitution and Section 7(1) of The ~~Prevention~~ Promotion of Access to Information Act 2000, to these outstanding documents. Moreover, any complaint of privilege or relevance or confidentiality is outweighed by the public interest and the Constitutional imperative of transparent and accountable governance. Moreover, the withholding of the documents restricts not only Ethekwini's rights of access to information, but also would be contrary to a fair, open and public hearing of the dispute.

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[13.13] Before dealing with the purpose of a declaratory order, it is necessary to briefly discuss privilege, confidentiality and relevance in light of the Ministers' contention that the order granted by MURUGASEN J could never have intended for the Ministers to dispatch the aforementioned documents.

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~~[14]~~ THE LEGAL POSITION

[14.1] The law relating to privilege does limit a person's constitutional right of access to State held information. However, this is not a blanket prohibition. The extent of such limitations will depend on the particular circumstances of each particular case.

[14.2] In *Jeeva and Others v Receiver of Revenue, Port Elizabeth and Others* (*supra*) JONES J held that[11]:

> "There will, in addition, frequently be special reasons arising out of the facts and circumstances of a particular case which could operate either for or against upholding the limitation of privilege."

Further, at page 453 D the Learned Judge continued to state

> "The *onus* is on the Receiver of Revenue to show that the limitation he seeks to place upon the applicants' right of access to information is reasonable and justifiable."

Further, at page~~s~~ 456 D - E the L~~l~~earned Judge continues -

> "In addition, the facts and circumstances of a given case may induce a court to conclude that the privilege should ~~NOT~~ not take precedence over the constitutional right of access to information; the particular facts and circumstances of the case may be such that the right of access to information should not and cannot yield in terms of s 33(1) to the claim of a legal professional privilege, even despite the compelling motivations which operate generally to uphold the privilege, and even despite its importance to the judicial system generally and not merely to the particular litigation."

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[14.3] Therefore, the argument by Mr *Mokhari* that it could never have been the Court's intention is based on his mistaken submission that in ALL cases the right of professional privilege is an absolute limitation of a party's constitutional right of access to information.

[14.4] Moreover, the office of the Ministers is a constitutional body with a public interest duty. It must operate with transparency and accountability. The Ministers have a duty to explain to the public how they arrived at the decision that Ethekwini now seeks to review. The documents sought by Ethekwini will assist in the enquiry into the

[11] At pages 445 H - I

rationality of the decisions taken by the Ministers. It cannot simply be stated now that these documents are covered by privilege or confidentiality.

[14.5] Furthermore, what is now accepted as a legal truism is that the exercise of all public powers must comply with the Constitution:

> "Furthermore, wWithout a the complete record, a Court cannot perform its constitutionarlly entrenched review function, with the result that a litigant's rights in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a Court with all the issues being ventilated, would be infringed."[12]

This was cited with approval in the recently decided case of *Zuma v Democratic Alliance*[13] delivered on 28 August 2014.

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MS MARKS, MAYBE THE SENTENCE UNDERNEATH THE QUOTATION SHOULD BE PUT BEFORE THE QUOTATION??

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[14.6] Returning to the main application in this matter and the background of the dispute, it is essential to discuss the purpose of a declaratory order.

[12] NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 (SCA), DEMOCRATIC ALLIANCE and Oethers v ACTING NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS and Oethers 2012 (3) SA 486 SCA para 37.

[13] (836/2013) [2014] ZA SCA 101 (28 August 2014).

~~[15] **HEADING??????????????????????**~~PURPOSE OF A DECLARATORY ORDER

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[15.1] The purpose of a declaratory order is to determine the actual intention of the court. It is not for the purpose to persuade the court to alter its intention. ~~This Court may not alter the order to correct something **(to include or delete certain words in the order???)** which the Court (**who granted the original order???)** intended even though the **(that???)** Court may have been wrong.~~

[15.2] In other words, this Court is not empowered to determine whether MURUGASEN J was correct or incorrect in granting the final order. All the Court is empowered to do is to interpret the intention of the order.

[15.3] In order to do this the Court has to first look at the language of the order. The word ALL has been defined in the South African Oxford Dictionary 2nd Edition as being "the whole number of amount" and "everything".

[15.4] This was qualified by the words "of the documents relating to the decisions which Ethekwini seeks to review and set aside in the counter application". In other words, notwithstanding that the documents to be dispatched by the Ministers were not listed the interpretation of the

order is that ALL of the documents, including those which the Ministers now seek to claim as confidential, irrelevant and privileged were included in the order to be dispatched. In other words, the Court's intention was not that a "reduced record" be dispatched by the Ministers to Ethekwini.

[15.5] To the extent that the wording of the order is unclear (which was not expressly argued by the parties) but is implied or intimated in the opposition to the counter applications, then and only then this Court would be entitled to take into account any extrinsic facts.[14]

[15.6] The extrinsic facts reveal that these particular documents were the subject matter of the court order that was granted when the application to compel was brought by Ethekwini on 10 May 2011 when MURUGASEN J granted the order. To my mind, if it was the Court's intention to exclude these documents then the order would have stated such. Moreover, on the date that the order was granted there was no opposing affidavits filed on behalf of the Ministers that the documents sought were irrelevant, confidential or privileged.

[15.7] In conclusion, the application brought by the Ministers for the declaratory order now sought to exclude the documents mentioned,

[14] *FRANKEL MAX POLLAK VINDERINEG INC v MENELL JACK HYMAN ROSENBURG & CO INC AND OTHERS* 1996 (3) SA 355 (A) p363 - 364

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would NOT amount to an interpretation of the order but would amount to a belated opposition that would change the "sense and substance" of the order which is impermissible. The application for thea declaratory order sought by the Ministers therefore falls to be dismissed.

[16] THE COUNTER APPLICATIONS

16.1 The Contempt of Ceourt Application

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[16.1] .1 Ethekwini seeks an order thatfor the Ministers to be held in contempt of the order granted by Court on 10 May 2011 and to impose punishment in the discretion of the Court.

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[16.1.2] Mr Pammenter on behalf of Ethekwini, argued that the Ministers' non-compliance with the order was wilful and *mala fide*. Mr *Mokhari* on behalf of the Ministers, has argued that there has been compliance with the order. However, if the Court determines that there was non-compliance then the Ministers aver that their "non-compliance" with the order was not wilful or *mala fide*, as they believed that the intention of the order was not to include the documents.

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[16.~~23~~] Having ruled that the court order dated 10 May 2011 included all documents to be dispatched, there is no dispute of fact that there has been non-compliance. The only issue is whether the Ministers are in contempt of the order granted on 10 May 2011.

~~[17]~~ THE LEGAL POSITION

[17.1] It was succinctly stated by CAMERON JA in *Fakie NO v CCII Systems (Pty) Ltd*[15] that to disobey a court order unlawfully and intentionally, is an offence referred to as contempt of court. The standard of proof required is for the applicant to prove all the elements of contempt beyond a reasonable doubt. Put differently, the test whether disobedience of a civil court order constitutes contempt has come to be stated as whether the "breach" was committed "deliberately and *mala fide*".[16] ~~(my abbreviation.) **IS THIS A QUOTATION – I CAN'T FIND IT IN LAW REPORT – ONLY A SENTENCE IN PARAGRAPH [5]**~~

[17.2] Therefore, in this application it is not sufficient to show that the order of the court was disregarded by the Ministers but that ~~the~~ by "non-compliance" in not dispatching certain documents the Ministers not only disregarded the court order, but that this ~~the Ministers' conduct~~ was a deliberate and intentional violation of the Court's dignity repute or

[15] 2006 (4) SA ~~at~~ 326 (SCA) para 41
[16] FAKIE NO v CC11 (*supra*) p 33 (C)

authority. A deliberate disregard is not enough since the non-complier~~/s~~ may have genuinely albeit mistakenly believed him or herself entitled to act in the way claimed.

[17.3] To my mind, this is exactly what occurred. The Ministers appeared to be under the belief (albeit mistakenly) that they were entitled to withhold certain documents based on the premise that they did not fully comprehend the intention of the court order dated 10 May 2011. To my mind eThekwini has failed to discharge the onus upon it. Therefore the application for contempt of a court order ~~is~~became premature and cannot be granted. To my mind it should be adjourned *sine die*.

~~[18]~~ APPLICATION TO STRIKE OUT THE OPPOSITION/DEFENCE

[18.1] As mentioned before, the non-compliance of the Ministers cannot be said to be wilful and deliberate at this stage. The non-compliance was based on the Ministers' belief (albeit mistakenly) that they were not obliged to disclose documents which they perceived to be irrelevant, confidential and privileged. The order did not take away the Ministers' rights to clarify what the order of 10 May 2011 intended to achieve. This

they have done in seeking the aforementioned declaratory, albeit three years later.

[18.2] Moreover, and in light of the findings of this Court that the non-compliance with the order was not wilful or with the necessary *mala fides*, the application to strike out the defence becameis premature. If however, after the order of this Court has been brought to the attention of the Ministers and they have failed to comply with the order of this Court, then Ethekwini may on the same papers, supplemented as far as necessary, move for the application to strike out the opposition of the Ministers in the review application, and/or for the Ministers to be held in contempt of court.

[19] COSTS

[19.1] In considering the issue of costs, the Court has a discretion which is to be exercised judicially. The Court is required to take into consideration the circumstances of the case, the issues at hand, the conduct of the parties and any other relevant circumstances.[17]

[17] *FRIPP v GIBBON & CO* 1913 AD 354

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[19.2] The general rule is that the costs follow the result. In other words, that party which is successful should also be entitled to a costs order. However, it was argued by Mr *Mokhari* that both parties draw the costs from the same fiscus ~~(spelling???)~~. Moreover, although Ethekwini ~~have~~ has been successful in the main application, they have been unsuccessful in the counter applications and there should be no order as to costs.

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[19.3] However, it is relevant to note that Ethekwini was ~~were~~ not aware of the declaratory order being sought up until the time that the matter was being argued in court.

[19.4] The aforementioned irregular steps taken by the Ministers should be suitably penalised with a relevant order as to costs. I see no reason why Ethekwini, being unsuccessful in their counter applications, should be made to bear the costs of that litigation which to my mind, was derailed as a result of the irregular steps taken by the Ministers.

[19.5] The Court is of the opinion that a fair and just order to both parties would be that the Ministers are liable and should be ordered to pay the costs of both the main application, as well as the counter applications. Furthermore there has been a delay of over three years in seeking "clarity" of this order.

[19.6] ~~Furthermore t~~The explanation given by the office of the State Attorney, Pretoria, that the failure to serve notices on Ethekwini of the amended ~~amendment~~ notice of motion, as well as the failure to file the notice in the court file timeously was a result of an oversight, is unacceptable.

[20] The following order is made:

1. The application for a declaratory order is dismissed.
2. The order of the High Court is amended and clarified only to the degree reflected in what is set out hereafter:~~.~~
   2.1 That the Minister for Co-operative Governance and Traditional Affairs AND/OR the Minister of Finance are directed to comply with the order of the High Court dated 10 May 2011 within ten days of the date of this order.
   2.2 The record to be produced and lodged by the Ministers in terms of the order dated 10 May 2011, shall include the:
      a. Study to assist the DPLG to determine appropriate levels of ratios and limits;
      b. Counsel's opinion given to the applicants on:
         aa. the prospects of success (in relation to the case in the North Gauteng High Court);

bb. the manner in which the Department may re-introduce the ratios.

3. Counter applications

3.1 The application to declare the Ministers in contempt of court is adjourned *sine die*.

3.2 The application to strike out the Ministers' defence/opposition to the review proceedings is adjourned *sine die*.

3.3 In the event that the Ministers fail to comply with the terms of the court order in its amended form, Ethekwini is granted leave to apply on the same papers, supplemented as far as necessary, for an order striking out the Ministers' opposition to the counter application to review and/or for an order to declare the Ministers in contempt of court.

4. Costs

The National Minister for Co-operative Governance and Traditional Affairs and/or the Minister of Finance are directed to bear the costs of the main application and the counter applications jointly and severally, the one paying the other to be absolved (including the costs occasioned by two counsel).

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MARKS AJ

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ARGUED ON : 4 AUGUST 2014

JUDGMENT HANDED DOWN ON : 6 OCTOBER 2014

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