**At the Jerusalem Supreme Court** **HCJ 2732/05**
**Sitting as the High Court of Justice**

In the matter of:

1. **Head of the Azon Municipal Council, Mr. _____ Hassin**
2. **Head of the Nabi Eliam Village Council, Mr. _____ Redoan**
3. **HaMoked: Center for the Defence of the Individual founded by Dr. Lotte Saltzberger (R.A.)**

Represented by attorneys Michael Sefarad and/or Shlomi Zachariah and/or Natalie Rosen and/or Neta Patrick

of 49 Ahad Ha'am, Tel Aviv 6683;

Tel: 03-6206947/8/9. Fax: 03-6206950

**The Petitioners**

- Versus -

1. **The Government of Israel**
2. **The Army Commander of the West Bank**
3. **The Director of the Population Administration Office, eastern Jerusalem**

Represented by the counsel, the State Attorneys, ministry of Justice, Salah A-Din Street, Jerusalem

**The Respondents**

## Application for an Order of Contempt of Court

**The petitioners humbly request that the honorable court exercise its authority under Section 6(1) of the Contempt of Court Ordinance, and enforce a fine and/or a detention against the respondents for the absolute order that was issued under this petition more than two years ago, on 15 June, 2006, and this for the reasons enumerated below:**

### A. The petition and the judgment thereon

1. This petition was concerned with a segment of the separation barrier that was erected upon property belonging to the villages of Azon and Nebi Eliam (hereinafter: the "**villages"**), with the purpose of surrounding the Jewish settlement of Zufin from the east and from the south.

2. On 15 June, 2006, **more than two years and three months ago,** the High Court of Justice composed of the honorable Chief Justice (ret.) A. Barak, the honorable (as she then was) Justice Dorith Beinisch and the honorable Ayala Procaccia ruled that the route of the separation barrier as it extended within the region of the Palestinian villages, which is the subject of this petition, was henceforth nullified.

3. The length of the eastern portion of the route extends five kilometers, and it "locks away" between it and between the West Bank border, territory, which exceeds 1,000 dunams, most of which is private Palestinian land. The respondents replied to the Order Nisi, which was issued in the petition, that they "agreed" to adjust the route so that this territory would remain on the eastern side of the Separation Barrier.

4. In the wake of this "agreement", which came as a result of the petition which was filed by the petitioners, and the harsh facts which were exposed over the course of the hearings therein, the High Court of Justice therefore ordered the following:

> "6. In light of the respondent's position, we have decided to accept the petition and to make the order nisi absolute. **We find that the route of the eastern segment separation barrier is unlawful, and we hereby announce its nullification**. In accordance with the State's request we are suspending the nullification announcement, for up to six months after completion of the building of the new route. **All the necessary steps should be taken so that the suspension period shall be as short as possible.** Obviously, nothing in these words expresses any position as to the legality of the new route which the respondents are considering, nor does it express any position in other petitions, which pertain to the northern or southern segment of the route of the barrier (see for example HCJ 10905/05 **The Mayor of Jois v. The Prime Minister**" (Emphasis added, M. S, S. Z).

A copy of the judgment in the petition is attached to this application as **appendix a.**

5. The court also deemed it appropriate to note the fact that the factual review that was presented before it, at the opening of proceedings related to the petition, was misleading and incomplete and caused an erroneous judgment. The court took a grave view of the fact that the term "security" was used to justify the route which formed the subject of the petition, despite the fact that the reason for the route, as has become clear in this case, was because of a zoning plan for the expansion of the Jewish settlement of Zufin, a plan which had not yet been validated!

6. In this regard the court had the following harsh words to say:

> "7. **In the petition before us a grave phenomenon has occurred. In the first petition the Supreme Court was not presented with the complete picture. The court dismissed the first petition on the basis of information only partially correct**. The state attorneys' office behaved correctly, in that the moment they were informed that plan 149/5 was being considered they relayed this information to the court, and the respondents acted correctly against this backdrop – and in light of our judgment in the Alfei Menashe case – when they changed the route of the barrier on their own initiative. Nonetheless, the petition before us alludes to an event with which we cannot be reconciled, in terms of which the information that was provided to the court did not reflect the overall considerations with which the decision makers were faced. As a result thereof there was a dismissal of a petition, which even the respondent would now agree should have been accepted. The special circumstances under which the security personnel operated and which brought about the problem were explained to us. We hope that this will not be repeated." (Emphasis added, M.S, S.Z).

**B. Chain of events after judgment was granted**

7. In the wake of the judgment a new route was planned by the respondents, as a consequence of which an updated seizure order was issued, seizure order 9/07 T' (hereinafter: the "**New Seizure Order**"). **The seizure order was issued in March, 2007, i.e. a year and a half ago!**

   The renewed seizure order and the accompanying letter is attached to this application and is marked **appendix b.**

8. The petitioners' objection to the new seizure order was filed with the respondents by the undersigned on 18 March, 2007. This objection was dismissed four months later, on 8 July, 2007.

A copy of the objection and the respondents' reply to the objection is attached to this application and is marked **appendices c and d respectively.**

9. The petitioners decided not to petition against the new seizure order and the new route, which was planned in its wake. In their letter to the representative of the respondents dated 5 August, 2007 (**in other words, more than thirteen months ago),** a notice relaying this decision was delivered to the respondents, together with a demand to begin work on the erection of the new route without delay, and this was done in order to bring about the removal of the barrier in its present route, a route which everyone agrees is patently and disproportionately harmful, aside from being illegal as held by the court. As stated, this application was made more than a year ago.

A copy of the letter from the undersigned to the respondents dated 5 August, 2008 is attached and marked **appendix e.**

10. On 31 March, 2008, about eight months after the demand by the undersigned to commence the works, and almost two years after the judgment was granted in the petition, Adv. Natalie Rosen from the offices of the undersigned applied to the respondents, and requested to know why despite the passing of such a long period of time, the respondents had not yet begun with their works, despite the seizure order and the new map of the route which had been drafted as a result thereof, having been in existence for over a year.

A copy of the letter from Adv. Rosen to the respondents dated 31 March, 2008 is attached and marked **appendix f.**

11. A month and a half after the letter was sent, the respondents dignified Adv. Rosen's application with a response. On 11 May, 2008 Sgt. Maj. Limor Ben-Hamo replied that "recently a budget was allocated to fix the route of the security barrier in the region under discussion". Sgt. Maj. Ben Hamo also added that the works were anticipated to begin in August, 2008, after the detailed engineering plans would be complete and after contact was made with the contractor.

A copy of the letter from Sgt. Maj. Linor Ben Hamo dated 11 May, 2008 is attached and marked **appendix g**

12. **The petitioners wish to state on this point that it is clear and beyond any doubt that the foot dragging and drawn out proceedings with respect to the plans and implementation of the construction of the separation barrier along its new route does not comply with the conditions that the court stipulated i.e. that the "period should be as short as possible". Already during the hearings that were held on the petition in 2006, the respondents claimed that they possessed alternative plans for the exiting route. It is not clear to the petitioners why it took so much time to redraw the route and to issue renewed seizure orders only in March, 2007, nine months after the judgment. It is not clear to the petitioners why it took a year from the time the respondents were informed that a petition would not be filed against the route until the time they began to try and find the budget resources for building the barrier along its new route, and to top it**

**all up they did not even make contact with those persons responsible for implementing the new route. <u>And lest one forget, during this entire period the petitioners' land as well as land owned by other Palestinian residents was taken up by the barrier in its old/ current route, a route which makes access to the lands very difficult, and which the court has already held is completely illegal, since it takes into account illegal and alien considerations</u>!**

13. About a month after receiving the letter from Sgt. Maj. Ben Hamo, at the beginning of August (as mentioned, the time meant for beginning the works), a further application was made on behalf of the offices of the undersigned to the respondents, in order to clarify why these works had not commenced.

    The letter from Adv. Natalie Rosen to the representative of the respondents dated 6 August, 2008 is attached and marked **<u>appendix h.</u>**

14. This application did not merit any response whatsoever on the part of the respondents. A month later, at the beginning of September, when it became clear to the petitioners that not even the minutest step had been taken in order to begin the works on the ground and to build alongside the new route and thereby take down the barrier alongside the present route, pursuant to the ruling of the honorable court under the present petition, the undersigned once more applied to the respondents, with the demand to begin building works alongside the new route.

    The letter from the undersigned dated 11 September, 2008 to the respondents is attached and marked **<u>appendix i.</u>**

15. **<u>As of the time of writing, this application was also not answered and did not merit any response on the part of the respondents. It goes without say that as of the time of writing this application nothing has been done in preparation for commencing the works</u>**.

16. Thus we have established the need for this application.

**C. The application under the Contempt of Court Ordinance**

17. As stated, for more than two years the court's judgment has gathered dust in the respondents' basement, like an unwanted object, which no one needs and which none of the respondents view with any importance. These respondents, who have tried to mislead the courts in the past with their various untrue utterances and declarations with relation to the security needs and nature that underlie the route of the barrier as it has been determined on the ground, have continued to minimize the importance and scope of harm to the petitioners, and they assume incredible liberties for themselves when it comes to defining the required period of time for dismantling the route as stated in the petition, and which the court directed that one should aim to accomplish within the shortest period possible. In the opinion of the respondents – so it would appear – a period of time of two years and three months is "reasonable" or even "fitting", or perhaps it constitutes a "short period".

18. **We do not know from where the respondents have the gall to relate to a judgment of the court as if it was worthless dust. There is no other way of interpreting what we are dealing with aside from calling it a decision which shows <u>contempt</u> for the judgment of the honorable court out of a belief, so it would appear, that the judges will not pressurize them a second time to assist the farmers of the villages of Azon and Nebi Eliam, and order that their lands be returned to them.**

19. Much has been said about the importance of the rule of law and the importance of enforcing court judgments, as a rock of our existence as an active democratic society. This democratic axiom is all the more true, when it deals with complying with a judgment, which was issued against one of the State Authorities. The honorable court has recently held in a judgment in HCJ 4805/07 **The Jewish Center for Pluralism – The Movement for Progressive Judaism in Israel v. The Ministry of Education et al** *Takdin Elyon* 2008(3), 1402 [2008] that:

> "One of the founding principles of the rule of law is that "when a judgment is given it is obligatory to comply with it to the letter and in its spirit" (dicta of Chief Justice Shamgar in HCJ 5711/91 **Poraz v. Speaker of the Knesset** *Piskei Din* 46(1) 299, 308 (1991). **The obligation to obey court judgments and to honor them is considered one of the basic conditions upon which the rule of law in a democratic state is based.** This obligation "emerges from the law, and it is a necessary expression for organizing societal life in accordance with the basic norms for enabling the existence of a framework in which the law is dominant" (*ibid*.). **Without obedience to court judgments, the principle of the rule of law and justice is undermined, and social order crumbles**. **Everyone acts according to what is correct in his own eyes and the distance from rule of law to anarchy is that of a hairsbreadth**. (*Ibid*. Paragraph 34 of the judgment of the honorable justice A. Procaccia; Emphasis added, M.S, S.Z.).

20. If this is important in normal cases, how much more important is it for the State Authority to uphold court judgments. The honorable Justice Procaccia added the following words, which are very apt to this present case. Because of their importance, we shall cite them in full.

> Dishonoring a judgment of the court by a citizen constitutes a serious display of harm towards the rule of law. **It is much, much more serious when the dishonoring of the judgments is performed by one of the State Authorities. Indeed, "the obligation to honor judgments of authorized courts, which applies to each person, applies with even greater force to the State Authorities" (Guideline 6.1003 of the Attorney**

**General's Guidelines (dated 15 June, 2003). A State Authority's evasion of a judgment of a judicial organ is one of the most serious and disconcerting dangers that engulf the rule of law in a democratic society**. (A. Rubenstein and B. Medina, *Constitutional Law of the State of Israel* (volume 1, Basic Principles, 5765) 271- 274). The essential principle of the rule of law is built on a tradition that states that the Government itself, like every citizen, is subject to the law and it has not been elevated above it. "The rule of law in its formal sense means, that all the factors of the State, whether it is individuals per individuals or per corporations, and whether it is the arms of the State, must act according to the law, and action in contravention of the Law needs to be met with organized sanctions by society" (the dicta of Justice Barak in HCJ 428/86 **Barzilay v. The Government of Israel** *Piskei Din* 40(3) 505, 621 (1986)). **A State in which the State Authority takes the law into its own hands – when it wishes to do so fulfills a judicial order that was given against it and when it wishes not to do so ignores it, is a State which germinates within it the seeds of calamity and anarchy, and develops a dangerous culture of the rule of might and of arbitrariness.** The State Authority is a public trust which "has nothing of its own" (HCJ 142/70 **Shapiro v. The Regional Committee of the Israel Bar Association** *Piskei Din* 25(1) 325, 331 (1971)). In this capacity, it is meant to serve as the supreme example of honoring the law and the rule of law. The eyes of the public look up to the Sate Authorities and to its office bearers. Honoring the values of law and justice, and developing a tradition of protecting the values of the rule of law are impacted by their behavior. **Non-compliance with the law and disobedience of court judgments on the part of the State Authority contains within it a deep moral harm not only to the formal infrastructure of the organs of the government and regime, but also affects the core tradition and culture of a proper regime, which serves as a shining example of proper behavior of the individual in society.** In one case in which the State abstained from following a judgment at the time determined for doing so, the following things were said, which are also appropriate for our case:

This reality of non-compliance with a court judgment for a period of 7 months is a harsh reality for a State governed by the law, where the State, which is entrusted with the maintenance of the rule of law, is

> itself a partner to this dishonoring of the law and the legal precedent.
>
> […]
>
> Beyond the aspect of the continued suffering of the chickens, the phenomenon of dishonoring a judgment on the part of a Public Authority is in and of itself worthy of harsh criticism, in light of the deviation it displays from the standard administrative proceedings, and from basic constitutional norms that underlie the democratic process.

The law enforcement authorities acted improperly when they neglected to implement the judgment's operative determinations during the allotted time. Even had they devoted time to examining alternative methods to the force-feeding, and even if they held the opinion in good faith that it would be possible to find a method which would comply with the criteria set by the judgment, the time and date for doing so was not in their hands. They were dictated to by the court, and it was their obligation to fulfill it word for word (Compare HCJ 551/99 **Shekem Ltd. v. Director of Customs and V.A.T** *Piskei Din Yisraelim* 54(1) 112, 125; HCJ 53/96 **H. Aloni Concern Ltd. v. Minister of Trade and Industry** *Piskei Din Yisraelim* 52(2) 1, 9-19; HCJ 3782/95 **Betsedek Organization v. The Government of Israel** *Piskei Din Yisraelim* 49(5) 362, 364). **It has already been said on more than once occasion that a violation of court orders does not only harm the protected interest upon which the judgment is based".**

(*Ibid.* paragraph 35 of the judgment of the honorable justice Procaccia; emphases added, M.S, S.Z).

21. **And what exactly are we dealing with? A judgment that was given on a petition in June, 2006 held what everyone knows, and at the end of day has not even been denied by the respondents: that the route of the present barrier is not the result of security considerations, but it is rather Jewish settlement considerations that have played a role in its design. For this reason alone it is clear that it is not legal and does not comply with the conditions as these were enumerated in the past by the honorable court.**

22. **In this case, in tandem with this contemptuous phenomenon, as has been revealed over the course of the hearings, is the harm of the severest nature to the petitioners' rights and to those of the Palestinian residents of the villages upon which the barrier has been erected and whose territory it locks up. Unfortunately, one detects that these things are not viewed with any seriousness by the respondents, who again and again try and change the clock in the sand, without providing any definite time for commencing the building of the new barrier route, and even when they are given a date, the respondents do not comply with it, so that one detects that even when their strength has been sapped they continue to throw sand in the petitioners' eyes, at a time when they do not even dignify them with a reply to their applications.**

23. And note well: this is not the first time that the respondents have taken the liberty of not complying with decisions of the honorable court in all that pertains to segments of the separation barrier which have been invalidated in the past by the court. This was also the case in the petition in HCJ 1748/06 **Sami Asmail Zamel Kisia, Mayor of Daharia et al v. Commander of the IDF Forces in the West Bank et al**, when the State did not comply with the conditions that were determined by the court for the removal of the low separation barrier in the south Mount Hebron region, and the petitioners were thus forced yet again to apply to the court in order that the latter issue an order to comply with the provisions of the judgment.

24. In its decision in the case of HCJ 1748/06 above, the court held the following:

> 5. The State has been ordered to remove the barrier within six months of the day judgment was given. The period of time, which was allotted for carrying out the order was designed to allow the State to arrange for a suitable alternative in the spirit of the principles that were established by the court. The court ordered the respondents to remove the barrier but avoided determining what the suitable alternative should be in order to allow the respondents to exercise their own discretion for choosing a new barrier that is less intrusive upon the local residents. However it has transpired that the State wasted the entire period of time that was allotted them, while abstaining from removing the barrier and were even considering an alternative that was based on the current route. From an exchange of correspondence between the parties and from the claims that were heard before us, it emerges that counsel for the State knew that the petitioners were not satisfied with the attempt to change the nature of the existing barrier and that they had given thought to initiating contempt of court proceedings. Even so, an application to postpone the implementation of the judgment was filed on behalf of the State only upon the termination of the period of six months, which the State was given in order for the barrier to be removed.
>
> The State opted not to fulfill the court order and to come before us after that period had terminated with an application which virtually called for an amendment to the judgment. One cannot be reconciled to such behavior. We therefore order the State to remove the barrier, as it was ordered to so by a judgment of this court."

The decision in HCJ 1748/06 **Sami Asmail Zamel Kisia, Mayor of Daharia et al v. Commander of the IDF Forces in the West Bank et al**, dated 24 July, 2007 is attached to this application and marked **appendix j**.

It should be noted that the application was accepted and the respondents were obligated to incur especially high costs.

25. There was also another case, in which the respondents were requested to dismantle the separation barrier in the region of the Bil`in Village (HCJ 8414/05 **Ahmed Issa Abdallah Yassin v. The Government of Israel et al** – the case of the barrier route that crossed the Bil`in Village lands). The court's intervention was required in order to force the respondents to present an alternative route in place of the route that had been invalidated by the court.

26. In light of all of this and in light of the respondents' conduct in this petition thus far, it is difficult to escape the impression that the respondents are trying to make it clear in their every step and action of their substandard conduct. That they have no desire to fulfill the provisions of the judgment and they do not wish to a change the route. And let us remind those who wish to forget – or worse than that: those who want to cause others to forget – that the route, which was invalidated by the court is not based upon a security response but rather on reasons that were concealed from the court, and whose goal it is to realize the plans for expanding Jewish settlement. Nothing more than this, and there is no connection between this route and security.

27. From the time the petitioners informed the respondents that they did not desire to petition against the new route, a period of time exceeding a year has passed. Nothing has been done; the time for doing so has arrived.

**D. Summary**

28. Until today, more than two years and three months later, the respondents have avoided fulfilling the order that was issued by the honorable court on 15 June, 2006, without any suitable explanation whatsoever. On the other side, the petitioners have been forced to come and demand, to write and to plead before the respondents for something that is so elementary – the fulfillment of the provisions of a judgment of the Supreme Court sitting as the High Court of Justice of the State of Israel. In their agony, the petitioners have been forced to act in a Sisyphean manner and roll their applications and their petitions down the slope that leads to the court, with an application to order the respondents to do that which they already had been ordered to do in the past.

29. The respondents' conduct is scandalous and outrageous, this is especially so in light of the special circumstances in which the judgment was given, and against the backdrop of a whole series of facts that were at first concealed from the court, a series of facts which proved that the chosen route as it was implemented did not flow from security considerations. Every day that passes exacerbates the mortal harm to the petitioners, to their land, to their livelihood and to their dignity. Every day that passes deepens the mortal blow to the rule of law, at a time when the State Authorities have abstained from fulfilling a judgment that was given to them by the highest judicial authority in the State of Israel. Behavior such as this should most appropriately not be abided by the court.

30. Therefore, all we can do is repeat our request to the honorable court : to return the respondents to the one and only path which exists in a State which advocates the rule of law – the path of fulfilling the judicial orders and being scrupulous in attaching equal weight to everything – big and small.

31. **For all these reasons, the petitioners are left with no choice but to apply to the honorable court and request that it issues an Order pursuant to its authority to do so under section 6(1) of the Contempt of Court Ordinance, whose goal it is to force by means of a fine or imprisonment upon the respondents to fulfill the absolute order that was issued by it on 4 September, 2007 in this case.**

32. The honorable court is also requested to order the respondents to pay the costs of this application and to pay the attorney's fees in addition to the V.A.T required under the Law.

Date: _____

_____ _____

Michael Sefarad Shlomi Zachariah

Counsel for the Petitioners