REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 38127/17
Appeal Case No: A 5028/19

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: YES
REVISED.
20/3/2020

In the matter between:

THE BODY CORPORATE OF PRESTON PLACE	Appellant
and	
CITY OF JOHANNESBURG	First Respondent
THE MUNICIPAL MANAGER OF THE CITY OF JOHANNESBURG: DR NDIVHONISWANI LUKHWARENI	Second Respondent

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an unopposed appeal against the dismissal of a contempt of court application.

[2] The appellant is the Body Corporate of a Sectional Title Scheme and the first respondent is the City of Johannesburg, a duly established Municipality which supplies electricity to the appellant. The second respondent is the municipal manager of the first respondent, "tasked with overseeing the implementation of court orders against the municipality" and the "logical person to be held responsible for the overall administration of the Municipality".[1]

[3] On 19 March 2018 a court order ("the court order") was granted against the first respondent after a settlement agreement was reached between the appellant and the first respondent. In terms of the court order the first respondent was ordered to, *inter alia*, provide the appellant with a full and precise statement of account of amounts owing by the appellant to the first respondent, duly supported by actual meter readings and/or proper proof thereof, and adjustment of the account and payment of any credits and certain ancillary relief. It is common cause that the first respondent did not comply with the court order. In fact, during the hearing of the appeal, almost two years later, this court was informed that it still had not complied with the order.

[4] In May 2018 the appellant launched contempt proceedings against the first and second respondents. In the contempt application it sought an order finding the first respondent in contempt of the court order and the imposition of a fine of R 500 000 on the first respondent. The contempt application was opposed by both respondents but the respondents failed to file any answering affidavits. The first respondent, at the behest of the judge hearing the contempt application, filed an explanatory affidavit, setting out the reasons why it had failed to comply with the order.

[5] After receiving the explanatory affidavit and then hearing argument, the court *a quo*

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[1] *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) at [24].

ultimately found that it was impossible for the first respondent to comply with the court order and dismissed the contempt application with costs. It is against this finding that the present appeal is brought. The appellant submits that court the *a quo* erred in fact and law, on the factual and legal bases and grounds set out the notice of appeal.

THE APPEAL

[6] The appellant seeks an order setting aside the court *a quo's* dismissal of the applicant's contempt of court application and replacing it with an order in the following terms:

> *1.1 That the First Respondent be found to be in contempt of the Order of Court granted on 19 March 2018;*
> *1.2. That the First Respondent be ordered to pay a fine of R500,000.00 (Five Hundred Thousand Rand) forthwith.*
> *2. Alternatively to 1 above* **(should read 1.2 above),** *the duly authorised representative of the First Respondent, Dr Ndivhoniswani Lukhwareni, in his capacity as the Municipal Manager of the First Respondent, be committed to prison for contempt of the Court Order granted on 19 March 2018, by virtue of the First Respondent's non-compliance with such Court Order.*
> *3. Costs of suit on the Attorney and own client scale.*

[7] The first respondent and the second respondent were represented by attorneys Kunene Ramapala Inc Attorneys at the contempt application and when the court order was granted against the first respondent. Although the respondents did not file heads of argument or formally oppose the appeal, a representative of the attorneys' firm as well as counsel were present in court during the hearing of the appeal. However, it was conceded that there was no power of attorney for the appeal as required by Rule 7(3), and that the respondents were therefore not properly before court. Nevertheless, the court permitted counsel to make submissions in order to assist the court. At the start of the proceedings counsel for the respondents confirmed that there had been no compliance with the court order. He further informed this court that there would be no opposition to the appeal, as well as the main relief sought by the appellant against the

first respondent, namely the imposition of a fine. It was suggested by both parties that this court should find the first respondent in contempt and impose a fine, but suspend the payment thereof on condition that the first respondent complies with the order within 30 days.

[8] The suitability of imposing a fine on the first respondent was raised with the appellant. Counsel for the appellant submitted that a fine might not be suitable and that this court should impose the alternative remedy sought, namely committing the second respondent to prison by virtue of the first respondent's non-compliance with the court order. After hearing the appellant on the merits and the relief sought, there were two questions that needed to be answered:

1. Are the first and second respondent in contempt of the court order granted on 19 March 2018?
2. If so, what is the appropriate remedy?

THE CONTEMPT

[9] The appellant has had a long and troubled relationship with the first respondent going back to 2010. Since then, the meter at the appellant’s premises had been replaced, readings were disputed and excessive amounts were claimed. In March 2014 the parties reached an agreement and the matter was settled and payments were made. In June 2017, the first respondent removed certain meter cables, the transformer blew up and a generator had to be installed. The appellant avers that unsubstantiated accounts were thereafter rendered without readings of any meters. In light of the ongoing disputes and inadequate information, as well as wildly fluctuating electricity bills, the appellant eventually sent a letter of demand to the first respondent for a breakdown of the account, readings and background information. No adequate response was received. In due course he appellant launched an application, essentially to demand a statement and debatement of account.

[10] The application was settled and an order was made against the first respondent.

The court ordered the first respondent to provide the appellant, *inter alia,* with:

> 1. a full and precise Statement of Account of amounts owing by the appellant to the first respondent, alternatively credits due to the appellant in respect of electricity and interest, if any, debited to the appellant's account for the period June 2016 to date;
> 2. copies of the actual meter readings conducted at the appellant's property under account number [....] and to provide proper proof thereof within 15 (fifteen) days of the court order;
> 3. the method of calculation of the consumption and the applicable tariff used to calculate the consumption for the relevant period within 15 (fifteen) days of the court order.

[11] On 19 and 27 March 2019 respectively, the appellant's attorney forwarded a letter to the first respondent's attorneys *"Kunene Ramapala Inc"* attaching a copy of the draft court order. It also pointed out that the appellant awaited the first respondent's compliance therewith, within the time periods referred to in the agreement of settlement. Kunene Ramapala Inc did not acknowledge or reply to any of the letters.

[12] On 3 April 2018 the original court order was uplifted from the court file and forwarded in an email addressed to Kunene Ramapala Inc. The first respondent was again requested to acknowledge receipt of the court order as well to comply with the court order within the time periods referred to in the settlement agreement. There was no response to this letter. On 9 April 2018 a further letter was addressed to the attorneys pointing out, *inter alia*, that in the absence of receiving compliance with the court order within the time period specified therein, the appellant intended to proceed with a contempt application together with a punitive order for costs. Yet again, there was no response to the letter.

[13] On 30 April 2018 the appellant instituted the contempt application against first respondent as well as against second respondent. The contempt application was

served on the first respondent at Kunene Ramapala Inc and on the second respondent on Ms Nevas, the legal advisor at second respondent's business address. A notice of intention to oppose was filed on behalf of both first and second respondent and Kunene Ramapala Inc was appointed as their attorneys. The respondents did not file any answering affidavits and the application was eventually set- down for hearing in the opposed motion court for Tuesday 19 June 2018 before Matojane J. Although the respondents were represented in court by Kunene Ramapala Inc as well as counsel, there was still no answering affidavit filed on behalf of the first or second respondent. The learned judge, after hearing argument, ordered the first respondent to file an "explanatory affidavit" and stood the matter down to Thursday 21 June 2018. The first respondent complied and filed an explanatory affidavit, deposed to by Selby Sello Rasoesoe ("Mr Rasoesoe"), the Acting Deputy Director of the first respondent in the legal department.

[14] During the hearing of the appeal the appellant initially took issue with the fact that it was not given an opportunity to answer/reply to the explanatory affidavit. It submitted that if given the opportunity, it could have easily refuted the allegations in the explanatory affidavit. During the hearing of the appeal the appellant however intimated that it was no longer pursuing that issue.

[15] The court *a quo* found that it was impossible for the first respondent to comply with the court order and dismissed the application with costs.

Was it impossible for the first respondent to give effect to the court order?

[16] The first respondent, in its explanatory affidavit, admitted that it failed to comply with the court order and set out the reasons for non-compliance. In summary the explanation is the following: Mr Rasoesoe attended at the appellant's premises for an inspection *in loco,* seemingly, on the day after the court *a quo* ordered the delivery of the explanatory affidavit. He found a meter box at the appellant's premises which, according to the first respondent's records, belongs to Marabella Complex, situated at [....] Pretoria Street, Oaklands. This meter was apparently installed at Marabella on 5

November 2013. Mr Rasoesoe then proceeded to Marabella Complex at [....] Pretoria Street in Oaklands to verify the meter number physically present at that address, but he was denied access. He then sent a request to City Power to source the services of the JMPD to gain entry to the premises and to get access to the meter. He stated that the JMPD said "*they will attend at the premises to assist with access to the physical meter".*

[17] The first respondent contends that the last actual reading on the meter at the appellant's premises was on 31 July 2017. Since then readings had been estimates because the first respondent's staff was unable to access the appellant's premises to take an actual reading. No particulars are provided of any attempts made to take an actual reading between 31 July 2017 and 20 June 2018. It contends that the meter at appellant's premises "has been removed" and the first respondent could not "obtain the downloads from the property" and as a consequence "no data was transmitted to the first respondent from the meter", despite annexing to the explanatory affidavit certain information which appears to have been extracted from these downloads which were allegedly not obtained.

[18] The court *a quo* found that the appellant had removed the official meter and this made it impossible to comply with the court order. On a proper reading of the explanatory affidavit there was no basis for such a finding.

[19] When Mr Rasosoe visited the appellant's premises, albeit three months after the first respondent was ordered to do so, he found a meter at the appellant's premises, but the meter was in fact one allocated to a totally unrelated complex located in [....] Pretorius Street, Oaklands. The only logical conclusion is that appellant's meter is somewhere in the greater Johannesburg area and is sending in readings for an unknown property. What is astounding is that, although the wrong readings have been received since November 2015, the first respondent never checked the meter despite complaints since 2017. This begs the question of how, where and to which complex the readings on that particular meter were being billed, and what readings were being applied to appellant. The first respondent's explanation only serves to confirm the

appellant's case.

[20] The relief sought by the appellant was that the first respondent should provide copies of the actual meter readings. The learned judge apparently took into consideration the alleged inability of the first respondent to gain access to the appellant's premises in order to take actual readings, but something which appears to be a meter reading was in fact included in the explanatory affidavit as COJ4 and appears to have been available at all times. No explanation was given by the first respondent why it was not made available in terms of the order, or how it was annexed when the affidavit itself said that it was not available. The alleged lack of access to the property can therefore not excuse the first respondent from complying with the agreed court order. The explanatory affidavit in addition fails to set out the dates on which the first respondent attempted to access the property after the court order was granted. The court *a quo* should also have considered that the first respondent's staff did not need to have access to the meter because it downloads readings automatically as may be seen from annexure COJ4 which has readings from 31 July 2017 to 4 June 2018. The appellant further sought a full statement of account as well as the method of calculation of the consumption. No explanation was provided for the failure to provide these. Under the circumstances the court *a quo* ought to have found that no valid explanation was tendered and that it was possible for the first respondent to have complied with the order.

THE CONTEMPT

[21] In order to succeed with an application for contempt *ex facie curiae,* the appellant needs to prove the order; service or notice of the order; non-compliance; and wilfulness and *mala fides* beyond reasonable doubt, because the contempt relief it seeks is punitive (a *declarator* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities). Once the appellant has proven the essential requisites, the respondents bear an evidential burden in relation to wilfulness and *mala fides*. Should the respondents fail to advance evidence that establishes a

reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt. See *Fakie NO v CCII Systems (Pty) Ltd.*[2]

[22] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*[3] the Constitutional Court ("CC") summarized the position as follows:

> [67] Summing up, on a reading of *Fakie*, *Pheko*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof — beyond reasonable doubt — applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies — for example, declaratory relief, mandamus or a structural interdict — that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof — a balance of probabilities — applies.

Should the first respondent be found in contempt?

[23] It is not in dispute that the first three requisites, namely the order; service or notice of the order and non-compliance have been established by the appellant in regard to the first respondent. The issue is whether, in the circumstances of this case, the first respondent has shown good cause why it should not be held in contempt of the court order.

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[2] 2006 (4) SA 326 (SCA)at [42]
[3] 2018 (1) SA 1 (CC)

[24] The court order was granted on 19 March 2018 with the consent of the first respondent. The first respondent therefore had to perform in terms of its own voluntary undertakings to do so. As stated by the Supreme Court of Appeal in *Meadow Glen Home Owners Association*,[4] that obliged the first respondent to make serious good-faith endeavours to comply with the court order, as is expected from public bodies. No attempt was however made to comply with the order and no reasons were advanced as to what steps were taken to give effect to the order. In fact, the first time an attempt was made to comply was when the matter was before the court *a quo* in the opposed motion court, more than three months later, and only after the first respondent was instructed by the court to file an explanation. It was only then that the first respondent did an inspection *in loco* at the appellant's premises. Then, despite finding a meter at appellant's premises that does not belong to that address, the first respondent made no attempt to further investigate in order to comply with the order. If there was an issue with the implementation of the order the first respondent should have returned to court seeking a variation of the order or a relaxation thereof. As stated in *Meadow Glen Home Owners Association* [5] it was not appropriate for the first respondent to wait until the appellants came to court complaining of non-compliance in contempt proceedings, before raising difficulties in complying with the order. Its failure over a protracted period to take any steps is to be deprecated. In the circumstances the first respondent's explanation is inadequate and it can be inferred that its conduct was wilful and *mala fides*. In the result, the first respondent's contempt was established beyond reasonable doubt.

[25] The next issue is the sanction that must be imposed. The appellant, in its grounds of appeal as well as in its heads of argument, contended for the imposition of a fine on the first respondent. As stated earlier, during argument the suitability of a fine was raised with counsel for the appellant, *Mr Roux*. *Mr Roux* conceded that a fine might not be the most suitable remedy in the circumstances and submitted that this court should,

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[4] At [8]
[5] At [8]

as sought by the appellant in the alternative, commit the second respondent to prison for the first respondent's failure to comply with the court order.

Is the second respondent in contempt?

[26] In the contempt application and in its grounds of appeal the appellant only sought an order of contempt against the first respondent, and not against the second respondent. This is clear from the notice of motion in the contempt application and the founding affidavit in support thereof. It only sought **relief** against the second respondent, **"*by virtue of the First Respondent's non-compliance with such Court Order",*** and then only in the alternative to a fine.

[27] The relief sought against the second respondent is incompetent because the appellant cannot ask for the committal of the second respondent to prison before it had established contempt on the part of the second respondent personally. In *Matjhabeng supra* the CC held that where public officials were cited for contempt in their personal capacities, the officials themselves, rather than the institutional structures for which he or she was responsible, must have wilfully or maliciously failed to comply with an order. This means, in general terms, that the official in question, personally, must deliberately defy the court order. In paragraph [76] of the judgment the CC held as follows:

> "[76] The next issue for determination is whether the non-compliance on the part of Mr Lepheana was wilful and *mala fide*. The reason for these requirements lies in the nature of the contempt proceeding and its outcome. In order to give rise to contempt, an official's non-compliance with a court order must be 'wilful and *mala fide'*. In general terms, this means that the official in question, personally, must deliberately defy the court order. Hence, where a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply. As the Supreme Court of Appeal has held —
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> 'there is no basis in our law for orders for contempt of court to be made

against officials of public bodies nominated or deployed for that purpose, who were not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings'.

[28] The appellant must prove the same four requisites discussed earlier. It must prove that the second respondent had personal knowledge of the order, and not just knowledge imputed by the fact that he is the municipal manager of the first respondent; that he was personally aware of the consequences that would befall him if he did not comply with the order, and that he wilfully and *mala fide* ignored the order.

[29] There must be no doubt left in the contempt application about who was at risk of a finding of contempt. The founding affidavit, in this regard, is in my view, lacking. Although the second respondent is seemingly cited in his personal capacity, the intention is clearly not to hold him liable for his own contempt but to hold him responsible for the first respondent's contempt. During the contempt hearing the appellant never sought an order against the second respondent, and the court *a quo* was never asked to consider such an option. The explanatory affidavit was clearly filed to explain the first respondent's failure to comply and lacks any detail as far as the second respondent's alleged contempt is concerned. None of the parties addressed the appropriateness of committing the second respondent to prison. Before any order of contempt can be made against the second respondent he should have been forewarned that committal to prison could be imposed and should have been granted the opportunity, in his personal capacity, to explain the non-compliance. Had the second respondent known that this was on the cards, he might have considered filing an explanatory affidavit setting out the reasons why he should not be held personally liable. The relief sought against the second respondent must, for these reasons alone, fail.

THE RELIEF

[30] The main objective of contempt proceedings is to vindicate the authority of the court

and coerce litigants into complying with court orders.[6] In *Victoria Park Ratepayers' Association v Greyvenouw CC and Others,*[7] Plasket AJ, (as he then was) said the following with regards to compliance with court orders by the state.

> "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 section 1 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 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.

[31] It is common cause that as at date of the hearing of the appeal, the first respondent had still not complied with the court order. The appellant submitted that the matter need not be referred back to the court *a quo* because all the elements required for the relief sought are present and had been proved and no further evidence was required. It was submitted that the appellant, as a Body Corporate, is already out of pocket, at the expense of the homeowners, and simply requires that the accounts be corrected. The appeal court can therefore, in terms of section 19(d) of the Superior Courts Act 10 of 2013, make a finding on the existing papers as well as a motion court could.

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[6] Meadows Home Owners Association supra at [16]
[7] [2004] 3 All SA 623 (SE) at [23]

[32] In *Pheko and Others v Ekurhuleni City*[8] the CC stated that while courts do not countenance disobedience of judicial authority, it needed to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority. At paragraph [37] it held that:

> "Where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a *mandamus* demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance."

[33] The appellant still seeks compliance with the order. It is clear that the first respondent is capable of complying with the order and should be granted a further opportunity to do so. The only suitable remedy in the circumstances would be to impose a fine.

[34] In the circumstances the court *a quo* should have found the first respondent in contempt, imposed a fine, and ordered the suspension of the payment of the fine on condition that the first respondent complies with the order. In the result the following order is made:

1. The appeal succeeds with costs.
2. The order of the court *a quo* is set aside and replaced with the following order:
    - 2.1 The application against the first respondent is granted with costs on an attorney client scale.
    - 2.2 The first respondent is found to be in contempt of court and is fined R 500 000 (five hundred thousand rand).
    - 2.3 The payment of the fine is suspended on condition that the first respondent complies with the court order dated 19 March 2018

[8] 2015 (5) SA 600 (CC) at [37]

within 30 (thirty) days of the order.

L. WINDELL
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

W. L. WEPENER
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Appellant's Attorneys:	Arnold Joseph Attorney
Counsel for appellant:	Adv. C D Roux
First and Second Respondents' Attorneys:	Kunene Ramapala Inc
Date of hearing:	24 February 2020
Date of judgment:	20 March 2020