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

CASE NO: 38127/17

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

05.10.2021	**Electronic**
DATE	SIGNATURE

In the matter between:

THE BODY CORPORATE OF PRESTON PLACE Applicant

and

CITY OF JOHANNESBURG First Respondent

THE MUNICIPAL MANAGER OF THE CITY OF JOHANNESBURG, DR NDIVHONISWANI LUKHWARENI Second Respondent

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JUDGMENT

CRUTCHFIELD AJ:

[1] This opposed application for an order of contempt came before me on 28 July 2021. The parties' legal representatives did not file a joint practice notice in terms of the consolidated practice directive dated 18 September 2020. I heard the application but required the parties to deliver and upload the joint practice note on caselines after the hearing.

[2] The applicant was the Body Corporate of Preston Place, established in terms of section 2(1) of the Sectionals Titles Schemes Management Act, 8 of 2011.

[3] The first respondent was the City of Johannesburg, a municipality established by the MEC for Local Government and Development Planning of Gauteng Province, in terms of section 12(1) of the Local Government Municipal Structures Act, 1998 ('the Act').

[4] The second respondent was Dr Ndivhoniswani Lukhwareni, the Municipal Manager of the City of Johannesburg, acting in terms of section 82 of the Act.

[5] The applicant was a consumer of electricity supplied by the first respondent, ('the City'), in respect of which the applicant pays the City.

[6] This application was the second by the applicant for a finding of contempt against the first and second respondents. The applicant sought the following relief:

6.1 That the first and second respondents be found in contempt of the order of Court granted on 20 March 2020.

6.2 That the first respondent pay a fine of R1 000 000.00 (one million rand) forthwith.

6.3 That the second respondent be committed to prison for his contempt of the order granted by this Court on 20 March 2020 by virtue of the second respondent's non-compliance therewith.

6.4 Costs of suit on the attorney and own client scale payable by the first and second respondents jointly and severally the one paying the other to be absolved.

[7] This application together with the first application for contempt arose out of a settlement agreement concluded between the applicant and the first respondent ('the agreement') that was made an order of court on 19 March 2018 under case number 38127**/**17 ('the court order').

[8] The court order stands to be read together with the order of the Full Court granted on 20 March 2020 ('the Full Court order'). The court order of 19 March 2018 was referred to as **'JVA2'** in the applicant's application.

[9] The agreement obliged the first respondent to provide the applicant with a full and precise statement of account of the amounts owed by the applicant to the first respondent, duly supported by actual meter readings and/or proper proof thereof. and an adjustment of the actual account and payment of any credits and ancillary relief.

[10] The applicant alleged that despite the lapse of more than two (2) years since the agreement was made an order of court, and, notwithstanding a plethora of correspondence imploring the first respondent to comply with the court order, the first respondent failed to do so and allegedly exhibited a total disregard for the court order.

[11] The first and second respondents relied in respect of the first contempt application on what was referred to as an 'explanatory affidavit'. The latter document set out the reasons that the respondents had failed to comply with the court order.

[12] Pursuant to the explanatory affidavit, the court *a quo* hearing the first contempt application determined that it was impossible for the first respondent to comply with the court order and the first contempt application was dismissed with costs. The applicant appealed the outcome of the first contempt application to the Full Court.

[13] The Full Court order granted, on 20 March 2020, provided that:

13.1 The appeal succeeds with costs.

13.2 The order of the Court *a quo* is set aside and replaced with the following order:

13.2.1 The application against the first respondent is granted with costs on an attorney/client scale.

13.2.2 The first respondent is found to be in contempt of the Court order and is fined R500 000.00.

13.2.3 The payment of the fine is suspended on condition that the first respondent complies with the Court order dated 19 March 2018 in 30 days of this order.

[14] Whilst the appeal before the Full Court was not formally opposed by the respondents, their legal representatives were present in court during the appeal. They

conceded that there had not been compliance by the respondents with the court order. Furthermore, the respondents did not oppose the appeal or the imposition of the fine.

[15] The court in *Fakie NO v CCII Systems (Pty) Ltd*[1] summarised the position in respect of contempt proceedings as follows:

> '1. The civil contempt procedure is a valuable and important mechanism for securing compliance with Court orders, and survives constitutional scrutiny in the form of a Motion Court application adapted to constitutional requirements.
>
> 2. The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
>
> 3. In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
>
> 4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
>
> 5. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[16] Both wilfulness and *mala fides* on the part of the respondents must be established for a finding of contempt to be made. They do not function as substitutes of each other.

[17] The Full Court referred to and relied upon *Matjhabeng Local Municipality v Eskom Holdings Limited & Others*.[2] In terms thereof, the applicable onus of proof must accord with the purpose sought to be achieved by the relief claimed in the contempt proceedings.

[18] On 20 March 2020, the applicant's attorney of record transmitted a copy of the judgment of the Full Court to the respondents' attorneys of record and advised that the

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1 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 325 (SCA) ('*Fakie*') para 42.

2 *Matjhabeng Local Municipality v Eskom Holdings Limited & Others* 2018 (1) SA 1 (CC) ('*Matjhabeng*').

applicant required strict compliance with the order of 19 March 2018 within 30 days thereof, failing which the first respondent was to pay the fine of R500 000.00 (five hundred thousand rand) imposed on the first respondent.

[19] The respondents' attorneys replied on 23 March 2020, that the judgment had been transmitted to the first respondent, (the applicant presumed the latter reference to the first respondent was a typographical error that ought to read 'the second respondent'), for urgent compliance with the Full Court order.

[20] On 23 March 2020, the applicant's attorney received a telephone call from an employee, one Mr Clifford Komana of City Power (Pty) Ltd, Legal Department, requesting the name and contact details of the person with whom contact could be made in order for a City Power technician to read the meter, which the applicant's attorney duly furnished, nothing further occurred.

[21] The agreement was made a court order more than two years ago. The Full Court delivered its judgment and order some 18 months ago. The respondents failed to comply therewith. Accordingly, the applicant launched this second application for contempt.

[22] The answering affidavit in the second contempt application was delivered on behalf of both the first and second respondents. The respondents raised two issues; the absence of proper service on the second respondent, and, non-compliance with the Full Court order by the respondents.

[23] I was informed at the hearing that the second respondent terminated his employment with the first respondent in the intervening period and was not employed by the first respondent any longer.

[24] The respondents contended that personal service of the Full Court order was required in that the second respondent's liberty was at risk pursuant to the alleged contempt.

[25] The second issue raised by the respondents was that it was impossible for the respondents to comply with the agreement and court order read together with the order of the Full Court.

[26] The respondents relied upon the 'explanatory affidavit' that was placed before the court *a quo* and pursuant to which the Full Court determined that the first respondent was well able to comply with the court order incorporating the agreement. Thus, the Full Court granted the order aforementioned. Notwithstanding, the respondents continued to rely on the explanatory affidavit in the second contempt application.

[27] The respondents alleged that the last actual reading of the meter at the applicant's premises was on 31 July 2017. The applicant's meter box was numbered 63034153, being the meter box belonging to Marabella Complex and not to the applicant. Subsequently, the applicant's electricity consumption had been estimated.

[28] The first respondent alleged that it was unable to ascertain when meter 63034153 was installed at the applicant's premises. Accordingly, the first respondent alleged that it could not be found to be in wilful disregard of the Full Court's order.

[29] However, the respondents alleged that:

'The facts surrounding the installation of meters at the applicant's property will have to be done to ensure compliance with the settlement agreement.'

[30] The deponent on behalf of the first respondent failed to articulate why the first respondent's officials and employees had not undertaken and completed that investigation in the interim.

[31] Other than the single telephone call made to the applicant's attorney and the deponent's inspection of the applicant's premises, nothing had been done by the first respondent to comply with the court order read together with the Full Court order.

[32] The statements annexed by the respondents to the answering affidavit reflected that the meter calculating the electricity usage at the applicant's premises from 15 July 2017 to 19 April 2018 was meter number 63054623. The meter calculating the consumption from 13 September 2019 was meter number 63034153. The respondent alleged that meter number 63034153 was installed at Mabella Complex and the respondents could not explain how the meter was installed at the applicant's property.

[33] The City could not explain when the meter was installed and nor did it explain why it could not do so, or, what steps it had taken in order to ascertain the circumstances under which meter number 63034153 was installed at the applicant's premises.

[34] Not a single averment was made on behalf of the City as to what transpired, if anything at all, in the interim in compliance or attempted compliance with the Full Court order.

[35] The City simply stated that it was impossible to comply with the agreement.

[36] Accordingly, the respondents failed to comply with the settlement agreement, court order and the order of the Full Court ('the court orders').

[37] Objectively considered, the respondents did not provide an exculpatory version for their non-compliance.

[38] On the undisputed or common cause facts in respect of the respondents' non-compliance with the provisions of the court orders, the evidentiary burden resting on the respondents in terms of the *Fakie* judgment was not complied with by them.

[39] Thus, the respondents failed to advance evidence that established a reasonable doubt that their non-compliance with the court orders was wilful and *mala fide*.

[40] Absent compliance with the court order, unless a respondent is able to establish conduct that is not wilful and *mala fide*, that respondent is in contempt of the court order and obliged to suffer the consequences.

[41] Wilfulness and *mala fides* are legal conclusions that flow from the facts established on the papers. In the absence of any facts or admissible evidence from which facts can be adduced, advanced by the respondent, there is no basis whatsoever to find anything other than that the respondents failed to meet the duty resting upon them to advance evidence that negated the elements of wilfulness and *mala fides*.

[42] The respondents' conduct, objectively assessed, demonstrated in my view wilful and *mala fide* non-compliance. The finding of wilfulness and *mala fides* against the respondents is justified, this being the only inference established by the respondents' conduct.

[43] The applicant proved the court orders and service thereof on the City. Personal service, a requirement for incarceration, was not proved by the applicant on the second respondent beyond a reasonable doubt. Accordingly, the application against the second

respondent stands to be dismissed. In so far as the service alone was an issue in respect of the case against the second respondent, the costs will not be affected by the dismissal.

[44] The Constitutional Court emphasised in *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others,*[3] *that:*

'[27] Contempt of Court proceedings exist to protect the rule of law and the authority of the Judiciary as the applicant correctly avers, "the authority of Courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the Courts". Any disregard for this Court's order and the judicial process requires this Court to intervene. As enunciated in *Victoria Park Ratepayers' Association,* "contempt jurisdiction, whatever the situation may have been before 27 April 1994, now also involves the vindication of the Constitution". Thus, the issues at the heart of this matter are irrefutably constitutional issues that engage this Court's jurisdiction.'

and

'[60] As this Court held in *Tasima 1*, "the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system … and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built". It is perspicuous that the constitutional right of access to courts will be rendered an illusion unless orders made by Court who are capable of being enforced by those in whose favour the orders were made. In *SALC*, it was said that "if the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses and chaos ensues". A complete denial of judicial mechanisms "would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disaster". Accordingly, it is necessary for this Court to send, by virtue of a punitive sanction, an unequivocal message that its orders must be obeyed.'

[45] In the circumstances, the first respondent is in contempt of the Full Court order delivered on 20 March 2020 under case number 38127/17 and I intend to grant an order accordingly.

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3 *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others* CCT 52/21 dated 29 June 2021.

[46] The Full Court considered the appropriateness of a fine of R500 000.00 against the City. Given the Full Court's approval thereof, I intend to follow that course of sanction.

[47] By reason of the aforementioned:

47.1 The first respondent is declared to be in contempt of the order of the Full Court delivered on 20 March 2020 under case number 38127/17.

47.2 The first respondent is ordered to pay a fine of R500 000.00 (five hundred thousand rand) forthwith.

47.3 The application against the second respondent is dismissed.

47.4 The first respondent is liable for the costs of the application on the attorney and own client scale.

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ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal

representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 5 October 2021.

COUNSEL FOR THE APPLICANT:	Mr C D Roux.
INSTRUCTED BY:	Arnold Joseph Attorney.
COUNSEL FOR RESPONDENTS:	Mr Nyangiwwe.
INSTRUCTED BY:	Kunene Ramapala Inc.
DATE OF THE HEARING:	28 July 2021.
DATE OF JUDGMENT:	5 October 2021.