


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2017/37231

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

10 December 2021
.....
SIGNATURE
DATE

In the matter between:

PAMELA DUDUZILE NKOSI

First Applicant

SIBONGILE GOODNESS NJAPA

Second Applicant

BENJAMIN SEMAKALENG RABOSHABA

Third Applicant

LEBOHANG STEVEN MOTSUMI

Fourth Applicant

PATRICK MANDLA NXUMALO

Fifth Applicant

NIKEZIWE DORRIES NHLEKO

Sixth Applicant

RENDANI VIRGINIA RAMUHASHI

Seventh Applicant

EDWARD RABAGE MOTSEOTHATA

Eighth Applicant

ZWELAKHE MANANA

Ninth Applicant

and

THE CITY OF JOHANNESBURG

First Respondent

METROPOLITAN MUNICIPALITY

JOHANNESBURG PROPERTY COMPANY

Second Respondent

DEPARTMENT OF HUMAN SETTLEMENTS
TSHEPO FREDDY MOKATAKA
THE MUNICIPAL MANAGER
THE MAYOR OF THE CITY OF JOHANNESBURG

Third Respondent
Fourth Respondent
Fifth respondent
Sixth Respondent

Delivered: 10 December 2021 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ:

Introduction

1. On 3 October 2017, the applicants brought an application for orders, among others, declaring the conduct of the first and second respondents in failing to install bulk water and electrical infrastructure on erven 1779, 1777, 1740, 1752, 1776, 1775, 1733 and 1769 to be inconsistent and in contravention of sections 26(1) and (2) of the Constitution of the Republic of South Africa and directing the first and second respondents to install the necessary infrastructure on the said erven.
2. On 15 October 2018, by agreement between the parties, the court per Justice Mudau ordered that:

“1. The first and second respondents are ordered to install the bulk water and electrical infrastructure on the first to ninth applicants’ stands, namely erf 1779, 1777, 1740, 1770, 1752, 1776, 1775, 1733 and 1769.

2. *The second respondent has prepared a report of the budget for the installation of bulk water and electrical infrastructure on the first to ninth applicants' stands as described in paragraph 1 above. The report is awaiting the first respondent's council approval.*
3. *The first and second respondents accept that the installation of the bulk water and electrical infrastructure on the first to ninth applicants' stands as described in paragraph 1 above is urgent and is to be prioritised by the respondents. The first respondent shall endeavour to have a special meeting of council convened in terms of section 29(2) of the Municipal Structures Act 117 of 1998 to approve the report mentioned in paragraph 2 above.*
4. *The first and second respondents shall within 60 days from the date of this order file a report, under oath, setting out the steps they have taken to install the bulk water and electrical infrastructure on the first to the ninth applicants stands, which stands are described in paragraph 1 above.*
5. *The applicants may within 30 days of that report/reports, deliver commentary thereon, under oath.*
6. *The first respondent is ordered to write off the rates and taxes amounts owed by the first to ninth applicants in respect of their individual stands from the date of purchase of the stand to the date of use of the bulk water and electrical services on each stand within 30 days of this order being served on the first respondent.*
7. *The first and second respondents shall pay the costs of this application on a party and party scale, the one paying the other to be absolved."*

3. The applicants allege that the first and second respondents have failed to comply with the above order.
4. Accordingly, on 4 October 2019, the applicants filed an application for contempt of court. In terms of the notice of motion, the applicants seek orders:
 - 4.1. Joining the fourth, fifth and sixth respondents to the proceedings;
 - 4.2. Declaring that the first and second respondents be held in contempt of the court order of Justice Mudau on 15 October 2018;
 - 4.3. The first, second, fourth and fifth respondents within 30 days of the granting of the order comply with paragraphs 4 and 6 of the order of Justice Mudau on 15 October 2018;
 - 4.4. The fifth respondent within 30 days of the granting of the order report back to the court on when the bulk infrastructure will be installed on the applicants stands as referred to in paragraph 1 of the order of Justice Mudau on 15 October 2018;
 - 4.5. The first and second respondents be ordered to pay the costs of the application jointly and severally the one paying the other to be absolved on an attorney and client scale.

5. The first, second, fourth, fifth and sixth respondents (“the respondents”) oppose this application.
6. The respondents have raised a point *in limine*. They argue that the application to join the fourth, fifth and sixth respondents is flawed for two reasons. The first is that this is an application for contempt of a court order in terms of which judgment has already been given and as a result, it is impossible for the fourth, fifth and sixth respondents to exercise their right to file answering papers. The second reason is that the applicants have not satisfied the test for joinder.
7. On the merits, the respondents aver that the first respondent, on 12 June 2019, filed a report with the registrar in compliance with the court order.

Discussion

Was there compliance with the court order of 15 October 2018?

8. The first respondent is the City of Johannesburg Metropolitan Municipality. It is responsible for the provision of services including the supply of water and electricity. The first and second respondent initially opposed the main application and filed answering papers. On the date of the hearing of the main application, Justice Mudau made an order by agreement between the parties. As appears from the order, the parties agreed that:

- 8.1. The first and second respondents will install the bulk water and electrical infrastructure on the first to ninth applicants' stands, namely erf 1779, 1777, 1740, 1770, 1752, 1776, 1775, 1733 and 1769.
- 8.2. The second respondent had already prepared a report of the budget for the installation of bulk water and electrical infrastructure on the first to ninth applicants' stands as described above and was awaiting the first respondent's council approval.
- 8.3. The first and second respondents accept that the installation of the bulk water and electrical infrastructure on the first to ninth applicants' stands is urgent and is to be prioritised. The first respondent shall endeavour to have a special meeting of council convened in terms of section 29(2) of the Municipal Structures Act 117 of 1998 to approve the report mentioned in sub paragraph 2 above.
- 8.4. The first and second respondents will, within 60 days from the date of the order, file a report under oath setting out the steps they have taken to install the bulk water and electrical infrastructure on the first to the ninth applicants stands.
- 8.5. The applicants may within 30 days of that report/reports, deliver commentary thereon, under oath.

- 8.6. The first respondent will write off the rates and taxes amounts owed by the first to ninth applicants in respect of their individual stands from the date of purchase of the stand to the date of use of the bulk water and electrical services on each stand within 30 days of the order being served on the first respondent.
- 8.7. The first and second respondents will pay the costs of the application on a party and party scale, the one paying the other to be absolved.
9. In opposing these contempt of court proceedings, the respondents argue that:
- 9.1. On 12 June 2019, the first respondent through its attorneys filed a report with the registrar *albeit* late;
- 9.2. The reasons for the late delivery were articulated in an email dated 2 July 2019;
- 9.3. On 19 November 2019, the second respondent's transactions committee made a recommendation to the mayoral committee for the approval of the installation of the bulk services;
- 9.4. In July 2020, the City Council resolved as follows:

"[1] That the City shall install the required electrical and water bulk services in respect of the properties Erven 1731 to 1781

depicted on the map Annexure G in accordance with budget available over the applicable financial years.

[2] That the Revenue Department of the City submits the requisite report for the write off the rates and taxes in respect of the erven listed on Annexure A, amounting to R917 875. 26 including any amounts accumulated subsequent to the approval of the report be written off in terms of the approved delegations of the COJ”;

9.5. The resolution of July 2020 is evidential proof that there was compliance of the court order and therefore, it is not true and correct that the first respondent’s conduct is wilful and *mala fide* “*when a report was previously filed with the registrar*”.

10. The applicant however argues that:

10.1. On 12 June 2019, the respondents’ attorneys filed a document that they allege is a report under the cover of a letter dated 31 May 2019. The purported report was however

10.1.1. not made under oath as required by the court order; and

10.1.2. nothing more than a consolidation of correspondence prior to the court order being granted and fails to set out the steps that

have been taken since the court order to install the bulk infrastructure;

10.2. To date, the rates and taxes accounts continue to accrue. The respondents have thus failed to write off the rates and taxes as per the court order;

10.3. The applicants' attorneys have, subsequent to the purported report, informed the respondents that the purported report is unsatisfactory and does not comply with the court order. The respondents were accordingly placed on terms to comply but failed to do so as a result, this application was launched.

11. On a reading of the papers, the following is apparent:

11.1. On 12 June 2019, the respondent's attorneys presented for filing, as per the filing sheet, *"The First and Second Respondent's Report"*.

11.2. What was however filed was

11.2.1. a letter, on the letterhead of the first respondent addressed to the respondents' attorneys dated 31 May 2019, stating that:

“ ...

2. *We have been attempting to secure a meeting with our Revenue Colleagues for some time now, without any success. We will continue to make every effort to secure same so that we can deal with the issues of rates write-off.*
3. *We are also finalising a report to be submitted to Council for approval for installation of bulk services. The report will be included in the pack of our Next Transactions and Service Delivery Committee and Council.*
4. *We attach the unsigned report for your convenience.*
5. *The Eskom input is still outstanding. However, we have decided to finalise the Report without the exact figure from Eskom.*
6. *We will make room for the Eskom costs in the Report.*
7. *Hopefully we will be able to submit the Report to the Next Council meeting.”*

11.2.2. an internal memo of the first respondent dated 31 July 2018 containing nothing more than a consolidation of correspondence prior to the court order being granted.

12. It is vital to the administration of justice that those affected by court orders obey them. A litigant who has obtained a court order requiring an opponent to do or not to do something is able to approach a court, in the event of non-

compliance, for a further order declaring the non-compliant litigant in contempt of court and impose a sanction. The sanction usually has the object of inducing the non-compliant litigant to fulfil the terms of the previous order.

13. The test for when disobedience of a civil order constitutes contempt is that an order was granted against the respondent; that the respondent was either served or informed of the court order or its contents; that the respondent disobeyed or neglected to comply with the order and that the refusal was wilful or *mala fide*.
14. I am satisfied that the legal requirements for civil contempt have been fulfilled.
15. The respondents attempt to rely on a letter of 31 May 2019 and an internal memorandum of July 2018 (that is prior to the order of Justice Mudau) cannot come to the respondents' aid. There was a clear disregard by the respondents to meaningfully address the point of substance of the court order directly. No attempt whatsoever was made by the respondents to address the applicants concerns and the court order.
16. It was only after the applicants had launched these proceedings in October 2019, did the respondents, in their opposing papers attempt to provide an update on the steps they have taken to install the bulk infrastructure.

17. Despite the first and second respondents accepting in October 2018 that the installation of the bulk water and electrical infrastructure on the first to ninth applicants' stands was urgent and was to be prioritised by the respondents and endeavoured to have a special meeting of council convened to approve the report mentioned in paragraph 2 of the order, it was only in July 2020 that there was a resolution that the required electrical and water bulk services in respect of the properties shall be installed.
18. To date, the bulk infrastructure has not been installed nor have the applicants' rates and taxes been written off as per the court order.

Joinder of the fourth, fifth and sixth respondents

19. The test for joinder requires that a litigant have a direct and substantial interest in the subject-matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts.
20. In *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC), the Constitutional Court held that when a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of

justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.

21. By virtue of their constitutional and statutory responsibilities, the joinder of the fourth, fifth and sixth respondents in respect of this court's continuing supervision of the implementation of the court order is appropriate. The general duty imposed on municipalities in respect of the provision of municipal services includes giving effect to the Constitution by prioritising the basic needs of the community, promoting the development of the community and ensuring that there is access to at least the minimum level of municipal services.
22. It needs to be stressed that the Constitution enjoins organs of state, like the first respondent to adhere and give effect to its obligations and to meaningfully comply with court orders. Where an organ of state fails in its duty, a court must assume an invidious position of having to oversee state action, to address and correct the failures. It is precisely because of the leadership entrusted to the fourth, fifth and sixth respondents that they have a duty to undertake responsibility for implementing the court order. The first respondent, as an organ of state, is duty-bound to comply with the orders of this court, as it is with all of its obligations under the Constitution.

23. I am therefore satisfied that the applicants have made out a case for the relief sought.

Costs

24. The Constitutional Court has, in the matter of *Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)* at [223] restated the standard for costs on this scale, “More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.”
25. The first and second respondents’ failure to comply with the court order and their evasive response to adequately to address the issues that arise in this case warrants a punitive cost order.

Order

26. In the result, I make the following order:

26.1. The fourth, fifth and sixth respondents are joined as a party to these proceedings;

26.2. It is declared that the first and second respondents are in contempt of the court order of Justice Mudau on 15 October 2018;

26.3. The first, second, fourth and fifth respondents are ordered to, by 1 February 2022, file a report under oath

26.3.1. setting out the steps taken since July 2020 to install the required electrical and water bulk services on the first to ninth applicants' stands, namely erf 1779, 1777, 1740, 1770, 1752, 1776, 1775, 1733 and 1769;

26.3.2. setting out the date by when the required electrical and water bulk services in respect of the aforementioned stands will be installed; and

26.3.3. confirming that the rates and taxes amounts owed by the first to ninth applicants in respect of their individual stands from the date of purchase of the stand to the date of use of the bulk water and electrical services on each stand has been written off.

26.4. The first and second respondents are ordered to pay the costs of the application jointly and severally the one paying the other to be absolved on an attorney and client scale.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant: Adv A Dipa

For the Respondent: Adv T Makgate

Date of the hearing: 26 October 2021

Date of the judgment: 10 December 2021