REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 2021/27206

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED YES/NO

18 October 2022.

In the matter between:

DILUCULO PROPERTIES (PTY) LTD	**Applicant**
and	
CITY OF JOHANNESBURG	**First Respondent**
BRINK, FLOYD	**Second Respondent**

In re:

Case No: 5576/2018

DILUCULO PROPERTIES (PTY) LTD	**Applicant**
and	
CITY OF JOHANNESBURG	**Respondent**

JUDGMENT

MUDAU, J

[1] These are contempt of court proceedings. The applicant in addition, seeks other substantive relief. The applicant is the registered owner of the immoveable property described as Erf [....] Johannesburg Township, Registration Division I.R., Gauteng ("the property"), commonly referred to as Jozi House. Jozi House is a 17 story building, comprising 244 residential units and 2 commercial spaces. The first respondent is the City of Johannesburg, a Metropolitan Municipality ("the municipality"). The second respondent is Floyd Brink ("Brink"), an adult male and the then acting City Manager of the first respondent.

In limine

[2] The respondents have taken an in *limine* point law of non-joinder of the second respondent, even though cited in his nominal and personal capacity in the current proceedings. It is trite that a court could, *mero motu*, raise a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected.[1] In its notice of motion the applicant did not seek an order for joinder directed against the second respondent personally.

[3] Counsel for the respondents contends that formal joinder of the second respondent is necessary as the second respondent was not a party in litigation proceedings before Mtati AJ that preceded these contempt proceedings. This Court was referred to the Labour Appeal Court decision *National Union of Metalworkers of SA and Others v Vulcania Reinforcing Co (Pty) Ltd and Another*[2] wherein at para 18 it is stated:

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[1] See *Occupiers of ERF 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA) paras 11-12.
[2] (2022) 43 ILJ 1307 (LAC) (22 March 2022).

> "In any event, the second respondent was not a party to the proceedings when the consent order was made. The procedure followed in this matter is no different from that which was followed in *Matjhabeng.* The second respondent was called upon to file an affidavit explaining his non-compliance with the consent order and to face a contempt of court order. He was never joined in the proceedings. Failure to join the second respondent in his personal capacity was fatal to the appellants' case against him". (footnote omitted)

[4] In opposing this argument on non-joinder, counsel for the applicant submitted that it is incorrect that a separate application must be brought to join such person in his or her personal capacity. Citation in a personal capacity, it was argued, was sufficient.

[5] The law on joinder is however, settled. No court can make findings that affect any person's interests, without that person first being a party to the proceedings before it. In *Mjeni v Minister of Health and Welfare, Eastern Cape*[3] Jafta J held:

> "[C]ontempt of court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he wilfully and contemptuously refuses to comply with the court order".[4]

[6] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*[5] at para 103 the court stated thus:

> "Bearing in mind, that the persons targeted were the officials concerned − the Municipal Manager and Commissioner in their official capacities − the non-joinder in the circumstances of these cases is thus fatal. Both Messrs Lepheana and Mkhonto should thus have been cited in their

[3] 2000 (4) SA 446 (TkH).
[4] At 454G-H.
[5] 2018 (1) SA 1 (CC).

personal capacities − by name − and not in their nominal capacities. They were not informed, in their personal capacities, of the cases they were to face, especially when their committal to prison was in the offing. It is thus inconceivable how and to what extent Messrs Lepheana and Mkhonto could, in the circumstances, be said to have been in contempt and be committed to prison".

[7] In this matter, the applicant has not been able to secure personal service of the order on the second respondent. The return of service indicates that service was effected upon Ms N Sefalafala, a legal clerk employed at the head office of the municipality. Brink was not informed, in his personal capacity, of the case he was to face, particularly when his committal to prison is looming.

[8] I accordingly find that that the objection of non-joinder by the municipality in this matter, is not a purely idle or technical one, taken simply to cause delays and not from a legitimate concern to safeguard the rights of Mr Brink. The point in *limine* is meritorious and thus upheld.

Background facts

[9] On 28 February 2013, the property was rezoned from "Business 1" to "Residential 4". It is common cause that municipal services are supplied to the property by way of a single bulk meter in respect of water consumption; and separate bulk meters in respect of electricity consumption, applying respectively to the residential and commercial portions of the property. The applicant "resells" the electricity to its tenants as measured by the individual meters supplied to each unit.

[10] The thrust of the dispute is, as the applicant contends, that from 28 February 2013 any service charges ought to have been raised in accordance with the appropriate "multi-dwelling" tariff applicable for any given period of time. It contends that the water supply to the properly, for example, is still being charged on the business tariff despite the rezoning of the property to Residential 4 on 28 February 2013 as indicated above.

[11] According to the applicant, on 25 February 2015, the municipality recalculated the account, but again calculated the water portion thereof on the “commercial” tariff. Furthermore, the municipality caused inconsistent amounts to be raised to the account for the respective billing periods. In so doing, the municipality had raised 95 tranches to the account, but reversed only 10 thereof.

[12] According to the applicant, the water consumption for some 51 billing periods had been raised in 33 entries, which by virtue of the municipality's stepped tariff system, which on the applicant’s version, artificially inflated the charges raised to the account. The applicant raised queries with the municipality in an attempt to resolve the dispute by way of the latter’s internal mechanisms. This included lodging a complaint with the Municipality's ombudsman on 14 July 2017. The matter however, remained unresolved.

[13] Subsequently, on 8 February 2018, the municipality proceeded to terminate the water supply to the property and removed the water meter. As a result, the applicant launched an urgent *mandamus* application in this Court, which comprised of 2 parts on 13 February 2018. Part A of the application under case number 5576/2018 against the first respondent only, was granted. The applicant sought certain interim interdictory relief in relation to the supply of water and electricity to the property pending finalisation of Part B thereof.

[14] On 9 May 2019, Mtati AJ heard Part B of the application and granted an order in the following terms:

> “1. That the Respondent is ordered and directed to amend its records in order that the municipality services and rates are reflected as those pertaining to a residential building alternatively a predominantly residential and partly commercial building.
>
> 2. The Respondent is ordered and directed to effect such change to its records within 1 (one) month of the date of service of any order of this Honourable Court.

3. Having given effect to 1 and 2 above, the Respondent is ordered and directed within 10 (ten) days thereafter to recalculate all services and rates of accounts under the account number [....], and without limiting the generality hereof the Respondent is ordered and directed to recalculate the water and sewerage components of the account to the appropriate multi dwelling tariff with effect from 28 February 2013 to present."

[15] The order was served on the municipality by the Sheriff of the Court on 23 May 2019. This is the subject of the contempt relief sought in these proceedings. The applicant contends that service was "by extension on the office of the second respondent". As indicated above, there was no personal service on the second respondent in his personal capacity. The applicant alleges that, notwithstanding service of the court order and subsequent engagement, the respondents have failed to recalculate the account as ordered. In order to avoid rendering this application unduly bulky, the applicant prepared a separate reference bundle including all of the pleadings in respect of case number 5576/2018.

[16] On 21 May 2019, notwithstanding the order, the municipality disconnected the supply of electricity to the property. Further correspondences between the parties followed, i.e. letters from the applicant's attorneys to the respondents on 23 May 2019, and on 8 July 2019 and again on 6 April 2021, in which the respondents' alleged contempt of the order was recorded. The applicant subsequently received a Customer Electricity Disconnection Card from the municipality. This resulted in an exchange between VMW Inc., representing the applicant and the municipality, with the municipality ultimately requesting one of its officials (the deponent its answering affidavit) to contact VMW Inc. with a view to finalise the dispute. The applicant submits that any interest charged on the account ought to be reversed, as it has been raised on amounts which are not due, owing and payable to the municipality. Part A of this application in part, seeks the structured relief set out in the notice of motion, together with a declaration of contempt.

[17] Part A of the notice of motion in this application is couched in the following terms:

“1. That this matter be treated as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. That the First and Second Respondents are declared to be in contempt of the order of the Honourable Justice Mtati of 9 May 2019 under case number 2018/5576, annexed hereto as "Y".

3. That the First Respondent be ordered and directed to amend the municipal account with account number [....] pertaining to the property described as Erf [....] Johannesburg Township, registration Division I.R., Gauteng (hereinafter referred to as "the property”) as follows:

3.1. That for the 2012/2013 year the mixed-use tariff be applied to water consumption, the residential conventional resellers’ tariff be applied to electricity consumption for the residential units, the business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

…

3.3. That for the 2014/2015 year the mixed-use tariff be applied to water consumption, the residential conventional resellers' tariff be applied to electricity consumption for the residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

3.4. That for the 2015/2016 year the mixed-use tariff be applied to water consumption, the residential conventional resellers’ tariff be applied to electricity consumption for residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

3.5. That for or the 2016/2017 year the mixed-use tariff be applied to water consumption, the domestic conventional resellers' tariff be applied to electricity consumption for the residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

3.6. That for the 2017/2018 year the mixed-use tariff be applied to water consumption, the residential conventional resellers tariff be applied to electricity consumption for the residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the “other classes of property tariff” be applied to sewerage consumption;

3.7. That for the 2018/2019 year the mixed-use tariff be applied to water consumption, the residential conventional resellers’ tariff be applied to electricity consumption for the residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

3.8. That for the 2019/2020 year the mixed-use tariff be applied to water consumption, the conventional resellers’ tariff be applied to electricity consumption for the residential units, the conventional business tariff be applied to electricity consumption for the commercial units and the tariff for 'blocks of flats be applied to sewerage consumption;

3.9. That for the 2020/2021 year the mixed-use tariff be applied to water consumption, the residential conventional resellers tariff be applied to electricity consumption for the residential unit, the conventional business tariff to be applied to electricity consumption for the commercial units and the tariff for flats be applied to sewerage consumption.

4. That should the First Respondent have rational reasons as to why it is not required to recalculate the accounts as contemplated in paragraphs 3.1 to 3.9 above, it is to provide reasons therefore within a period of 14 days of any order of this Honourable Court.

5. That the reasoning contemplated in paragraph 4 above must be on affidavit and supported by primary evidence used in support thereof, including but not limited to:

5.1. The tax invoices relating to the account with account number [....] for the period from 2013 to present;

5.2. The job cards relating to the installation of the electricity meters at the property;

5.3. Any further job cards relating to the electricity meters at the property;

5.4. The electricity meter reading records, including but not limited to ticket stubs by meter readers or downloads from an electronic meter system, for the period from 2013 to present;

5.5. The job card relating to the installation of the water meter with meter number [....] at the property;

5.6. Any further job cards relating to the meter number recorded in paragraph;

5.7. The meter reading records relating to the water meter recorded in paragraph 5.5 above, including but not limited to any ticket stubs from meter reader or downloads from an electronic metering system, for the period from 2013 to present. That to the extent necessary, the Applicant be permitted to effect service of the Notice of Motion, Founding Affidavit and all further processes herein, including any Order of this Honourable on the Second Respondent by serving same on the

legal advisor, alternatively the secretary to the legal advisor, at the Second Respondent's place of business".

[18] Part B, which is not before me asks for the following relief: *"2.1 that the First Respondent be fined the amount of R200,000.00 (Two Hundred Thousand), alternatively such other amount as the Honourable Court may deem fit; and 2.2. that the Second Respondent be committed to prison for a period of 2 (Two) months, alternatively such other period as the Honourable Court may deem fit"*.

[19] The relief in Part B as indicated above, has the potential to commit the second respondent to a prison term, and the added potential to violate his right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial. This implicates constitutional rights such as those in section 12(rights as well as the right to fair trial in section 35(3) of the Constitution.

[20] Before this Court, the question of urgency, correctly, was no longer pursued by the applicant. In any event the applicant did not make out a case for the granting of the relief sought. The respondents sought leave which was granted to supplement the answering affidavit introducing new facts relating to the tariff change applications (annexure "G3") made by the applicant which fact was not disclosed by the applicant in their papers. The municipality asserts that the change of tariff application after the court order was obtained, on both the water and electricity are the very same issues the applicant seeks to hold the respondents to be in contempt of court.

[21] With leave of this Court, the applicant also filed a supplementary replying affidavit. The applicant takes no issue with the respondents' supplementary affidavit. The applicant contends that the documents tendered by the respondents were not adduced by the applicant in the founding and replying affidavits as "an oversight" due to the fact that "they were not relevant" at the time the documents were filed. This is hardly convincing. Furthermore, that the papers were "drafted on an urgent basis and accordingly a drafting error arose in applying the split meter over the entire recalculation period" is not persuasive.

[22] The split meter was installed at the property on 22 February 2021 as requested. In oral submission, counsel for the applicant abandoned the first part of the structural relief sought in as far that electrical service is concerned.

[23] The respondents, in their answering affidavit, dispute their non-compliance with the order. In sum, the respondents submit that the applicant is aware that they had taken steps to comply with the order and refer to two tax invoices, dated 26 September 2019 and 20 March 2020, which they allege, demonstrate their compliance.

[24] The respondents point out that annexure “FA6” attached to the founding affidavit shows that first respondent charges the applicant on a multipurpose residential tariff and the services have been recalculated from 2016 to 2019 which amounts to 1136 days. Further, that the tax invoice dated 26 September 2019.. billed on the multipurpose residential tariff shows a recalculation commencing from July 2015. As for the structural remedy, they contend that it is only relevant in the event where the applicant succeeds in its case that the respondents are in contempt of court.

The contempt of court relief

[25] It is trite that an applicant for contempt must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) wilfulness and mala fides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide.

[26] It is well established that non-compliance with court orders imperils judicial authority. Contempt of court is a criminal offence and the elements making up contempt must be proven beyond reasonable doubt. After all, personal liberty cannot be taken away randomly. To convict anyone for contempt of court, it must thus be proved that he or she was personally aware of the court order.[6]

[6] See *Setshedi v Ndebele and another* [2015] JOL 33120 (LC).

[27] The SCA in *Fakie NO v CCII Systems (Pty) Ltd*[7] set out the requirements necessary to hold a party in contempt of court. *Fakie* was cited with approval in in numerous decisions. Cameron JA held that it is a crime to intentionally and unlawfully disobey a court order. It amounts to violation of the dignity, repute or authority of a court or judicial officer.

[28] Cameron JA dealt with the standard of proof to be applied where committal was sought solely to enforce compliance with a court order. He held that the civil standard (on a preponderance of probabilities) for a finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt.

[29] Recently in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma*[8], the Constitutional Court held at para 37 that:

> *"*As set out by the Supreme Court of Appeal in *Fakie*, and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established*".*

[30] From the supplementary papers, it is apparent that during February 2021, after the order of 9 May 2019 was granted, a split meter (i.e. one meter to measure residential electricity consumption and one meter to measure business electricity consumption) was installed at the applicant's property. The split meter was installed pursuant to an earlier application made by the applicant for a split meter. As indicated, this was not disclosed by the applicant in its founding papers. In the light

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[7] 2006 (4) SA 326 (SCA).
[8] 2021 (5) SA 327 (CC).

of this fact which is now common cause, there is no basis to conclude that the conduct by the first respondent was mala fide under the circumstances.

[31] The applicant asserts that the fact that there were two meters at the time that the application was brought instead of one, simply means that the structural relief sought by it in regard to electricity is no longer necessary and does not change the fact that the municipality has not otherwise complied with the 9 May 2019 order, in that, the recalculation is still not to 28 February 2013; there are still incorrect tariffs for water and sewerage.

The structural relief

[32] As for the structural relief sought, the applicant alleges this is based on its letter of 6 April 2021, "FA17" addressed to the respondents. The thrust of the allegation being that these tariffs have been assigned to the particular years based on the definitions as contained in the annual electricity, water and sewerage tariff. The applicant submits in this regard that applying this simple recalculation to each of the ledger entries from 28 February 2013 to present without more, will bring an end to the dispute. The basis for the proposed recalculations remains obscure.

[33] It is often said with regard to *National Director of Public Prosecutions v Zuma*[9], that onus plays no role in opposed motion proceedings for final relief in the context of conflicting factual versions. Hence as was summarised in *Zuma*:

> *"... It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises*

[9] 2009 (2) SA 277 (SCA) paras 26-27.

fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers".[10]

[34] The structural relief sought therefore cannot be resolved on the papers as it is in the absence of relevant supporting evidence to substantiate the tariff claims.

[35] In terms of section 95 (e) of the of the Local Government: Municipal Systems[11] ("the Systems Act"), the municipality has a legal obligation "to ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due". On an overall conspectus, the municipality has been dilatory in its dealings with the applicant. There is no denying that the applicant has been met with unduly delayed and laconic responses from the municipality with regard to the billing dispute relating to the property.

[36] In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[12] the Constitutional Court held:

> "This court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in *Kirland*:
>
> > '(*T)here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right and it must do it properly'.*"[13]

In this case, the state is represented by the municipality at a service delivery level. This apt for purposes of costs, which ordinarily follow the result.

Order

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[10] Para 26.
[11] Act 32 of 2000.
[12] 2019 (4) SA 331 (CC).
[13] Para 60.

[37] I therefore make the following order:

[1] The application is dismissed.

[2] Each party to pay its own costs.

MUDAU J
[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv. L Hollander
Instructed by:	VMW Inc.
For the Respondent:	Adv E Sithole
Instructed by:	Madhlopa & Thenga Inc.
Date of Hearing:	26 July 2022
Date of Judgment:	18 October 2022