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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)
REPUBLIC OF SOUTH AFRICA**

CASE NO: 44294/2020

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

08.03.23

In the matter between:

TALACAR HOLDINGS (PTY) LTD

Applicant

And

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

First Respondent

FLOYD BRINK N.O

Second Respondent

FLOYD BRINK

Third Respondent

MELUSI MLANDU N.O

Third Party/Proposed Fourth Respondent

JUDGMENT

SENYATSI J:

[1] This is the return of the rule nisi following the order by Dlamini J on 16 March 2022, in terms of which all persons with a legitimate interest in the contempt application were called upon to show cause, if any, why the following orders ought not to be made final:

- (a) That charges of perjury be lodged against Melusi Mlandu, the deponent of the answering affidavit dated 11 March 2022 filed on behalf of the first respondent (“the Municipality”) and the second respondent, (“the Municipal Manager”) in the second contempt of court application.
- (b) That the Municipal Manager be arrested and imprisoned for a period of 90 days alternatively, be ordered to pay a fine of R250 000.00 as punishment for his contempt of the orders of this court; and
- (c) That the Municipality and Municipal Manager *de bonis propriis*, be ordered to pay the costs of this application, jointly and severally the one paying the other should be absolved, such costs to be taxed on the attorney and client scale, including the cost of counsel.

[2] The *rule nisi* was a sequel to two court orders by Siwendu J and Opperman J, respectively. The gist of the court orders was, inter alia, that the services, namely, water, electricity and refuse removals were not to be terminated pending the debatement of account and flagging of the applicant’s account with the Municipality. This was to be done within a specified period mentioned in the orders.

[3] The Opperman J order was to the following effect:

- a) The Municipality will credit the applicants account held under number 5[...] in the amount of not less than R140 000.00 being the admitted incorrect charges levied on the applicant’s account within 3 calendar days of the court order;

- b) The respondents are to take all steps necessary to finalize all necessary investigations, if any, and obtain any outstanding reports and water and electricity downloads within 7 calendar days of the date of the court order;
- c) The respondents alternatively, the respondents' representatives must attend a meeting with the applicants' representatives to debate the water and electricity charges for the months of November 2019 to February 2022 within 15 calendar days of the date of the court order to determine the reason for the incorrect/unreasonable charges which are still being levied on the applicants account and to determine all amounts overpaid by the applicant and allocate the additional credits due to the applicant which shall be paid to the applicant within 10 days of determination they thereof.

[4] In respect of the Siwendu J Order, which was issued prior to the Opperman J Order, it was ordered as follows:

- a) That all necessary internal investigations, if any, be finalized and the applicants account held under number 5[...], all amounts due to the applicant, in full within 7 days of the date of the court order had to be credited;
- b) In the alternative to (a) above the respondents must finalize all necessary investigations, if any, and any outstanding reports within 7 days of date of this court order and attend a meeting with the applicant's representatives to debate the account within 15 days of date of this court order.

[5] On 16 March 2022, Dlamini J issued an order ("Dlamini J Order") in the following terms:

- (a) The Municipality and the Municipal Manager were declared in willful contempt of the Siwendu J and Opperman J court orders;

- (b) The Municipality and the Municipal Manager were ordered to immediately comply with the Siwendu J and Opperman J court orders; and
 - (i) to credit the applicant and provide proof thereof to the applicant's attorney of record;
 - (ii) to deliver all the original and supporting documents, reports, downloads, job cards, to the applicant in respect of the water and electricity consumption charges billed to the applicant's account for the period November 2019 to February 2022,
- (c) The Municipality and the Municipal Manager were ordered to attend a meeting with the applicant and
 - (i) to conduct a debatement of the applicants account for the period November 2019 to February 2022;
 - (ii) the reason for the incorrect/unreasonable charges which are still being levied on the applicant's account and
 - (iii) all amounts overpaid by the applicant and to allocate the additional credit due to the applicant which shall be paid to the applicant within 10 calendar days of determination thereof.
- (d) the interdict by Siwendu J on 18 December 2020, under case number 2020/44292 would remain valid and enforceable until such time as the debatement of the applicant's account held under number 55266117 has been finally resolved and all due credits paid over to the applicant, if any
- (e) Dlamini J issued a *rule nisi* calling upon all persons with a legitimate interest to show cause, if any, on 15 August 2022 why the following orders should not be

made final:

- (i) the Acting Municipal Manager be held liable for each count of perjury in his answering affidavit dated 11 March 2022;
- (ii) The Municipal Manager and the Acting Municipal Manager be imprisoned for a period of 90 days or such other period as determined by the court, alternatively, the Municipality and the Municipal Manager and the Acting Municipal manager be ordered to pay a penalty of R250 000.00 to the applicant.

[6] Both Siwendu J and Opperman J court orders remain unchallenged. The respondents provided an answer on why the Dlamini J order should not be made final.

[7] The applicant contends that the respondents remain in contempt of the court orders because they have failed and/or refused:

- (a) to credit the applicant's account with an amount of not less than R140 000.00 within 3 days of the court order, that is, by 21 February 2022;
- (b) to provide the water meter downloads for the period November 2019 to February 2022 within 7 days, that is by 25 February 2022;
- (c) to provide the electricity meter downloads for the period November 2019 to February 2022, that is by 25 February 2022.
- (d) to determine the reasons for the incorrect charges levied on the applicant's account for the period November 2019 to February 2022;
- (e) to determine all amounts overpaid by the applicant to the first respondent for the period November 2019 to February 2022; and

- (f) to allocate additional credits due to the applicant for the period November 2019 to February 2022;
- (g) to hold a meeting to debate the applicant's account;
- (h) to resolve the ongoing billing dispute that has been ongoing since 2018.

[8] It is evident from the papers and this is a common fact between the parties that the Siwendu J order was made by agreement between the parties.

[9] The Opperman J Order was sought and obtained following termination of services of the applicant by the Municipality. The Municipality concedes that the termination of the electricity ought not to have happened as the account was flagged.

[10] The respondents contend that for the account to be flagged, a manual intervention is required and that due to the volume of the accounts, which are over one million in number, a human error is possible.

[11] Within five days of the Opperman J Order, another application was launched, this time before Dlamini J which culminated in the Dlamini J order which was obtained by default as the attorney for the respondents was attending another court in Limpopo.

[12] As far back as on 17 March 2022, the respondents made a request to the applicant for a meeting for the debatement of the applicants account as ordered by the orders. The meeting was refused by the applicant.

[13] The controversies in this application is firstly whether or not the respondents continue to be in contempt of the court orders and whether Mr. Melusi Mlandu has rendered himself are guilty of perjury by contending that the matter has been settled. Secondly and most importantly, the applicant needs to know that there was a deliberate and willful intent on the respondents to ignore the court orders.

[14] I will now deal with the first issue on the law pertaining to perjury. Section 9 of the Justice of Peace and Commissioners of Oaths Act 16 of 1963 provides as follows:

“Any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath of affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury.”

[15] The learned authors Hoor, Cowling & Milton in South African Criminal Law and Procedure¹ comment as follows:

“Although this offence is often called ‘statutory perjury’, that description is inaccurate, for it is an independent substantive offence and the perjury rules (for example that requiring corroboration) do not apply. The essential elements of the offence are: (i) a false statement; (ii) in an affidavit, affirmation or attested declaration (iii) made before a competent person (iv) *mens rea*.”

[16] The elements of the crime of perjury are applicable in both criminal and civil proceedings.

[17] In the instant case, the contention by the applicant is that because the respondents stated under oath that the matter was settled when in fact it was not, they have subjected themselves to be guilty of perjury. The respondents contend that the settlement related to the queried account and the fact that credits in excess of R140 000.00 were passed on the applicant’s account as required by the Siwendu J Order. They contend that the context of the use of the word “settled” was not intended to state that all the issues were resolved.

[18] The test to ascertain whether there is an intention to lie under oath, is to consider

¹ Vol 3: Statutory Offences CD Rom and Intranet: ISSN 2218 – Jutastat, e-publication at C2 P25; S v Ncamane (R153 - 2019) [2019] ZAFSH 220 (28 November 2019)

the context of words used in the affirmation.²

[19] In their answering affidavit to the Dlamini J Order, the respondents state that they reversed R166 496.30 and credited same to the applicant's account. They attach to their affidavit documents marked "SAS2". In fact, a copy of the tax invoice dated 2022/03/10 shows an opening balance of R569 591.13 which after adjustments are made takes the balance to R663 967.65. The respondents contend that the balance is after the deduction of R166 496.30.

[20] If regard is had to the context at which the word "settled" was used, I find no factual basis to conclude that Mr. Mlandu has perjured himself in contravention of the legislation. There is therefore no reason to hold that he is guilty of perjury and as a consequence the explanation given for the use of the words in the context used, fails to meet the requirement of the offence of perjury.

[21] I now deal with the second issue which is whether the respondents have deliberately ignored the court orders. It is trite that a party to a civil case against whom a court has given an order and who intentionally refuses to comply with it, commits contempt of the order.

[22] In *Fakie NO v CCII Systems (Pty) Ltd*³ the court held that:

"It is a crime to unlawfully and intentionally to disobey a court order.⁴ This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.⁵ The offence has in general terms received a constitutional stamp of approval, since the rule of law, a founding value of the Constitution requires that the dignity and authority of the courts, as well as their capacity to carry out their functions,

² See *S v Van Staden en Ander* 1973 (1) SA 70H

³ [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at para 6

⁴ *S v Beyers* 1968 (3) SA 326 (SCA)

⁵ See *Melius de Villiers The Roman and Roman- Dutch Law of Injuries* (1899) pg 166; *Attorney – General v Crockett* 1911 TPD 893 at 925 -6

should always be maintained.⁶

[7] The form of proceeding CCII involved appears to have been received into South African law from English law – and is a most valuable mechanism.⁷ It permits a private litigant who has obtained a court order requiring an opponent to do or not to do something (*ad factum praestandum*),⁸ to approach the court again, in the ...of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

[8] In the hands of a private party, the application for committal is a peculiar amalgam, for it is civil proceedings that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.”

[23] It is manifest from the quoted passages above that a civil contempt is a feature of our law as the court orders need to be complied with. This ensures the rule of law is observed and embraced in our society.

[24] The fact for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and *mala fide*.⁹ A deliberate disregard is not enough, since the non-complier may genuinely; albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.¹⁰

⁶ Coetzee v Government of the Republic of South Africa [1995] ZACC 7; 1995 (4) SA 631 (CC)

⁷ Attorney- General v Crockett (Supra) pg 917 - 922

⁸ Bannatyne v Bannatyne [2002] ZACC 31; 2003 (2) SA 363 (CC) at para 18

⁹ Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 602 (SCA) paras 18 and 19

¹⁰ Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524 D

Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).¹¹

[25] The applicant must establish:

- a) the existence of the order;
- b) its service on the respondent;
- c) non-compliance in order to succeed with the civil disobedience of the court order. The respondents must furnish evidence raising a reasonable doubt whether non-compliance was willful and *mala fide*, to rebut the offence.¹²

[26] Although committal for contempt of court is permissible under our Constitution, the courts should always guard against finding an accused person guilty of a criminal offence in the absence of conclusive proof of its essential elements.

[27] In *Fakie NO v CII Systems (Pty) Ltd*¹³, Cameron J held as follows in dealing with the Constitutional imperatives on contempt of court:

“[23] It should be noted that developing the common law does not require the prosecution to lead evidence as to the accused’s state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and *mala fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disapprove willfulness and *mala fides* on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.”

¹¹ Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 692 E –G

¹² Fakie NO v CII Systems (Pty) Ltd (Supra) at para 22

¹³ Supra at paras 23 and 24

[28] There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an accused person for the purposes of s35 of the Bill of Rights. On the contrary, with respect to the careful reasoning in the Eastern Cape decisions, it does not seem to me to insist that such a respondent falls or fits within s35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only to be detained without trial,¹⁴ but not to be deprived of freedom arbitrarily or without cause.¹⁵ This provision affords both substantive and procedural protection,¹⁶ and an application for committal for contempt must avoid, infringing it."

[29] As already stated, once the applicant has proved the existence of the order, the service thereof and failure to comply with the order, *mala fides* requirements are inferred and the onus will be on the respondent to rebut the inference on balance of probabilities.¹⁷

[30] If regard is had to the fact that the debatement has not taken place because the applicant refused the request, it is not difficult to understand why the parties are still a distance apart in resolving the debatement. This is so because the applicant insists that it should be provided with the original records and not copies of the source documents used to charge for services. The applicant complains about the use of computer screen spread sheets as source of documents, but it is also manifest from the papers that the respondents are experiencing challenges to secure some of the original source of documents on which the invoices to the applicant are based. While there is criticism by the applicant that one of the staff of the first respondent instructed one of her colleagues to "generate" the original, that on its own cannot be imputed on the City Manager

¹⁴ Bill of Rights s12 (1)(b)

¹⁵ Bill of Rights s12(1)(a)

¹⁶ *Bernstein v Bester* NO [1996] ZACC 2; 1996 (2) SA 751 (CC) para 145 -146

¹⁷ *Frankel Max Pellak v Menell Jack Hyman Rosenberg* 1996 (3) SA 355 at 367 E

himself. There is no evidence on the papers to suggest that the staff concerned acted at the behest of the city manager. As stated, the account can be debated with the co-operation of the applicant. I am fortified on this view by the fact that the applicant even suggested to the respondents that the matter will be considered to be settled if payment of over R 489 000 of the legal bill as well as the additional credit of more than R94 000 could be credited by the first respondent on the account of the applicant held with the first respondent.

[31] The applicant contends that the respondents are thumbing their noses to the court orders. I am not convinced that failure to produce some of the original documents is the demonstration of the required intent to disobey the court orders. On the contrary, if the applicant were to agree to further account debatement meetings, it is likely that significant progress will be made to resolve the account debate. Based on the papers before me, I am not persuaded that the respondents have perjured themselves. Regards is had to the fact that the sheer volume of the Municipal accounts, which is over 1 million and the fact that the flagging of the account required manual intervention, this is in my view, a demonstration of the absence of *mens rea* to perjure themselves especially the third respondent who has shown by presenting emails the steps he took to ensure the court orders are complied with.

[32] It should be remembered that the City Manager including Mr. Mlandu who was acting city manager when he deposed to an affidavit, acts through various support staff members. This explains for instance, why the affidavits are also compiled and signed by the legal advisor of the Municipality who has access to records. I do understand the frustration experienced by the applicant to get the matter resolved but caution that the co-operation by the applicant is key to resolving the debatement of the account. Accordingly, I have not been able to find the basis that indeed the respondents have perjured themselves.

[33] The respondents contend that when the court was approached with the alleged third contempt application, there was no default because the applicant's account had

already been credited prior to the launching of the alleged contempt application.

[34] The applicant insists that there was no compliance in that, there was still an amount of over R94 376.52 on account number 5[...] that still required to be credited by the respondent. This as already stated is suggested in a letter written in July 2022 to the respondents and included an amount for payment of the legal bills.

[35] I have considered the submissions made by the parties on the third alleged contempt. I am not persuaded that there was a deliberate intent to disobey the court order by the respondents.

[36] From the papers, it appears manifest to me that the reason the rule nisi order was obtained was because of the account, which was still disputed by both parties. The respondents contend that there are no additional credits to be passed on the account of the applicant and that they are not in contempt of the court orders.

[37] The applicant is still insisting that some of the account show for instance the same consumption of electricity on the subsequent months. This is the function of debatement of the account, of which, in any considered view, would still take place. I am fortified on the view by the fact that the applicant refused about two requests about two requests to debate the account from the respondents contending that the debatement will not serve any purpose as the applicant believed the respondents were deliberately disobeying the previous court orders.

[38] The other point for considerations whether perjury has been proved by the applicant against the Acting City Manager of the first respondent. The basis of the charge is that he lied under oath when he stated that the matter had been settled.

[39] The analysis of what Mr Mlandu states under oath in the context of the account is reference to the query on the account. Consequently, I am of the view that Mr Mlandu did not perjure himself.

[40] Having regard to the papers before me, I am not persuaded that the *rule nisi* should be made final and that Mr. Mlandu has perjured himself and that the court orders have been deliberately disobeyed.

ORDER

[41] The following order is made:

- (a) The existing *rule nisi* ordered by Dlamini J is discharged;
- (b) The application to find Mesuli guilty of perjury is refused;
- (c) The applicant is ordered to pay the costs.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 11 November 2022

DATE JUDGMENT DELIVERED: 8 March 2023

APPEARANCES

Counsel for the Applicant: Adv WH Pocock

Instructed by: Di Siena Attorneys

For the Respondent: Adv F Magano

Instructed by: Nozuko Nxusani Inc