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

CASE NO: 30323/2021

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

04.05.23

In the matter between:

TONCHA PROPERTIES (PTY) LTD

Applicant

And

THE CITY OF JOHANNESBURG

Respondent

Neutral Citation: *Toncha Properties (Pty) Ltd v The City of Johannesburg* (Case No:

30323/2021) [2023] ZAGPJHC 425 (4 May 2023)

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered.*

JUDGMENT

SENYATSI J:

A. INTRODUCTION

[1] This is an opposed application for contempt of court order granted by Makume J
On the 7th of September 2021.

B. BACKGROUND AND FACTS

[2] On the 7th of September 2021, Makume J issued the order against the
respondent in the following terms:

- (a) "The applicant is not liable to the respondent for the payment of electricity charges on account number[...], in respect of Erf [...] Roodepoort, situated at[...], Roodepoort ("the property") for the period from 20 August 2019;
- (b) The respondent is to conduct a formal audit of the alleged outstanding balance reflected on the applicant's account, for the period of February 2016 to date and the outcome of such audit, supported by actual historical metre readings and job cards, is to be made available to the applicant's attorneys within 14 (fourteen) days of the granting of this order;
- (c) The respondent must remove their redundant meter number [...] from the applicant's property;
- (d) The respondent is interdicted and restrained from demanding payment from the applicant of any purported electricity charges or taking legal action against the applicant until the dispute between the parties has been finalised;
- (e) The respondent will pay the costs of this application on the scale as between attorney and client.

- [3] The history of this matter goes as far back as February 2016 as stated in the main application. Electricity supply to the property was disconnected by the respondent on the 20th of August 2019. No electrical supply services have been available or provided to the property since August 2019. The respondent has continued to charge what it purports to be actual electricity usage on the property to the applicant's account since August 2019 even though the services had been terminated.
- [4] Between 20 August 2019 and May 2021, the City of Johannesburg charged the applicant in excess of R118,000.00 for the purported electricity charges at the property. The applicant has attempted to formally resolve the problem with the respondent's officials on not less than seven occasions, from attending the offices of this City of Johannesburg, to employing specialists to engage with the respondent, to launching formal disputes, to writing letters of demand and all these efforts proved unsuccessful.
- [5] Consequently, the applicant issued the main application which was not opposed and obtained the order which is the subject of contempt application. The copy of order was served by the applicant's attorneys by hand. The respondent was required to comply with the order on or before the 28th of September 2021.
- [6] On 16 September 2021, the respondent's attorneys sought an indulgence to delay compliance with the order by way of a letter dated 16 September 2021. The applicant refused to grant the indulgence and contended that the respondent had more than six years to remedy what it was meant to do in

terms of the order, which it had had numerous requests to remedy and which it had failed to do.

[7] The applicant made a written demand to the respondent to comply with the order and this demand was made on the 30th of September 2021, and the response thereto by the respondent was that it was conducting the necessary investigations. A second demand was issued by the applicant on the 15th of October 2021 to comply with the court order and this was not responded to.

[8] The respondent claimed that it was not able to comply with the order due to the regulations imposed in terms of COVID-19 National State of Disaster, which made it impossible for them to do. In its answering papers the respondent states that the redundant metre was removed from the property on the 8 November 2021. This is now common cause to the parties because it was confirmed by the applicant in its papers.

C. THE ISSUE FOR DETERMINATION

[9] The quibble between the parties is whether the Makume J order has been complied with. The respondent claims that it has complied with the order whereas the applicant contends that the order has not been complied with and thus in contempt thereof.

D. THE LAW AND REASONS FOR THE JUDGMENT

[10] The requirements for a party to be held in contempt of a court order are well trodden in the judicial turf.

[11] The test to be applied to determine whether a party is in contempt was spelled out in *Fakie NO v CCII Systems (Pty) Ltd*¹ by Cameron JA (as he then was) in the following terms:

“[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’² 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.³ Even a refusal to comply that is objectively unreasonable may be bona fide though unreasonableness could evidence lack of good faith.⁴”

[12] These requirements, that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evidences⁵. Honest belief that non-compliance is justified or proper is incompatible with that intent.

¹ (653/04) [2006] ZASCA 52

² See Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I.

³ See Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524 D

⁴ Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 692E-G per Botha J.

⁵ See the formulation in *S v Beyers* 1968 (3) SA 70 (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and

[13] As held in *Fakie* the principles are summed up as follows:

- (a) 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.
- (b) The respondent in such proceedings is not an 'accused person' but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) 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.
- (d) 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.
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it') and CR Snyman *Strafreg* (4ed, 1999) page 329 ('Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van 'n regterlike amptenaar in sy regterlike hoedanigheid, of van 'n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande 'n aanhangige regsgeding wat die strekking het om die uitslag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding').

[14] In this litigation, it is evident from the papers that the meter forming the subject of this litigation was removed during November 2019 which is three months after the Makume J order was granted. It is also evident that the reconciliation of the applicant was done by one of the employees of the respondent. There remains a dispute with regards to the calculations in terms of which certain credits were passed onto the account of the applicant.

[15] The court order in terms of which the applicant seeks to hold the respondent in contempt does not specify in any terms how a revised account should be achieved except to state that it must be a “formal audit”. The order refers to a “formal audit” but does not detail whether the formal audit is conducted by an expert appointed by both parties or if the respondent’s employee will meet the requirement of “a formal audit” to reconcile the account from February 2016 to the date of the order. Accordingly, I not able to make a pronouncement on this aspect.

[16] Having regard to the papers before me as well as the submissions by all the parties’ counsel, I am satisfied that the respondent has discharged the burden that the alleged non-compliance with the order was not *mala fides*. Accordingly, I hold the view that the respondent was not in contempt of the court order.

E. ORDER

[17] The following order is made:

(a) The application for contempt of court order is dismissed with costs.

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

DATE JUDGMENT RESERVED: 7 November 2022

DATE JUDGMENT DELIVERED: 4 May 2023.

APPEARANCES

Counsel for the Applicants: Adv CJ Bekker

Instructed by: Robyn Lee Havenga

Counsel for the Respondent: Adv SD Maritz

Instructed by: Mohamed Randera & Associates