



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

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

Date: Signature: *M. Van Nieuwenhuizen*

CASE NO: 2021/58758

DATE:

In the matter between:

AFHCO HOLDINGS (PTY) LIMITED

Applicant

and

CITY OF JOHANNESBURG METROPOLITAN

First Respondent

CITY POWER JOHANNESBURG (PTY) LIMITED

Second Respondent

JOHANNESBURG WATER (PTY) LIMITED

Third Respondent

FLOYD BRINK

Fourth Respondent

BRYNE MADUKA

Fifth Respondent

Coram: M Van Nieuwenhuizen, AJ

Heard on: 18 May 2023

Delivered: 26 June 2023

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

[1] The application came before me for hearing on the 18th of May 2023 in the unopposed Motion Court. The applicant sought an order in terms of its draft Court order.¹:

[2] Having heard argument from counsel for the applicant Ms Lombard and counsel on behalf of the first to fifth respondents, Mr Sithole (who appeared at the hearing of the unopposed application on behalf of the respondents), I handed down an order on the 18th of May 2023 in terms of the applicant's draft Court order.² I granted an order in the following terms:

2.1 The fifth respondent is joined to these proceedings.

2.2 The first, second and third respondents are declared to be in contempt of the Court order ("**the Court order**") dated the 14th of June 2022;

2.3 The first, second and third respondents are ordered to fully comply with the terms of the Court order, within 10 (ten) days of service of this order;

2.4 The fifth respondent is ordered to take all necessary steps to ensure that the first, second and third respondents fully comply with the terms of the Court order, within 10 (ten) days of service of this order;

2.5 In the event of the first and/or second and/or third respondents

¹ CaseLines, 05-21 to 05-24; Notice of Motion, 034-1 to 034-5

² And which draft Court order also appears on CaseLines, 052-1 to 052-4

failing to comply with paragraph 2.3 above:

2.5.1 ordering the fifth respondent to appear before Court on a date stipulated by the Court, to show cause as to why an order should not be granted:

2.5.1.1 declaring the fifth respondent, in his personal capacity to be in contempt of this order;

2.5.1.2 committing the fifth respondent to imprisonment until such time as the first, second and third respondents have fully complied with the provisions of the Court order;

2.5.2 ordering the fifth respondent to pay the costs of this application in his personal capacity, jointly and severally with the first, second and third respondents, on an attorney and own client scale.

2.6 The first, second and third respondents are ordered to pay the costs of this application on an attorney and own client scale, jointly and severally and *in solidum*, the one paying the other to be absolved.³

[3] A request for reasons in terms of Rule 49 was delivered by the respondents on the 31st of May 2022.⁴

³ Signed Court order dated 18 May 2023, CaseLines 055-1 to 055-4

⁴ Signed by the respondents' attorneys on the 31st of May 2023, e-mailed to my Registrar and uploaded to CaseLines on the same date, CaseLines 058-1

- [4] On the 7th of June 2023 the respondents delivered and uploaded to CaseLines an application for leave to appeal⁵ wherein the respondents sought leave to appeal to the Full Bench of the Gauteng Division, Johannesburg, alternatively to the Supreme Court of Appeal against the entire order contained in my ruling delivered on the 18th of May 2023. The reasons underpinning the application for leave to appeal included that I erred in not finding that at the time of hearing the contempt of Court application, the respondents had not complied with the Court order of His Lordship Mr Justice Vorster AJ dated 14 June 2022 and presented such evidence before Court.⁶ The respondents furthermore state in their application for leave to appeal *“To the contrary and had the learned Judge had regard to the compliance evidence as submitted before Court would have found that the respondents were not in contempt of the Court for the alleged failure to comply with the Court order of His Lordship Mr Justice Vorster AJ dated 14 June 2022”*.⁷ The respondents state that further grounds of fact and law to this application for leave to appeal shall be provided in a supplementary notice of appeal upon receipt of the reasons for granting the orders in my Court order.⁸
- [5] It is not my intention to deal with the application for leave to appeal, which will no doubt, on the handing down of this judgment be proceeded with by the respondents in the normal course.
- [6] The matter concerns the re-billing and rectification of a municipal account pertaining to a vacant stand of which the applicant is the registered owner, namely Erf 279 Jeppestown South situated at 3 Long Street, Jeppestown South (***“the property”***).

⁵ CaseLines 059-1 to 059-11

⁶ Para 1.1, CaseLines 059-2

⁷ Para 2, CaseLines 059-2

⁸ Para 4, CaseLines 059-3

Contempt application

[7] At the outset Ms Lombard referred me to a Court order dated the 22nd of March 2023 granted by Wanless AJ **by agreement between the parties** in the following terms:⁹

“[1] The application is postponed sine die.

[2] The first to fifth respondents relinquish their rights to deliver an answering affidavit to the contempt of Court application instituted under the above case number.

*[3] The first to fifth respondents are afforded a final indulgence until the **6th of April 2023**, to comply with the Honourable Justice Vorster’s order dated 14 June 2022 and granted under the above case number.*

[4] No further postponements will be afforded to the first to fifth respondents with regards to the contempt of Court application instituted under the abovementioned case number.

[5] Ordering the first to fifth respondents to pay the wasted costs occasioned by the postponement on the attorney and client scale, jointly and severally and in solidum the one paying the other to be absolved.”

[8] Ms Lombard on behalf of the applicant argued that for want of non-compliance with the order of Vorster AJ dated the 22nd of June 2022 and

⁹ CaseLines 047-1 to 047-3

after a plethora of correspondence, the respondents came to Court on the 22nd of March 2023 and sought a further indulgence from this Court which culminated in the order of Wanless AJ. It is apparent from the aforementioned Court order by agreement that the first to fifth respondents were afforded a **final indulgence** until the **6th of April 2023** to comply with Vorster AJ's order, that no further postponements would be afforded to the respondents with regard to the contempt of Court application and that the first to fifth respondents relinquished their rights to deliver an answering affidavit to the contempt of Court application.

- [9] The application was served on the first to fifth respondents respectively by way of Sheriff on the 20th of January 2023.¹⁰ The first to fifth respondents delivered a notice of intention to oppose on the 17th of March 2023.¹¹ No answering affidavit(s) have been filed on behalf of the respondents.
- [10] On the 22nd of March 2022 Wanless AJ granted an order in the terms as set out in paragraph 7 **by consent** between the parties.¹²
- [11] Ms Lombard argued that the respondents have not complied with the order of Vorster AJ to date, despite having been afforded a final opportunity to do so and as such are in contemptuous disregard of Vorster AJ's order.
- [12] A notice of set down for the hearing dated the 18th of May 2023 was served on the first to fifth respondents' attorneys of record by way of e-mail on

¹⁰ CaseLines, 037-1 to 037-5

¹¹ CaseLines, 042-1 to 042-2

¹² CaseLines, 047-1 to 047-3

the 20th of April 2023.¹³

Initial application / rectification application

- [13] An order was granted by Vorster AJ on the 14th of June 2022 in terms of which it was ordered that the applicant's municipal account be rectified.¹⁴
An order in the following terms was granted by Vorster AJ:

[1] The first, second, third and fourth respondents are ordered to rectify Account No. 554763021 (hereinafter referred to as "the account") within 20 days of service of this order, in the following material respects:

[1.1] The first and/or second respondents are ordered to reverse all charges raised for electricity consumption on the second respondent's electricity meter number 98370289 with effect the first respondent's March 2018 (2018/03/07) statement to date hereof;

[1.2] The first and/or the second respondents are ordered to debit the 70 kBa minimum demand charge per month to the account with effect the first respondent's March 2018 (2018/03/07) statement to date hereof;

[1.3] The first and/or third respondents are ordered to reverse all charges raised for water and sewage consumption on the third respondent's water meter number CNWA76 to the account with effect from the first respondent's March 2018 (2018/03/07)

¹³ CaseLines, 049-21 to 049-27

¹⁴ CaseLines, 031-1 to 031-4

statement to date hereof;

[1.4] The first and/or third respondents are ordered to bill the correctly applicable water and sewer availability charges to the account for a period not exceeding 3 years from date of the re-billing of the account;

[1.5] The first and/or second and/or third respondents are hereby ordered to reverse all interest and/or default and/or pre-termination charges raised to the account with effect from the first respondent's March 2018 (2018/03/07) statement to date hereof;

[1.6] The first respondent is ordered to furnish the applicant with an accurate and rectified municipal statement in terms of paragraphs 1.1 to 1.5 above within 20 days of service of this order;

[1.7] The fourth respondent is ordered to ensure that the first and/or second and/or third respondents fully comply with their obligations in terms of paragraphs 1.1 to 1.6 above.

[2] The costs of this application are to be borne by the first, second and third respondents, jointly and severally and in solidum, the one paying the other to be absolved, on the attorney and own client scale."

[14] The applicant's attorney of record served the order on the first, second and fourth respondents' attorney of record on the 4th of July 2022 and on

the third respondent on the 6th of July 2022.¹⁵

[15] In terms of clause 1.6 of the order the first respondent were to furnish the applicant with an accurate and rectified municipal statement in terms of paragraphs 1.1 to 1.5 of the order of Vorster AJ by the 3rd of August 2022.¹⁶

[16] Notwithstanding the exchange of a plethora of correspondence as well as numerous meetings the applicant contends that there has been no compliance with the order at any stage.¹⁷

Joinder of the fifth respondent

[17] The joinder of the fifth respondent is sought, in circumstances where he is the new Acting Municipal Manager, responsible for the discharge of the first respondent's obligations. The fourth respondent was the Municipal Manager, at the time the rectification application was instituted, and the order of Vorster AJ granted. The fourth respondent was subsequently suspended, and the fifth respondent appointed in his place.¹⁸

[18] The fifth respondent is the Acting City Manager of the first respondent. He is the relevant and duly appointed responsible official of the first respondent who is mandated to ensure that the first respondent and its officials *inter alia*, fully comply with their mandated and lawful responsibilities in terms of the provisions of the Local Government Municipal Systems Act No. 32 of 2000 and/or all other relevant by-laws

¹⁵ CaseLines, 035-8 to 035-22; 036-10 to 036-13

¹⁶ CaseLines, 035-23

¹⁷ CaseLines, 035-8 to 035-31 and 036-14 to 036-61 (for the correspondence itself)

¹⁸ CaseLines, 035-24 to 035-26, paras 12-20 and 035-31 to 035-32, paras 69-74

and national legislation.¹⁹

[19] In this capacity and his appointment as such, the fifth respondent has peremptory responsibilities to the Executive and the City of Johannesburg's ratepayers in terms of the provisions of the Local Government Municipal Systems Act No. 32 of 2000 (*"the Act"*).

[20] In terms of section 55(1)(b) of the Act, municipal managers:

"(1) As head of administration the municipal manager of a municipality is, subject to the policy directions of the municipal council, responsible and accountable for –

"(b) the management of the municipality's administration in accordance with this Act and other legislation applicable to the municipality;"

[21] In terms of section 55(2) of the Act:

"(2) As accounting officer of the municipality the municipal manager is responsible and accountable for –

(a) all income and expenditure of the municipality;

(b) all assets and the discharge of all liabilities of the municipality; and

(c) proper and diligent compliance with applicable municipal finance management legislation."

¹⁹ CaseLines, 035-4, paragraph 9

- [22] Having regard to the provisions of the Act, the fifth respondent is ultimately the senior official within the first respondent, who is responsible, *inter alia*, for the proper performance of the first respondent's officials in the fulfilling of the first respondent's obligations and duties owing to the ratepayers of Johannesburg.
- [23] The applicant contends that having regard to the fact that the second and third respondents are wholly owned subsidiaries of the first respondent and that the applicant has exhausted all of its efforts in its dealings with the officials of the first respondent in order to obtain compliance with the Court order, it is necessary that the fifth respondent be joined to these proceedings as it is the intention of the applicant to seek relief against the fifth respondent in terms of his duties and responsibilities as prescribed in the Act.²⁰

The first respondent's "notice of compliance"

- [24] Ms Lombard argued that the respondents came to Court that morning and that her client was not aware of any opposition prior to the respondents' counsel arriving at Court the morning of the unopposed hearing. Ms Lombard referred me to the respondents' purported "*notice of compliance*" which was uploaded to CaseLines at 09:16 on 18 May 2023, the date of the hearing. The document uploaded is headed "*Billing account adjustment*".²¹ Ms Lombard contended that the document so uploaded to CaseLines does not constitute compliance with the Court order of Vorster AJ and does not constitute an accurate and rectified municipal statement as was required in terms of paragraph 1.6 of Vorster AJ's order. It is patently apparent that the document delivered by the respondents in purported compliance with the Court order of Vorster AJ does not

²⁰ CaseLines, 035-6, paragraph 20

²¹ CaseLines, 053-1 to 053-3 and proof of service of purported notice of compliance (18 May 2023), CaseLines, 053-4 to 053-7

constitute an accurate and rectified municipal statement in terms of paragraph 1.6 of Vorster AJ's order. I accordingly found that the document purported to comply with Vorster AJ's order does not in fact comply with Vorster AJ's order and that the first respondent has therefore not furnished the applicant with an accurate and rectified municipal statement in terms of paragraph 1.6 of Vorster AJ's order within 20 days of service of that order or on the 6th of April 2023 in accordance with Wanless AJ's order or as at 18 May 2023 when I granted the order.

- [25] Ms Lombard directed me to correspondence dated the 17th of May 2023 which was e-mailed to the applicant's attorney at 4:34 pm the day before the Court hearing wherein the attorney for *inter alia* the first respondent advised the applicant's attorney as follows:

"... We refer to the above matter and e-mail below from our client.

We are advised that the journals have been approved and pending for capturing.

Our client instructed that we request that parties prepare an order by agreement confirming that the respondents are afforded until 24 May 2023 to pass credits on the account."

The applicant denied that there had been compliance with the Court order.²²

- [26] Ms Lombard contended that on the respondents' own version they have not complied with Vorster AJ's Court order having regard to the contents

²² Applicant's denial of compliance (e-mail dated 18 May 2023), CaseLines 054-1

of the e-mail dated the 17th of May 2023.

[27] Ms Lombard furthermore contended that almost a year had lapsed since the granting of the order by Vorster AJ and almost a further two months since the granting of the order of Wanless J and the respondents have still not complied with either order. Ms Lombard argued that the respondents had been unequivocally prohibited to deliver an answering affidavit by the order of Wanless AJ and that the order which the applicant seeks must therefore follow.

[28] Ms Lombard argued that with reference to the e-mail dated the 17th of May 2023 wherein the respondents' attorney states that they request the parties to prepare an order by agreement confirming that the respondents are **afforded until 24 May 2023** (own emphasis) to pass credits on the account, Ms Lombard argued that if the respondents were *bona fide* they would accede to the order in terms of paragraph 3 of the draft Court order which reads "*The first, second and third respondents are ordered to fully comply with the terms of the Court order, within 10 days of service of this order*", which 10 days would take the date beyond the 24th of May as requested by the respondents.

The respondents' contentions

[29] Mr Sithole on behalf of the respondents referred me to the Constitutional Court judgment of ***Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others***.²³

[30] On the strength of the ***Zuma*** State Capture matter Mr Sithole argued that a party must show deliberate conduct and unwillingness to participate and/or comply with an order and only then can a party be found guilty of

²³ (CCT52/21) [21] ZACC 28; 2021 (11) BCLR 1263 (CC) (dated 17 September 2021)

contempt. Mr Sithole contended that a failure to comply with a Court order does not automatically mean that one is in contempt. He argued that Ms Lombard referred me to a document²⁴ where a thorough explanation has been provided to the Court where it says, *“We are advised that the journals have been approved and pending for capturing ...”*. Mr Sithole argued that the re-billing of a municipal account has to go through various systems and captured and approved by various individuals in various departments of the first, second and third respondents. He argued that the document headed *“Billing Account Adjustment”* does not indicate the actions of a delinquent litigant who does not want to comply. Mr Sithole argued that I cannot find that the respondents are not willing to comply with the Court order and that there is deliberate non-compliance with Vorster AJ’s order in the face of the document at CaseLines 053-3. Mr Sithole argued that the applicant had referred me to an extract from a journal that is not in line with the Court order according to the applicant - however Mr Sithole argues that this is not the case before me. Mr Sithole stated that the applicant’s case is that *“nothing had been done”* in compliance with the Court order. Mr Sithole argued that another Court would appreciate that once you have taken steps in compliance with a Court order there has been compliance.

- [31] The respondents also did not want to accept clause 3 of the applicant’s draft Court order. Mr Sithole argued that they have told me that the capturing takes time and that I cannot grant an order in terms of which they are provided a further 10 days to comply with the Court order of Vorster AJ. Mr Sithole argued that there is no prejudice to the applicant if the municipal account is not rectified as we now speak and it takes steps to be rectified, which this Court refuses to accept. Mr Sithole argued that the first respondent operates through its individuals and they have different departments and those departments are run by different personnel and that the different departments have to be engaged with and

²⁴ Referring to the document headed *“Billing Account Adjustment”*, CaseLines, 053-3

the different departments have to ascertain whether that which another department has done is compliant with the Court order.

[32] Mr Sithole argued that the document headed "*Billing Account Adjustment*" shows that the third respondent had taken steps to comply and therefore they are compliant. I put it to Mr Sithole that the Court order makes provision for specific orders that have to be complied with and that one cannot merely say that one can take any step and that once you have taken any step, that constitutes compliance. The Court order states exactly what his clients had to do and they have not complied.

[33] Mr Sithole argued that I am not appreciating that his clients have taken steps. Mr Sithole argued that I may not agree with the respondents that they are "*fully compliant*" and they seek an opportunity to file an affidavit(s) to state why his clients say that the document headed "*Billing Account Adjustment*" is compliant. Mr Sithole also argued that I must consider what the word "*accurate*" means in terms of clause 1.6 of Vorster AJ's Court order and whether it was one-sided - is it accurate when the Court says it's accurate or is it accurate when the respondents say it is accurate, however, Mr Sithole stated that he did not intend pursuing that argument.

[34] Mr Sithole requested that the matter be removed from the roll and argued that his clients had tendered party and party costs. Mr Sithole argued further that I cannot justify granting the full order that the applicant seeks, as the respondents have taken steps. Mr Sithole argued that if I am inclined to find that the steps that the respondents took is not in compliance with Vorster AJ's Court order, I ought to postpone the application affording them an opportunity to file an answering affidavit(s) to show that what they have done constitutes compliance with the Court order of Vorster AJ.

[35] Mr Sithole referred me to section 34 of the Constitution of the Republic of

South Africa²⁵ under the heading “*Access to Courts*” that reads “*Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum*”. Mr Sithole argued that one must be allowed to place one’s case before a Court. Mr Sithole furthermore argued that the document headed “*Billing Account Adjustment*” means that his client as individuals who are communicating with his attorney have been advised that the journals have been approved and pending for capturing. Mr Sithole argued that there has been capturing and understanding of the numbers punched in the journals and that that is in compliance with the Court order and therefore awaiting capturing. Mr Sithole agrees that the capturing has not been done “*in accordance with the Court order and that such capturing is pending*”. Mr Sithole again states that I have to determine whether a party who has taken steps is in contempt. Mr Sithole agrees that they have not re-billed a document in the form of a tax invoice in accordance with paragraph 1.6 of the Court order.

- [36] Mr Sithole argued that the matter has been settled by the parties and rightly or wrongly the applicant disagrees with the manner in which the respondent says it has complied. Reasonable steps have been taken – Mr Sithole states on a question posed by me that they have “*not completely taken the steps in terms of the Court order*” but that “*some steps*” have been taken. Mr Sithole argued that I must find that the parties are in the process of compliance and that they will comply but a gun cannot be held against his client(s)’ heads to say that they are in contempt and that they have to comply with Vorster AJ’s order within 10 days of granting of this Court’s order. Mr Sithole argued that the next thing will be that the fifth respondent is arrested for contempt if they do not comply. Mr Sithole argued that they will seek their remedy if I make the Court order as sought by the applicant. Mr Sithole argued that I am turning a blind

²⁵ Act 108 of 1996

eye to the respondents' version that they have taken steps and hence, that I have rejected the respondents' version to the effect that they have taken steps.

Deliberation

[37] I disagree with Mr Sithole's contention that I am not called upon to decide whether or not the document headed "*Billing account adjustment*" under the heading "*Notice of compliance*"²⁶ signed by three of seven individuals constitutes compliance in accordance with Vorster AJ's order. That is precisely what I am called upon to determine in order to find whether or not the respondents are in contempt of Vorster AJ's Court order. This document clearly does not constitute "*an accurate and rectified municipal statement*" in terms of paragraphs 1.6 of Vorster AJ's order.

[38] Having regard to my findings as set out in paragraph 37 above a further postponement for the respondents to attempt to show compliance with the order of Vorster AJ will not assist the respondents. Wanless AJ has ordered that there shall be no further postponements regarding the contempt application. Any request for a postponement of this matter has been refused.

[39] This Court also rejects any assertion by the respondents that they have not been afforded sufficient time in order to fully comply with Vorster AJ's order specifically having regard to the respondents' contention that various approvals have to be given by various individuals in various departments of the first respondent.

[40] One only has to have regard to the exchange of the plethora of correspondence²⁷ to appreciate the prejudice that the applicant has

²⁶ CaseLines, 053-3

²⁷ CaseLines, 035-8 to 035-31 and CaseLines, 036-14 to 036-61 (for the correspondence itself)

suffered as a result of the respondents' non-compliance and to comprehend the great lengths to which the applicant's attorney had gone in order to attempt to induce the respondents to comply with the Court order. Various undertakings had been given by the respondents that they would comply by certain dates and by which dates there was still non-compliance. One such letter²⁸ is addressed by the applicant's attorney to the fifth respondent dated the 5th of December 2022 wherein the applicant's attorney *inter alia* states the following:

"3. *We address this letter to you for the sole purpose of furnishing the City of Johannesburg, its subsidiaries as well as yourself with one final opportunity to comply with the relevant Court orders in respect of the Long Street property.*

4. *As City Manager, we have no doubt that you are familiar with the aforementioned matters. Notwithstanding, please be advised as follows:*

4.1 *The Long Street property was purchased by our client around the beginning of 2017 as vacant stands (subject to Erf 279 Jeppestown South which was occupied by the previous owner until February 2018), which our client intended to develop but did not.*

4.2 *Subject to Erf 279 Jeppestown South on which utilities were consumed until February 2018 and were paid for by our client, no water and/or electricity have at any material time been consumed at the Long Street property.*

4.3 *Despite the above, the City of Johannesburg have*

²⁸ Annexure "EJS19", CaseLines 036-29

persistently billed various individual erven of the Long Street property for fictitious water and/or electricity charges which our client has disputed for several years to no avail (hereinafter referred to as “the fictitious billing”).

- 4.4 *The most egregious fictitious billing occurred on account numbers 554763021, corresponding to Erf 279 Jeppestown South and 554579424 corresponding to Erf 281 Jeppestown South. Such accounts’ combined arrears roughly reflected the incorrect amount of approximately R70 000 000,00 which falls to be reversed in its entirety.*
- 4.5 *The incorrect billing on these two stands alone, exceeds the value of all 63 (sixty three) stands that make up the Long Street property.*
- 4.6 *In this regard our client launched various applications to compel the City of Johannesburg as well as its subsidiaries, Johannesburg Water and City Power to reverse and correct the fictitious billing. The attached Court order relates specifically to account numbers 554763021 and 554579424.*
- 4.7 *To date hereof the City of Johannesburg, along with City Power and Johannesburg Water, have failed to comply with the Court orders.*
- 4.8 *In addition to the above, our client has sold the Long Street property. However, our client is unable to effect transfer of same as a direct result of the failure of the City of Johannesburg to correct the billing in*

terms of the Court orders and supply correct clearance figures.

- 4.9 *Notwithstanding the fact that our client stands to lose the sale of the property due to transfer not having taken place to date hereof, our client is suffering major damages in respect of inter alia costly rates, sewer and water availability charges that our client every (sic) is required to pay every month whilst the accounts remain unrectified, and correct clearance figures are not forthcoming. Additionally, our client is forced to incur security costs of approximately R156 000,00 per month to ensure that the Long Street property is not hijacked.*
- 4.10 *The above has been brought to the attention of the City of Johannesburg, City Power and Johannesburg Water. In this regard various meetings were held and correspondence exchanged to urgently correct the billing of accounts 554763021 and 554579424 in order for our client to effect transfer of the Long Street property.*
- 4.11 **We were informed by the City of Johannesburg at the end of October 2022 that the billing department was simply waiting for relevant journals to be signed off by City Power and Johannesburg Water respectively after which the corrections would reflect on the City of Johannesburg system.** (Own emphasis)
- 4.12 **Despite numerous requests for an update regarding the above, none have (sic) been**

forthcoming and it is clear that the process of rectifying these accounts has come to a standstill. (Own emphasis)

4.13 *In the circumstances we have prepared the relevant contempt of Court applications as well as a damages action against the City of Johannesburg for the loss suffered by our client.*

5. *In light of the above we implore you as the City Manager to take immediate action in these matters to bring them to finality and ensure compliance with the Court orders.*

6. *Please take note that should account numbers 554763021 and 554579424 not be rectified in terms of the Court order by end of business Friday the 13th of January 2023 we are instructed to immediately institute the damages action as well as the contempt of Court application in which we will seek to hold you personally liable with the City of Johannesburg, City Power and Johannesburg Water ...”*

[41] The aforesaid letter reflects a date prior to the launching of the contempt application during January 2023 and prior to the order of Wanless AJ whereby the respondents had agreed to comply with Vorster AJ’s Court order by no later than the 6th of April 2023.

[42] This Court finds the respondents’ lackadaisical attitude to orders of this Court contemptuous. It is apparent that by the 6th of April 2023 the respondents had been in contemptuous disregard of an order(s) of this Court. Mr Sithole’s assertions to the effect that the matter ought to be removed from the roll and that the respondents may “*fully comply*” with the order of Vorster AJ at their leisure “*without a gun being held to their heads*” makes a mockery of any order that this Court has made or may

make.²⁹

Applicable legal principles

[43] In the matter of ***Sikunye Holdings (Pty) Ltd and the Municipal Manager of Govan Mbeki Local Municipality and Others***³⁰ Langa J *inter alia* held the following:

“[14] Concerning the alleged non-compliance with the order, the respondent maintains that it has complied with the order, albeit partially, as it has launched an application for leave to appeal in respect of the balance of the orders, namely orders 3 and 5 of the judgment. The respondents also note that although there has been compliance, in their view, such compliance appears not to have been in accord with the method that the applicant believes should have been used. The respondents suggest that the envisaged meeting of the 28 March 2022 was aimed at resolving the misunderstanding on the calculation of the amounts involved. They, however, also strongly argue that since the applicant concedes in that the clearance certificates were indeed issued, albeit incorrect, it cannot therefore be argued that there was non-compliance with the order. The respondents therefore maintain that they were aware of the order, they complied therewith partially and that the applicant therefore failed to prove that there was wilful and mala fide non-compliance with the order.

The issues for determination

²⁹ As is apparent from the respondents’ non-compliance with the orders of Vorster AJ and Wanless AJ

³⁰ A judgment of the High Court, Mpumalanga Division, Middleburg Local Seat under case number 959/2022 dated the 22nd of March 2022.

- [15] *The crisp issue for determination is whether the applicant has proved beyond reasonable doubt that the respondents are in contempt of the court order as alleged by the Applicant.*

The Legal principles

- [16] *In **Fakie NO v CCII Systems (Pty) Ltd** [2006] ZASCA 52; 2006 (4) SA 326 (SCA) the SCA held that civil contempt is an important tool to secure compliance with a court order and that wilful disobedience of a court order made in civil proceedings is a criminal offence. The court held further that the applicant in such motion proceedings must prove that an order was made by court, served (or notice given) on the respondent, that it was not complied with by the respondent and that the non-compliance was mala fide. It is only after these requirements have been proven that the respondent bears the onus to prove reasonable doubt that the non-compliance was not due to wilfulness or mala fides on its part. The court held further that a respondent can however still escape liability if the wilful disobedience was a result of his mistaken, but reasonable belief, that he was entitled to commit the act in question.*

- [17] *In **Matjhabeng Local Municipality v Eskom Holdings Ltd and Others** 2018 (1) SA 1 (CC) the Constitutional Court referred with approval to Fakie supra, and stated the following:*

- [50] *“It is important to note that it “is a crime unlawfully and intentionally to disobey a court order”. See also **S v Beyers** 1968 (3) SA 70 (A). The crime of contempt of court is said to be a “blunt instrument”. **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality** [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (Meadow Glen) at paragraph 35.*

Because of this, “[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence”. Simply put, all contempt of court, even civil contempt, may be punishable as a crime. The clarification is important because it dispels any notion that the distinction between civil and criminal contempt of court is that the latter is a crime, and the former is not.

[51] *In summation, the majority affirmed the availability of civil contempt, and that it passes constitutional muster in the form of a motion court application adapted to constitutional requirements. It stated that the respondent is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings. The majority held that an applicant in contempt proceedings must prove all the requisites of contempt beyond reasonable doubt. However, it stated that, “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”. See also **S v Beyers** 1968 (3) SA 70 (A); **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality** [2014] ZASCA 209; 2015 (2) SA 413 (SCA).*

Discussion and evaluation

[18] *Civil contempt is an important tool to secure compliance with a court order and that wilful disobedience of a court order made in civil proceedings is a criminal offence. **Fakie NO v CCII Systems (Pty) Ltd.** Contempt of court or wilful disobedience of*

a court order is a crime which violates the dignity of the court and that the objectives of the contempt proceedings are to vindicate the authority of court and to force the litigants to comply with court orders.

[19] *While contempt of court is not an issue inter partes but an issue between the court and the party who failed to comply, it is, however, trite that for the first respondent to be held criminally liable it must be proven that it was aware of the order and failed to comply with the order. The applicant in this case is therefore required to prove that the respondents have made unlawful and incorrect calculation of the rates and charges on the property in question in violation of the court order. It is clear from the established principles that the required standard for contempt of court is proof beyond reasonable doubt. As stated above, the respondents are not challenging the existence of the order, or that they were aware thereof. The respondents, however, still deny the contravention of the order.”*

[44] In the aforementioned matter the first respondent was *inter alia* found to be in contempt of paragraphs 1, 2 and 4 of the order made by the aforesaid Court on the 5th of August 2021 under case number 3763/2018. The first respondent was committed to imprisonment for contempt of Court for a period of thirty days, which order was suspended in terms of paragraph 3 of the Court order.³¹

[45] An applicant for a committal order must establish service of the order, non-compliance with the terms of the order and wilfulness and *mala fides*

³¹ Order may be found at page 14 of the Judgment.

beyond a reasonable doubt.³²

[46] In the matter of **JR v AL**³³ Opperman J inter alia held:

“Punitive and coercive nature of contempt orders and sanction sought by applicant

[40] *The object of contempt proceedings is not only to punish the guilty party but also to compel compliance with the court order.*

[41] *In his minority judgment in Fakie, Heher JA explained the marked and important distinction between coercive and punitive orders as follows:*

‘[74] *The following are, I would suggest, the identifying characteristics of a coercive order:*

1. *The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached) order ad factum praestandum together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.*
2. *Such an order is made for the benefit of the*

³² Onus in respect of the committal order **Tasima (Pty) Ltd v Department of Transport** [2016] 1 All SA 465 (SCA). Also see **Pheko v Ekurhuleni City** 2015 (SA) 600 (CC); **Uncedo Taxi Service Association v Maninjwa** 1998 (3) SA 417 (E)

³³ Case number 21609/2021 dated the 28th of October 2021

applicant in order to bring about compliance with the breached order previously made in his favour.

3. *Such an order bears no relationship to the respondent's degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.*
4. *Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.*

[75] *By contrast, a punitive order has the following distinguishing features:*

1. *The sentence may not be avoided by any action of the respondent after its imposition.*
2. *The sentence is related both to the seriousness of the default and the contumacy of the respondent.*
3. *The order is influenced by the need to assert the authority and dignity of the court and as an example for others.*
4. *The applicant gains nothing from the carrying out of the sentence.'*

[42] *In the State Capture decision, Acting Deputy Chief Justice Khampepe remarked that although she preferred the foregoing delineation, the majority in Fakie:*

‘....rejected the idea that there is a bright line between the two, maintaining that the binary between seeking enforcement through a contempt order and vindicating the authority of the court may be a false one. It held that the enforcement of an order in contempt proceedings has a public dimension, and that it is almost impossible to disentangle the punitive from the coercive purposes of contempt order.’

[43] *I was urged to follow the approach formulated as follows in the State Capture matter:*

[62] *Notwithstanding this, I might have been persuaded to compel compliance had I been given a single reason to believe doing so would be a fruitful exercise. As it will not be fruitful, I defer to what was said in Victoria Park Ratepayers’ Association:*

“Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.”

Indeed, at the core of these contempt proceedings

lies not only the integrity of this Court and the Judiciary, but the vindication of the Constitution itself.'

[44] *Generally, in cases of contempt of court, a court is loath to restrict the personal liberty of an individual and if a period of imprisonment is imposed, it is generally suspended. As such, at its core, coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance with a court order. This is what the applicant contends he sought when launching this application. This is indeed borne out by the notice of motion as originally crafted.*

[45] *However, in light of the respondent's continued contemptuous non-compliance after service of the second contempt application, the applicant amended his notice of motion on 12 October 2021 to seek a punitive order of 30 days direct imprisonment alternatively a punitive order in the form of a fine together with a suspended sentence of direct imprisonment subject to certain conditions.'*³⁴

[47] In paragraph 137 of the **State Capture** matter it was held that:

[137] *The right, and privilege, of access to court, and to an effective judicial process, is foundational to the stability of an orderly society. Indeed, respect for the Judiciary and its processes alone ensures that peaceful, regulated and institutionalised mechanisms to resolve disputes prevail as the bulwark against vigilantism, chaos and anarchy. If, with impunity, litigants are allowed to decide which orders they wish to obey and those they*

³⁴ See also **Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others** 2021 (5) SA 327 (CC)

*wish to ignore, our Constitution is not worth the paper upon which it is written.*³⁵

[48] Accordingly, I have found the first to third respondents to be in wilful, deliberate and *mala fide* contempt of the Court order issued by Vorster AJ and I granted to the applicant the order sought in its draft Court order.³⁶ For the reasons set out above, I have granted a punitive costs order against the respondents in favour of the applicant.³⁷



M VAN NIEUWENHUIZEN
*Acting Judge of the High Court of South Africa
 Gauteng Division, Johannesburg*

³⁵ Also see paragraph 71 of Opperman J's judgment; **Kenton-on-Sea Ratepayers Association and others v Ndlambe Local Municipality and others** 2017 (2) SA 86 (ECG) where prior to the contempt hearing the breach had been purged and a warning had been given; **AG v DG**, 2017 (2) SA 409 (GJ) where repeated breach of maintenance court order and frustrating the process of execution of such order including the hiding of assets was met with an order to pay arrear maintenance and a suspended sentence of 5 days imprisonment if maintenance was not paid; **Readam SA (Pty) Ltd v BSB International Link CC and Others** 2017 (5) SA 184 (GJ) where there was non-compliance of a court order over an extended period and the contemnor was sentenced to 30 days imprisonment in the event of non-compliance with the court order which was suspended; **Laubscher v Laubscher** 2004 (4) SA 350 (T), interim custody order was breached and 30 days imprisonment was imposed suspended for 1 year; **Victoria Park Ratepayers Association v Greyvenouw CC** [2004] ALL SA 3 623 (SE) for ongoing contempt a fine of R10 000 alternatively 3 months imprisonment suspended was imposed.

³⁶ See paragraph 2 hereinabove and uploaded to CaseLines, 052. My signed Court order may be found at CaseLines, 055 dated 18 May 2023

³⁷ Ms Lombard referred me to the matter of **Public Protector v South African Reserve Bank** [2019] ZACC 29 and **Limpopo Legal Solutions v Eskom Holdings SOC Ltd** 2017 (12) BCLR 1497 (CC) at paragraphs 35 and 37

HEARD ON:	18 May 2023
DATE OF JUDGMENT:	26 June 2023
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