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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 2023-081841

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

23.08.23

In the matter between:

GUMEDE, NYANGENI SAUL N.O.

FIRST APPLICANT

**in his capacity as trustee of DIPULA
PROPERTY INVESTMENT TRUST**

RIDWAAN, ASMAL N.O.

SECOND APPLICANT

**in his capacity as trustee of DIPULA
PROPERTY INVESTMENT TRUST**

PETERSEN, ISAK SMOLLY N.O.

THIRD APPLICANT

**in his capacity as Trustee of DIPULA
PROPERTY INVESTMENT TRUST**

AZIZOLLA , BRIAN HILTON N.O.
in his capacity as Trustee of the
DIPULA PROPERTY INVESTMENT
TRUST

FOURTH APPLICANT

and

THE CITY OF JOHANNESBURG

RESPONDENT

JUDGMENT

SENYATSI J

- [1] This is an application brought on an urgent basis for the reconnection of electricity supply to the applicants' premises known as Erf [...], Vorna Valley Extension 21 Township, Registration Division IR, Gauteng Province and Portion 5 of Erf [...], Vorna Valley Extension 21 Township, Registration Division IR, Gauteng Province, held by consolidated certificate of Title number 079412/07 with account number 221380022("the property").
- [2] The applicants also seek an order to hold the respondent in contempt of a court order, which was granted by Moshidi J on 27 February 2018. In

terms of that court order, the respondent was interdicted and restrained from disconnecting electricity and water supply to the property pending :-

(a) 14 days' notice having been given by the respondent to the applicant in respect of such disconnection;

(b) the resolution of the dispute led by the applicant against the charges raised during the period February 2015 to December 2015 in respect of the property by agreement or action to be instituted by the respondent against the applicant to claim the disputed amounts;

[3] It is the applicant's case that no 14 days' notice was sent to them to terminate the electricity and water supply services to the property and that the respondent has not resolved the disputed amount of about R3,6 million or issued summons for the recovery thereof in an action procedure.

[4] The respondent contends that it was entitled to terminate the electricity supply to the property because it had given a 14 days' notice in terms of pre- termination notice that was sent and pasted it on the wall of the property during April 2023. It contends therefore that it was not in contempt of court and that in any event the application is not urgent and that it should be struck from the roll with costs.

- [5] I do not agree that the matter is not urgent. In my considered view this matter is very urgent because the electrical supply services to the property is crucial for the continuation of the business operations by the applicants.
- [6] During the oral submissions made by both counsels, I enquired from Advocate Ralikhuvhana on behalf of the respondent whether the amount said to be owed was inclusive of the disputed amount. His response was that the amount was excluded because the applicants were making irregular payments and that for two years in 2016 and 2017, they did not pay for the services. Mr Ralikhuvhana was asked to show me in the papers where that disputed amount is shown as ring fenced. He was not able to do that because the tax invoice attached to the answering affidavit which is marked “**COJ 3**” shows an amount of R3,7 million that the respondent claims it is owed. At the same time, the invoice shows a payment of R70K made by the applicants in June 2023.
- [7] The crisp issues are whether the application deserves to be heard on an urgent basis; whether the respondent was entitled to terminate the supply of the electricity to the property and whether in doing so, the respondent was in contempt of court the court order issued by Moshidi J in 2018. The court order said that the disputed amount by the applicant should be resolved or be litigated upon and that a 14 days notice had to be given prior to termination of the supply of the electricity to the property.

- [8] The respondent does not deny that it did not resolve the disputed amount or that it has taken recovery steps against the applicants for the amount said to be owed to it. Consequently, I hold the view that it was not entitled to terminate the electricity supply to the property.
- [9] There was no explanation proffered on why the pre-termination notice was pasted on the wall of the applicants as it has to be accepted that such a notice would have been delivered during working hours. I therefore cannot agree with the submission made on behalf of the respondent that that is the manner in which such pre-termination notices are normally delivered. There is no certainty that the notice was in fact seen by the applicants.
- [10] I now deal with the contempt leg of the application. The principles on contempt of court order are trite.
- [11] The requirements for a party to be held in contempt of a court order are well trodden in the judicial turf.
- [12] 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:

¹ (653/04) [2006] ZASCA 52

“[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”

[13] 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

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.

dignity, repute or authority that this evidences⁵. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[14] As held in the *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.

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 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’).

(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.

[15] 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.

[16] The respondent did not, in my considered view form the required intent to disobey the court order as it thought the notice pasted to the wall of the applicants' property complied with the required 14 days' notice. However, I am not satisfied that no steps have been taken as required by Moshidi J

order to either resolve, by agreement, the disputed amount or take judicial recovery steps regarding the disputed amount.

[17] It follows in my view that the applicants have substantially made out a case on the first prayer.

ORDER

[17] The following order is made :

17.1.The Respondent is ordered to forthwith reconnect the electricity supply to the property known as Erf [...] Vorna Valley Extension 21 Township, Registration Division IR, Province of Gauteng and Portion 5 of Erf [...], Vorna Valley Extension 21 Township, Registration Division IR, Province of Gauteng, held by Consolidated Certificate of Title T079412/07 with account number 221380022 (“the property”);

17.2.The Respondent is not in contempt of the court order issued by His Lordship Mr Justice Moshidi on 27 February 2018 annexed hereto marked Annexure “XX” (“the order”);

17.3.The Respondent is ordered to pay the costs on a scale as between attorney and client;

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

DATE APPLICATION HEARD: 22 August 2023

DATE JUDGMENT HANDED DOWN: 23 August 2023

APPEARANCES

Counsel for the Applicant: Adv Dobie

Instructed by : Madhlopa and Thenga Incorporated.

Counsel for the Respondent: Adv Ralikhuvhana

Instructed by: Reaan Swanepoel Attorneys