

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 19080/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES /NO
(3)	REVISED.
	
..... SIGNATURE	04 Nov 2022 DATE

In the matter between:

**GREATER TSHWANEUMKHONTO WE SIZWE
MILITARY VETERANS
MAFIKA MAHLANGU
WILLY SIBANDE
EDWARD KOMATI**

1st Applicant

2nd Applicant

3rd Applicant

4th Applicant

and

**PUBLIC INVESTMENT CO-OPERATION SOC LTD
GOVERNMENT EMPLOYEES PENSION FUND
MOFFAT SITHOLE**

1st Respondent

2nd Respondent

3rd Respondent

In re:

PUBLIC INVESTMENT CO-ORPERATION SOC LTD
GOVERNMENT EMPLOYEES PENSION FUND

1st Applicant

2nd Applicant

and

GREATER TSHWANEUMKHONTO WE SIZWE

MILITARY VETERANS

MAFIKA MAHLANGU

WILLY SIBANDE

EDWARD KOMATI

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

J U D G M E N T

MNGQIBISA-THUSI J:

[1] The applicants seeks an order holding the respondents to be in contempt of an order handed down by Holland-Muter AJ on 24 March 2020 and the committal of the third respondent to imprisonment. The relief sought by the applicants in their notice of motion dated 14 December 2020 reads as follows:

- 1.1 Holding and declaring the first and second respondents in contempt of the order of Holland-Muter AJ handed down on 24 March 2020 (“the order”).
- 1.2 Ordering the third respondent to forthwith complete the process and all other acts of compliance with the order.
- 1.3 Personally committing the third respondent to prison for a period of 90 days should he fail to comply with paragraph 2 of the order, which arrest and imprisonment are to take place 48 days of the order.

1.4 The first and third respondents to pay the costs of this application on an attorney and client basis.

[2] The first applicant, the Greater Tshwane Umkhonto we Sizwe Military Veterans, is an association established in terms of the Military Veterans Act. The second applicant, Mafika Mahlangu, is a member of the first applicant. The third applicant, Willy Sibande, is the first applicant's Head of Business. The fourth applicant, Edward Komati, is a representative of the Local Business Forum. The first respondent, the Public Investment Corporation SOC Limited, is an asset management company wholly owned by the Government. The second respondent, the Government Employees Pension Fund, is a pension fund responsible for managing and administering, inter alia, pensions of Government employees. The third respondent is the Chief Executive Officer of the first respondent.

[3] The respondents are opposing the relief claimed and have filed an answering affidavit and have also instituted a counter-application seeking a cost order on an attorney and own client in respect of the reserved costs of the urgent application. However, at the time of the hearing of this application, the applicants had not filed their replying affidavit.

[4] On 20 March 2020, the first and second respondents brought an urgent application seeking an order interdicting and restraining the applicants from interfering with construction work the first respondent was engaged in at the Kingsley Centre, Arcadia and from engaging in harmful and violent conduct at the site.

[5] On 24 March 2020 the granted an order, by consent of the parties, on the following terms:

- “1. That the Respondents and/or any other persons and/or institutions are interdicted and restrained from:
 - 1.1 Intimidating, threatening and assaulting employees, contractors and/or sub-contractors of the Applicants in the performance of their duties in the redevelopment and construction work at Kingsley Centre situated in Arcadia, Pretoria CBD at the corner of Steve Biko Street and Stanza Bopape Street, in Tshwane Metropolitan Municipality (“the Property”);
 - 1.2 Interfering with, threatening, harassing, instructing or intimidating the employees, contractors and/or subcontractors of the Applicants causing such employees, contractor and/or subcontractors to cease their duties in the redevelopment and construction work at the Property;
 - 1.3 Being physically situated within 50 meters of the Property, unless with the prior consent of the Applicants;
 - 1.4 Causing, directing, inciting or permitting other persons to conduct themselves as set out in paragraphs 3.1 to 3.3 (*sic*);
2. That the First to Third Respondents and/or any other persons and/or institutions are interdicted and restrained from:
 - 2.1 Interfering with, threatening, harassing, instructing or intimidating in any manner the employees of the first applicant at its main place of business situated at Menlyn Maine Central Square, Corner Aramist Avenue & Corobay Avenue, Waterkloof Glen Extension 2, Pretoria (“main place of business”);
 - 2.2 Illegally entering without authorisation, the First Applicant’s main place of business.
3. The South African Police Service is ordered to take all steps reasonably necessary given its available resources to give effect to this order., contractors and/or subcontractors of the Applicants causing such employees, contractor and/or

subcontractors to cease their duties in the redevelopment and construction work at the Property;

4. Within 45 days after expiry of the National Lock-Down due to the Covid-19 Virus, the parties are to hold a meeting and negotiate in good faith to the local community participation in the redevelopment of the Property, and resolving all outstanding issues in this regard.
5. The costs of this application are reserved.”

[6] From the papers filed it appears that on 17 August 2020 the first respondent appointed an independent mediator to facilitate a process in accordance with paragraph 4 of Holland-Muter AJ’s order of 24 March 2020. The mediation process started on 17 August 2020, where the respondents’ employees and the legal representatives of both the applicants and the respondents were present.

[7] It appears that during the negotiations an impasse was reached when the first and second respondents refused to accede to certain demands made by the applicants, in particular, the demand by the applicants that the respondents preferentially appoint the first applicant as a sub-contractor without a competitive bidding process. As a result, the meeting was adjourned.

[8] The demands made to the respondents by the applicants include, *inter alia*, that:

- 8.1 in terms of regulation 4 of the regulations under the Preferential Procurement Policy Framework Act 5 of 2000, it is entitled to a 5% stake in the 30% stake of subcontractors.

- 8.2 ring-fence the 5% stake in future subcontracting projects of the first respondent and that the remaining 25% stake should be isolated for the remaining group of Previously Disadvantaged Individuals (“PDIs”) on whose mandate the first applicant has to act on its behalf;
- 8.3 the respondents to provide the applicants with historical and up to date quantities and values of the first respondent’s projects; and
- 8.4 the respondents provided the applicants with the scope of work done and still to be done and bills of quantities(historical and future) of the first respondent’s project in order to quantify the first applicant’s 30% entitlement for the works.

[9] On 27 August 2020 the applicants through their attorneys sent a letter to the respondents’ attorneys informing them that the first applicant had a mandate to represent the disadvantaged group called the Tshwane Concerned Citizens.

[10] On 16 September 2020 the respondents’ attorneys wrote a letter to the applicants’ attorneys informing them, inter alia, that:

- 10.1 the applicants did not have the mandate and authority to engage with the respondents in formal discussions with respect to the applicants’ participation in re-development projects of the first respondent;
- 10.2 the PPPFA and its regulations do not give State owned entities the discretion of who to select from the designated groups as sub-contractors; and

10.3 the court did not order the mediator to provide it with a report of the outcome of the negotiations.

10.4 the respondents would no longer further participate in the mediation process due to reasons that it would offend the principles contained in section 217 of the Constitution. Further that paragraph 4 of Holland-muter AJ's order was strictly unenforceable as it did not provide for a deadlock breaking mechanism and that the court did not require a report back by the mediator.

[11] On 22 September 2020, the applicants' attorneys sent a letter indicating that the first applicant had proof of second applicant's membership to first applicant.

[12] The primary objectives of contempt proceedings are to vindicate the authority of the court and to force litigants into complying with court orders.

[13] In contempt proceedings, the applicant bears the onus of proving, beyond a reasonable doubt that the respondent is in contempt of a court order. The test for whether disobedience of a court order amounts to contempt is whether the breach was committed deliberately and *mala fide*. In *Tasima (Pty) Ltd and Others v Department of Transport and Others*¹, the court held that:

“[18] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 9. *Fakie* also held that whenever committal to prison is sought, the criminal standard of proof applies (para 19). A declarator of contempt (without imprisonment) and a mandatory order can however be made on the civil standard (see *Fakie* para 42). The

¹ [2016] 1 All SA 465 (SCA).

applicant for a committal order must establish (a) the order; (b) service or notice of the order; (c) non-compliance with the terms of the order and (d) wilfulness and *mala fides*, beyond a reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears the evidentiary burden in relation to (d) (*Fakie* para 42). Should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt (*Fakie* paras 22-24)".

[14] It is common cause that an order was made on 24 March 2020 in terms of which the parties had to comply with. Further that the parties did meet and engage in negotiations with regard to the issues in dispute. However, when it became clear that a resolution pertaining to the issues could not be achieved, the negotiations stopped and the meeting was stopped. It is also common cause that the respondents had informed the applicants of their intention not to further engage in the negotiations because of the impasse.

[15] It is the applicants' contention that taking into account that a court had ordered the parties to engage in negotiations in order to resolve their issues, and taking into account that when the meeting was adjourned because a stalemate had been reached, it was not open for the respondents to abandon the negotiations and to refuse to participate further. It is the respondents' contention that since the parties were engaged in negotiations, there was no obligation on either party to be forced to agree to terms demanded by the other party and that once a stalemate was reached as the respondents' were not in a position to accede to the applicants' demands which would render them guilty of contravening the Constitution, they were entitled to not to further participate in the negotiations.

[16] In line with the court's directive to the parties to hold a meeting and negotiate the issues in dispute, the first respondent appointed a third party to assist in facilitating in the resolution of the disputes.

[17] In participating in the negotiations proceeding, neither party was under any obligation to accede to the demands of the other. The first and second respondents were not obliged to agree to the applicants' demands which would result in the contravention of the Constitution, in particular, section 217. The respondents participated in the negotiations in the same way as the applicants, with the aim that a resolution would be achieved. In negotiations, no one can be forced to reach a settlement if such settlement would not be in its own interest. The fact that the negotiations were court ordered, does not change the nature of what negotiations are.

[18] I am of the view that, by willingly engaging a third party to assist the parties in their negotiations and the respondents actively participating in the process, the respondents have proven that they complied with the court order. Their subsequent reticence at further participation in negotiations with the applicants and proffering a plausible explanation for their action, does not render their conduct to have been wilful and mala fide. The fact that the agreement between the parties to negotiate on issues which led to the launching of the urgent application, does not change the nature of the process they were engaged in.

[19] I am satisfied that the respondents have rebutted the inference of deliberate and mala fide non-compliance with the court order of 24 March 2020 and that the applicants

have not shown sufficient cause that the respondents, by not further participating in negotiations with the applicants, are in contempt of the order of 24 March 2020.

[20] In their counter-application, the respondents are seeking an order for the costs reserved in the urgent application, on a punitive scale. It is the respondents' submission that the conduct of the applicants in endangering lives and the economic harm caused by the applicants' conduct warrants a cost order on a scale of attorney and own client scale. It is further the respondents' contention that with regard to this application, since they had warned the applicants that should they bring these contempt proceedings since they were not in contempt of the order, they would seek a punitive cost order if successful, they were entitled to such order.

[21] On behalf of the applicants it was submitted that should the applicants be unsuccessful in this application, the Baywatch principle should apply as they were only vindicating their constitutional right of access to court.

[22] It is trite that the issue of costs is within the discretion of the court, which discretion must be exercised judicially. It is a general rule that costs follow the results. Therefore, the successful party is entitled to costs unless there are good reasons to depart from such rule.

[23] Inasmuch as the respondents seek punitive cost orders on an attorney and own client basis in this application and the urgent application, I am not convinced that such an order is warranted under the circumstances. I am also not convinced that the

circumstances of this case fall under the conditions under which the Baywatch principle is applicable. However, since the applicants sought costs on an attorney and client scale if successful, there is no reason why the respondents, as the successful parties, cannot be granted a punitive cost order on an attorney and own client scale.

[24] In the result the following order is made:

1. The application is dismissed with costs on an attorney and client scale.
2. With regard to the urgent application, the respondents are to pay the costs of the urgent application on an attorney and client scale.



NP MNGQIBISA-THUSI
Judge of the High Court

Date of hearing: 09 March 2022

Date of judgment: 11 November 2022

Appearances

For Applicants: Adv P Makhambeni (instructed by Nkome Attorneys Inc)

For Respondents: Adv V Qithi (Mngadi Attorneys Inc)