

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No : 924/2013

In the matter between:-

MATJHABENG LOCAL MUNICIPALITY

Applicant

and

ESKOM HOLDINGS SOC LTD
MEMBER OF THE EXECUTIVE COUNCIL,
LOCAL GOVERNMENT, FREE STATE
PROVINCIAL GOVERNMENT

1st Respondent

2nd Respondent

NATIONAL ENERGY REGULATOR OF SA

3rd Respondent

NATIONAL MINISTER OF MINERALS &
ENERGY

4th Respondent

THE MINISTER OF PROVINCIAL & LOCAL
GOVERNMENT, RSA

5th Respondent

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

26 JUNE 2015

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- [1] This is an application by Matjhabeng Local Municipality, the applicant, for leave to appeal my judgment of 19 February 2015. Although several respondents have been cited in the main application, second to fifth respondents gave notice to abide the judgment of the court. Eskom Holdings Soc Ltd, cited as first respondent, was the only respondent who filed

papers in the main application. It opposes the application for leave to appeal. I shall refer to Eskom later herein as respondent only.

- [2] The application is based on substantive and procedural grounds of appeal and it is also alleged by applicant that procedural irregularities have taken place. I shall deal with the grounds and submissions in more detail later.
- [3] In accordance with rule of practice 16(5) of this division the parties agreed that the application for leave to appeal could be adjudicated in chambers on receipt of their heads of argument. The heads of argument have been filed and considered.
- [4] A distinguishing feature of this application is the filing of an affidavit by the applicant's municipal manager, Mr Mothusi Frank Lepheana ("Lepheana") which is referred to as an explanatory affidavit and which is appended to the application for leave to appeal. Annexed to this affidavit is a draft affidavit which was allegedly prepared by senior counsel in Johannesburg. It was intended that the draft affidavit would be deposed to by Lepheana to serve as applicant's reasons in response to Kruger J's directions in the court order of 18 September 2014.
- [5] Messrs Moroka Attorneys, the attorneys who appeared for applicant at all relevant times in the main application proceedings, are not the applicant's attorneys of record any

more. Their mandate has been terminated following my order of 19 February 2015.

[6] Mr Malgas, (“Malgas”) the attorney at Moroka Attorneys directly involved in the litigation, deemed it fit to file an explanatory affidavit in response to the explanatory affidavit of Lepheana referred to above. In this affidavit Malgas disputes several material allegations contained in Lepheana’s affidavit. I am requested by applicant “...to accept that the draft affidavit prepared by senior counsel attached hereto marked “B”, be accepted for purposes of the adjudication of the appeal, or that upon the consideration of the appeal, if the matter is remitted back to the Court a quo, that the Court a quo should give direction for the filing of proper affidavits.”

[7] I do not deem it necessary to refer in any detail to the draft affidavit, but merely wish to state that even in this document Lepheana failed to report why applicant had not provided all the information required in paragraph 2 of the order of 31 July 2014 and why he had not reported to the court the reasons for failure to pay the current account for August 2014 in full. More importantly, he failed to disclose the details required in paragraph 7 of the order of 31 July 2014 which reads as follows:

“The applicant to disclose to the first respondent and the above Honourable Court the status of money collected from end users, in lieu of electricity usage, from June 2013 to present, and what it has been utilised for before on 6 August 2014.” It is clear from a reading of paragraph 4 of the court order of 18

September 2014 that Lepheana (as the acting municipal manager at the time) was called upon to give reasons why there was non-compliance with the court order of 31 July 2014 and special reference was made to the directions contained in paragraphs 4(a) – (d). Paragraph 4(d) called upon the municipal manager (Lepheana) to advance reasons why he should not be held in contempt of court for non-compliance with the order of 31 July 2014. The issue was set out in more detail in paragraph 5 in that the municipal manager was called upon to give his reasons in the form of an affidavit before a certain date and to be present in person at court on 6 November 2014.

- [8] In the light of the contradictory versions of Lepheane and Malgas, and in view of the fact that adv Louw, who was applicant's counsel throughout the main proceedings and the person who drafted Lepheane's "reasons" placed before court, appeared for applicant on 6 November 2014 in accordance with the order of 18 September 2014 and Lepheana's own appearance that day, I am not prepared to accede to applicant's request that the draft affidavit be accepted for purposes of adjudication of the application for leave to appeal. It must also be noted that unlike Lepheana's version now placed before me, he had ample time to peruse and consider the affidavit sent to him by e-mail and even made corrections thereto before he deposed to it and dispatched same to the attorneys. This is apparent from the founding affidavit in support of an application for

condonation which he deposed to two days later, i.e. on 17 October 2014.

- [9] In several of the grounds of appeal and as argued by applicant's counsel reliance is placed on the fact that I misdirected myself in so far as Lepheane was not cited as a party to the proceedings, the application papers were not served on him personally and that he was also not served with a court order. Mr Louw conceded that the first two requisites to prove contempt of court have been met, i.e. the granting of the orders of 31 July 2014 and 18 September 2014 and secondly that Lepheane was fully aware of both orders which were granted by agreement between the parties. The fact that service of the orders was not effected on Lepheane as municipal manager, is really immaterial in the circumstances. The orders were granted by agreement.
- [10] Although Leheana relied on vague and general averments, there is also no doubt that there was a failure to give reasons for the non-compliance with paragraphs 2, 4 and 7 of the order of 31 July 2014. The third requirement for contempt has been met. The only issue is whether Lepheana has satisfied the evidential burden in relation to wilfulness and *mala fides*, to which I shall return.
- [11] It is also alleged that I misdirected myself and that Lepheane's right to a fair trial has been violated. In particular, it is alleged that he was ambushed in so far as he was subjected without warning to examination and even

cross-examination. It should be record that Kruger J made an order that the municipal manager had to attend the court proceedings on 6 November 2014 personally. Having perused the affidavits of both parties prior to the hearing of the application, it struck me that Lepheana did not respond fully and the purpose of calling him to the witness box for examination was in an effort to obtain more detail. The finding of *mala fides* and wilfulness was in fact made based on his explanatory affidavit and his failure to state categorically why he did not comply with the aforesaid two orders. His oral evidence did not take the matter any further.

[12] I am criticised for convicting Lepheana for contempt of court in the absence of a substantive application by respondent. There was no objection to the approach adopted and no word of objection was raised even in the draft affidavit prepared by senior counsel. The order of 18 September 2014 has never been set aside and no appeal in respect of that order is pending. In fact, that order was by agreement.

[13] Organs of State act through public servants and *in casu* the municipal manager is the accounting officer of the applicant. Organs of State and public officials, like all citizens, must abide by court orders. I have referred to several authorities in my judgment. See also **Pheko and Others v Ekurhuleni Metropolitan Municipality (no 2)** [2015] ZACC 10 at para [25] and further. The full bench of the Gauteng North High Court expressed itself as follows in para [37.2] of the fresh out of the oven judgment of **The Southern Africa Litigation Centre v The Minister of Justice**

and Constitutional Development, case no 27740/2015 delivered on 24 June 2015:

“A democratic State based on the rule of law cannot exist or function, if the government ignores its constitutional obligations and fails to abide by Court orders. A Court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by Court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”

[14] I am satisfied that there is no reasonable possibility that another court may find that either a substantive contempt of court application should have been brought *in casu*, incurring further costs and more so, that the municipal manager had to be cited as respondent in such application, given the fact that he was directed by an order of court to provide reasons under oath. The authorities are clear and that is that in the event of complaints of contempt of court, proceedings may be proceeded with against the functionary or functionaries responsible for ensuring compliance with the court order. When such functionary or functionaries are specifically identified and directed in an order of court to do something or to refrain from acting in a specific manner, there is no reason to insist on a separate and new application for institution of contempt proceedings, or to join the recalcitrant functionary in the pending application. **In Pheko and Others** *loc cit* the applicants intended to join the municipal manager and executive mayor of the municipality in a matter where the municipality was ordered to comply with court orders, but refrained to do so. No functionary was cited at all. It was not

necessary to consider the joinder application as the Court found that the municipality was not in contempt of court.

[15] Many references in the application for leave to appeal as well as in applicant's heads of argument are found to the effect that I misdirected myself in convicting Lepheane of contempt of court in respect of the monetary debts of applicant. I have made it clear that the conviction of contempt of court had nothing to do with the fact that applicant as judgment debtor did not or could not pay the judgment debt. I refer *inter alia* to paragraphs 40, 41, 43, 45 and 46 of my judgment.

[16] The application for leave to appeal is also directed at the setting of a time table for applicant to pay its outstanding debt to Eskom in monthly instalments, the last payment to be made at the end of September 2015. The order of Kruger J dated 18 September 2014 is in essence a structural interdict and although judgment was granted by agreement against applicant for payment of the sum of R371 908,24 to Eskom, the court directed applicant as represented by the municipal manager in paragraph 4(c) to provide reasons why the judgment debt should not be payable on or before 31 March 2015. Bearing in mind the payment plan adopted by applicant's council and the representations by Adv. Louw on behalf of applicant as well as the facts set out in the explaining affidavit of Lepheana concerning serious financial constraints, I was prepared to allow applicant to pay the outstanding debt in respect of arrears in eight instalments from February 2015 to September 2015. This is in essence

what applicant sought: an opportunity to pay the debt in instalments with a final payment on 30 September 2015. In my view there is no reasonable possibility that another court may find that I misdirected myself in this regard, but even if that might be case, no appeal in this regard will have any practical effect in that the judgment granted by Kruger J would still stand.

[17] It is furthermore alleged that a misdirection has been committed in so far as the applicant was directed to pay the future monthly accounts for electricity supply by Eskom in full on due date. This order is in line with paragraph 4 of the order of 31 July 2014 agreed to by the parties read with paragraph 4(a) of the order of 18 September 2014. Even if my order could be set aside on appeal, it would be of no practical value as the order of 31 July 2014 will still stand and has to be obeyed. However and as mentioned, my order is merely a confirmation of an agreement entered into between the parties and which was made an order of court earlier.

[18] I am also satisfied that the costs order was fully justified and that there is no reasonable possibility that another court may interfere with that order if the history between the parties and applicant's failures are considered.

[19] In so far as my orders granted on 19 February 2015 are modifications of the structural interdict issued by Kruger J, and bearing in mind applicant's continued responsibility to

comply with such interdict, it was considered fair to include paragraph 6 in the order to allow anyone of the parties the right to enrol the application with 14 days written notification to the other party and if this is not done, for the application to be postponed to 8 October 2015, a date after the final payment is supposed to be made. In view of the purpose of structural interdicts, I am of the view that there is no reasonable possibility that another count may intervene with such order.

[20] Consequently the application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel.

J. P. DAFFUE, J

On behalf of applicant: Adv. W. R. Mokhari SC
with A. E. Ayayee
Instructed by:
Rampai Attorneys
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On behalf of respondent: Adv. M. G. Khoza SC
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