

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

Case No. : 3064/2013

In the matter between:-

AGRITRANS (PTY) LTD

Applicant

and

MAFUBE MUNICIPALITY

First Respondent

ISAAC RADEBE

Second Respondent

Case No.: 3547/2013

In the matter between:-

AGRITRANS (PTY) LTD

Applicant

and

MAFUBE MUNICIPALITY

First Respondent

ISAAC RADEBE

Second Respondent

HEARD ON: 17 OCTOBER 2013

JUDGMENT BY: MONALEDI, AJ

DELIVERED ON: 20 FEBRUARY 2014

MONALEDI, AJ:

- [1] This matter came before the court by way of an urgent application in which the relief sought was an order declaring the first respondent to be in contempt of a court order obtained under case number 2365/2004 (the “first court order”) and an order obtained under case number 1360/2008 (the “second court order”), together with an order that the first respondent be committed to prison, either immediately or that the order be suspended. In the alternative, the applicant sought interlocutory relief.
- [2] These matters were argued together and it was agreed that they should be dealt with on the same argument without any distinctions. I shall use the pleadings in case number 3064/2013

in order to deal with the issues. The averments in the pleadings are similar save for the dates pertinent to each of the court orders.

- [3] The applicant is Agritrans (Pty) Ltd (“Agritrans”), a company with limited liability registered in terms of the Companies Act, 61 of 1973 and the Companies Act 71 of 2008 with registered address being the remaining extent of the farm Paisley No 73 (“the property”), district Frankfort, Free State Province. Agritrans is the registered owner of the property.
- [4] The first respondent is Mafube Municipality, a local authority established in terms of the provisions of the Local Government Municipal Structures Act, No 117 of 1998 (“Act 117 of 1998”) which conducts business from the Municipality Office Building, Frankfort, Free State Province.
- [5] The second respondent is Mr Isaac Radebe, the Municipal Manager of the first respondent, who was appointed in terms of section 82(1)(a) of Act 117 of 1998. He is the head of administration and the accounting officer of the first respondent.
- [6] The applicant seeks relief for:
 - “2. An order declaring the first respondent to be in contempt of the court obtained by the first applicant against the first respondent under case number 2365/2004 (the first court order) and/or case number 1360/2008 (the “second court order”);
 - 3. An order directing the first respondent to comply with paragraphs A1.1.1, A1.1.2 and A1.1.3 of the Court order [as amended by the order granted on appeal under case number A248/08] within five days of date of this order failing which the second respondent be committed to prison for a period of ninety days for contempt of court;
 - 4. In the alternative to paragraphs 2 and 3 above, an order directing the first respondent to:

4.1 within five days of date of this order repair and make operational the two sewerage pumps situated in the sewerage pump house (the Namahadi pump house) which services the Namahadi settlement (the Namahadi sewerage works);

4.2 maintain and operate the pumps at the Namahadi pump house and the Namahadi sewerage works situate on the remaining extent of the farm Paisley No 73, district Frankfort (the property):

4.3 maintain and operate the pumps situate on the property from which sewerage effluent is pumped from the Namahadi sewerage works to the pivot irrigation system;

4.4 make available to the first applicant all effluent produced by the Namahadi sewerage works situate on the property;"

[7] In the Applicant's replying affidavit notice is given to the respondent that the applicant will, as an alternative to the contempt of court relief, seek declaratory relief that:

i. It is ordered that the first respondent has failed to comply with the court orders; and

ii. That the first respondent is directed to comply with the first and second court orders.

[8] The application has a long history and is it the fourth in a series of applications brought by the applicant against the first respondent. For purposes hereof the court will not discuss the build-up in full. In any event is it fully set out in the founding papers and is not in contention.

[9] The applicant approached this Court on 8 August 2013 (Kruger, J) on an urgent basis for the relief set out in paragraph [6] above. The application was considered not urgent and the respondent was granted leave to file opposing papers. The application was heard by and a rule nisi was granted by consent of both the parties. In terms of the court order, the respondents

were called upon to show because why the interim interdict should not be made an order of court.

[10] It is not in the dispute that there was an order, that it was served or came to the notice of the respondents and that there was non-compliance with the order. The only aspect to be decided is whether the non-compliance of the order in relation to the affluent and spillages in the period 14 to 28 August 2013 was due to wilful and mala fide defiance of the order.

[11] **In Noel Lancaster Sands (Edms) Bpk v D Theron en Andere 1974 (3) SA 688 (T)** Botha J (as he then was) found at 691A-B that if an applicant proved that a respondent, with knowledge of a Court order, acted in conflict with its terms, such an applicant would prima facie be entitled to a committal order. The respondent would, however, be able to resist the relief sought if he were to prove - and the onus rests upon the respondent in this regard - that he had not intentionally defied the order or had not acted mala fide in doing so.

[12] The following view was held in **Sparks v Sparks 1998 (4) SA 714 (W)**:

“Accordingly, once it is shown that an order was granted and that the respondent has disobeyed it, or neglected to comply with it, wilfulness will be inferred and the onus is on the respondent to rebut the inference of wilfulness on a balance of probabilities. The onus lies on the respondent since he must by his default be regarded as having intended the natural consequences of his action, namely to bring the administration of justice into contempt.

Insofar as mala fides is concerned, I see no reason why the onus of rebutting same should not equally rest upon the shoulders of the defaulting respondent.”

- [13] The onus is on the applicant to prove contempt beyond a reasonable doubt. Once that is established there is an onus of rebuttal on the respondent. Should he fail to advance evidence that established a reasonable doubt as to whether his non-compliance was wilful and mala fide, the applicant would have proved contempt beyond a reasonable doubt. In this regard reference is made to **Fakie NO V CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** on page 344J to 345A.
- [14] The applicant in its application referred to correspondence dated 26 June 2013 directed at the first respondent calling latter to comply with the court orders and to repair the pumps. This resulted in an improvement of the functioning of the facility.
- [15] Further correspondence followed on 1 July 2013 again reminding the first respondent to comply with the court orders.
- [16] The respondents argued that the spillages and overflow was not as a result of any wilful and mala fide conduct or failure on their part. It is further stated that it was not necessary to bring this application as there were no overflows, save those in August 2013 and as such this application is pre-mature.
- [17] The second respondent states in his opposing affidavit that the spillages were caused by “factors beyond the control of the officials of the first respondent or myself.” He then states further that the facility is very old and was burdened beyond its demand by a “vast population growth” in the last number of years. It is however not in dispute that since 2008 when the court order was granted, until June 2013 the facility was indeed fully operational. It is further stated that since the application was issued on 6 September, no further problems were experienced.

The ability of the facility to deal with the workload seems not to be an issue.

[18] He further sets out in the opposing papers a number of malfunctions experienced with the equipment at the facility. From the steps taken it is clear that the respondents failed to properly maintain the equipment and plan ahead for the increase in population. It seems that they did not maintain the facility as directed in anticipation of department of water and forestry to implement other proposals.

[19] If the contention of the second respondent regarding the increase in population is indeed true, the fact that no further problems were experienced cannot be explained at the hand of difficulties with the pumps.

[20] The first instance referred to in the founding affidavit was rectified almost immediately upon it being brought under the intention of the first respondent. This is an indication that the facility was not adequately managed. This then seemed to be the process in which the facility was thereafter operated, being that only after being made aware of spillages; the problem would be attended to.

[21] It is evident that the respondents are able to comply with the court orders as there were no spillages since 6 September 2013 to date of hearing of the application.

[22] The court finds that the respondent has failed to advance evidence establishing a reasonable doubt that their non-compliance with the court order was wilful and mala fide.

[23] I am satisfied that the first respondent, through its functionaries,

by not timeously identifying shortcomings in the facility and its equipment and maintaining and operating the sewerage works, there is no evidence before me to prove that the respondents did not intend to act in breach of the Court order. I am satisfied that the evidence shows that they did so both wilfully and in bad faith.

[24] The first respondent is found to be contempt of the court orders under case number 2365/2004 on 29 April 2011, and in respect of the order under case number 1360/2008.

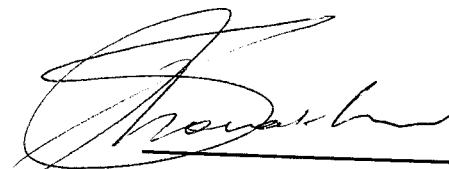
[25] There is no reason to deviate from the practise that the successful party should be awarded the costs. The applicant had no other recourse to ensure that the respondent keeps to the court orders. This was done after the respondent was alerted to the fact that they were in breach of a court order, and was done so on numerous instances. Their conduct in this regard was of such a nature that a punitive cost order must follow.

[26] In the result, the following order is made in respect of both matters:

- a. The first respondent is declared to be in contempt of the court order obtained by the applicant against the first respondent under case number 2365/2004, and in respect of the order under case number 1360/2008;
- b. The first respondent is directed to comply with paragraphs A1.1.1, A1.1.2 and A1.1.3 of the first court order and/or the provisions of the second court order (as amended by the order granted on appeal under case no A248/2008) within 5 days of the date of this order, in so far as it has not yet complied with those orders, failing which the

second respondent is to be committed to prison for a period of 90 days for contempt of court;

- c. The first and second respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the Applicant's costs on an attorney and client basis.



S. MONALEDI, AJ

On behalf of applicant: Adv. N. Snellenburg

Instructed by: **TIEFENTHALER ATTORNEYS
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