



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Case 2024/097004

Date: 04 September 2024

WJ du Plessis

In the matter between:

ACTOPHAMBILI ROADS (PTY) LIMITED

Applicant

and

**MEMBER OF EXECUTIVE COUNCIL:
GAUTENG PROVINCIAL GOVERNMENT:
DEPARTMENT OF ROADS AND TRANSPORT**

First Respondent

**HEAD OF DEPARTMENT:
GAUTENG PROVINCIAL GOVERNMENT:
DEPARTMENT OF ROADS AND TRANSPORT**

Second Respondent

ANDREW NGOBENI

Third Respondent

PEWE HLATSHWAYO

Fourth Respondent

HERALD MLAMBO

Fifth Respondent

KWAGGA HOLDINGS (PTY) LIMITED

Sixth Respondent

TAU PELE CONSTRUCTION (PTY) LIMITED

Seventh Respondent

TEFLA GROUP (PTY) LTD

Eighth Respondent

LEAFY SPACE (PTY) LTD

Ninth Respondent

BEST ENOUGH TRADING AND PROJECTS 398 CC

Tenth Respondent

DOT AFRICA CIVILS

Eleventh Respondent

Coram: Du Plessis AJ

Heard on: 3 September 2024

Decided on: xxx

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 4 September 2024.

ORDER

The following order is made:

1. The application is struck from the urgent roll for lack of urgency.
2. The applicant must pay costs on a party and party scale, and on scale C.

JUDGMENT

DU PLESSIS AJ

[1] This urgent application is for contempt of court, in which the applicant asks that the first to fifth respondents be declared in contempt of the court order under case number 2024-025996, and be imprisoned for three months.

[2] The applicant, Actophambili Roads (Pty) Limited (“Actop”), is a private company that obtained interdictory relief under case number 2024-025986 against the first and second respondents pending a review of a tender granted to the sixth to eleventh respondents.

[3] The first respondent is the Member Executive Council: Gauteng Provincial Government: Department of Roads and Transport (hereafter “MEC”, currently Ms Kedibone Diale-Tlabela), the executive authority of the Gauteng Department of Roads and Transport. The second respondent is the Head of Department: Gauteng Provincial Government: Department of Roads and Transport (hereafter “HOD”, currently Dr Thulani Mdadane). The third respondent, Mr Andrew Ngobeni, is employed by the Gauteng Provincial Government: Department of Roads and Transport. So is the fourth respondent, Mr Simpewe Hltashwayo and the fifth respondent, Mr Herald Mlambo. They will be collectively referred to as “the respondents” unless where it is necessary to distinguish between them, then they will be referred to as they are cited.

[4] The sixth to eleventh respondents are private companies cited in this application as successful bidders in the Gauteng Department of Roads and Transport, contracting to supply and apply dilute emulsions on various roads for three years to the Gauteng Province. No relief is sought against them.

Background

[5] The applicant states that the first to fifth respondents are in contempt of the judgment and order granted by this court on 30 April 2024. This order followed an application to interdict the first and second respondents from taking any actions to further implement the tender, pending the finalisation of review proceedings of the tender that was awarded to the sixth to eleventh respondents.

[6] On 22 August 2024, Adtop received information that the Department has taken steps to further the Tender and the works contemplated therein. Their attorneys immediately contacted the first, second and sixth to eleventh respondents, informing them that if they breached the order, the applicant would approach the court to seek an order to hold them in contempt of court. In this letter, they referred to the judgment of Pullinger AJ case number 2024-025986, annexed the order *and* quoted the relevant

paragraphs in the letter. In their heading, they placed the incorrect case number 2023-084713.

[7] On 23 August 2024, the 6th respondent undertook not to contravene the order, as did the tenth and eleventh respondents.

[8] On 23 August 2024, the Department's legal representatives emailed to inform the applicant that their client would not proceed with any further steps in contravention of the court order. The applicant required a written undertaking from the department, which they have not received.

[9] On 23 August 2024, the legal representatives of the tenth and eleventh respondents sent correspondence that they received, urging the applicant to contact the Department to get clarity. The letter was written by Andrew Ngobeni, with Simphiwe Hlatshwayo and Herald Mlambo included in the email, advising them that they can continue with their current scope of work. The email stated

We have noted the attached letter and judgment.

We subsequently made a verbal contact with our legal unit in the department who advised that we proceed and complete the current scope of work in spite of the attached letter and judgment".

[10] The reference line included case number 2024-025986, the case number of Pullinger AJ's judgement and order.

[11] The applicants then sent another letter to the Department, addressed to the three individuals, informing them that a declaratory order would be sought against them personally for contempt of court and incarceration. It also requested an irrevocable and unconditional undertaking that they would not contravene the judgment and order. Such an undertaking must be sent by 10:00 on Tuesday, 27 August 2024. Otherwise, an urgent application will be launched to place them in contempt and commit them to

imprisonment. Mr Hlatshwayo replied by email, giving an undertaking, but the applicants wanted a signed undertaking, which they did not receive.

[12] The Department answered that they investigated the matter and found that purchase orders were issued by the 3rd, 4th and 5th respondents, and the work had started, but they are still awaiting a detailed response on the issue. The Department met with the individuals and found out that they are based in the Regions, and some of them are in the Directorate Maintenance. The issue was handled through the Directorate: Supply Chain Management, who was not part of the court proceedings and was unaware of the order; they are now aware of it. They will abide.

[13] These colleagues were thus unaware of the judgment and the order, and its implications were not communicated to them. When another colleague inquired about the court order, they enquired about the order under case number 2024-004029, and the legal department advised them that they could proceed as there was no interdict at the time. However, this was a court order under a different case number. The three colleagues have since been made aware of the judgment and will abide by it. They signed undertakings that they would abide by the order. Although only two of the three were uploaded on the day of the hearing, counsel informed the court that it was due to an error of the attorneys. The respondents state this is not a case of deliberate or malicious undermining of the court order.

[14] The respondents further stated that this application is an abuse of process. They state that there are other remedies available that can be employed instead of contempt. Resorting to contempt proceedings should be reserved for those genuine cases where the wrongdoer deliberately and maliciously embarks on a pattern to undermine the court's integrity. This is not such a case, they say.

[15] The applicant still persisted with the relief sought. They insist that the Department must inform all the relevant departments and regions of the court order and the consequences of such a court order. Neither the applicant nor the court “should [...]

be held hostage by the incompetent report structures withing (sic) the Department”. They point out that no confirmatory affidavits were filed and that the facts are true and correct.

Ad urgency

[16] The respondents argue that contempt proceedings are not inherently urgent, relying on *Manamela v Maite*¹. Dippenaar J stated

“The applicant’s broad reliance on “contempt proceedings being inherently urgent” is also misconceived. Simply because an application concerns contempt proceedings, that does not of itself justify the enrolment of such application on the urgent court’s roll. As in every other urgent application, the issue of urgency must be evaluated in the context of the specific facts of the matter. There must be exact compliance with the requirements of r 6(12)(b) and an applicant must explicitly set out the specific facts which render such application urgent and why an applicant could not be afforded substantial redress at a hearing in due course.”

[17] A similar approach was set out in *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*,² where Wilson J stated that

“I do not think that can be true as a general proposition. I accept that the enforcement of a court order may well qualify as urgent, in situations where time is of the essence, but it seems to me that contempt proceedings entail the exercise of powers which often demand the kind of careful and lengthy consideration which is generally incompatible with urgent proceedings. For example, it cannot be sound judicial policy to commit someone to prison, even where the committal is suspended, or to impose a fine, on an urgent basis, simply because that might be the only way to enforce a court order. There must, in addition, be some other feature of the case that renders it essential that the court order be instantly enforced, such that the penalties associated with contempt require immediate imposition. [own emphasis]

¹ [2023] ZAGPJHC 1011 para 47.

² [2023] ZAGPJHC 846 par 7 – 8.

The fundamental point is that a matter is urgent because of the imminence and depth of harm that the applicant will suffer if relief is not given, not because of the category of right the applicant asserts.”

[18] I agree. No specific facts were proffered for why, on these facts, this application is still urgent. On this basis, the application fails. In their heads of argument, the applicants make the following argument: they received a court order, they received information that the court order is contravened, and immediately launched the application because should the contravention continue and there be a furtherance of the Tender, then the review proceedings become moot. In reply the respondents state that the relevant people know now about the correct position, and they gave undertakings that they will not contravene the order, therefore the application is not urgent. The applicant's focus then shifts, and they state that this does not detract from the fact that the respondents contravened the order despite being called to cease their actions. This falls outside what Wilson J sets out above.

[19] Thus, when the third to fifth respondents gave the undertaking not to proceed while the review is pending, the matter was no longer urgent.

Order

[28] The following order is made:

1. The application is struck from the urgent roll for lack of urgency.
2. The applicant must pay costs on a party and party scale, and on scale C.



WJ du Plessis
Acting Judge of the High Court

For the Applicants:

CJS Kok instructed by Goodes & Co
Attorneys

For the Respondents:

S Sthungu instructed by the State
Attorney