IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Not reportable

CASE NO. 2025-183503

In the matter between:

DISABILITY ECONOMIC EMPOWERMENT TRUST	Applicant
and	
INDEPENDENT DEVELOPMENT TRUST	First respondent
CARMEN-JOY ABRAHAMS	Second respondent

JUDGMENT

LAING J

[1] This is an application for an order declaring the respondents to be in contempt of court in relation to Appels AJ's finding that a Service Level Agreement (SLA) between the parties was valid and enforceable. The applicant also seeks an order directing the respondents to take certain steps to give effect to the above finding.

Applicant's case

[2] The applicant's Chief Executive Officer, Mr Thabiso Phetuka, stated that the applicant is a registered non-profit organization (NPO). It conducts its affairs through its trustees and focuses on the upliftment and empowerment of persons with disabilities. The first respondent is a state-owned entity and a programme implementation agency, listed under Schedule 2 of the Public Finance Management Act 1 of 1999 (PFMA). The second respondent is its Acting Chief Executive Officer.

[3] Mr Phetuka explained that the Department of Public Works and Infrastructure (DPWI) administers the Expanded Public Works Programme (EPWP), which was designed to create work opportunities for the unemployed and to facilitate community development projects. The DPWI appointed the first respondent as the implementing agent for a component of the EPWP, viz the Non-State Sector (NSS) programme. In that regard, the efficacy of the programme depended on partnerships with various NPOs such as the applicant to create and manage work opportunities, using public funds administered by the first respondent.

[4] On 5 May 2024, the first respondent advertised a tender for participation by NPOs in the NSS programme for the 2024/2025 and 2025/2026 financial years. The applicant submitted a bid, which resulted in its appointment. The parties concluded an SLA that took effect on 31 July 2024; it remains in force until 31 March 2026. In terms thereof, the applicant is required to create and manage work opportunities for persons with disabilities in alignment with the objectives of the EPWP. The SLA makes provision for the deployment of 100 participants to four different projects operated by the applicant in and around East London. They are required to offer their services in exchange for a monthly stipend, funded by the first respondent.

[5] Mr Phetuka alleged that the parties successfully conducted their respective obligations during the 2024/2025 financial year, but the situation changed after that. On 8 April 2025, the first respondent requested the applicant to furnish it with certain compliance documentation, including a current NPO registration certificate or letter of good standing from the Department of Social Development (DSD). This was done to determine whether the applicant remained eligible for participation in the NSS programme during the 2025/2026 financial year. It duly complied with the request. Nothing more was heard from the first respondent until 30 June 2025, when it

informed the applicant that it had terminated the SLA for the 2025/2026 financial year for lack of good standing with the DSD. This came as a surprise to the applicant, said Mr Phetuka, because its registration status as an NPO was unchanged. On 1 July 2025, the applicant challenged the termination of the SLA, prompting the first respondent to reverse its decision. On 2 July 2025, however, the first respondent's Management Bid Adjudication Committee (MBAC) approved a list of NPOs for the allocation of EPWP funds in relation to the 2025/2026 financial year. The applicant was not included. The reason given was that it had failed to comply with the provisions of the Non-Profit Organizations Act 71 of 1997 (NPO Act). Despite a flurry of communication between the parties during the following weeks, the first respondent confirmed, on 23 July 2025, that the SLA had indeed been terminated and that the applicant was excluded from participation in the NSS programme for the 2025/2026 financial year.

[6] Consequently, the applicant instituted urgent legal proceedings. It sought, inter alia, an order declaring that the SLA was valid and enforceable, and directing the first respondent to carry out its obligations by reinstating the applicant as a participant. Appels AJ handed down an order in favour of the applicant on 2 September 2025. The first respondent has not noted an appeal.

[7] On 3 September 2025, the applicant's attorneys sent a letter to the first respondent's attorneys, insisting on compliance with the order. The latter responded on 19 September 2025, disputing the applicant's interpretation and pointing out that the first respondent was not aware of any remaining obligations. They also invited the applicant to indicate why the SLA should not be terminated under clause 6.1. Even if there were remaining obligations, said the first respondent, it would need to secure extra funding from the DPWI for the applicant's further participation. To this, the applicant's attorneys sent a letter on 26 September 2025, demanding reinstatement and the allocation of funds for disbursement in accordance with the programme. The first respondent did not reply.

[8] The present application was brought on an urgent basis. Mr Phetuka averred that the SLA, as a fixed term contract, will lapse on 31 March 2026; any delay would erode its remaining value. Furthermore, the 100 disabled beneficiaries deployed by

the applicant to various projects have not received stipends since 1 April 2025, which was when the 2025/2026 financial year commenced. They depended on the programme for their basic needs, as well as a sense of dignity and worth. The applicant was unable to support the beneficiaries on its own.

Respondents' case

[9] A senior manager in the first respondent's Legal Services Unit, Mr Tshepo Rapetswa, admitted the existence of the order and its proper service. He argued, however, that the applicant had misinterpreted it. Firstly, there was no need for the first respondent to confirm that the SLA remained extant. Secondly, the provisions thereof made it clear that the allocation of work opportunities was limited to the 2024/2025 financial year. Nevertheless, the applicant now sought relief that was never contemplated in the main application and which unduly interfered with the budgetary powers of the DPWI. Thirdly, the applicant incorrectly relied on paragraph 58 of Appels AJ's judgment to claim relief not supported by the order.

[10] Mr Rapetswa went on to say that the first respondent had requested the applicant to demonstrate proof of its good standing with the DSD by no later than 11 April 2025. The applicant failed to do so. This resulted in the MBAC's decision on 2 July 2025 and the continuation of the NSS programme during the 2025/2026 financial year without the applicant. It only succeeded in demonstrating compliance by 1 August 2025, well after the period prescribed in terms of section 18 (1) of the NPO Act. Consequently, said Mr Rapetswa, the court in the main application had misdirected itself, both factually and legally, in finding that the first respondent had incorrectly relied on impossibility of performance under the SLA. Its non-allocation of budget for the applicant's further participation did not mean that the impossibility had been self-created. He noted further, however, that the court had not expressly directed the first respondent to allocate the necessary budget; there was nothing in the order to that effect.

[11] In any event, contended Mr Rapetswa, the first respondent's letter of 19 September 2025 indicated that any non-compliance was neither wilful nor mala fide. It simply reflected the first respondent's honest belief that there were no remaining obligations under the SLA. There was also no basis for the applicant's having joined the second respondent in her personal capacity and for having sought the imposition of criminal sanctions against her.

In reply

[12] The applicant argued, in reply, that the first respondent was attempting to relitigate the case. The order made by Appels AJ was final and binding and its effect was that the first respondent was required to perform its obligations under the SLA. In that regard, 100 work opportunities were allocated to the applicant over the full period of the 2024/2025 and 2025/2026 financial years.

Issues to be decided

[13] The first respondent never challenged the urgency of the application. Considering the vulnerability of the beneficiaries involved, whose dependency on the programme was never disputed, the alacrity with which the proceedings were instituted is understandable. The remaining duration of the SLA must be considered, too. Overall, the court is satisfied that the applicant has sufficiently set out the circumstances that render the matter urgent and why the applicant would not obtain substantial redress in due course. The respondents have also not complained of any prejudice caused by the curtailed timeframes imposed upon them.

[14] The key issue to be decided is whether the respondents have failed to comply with the order of the court in the main application. If so, then wilfulness and mala fides must be investigated as explained further below; if not, then that is the end of the matter. A brief description of the relevant principles follows.

Legal framework

[15] The test for deciding whether a party is in contempt of court is well known. In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*,[1] the Constitutional Court confirmed that an applicant must demonstrate that: (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order.[2] The court went on to say that once the above elements had been established, wilfulness and mala fides were presumed. The respondent bore an evidential burden to establish reasonable doubt; if he or she failed to discharge the burden, then contempt was established.[3]

[16] At the heart of the present matter is the interpretation to be given to the judgment handed down by Appels AJ in the main application. The principles in that regard are trite. The following extract from *Herbstein and Van Winsen* is helpful:[4]

'The basic rules for interpreting the judgment or order of a court are no different from those applicable to the construction of documents. The court's intention has to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. Where the court order records an agreement of settlement, the basic principles of the interpretation of contracts need also to be applied to ascertain the meaning of the agreement.[5] The judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. But if any uncertainty in meaning emerges, the extrinsic circumstances surrounding or leading up to the court's grant of the judgment or order may be investigated and taken into account in order to clarify it.[6] The rule that no evidence is admissible to contradict, amend or add to an order which is clear and

[1] 2021 (5) SA 327 (CC).
[2] Para 37. The test was set out by the Supreme Court of Appeal in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), para 22; it was confirmed by the Constitutional Court in *Pheko and Others v Ekurhuleni City* 2015 (5) SA 600 (CC) (*'Pheko II'*), para 32.
[3] Ibid.
[4] Andries Cilliers, Cheryl Loots, and Hendrik Nel SC *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (2009), at ch35-p937.
[5] *Englebrecht NNO v Senwes Ltd* 2007 (3) SA 29 (SCA), at 32 – 33.
[6] Ibid.

unambiguous is a rule of law, not merely a rule of evidence that can be waived by the parties.[7]'

[17] Of immediate relevance is the interpretation to be given to the order, as this will determine whether the respondents have failed to comply. The commentary in *Herbstein and Van Winsen* is of further assistance:[8]

'The order with which a judgment concludes has a special function: it is the executive part of the judgment that defines what the court requires to be done or not done. While it may be said that the order must be read as part of the entire judgment and not as a separate document, the court's directions must be found in the order and nowhere else. Thus, if the meaning of an order is clear and unambiguous, it is decisive and cannot be restricted or extended by anything else stated in the judgment.[9]'

[18] The above principles constitute the basic legal framework within which the present matter must be decided. They are applied to the facts in the discussion that follows but not before the judgment in the main application is considered more closely.

Judgment in the main application

[19] As a point of departure, the court recognized that the applicant sought, on an urgent basis, a declarator to the effect that the SLA was valid and enforceable. Furthermore, the applicant sought an order for specific performance. After considering the relevant provisions of the SLA and the NPO Act, the court found that there was no merit in the first respondent's assertion that the applicant had breached the agreement. Even if there had been a breach, then the first respondent had not complied with the cancellation procedure. Consequently, said Appels AJ, the applicant was entitled to the declarator sought.

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[7] *Postmasburg Motors (Edms) Bpk v Peens* 1970 (2) SA 35 (NC), at 39.
[8] Cilliers et al *Herbstein and Van Winsen* op cit.
[9] *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A), at 716B – C.

[20] The court went on to address the first respondent's argument regarding the legal effect of the MBAC's decision. Appels AJ held that it was unnecessary for the applicant to apply for the setting aside of the decision before attempting to enforce its rights under the SLA.

[21] It was the first respondent's remaining argument, however, that seems to have sowed the seeds of controversy in the present matter. The contention was made that an order for specific performance would not be competent and would be impossible to execute. This was because the MBAC's decision had already been implemented. The EPWP funds for the 2025/2026 financial year had been allocated to other NPOs who were participating in the NSS programme; no budget remained for the applicant. Appels AJ remarked as follows at paragraph 58:

'The fact that the respondent has not allocated a budget for the applicant's participation in the programme for the 2025/2026 financial year does not mean that specific performance is not a competent remedy. In any event, a party may not rely on the impossibility of performance if the impossibility is self-created. In this regard, the following was held in *Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal*:[10]

"This brings me to the appellant's defence of supervening impossibility of performance. As a general rule impossibility of performance brought about by *vis major* or *casus fortuitus* will excuse performance of a contract. But it will not always do so. In each case it is necessary 'to look to the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant, to see whether the general rule ought, in the particular circumstances of the case, to be applied'. The rule will not avail a defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault. Save possibly in circumstances where a plaintiff seeks specific performance, the onus of proving the impossibility will lie upon the defendant."[11]'

[22] The court proceeded further at paragraph 59:

'In this matter, the respondent's alleged inability to perform is self-created and resulted from its own actions. The respondent made a deliberate decision to exclude the applicant from the list of approved NPOs, even though there has been no breach of the SLA and even though the respondent did not comply with the provisions of the cancellation clause.

[10] 2008 (4) SA 111 (SCA).
[11] Para 28, footnotes omitted.

Therefore, it is not permitted to rely on an alleged impossibility of performance when such impossibility is due to its own fault.'

[23] Appels AJ concluded that the applicant was indeed entitled to a declaration that the SLA was valid and enforceable, and that the first respondent was obliged to comply with its obligations. Whether the respondents have failed to do so forms the subject of the present matter.

Discussion

[24] It is important to note, at the outset, that the order did no more than direct the first respondent to perform its obligations. Appels AJ did not order it to reinstate the applicant as a participant in the NSS programme, allocate work opportunities for the 2025/2026 financial year, or release funding, as sought by the applicant in the present matter in addition to a declaration of contempt. The relevant portion of the order states as follows:

'(1) . . .

(2) It is declared that the service level agreement signed on behalf of the applicant and the respondent on 22 August 2024 and 3 September 2024 respectively, remains valid and enforceable.

(3) The respondent is directed to perform its obligations in terms of the service level agreement referred to in paragraph [2] of this order.

(4) . . .'

[25] Several clauses of the SLA are pertinent. In this regard, clause 2.1 records that:

'The IDT [ie the first respondent] hereby appoints DISABILITY ECONOMIC EMPOWERMENT TRUST [ie the applicant] to support the Non-State Sector's NPO Programme in the creation of work opportunities as per the EPWP Phase 5 targets and as envisaged in clause 8.1 of this Agreement.'

[26] Work opportunities are defined as the paid work created under the programme. The meaning of the term, ‘EPWP Phase 5 targets’, however, is critical for the determination of the matter. It is defined as follows:

‘the creation of work opportunities in year *(2024/2025)* by providing incentives to non-state sector organizations, against targets agreed in the main Agreement, and as maybe amended through due processes as defined in the main Agreement’.[12]

[27] At the commencement of the SLA, the parties envisaged the targets as those limited to the 2024/2025 financial year. They made provision for the possible amendment of targets, but only in accordance with the main agreement that had been concluded between the DPWI and the first respondent. In that regard, the latter was required to manage the implementation of the NSS programme as a component of the EPWP, using NPOs such as the applicant to create work opportunities for the unemployed. The above interpretation is supported by clause 8.1:

‘For the *2024/2025* financial year, the SERVICE PROVIDER [ie a registered NPO such as the applicant] shall be paid an amount of R 122 (one hundred and twenty-two rands) per day per work opportunity created for ordinary participants *for 94 days from August 2024 to 28 February 2025* and R 125 (one hundred and twenty-five rands) per day *for 14 days in March 2025*; R 139 (one hundred and thirty-nine rands) per day for supervisors / GBV participants *for 94 days from August 2024 to 28 February 2025* and R 149 (one hundred and forty-nine rands) *for 14 days in March 2025*. A total of 100 (96 ordinary participants and 4 supervisors) work opportunities, for a person working 108 days and in accordance with the allocated budget, will be created at a total wage cost of R 1 329 536.’[13]

[28] Clause 8.2 sets out the non-wage and administration costs. Clause 8.3 indicates that the total contract value is R 1 465 282 ‘for [the] *2024/2025* financial year’ (emphasis added). Other clauses that are relevant include: clause 13.1, which indicates that the SLA comprises the whole agreement between the parties; clause 13.2, which stipulates that no addition to or variation of any clause will be of any force or effect unless placed in writing and signed; and clause 16.1, which records

[12] Emphasis added.
[13] Sic, emphasis added.

that the parties agree that the existence of the SLA is contingent upon the subsistence of the main agreement and the continued need for the services in question.

[29] The duration of the SLA is indeed from 31 July 2024 until 31 March 2026, as the applicant has repeatedly emphasised. It is, nevertheless, abundantly clear that the parties envisaged, initially at least, that the applicant's services were restricted to the 2024/2025 financial year in alignment with the EPWP 5 targets. An extension thereof to cover the 2025/2026 financial year was certainly possible, but not before the DPWI and the first respondent had first amended the targets in accordance with the main agreement, after which the parties to the SLA would have been required to complete and sign an addendum.

[30] Overall, there is no obligation on the part of the first respondent to include the applicant as a participant in the NSS programme for the 2025/2026 financial year. It simply does not arise from a plain reading of the SLA. It cannot be said that the first respondent has failed to comply with its obligations.

Relief and order

[31] The court in the main application was critical of the MBAC's decision to exclude the applicant. This was because it had been based on a non-existent breach and the first respondent's failure to adhere to the cancellation procedure set out in the SLA. In that regard, Appels AJ held, with reference to *Snow Crystal*, that the first respondent could not contend that an order for specific performance would be incompetent and impossible to execute when such impossibility was self-created or due to its own fault. The court did not find, however, that the first respondent was contractually bound to have included the applicant as a participant. That was never an issue.

[32] There is, in the end, no basis upon which to hold that the first respondent failed to comply with the order made by Appels AJ. The commentary in *Herbstein*

and Van Winsen indicates that the court's directions must be found in the order and nowhere else. If Appels AJ's order can be said to be unclear or ambiguous (which it is not), then, once read as part of the entire judgment, it most certainly never required the first respondent to carry out the obligations expected of it by the applicant. Anything to that effect would amount to an unwarranted extension of the order, unsupported by the judgment.

[33] Consequently, the question of wilfulness or mala fides on the part of the respondents does not arise. They cannot be found in contempt of the order in the main application.

[34] Regarding costs, the applicant sought the implementation of the principles enunciated in *Biowatch Trust v Registrar, Genetic Resources, and Others.*[14] In that regard, the Constitutional Court considered the proper judicial approach for the determination of costs awards in constitutional litigation. The court held, per Sachs J, that:

' . . . it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.'[15]

[35] The court went on to say that what mattered was not the nature of the parties or the causes that they advanced. Rather, what mattered was the character of the litigation and the conduct of the parties in pursuit of it.[16] In a sense, all litigation is constitutional. This is because the Constitution, as the supreme law of the Republic, invalidates law or conduct that is inconsistent with it and demands that its obligations be fulfilled.[17] It is the standard against which the theatre of life and its dramatis personae are measured. The principle that a party must comply with an order of

[14] 2009 (6) SA 232 (CC).
[15] Para 16.
[16] Para 20.
[17] See section 2, Constitution of the Republic of South Africa, 1996.

court is integral to the supremacy of the Constitution. In *Pheko II*,[18] the Constitutional Court held, per Nkabinde J, that:

'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts.'[19]

[36] Whether the present matter amounts to constitutional litigation for purposes of applying the *Biowatch* principle is, however, a different issue. Considering the factual matrix that informs the dispute, it cannot be said that it entails the direct enforcement of clearly articulated constitutional rights and obligations. If anything, then the dispute chiefly concerns the determination of rights and obligations that fall more accurately within the orbit of the law of contract, albeit under the gravity and pull of the Constitution, so to speak. It is unnecessary for the court, in the circumstances of the case, to depart from the general rule when making the costs award. Scale B would be appropriate.

[37] Consequently, the following order is made:

(a) the application is dismissed; and

(b) the applicant is ordered to pay the respondents' party-and party costs, on scale B, in terms of rule 67A read with rule 69 of the Uniform Rules of Court.

JGA LAING

[18] See n 2 above.
[19] Para 1.

JUDGE OF THE HIGH COURT

APPEARANCE

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Date heard:	21 October 2025.
Date delivered:	25 November 2025.