



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 020979/2022

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
DATE: 16 JANUARY 2023
SIGNATURE: *ML SENYATSI*

In the matter between:

MBHELE NOMSHADO ZERICH

First Applicant

MBHELE FRANK GOODMAN

Second Applicant

and

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

First Respondent

HERBY PROP TWENTY EIGHT CC

Second Respondent

Delivered: By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 16 January 2023

JUDGMENT

SENYATSI J:

[1] The controversy in this matter is whether or not the City of Ekurhuleni Metropolitan Municipality ("Ekurhuleni Metro") is in contempt of a court order by Swanepoel AJ issued on 8 September 2022.

[2] The court order ("the court order") was to the following effect:

- "1. The electricity having been restored on the 6th September 2022;
2. The First Respondent is to desist from suspending the applicants access to electricity and/or blocking the Applicant's pre-paid electricity meter in the future so long as the applicants pay for the services consumed. (*my own emphasis*);
3. The first respondent is to pay the costs of this application."

[3] The applicants brought an urgent application on the grounds that Ekurhuleni Metro is in contempt of the court order in that they are unable to purchase the pre-paid electricity because their pre-paid meter was blocked by Ekurhuleni Metro.

[4] The requirements for a party to be held in contempt of a court order are well trodden in the judicial turf.

- [5] The test to be applied to determine whether a party in contempt was spelled out in *Fakie NO v CCII Systems (Pty) Ltd*¹ by Cameron JA (as he then was) in the following terms:²

“[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide.’³ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.⁴ Even a refusal to comply that is objectively unreasonable may be bona fide though unreasonableness could evidence lack of good faith.”

- [6] The history of this litigation is replete with facts that are common course to the parties. It is the applicants’ case that since purchasing the property in 1997, they have not received title thereto. The title still remains with the second respondent.
- [7] Some 12 years after taking occupation of the property the applicants applied and were granted permission to open an account with Ekurhuleni Metro for services to be rendered on that account. Simultaneously with the approval of the account, Ekurhuleni Metro was able to indicate or water and sewage

¹ (653/04) [2006] ZASCA 52

² See para a

³ See *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I.

⁴ See *Consolidated Fish (Pty) Ltd v Zive* 1968 (2) SA 517 (C) 524 D

services in the name of the applicant. The account was opened as a tenant account with the Ekurhuleni Metro for those services.

- [8] From the papers it appears that even when they account for those services was in the name of the applicants, it was never kept up to date. This led to the parties agreeing to an arrangement in terms of which the areas for consumption of water and sewage which is at 21 August 2022 was R32 282.76, the applicants were to pay R294.40 towards the areas. It appears from annexure MN14A to the founding affidavit that the arrangement had been made much earlier than that date, that 21 August 2022. The electricity was consumed in terms of a pre-paid meter which could be used for as long as the other services were paid for.
- [9] The dispute arises due to the blocking of the pre-paid electricity meter due to the alleged non-payment after consumption of services. It appears that this is the armoury available to the metro when water and other related services are not paid for.
- [10] In a nutshell this is what led to the Swanepoel AJ order which is the subject of the application today. There is also a pending rescission application to set aside that order.
- [11] The applicants do not aver in their initial founding affidavit that they have paid for the services which renders the blocking of the pre-paid meter a contemptuous action by the first respondent. They however filed a supplementary affidavit that although the court order says that the prepaid meter must not be suspended as long as they pay for the consumption of water

and sewage services, they have been unable to do so because the account in their name has been closed.

[12] Ekurhuleni Metro contends the services were not paid for as required by the court order. It contends that even prior to the order been issued, the tenant's account in which the services were paid for had been closed. The closure was, so contend the first respondent, consistent with the policy that was adopted in 2017 for closure of the tenants account was implemented in 2022. It contends that the services that can still be paid for through the second respondents account and that the closure of the tenants account was in accordance with the policy that was legally adopted and implemented by it. Whilst that may well be the case, it is difficult to understand how the tenants who have valid rental agreements with the owner would pay for water and sewage services rendered to them where for instance, the owner is not a commercial rental business entity with the ability to create prepaid electricity metres for its tenants. However, this is not an issue that this court is required to adjudicate on.

[13] Ekurhuleni Metro also states in its papers that its implementation of the policy to close accounts of the tenants was not done in a rushed manner, but followed due process of notifying the occupants of the property by serving the necessary notice. It contends that if payment of the services consumed is effected, the pre-paid meter will be unblocked.

[14] Having regard to the papers before me, I am not persuaded that the court order was disobeyed with the required mala fide to render the first respondent liable to contempt. On the country, the court order states that for as long as consumption of services is paid for; the pre-paid meter will not be blocked.

- [15] There is no evidence in the founding papers that payment of the services was made by the applicants as required by the court order. The attempt by the applicants to supplement their papers to say payment was impossible to make as the tenant's account had been closed does not, in my view, hold. This is so because when the Swanepoel AJ court order was issued the tenants account had already been closed. More importantly, the applicants do not disclose the steps they took to get the payment issue resolved post the court order with regards to how the payment was to be made.
- [16] The applicants, from their papers state that they have been in possession of the property since 1997. And a submission was made that the bond which was taken to fund the purchase price was in fact settled by the applicants in 2012. It defies logic, in my view, that the applicants have not taken steps to assert their rights to title over the property. This is again a point that is not before this court but just an observation.
- [17] Having regard to the papers before this court, I am not in a position to declare that the first respondent is in breach of the court order.
- [18] Advocate Nobangule submitted that the court should consider the principles laid out in *Ekurhuleni Metropolitan Municipality v Anzotrax (Pty) Ltd t/a Topbet Germiston*.⁵ In that case the nub of the dispute between the parties was whether the municipality is empowered by the provisions of Section 34 of the Ekurhuleni Metropolitan Municipality By-law to discount the electricity supply to a tenant who holds its own consumer agreement with the municipality in respect of

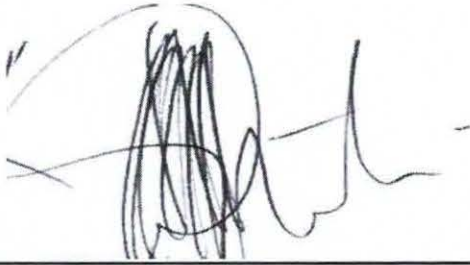
⁵ [2016] ZAGPJHC 178

electricity supply, which was fully paid, in regard to arrear property rates and taxes owed by the owner.

[19] The court correctly held that the municipality was not entitled to disconnect electricity under these circumstances. The facts of the present case are distinguishable. The services that are the subject of the dispute are not rates and taxes but water and sewage services which the applicants concede consume. Reliance on *Ekurhuleni Metropolitan Municipality v Anzotrax (Pty) Ltd t/a Topbet Germiston* by the applicant finds no application in the present case. I say so because in their founding affidavits, the applicants do not state that after the court order was issued they were sent from pillar to post in their attempts to pay for the services consumed. Instead, through the mouth of their legal representative who provided the sworn founding affidavit on their behalf, they are silent on this important point. It is only in the supplementary affidavit that an explanation is provided that the account was closed. This fact was known even before the order that is the subject of this litigation was obtained.

[20] Accordingly, the following order is made:

- (a) The forms and time periods for service as required by the rules of this court are dispensed with;
- (b) The application for an order declaring that the first respondent is in contempt of the court order granted by Swanepoel AJ on 8 September 2022 under case number 2022-020979 is dismissed;
- (c) The applicants are ordered to pay the costs of this application.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a long horizontal stroke extending to the right.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 13 January 2023

DATE DELIVERED: 16 January 2023

APPEARANCES

Counsel for the Applicant

Adv Nobangule

Instructed by

Maseko Nondumiso Inc

Counsel for the Respondent:

Mr S Lusenga

Instructed by:

Lusenga Attorneys Incorporated