REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 31566/2021

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

22/11/2021 **Judge Dippenaar**

In the matter between:

SIENAERT PROP CC First Applicant

and

CITY OF JOHANNESBURG First Respondent

CITY POWER (SOC) LIMITED Second Respondent

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 22nd of November 2021.

DIPPENAAR J:

[1] This is the third urgent application pertaining to the disputes between the parties, which has its genesis in the issuing of a rates clearance certificate pertaining to an immovable property owned by the applicant.

[2] In the present application, launched on 2 November 2021, the applicant sought orders declaring that the first and second respondents were in contempt of an order granted by Weiner J in this division on 23 September 2021("the Weiner J order"); the imposition of a fine of R100 000, an order directing the respondents to forthwith issue a rates clearance certificate under s 118(1) of the Local Government; Municipal Systems Act[1] ("the Act"), an order directing that the order granted would be executable pending any appeal launched by the respondents and a punitive costs order. At the hearing the applicant sought somewhat attenuated relief.

[3] The respondents disputed urgency and emphasised that the applicant did not comply with the relevant practice directives. It was common cause that the applicant did not do so. Its replying affidavit was also delivered late and was only delivered during the afternoon of Tuesday 9 November 2021. The matter stood down until the following day and costs were reserved.

[4] The background to the present application is the same factual matrix that rendered the two earlier applications urgent, being the threat of imminent liquidation of the applicant

[1] 32 of 2000

by one of its creditors, Sasfin Bank Ltd, with whom it concluded a settlement agreement requiring the applicant to secure transfer of the immovable property. To do so, the applicant required a clearance certificate. This state of affairs moved the applicant to launch urgent proceedings against the respondents, which ultimately culminated in an order granted by Kollapen J on 20 July 2021 in unopposed proceedings. The said order was served on the respondents on 21 July 2021.

[5] As the respondents did not comply with that order, a further urgent application was launched by the applicant, which was opposed by the respondents and culminated in the order and judgment of Weiner J on 23 September 2021. According to the applicant, the urgency which existed at the time of the earlier urgent applications has not abated and the circumstances under which the first two orders were rendered urgent remain. It is trite that commercial urgency can justify the hearing of an application on an urgent basis.[2]

[6] Although the applicant in its present founding affidavit did not elaborate on the issue further, but rather relied on the grounds raised in the urgent proceedings before Weiner J, the risk of liquidation remains. The judgment of Weiner J was attached to the founding papers as was the order of Kollapen J. Although the applicant could have restated those grounds, they were already stated in the judgment of Weiner J and thus formed part of the founding papers. The respondents did not dispute this state of affairs, nor that absent the clearance certificate the property cannot be transferred. The respondents also did not contend for any prejudice. It is well established that continuous contempt renders a hearing urgent[3].

[7] On the facts presented I am satisfied that the applicant has illustrated that it will not obtain substantial redress at a hearing in due course[4] and it would not be appropriate

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[2] Twentieth Century Fox Film Corporation and Another v Anthony Black Films *Pty) Ltd 1982 (3) SA 582 (W)

[3] Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others (CCT521/21) [2021] ZACC 18 at paras [31]-[34]

[4] East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others [2011] ZAGPJHC 196 (23 September 2011) paras 6 and 7

to strike the matter from the roll purely on technical grounds, considering the important substantive issues between the parties.[5] I am further persuaded that in the circumstances, the matter is sufficiently urgent to be entertained and that the applicant's non-compliance with the practice directives should be condoned.

[8] I turn to whether the respondents are in contempt of the order of Weiner J. The requisites for civil contempt are well established and it is not necessary to repeat them[6]. It is common cause that the Weiner J order was granted and that the respondents had notice of the proceedings. The judgment and order of Weiner J was served on the respondents' legal representatives on 27 September 2021.

[9] In argument, the respondents contended that on the applicant's own version, they had complied with the order of Weiner J as a clearance certificate had been issued as ordered by the court. That certificate however included electricity charges of R9 141 974.28, despite the order providing that the revised clearance certificate should exclude electricity charges. The respondents' contention thus lacks merit and I am persuaded that the applicant has established a breach of the Weiner J order.

[10] It is trite that the respondents bear an evidentiary burden to put up evidence raising a reasonable doubt as to whether their non-compliance with the order of Weiner J was willful and mala fide[7].

[11] The respondents' basis of opposition was predicated upon attacks on the validity of the order of Kollapen J and the judgment and order of Weiner J. On the same date as the answering affidavit was delivered on 8 November 2021, the respondents lodged an application for leave to appeal against the judgment and order of Weiner J. The day before, on Friday 4 November 2021, a rescission application was launched against the

[5] Pangbourne Properties Ltd v Pulse Moving CC and Another 2013 (3) SA 140 (GSJ)
[6] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) ; Matjhabeng Municipality & Others v Eskom Holdings Ltd & Others; Mkhonto & Others v Compensation Solutions (Pty) Ltd 2018 (1) SA 1 (CC)
[7] Authorities cited in fn 6

order of Kollapen J. The respondents had already threatened to take such action on 27 September 2021, reiterated a month later, but failed to timeously do so. At the time, the respondents advised that they were awaiting reasons to be provided by Kollapen J.

[12] The respondents did not in their answering papers aver that they would abide by the orders granted by Kollapen J or Weiner J, nor did they explain their failure to comply with the Weiner J order. The respondents further did not express any confusion regarding the content of that order.

[13] The answering affidavit was almost exclusively devoted to technical grounds pertaining to urgency and references to case law in motivation of their contention that order of Kollapen J was erroneously granted and that it was a nullity and thus that the Weiner J order was tainted and similarly invalid as it was predicated on the order of Kollapen J. As such the respondents argued that it was not necessary to set the Kollapen J order aside. Seen in context, the respondents ignored the orders based on their views regarding the validity of the orders of Kollapen J and Weiner J.

[14] Much of the respondents' argument was devoted to arguing the merits and prospects of success of the respondents in both the rescission application and the application for leave to appeal. It is not however appropriate to consider those merits now as this court is not sitting as a court of appeal in either of those proceedings. The orders of Kollapen J and Weiner J were granted in their terms and it is not open reconsideration in these proceedings[8].

[15] The conduct of the respondents in ignoring the said orders is contrary to what is expected of state departments. As stated by the Supreme Court of Appeal in *Minister of Home Affairs and Others v Somali Association of South Africa and Another*[9]:

[8] Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306; Cross-Border Road Transport Agency v Central Road Services (Pty) Ltd and Others 2015 (5) SA 370 (CC) at para [38]-[39]
[9] 2015 (3) SA 545 (SCA)

[27] To be sure, courts proceed on the assumption that other arms of state will take prompt and competent steps to comply with its orders and that further judicial supervision will not be necessary…

[33] … the relevant authorities were not free, in their election, to simply disregard the order of Pickering J. The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially state departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey it.

[34] In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others [2013] 2 All SA 251 (SCA) ([2013] ZASCA 5) para 17 it was put thus:

> *'(A)s Froneman J observed in Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 229B – C: "An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (Culverwell v Beira 1992 (4) SA 490 (W) at 494A – C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (Hadkinson v Hadkinson [1952] 2 All ER 567 (CA); Bylieveldt v Redpath 1982 (1) SA 702 (A) at 714).'*

Byliefeldt v Redpath 1982 (1) SA 702 (A) stated at 714E – G:

> *'In Hadkinson v Hadkinson [1952] 2 All ER 567 sê DENNING LJ, met verwysing na 'n party wat 'n Hofbevel verontagsaam het, te 575B – C:*
>
> > *. . . I am of opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impeded the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.*
>
> *'Ek gaan, met eerbied, akkoord met hierdie benadering.'*

[35] It is a most dangerous thing for a litigant, particularly a state department and senior officials in its employ, to wilfully ignore an order of court. After all, there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants themselves to judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders, and judgments of the courts cannot be any clearer on that score. No democracy can survive if court orders can be shunned and trampled on as happened here. As this court stressed in Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) para 52:

> *'Our present constitutional order is such that the state should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights.'*

[36] That the state must obey the law is a principle that is fundamental to any civilised society. The logical corollary is that the state, its organs and functionaries cannot arrogate to themselves the right not to obey the law or elevate themselves to a position where they can be regarded as being above the law."

[16] It is thus clear that the respondents should have obeyed the orders of Weiner J and Kollapen J, even if they were of the view that they are wrong. From the respondents' version, it appears that they have simply ignored the existence of the Weiner J order and there is no suggestion that they intend to obey it.

[17] In arguing, in an attempt to overcome their difficulties, that the order of Kollapen J was a nullity and thus tainted the order of Weiner J, the respondents' argument relied

heavily on the judgment in the Supreme Court of Appeal in *The Master of the High Court (north Gauteng High Court, Pretoria) v Motala NO and Others*[10] *("Motala").* This reliance is however misconceived as *Motala* was rejected by the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd*[11]*("Tasima")*.

[18] As held in Tasima[12]:

> *"…the legal consequences that flows from the non-compliance with a court order is contempt. The essence of contempt lies in violating the dignity, repute or authority of the court. By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that court's dignity, repute and authority and the dignity, repute and authority of the judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt".*

[19] The respondents can thus not escape the legal consequences of their contempt by contending that the underlying order of Kollapen J is null and void.

[20] It is further apposite to refer to the relevant principles as stated by the Constitutional Court in *Zuma*[13]:

"[59] It cannot be gainsaid that orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside. *This, in addition to typifying common sense, the Constitution itself enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. This has been confirmed in multiple cases, including Mjeni, in which the Court stated that "there is no doubt, I venture to say, that [complying with court orders] constitutes the most important and fundamental duty imposed upon the State by the Constitution".*

[60] As this Court held in Tasima I, "the obligation to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system . . . and is the stanchion around which a State founded on the supremacy of the Constitution and the rule of law is built". It is perspicuous that the constitutional right of access to courts will be rendered an illusion unless orders made by courts are capable of being enforced by those in whose favour the orders were made. In SALC, it was said that "if the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone by stone

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[10] 2012 (3) SA 325 (SCA)
[11] 2017 (2) SA 622 (CC) at paras [188]-[]
[12] Para [186]
[13] Fn 3 supra

until it collapses and chaos ensues". A complete denial of judicial mechanisms "would render meaningless the whole process of taking disputes to courts for adjudication and that is a recipe for chaos and disorder". Accordingly, it is necessary for this Court to send, by virtue of a punitive sanction, an unequivocal message that its orders must be obeyed."

[21] During argument, the respondent's counsel sought to raise confusion regarding the meaning of the order of Weiner J as well as many other issues not expressly addressed in the answering papers. Absent the issues being raised in the answering papers, those issues cannot be entertained.

[22] The respondents argued that they were not in willful and mala fide breach of the order of Weiner J. Reliance was placed on *Multichoice Support Services (Pty) Ltd v Calvin Electronics t/a Batavia Trading and Another*[14]*("Multichoice"*), wherein it was held:

> "*But even if Calvin proved non compliance with the order, the presumption of willfulness and mala fides would have been easily rebutted. A deliberate disregard of the order is not good enough, since the alleged contemnor may genuinely, albeit mistakenly believe itself (entitled)* [15]*to act in the way claimed to constitute the contempt* "

[23] The respondents did not in their answering affidavit explain the circumstances under which they decided not to comply with the order of Weiner J nor were any averments made to establish their bona fides in doing so. On their papers, the respondents did not bring themselves within the ambit of the principle relied on and absent the necessary factual matrix being provided it cannot be concluded that the respondents acted genuinely albeit mistakenly in ignoring the Order of Weiner J.

[24] From the papers, it cannot be concluded that the respondents have discharged their evidentiary burden to raise reasonable doubt that their non-compliance with the

[14] [2021] ZASCA 143 (8 October 2021)
[15] [Sic] . As held in Fakie, supra "In such a case good faith avoids the infraction. Even a refusal to obey that is objectively unreasonable may be bona fide (although unreasonableness could evidence a lack of good faith)".

Weiner J order was willful and mala fide. I conclude that the respondents are in willful and mala fide non-compliance with the order of Weiner J.

[25] Lastly, the respondents contended that under s18(1) of the Superior Courts Act[16], the operation of the order of Weiner J was suspended as an application for leave to appeal has been lodged. It was argued that the applicant had made out no case for special circumstances allowing the execution of the order pending the application for leave to appeal.

[26] The present application is not however an application under s 18(3) of the Act for leave to execute pending appeal. The applicant's case is predicated on the contention that there is no valid application for leave to appeal until condonation is granted.

[27] The relevant portions of s 18 of the Act provide:

> *"(1) Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject matter of an application for leave to appeal or an appeal, is suspended pending the decision of the application or appeal".*
>
> *…*
>
> *(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules".*

[28] Under r 49(1)(b) of the Uniform Rules:

> *"When leave to appeal is required and it has not been requested at the time of the judgment or order, application for leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's orders are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned period of fifteen days".*

[16] 10 of 2013

[29] As held in *Panyaiotou v Shopright Checkers (Pty) Ltd* [17] *("Panyaiotou")*, it is only if condonation is granted for the late delivery of an application for leave to appeal that it is reinstated. Put differently, a judgment is not suspended by the late delivery of an application for leave to appeal even if that application is accompanied by a condonation application[18]. I do not agree with the respondents' contention that the judgment is distinguishable because it pertained to an appeal to the Supreme Court of Appeal. The principles accepted in *Panyaiotou* were moreover recently endorsed by the full court in *Myeni v Organization Undoing Tax Abuse NDC and Another* [19].

[30] An application for leave to appeal thus only suspends the operation of an order if that application is lodged timeously. In the present instance, that right lapsed on 15 October 2021 and the application for leave to appeal was only launched on 8 November 2021. The belated delivery of the application for leave to appeal and the condonation application thus do not assist the respondents.

[31] Turning to the rescission application launched against the order of Kollapen J, it is trite that the launching of rescission proceedings does not suspend the operation of the order.[20] The existence of that rescission application thus also does not assist the respondents.

[32] I conclude that the respondents are to be held in contempt of the order of Weiner J.

[33] I agree with the applicant's contention that in light of the history of the matter there is every likelihood that the respondents will continue with their conduct[21] and fail to issue

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[17] 2016 (3) SA 110 (GJ) at paras [12]-[15] and the authorities cited therein
[18] Unreported judgment of Davis AJ in KKT v MSR , Gauteng Division, case number 4081/2013 (10 March 2017) para 5.4
[19] Unreported judgment of the Full Court, Gauteng Division, case number 15996/2017 (15 February 2021)
[20] Pine Glow Investments (Pty) Ltd and Others v Brick-On-Brick Property and Others 2019 (4) SA 75 (MN); Lumisa Technologies and Another v Nedbank Ltd and Others 2020 (4) SA 553 (ECG); Erstwhile Tenants of- Williston Court and Others v Lewray Investments (Pty) Ltd and Another 2016 (6) SA 466 (GJ)
[21] Minister of Home Affairs supra para [36]

the relevant clearance certificate as required by s 118(1) of the Municipal Systems Act[22] as directed.

[34] In order to determine a proper sanction, it is apposite to refer to *Minister of Home Affairs and Others v Somali Association of South Africa and Another*[23], wherein the Supreme Court of Appeal held, in the context of an appropriate remedy:

"[26] That conclusion brings into sharp focus the question of remedy. As it was put in Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) ([2007] ZASCA 70) para 17: '(T)hough the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in Fose v Minister of Safety and Security) without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced.' [Footnotes omitted.]
Courts, as Harms JA observed, should not be overawed by practical problems. 'They should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach. Fose v Minister of Safety and Security held that —

> *"(a)ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.*
> *. . .*
> *I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.' [Footnotes omitted.]*

Harms JA added that 'what "effective relief" entails will obviously differ from case to case'."

[35] The relief sought by the applicant is a mandamus aimed at compliance with s118(1) of the Act. In my view that would constitute an effective remedy in the circumstances.

[36] The applicant further sought the imposition of a fine of R100 000. I am not persuaded that such a fine should be imposed as an additional sanction. Rather,

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[22] Local Government: Municipal Systems Act 32 of 2000
[23] 2015 (3) SA 545 (SCA)

considering the history of the matter, a suspended fine should be imposed to ensure compliance and deter any further contempt. The respondents did not challenge the amount of the fine sought to be imposed.

[37] I turn to the issue of costs. The normal principle is that costs follow the result. There is no reason to deviate from this principle. The applicants sought a punitive costs order by virtue of the respondents' conduct. The respondents, based on the non-compliance with the practice directives, also sought a punitive costs order. Considering all the relevant facts and how the litigation was conducted by the respondents, a punitive costs order is warranted. However, as a mark of disapproval for the applicant's non-compliance with the practice directives, the punitive costs order will be disallowed.

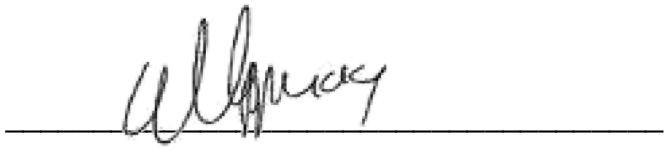
[38] I grant the following order:

[1] The first and second respondents are held in contempt of the court order granted by Her Ladyship Weiner J on 23 September 2021 under case number 2021/31566;

[2] The respondents are directed to issue a rates clearance certificate to the applicant which excludes any electricity charges, in terms of s 118 (1) of the Local Government; Municipal Systems Act 32 of 2000 forthwith and by no later than 22 November 2021;

[3] A fine of R100 000 is imposed on the respondents in consequence of the contempt, which is suspended on condition that the respondents fully comply with the order in [2] above, failing which the fine will be payable forthwith;

[4] The respondents are directed to pay the costs of this application.



EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES

DATE OF HEARING	: 10 and 11 November 2021
DATE OF JUDGMENT	: 22 November 2021
APPLICANT'S COUNSEL	: Adv. C. Van der Merwe
APPLICANT'S ATTORNEYS	: KG Tserkezis
RESPONDENTS' COUNSEL	: Adv. E. Sithole.
RESPONDENTS' ATTORNEYS	: Madhlopa and Thenga Incorporated