



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

Case Number: 5802/2021

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
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DATE	SIGNATURE

In the matter between:

**HYDE PARK GARDENS (PTY) LTD t/a  
SHELL HYDE PARK GARDENS**

Appellant

and

**CITY OF JOHANNESBURG**

**METROPOLITAN MUNICIPALITY**

First Respondent

**THE MUNICIPALITY MANAGER: CITY OF**

**JOHANNESBURG**

Second Respondent

**THE EXECUTIVE MAYOR: CITY OF JOHANNESBURG**

Third Respondent

**NICOLE DAS NEVES**

Fourth Respondent

**BVELELA ENGINEERING**

Fifth Respondent

**Neutral Citation:** *Hyde Park Gardens (Pty) Ltd T/A Shell Hyde Park Gardens V City Of Johannesburg & Others* (Case No. 5802/2021) [2023] ZAGPJHC 552 (23 May 2023)

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## JUDGMENT

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### MALUNGANA AJ

- [1] On 08 July 2020, an agreed order was granted by this Court in the proceedings which had been instituted by the applicant on urgent basis.
- [2] The relevant terms of the order can be summarised as follows:
- [2.1] That the respondents or their agents appertaining to City of Johannesburg Municipality Account No: 220096837 are - interdicted from cutting off the applicant's electricity supply to the property known as Shell Hyde Park Gardens situated at 99 William Nicol Drive, Hyde Park, Johannesburg ("THE PROPERTY") on the condition set out in paragraph 3 and pending the final determination of the remainder of this application.
- [2.2] Pending the final determination of the remainder of this application the applicant will pay to the second respondent, in respect of the supply of electricity to the Property on its account, an amount of R25 000.00 per month, payable within 7 days of receipt of an invoice from the second respondent.
- [2.3] The respondents will render to the applicant an accurate accounting, together with substantiating documents (including meter readings) in respect of all amounts claimed by them on the account, setting forth the nature of the outstanding charges, the periods to which they relate and all payments made by the applicant within 60 days of the order.
- [2.4] The parties will thereafter meet (whether remotely or otherwise) to debate the aforesaid account within 30 days of it having been provided.
- [2.5] Alternative to para.2.3 *supra*, the preparation of the account is , in terms of s 38 of the Superior Courts Act 10 of 2013, referred to a referee for a decision, which referee shall be a chartered accountant, to be agreed upon between the parties within 7 (seven) days of the granting of the order, and failing the parties agreeing upon the identity of the referee as aforesaid, authorising the chairman of the South African Institute of Chartered Accountants or such similar body to appoint a chartered referee, who has

knowledge of the operation of municipal accountants/utilities. The proposed accountant shall have the powers stated in paragraphs 3.2 to 3.2.8.8 of the notice of motion.

- [3] It is well established that the High Court has inherent jurisdiction summarily to punish all types of contempt whether committed *in* or *ex facie curiae*.
- [4] The applicant avers in paragraph 17 of the founding affidavit that on 22 July 2020 it received an account from the second respondent pursuant to the aforesaid court order. In response, the applicant duly effected payments in accordance therewith.
- [5] On 13 August 2020, the applicant addressed a correspondence to the respondents' attorneys pertaining to the July account reminding the respondents to comply with the court order by rendering the accurate account together with the supporting documents including the meter reading within 60 days of the order<sup>1</sup>
- [6] In response to the applicant's correspondence of the 13<sup>th</sup> of August 2020, the respondents' legal representatives provided the applicant with the purported account as contemplated in paragraph 4 of the order.
- [7] On 15 September 2020 the applicant, through its legal representatives wrote another correspondence to the respondents' attorneys highlighting certain deficiencies in the respondents' account, and again reminding the respondents to comply with the court order. Amongst the complaints, the applicant indicated to the respondents that there were no meter readings for the period 2019, and the respondent has not adjusted the account to take into account the adjustments for the period June 2015 and September 2016.
- [8] The applicants further alleges that it suffers prejudice in that it needs to budget. It had received grossly inflated accounts from the respondents from time to time to the tune of R3000 000.00 (between June 2019 and September 2017). All its attempts to have the accounts rectified were in vain, and constantly receive threats of termination from the respondents.
- [9] According to the respondents, steps were taken to comply with the court order. In support of these averments the respondents contend that in investigating the complaints raised by the applicant it had to liaise with various officials from internal departments and City Power.<sup>2</sup>

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<sup>1</sup> Case lines 001-17 Founding Affidavit (AF)

<sup>2</sup> Case lines 004-8. Answering Affidavit (AA).

[10] In paragraphs 17; 18 and 19 of the answering affidavits the respondents contend as follows:

“17. In attempt to demonstrate their *bona fides* and the steps taken to comply with court order, a report was prepared and provided to the Applicant’s attorneys on or about 4 September 2020, advising them of the issues identified in respect of the account, explaining the charges on the account and providing substantiating documentation pertaining thereto (“the September report”).

18. The September report further acknowledged and recorded certain shortcomings in the accuracy of the account at the time when same was produced and indicated that the City was in the process of taking the necessary steps to rectify same.

19. It must be appreciated that being a municipality, the City requires the input and approval of various levels before it is able to put forward and implement any decision to alter an account. The necessary processes associated with attending to the amendment of the account were further frustrated and made increasingly difficult by the COVID 19 pandemic, the ensuing lockdown restrictions, and the temporary unavailability of key individuals in obtaining the necessary documentation and processing the necessary amendments.”

[11] The respondents state that the applicant rejected the respondents’ September report and the City’s attempts to comply with the court order in question.

[12] In compliance with the court order, on 28 June 2021 the City prepared another report which was provided to the applicant. The said report sets out issues and points of contention that were identified. I do not find it necessary for the purpose of this judgment to state the issues and points referred to by the respondents.<sup>3</sup> Suffice to state that the respondents thereupon attended to the rectification of the account, and credited the applicant’s account in the sum of R1 019 849.48 (para.33). The physical address of the applicant’s property was rectified, as well as the actual reading of the electricity meter and the account was billed accordingly. There are statements of accounts also attached to answering affidavit in this regard.

[13] In advancing the applicant’s case, counsel for the applicant referred this court to the well-known decision (*locus classicus*) in *Fakie No v CCI*

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<sup>3</sup> 004-11 of the AA. Para 26.

*Systems (Pty) Ltd 2006 (4) (SCA)*, in which Cameron JA stated as follows:

- (a) The essence of contempt of court “lies in violating the dignity, repute or *authority of the court.*” *The offence has been approved by the Constitutional Court as the rule requires the dignity of the courts to be maintained.*
  
- (b) “*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. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way that constitutes the contempt. In such a case, good faith avoids the infraction. Even refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*”
  
- (c) These requirements – that the refusal to obey should be both wilful and mala fide, and that the unreasonable non-compliance, provided it is bona fide, does not constitute contempt -accord with the broader definition of the crime, of non-compliance with civil orders is a manifestation. They show that the offence is committed not by disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with intent.
  
- (d) The onus is of criminal standard of proof being proof beyond reasonable doubt.
  
- (e) *Once an applicant shows an order in existence and that it came to the notice or attention of a respondent and that the respondent had disobeyed or neglected to comply with the order, wilfulness and mala fides will be inferred and the applicant will then be entitled to a committal order. An evidentiary burden then rests upon a respondent in relation to the aspect of wilfulness and mala fides. A respondent must advance evidence that establishes a reasonable doubt as to whether non-compliance with such order was wilful and mala fides. A respondent does not bear a legal burden to disprove wilfulness and mala fides. If the respondent fails in*

*discharging such evidentiary burden, contempt of the court order will be established beyond reasonable doubt.”*

[14] It follows from the *Fakie* judgment *supra*, that the defaulter must have failed to comply with the court order wilfully and with *mala fides*.

[15] In the present case the respondents, for their part proffered a reasonable and satisfactory explanation for their failure to fully comply with the order in question as given in the answering affidavit. Subsequent to the court order, the respondents took certain steps to investigate the discrepancies in the applicant's utility account. Notwithstanding the shortcomings, in September 2020 and June 2021, the respondents issued reports relating to the investigations carried out on the implicated account. The respondents further state the delay in some instances were delayed by the fact that it needed approvals from various entities, whose key personnel were absent during the COVID 19 era. In my view the non-compliance is void of wilfulness and *mala fides*. The City further averred in its papers that where overcharging has been identified the respondents had passed on credit to the applicant. Moreover, it seems to me that the order by Jacob J makes provision for the resolution of dispute as when they arise during the existence of the order.

[16] The City has placed sufficient information before the court to prove that it has taken the necessary steps to comply with the subject matter of the court order. I find that the evidence advanced establishes a reasonable doubt that their failure to comply with the court order was wilful and *mala fide*.

[17] In the circumstances, I make the following order:

1. The application to declare the respondents to be in contempt of court order of Jacob J dated 8 July 2020 is refused;
2. The applicant is directed to pay the costs of this application.

Court

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MALUNGANA PH  
Acting Judge of the High

## APPEARANCES

For the Applicant : Adv. Jacobo Alli

Instructed by : SLH Inc

For the Respondent:  
Instructed by : Adv. Samantha Jackson  
: Moodie & Robertson