

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION**



Case No: 32188/21

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| (1) | REPORTABLE: No |
| (2) | OF INTEREST TO OTHER JUDGES: No |
| (3) | REVISED: No |

Signature

Date

In the matter between:

CHURCHILL HOUSE (PTY) LTD (IN LIQUIDATION)

1st APPLICANT

(Registration N.O 2000/016676/07)

IVOR LANCELOT VAN DIGGELEN N.O.

2nd APPLICANT

THEODOR WILHELM VAN DEN HEEVER N.O.

3rd APPLICANT

REHANA MOOLLAJIE N.O.

4th APPLICANT

(IN THEIR CAPACITIES AS LIQUIDATORS OF

CHURCHILL HOUSE (PTY) LTD – IT 1054/17)

And

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

RESPONDENT

JUDGMENT

MOTEPE AJ

Introduction

[1]The applicants bring an application against the respondent for contempt of a court order. The court order in question was granted by my brother Strijdom AJ on 20 October 2022. The application is brought on an urgent basis.

[2]As a punishment for contempt, the applicant seeks an order that the respondent be ordered to pay a fine of R100 000.00 or an amount determined by this Court. They also seek an order in terms of which the respondent “*is obliged to furnish the applicants, within 5 days of the granting of this order, with full and itemised particulars of the amounts which may have become due for payment in terms of*

Section 118(1) of the Local Government: Municipal Systems Act, 32 of 2000 (“the Act”) in respect of any Municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties for a period of 2 years prior to the granting of this order in respect Units S0000 in respect of account number 201530654”

Urgency

[3]As aforesaid, the court order sought to be enforced was granted on 20 October 2022. This application itself was issued on 28 February 2023, according to the stamp appearing on the face of the notice of motion. The service affidavit deposed to by the messenger employed by the applicant’s attorneys confirms that this application was served on the respondent’s attorneys on 28 February 2023. The notice of motion however required the respondent to notify the applicants’ attorneys in writing and via email by no later than 17h00 on 24 February 2023 whether it intended opposing the application and most importantly to deliver its answering affidavit by no later than 17h00 on 28 February 2023.

[4] I hasten to add that the applicants have also uploaded an electronic proof of service according to which the unsigned and not yet issued application was emailed to the respondent’s attorneys on Thursday, 23 January 2023 at 16h32. The application was set down for 7 March 2023.

[5] It is now firmly established that the continuing contempt of court entitles the applicant to approach a Court on an urgent basis. The applicable authorities were usefully restated and affirmed by the Constitutional Court in *Secretary for 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*¹ The applicants are however still required to assess the appropriate degree of urgency in each particular case. It apposite to quote what Coetzee J said in *Luna Meubel Vervaardigers v Makin and Another*² :

“Practitioners should carefully analyse the facts of each case to determine, for the purposed of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency the case demands. It must be commensurate. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in time and day for which the matter be set down.”

[6] In this case, the order sought to be enforced had been granted more than 4 months ago. While it is so that the applicants emailed the application on 23 February 2023, this is of no moment because on the applicants own version in the said email, the application was “unissued”.

¹ 2021 (5) SA 327 (CC) paras 30-33

² 1977 (4) SA 135 (WLD) at 137 E-F

[7]The respondent's attorneys had to firstly get instructions from the respondent. Experience teaches us that state respondents have to be afforded reasonable time because of their own internal processes they must follow before deciding to oppose a matter. 23 February 2023, when the "unissued" application was email to the respondent's attorneys was a Thursday. 28 February 2023, when the respondent had to file their answering affidavit was the following Tuesday. This means the respondent was effectively granted only 3 court days to oppose this application. What is worse is that the application itself was only issued on 28 February 2023. How could the respondent be expected to finalise its answering affidavit and file it on 28 February 2023 before having sight of the issued application. This is totally unreasonable.

[8]For the above reasons, while contempt of court is by its very nature urgent, the degree of urgency in this matter did not warrant such extremely truncated time frames. However, while I find that the degree of urgency in this application is inappropriate, I have decided not to strike it off the roll but deal with the merits of the application as urged by Mr Makuya who appeared for the respondent.

Merits

[9]The starting point is the order sought to be enforced. It is reproduced in full:

"1. Declaring that the Respondent is obliged to furnish the Applicants within 5 days of the granting of this order with full and itemised particulars of the amounts

which may have become due for payment in terms of Section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 “(the Act”) in respect of any municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties for a period of 2 years prior to the granting of this order in respect of Units S0000, S0001, S0002, S0004, S0005, S0006, S0007, S0008, S0009 of Churchill House Sectional Scheme with Sectional Deed Title numbers ST122160/2006, ST122161/2006, ST122159/2006, ST50891/2006, ST69701/2005 AND ST80825/2006 in the suburb of Pretoria;

2. That the Respondent is ordered to pay the costs of this application on the scale as between attorney and client.”³

[10] The requirements for establishing contempt of court were once more restated by the CC in *Zuma*⁴. It said the following:

“As set out by the Supreme Court of Appeal in Fakie and approved by this court in Pheko II, it is trite that an applicant who alleges contempt of court must establish 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. Once these elements are established, wilfulness and mala fides are presumed and the respondent bares an evidentiary

³ CA1, at 030-27

⁴

burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.”

[11] The deponent who deposed to the founding affidavit on behalf of the applicants (“*the deponent*”) allege at paragraph 14 of their founding affidavit that the judgment of Strijdom AJ was served by the applicants’ attorneys on the respondent via email on 21 October 2022 and per hand on 25 October 2022. On or about 3 November 2022, an urgent contempt application was brought on the basis that the respondent had failed to comply with the said order. This however, is not borne out by the facts. At paragraph 17 of the founding affidavit the deponent to the founding affidavit states the following:

*“The Respondent then provided figures prior to the matter being heard, and so the matter was removed from the urgent roll with costs. A copy of the Contempt Court Order dated 11 November 2022 (“**the Contempt Order**”) is attached hereto marked as **Annexure “CA4”***

[12] The importance of the above is that the Respondent had failed to comply with the Court order but complied immediately before the hearing of the application on 11 November 2022. On the applicants own version, the Respondent fully complied with the Court order then.

[13] The deponent then proceeds to state at paragraph 18 that most of these figures were correct except for account number 2015306547, which was incorrect.

[14] The deponent states further at paragraph 19 that on 17 January 2023, the applicant's attorneys despatched a letter to the respondent disputing the figures on that account. On or about 20 January 2023, the respondent replied to this letter, seeking indulgence to investigate and "re-build the account". The respondent undertook to revert by the end of January 2023. The deponent then alleges that the respondent has failed to provide "a rebuild" or accurate figures.

[15] The applicants in this application confirm under oath that the respondent did give all the figures in respect of all the accounts as per the court order, before 11 November 2022. The only difficulty is that according to the applicants, the figures in one of the accounts "*were grossly inflated*". This is disputed by the respondents but that is not the issue. The issue is that as at 11 November 2022, the respondent had fully satisfied the court order by furnishing the applicants with full and itemised particulars of the amounts owing. The fact that the figures on one of the accounts are disputed means there is a new dispute between the parties that has arisen. This however does not detract from the fact that the respondent furnished "full and itemised particulars" as per the court order. It was not open to the applicants to bring contempt proceedings.

Erratum

[16] On Tuesday, 7 March 2023 after hearing this application, I reserved my judgment. However my clerk made an error recording that I had granted the application and made the draft order uploaded by the applicants on caselines as

an order of court. When she gave me draft orders in other matters, that I had correctly granted, she also included this draft order which I signed, assuming that it was one of those I granted. It was only on Friday morning, on 10 March 2023 that I noticed this while preparing my judgment. I immediately requested my clerk to correct this error. That erroneous order was immediately removed to be replaced with the correct order reading “Judgment reserved”. Any inconvenience to the parties is regretted.

ORDER

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

1. The application is dismissed with costs on a party and party scale.

JA MOTEPE AJ

Acting Judge of the High Court of
South Africa, Gauteng Division,
Pretoria

This judgment was handed down electronically by circulation to the parties and or parties' representatives by email and by being uploaded too CaseLines. The date and time for the hand down is deemed to be 14h00 on 10 March 2023

Heard on: 7 March 2023

Date of Judgement: 10 March 2023

Appearances

For the Applicant: Adv Subruyen

Instructed by: K G Tserkezis Inc.

For the Respondent: Adv U.B Makuya

Instructed by: Leepile Attorneys