

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 59109/20

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 2 JUNE 2023

In the matter between:

RDP'S BUSINESS ENTERPRISE CC

Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

1st Respondent

THE MUNICIPAL MANAGER:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

2nd Respondent

JUDGMENT

K STRYDOM, AJ

Introduction:

- 1) The Applicant seeks an order for the committal of the second Respondent ("the Manager") to prison due to the failure by the first Respondent ("the City") to comply with a Court order given on 15 July 2021 ("the order").

- 2) In terms of the Court order, the City was ordered to disclose certain records related to a tender bid (tender nr SDCT 11-2015-16) which were previously requested by the Applicant in terms of the *Promotion of Access to Justice Act*, 3 of 2000 (“PAIA”).
- 3) It is common cause that the City has only partially complied with the order and has not supplied all the records it was ordered to.

Background

- 4) The request in terms of PAIA was made on 28 August 2020. After no response was received, the Applicant launched an internal appeal on 9 October 2020. Again, no decision was made, and it was therefore deemed that the request was refused. This necessitated the Applicant to approach the Court. The Respondents were ordered to provide the records within 15 days of the 15th of July 2021. The Respondents did not oppose this application.
- 5) Pursuant to the order, on 9 September 2021, the City provided some records in terms of rule 53(1)(b) notice. On the 14th of October 2021, they were informed by the Applicant that this constituted only partial compliance with the order. No response being received, the Applicants, again, on 17 January 2022 requested the Respondents to provide the outstanding records. On 18 January 2022 the Manager merely replied that the matter had been directed to the wrong officials (by the Applicant) and gave a new address for PAIA requests. No explanation or justification for the partial compliance was proffered and no further communication from the Respondents, or additional records, have been forthcoming since.
- 6) This application was launched on 22 April 2022 and was duly served on both Respondents. Both Respondents filed the notice of intention to oppose on 3 May 2022 and filed their joint answering affidavit on 25 July 2022.

The Respondents’ arguments against contempt

- 7) In *casu*, there is no dispute that the order was made and duly served on the Respondents. The Respondents do not deny that there has been partial non-compliance with the order. The Respondents therefore bear the burden of proving that their non-compliance was not wilful and *mala fide*.¹

¹ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 9

- 8) The Respondents give the following explanations and/or justifications for their non-compliance:
- a) They have fully complied by supplying the records that were under their control in terms of the rule 53(1)(b): The order called upon them to provide records that are under their control. As the City does not have storage facilities, the outstanding records are stored with independent service providers. These service providers are therefore “in control” of the records. As such, the argument goes, the order did not call on the Respondents to provide those records.
 - b) The delay in compliance was caused by the Applicant, as it communicated the order to the wrong department.
 - c) They are unaware of the whereabouts of certain records and/or certain records may have been destroyed: The Respondents admit that the paid invoices and remittance advices from appointed service providers have not been supplied. They aver that some of the requested records date as far back as 2017 and may therefore no longer be available in the archives as the records are disposed of after 5 years in storage. In this regard it is important to note that the answering affidavit states that *"the Respondents cannot confirm at this stage if such records are available"* and that they have requested these records from the archives and will provide them if they become available.
 - d) Certain of the records do not exist: With regards to the service level agreements requested, the Respondents deny that any such agreements were concluded and alleges that all service providers were contracted in terms of the general conditions of contract, which were provided to the Applicant. There was no bid adjudication committee and as such no records can be provided in this regard.
 - e) They did not have to provide certain documents: The electronic and/or transcript

versions of the records pertaining to the decisions of the committees, for instance, form part of the operations of a public body as envisioned in section 44(1) of PAIA . As such, access may be refused as they contain discussion or deliberation for the public body.

- 9) The argument that a delay was caused by the Applicant stands to be summarily dismissed. The very compliance that the Respondents seek to rely on in [a] supra, occurred pursuant to the communications addressed to the supposedly incorrect department by the Applicant. The rule 53(1)(b) was delivered by said department prior to the communication from the Manager. In any event, the order, partial compliance and further requests for full compliance came to the attention of the correct department from January 2022. This argument therefore does not provide a justification for the continued non-compliance by the Respondents.
- 10) With regards to the submissions pertaining to the service level agreements and the bid adjudication committee records, I am constrained by the *Plascon Evans*² rule, to accept the Respondent's evidence that these records do not exist. As such their non-compliance, in this regard, cannot be said to be wilful and *mala fide*.
- 11) In view of my findings supra, the Respondents' remaining arguments, against a finding of contempt, are that:
 - a) on their interpretation of the order, they have complied, alternatively,
 - b) that the records may be unavailable or may have been destroyed, and/or
 - c) that their disclosure of records, in spite of section 44 of PAIA, shows their good faith, and/or
 - d) that their partial compliance shows an absence of wilfulness and lack of *mala fides*.

Legal analysis of Respondents' arguments

- 12) To contextualise contempt proceedings, it is important to note that, as stated by Kirk-Cohen J, "...*(c)ontempt of Court is not an issue inter parties; it is an issue between the Court and the party who has not complied with a mandatory order of Court.*"³

² *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634

³ *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 6730-E

13) As the Applicant has proven the order, service thereof and non-compliance therewith, the Respondents' non-compliance is presumed to be wilful and *mala fide*. The Respondents, therefore, have the evidential burden to negate this presumption. As was stated in *Fakie*⁴:

"Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

14) The standard of proof, however, will depend on the consequences of the various remedies available. If the Applicant seeks remedies such as imprisonment or fines, which have a material consequence on an individual's freedom and security and as such are subject to the criminal standard of proof, the Respondents only need to lead evidence that creates a reasonable doubt that the non-compliance was wilful and *mala fide*. However, where civil contempt remedies are sought, such as declarators or structural interdicts, the Respondents must lead evidence that shows, on a balance of probabilities, it is not wilful and *mala fide* in its non-compliance.⁵

15) On the day of hearing, I stood the matter down to enable the parties discuss whether any civil remedies would cure the non-compliance. Despite discussions, the parties could not agree on any such terms and the Applicant accordingly persisted with the present application for committal of the Manager.

16) Accordingly, the Respondents' evidence (or justifications) presented stand to be assessed with reference to whether it creates reasonable doubt as to wilfulness and *mala fides* of the Respondents' non-compliance.

The question of "control" of the records

17) The argument, pertaining to the interpretation of the order, seemingly finds its justification in pronouncements, such as in *Fakie*⁶ that a deliberate (wilful) disregard is not enough, if it can be shown that the Respondents truly believed they were acting in good faith in not complying with the order:

⁴ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 38

⁵ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) para 67

⁶ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 9

“...since the non-complier may genuinely, albeit mistakenly, believe him of herself entitled to act in a way claimed to constitute contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).”

- 18) The Respondents' argument that, as the requested records are in the possession of the City's archiving and storage service providers, they are not "in control" of the records, is disingenuous and legally unsound⁷. I agree with the Applicant's contention that the mere fact that the Respondents can request these records is indicative of their control. Furthermore, by virtue of the services provided by these service providers, the records remain the possessions of the City to do with as it pleases. The service providers have no ownership over these records and merely act as a conduit for the archiving of the records.
- 19) For purposes of assessing conduct in contempt proceedings, the question is, however, not whether fact relied on was legally sound, but whether the Respondents, in fact relied on this interpretation (when they failed/refused to provide the records) and, if so, whether their reliance on this interpretation was *bona fides*.
- 20) The Respondents raised this argument for the first time in their answering affidavit in June 2022. Notably, when the Manager replied to the queries of the Applicant, in January of the same year, no mention was made of this interpretation or that the Respondents had, in their view, therefore fully complied with the order.
- 21) When seen holistically, it is clear from the answering affidavit, that this argument was borne out of the necessity to provide an explanation for non-compliance. It was not the reason for non-compliance in the mind of the Respondents prior to the inception of this application. If it had been, given their burden of proof, it would have been expected of the Respondents to clearly articulate, in the answering affidavit, the exact circumstances and basis for their reliance on the interpretation.
- 22) Furthermore, the Respondents' averments in the answering affidavit, that they have requested the records from the archives and will supply same to the Applicant if they are received, directly contradicts any *bona fide* reliance on such an interpretation.

⁷ See for instance *Arlow v Arlow* 2008 JDR 1490 (T) where the Court held that a party is in control of records even if they are physically kept by said party's auditors.

23) In view of the aforementioned, I find that this justification is not a *bona fides* reflection of the true reason for the Respondents' non-compliance.

The unavailability and/or possible destruction of the records

24) The Respondents allude to the fact that the paid invoices and remittances requested may have already been destroyed. This justification does not assist the Respondents. It, in fact, serves to underscore their lackadaisical approach to compliance with the Court order: Despite being aware of the Applicant's request since 2020, they had, by 2022, not yet even ascertained the status of these records. To add insult to injury, it would appear that, by 2023, they still had not done so: Counsel for the Respondents, upon my invitation, during argument obtained instructions confirming that the status of the records was still unknown at date of hearing. The fact that the status of these records remains uncertain due to the inaction of the respondents cannot be said to be a *bona fides* justification for the failure to comply with the order.

25) My finding that justification is not *bona fides*, is further strengthened by the fact that despite the assertion that the records were requested and will be provided, no proof of the request was attached, nor has any feedback regarding the alleged request been provided a date of hearing some 10 months after the alleged request.

26) Furthermore, the Respondents' assertion, regarding the possible destruction of the records, is, in fact, an indictment of their conduct: Despite being aware of the real risk that the requested records will be destroyed after five years, that were prepared to sit back and have the clock run out for three years following the request being made

Does the partial compliance negate the inference of wilfulness and mala fides?

27) Counsel for the Respondents argued that, given the partial compliance with the Court order, it cannot be found, beyond reasonable doubt, that the Respondents were wilful and *mala fide* in their non-compliance. It was submitted that the Respondents acted in good faith by endeavouring to comply with the order.

28) In this regard I have taken note of the dictum in *Consolidated Fish Distributors (Pty) Ltd v Zive and Others*,⁸ where the Court held that an enquiry into the materiality of the partial non-compliance must be done:

⁸ *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C) at 522B-E.

“Contempt of Court, in the present context, means the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction. In Southey v Southey it said was said that Applicant for an attachment had to show a wilful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases, however probably for the reason that in 99 percent of the cases the whole order was disobeyed, which is obviously a ‘material’ non-compliance. It is reasonable to suggest where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the Court would take the substantial compliance into account, and would not commit for the minor non-compliance.”

- 29) Having admitted to not providing, the records pertaining to paid invoices and remittances, the Respondents made no submissions regarding the materiality of these records. The burden being theirs, I accordingly cannot find that the non-compliance was of a minor nature.
- 30) In any event, the paid invoices and remittances constitute a different class of records to the other records which have been provided and as such cannot be viewed as minor or incidental to that which is already been supplied.
- 31) The Respondents further argued that they acted in good faith by referencing the provision of the minutes of the Evaluation Committee, as an example. Despite their view that they did not need to disclose these records, by virtue of section 44 of PAIA, they provided same.
- 32) The provision of these records cannot be used to infer the nature of the conduct of the Respondents, whether it be *mala* or *bona fide*. The Respondents did not graciously bestow upon the Applicant records to which it was not entitled; they merely complied with the Court order.
- 33) The section provides that the requested records *may* be refused. This is a consideration to be dealt with by a public body in deciding whether to refuse or grant access following receipt of a PAIA request. This matter is long past that stage. The issue of whether or not the refusal (in this case the deemed refusal) to supply the records was fair and reasonable, should have been raised in Court when the application to set aside the refusal was made. As previously stated, the Respondents chose not to oppose that application and was subsequently ordered to provide these

records. They did not attempt to challenge the lawfulness of this order, as would have been their duty had there been any illegality.⁹

- 34) Referencing *Barkhuizen v Napier*¹⁰, it was also argued that the concept of good faith entails that where compliance is impossible, it should not be enforced. This argument is a conflation of two distinct concepts: compliance with the terms of a contract and compliance with a Court order. *Barkhuizen* is authority for contractual terms. Where Court orders are concerned, the exact converse is true: the SCA, in *State Capture*¹¹ reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, Court orders are binding until set aside
- 35) I accordingly find that the partial compliance by the Respondents also does not negate the presumption of wilfulness and *mala fides*.

Finding

- 36) In view of my findings *supra*, it is evident that none of the arguments proffered by the Respondents individually represent a *bona fides* explanation of or justification for the conduct of the Respondents.
- 37) Counsel for the Respondent valiantly argued that, when viewed collectively, the justifications set out *supra* paint a picture of Respondents who are not deliberate/wilful or *mala fide*. Referencing *JR v AL*¹², the intimation was that, to prove contempt beyond a reasonable doubt, more than a mere failure to provide the records must be proven; the Respondents must be shown to be deliberate in their non-compliance.
- 38) However, the comments made in paragraphs 8 and 9 of *JR v AL*, are a restatement of the dictum in *Fakie*, set out *supra*. Contextually it refers to good faith (dealt with *supra*) negating the presumption of wilfulness and *mala fide*.
- 39) It is, however, this very presumption, that undermines the Respondents' entire argument: It is not for the Applicant to prove beyond reasonable doubt that the Respondent is *mala fide* and wilful in its non-compliance. The Applicant has already proven that the Respondent is assumed to be wilful and *mala fide*. The Respondents

⁹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) para 82

¹⁰ *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 29

¹¹ *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) ("State Capture") at para 85

¹² *JR v AL* (21609/2021) [2021] ZAGPJHC 590 (28 October 2021)

were called upon to provide evidence that would create reasonable doubt in the mind of the Court as to whether the presumption is correct.

- 40) Simply put, the Respondents have not presented any *bona fide* facts, justifications or arguments upon which this Court can make a determination of their wilfulness and *mala fides*.
- 41) As Respondents have provided no *bona fide* or valid justifications or evidence to rebut the presumption and, as such, no reasonable doubt has therefore been established.
- 42) I accordingly order as follows:

Order

1. The Respondents are found guilty of being in contempt of the Court order granted on 15 July 2021 by Manamela J under case number 59109/20.
2. A warrant of arrest is authorised committing the second Respondent to imprisonment for contempt of Court for a period of 30 calendar days, which warrant is wholly suspended for a period of 1 year on condition that the Respondents, jointly or separately, purge their contempt as follows:
 - 2.1. The Respondents shall provide to the Applicant, within 15 business days of this order, all outstanding records in terms of the order made by Manamela J on the 15th of July 2021
 - 2.2. The Respondents shall, immediately, on the date of this order, inform all relevant service providers, to cease with the destruction of all records related to or stemming from tender nr SDCT 11-2015-16 and, additionally, specifically refer to those records as per Manamela J's order of the 15th of July 2021. Proof of transmittal of this instruction shall be served on the Applicant within 2 business days of this order.
 - 2.3. Where a record cannot be found, has been destroyed or does not exist, the second Respondent shall, within 20 business days of this order, depose to and serve on the Applicant, an affidavit, personally verifying that the record cannot be found or does not exist, which affidavit shall, with regards to each record not found or not in existence, be compliant in the following respects:
 - 2.3.1. It shall set out a full account of all the steps taken to find the record or to determine whether it exists or has been destroyed, as the case may be.

- 2.3.2. Where a record cannot be found, it shall include all communications with any and/or all service providers who stored such a record, as well as all communications with every person who conducted the search on behalf of the Respondents. It shall indicate whether copies exist and, if so, in whose possession said copies may be found.
- 2.3.3. Where a record has been destroyed, it shall indicate the precise circumstances of the destruction, including, by whom it was destroyed, on whose instruction, as well as the reason for and date of destruction. It shall further annex all communications with any person/organisation/service provider regarding the destruction of the record and indicate whether copies exist and, if so, in whose possession such copies may be found.
- 2.3.4. Where a record does not exist, it shall contextualise the reasons for the non-existence of the record with, inter alia, specific reference to the relevant Municipal Supply Chain Management Regulations and the procedures followed pertaining to tender nr SDCT 11-2015-16.
- 2.3.5. For each record that cannot be found or has been destroyed, it will provide the name and contact details of the last person/entity that was in possession of the record and provide written authority to such person/entity to reply directly to the Applicant regarding any queries made by it regarding the status of such a record.
3. Should the Respondents fail purge their contempt in any manner as set out paragraph 2 of this order, the Applicant may approach the Court, with papers duly supplemented, if necessary, to implement the committal of the second Respondent.
4. The Respondents are ordered to pay the Applicant's costs jointly and severally, the one paying the other to be absolved.

K STRYDOM
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing:

14 April 2023

Judgment delivered:

2 June 2023

Appearances:

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