IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 4012/2022

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
7/07/2023

DATE SIGNATURE

In the matter between:

MADELEINE PROPERTIES (PTY) LTD Applicant

AND

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY First Respondent

THE MUNICIPAL MANAGER OF THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY Second Respondent

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JUDGMENT

OOSTHUIZEN-SENEKAL AJ:

[1] On 16 May 2013 the applicant brought an urgent application on the grounds that the respondents are in contempt of the court orders granted on 19 May 2021; 29 July 2021 and 3 February 2022 under case number(s) 2361/2021, 4012/2022 and 36713/2021.

[2] On the morning of the hearing the parties informed me that they had reached an agreement in the matter whereafter a draft order was presented to me. The only issue which the parties failed to agree upon was that of costs. The applicant declined to accept the respondents tender of costs on a party and party scale and sought a punitive cost order against the first respondent. After hearing oral arguments from both sides regarding costs I granted the following order:

Having read the papers filed on record and having heard the representatives of the parties, by agreement between the parties, it is ordered:

1. A further consolidated interim interdict is granted restraining the first and second respondents from terminating and/or lowering (or threatening to do so) the municipal services to Portion 0 of Erf 80 Arcadia, Registration Division J.R Province of Gauteng, held by Deed of Transfer T8967/2003, and Portion 0 of Erf 1119 Arcadia, Registration Division J.R., Province of Gauteng, held by Deed of Transfer T24844/1965, situated at 230 Hamilton Street // 562 Pretorius Street, Pretoria, also known as the Pretoria Hotel (herein "the properties"), pending the outcome and final adjudication of:

    1.1 the disputes lodged by the applicant with the first respondent on 11 May 2021 and 29 June 2021 in terms of the provisions of Section 95(f) read together with Section 102(2) of the Municipal Systems Act, No. 32 of 200 (herein 'the Systems Act") in respect of municipal accounts with numbers 2016494312 and 2047270170 (herein "the applicant's accounts)

2. The first and second respondents are directed and ordered to comply with the Court Orders granted by this Court on 19 May 2021 (under case numbers

23618/2021: “the Court Order”), and 28 July 2021 (under case number 36713/2021: “the second Court Order”);

3. The first and second respondents shall ensure that pending the operation of this interdict and the previous interdicts, the applicant’s accounts are secured with a “dunning lock” which shall be in place until 11 August 2023, whereafter, and if the issues between the parties as set out in order 1 above have not been resolved, the first and second respondents shall ensure that the secured “dunning locks”, shall be extended.

4. The contempt application with this case number is postponed *sine die* and the respondents shall file their answering affidavits within 20 (twenty) days from the date of this order.

5. The first respondent shall pay all the applicant’s costs in respect of the urgent application of 16 May 2023 on the scale as between attorney and client.

[3] Consequently, on 17 May 2023 the respondents requested written reasons in terms of Rule 49 regarding prayer 5, the cost order. Due to internal communication challenges, I only received the said request on 26 June 2023.

[4] The applicant is Madeleine Properties (Pty) Ltd, (“the applicant”), a company with limited liability, duly established and incorporated in terms of the Company Laws of the Republic of South Africa and the registered owner of Portion 0 of Erf 80, Arcadia, Registration Division JR Province of Gauteng, held by deed of transfer T8967/2003. The applicant conducts a business as a hotel which accommodates hundreds of guests, which also consists of a conference and function venue. The applicant is dependent on electricity supply to be sustainable. Although the applicant has access to a backup generator, it cannot continually rely on generator-power, due to the enormous costs thereof and the limitation generator-power imposes. In addition, the tranquillity of the hotel environment is negatively impacted and the increased costs will mean the downfall of the hotel. It is furthermore important to emphasize that any termination and/or interruption of municipal utilities to the property causes reputational damage to the applicant who can permanently lose clientele if the situation carries on indefinitely.

[5] The first respondent is the City of Tshwane Metropolitan Municipality ("the municipality"), a municipality duly established in terms of the Local Government Municipal Structures Act, Act 117 of 1998.

[6] The second respondent is the Municipal Manager of the City of Tshwane Metropolitan Municipality ("the municipal manager"). The municipal manager is the head of the municipality's administration appointed in terms of section 54A of the Local Government: Municipal Systems Act, Act 32 of 2000 ("the Systems Act").

[7] These are my reason for granting a punitive cost order against the first respondent.

[8] The history of this litigation is replete with facts that are common course between the parties.

[9] It is necessary to comprehensively traverse the history and background facts of the matter, and in particular to highlight what was no less than egregious conduct on the part of the first respondent in the application, which led to the punitive order of costs being granted.

[10] For sake of convenience the relevant chronological history of the matter will be set out in table form as follows:

DATE	EVENT
5 May 2021	First respondent served a notice of discontinuation of services on the applicant.
11 May 2021	Applicant lodged a formal dispute with the first respondent in terms of the relevant provisions of the Systems Act, which dispute was directed at, *inter alia*, seeking clarification on the increase of the applicant's rates and taxes account and valuation of the property.
13 May 2021	Due to the fact that the notice of termination of municipal services not being withdrawn and remained a threat, the applicant

	launched an application against the first respondent under case number 23618/2021 which was heard on 18 May 2021. The said application was brought in two parts - Part A being for interdictory relief pending Part B, the latter of which was a review application to set aside the decision by the Municipal Valuer increasing the property value.
18 May 2021	Mbongwe AJ heard the said Interdict application under case number 23618/2021 and granted an order interdicting the first respondent from terminating or lowering the municipal services to the property pending Part B of the application. ("the May Court Order)
24 May 2021	First respondent, notwithstanding the existing interdict preventing it from doing so, disconnected the electricity supply to the property. Following various correspondence addressed to the first respondent the electrical supply was restored.
29 June 2021	Applicant issued a second dispute with and to the first respondent pertaining to the billing of its municipal services, specifically electricity billing.
15 July 2021	Applicant received a final demand in respect of alleged arrears on its municipal accounts. Considering the May 2021 order, the subsequent termination of the applicant's municipal services and the reconnection, following the applicant's demand, the applicant again, through its attorneys, demanded an undertaking that termination of the municipal services shall not be effected. No response was forthcoming in the regard from the first respondent.
23 July 2021	Applicant again approached the Court on an urgent basis for interdictory relief against the respondents under case number 36713/2021, which application was set down for 28 July 2021.
27 July 2021	Respondents delivered a notice to oppose the urgent application set down for 28 July 2021.

28 July 2021	After engagement with the respondents, Mbongwe J granted an order by agreement between the parties. In terms of the order, further interdictory relief was granted against the respondents pending finalisation of the disputes lodged with the first respondent, pending the review and pending the outcome of the remainder of the relief sought in that application (since some of the relief was postponed *sine die*). The respondents were also ordered to file their answering affidavit in the application under case number 36713/2021 pertaining to the postponed relief, within 20 days from date of the order. To date, no answering affidavit has been delivered. ("the July Court Order")
11 January 2022	Respondents in disregard of the existing interdicts again served a notice of termination of services on the applicant.
24 January 2022	In response the applicant launched an application under this case number on an urgent basis for relief holding the respondents in contempt of court and compelling compliance with the two court orders granted.
3 February 2022	Janse van Nieuwenhuizen J granted an order which contained mandatory relief ordering the respondents to comply with all court orders and also authorised the applicant to approach this Court on the same papers, as supplemented, in the event of further contemptuous behaviour on the part of the respondents. ("February Court Order)
6 April 2022	A copy of the court order dated 3 February 2022 was served on the respondents by hand, which the respondents have acknowledged receipt thereof.
29 April 2022	Respondents served a final demand on the applicant, which triggered this application. After the exchange of correspondence between the parties' legal teams, the matter was removed from the roll since the first respondent attorneys advised that the final demand will not be acted upon and was issued by mistake.

13 December 2022	Applicant launches a second review under case number 061018/2022, reviewing a further increase in new valuation roll.
6 April 2023	Contractors of the first respondent arrived at the property and served a termination notice of electricity supply to the property on the applicant. The municipal services were disconnected by the contractors.
11 April 2023	The applicant's attorneys of record addressed a letter to the respondents and their attorneys of record advising of the unlawfulness of the termination of the applicant's municipal services and requesting an undertaking to restore the electricity supply to the property.
12 April 2023	At approximately 11h20, the applicant's municipal services were restored. Applicant did not proceed with the envisaged urgent application being prepared. At approximately 13h35, a contractor of the first respondent again arrived at the property and advised the applicant that he was there to disconnect municipal services of the applicant. At about 15h30 the disconnection of the applicant's electricity supply was effected by the contractor. At 23h00 the electricity supply to the applicant was restored by the first respondent.
2 May 2023	Applicant served the current contempt of court application on the respondents' attorney of record to be adjudicated in the normal course with reservation to bring it on urgent basis should further threats of termination be issued by the respondents of services to the property.
8 May 2023	The respondents' attorneys of record confirmed receipt of the

	contempt application. Respondents delivered a final demand to discontinue services under account number 2016494312 to the applicant.
9 May 2023	Respondents delivered a final demand to discontinue services under account number 2047270170 to the applicant.
10 May 2023	Respondents served a disconnection notice upon the applicant, notwithstanding the demands allowing a period of 14 days before such notice was warranted. Applicant amended its notice of motion to expediate the contempt application to be heard on urgent court roll- 16 May 2023.
11 May 2023	Notice to oppose filed by the respondents.

[11] It is known to the parties that in awarding costs this court has a discretion which should be exercised judicially upon the consideration of the facts in the matter and that, in essence, a decision be made where fairness to both sides should be considered. This requires me to consider the circumstances that has led to the urgent application, the conduct of the parties and any other factor which may have a bearing on the issues of costs and accordingly make an order which is fair.[1]

[12] In considering an appropriate order as to costs, a court must exercise its discretion judicially to bring about a fair result. Punitive costs serve as a mark of a court's displeasure with one or more facets of the unsuccessful litigant's conduct. In *Geerdts v Multichoice Africa (Pty) Ltd*[2], Myburgh JP held that:

> "Vexatious, unscrupulous, dilatory or mendacious conduct on the part of an unsuccessful litigant may render it unfair for his opponent to be out of pocket in the matter of his own attorney and client costs".

[1] Erasmus Superior Court Practice 2nd Edition, Vol 2, pages D5-5 – D5-26
[2] [1998] ZALAC 10 (29 June 1998) at para [48].

[13] The Supreme Court of Appeal in *Du Toit NO v Thomas NO and Others*[3] held that a punitive costs order is also justified where a party displayed an "unconscionable stance".

[14] It is of the utmost importance to be alive to the provisions of section 165(5) of the Constitution that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. There is no doubt that court orders, once issued, are binding and must therefore be complied with.[4] In *Moodley v Kenmont School and Others*[5] Madlanga J said:

> "I cannot but again refer to section 165(5) of the Constitution which provides that '[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies'. This is of singular importance under our constitutional dispensation, which is founded on, amongst others, the rule of law. The judicial authority of the Republic vests in the courts. Thus, courts are [the] final arbiters on all legal disputes, including constitutional disputes. If their orders were to be disobeyed at will, that would not only be 'a recipe for a constitutional crisis of great magnitude', '[i]t [would] strike at the very foundations of the rule of law and of our constitutional democracy."

[15] In line with a notable trend by our courts in recent times to hand down punitive orders, particularly against malfeasant state officials, the Supreme Court of Appeal in the matter of *Ndabeni v Municipal Manager: OR Tambo District Municipality and Another*[6] granted a punitive costs order against respondents to mark its displeasure at the manner in which they conducted the litigation. In doing so, the Supreme Court of Appeal reinforced the principle that organs of state are duty bound to conduct themselves in an exemplary manner, remarking that:

> "The lackadaisical manner in which the respondents conducted this litigation warrants a punitive costs order against them. They dragged the litigation unnecessarily to the

[3] (635/15) [2016] ZASCA 94 (1 June 2016).
[4] *Ndabeni v Municipal Manager: OR Tambo District Municipality and Another* (Case no 1066/19) [2021] ZASCA 08 (21 January 2021).
[5] [2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 BCLR 74 (CC) at para 36.
[6] Case no 1066/19) [2021] ZASCA 08 (21 January 2021) Also see *Merafong City v Anglogold Ashanti Ltd* [2016] ZACC 35, 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 CC.

detriment of the appellant. Almost all their responses to the appellant were preceded by an application for condonation for the late filing of their documents. They were not candid with the court and provided information scantily. They did nothing for at least nine months until the appellant launched the contempt application. This must be frowned upon by this Court in line with what was said by Cameron J in Merafong."

[16] The majority judgment is important for a number of reasons. Most obviously, because it reaffirms the pertinent provisions of section 165 (5) of the Constitution that speak to the important constitutional role of courts of law, their independence, and the sanctity of their orders, and reaffirms the rule of law, a foundational value that underpins our constitutional democracy. Perhaps, however, its real significance lies in the fact that the judgment signals that the majority were not prepared to let obstructive and dilatory legal tactics by a state litigant win the day.

[17] As was recently emphasised by the Constitutional Court in *Public Protector v South African Reserve Bank*[7] :

"The Constitution requires public officials to be accountable and observe heightened standards in litigation. They must not mislead or obfuscate. They must do right and they must do it properly. They are required to be candid and place a full and fair account of the facts before a court."

[18] In my view, by parity of reasoning the above statements apply with equal force in the circumstances of this case. The history and background facts set out above clearly speaks for itself and I need not discuss the respondents' inexcusable approach to the applicant's predicament. The respondents' conduct has been repeatedly contemptuous of various court orders.

[19] Therefore, the lackadaisical and cavalier manner in which the respondents conducted this litigation warrants a punitive costs order against them. They dragged out the litigation unnecessarily and without justifiable cause to the detriment of the appellant. They did nothing, since May 2021, to resolve the disputes until the appellant launched

[7] 2019 (6) 253 (CC) at para [152]

the contempt application. This must be frowned upon by this Court in line with what was said by Cameron J in *Merafong supra.*

[20] The applicant conducts a business in the hospitality industry, and it make a contribution to the economy of the country. The food hospitality industry relies on uninterrupted electricity to ensure their product maintains up to standard. Sustaining constant refrigeration of food produce is crucial, and unlawful termination of electricity supply compromises this, which could result in losses from having to dispose of food and increasing the risk of contamination. Furthermore, such businesses lose clientele, because of not being able to provide guaranteed services during functions and or conferences. Companies, as the applicant, are forced to explore alternative methods to sustain their businesses. All this could be prevented if the respondents' actively and expeditiously participate in disputes that arise similar to the dispute in the present matter. It is unacceptable that a dispute of this nature dragged on for two years.

[21] As already indicated costs have been awarded on a punitive scale against the respondents in this matter. The conduct of the respondents, in particular, has demonstrated the necessity for such an order. The respondents displayed a complete disdain for the applicant in the way they treated the applicant. The respondents have been dismissive of the applicants' pleas for the matter to be dealt with expeditiously since May 2021, two years ago. The principal contributors to the unnecessary prolonging of this dispute and processes after May 2021 are the respondents. This has not only diverted judicial resources, but also caused undue expense to be incurred and effort to be expended by the applicant.

[22] In so far as the punitive costs were concerned, I am of the view that, it unnecessary for the applicant's application to have been met with any opposition, as I find that such opposition was simply an abuse of process and misguided. In fact, on the morning of the hearing the parties reached an agreement and an order was granted to that effect. On that basis alone a cost order on attorney and client scale was justifiable.[8]

[8] *Minister of Police v Sheriff, Mthatha and Another*2022 (1) SA 229 (ECM)

[23] In *Minister of Police v Sheriff, Mthatha and Another*[9] reiterated the test regarding punitive cost orders as follows:

> "[57] The following remarks relating to an award of punitive costs on an attorney and client scale in *Public Protector*[10] are helpful:
>
> "[221]. . . An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.
>
> [222] The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.
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> [223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.[11] Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court."[12]

[24] For all the above reasons a punitive order of costs against the respondents was warranted in this matter.

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[9] 2022 (1) SA 229 (ECM) para [57}.
[10] *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) 2019 (6) SA 253 (CC), at para 220.
[11] *Orr v Solomon* 1907 TS 281
[12] Also see Plastic Converters Association of South Africa on behalf of Members v National Union of Metalworkers of SA (2016) 37 ILJ 2815 (LAC) ([2016] ZALAC (39), where the Labour Appeal Court held, in the context of non-constitutional matters, that —

> "(t)he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible conduct. Such an award is exertional and is intended to be very punitive and indicative of extreme opprobrium."

CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 7 July 2023.

DATE OF HEARING: **16 May 2023**

DATE JUDGMENT DELIVERED: **7 July 2023**

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