



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case number: 6192/2023

In the matter between:

DEMOCRATIC ALLIANCE

APPLICANT

and

**THE ACTING MUNICIPAL MANAGER OF THE
METSIMAHOLO LOCAL MUNICIPALITY
FUSI JOHN MOTLOUNG
HELGARDT MULLER N.O.
EHEILA MARTINA HENDRIKA MULLER N.O.
HELGARDT MULLER N.O.
CHANTE GAIL COETZEE N.O.
CORRIE PLOOS VAN AMSTEL N.O.
EXECUTIVE MAYOR OF THE METSIMAHOLO
LOCAL MUNICIPALITY
COUNCIL OF THE METSIMAHOLO LOCAL
MUNICIPALITY
THE SPEAKER OF THE COUNCIL OF THE
METSIMAHOLO LOCAL MUNICIPALITY
THE METSIMAHOLO LOCAL MUNICIPALITY
LUCAS FISHER**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT

EIGHTH RESPONDENT

NINTH RESPONDENT

TENTH RESPONDENT
ELEVENTH RESPONDENT
TWELFTH RESPONDENT**

Coram: Loubser J

Heard: 6 February 2025

Delivered: 22 May 2025

Summary: Civil contempt proceedings – Court orders not complied with – Whether non-compliance was willful and *mala fide*.

ORDER

1. The application for an order declaring the First and the Eleventh Respondents in contempt of this Court's orders dated 21 December 2023 and 15 February 2024 under case number 6192/2023, is dismissed.
2. The First and the Eleventh Respondents are to pay the Applicant's costs in the application against them jointly and severally on the party and party scale up to 14 May 2024, including the costs occasioned by the employment of two counsel on Scale C.
3. The application for an order declaring the Third, Fourth, Fifth and Sixth Respondents in contempt of this Court's orders dated 21 December 2023 and 15 February 2024 under case number 6192/2023, is dismissed.
4. The Third, Fourth, Fifth and Sixth Respondents are to pay the Applicant's costs in the application against them jointly and severally on the party and party scale up to 6th February 2025, including the costs occasioned by the employment of two counsel on Scale C.

JUDGMENT

Loubser J

[1] In this application the Applicant moves for declaratory orders to the effect that the First and Eleventh Respondents (hereinafter referred to as the Municipality Respondents) and the Third, Fourth, Fifth and Sixth Respondents (hereinafter referred to as the Trust Respondents) are in contempt of court in that they have disobeyed the interim orders made by this Court on 21 December 2023. The Trust Respondents are the trustees of the Lizelle Sake Trust.

[2] In addition, the Applicant seeks a sentence of 15 months imprisonment to be

imposed on the two sets of Respondents, alternatively a sentence of 15 months imprisonment unless they demonstrate within seven days that they have paid back the monies they have received and that they would now abide by the court order in question. On top of it all, the Applicant seeks a fine of R50 000.00 to be given to the Second Respondent and the Trust Respondents each for their contempt of the Court order.

[3] The events leading up to the present application can briefly be summarized as follows: During 2013 the Municipality concerned, and the Trust, entered into a services agreement for the provision and installation of engineering services pertaining to water and sewer systems. In terms of the agreement, the installation of the systems would take place on land owned by the Trust. The agreement further provided that the Municipality would not be liable for the costs of the design, installation and provision of the systems. It was envisaged that the land would later become a township. However, a dispute arose two years later between the parties concerning the implementation of the services agreement. In terms of the arbitration clause in the agreement the dispute went to arbitration and the Trust delivered a statement of eight claims totaling roughly R138.5 million. Claim 1 was for an amount of approximately R42 million plus 10% interest plus costs of suit.

[4] At the time, the Municipality was advised by its attorneys that, in terms of the agreement, the Municipality was not indebted to the Trust in any form or fashion, and that it was not liable to pay any of the claims. Ignoring this advice, the Municipality proceeded to enter into a partial settlement agreement with the Trust on 7 July 2023, in terms of which the Municipality would pay the Trust R27.8 million in respect of claim 1. This partial settlement agreement prompted the Applicant to launch an urgent application in this Division to obtain interim relief pending future review proceedings to have the partial settlement agreement reviewed and set aside. The matter came before Reinders, J who made an order on 28 July 2023 to the effect that, pending the review, the Municipality and its officials are prohibited from making any payments to the Trust in respect of the partial settlement agreement, and that the agreement is suspended.

[5] By the end of the year, the Applicant came back to court alleging that the Municipality and the Trust had taken a number of steps to circumvent the order of Reinders, J and that they had made themselves guilty of contempt of court in the process. According to the Applicant, these steps consisted of the following: The Municipality and the Trust terminated the partial settlement agreement and informed the Arbitrator accordingly. The Trust then filed an application for summary judgment in respect of

claim1, which application the Municipality did not oppose by way of an answering affidavit. Summary judgment was then entered by the Arbitrator against the Municipality in respect of claim 1 on 13 October 2023. According to the Applicant, the Municipality's total liability under the arbitration award amount to some R100 million.

[6] It did not end there. After the arbitration award, the Municipality and the Trust entered into a new settlement agreement in terms of which the Municipality would pay the Trust R43.2 million by the payment of R5 million per month. The terms of the new agreement did not differ much from the arbitration award, but the rate of interest was now higher.

[7] The further application launched by the Applicant in these respects came before this Court. The Applicant sought certain interdictory relief pending the adjudication of a future review application in which certain declaratory relief will be sought. The declaratory relief in the review application is aimed at finding the Trust and the Municipality guilty of contempt of court for circumventing the orders of Reinders, J and to have the decision to waive the partial settlement, the arbitration award and the new settlement agreement reviewed and set aside. The Applicant will also seek an order on review that the Trust return to the Municipality all the payments it had already received pursuant to the impugned decisions.

[8] On 21 December 2023 this Court made certain specific orders after finding that the Applicant has shown a *prima facie* right for the interdictory relief sought, having regard to the prospects of success it has in the review proceedings. The orders were all made pending the final adjudication of the review application. Firstly, the Court interdicted the Municipality Respondents and the Trust Respondents from taking any steps to implement the decision to terminate or waive the partial settlement agreement, the arbitration award dated 13 October 2023, the decision of the Council of the Municipality to approve a new settlement agreement with the Trust, and the new settlement agreement itself. In addition, the Court suspended the abovementioned waiver decision, the arbitration award, the approval decision and the new settlement agreement. Lastly, the trustees of the Trust were directed to return within seven days the full quantum received by the Trust pursuant to the partial settlement agreement, the waiver decision, the arbitration award, the approval decision or the new settlement agreement.

[9] In the present application, it is these orders the Applicant alleges have not been obeyed by the First and Second Respondents, as well as the trustees of the Trust. It is alleged that subsequent to the handing down of the orders, the Municipality continued to pay the Trust a total amount of some R22 million up to 22 March 2024. Thereafter the Municipality stopped the payments. It is alleged that the Trust continued to receive the payments from the Municipality after the Court order, and that it had failed to pay back the monies received within 7 days of the Court order.

[10] It needs mentioning that after the handing down of the orders, the Municipality, its functionaries and the trustees of the Trust made application for leave to appeal against the orders made by the Court. This Court dismissed the application, and the said Respondents then petitioned the Supreme Court of Appeal for leave to appeal. This petition was also dismissed by the Supreme Court of Appeal.

[11] In their answering affidavit in the present application the Municipality Respondents emphasized that they acted upon legal advice by their lawyers when they made the payments to the Trust. After they instructed new lawyers, they stopped all payments to the Trust. They were therefore not *mala fide* or willful when they made payments to the Trust. They accepted the advice of their erstwhile legal representatives that their application for leave to appeal suspended the orders handed down by this Court.

[12] The Municipality Respondents further alleged that the systems were installed by the Trust on land belonging to the Municipality, and that the Municipality therefore benefitted from those installations. This new allegation is in stark contrast to the view adopted by the Applicant so far, namely that the installations took place on land belonging to the Trust itself. Should it be shown in the review proceedings that the Municipality indeed owned the land where the pipelines were installed, it would perhaps raise the question whether the Municipality was not in any event liable to pay the Trust for such installations.

[13] It is also pointed out by the Municipal Respondents that they have made the last payment to the Trust in March 2024 and that no more payments will be made.

[14] The Applicant filed a replying affidavit to this answering affidavit on 16 July 2024, insisting that the payments made to the Trust were made *mala fide* and willfully. The

Applicant pointed out that it had warned the Municipality on numerous occasions that the application for leave to appeal in both this Court and the Supreme Court of Appeal did not suspend the Court order on 21 December 2023. However, at the hearing of the contempt application, counsel appearing for the Applicant informed the Court that the proceedings are not aimed at the Municipality Respondents any longer because they have aligned themselves now with the Court's orders, and in addition, they had made the payments to the Trust upon legal advice by their erstwhile attorneys.

[15] Consequently, the application against the Municipality Respondents stands to be dismissed. As for costs, I am of the view that it would be fair in the circumstances to order the Municipality Respondents to pay the Applicant's costs up to the 14th of May 2024, when the Respondents filed their answering affidavit, on the party and party scale. Such costs should include the costs occasioned by the employment of two counsel and their fees on scale C.

[16] In their answering affidavit, the trustees of the Trust also state that the water and sewerage lines were not installed on the land of the Trust, but on Municipal land. The Municipality must therefore pay them for the systems installed. Subsequent disputes between the Trust and the Municipality including several rounds of litigation between them brought the Trust to the brink of bankruptcy, they say. Furthermore, they expressed the view at the time that their petition to the Supreme Court of Appeal would succeed and the order of this Court dated 21 December 2023 would be set aside. At the same time, they shared the view of the Municipality that their applications for leave to appeal had suspended the orders of this Court automatically, with the result that they were not obliged to obey the orders of the Court.

[17] At this juncture reference needs to be made to the provisions of Section 18(2) of the Superior Courts Act 10 of 2013 which provides as follows: ". . . the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal." Both the Trustee Respondents and the Municipality Respondents were therefore patently wrong in assuming that the orders of this Court were suspended and that they did not need to comply with it. Nevertheless, the Trustees maintain that they were *bona fide* in their belief, because the order that they must pay back the payments they have received, constituted

final relief. In this respect they are also wrong, because the Court pertinently made that order also pending the outcome of the review proceedings.

[18] Be it as it may, a supplementary affidavit was handed in at the hearing of the application on behalf of the Trustees with permission of the Court. In this affidavit the Trustees state for the first time that they acted on legal advice at all times when they received the payments from the Municipality, and therefore they did not act *mala fide*. In addition, they are not in contempt for not paying back the money received, because they are financially unable to do so and First National Bank had declined them a loan to pay back the money in compliance with the Court order. The Trustees also stated that they would not accept any further payments until the review application is finalized.

[19] Now in contempt proceedings of the present kind, an applicant is required to establish four requirements, namely an order that was granted, that the alleged contemnor knew of it, that he has failed to comply with the order and that he has done so willfully and with *mala fides*. When the first three elements have been established, *mala fides* and willfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence.¹

[20] It is clear from the application papers before me that the Trust Respondents were well aware of this Court's order dated 21 December 2023, and that they have not complied with the order. The only question before the Court is consequently whether they have established a reasonable doubt when it comes to the question whether they were willful and *mala fide*.

[21] In argument the Applicant made much of the fact that the Trust Respondents mentioned legal advice for the first time in their supplementary affidavit, while the Municipality Respondents have mentioned right from the beginning that they had acted on legal advice when they made the payments. However, a letter by the attorneys of the trust to the Applicant's attorneys dated 20 February 2024 shows that the Trust Respondents believed that they had received the payments lawfully, because they have installed pipelines on the land of the Municipality and the payments made were in respect of those pipelines. This letter at least shows that at a very early stage, and at the time

¹ *Pheko v Ekurhuleni Metropolitan Municipality* [2015] ZACC 10; 2015 (5) SA 600 para 36

that the Trust were receiving payments from the Municipality, the Trust was assisted by a firm of attorneys. There is no indication in this letter that the Trust was advised not to receive any payments from the Municipality. On the contrary it was stated by the attorney that the order of this Court showed elements of finality and was therefore appealable. The filing of applications for leave to appeal would consequently suspend the orders of the Court. On the date of this letter, the petition to the SCA for leave to appeal was still in the making.

[22] The papers filed by the Trust Respondents show, firstly, the new allegation that pipelines were installed on land owned by the Municipality, and that the Municipality were consequently indebted to the Trust in huge amounts. That is where the payments came from, they say. Secondly, their papers show that their position does not differ much from the position of the Municipality when the role played by legal advice comes into focus. To put it differently, it cannot be said that the Trust acted entirely on its own when it continued to receive and accept the moneys paid by the Municipality. Their own attorneys were at their side at the time, and more importantly, they believed that their application for leave to appeal had suspended the orders of this Court. Most probably, they also found support for their belief in the conduct of the Municipality in paying them.

[23] As for the failure of the Trust to pay back the R22 million received from the Municipality: The Trust Respondents say they are not financially able to pay back, and they were unsuccessful in obtaining a loan from a bank for such a purpose. Can this be called *mala fide* conduct? I think not.

[24] In the premises, I come to the conclusion that the Trust Respondents have presented sufficient evidence to create a reasonable doubt whether they were acting willfully and with *mala fides* when they failed to comply with the Court order of 21 December 2023.

[25] As for costs, I am of the view that the Applicant had reason to approach the Court with the application against the Trust Respondents. Thereafter it was up to the Trust Respondents to create a reasonable doubt as to their willfulness and *mala fides*, which they managed to do. In the circumstances, the Trust Respondents should pay the Applicant's costs up to the 6th February 2025, when they filed their supplementary affidavit during the hearing of the application.

[26] The following orders are made:

1. The application for an order declaring the First and the Eleventh Respondents in contempt of this Court's orders dated 21 December 2023 and 15 February 2024 under case number 6192/2023, is dismissed.
2. The First and the Eleventh Respondents are to pay the Applicant's costs in the application against them jointly and severally on the party and party scale up to 14 May 2024, including the costs occasioned by the employment of two counsel on Scale C.
3. The application for an order declaring the Third, Fourth, Fifth and Sixth Respondents in contempt of this Court's orders dated 21 December 2023 and 15 February 2024 under case number 6192/2023, is dismissed.
4. The Third, Fourth, Fifth and Sixth Respondents are to pay the Applicant's costs in the application against them jointly and severally on the party and party scale up to 6th February 2025, including the costs occasioned by the employment of two counsel on Scale C.


LOUBSER J

Appearances

For the Applicant:

Adv. A Stein SC, with him

Adv. D Sive

Instructed by:

Minde Schapiro & Smith Inc,
Bellville

c/o Symington and De Kok,
Bloemfontein

For the 1st, 2nd, 8th, 9th, 10th and 11th Respondents:

Adv. S. J. Van Rensburg SC with
him Adv. M Nduli

Instructed by:

Ntleru Inc Attorneys, Pretoria
c/o Amade & Company Inc,
Bloemfontein

For the 3rd, 4th, 5th and 6th Respondents:

Adv. N. Snellenburg SC

Instructed by:

Vuyani Phenduka & Associates Inc,
Rivonia
c/o EG Cooper Majiedt Inc,
Bloemfontein