REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 11860/2013

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

13/11/2013

In the matter between:

New Modder Developments (Pty) Limited Applicant

and

Ekurhuleni Metropolitan Municipality Respondent

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The Applicant, New Modder Developments (Pty) Limited is the owner of Wadeville Extension 43 Township, an industrial township with twenty one erven ("the property") that is situated within the jurisdictional area of the Ekurhuleni Metropolitan Municipality ("the Respondent").The Applicant seeks

an order declaring the Respondent in contempt of court for its purported failure to comply with an interim court order dated 19 August 2011[1] ("the interim order"), and that it be sentenced to a payment of a fine in the amount of R100 000 or such other amount that the court determines as a penalty for the contempt, alternatively that the sentence of payment of the fine of R100 000 be suspended on condition that the Respondent complies with the interim order. Coupled to the relief sought in this prayer, the Applicant seeks an order declaring that compliance with the interim order "is" that the Respondent supplies to each of the individual erven comprising Wadeville Extension 43, the respective capacities of electricity in the specific KVa allocations as set out in schedule A to the notice of motion.

[2] On 12 April 2011, the Applicant brought an application, under case number 34569/2011, in which it sought an order directing the Respondent to reconnect certain electricity supply cables, from its main substation to the Applicant's two mini substations outside the boundary of the property, which the Respondent had disconnected. The Respondent opposed the application. On 24 August 2011, the Court granted the interim order, pending an action to be instituted by the Applicant against the Respondent. The interim order provides in relevant part as follows:

"1 Pending the final determination of action proceedings ("the action") to be instituted by the Applicant against the Respondent within one month after date of this order for an order declaring that the Respondent is obliged, at its costs and without any contribution thereto by the Applicant, to construct, install and provide the external electrical services to Wadeville Extension 43 Township (situate at Portion 126 [a portion of portion 4] of the Farm Roodekop No 139, Registration Division IR) ("the property") and that the Respondent is obliged to activate and maintain the supply of 1880 KVa electricity to the property.

1.1 the Respondent is ordered, with effect from the date of this order, to reconnect or connect electricity supply cables, connecting the Respondent's main substation at corner Kreupelhout St. and Commercial

[1] The order is dated 19 August 2011, but it was made by Lamont J on 24 August 2011.

Road Wadeville, and to activate and maintain the supply of 1880 KVa electricity to the mini substation and to the property.

1.2 the Respondent is interdicted from withholding or disconnecting such supply of electricity to the property;

1.3 ...."

[3] The action to be instituted in terms of the interim order has been instituted and is part heard before Coppin J. The Respondent has complied with the first part of clause 1 of the interim order, which requires the Respondent, pending the outcome of an action, to "construct, install and provide the external electrical services" to the property. It has also complied with the first part of clause 1.1 of the interim order which requires it "to reconnect or connect electricity supply cables, connecting the Respondent's main substation at corner Kreupelhout St. and Commercial Road Wadeville to the Applicants two mini substations just outside the boundary of the property. The Respondent, however, purportedly refuses or has failed to comply with the second part of clauses 1 and 1.1 of the order, respectively, in terms of which it is ordered to "activate and maintain the supply of 1880 KVa electricity to the mini substations and to the property".

Contempt of Court

[4] The essence of the Applicant's argument is that the Respondent is in contempt of the interim order, which is a valid order of this Court and which, whether correctly or incorrectly granted, must be obeyed until properly set aside[2]. The Respondent denies that it is in contempt of the interim order arguing that its obligation was only limited to reconnecting the cables which it has done.

[5] To succeed in an application to hold the Respondent in contempt of court, the Applicant must allege and prove that the order of the court came to

[2] *Culverwell v Beira* 1992 (4) SA 490 (W) at 494 A-C.

the attention of the Respondent, and that the Respondent failed to comply with the order of court.[3] Once the applicant establishes that there has been non-compliance with the court order, the Respondent must provide evidence to raise a reasonable doubt as to whether non-compliance was wilful and *mala fide*. The onus, which is upon the Respondent, is an evidentiary burden. The Respondent no longer bears a legal burden, as in the past, to disprove wilfulness and *mala fides* on a balance of probabilities.[4]

[6] The object of contempt proceedings is to impose a penalty to vindicate the court's honour consequent upon the disregard of its order and/or to compel performance in accordance with the order.[5] Our courts have held that the following will be a complete defence to contempt:

(a) Where a person's failure to comply is due to inability or based upon a mistaken view as to what is required or if he *bona fide* believed that he was not required to comply with the court's order.[6]

(b) Where the respondent misunderstood the true meaning of the judgment, his failure to act thereon would be proof of the absence of wilfulness.[7]

(c) A *bona fide* belief that the court order had seized to operate.[8]

[7] However, before it can be determined whether or not the Respondent is in contempt of the interim order, it must be determined what the order requires of the Respondent. The basic principles applicable to the construction of all documents are applicable to the interpretation of a court

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[3] Herbstein & Van Winsen, *The Civil Practice of the High Courts of South Africa* (5th Ed), at 1103
[4] Herbstein & Van Winsen at 1104; *Faki N.O v CCII Systems (Pty) Limited* 2006 (4) SA 326 (SCA)
[5] *Protea Holdings Limited v Wriwt* 1978 (3) SA 865 (W), at 868B
[6] Turner v Luwellen & Wigginton (1905) 22 SC 153; *Abrahams v Mc Quirk* (1927) WLD 318
[7] *Consolidated Fish Distributors (Pty) Limited v Zive* 1968 (2) SA 517 (C) at 525
[8] *Gold v Gold* 1975 (4) SA 237 (D) at 239; *Macassar CC v Macassar Land Claims Committee* [2005] ALLSA 469 [SCA] at 477

judgment or order[9]. In other words, the meaning has to be ascertained primarily from the language of the judgment or order as construed accord according to the usual rules. If on a reading of the judgment or order, its meaning is clear and unambiguous, no extrinsic facts or evidence are admissible to contradict, vary, qualify or supplement the order, and not even the court that gave the judgement or order can be asked what its intention was in making the order. However, if any uncertainty in meaning emerges, the extrinsic circumstances leading up to the court's grant of the judgment or order may be investigated, and taken into account in order to clarify it.[10] Where the court order records a settlement agreement the principles relating to the interpretation of contracts should also be applied to determine the meaning of the agreement.[11]

[8] The Respondent contends that the interim order, properly interpreted, does not impose an obligation on the Respondent to supply 1180 KVa electricity towards the court. It contends that the direction or mandamus portion of the order, imposed upon the Respondent, was to reconnect the cables to the Applicant's two mini-substations – which it has done. It therefore submits that the Applicant has failed to prove that the Respondent failed to comply with the order, and even if there was non-compliance, the Applicant has failed to prove that such non-compliance was material, and that it comprised and amounted to wilful disobedience of the interim order, alternatively that no (material) non-compliance with the specific terms of the interim order ever occurred, further alternatively that, on the Applicant's own interpretation of the interim order, the order was objectively incapable (or impossible) to comply with, mainly because:

(a) the whole of the development only uses or consumes 100 KVa electricity. The Respondent can only install the electrical capacity and make electricity available to a stand. If the stand does not actually use or consume the electricity, any available current over

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[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603F- 604E
[10] *Firestone SA (Pty) Limited v Genitiruco AG* 1977 (4) SA 298 (A)
[11] *Engelbrecht v Senwes Limited* 2007 (3) SA 29 (SCA) at 32

and above such usage cannot be "supplied" to the stand; as it simply does not flow to the stand;

(b) the Applicant has installed a 300 Amp circuit breaker in the relevant mini substation. This circuit breaker can only cater for a maximum of 207 KVa electricity. It simply is not capable of receiving a supply of 1880 KVa electricity.

[9] The contention thus advanced by the Respondent is that even if it is to be found that there was in fact material non-compliance with the specific terms of the interim order, there is at least reasonable doubt as to whether such (alleged) non-compliance was wilful and/or *mala fide*. The Respondent furthermore contends that to the extent necessary or required, evidence is admissible to clarify the true nature, import and extent of the interim order, in order to ascertain its true meaning and that cognisance should be taken of background circumstances giving rise to the order.

[10] In this regard, the Respondent alleges in its answering affidavit, that the purpose and object for the granting of the interim order was effectively to grant a *mandament van spolie*. The Respondent was ordered to reconnect certain electrical cables to a mini-substation outside the boundary of the development, from where the cables had been disconnected shortly previously. That was the reason for which the interdict by means of an interim order was sought, and granted, and that the obligation to "activate and maintain" the supply of electricity to the property had, as its origin and motivation, the disconnection of the cables by the Respondent. Thus, it contends, that by ordering the Respondent to "activate and maintain" the supply of electricity to the property, the purpose of the interim order was to oblige the Respondent to reconnect the energised cable to the two mini-substations outside the boundary of the development, from which it had previously (prematurely) been disconnected.

[11] The Respondent alleges, in this regard, that the installed capacity to the development (dependent upon the size and load bearing capacity of the

relevant cables) was always in excess of 1 880 KVa and at all times when the interim order was granted, the Respondent had already provided and installed a capacity of 1 880 KVa (and higher) electricity to the development, and the cables just had to be reconnected. However, upon the interim order being made, the Respondent duly reconnected the installed cables to the Applicant's two mini-substations. The cables were then energised, and they have ever since been capable of conducting a capacity of (at least) 1 880 KVa electricity to the said sub-stations, and to property. In doing so, the Respondent contends that it has complied at least to the extent required in the interim order, and to the best of its ability, with the provisions of the interim order. The Respondent accordingly submits that it is not in breach of the interim order, because:

(a) the purported obligation to supply 1 880 KVa electricity does not amount, on an interpretation of the order, to a *mandamus*, and thus a failure to comply therewith does not amount to contempt towards the Court;

(b) to "activate the supply of electricity", in the context of the interim order, would mean to connect the electrical cables to the specific electrical points and to energise the cable, which it had done so, already some two years ago, without any complaint from the Applicant; and

(c) to "maintain the supply of electricity", in the context of the interim order, would mean to ensure that the supply is not disconnected and that there is no power interruption to the electricity point, which the Respondent has done.

[12] I am unable to agree with the contention of the Respondent that the interim order, properly interpreted, does not impose an obligation on the Respondent to supply 1880 KVa electricity towards the Court, as it is clear from a reading of the interim order that it unambiguously requires the Respondent to ". . . activate and maintain the supply of 1880 KVa electricity…to the property". The direction or mandamus portion of the order in paragraph 1.1 of the order – characterised by the words "the respondent is

ordered" – obliges the Respondent with effect from date of the order[12], to "reconnect or connect electricity supply cables" to the mini substations outside the property as well as "to activate and maintain the supply of 1880 KVa electricity to the two mini substations and to the property.

[13] The use of the words "activate and maintain the supply of 1880 KVa" in the clauses 1 and 1.1 of the interim order presupposes that 1880 KVa electricity was supplied to the property prior to the disconnection of the electricity supply cables by the Respondent. The interim order therefore obliges the Respondent to "reconnect the electricity supply cables from the Respondent's main substation ... to the Applicant's mini substations outside the property", and in doing so, also obliges it "to activate and maintain the supply of 1880 KVa electricity to the two mini substations and to the property – being the same amount of electricity that the Respondent had supplied to the property before it disconnected the electricity supply cables. Accordingly, I am of the view that the interim order unambiguously requires the Respondent "to activate and maintain the supply of 1880 KVa electricity...to the property, The court is, therefore, not permitted to have regard to any extrinsic facts or evidence to contradict, vary, or qualify the order.

[14] Turning then to the question of whether the Respondent is in contempt of the order, I am satisfied that the Applicant has proved the existence of the order, and that at all relevant times the Respondent was fully aware of the provisions of the interim order and, in particular, the requirement that the supply of electricity to be activated and maintained in terms of the order is 1 880 KVa. I am also satisfied that the Applicant has proved that the Respondent is in contempt of the interim order for failing to comply with the second part of clauses 1 and 1.1 of the interim order, by refusing to activate and maintain the supply of 1880 KVa electricity to the property. This much is clear from the letters that were sent by the Respondent's attorneys of record to those of the Applicant, dated 25 May 2012 and 25 March 2013, respectively. In the letter of 25 May 2012, the Respondent's attorneys state

[12] The order was made on 24 August 2011.

that:

"Your request to provide supplies to stands until 1880 kVa has been noted but cannot be supported…
As such we are prepared to accept the initial capacity per stand and will therefore not be in a position to entertain any application exceeding this."

It is clear from the letter of 25 May 2012, that the Respondent has refused to even consider providing 1880 KVa electricity to the property, despite being fully aware, at all times, of the provisions of the interim order which was made 15 months earlier, on 24 August 2011.

[15] More recently, the letter of 25 March 2013 also demonstrates the Respondent's refusal to activate and maintain the supply of 1880 KVa of electricity as required by the interim order. It states:

"2. We have consulted with our client and our instructions are that it is unable to increase the power supply from 1340 KVa to 1880 KVa as directed by the interim order …"

The reasons stated for the alleged inability of the Respondent to supply 1880 KVa electricity to the property are, inter alia, that the Applicant had applied for 1340 KVa electricity and not 1880KVa. This letter, in my view, simply ignores the level of electricity prescribed by the interim order.

[16] To the extent, therefore, that the Respondent has failed or refuses to activate and maintain the supply of 1880 KVa electricity to the property, as required by the interim order, the Respondent is in contempt of court. The Respondent, however, bears an evidential burden to establish reasonable doubt as to whether non-compliance was wilful and *mala fide*. The essence of the Respondent's contention, in this regard, is that its non-compliance of the interim order is neither wiful nor *mala fide* as the interim order is objectively impossible for to comply with.

[17] The basis of the Respondents contention, on this score, is that to "supply" 1880 KVa electricity technically properly, means that electricity current measuring 1880 KVa has to actually flow to, and be consumed or used by, the recipient of the electrical current. If the development does not actually draw 1880 KVa or any other significant amount of power (which the Applicant's development does not), the Respondent obviously cannot "supply" such capacity. It contends that on the Applicant's interpretation of the interim order, the order is objectively incapable to comply with because:

(a) the development only uses or consumes 100 kVa. Therefore any available current over and above such usage cannot be "supplied" to the stand, as it simply does not flow to the stand.

(b) the 300 Amp circuit breaker installed by the Applicant in the relevant mini-substation can only cater for a maximum of 207 kVa.

Application to set aside the interim order

[18] The Respondent consequently made application to the court, at the hearing of the matter, to set aside the interim order on the grounds that it is objectively incapable to comply with. The application for a discharge of the interim order was foreshadowed in the Respondent's answering affidavit, where it draws attention to the contents of the letter dated 25 March 2013, which recorded that the Respondent's attorneys hold instructions to bring an application for the variation of the interim order on the basis that the figure of 1880 KVa erroneously found its way into the interim order. The Respondent then proceeds to state that "the Respondent applies herewith for the discharge of the interim order, in support of which the contents of [the answering] affidavit will be relied upon". The Respondents use of the words "erroneously found its way into the interim order" in its answering affidavit, indicates that it seeks the discharge of the interim order in terms of rule 42 of the Uniform Rules of Court, which would in the ordinary course require an application. The Respondent has, however, not brought a counter application supported by a founding affidavit. In my view, not only is this highly irregular,

but it also prejudices the Applicant because there is no founding affidavit which sets out what evidence the Respondent relies upon,[13]/[14] and which the Applicant could answer to, without the limitations of a replying affidavit[15]. Furthermore, in the event of a dispute of fact in motion proceedings, a respondent's version is accepted in preference to the version of an applicant[16]. This rule also applies to a counter-application against the applicant in reconvention[17]. The Respondent cannot, by avoiding the status of an application in reconvention, enjoy the advantages of a respondent and avoid the disadvantages of an applicant in reconvention in respect of disputed facts.

[19] In addition, an application to correct an erroneous judgment or order must be brought within a reasonable time[18]. The Respondent's purported application for a discharge of the interim order does not meet this requirement, as during the period of approximately 1 ½ years after the granting of the interim order on 24 August 2011, until delivery of the answering affidavit on or after 24 May 2013, the Respondent was fully aware of all the terms of the interim order. It did not comply with it or unequivocally undertake to do so, nor did it take any steps to vary the interim order, despite its attorneys' letter of 25 March 2013, which recorded that they held instructions to bring an application for the variation of the interim order on the basis that the figure of 1880 KVa erroneously found its way into the interim order. No such application was brought. There is also no explanation for the delay. Accordingly, the application for the discharge of the interim order is irregular and falls to be dismissed.

[20] The interim order determined the parties' rights pending the outcome of

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[13] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 322 F-324G
[14] *Minister of Land Affairs & Agriculture v D & f Wevell Trust* 2008 (2) SA 184 (SCA) at 200C-E
[15] *Minister of Environmental Affairs & Tourism v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs & Tourism v Bato Star Fishing* (Pty) Ltd 2003 (6) SA 407 (SCA)
[16] *NDPP v Zuma* 2009 (2) SA 277 (SCA) per Harms DP.
[17] *Iuster Products Inc v Magic Style Sales* CC 1997 (3) SA 13 (A) at 21E
[18] *First National Bank of Southern Africa Ltd v Van Rensburg NO and Others: In re First National Bank of Southern Africa Ltd v Jurgens and others* 1994 (1) SA 677 (T) from 681B

the action, which is part-heard before Coppin J. Until finalisation of the action, it is the judicially determined law between the parties[19] and is binding upon each of them. Thus until properly set aside, the interim order stands and must be complied with. The Respondent has, however, failed or refuses to comply with the interim order and is in contempt thereof, but has failed to discharge its evidential burden to raise a reasonable doubt that its non-compliance with the interim order was wilful and *mala fide*. Accordingly, the Respondent is in contempt of the interim order.

Relief sought in Prayer 4 of the Notice of Motion

[21] The Applicant seeks the following relief in prayer 4 of its notice of motion:

"It is declared that compliance with the said order dated 19 August 2011 is that the Respondent supplies electricity to the individual erven comprising Wadeville Ext 43 as is set out in the schedule annexed to the notice of motion as **A.**"

[22] The Applicant's calculations of the distribution of 1880 KvA electricity among the 21 erven on the property is as set out in annexure "A" to the notice of motion. The Respondent's calculation appears from annexure "AA23" to the answering affidavit. During argument, the Applicant submitted that it did not require the court to choose between the two calculations in the application, as it accepts the distribution as set out in the columns under the heading "[i]ncreased to 1880KvA" in annexure "AA23" of the Respondents answering affidavit. In view of this concession, the Applicant sought an amendment to prayer 4 of the notice of motion to provide as follows:

"It is declared that compliance with the said order dates 24 August 2011 is that the respondent supplies electricity to the individual erven comprising Wadeville Ext 43 as is set out in the columns under the heading "[i]ncreased to 1880 KvA" in annexure "AAA23 hereto".

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[19] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1992 (2) SA 489 (A) 498A fflg.

[23] In essence, what the Applicant requests of the court in prayer 4 of its notice of motion (as it currently stands) is to interpret the interim order and declare that compliance with the interim order is that the Respondent supplies, to each of the individual erven comprising the development (further to what is already being supplied to the development itself), the respective capacities of electricity in the specific KVa allocations, as set out in schedule A to the notice of motion. In my view, the relief sought by the Applicant in prayer 4 of the notice of motion is totally distinct and separate from the relief sought and granted in the interim order, and is eminently more far reaching than the terms of the interim order. The Applicant effectively seeks a re-allocation of the electricity previously allocated to each of the separate erven within the development. The declaratory order sought by the Applicant to interpret what the nature, form and extent of compliance is to mean in the interim order – is actually a further interdict sought – this without any grounds being shown for such re-allocation. Thus what the Applicant in reality wishes to achieve, under the guise of contempt, is a re-allocation of the internal distribution of electricity amongst the various stands in the development. Thus, as contended for by the Respondent, the Applicant seeks to procure a new and *pro rata* distribution of electricity amongst the various stands, in order to favour the current purchaser of one of the Applicant's stands who has an evidently substantial need for additional capacity. For these reasons, I am of the view that the relief sought in prayer 4 of the notice of motion constitutes additional and further relief not envisaged in the interim order, and the Applicant is accordingly not entitled to such relief. In view of this finding, I see no need to consider the Applicant's application to amend prayer 4 of the notice of motion in the terms referred to above.

[24] In the result, I make the following order:

(1) The Respondent is in contempt of the interim order dated 19 August 2011 ("the interim order").

(2) The Respondent is sentenced to the payment of a fine in the amount of R50 000 as a penalty for being in contempt of the interim order,

such sentence is suspended on condition that the Respondent complies with the interim order within 14 days from date of this order.

(3) The relief sought by the Applicant in prayer 4 of the notice of motion is dismissed.

(4) The Respondent's application for a discharge of the interim order is dismissed.

(5) The Respondent is ordered to pay the costs of the application.

F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

Counsel for the Applicant:	JP Coetzee
Instructed by:	Kokinis Incorporated
Counsel for the Respondent:	S J Bekker SC and F J Nalane
Instructed by:	Nkosi Nkosana Inc
Date of Judgment:	13 November 2013