IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: 2021/40484

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

Signed: ..... Date: 14 March 2023

In the matter between:

K2012150042 (SOUTH AFRICA) (PTY) LTD Applicant
(Registration No.: 2012/150042/07)

and

UNKNOWN UNLAWFUL OCCUPIERS OF ERF 74, ELECTRON TOWNSHIP First Respondent

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

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REASONS FOR ORDER OF 8 FEBRUARY 2023

These reasons are handed down electronically by circulation to the parties by e-mail and by uploading to Caselines.

MOULTRIE AJ

Introduction and the order of 8 February 2023

[1] In this matter, the applicant seeks the eviction from its property located in Electron, Johannesburg of a large number of unlawful occupiers who have been identified in the proceedings thus far as 'the first respondent'. The City of Johannesburg is cited as the second respondent.

[2] On 8 February 2023, having heard counsel for the applicant and the City, as well as the occupiers in person (represented by Mr Mahlangu) at a virtual hearing on 19 January 2023, and having considered the matter, I formed the view that I did not have sufficient information before me on the question of whether it would be just and equitable in all the relevant circumstances to grant the eviction or not. I granted the order annexed hereto marked "A".

[3] On 6 March 2023, the City delivered an application for leave to appeal against that portion of my order declaring it to be in contempt of the earlier order issued in the matter by Rajab-Budlender AJ on 1 December 2021 (referred to as "*the compelling order*"). The City also delivered a request for written reasons. These are those reasons.

The relevant facts

[4] The compelling order reads as follows:

> *2. The Second Respondent is to provide a list of names and other details of the First Respondent who shall require emergency and/or alternative accommodation upon granting of an eviction order within 20 (twenty) calendar days of the service of this order on the Second Respondent.*
>
> *3. The Second Respondent is to file a comprehensive report regarding the availability of alternative and/or emergency accommodation in terms of Section 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1996 within 60 (sixty) calendar days of the*

service of this order on the Second Respondent.

4. The Second Respondent's report is to contain the following: -

4.1 The Second Respondent's information on the Applicant's property;

4.2 The Second Respondent's information on the First Respondent:

4.3 Whether an eviction order is likely to result in all or any of the occupiers becoming homeless;

4.4 If so, the steps that the Second Respondent proposes to alleviate the possible homelessness;

4.5 Implications for the owners of delaying the eviction; and

4.6 The Second Respondent's engagement with the First Respondent

5. The Second Respondent's report be supported by substantiating documents reflecting the Second Respondents findings in relation to the report.

[5] Despite the fact that the compelling order was served on the City, it initially failed to deliver any report at all for over ten months. On 5 September 2022, the applicant sought and obtained an order declaring the City to be in contempt of the compelling order and imposing a fine of R200,000, the payment of which was suspended upon condition that the City and/or certain of its officials complied with it within 20 days.

[6] Shortly thereafter, the City delivered a report in purported compliance with the compelling order.

[7] Having received the report, the occupiers delivered a supplementary affidavit on 29 September 2022 describing it as "*inadequate*" and alleging *inter alia* that:

(a) the report had failed to address the issue of alternative accommodation for the occupiers that might be rendered homeless by an eviction;

(b) "*the City has ignored its obligations*"; and

(c) the City had failed to comply with the compelling order.

[8] The applicant also delivered a supplementary affidavit on 5 December 2022, in which it *inter alia*:

(a) alleged that the report does not comply with the compelling order in

various respects;

(b) noted that this non-compliance had been raised in correspondence addressed to the City's attorneys on 20 September 2022 to no effect;

(c) observed that the City's failure to comply with the order had also been raised in the occupiers' supplementary affidavit; and

(d) contended that "*in the event that this Court is inclined to grant the Municipality further time in which to find and secure alternative accommodation for the unlawful occupiers, it is submitted that the Municipality is to account to this Court at the hearing of this matter fully in respect of all of its efforts that have been made since the filing of the … report …*".

[9] Approximately one month prior to the hearing, the parties delivered a joint practice note[1] indicating *inter alia* that:

(a) the issues for determination by me included "*whether the Second Respondent's report is adequate and complies with the compelling order*" and "*whether the Second Respondent's request for 12 months from the date of the filing of its report to find and secure alternative accommodation is justifiable and reasonable in the circumstances*";

(b) "*[t]he Applicant contends that the Second Respondent's report is inadequate and does not comply with the compelling order*"; and

(c) "*[t]he Second Respondent intends on filing a supplementary … report and shall endeavour to do so before the allocated hearing date. Should the Second Respondent be unable to file the report timeously, the Applicant shall be notified in advance. The supplementary report shall contain the requisite information omitted from the initial report. … The Second Respondent submits that it may also deliver a further affidavit setting out inter alia the steps it has taken in securing*

[1] Although the document indicated that it had "*been filed in the absence of the respondents' agreement with the contents*", I was advised at the commencement of the hearing that the practice note did in fact contain the input and accurately reflect the position of all parties.

> *emergency/alternative accommodation for the unlawful occupiers. … The Second Respondent welcomes any further directives the Court may impose*."

[10] The City's counsel confirmed at the commencement of the hearing before me on 19 January 2023 that it did not object to the delivery of the supplementary affidavits. Despite the applicant's demand that the City "*account to*" the Court at the hearing, however, it has not delivered any affidavits contesting the allegations in the supplementary affidavits.

[11] The City has also not sought to suggest that the report was compliant with the compelling order. Indeed, the City's counsel rightly conceded at the hearing that the report is deficient in a number of respects. In particular, he conceded that only paragraph 4.3 of the compelling order has been fully complied with in the report, and that the City remains in breach thereof. When I enquired why no attempt had been made to explain this non-compliance (for example in the affidavits contemplated in the joint practice note) and indicated that I was minded to declare that the City remains in contempt, he informed me that there had been "*a bottleneck in obtaining instructions*" and proposed that the City be given an opportunity to deliver a compliant report.

[12] Before reserving judgment, I requested both the applicant and the second respondent to furnish draft orders in the event that I was not minded to grant the eviction order sought by applicant. The applicant's proposed draft order delivered on 22 January 2023, proposed orders declaring the City and certain of its officials to be in contempt of the compelling order and requiring the City to deliver an affidavit within twenty court days setting out reasons why the court should not impose a period of imprisonment on the officials. The City's draft order did not include similar orders.

<u>The law on declarations of contempt of court</u>

[13] In *Pheko II*, Nkabinde J observed on behalf of the Constitutional Court that …

> *… (t)he rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the*

> *Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.*
> *Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.*[2]

[14] In order for a party to be found to be in contempt, it must be established that (a) an order was granted against it; (b) it was served with the order or had knowledge of it; and (c) it failed to comply with the order.

[15] Once these elements are established, wilfulness and *mala fides* are presumed, and the alleged contemnor bears an evidentiary burden to either establish a reasonable doubt or establish on a balance of probabilities that its non-compliance was not wilful or *mala fide*. Should it fail to discharge this burden, contempt will have been established.[3]

[16] The question of whether the alleged contemnor needs merely to show a reasonable doubt or whether it must go further and prove absence of wilfulness or *mala fides* on a balance of probabilities depends on whether the order imposes a sanction of committal to prison or a fine. In cases where the order in question does not impose a sanction of direct imprisonment or a fine, it is the civil standard of proof that applies:

> *[W]here a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be*

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[2] *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC) (*Pheko II*) paras 1- 2.

[3] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC) para 37.

employed. These include any remedy that would ensure compliance, such as declaratory relief, a mandamus demanding the contemnor behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.[4]

[17] Nkabinde ADCJ summed up the position as follows in *Matjhabeng*:

[T]he standard of proof must be applied in accordance with the purpose sought to be achieved, or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof — beyond reasonable doubt — applies always. A fitting example of this is Fakie*. On the other hand, there are civil contempt remedies — for example, declaratory relief, mandamus or a structural interdict — that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is* Burchell*. Here, and I stress, the civil standard of proof — a balance of probabilities — applies.*[5]

Application of the law to the facts

[18] The order granted by me on 8 February 2023 does not impose a sanction of direct imprisonment or a fine. No such sanction will be imposed unless and until all of the following further events have occurred:

(a) the City fails to comply with paragraph 3 of my order within the required time periods;

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[4] *Pheko II* (above), para 37; *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2018 (1) SA 1 (CC) paras 46 – 67; *Director-General, Dept of Rural Dev & Land Reform v Mwelase* [2018] ZASCA 105; 2019 (2) SA 81 (SCA) para 59 (overturned on appeal, but not on this issue).

[5] *Matjhabeng* (above) para 67, referring to *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) and the full court decision in *Burchell v Burchell* [2005] ZAECHC 35 per Froneman J.

(b) the City has been given a full opportunity, pursuant to paragraph 4 of my order, to show cause why its officials should not be arrested and imprisoned until such time as the City has complied or why a punitive, as opposed to purely coercive, sanction should be imposed (i.e. the city is given a further opportunity to explain its non-compliance with the compelling order and establish a lack of wilfulness or *mala fides*); and

(c) if the court hearing the matter should reach the conclusions that (i) the City has failed to comply; (ii) has also failed to establish a lack of wilfulness or *mala fides*; and (iii) that either imprisonment or a fine is an appropriate sanction.

[19] As such, the issue of contempt in the current matter fell to be considered on the basis of the civil standard of proof.

[20] There can be no question that the compelling order was in existence and that the City was aware of its existence. Indeed, Senyatsi J had already found the City to be in contempt of the order when he granted the first contempt order of 5 September 2022.

[21] Although the City did then deliver a report, it is also common cause that it did not comply with the compelling order. The report does not comply with the compelling order in at least the following respects:

(a) It does not include a complete "*list of names and other details of the [occupiers] who shall require emergency and/or alternative accommodation upon granting of an eviction order*" as required by paragraph 2 and 4.2 of the compelling order: it only identifies some of those people by name and referred obliquely to other unnamed occupiers whose details are not indicated. For example, in paragraph 12.3 only "*SP Sithole*" is identified by name, and the other occupants are referred to as "*other four occupants*", amongst whom are "*the children in the household*". The same applies to a large number of the other households referred to in paragraph 12 of the report.

(b) It contains no information whatsoever on the Applicant's property as

required by paragraph 4.1 of the compelling order.

(c) Although it concludes that all the occupiers would likely need temporary alternative accommodation in the event that they are evicted, it does not (as required by paragraph 4.4 of the compelling order) propose any steps whatsoever to be taken to alleviate their homelessness, and instead proposes that they be afforded a period of twelve months "*to find and secure alternative accommodation*" for themselves.

(d) It does not include any information regarding the implications for the owners of delaying the eviction as required by paragraph 4.5 of the compelling order.

(e) It contains no information regarding the City's engagement with the occupiers as required by paragraph 4.6 of the compelling order.

[22] The remaining question is whether the City's non-compliance with the order was wilful or *mala fide*.

[23] I am of the view that this is the only conclusion to be drawn from the City's own conduct: having recognised in the joint practice note that it would be necessary to deliver a further report which "*shall contain the requisite information omitted from the initial report"*, it failed to do so, leaving the court in the invidious position of being unable to perform its function of determining the eviction application in the light of all the relevant circumstances. What is more, the City failed to furnish its attorneys with instructions to deliver the contemplated *"further affidavit setting out inter alia the steps it has taken in securing emergency/alternative accommodation for the unlawful occupiers"*, in which it might have set out facts "*accounting to this Court*" for its non-compliance and establishing absence of wilfulness or *mala fides*.

[24] All the requirements of contempt were thus established on a balance of probabilities, and the declaration to this effect contained in my order was indicated.

[25] With regard to the punitive costs against the City (paragraph 10), I granted this on the basis that unexplained non-compliance by government officials with court

orders is a serious matter that justifies the award of costs on a punitive basis.[6]

[26] The remaining paragraphs of my order (i.e. other than paragraphs 2, 4 and 10 thereof) were granted so as to ensure that:

(a) the court hearing the eviction application is furnished with the information necessary for it to determine whether an eviction order would be just and equitable in all the relevant circumstances (paragraph 3 of the order);

(b) the respective rights of the applicant and the occupiers are safeguarded in an orderly and peaceful manner pending the final determination of the eviction application (paragraphs 5 to 8 of the order); and

(c) the notice requirements contained in the PIE Act are properly complied with in respect of occupiers of the property who may not be "represented" by the Inner City Federation (paragraph 9 of the order).

[27] The applicant is afforded fifteen days to supplement its grounds of appeal in accordance with Uniform Rule 49(1)(b). The application for leave to appeal will then be set down for hearing in accordance with Rule 49(1)(d) read with Chapter 11 of the Practice Manual and paragraphs 106 – 11 of Directive 2 of 2022.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

[6] *Municipal Manager O.R. Tambo District Municipality v Ndabeni* [2022] ZACC 3; 2022 (10) BCLR 1254 (CC) paras 39 - 44. See also *Paterson NO v Road Accident Fund and Another* 2013 (2) SA 455 (ECP) para 17, in which it was held that and "*it is trite that a party that fails to comply with a court order is visited with a costs order on a punitive scale unless exceptional circumstances exist*".

DATE HEARD:	19 January 2023
ORDER:	8 February 2023
REASONS REQUESTED:	6 March 2023
REASONS:	14 March 2023

APPEARANCES

For the applicant:	V Vergano instructed by F Stockley of Le Roux Vivier Attorneys (011 431 4117; fraser@mlv.co.za)
For the 1st respondent:	In person [some of whom c/o The Inner City Federation (072 407 0997; innercityferderation@gmail.com)]
For the 2nd respondent:	V Qithi instructed by A Mdletshe of Garnet Ngubane & Partners. (010 109 3154; ayanda@garnetinc.co.za)

"A"

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Johannesburg, 8 February 2023
BEFORE THE HONOURABLE ACTING JUDGE MOULTRIE

CASE NO.: 21/40484

In the matter between:

K2012150042 (SOUTH AFRICA) (PTY) LTD
(Registration No.: 2012/150042/07) Applicant

and

UNKNOWN UNLAWFUL OCCUPIERS OF
ERF 74, ELECTRON TOWNSHIP First Respondent

CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY Second Respondent

COURT ORDER

HAVING read the documents filed of record, heard counsel for the applicant and the second respondent, as well as some members of the first respondent in person on 19 January 2023 and having considered the matter:

IT IS ORDERED THAT:

1. The application is postponed *sine die*.

2. It is declared that the second respondent is in contempt of the order of her Ladyship Madam Justice Rajab-Budlender in this matter dated 1 December 2021.

3. The second respondent is directed to purge its contempt by:

3.1. within 14 (fourteen) calendar days of the date of this order, filing an updated list of the names and other details of each and every person occupying Erf 74, Electron ("the property") as of the date of this order.

3.2. within 60 (sixty) calendar days of the date of this order, filing a report containing comprehensive and up-to-date information supported by substantiating documents setting out:

3.2.1. the current availability of alternative and/or emergency accommodation for the persons identified in the list referred to in 3.1 above who shall require emergency and/or alternative accommodation in the event of their eviction from the property;

3.2.2. the information the second respondent has on the property, including particulars regarding the monthly rates and taxes levied and the amount of any arrears owing thereon, as well as any current and historical information that the second respondent may have regarding the zoning, use and occupation of the property;

3.2.3. the information the second respondent has on the persons identified in the list referred to in 3.1 above, including:

3.2.3.1. the dates on which they came to live on the property;

3.2.3.2. details of the informal dwellings that they occupy on the property;

3.2.3.3. its assessment of the personal circumstances of such further persons identified therein who were not

identified in paragraph 12 of the report filed on or about 9 September 2022, and whether such further persons will require emergency and/or alternative accommodation in the event of their eviction from the property.

3.2.4. the steps that the Second Respondent has taken and what steps it proposes to take to address the risk of homelessness for the persons identified in the list referred to in 3.1 above in the event of their eviction, including:

3.2.4.1. the timing of when temporary emergency accommodation may be made available, and the nature and location of the temporary emergency accommodation to be provided; and

3.2.4.2. the reasons why those steps are considered by the second respondent to be reasonably appropriate in the circumstances, particularly in view of the second respondent's financial and other constraints; and

3.2.5. the steps that the second respondent has taken to engage with the persons identified in the list referred to in 3.1 above in order to address the risk of homelessness in the event of their eviction.

4. Should the second respondent fail to purge its contempt as set out in 3 above, the applicant or the first respondent may set the matter down (with or without supplementation of the papers) as a matter of urgency upon notice to the second respondent and the officials identified below, calling upon them to show cause why:

4.1. a writ should not be issued authorizing and directing the officer commanding, Hillbrow Police Station, or such other person as s/he may direct, to immediately arrest the Executive Mayor (or Acting Executive

Mayor) of the second respondent; the Municipal Manager (or Acting Municipal Manager) of the second respondent; and the Executive Director (or Acting Director) of the Human Settlements Department of the second respondent, and to commit them to gaol until such time as the contempt is purged, or for such other period as the court may deem meet, and why a fine should not, in addition or alternatively, be imposed on the second respondent and the said officials in an amount to be determined by the court; and

4.2. the first respondent and/or the said officials in their personal capacities should not be ordered to pay the costs of such further proceedings on the attorney and own client scale.

5. The applicant shall be entitled to forthwith secure the property by erecting a fence around the property at its own cost.

6. With effect from the date upon which the list referred to in 3.1 above is filed by the second respondent, the applicant shall be entitled to prevent any person who is not identified on the said list from taking up occupation and/or erecting any dwelling at the property.

7. The applicants shall be entitled to enlist the services and assistance of the Sheriff of this Court; and/or members of the South African Police Service and/or appoint security companies in order to give effect to the orders in 5 and 6 above.

8. The applicant is directed forthwith to erect and display visible signage at and around the property in both English and isiZulu, containing the following information:

8.1. that the property is subject to a pending eviction application before this Court and under case number 21/40484; and

8.2. that no persons other than those already occupying the property as of 8 February 2023 may take up occupation of the property and/or erect any dwellings on the property.

9. The applicant is to serve a notice in terms of section 4(2) of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 ("the Act") on the occupants of the property at least 21 calendar days prior to the hearing of the eviction application, which notice shall:

9.1. notify the occupants of the property of the date and time of the hearing of the eviction application, and otherwise comport with the content of the notice authorised in paragraph 1 of the order of his Lordship Mr Twala in this matter on 28 October 2021; and

9.2. be served on the occupants of the property:

9.2.1. by service on the Inner City Federation, 6th Floor, Aspen House, 54 De Korte Street, Braamfontein in accordance with the requirements of Rule 4 of the Uniform Rules of Court; and

9.2.2. by service in accordance with paragraphs 2 to 6 of the order of his Lordship Mr Justice Twala in this matter dated 28 October 2021.

10. The second respondent is to pay the costs associated with the hearing on 19 January 2023 on the attorney and client scale.

BY THE COURT

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REGISTRAR

For the applicant:	V Vergano instructed by F Stockley of Le Roux Vivier Attorneys (011 431 4117; fraser@mlv.co.za)
For the 1st respondent:	In person [some of whom c/o The Inner City Federation (072 407 0997; innercityferderation@gmail.com)]
For the 2nd respondent:	V Qithi instructed by A Mdletshe of Garnet Ngubane & Partners. (010 109 3154; ayanda@garnetinc.co.za)