



REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2020 -08- 11
REGTERS KLERK PRETORIA 0001
GRIFFIER VAN DIE NOORD GAUTENG HOE HOF, PRETORIA

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

(1)	REPORTABLE: <i>YES</i> /NO
(2)	OF INTEREST TO OTHER JUDGES: <i>YES</i> /NO
(3)	REVISED.
<i>11/8/20</i> DATE	
<i>[Signature]</i> SIGNATURE	

CASE NO: 15437/2015

In the matter between:

CONCERNED RESIDENTS OF FLAG BOSHIELO WEST
S J BALOYI
K BAPELA
S F PHEFADI
M MOKOMANE
E LETAJENG

First Applicant
Second Applicant
Third Applicant
Fourth Applicant
Fifth Applicant
Sixth Applicant

and

SEKHUKHUNE DISTRICT MUNICIPALITY
EPHRAIM MOGALE LOCAL MUNICIPALITY
**MEC, DEPARTMENT OF WATER AFFAIRS,
LIMPOPO**
MINISTER OF WATER AND SANITATION
MINISTER OF BASIC EDUCATION
MINISTER OF HEALTH
**THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA**
ACTING MUNICIPAL MANAGER: SEKHUKHUNE

First Respondent
Second Respondent

Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

Seventh Respondent
Eighth Respondent

JUDGMENT

D S FOURIE, J:

[1] This is an urgent application in terms whereof the applicants seek orders declaring that the first and eighth respondents failed to comply with the order of Fabricius J dated 17 August 2017, that these respondents are declared to be in contempt of Court and that the eighth respondent be committed to prison for a period to be decided by this Court without the option of a fine.

BACKGROUND:

[2] The main application in this matter concerns the applicants' rights of access to water. This matter has a fairly long history. Relevant to this application is that on 21 July 2015 the parties obtained an interim court order by agreement, in terms of which the first respondent ("the Municipality") would provide the applicants with a temporary supply of water. According to the applicants the Municipality failed to comply with that order.

[3] On 17 August 2017 the parties concluded a further interim agreement in an effort to settle the dispute and to ensure that the applicants were provided with water. The August 2017 order provides *inter alia* as follows:

- "4. The first respondent is directed to fill the existing Jo-Jo tanks to capacity at least once a day every Monday, Tuesday, Wednesday, Thursday and Friday.
5. The first respondent is directed to implement the rotational plan by supplying the residents of the five villages with portable water through its reticulation system twice a week, every Wednesday and Saturday.

6. *The first respondent is directed to provide the applicants and the Court with reports by the 30th of every month ... on its compliance with water supply ...*
7. *The first respondent is to file a report by the 30th of each month, on oath, to the Court on the progress of the water plant until its completion ...".*

[4] According to the applicants the Municipality has thereafter deliberately and consistently failed to comply with its obligations to provide the applicants with access to water pending the construction of a long term water purification plant and has also fallen short of their constitutional duties to provide access to clean and safe water on a regular basis to the applicants.

[5] On 29 November 2019 another order was granted in terms whereof the Municipality was held in contempt of Court due to its failure to comply with its duties in terms of the existing court order.

[6] According to the applicants the Municipality continued to fail and give effect to the August 2017 order, despite the subsequent contempt order granted on 29 November 2019. The applicants further contend that they have received reticulated water once a week and their Jo-Jo tanks are filled by two trucks at most. This, according to them, despite the fact that the order provides that the applicants shall be provided with reticulated water twice a week and sufficient trucked water which has to be supplied in accordance with the time table. The respondents contend that there was substantial compliance and that any non-compliance was as a result of ailing infrastructure.

REQUIREMENTS FOR CONTEMPT

[7] Contempt is the wilful and *mala fide* refusal or failure to comply with an order of Court. An applicant must show that an order was granted against the respondent, that the order was served on or brought to the notice of the respondent and that the respondent has disobeyed or failed to comply with it (*Consolidated Fish Distributors (Pty) Ltd v Zive and others* 1968 (2) SA 517 (C) at 522).

[8] Wilfulness and *mala fides* will be inferred once it is shown that the respondent has disobeyed the order or neglected to comply with it. The respondent then bears the evidential onus to establish that the non-compliance was not wilful and *mala fide* (*Fakie N.O. v CC I Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at par 22-24).

[9] If a respondent can satisfy the Court that he did not intentionally disobey the order, or was not acting *mala fide* in not complying with it, a Court will usually not find against him. Such explanation may include the respondent's inability to comply with the order or that circumstances beyond his control prevented him from doing so.

DISCUSSION

[10] In the answering affidavit filed on behalf of the first and eighth respondents it is pointed out by the deponent that she is the Acting Municipal Manager for the first respondent who was appointed as such on 1 July 2020.

Her predecessor had already vacated this position on 28 February 2020, although he continues to be an employee of the first respondent.

[11] It is not disputed that the August 2017 court order has not been fully complied with. However, it is contended that the non-compliance therewith was neither wilful nor *mala fide*. It is also pointed out that on 21 July 2020 the first respondent filed a consolidated affidavit dealing with the period from March to June 2020 with a request for condonation for the late filing thereof. According to the explanation the national lockdown due to the COVID-10 Pandemic had an adverse effect on the first respondent insofar as consultation with its legal team is concerned to prepare and submit the affidavits timeously.

[12] According to the first respondent it relies on the Flag Boshielo Purification Plant for bulk water. This plant is managed and operated by a service provider, Lepelle Northern Water. In order to ensure the equitable distribution of water, the first respondent together with this service provider devised a plan in terms of which the various areas and towns dependant on the plant would receive water on specified days of the week. In order to accommodate the time table for the supply of water to the applicants, several significant changes had to be made.

[13] According to the February 2020 affidavit it is pointed out that a major breakdown was experienced by the bulk water service provider which led to water not being dispensed at the water treatment plant to the command reservoir and therefore the first respondent could not reticulate water. This failure was not due, so it is explained, to any intention of the first respondent as it did not have

control of the situation. It is further alleged that as soon as the breakdown was repaired, the first respondent restored the supply of water to the applicants.

[14] The replying affidavit is deposed to by the applicants' attorney of record. Save for a general denial that the first respondent has complied with the August 2017 court order, or that any non-compliance was not intentional or *mala fide*, the substance of the explanation given by the first and eighth respondent was not seriously challenged. The reply given to the reasons for the non-compliance and alleged inability to reticulate water is that the applicants have no knowledge of these allegations and that the respondents are put to the proof thereof.

[15] For the period after February 2020 the respondents rely on the affidavit for March to June 2020 which is attached to the answering affidavit. The explanation given therein can be summarised as follows:

[15.1] During March 2020 water was reticulated optimally on 5 and 6 March for the first week, the 8th and 9th of March for the second week and on the 11th of March a leak in the pipeline was discovered which was subsequently repaired. The leak caused a major water loss and delayed the supply of water for the third week. Reticulation resumed on 14th, 15th, 19th, 20th, 25th and 31st of March 2020;

[15.2] During April 2020 water was reticulated on the 6th, 7th, 12th, 13th and 18th of April 2020. During the reticulation on 18th April the Elandskraal reservoir experienced a leak in one of the inlet pipes and reticulation was ceased to repair the damage. It took some

time and the reticulation was completed on 20 April 2020 and apparently the supply continued for the 28th and 29th of April 2020;

[15.3] For May 2020 water was reticulated on the 4th, 5th, 9th, 10th, 15th, 16th, 21st, 22nd, 23rd, 27th and 28th May 2020;

[15.4] During June 2020 water was reticulated on the 2nd, the 3^d, 7th, 8th, 13th and 20th of June. Due to a pipe burst reticulation was only completed on 21st of June and it proceeded on the 25th and 26th of that month.

[16] It is also explained that the first respondent regularly notified the community through its ward councillors of the dates on which water would be reticulated and of the breakdowns as they happened at the treatment plant.

[17] With regard to the trucking in of water through Jo-Jo tanks it is explained that the first respondent has since the court order installed Jo-Jo tanks in the villages and most, if not all of them, are working to full capacity. It is pointed out that the Municipality had instances of a few Jo-Jo tanks which suffered theft of operational implements causing them to become dysfunctional. However, according to the explanation given the first respondent has been working with the community leaders and ward councillors to ensure that the infrastructure is protected for the benefit of the community.

[18] Currently three trucks are operational and service the Jo-Jo tanks. No breakdown was reported of any of the trucks, save for one which had to be sent

in for a service. According to the respondents the operational trucks continue to work overtime to ensure that there is distribution of water to the villages, notwithstanding the difficulties experienced in the plant and despite the fact that the trucks had to collect water from the treatment plant which is about 17 km from the villages. According to the explanation the trucks continued to fill up the Jo-Jo tanks as directed and during this period were delivering water, not only to the installed municipal tanks, but also to the homes of residents.

[19] The progress on the construction of the purification plant is also explained. It is alleged that the first respondent has been in constant discussion with Lepelle Northern Water to upgrade the plant in order to get progress on the project. The first respondent was advised that not much in terms of construction happened since the lockdown was announced in March 2020. However, having regard to the eased restrictions, construction has since commenced albeit on a sliding scale. Reference is also made to a comprehensive status progress report on the construction of the plant which is done in conjunction with the Lepelle Northern Water. Engagements with this entity are ongoing and the first and eighth respondents undertake to keep the Court informed of developments in this regard.

[20] Having regard to the explanation given above, it is then concluded by the first and eighth respondent that they are committed to compliance with the court order, to discharge its constitutional obligations and that any failure to comply with the order was not wilful or *mala fide*.

[21] The deponent to the replying affidavit alleges that the first respondent's conduct has not changed and it has instead continued its non-compliance with the August 2017 order. It is therefore submitted that the only reasonable inference to be drawn from the first respondent's conduct, is that it has acted and continues to act *mala fide*.

[22] However, with regard to the explanation given in the progress affidavit for the period March to June 2020, the following reply has been given:

"I confirm that the applicants have no knowledge of the allegations contained in the consolidated monthly progress affidavit for the months of March to June 2020, and the respondents are put to the proof thereof".

[23] Later in the replying affidavit it is also pointed out that this progress affidavit was only received after service of the urgent application on the first respondent and that it is unclear *"when the Municipality would have complied with the requirement to provide a monthly report had it not been for the launching of the urgent application"*.

[24] Taking into account the explanation given by the first and eighth respondents, as well as the applicants' inability to challenge these explanations, I am of the view that the explanations given are sufficient to conclude that the first and eighth respondents were not acting deliberately or *mala fide* when there was a failure to fully comply with the August 2017 court order. What is more, the explanations also indicate a willingness to comply although it was not always possible to do so. I therefore conclude that, in my view, the respondents have


discharged the onus to convince the Court that an order as prayed for, should not be granted.

[25] That brings me to the question of costs. It is common cause that the progress affidavit was filed completely out of time. That prevented the applicants to have the opportunity to properly consider it. This affidavit was only received, as I understand the papers, after the application was served. One can appreciate the fact that the first respondent had to function under restrictive conditions, but to wait for a period of about four months should not be held against the applicants. The late filing of this affidavit was, in my view, a contributing cause to the launching of this application. Taking into account all the facts and circumstances, I am therefore of the view that the first respondent should be ordered to pay 50% of the applicants' costs, notwithstanding the fact that the application cannot succeed.

ORDER

1. The application is dismissed;
2. The first respondent is ordered to pay 50% of the applicants' costs.




D S FOURIE
 JUDGE OF THE HIGH COURT
PRETORIA