REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDLEBURG (LOCAL SEAT)

CASE NUMBER: 749/18

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
	05/03/2024
.....	.....
SIGNATURE	DATE

In the matter between:

DIRBU CC	**First Applicant**
BRENDAN VILLAGE CC	**Second Applicant**
CARPIE CC Second Applicant	**Third Applicant**
CAREL JOSEF DIRKERT	**Fourth Applicant**
CAREL JOSEF DIRKERT N.O	**Fifth Applicant**
DEBRA ANN DIKKER N.O	**Six Applicant**
BAREND JOHANNES WAGNER N.O	**Seventh Applicant**

and

EMALAHLENI LOCAL MUNICIPALITY	**First Respondent**
THE ACTING MUNICIPAL MANAGER	
SIZWE MAYISELA	**Second Respondent**
THE CHIEF FINANCIAL OFFICER	**Third Respondent**
THE MAYOR LINDIWE NTSHALINTSHALI	**Fourth Respondent**

JUDGMENT

GUMEDE AJ

1. This is an application to compel compliance with a consent order that was granted by Abrahams AJ on 4 July 2018. The consent order related to a historic dispute between the parties in respect of water and electricity.

2. The terms of the consent order were as follows:

    a. The first respondent gave an undertaking that, pending the finalisation of the historic water and electricity supply disputes between the parties, it shall not disconnect or interfere with the services to any of the applicants' properties listed in an annexure, without first obtaining a court order authorizing it to do so;

    b. The first respondent was ordered to amend the existing statements to remove the historical debts and to reflect new zero balances, in respect of all of the applicants' properties, which would run separately, reflecting actual near readings and independently from the historical disputed accounts;

    c. The first respondent would not be entitled to or be allowed to transfer any of the historic disputed debt to the new zero balance accounts;

    d. The first respondent was ordered to prepare a complete and full statement and reconciliation in respect of all the applicants municipal accounts, dating back to three years before the date of the consent

order, within 60 days of being so ordered and such account to be delivered within the aforesaid period to the applicant;

e. Following the presentation of the aforesaid reconciled statements, the first respondent was ordered to participate within 30 days after delivery of the reconciled statements, in a statement and debatement of such accounts together with the applicants and/or their legal representatives;

f. Following the aforesaid statements and debatement, the parties will pay any agreed amount within a period of 30 days, save in the event of not being able to reach agreement on the amounts due;

g. In the event of the parties not being able to agree upon the amount due, the first respondent would, within 30 days of finalization of the statement and debatement, institute a claim in respect of amounts allegedly due;

h. It was recorded that the respective applicants acknowledge their indebtedness and/or would be liable for the payment of the amounts actually and legally proven to be due whether by agreement or determination by a court;

i. For a period of four months following the consent order, the parties would take joint readings of all the applicable meter readings to ensure that there is agreement in respect of the actual meter readings. The first respondent would give advance notice of the taking of meter readings some 48 hours before the meter readings are taken;

j. Following such statement and debatement, the fist respondent was ordered to rectify such accounts incorporating and reflecting whatever credit may be due to the applicants and specifically excluding any interest which may have been erroneously charged by the first respondent;

k. The applicants would be entitled to apply for prepaid meters in respect of their properties, which meters would be installed following the aforesaid application and payment of the standard rate for a prepaid meter. Following the installation, the applicants would be repaid any amounts relating to deposits paid that may be due within 60 days;

l. Should the first respondent proceed to disconnect or interfere with the service to any of the applicants' properties without first obtaining a court order, then the respondents undertake to rectify and reinstate the services within one hour of being informed by the applicants of such a disconnection, failing which the applicants were authorized to appoint their own electrician or other expert to forthwith restore such services;

m. Any such aforesaid violation would be reported to a specified email address;

n. The applicants would be entitled to reclaim the reasonable costs of such experts, in restoring the aforesaid servicers from the first respondent;

o. That the first respondent was ordered to pay costs of the application on party and party scale, including costs of 4 July 2018.

3. In the amended notice of motion, the applicants only seek compliance with paragraphs 1 and 11 of the consent order, which provides that the respondents shall not disconnect the water and electricity supply pending the finalization of the historic disputes between the parties as well as the order for the installation of the prepaid meters.

4. The respondents oppose the application and argue that the consent order is invalid even though they consented to it. They argue that the consent order is not justified by the merits and is without any foundation in law[1] and that it creates an administrative regime that is unique to the applicants and not recognized by the statutory framework which governs the supply of municipal services. They also raise dispute fact and argue that the applicants' interpretation of paragraph 11 of the consent order differs from the agreement that was reached by the parties.[2]

5. If I understand the respondents' argument in this regard, they submit that the agreement between the parties was incorrectly recorded in paragraph 11 of the consent order. That is so, so the argument goes, because the original notice of motion in the main application had sought an order that ***the first respondent to facilitate and install prepaid meters at all of the applicants' properties***, whereas the agreement contained in paragraph 11 of the consent order provides that "***the applicants will be entitled to apply for prepaid meters in respect of their properties, which meters will be installed following the aforesaid application and payment of the standard rate for prepaid meters***."[3]

6. It should be noted that both parties were legally represented when the consent order was granted.

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[1] FA, variation application, para 2.4
[2] AA, para 9-17 (bundle, p226-227)
[3] AA, para 46-49 (bundle, p235 – 236)

7. The Supreme Court of Appeal in ***The Road Accident Fund v Taylor and other matters,***[4] has confirmed that once the parties to litigation have reached a compromise, a court has no power or jurisdiction to embark upon an enquiry as to whether the compromise was justified on the merits of the matter or whether the compromise was validly concluded.

8. I am not persuaded by the belated attack on the interpretation of paragraph 11 of the consent order. The language used therein is plain, with no ambiguity. If the respondents genuinely believed that there existed a dispute in the interpretation, one would have expected them to approach the court for a variation of that order at the time such a dispute arose and not wait over four years to seek to impugn the consent order.

9. The variation of the consent order which the respondents now seek, can be summarized follows:

    a. The applicants may, within 30 days of the granting of this order, refer any dispute to the second respondent concerning any specific amount claimed by the first respondent for rates and taxes and the supply of electricity, sanitation, solid waste removal and water in respect of their properties.

    b. The second respondent must, within a reasonable period of referral of the dispute, consider and adjudicate upon the disputes and decide on debt collection and credit control measures to be implemented by the first respondent in relation to the disputed amount.

[4] (1136-1140/2021) [2023] ZASCA 64 (8 May 2023) at para 51

c. Six weeks prior to the implementation of the measures, the first respondent shall
    i. Provide the applicants with the decision of the second respondent, with notice of the decision.
    ii. Provide the applicant with adequate reasons as to why the decision was taken.

10. When regard is had to the order that is sought by the respondents in their variation application, it appears that the respondents are shifting the responsibility of compiling the [disputed] accounts to the applicants. That cannot be countenanced. It is the respondents who are the creditors in this relationship. It is the respondents who are responsible for invoices and for receiving payment. It is therefore the responsibility of the respondents to provide a reconciliation.

11. The respondents allege that applicants are using the consent order to frustrate the municipality's efforts to collect outstanding monies which includes, rates, levies electricity, etc., in contravention of the debt collection mechanism that is set out in the relevant legislative framework.[5] They also allege that they complied with the consent order in so far as it related to the removal of historical debt and balances to zero.[6] This is not supported by any tangible evidence, in fact the applicants allege that the respondents failed to remove the historical debt.

12. This being an application to compel compliance with the consent order, one would expect annexures of relevant statements if the respondents had indeed complied with the removal of historic balance and reset to zero.

[5] Record, p767, para 3.3 and p770, para 3.10
[6] Ibid, 3.4

13. Respondents further assail the validity of the consent order on the basis that it was not competent for the court to order to resolve the dispute by way of statement and debatement of account as this is contrary to the legislative scheme set out in the Municipal Systems Act.[7] They submit that the municipality had adopted a resolution not to install prepaid electricity meters to complexes and argue that the consent order creates an entitlement for the applicants which is not available to other consumers and that the consent order seeks to permit unauthorized persons to interfere with the electricity supply connection, in contravention of the bylaws which make such conduct a criminal offence. According to them, the consent order also seeks to deprive the municipality of its powers to disconnect electricity on the basis of nonpayment, which entitlement is not available to other consumers.[8]

14. The applicants deny that the impugned order creates an administrative regime unique to the applicants.[9] They point out that the order creates a short-term interim mechanism that only applies to the historical debt and is only applicable pending the finalization of the historic disputes. They allege that the current liabilities are expressly excluded from the operation of the consent order under paragraphs 2.3.2, 2.3.3, 2.3.4 and 2.3.12 and submit that the statutory regime on debt collection equally applies to the applicants' current liabilities, without qualification.

15. Applicants submit that section 102(2) of the Municipal Systems Act does not apply where there is a dispute between the Municipality and the person referred to in that subsection concerning any specific amount claimed by the Municipality form that person and therefore opens the door for the implementation of measures outside the ordinary debt collection and credit control measures.[10]

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[7] Para 8.5
[8] Ibid, 8.5 – 8.9
[9] AA to counterapplication para 11 (bundle p918)
[10] Ibid, para 16

16. I am not convinced that it was impossible for the respondents to comply with the impugned order in so far as it related to the following:

    a. resetting of the applicants' balances to zero,
    b. compiling and delivering a complete and full statement of reconciliation of 3 years historical debt within 60 days of the order and
    c. to participate in debatement of account and if agreement was not reached,
    d. to institute a claim against the applicants as set out in the consent order.
    e. There was also no reason why the parties could not take joint meter reading as agreed.

17. The respondents have not furnished any evidence and/or reasons why they say compliance was impossible.

18. On the question of meter installation, applicants submit that the homes in which the respondents were required to install meters, are not complexes and are not governed by a body corporate.[11] In this regard, the respondents' have already admitted that it may be possible to install pre-paid meters at the free standing houses.[12] It appears that initially the respondents did make the necessary plans to comply with the installation of the meters and even commenced the process of installation of pre-paid meters in terms of the court order but later backtracked and removed the meters.[13] The about turn is said to be justified by a council resolution which was taken in October 2015 wherein it was resolved that complexes shall be provided with a bulk meter.

[11] AA to counterapplication, para 27 (bundle, p926)
[12] AA, para 78.2
[13] AA to counterapplication, para 53

19. It should be noted that at the time of the consent order in 2018, the respondent would have been aware of its own council resolution. Notwithstanding, they proceeded to agree to the consent order.

20. Municipalities do install separate meters in single households, in instances where there is a main house and a flatlet or back rooms. There is no reason why the respondents cannot install separate meters in the applicants' premises.

21. The respondents have argued that it is no longer possible to for this court to order compliance with the consent order after four years has lapsed, I do not agree.

CONCLUSION

22. This court indeed has the power to vary a court order where a case for such a variation is made, however, in terms of Rule 42 once a court has duly pronounced a final judgment or order, it has no authority to correct, alter or supplement it. I am not persuaded that the respondents have made out a case for variation. In my view, the respondents' reliance on section 173 of the Constitution is misguided. The respondents have not furnished any cogent reasons why the court should deviate from the well-established rule relating to finality of judgments and to vary a court order some four years after the fact.[14]

23. In the premises, I make the following order:

[14] Rule 42

1. The respondents are ordered to comply with paragraph 1 of the court order dated 4 July 2018.

2. The respondents are ordered to comply with paragraph 11 of the court order dated 4 July 2018, by installing prepaid meters at the applicants' properties within 30 days of this court order.

3. The respondents' counterapplication for a variation of the court order of 4 July 2018 is dismissed.

4. The respondents are ordered to pay costs.

Z GUMEDE

Acting Judge of the High Court

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 5 March 2024 at 10:00.

APPEARANCES

For the Appellant	:	PG Cilliers SC with RJ Groenewald
Instructed by	:	Harvey Nortje Wagner & Motimele Inc
For the Respondents:		A Vorster
Instructed by	:	Ka-Mbonane Inc
Date of hearing	:	18 July 2023
Date of judgment	:	5 March 2024