

SOUTH AFRICA / JUDGMENT

Allie and Others v Department of Rural Development and Land Reform and Others (LCC 145/2019) [2024] ZALCC 16 (8 May 2024)

[2024] ZALCC 16

COURT
Land Claims Court

BEFORE
Flatela

CASE / FILE NUMBER
LCC 145/2019

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD
AT RANDBURG
CASE
NO: LCC 145/2019

In the matter between:

MOHAMMED
HASSAN ALLIE
First
Applicant
FARIEDA
TAPE
Second
Applicant
YUSUF
ALLIE
Third Applicant
MOHAMMED
SEDICK ALLIE
Fourth Applicant
MAGHIA
OSMAN
Fifth
Applicant
LAYLA
BARRON
Sixth
Applicant

And
THE DEPARTMENT OF
RURAL DEVELOPMENT
AND
LAND
REFORM
First Respondent
GOZYN
ALLIE (THE YOUNGER)
Second
Respondent
REGIONAL
LAND CLAIMS COMMISSIONER
Third
Respondent
CHIEF
LAND CLAIMS COMMISSIONER
Fourth Respondent

JUDGMENT

FLATELA, J

Introduction

1. These are civil contempt proceedings against the First, Third and Fourth Respondents due to their failure to comply with the order granted by this court on 14 June 2023. The First, Third and Fourth Respondents shall be referred to as State Respondents.
2. On 14 June 2023, this court granted an order by agreement between the Applicant and the State Respondents in terms whereof, the State Respondents were ordered to make the record available for inspection by the applicant's attorneys within 20 court days of the date of the order.
3. The State Respondents failed to comply with the court order within the time frames as stipulated in the order. The Applicant launched this application on 06 September 2023. The applicant seeks the following orders against the State Respondents:
 1. Declaring that the Respondents are guilty of criminal contempt of court order for their material failure to comply with the court order issued by this court on 14 June 2023.
 2. Sentencing the Respondents to undergo 12 (twelve) months imprisonment; alternatively, such period as the court may deem fit.

3. Ordering the Respondents to submit themselves to the South African Police Service, at a police station at a date to be determined by this court for the officer in charge to ensure that they are immediately delivered to a correctional centre to commence serving the sentence imposed and;
4. Directing the Respondents to bear the costs of the application on attorney and client scale.
5. Alternatively, the orders be suspended for a period of two years on condition that they comply fully with the order.
6. That a money fine be imposed on the Respondents in their personal capacity, such as this court deems appropriate.
7. Alternatively, declaring that the State Respondents are in material breach of the order.
8. Declaring that the State Respondents are guilty of civil contempt for their material failure to comply with the order.
9. Directing the State Respondents to bear the costs of this application, jointly and severally liable the one paying the other to be absolved.
4. At issue in this matter is whether the requirements of contempt have been established.

Brief Background

5. On 30 October 2019, under this case number, the applicants approached this Court on an urgent basis seeking interdictory relief against the State Respondents wherein an interdict was sought against the State Respondents from paying the Second Respondent compensation for the Land Claims lodged by Second Respondent's mother in respect of Erf 1457 and ERF 1458, Hout Bay Western Cape.
 6. On 7 September 2021, the matter served before Barnes AJ who granted an interdictory relief in favour of the applicants (the "engagement order") in terms of which the parties were ordered to engage with one another and to try and resolve the dispute. The engagement would include the use of the services of a mediator.
 7. The parties attempted to mediate, however the mediation process failed.
 8. The applicants launched an application seeking an order to the effect that the State Respondents be ordered to undertake not to make payment of any compensation nor restore any right to the Second Respondent until the review proceedings are finalised or unless agreed to by the applicants and the Second Respondent. The review application was to be brought before 1 March
2023. On 28 January 2023, the order was granted by consent between the Applicant and the Respondents.

9. On 28 February 2023, the applicants launched the review application against the State Respondents. On 18 April 2023, the State Respondents filed a Notice in Rule 32 of the Rules of this Court. On 2 May 2023, the applicants filed an application to compel against the State Respondents.
10. On 14 June 2023, both applications served before me and by agreement between the parties the following order was granted:
 - 1) The First, Third and Fourth Respondents' Application and notice in terms of Rule 32 of the Land Claims Court Rules, dated 18 April 2023 is withdrawn.
 - 2) The applicant's application to order compliance dated 2 May 2023, is withdrawn.
 - 3) The First, Third and Fourth Respondent are to make the record available for inspection to the applicants/the applicants' attorneys within 20 court days of the date of this order.
 - 4) The cost pertaining to paragraphs 1 and 2 above are reserved.
11. It is common cause that the State Respondents have since complied with the order on 12 January 2024 after the launch of this application.

Legal Principles

12. Section 165 (5) of the Constitution provides that "An order or decision by a court binds all persons to whom and the organ of state to which it applies".
13. The requirements of contempt of Court were neatly summarised in *Fakie v CCII Systems (Pty) Ltd* [1] and approved by the Constitutional Court in *Pheko and Others v Ekurhuleni Metropolitan Municipality (Pheko 2)*[2], *Pheko II*, an applicant who alleges contempt of Court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed, and the Respondent bears an evidentiary burden to establish a reasonable doubt. Should the Respondent fail to discharge this burden contempt would have been established.

Cameron JA went on to outline the defences to a charge of contempt of Court. He said:

'The test for when disobedience of a civil order constitutes contempt[3] has come to be stated as whether the breach was committed 'deliberately[4] and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[5] (internal footnotes omitted).

These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a

manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the Court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.’[6]

14. Having dealt with the legal principles applicable to this matter, I now turn to deal with facts as they manifest in the pleadings in which these principles must apply.

The Applicant’s

submissions

Service and Knowledge of the Order and the Respondent’s Wilful and Mala Fide

15. The applicants contend that the State Respondents were aware of the order which was made by agreement between the parties on the following basis:
 1. On 19 June 2023, the Judges Registrar emailed the copy of the court order to the State Attorneys, the State Respondents’ attorneys of record.
 2. The State Respondents were represented in court when the order was granted, and;
 3. The applicant’s attorneys wrote a letter to the state attorney on 31 July 2023 by way of an email to which an order of the court was annexed. In this letter, the State Respondents were put on terms to provide the record before Wednesday, 2 August 2023 failing which the applicants advised them that they will hold the State Respondents in contempt and seek appropriate criminal sanction against them.
16. No response was received from the State Respondents. The Applicant submitted that the State Respondents were wilful and mala fide by refusing to comply with the court order.
17. The Applicants also relies on the Respondents answering affidavit which stated that “..., the state respondents were in fact co-operative from the moment they were informed of the court order they had to follow”.
18. The State Respondents raised a procedural issue regarding the service of the order upon the Third and Fourth Respondents personally regard being had to the possibility of a committal order against Dr Wayne Alexander, the Regional Land Claims Commissioner, Western Cape and Ms Nomfundo Ntloko, the Chief Land Claims Commissioner.
19. The State Respondents contended that the Applicants ought to have been joined in these proceedings as the orders sought against them in their personal capacity would result to committal to prison, thus taking away the liberty of an individual thereby violating the rights of the freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial in terms of section 12(1) and the fair trial rights in terms of section 35(3) of the Constitution.

20. The State Respondents also argued that the Applicants failed to prove that there was personal service upon the State Representatives or that they have knowledge of it.
21. In Reply, the Applicant argued that the personal service of the order is not a pre-requisite for contempt of court proceedings.

Discussion

22. The relief sought against the State Respondents is committal, the standard of proof is beyond reasonable, whereas proof on a balance of probabilities suffices where the remedies sought 'do not have the consequence of depriving an individual of their right to freedom and security of the person.'^[7]
23. As stated earlier in this judgement, the test for contempt requires a deliberate intentional disobedience of the court order; an applicant who alleges contempt of Court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order.
24. Once these elements are established, wilfulness and mala fides are presumed, and the Respondent bears an evidentiary burden to establish a reasonable doubt. Should the Respondent fail to discharge this burden, contempt would have been established.
25. Practice Directive No. 17 of this court deals with the Service where the Land Claims Commission is the party to the proceedings. It states:

"In all matters in which the Land Claims Commission is a party, service shall be affected on the relevant regional office of the Commission as well as on the national office. Service shall also be affected upon legal representative of the Land Claims Commission."
26. This practice directive was issued by the Acting Judge President on 04 April 2015.
27. On 1 December 2023, the office of the Registrar of the Court issued a directive wherein the Applicant was directed to serve these proceedings to the offices of the Minister, the Commission and the Regional Land Claims Commissioner as well as the state attorney.
28. It seems to me that Service Directives as well as the directives of 1 December 2023 were completely ignored by the applicants. Instead of complying with the directives from the office of the Registrar, the applicants' legal representatives questioned the status of the directives as it was penned by an intern in the office of the Registrar. If the applicants' legal representatives had familiarised themselves with Practice Directive No. 17, they would have noticed that the email from the Registrar's office was simply re-iterating this service directive.
29. The applicants' counsel argued forcefully that there was no need to serve the State Respondents with the contempt proceedings personally and the service upon the legal representative suffices. I do not agree.

30. Dealing with the contempt proceedings against the government representatives, In *Mjeni v Minister of Health and Welfare, Eastern Cape*[8] , Jafta J held that :

‘[C]ontempt of court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he willfully and contemptuously refuses to comply with the court order.’[9]

31. It is trite that personal service must be affected on the contemnor for the contemnor to be held in contempt of court, if there is none, at least it must be shown that the contemnor has knowledge of the court order. In this matter, the applicant has failed to prove that the contemnor had knowledge of the court order.
32. I am not satisfied that the applicants have proven requisite two and three for the State Respondents to be held in contempt. There is no evidence that the Chief Land Commissioner, Ms Nomfundo Ntloko -Gobodo, the Chief Director: Land Restitution Support, Dr Wayne Alexander and the Regional Land Claims Commissioner were made aware of the court order of the 14 June 2023. Consequently, I find no basis for the applicant’s contention that State Respondents are in wilful disregard of the court order.
33. The requirement of personal service or the joinder application was further clarified In *Matjhabeng Local Municipality v Eskom Holdings*[10]’. The Constitutional Court clarified the procedural and substantive issues concerning the requirements of contempt of court , when allegations of the contempt *ex facie curiae* are made where the resultant committal to prison violates the rights of the freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial in terms of section 12(1) and the fair trial rights in terms of section 35(3) of the Constitution.
34. In that matter, the dispute arose from a settlement agreement between the Matjhabeng Local Municipality and Eskom Holdings Limited regarding overdue

electricity bills. A court order was issued to regulate the monthly payments by the Municipality to settle the arrears. Due

to non-compliance with the first order, a second order was issued. In terms of the second order, certain obligations were imposed on the Municipality and on Mr. Lepheana, the Municipal Manager. A third order was subsequently granted, including a rule nisi calling upon Mr. Lepheana, in his official capacity, to file a report justifying non compliance with the second order. Mr. Lepheana filed an explanatory affidavit detailing various attempts to settle the dispute. He was accordingly held in contempt of court and was sentenced to six months imprisonment wholly suspended for failure to comply with the court order. Mr Lepheana was present in court when the court order was granted against the Municipality.

35. In *Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [11], Compensation Solutions instituted proceedings in the High Court of South Africa, Gauteng Division against the Commissioner of the Compensation Fund, Director-General of the Department of Labour, and Minister of Labour for declaratory relief and mandamus to obtain payment for outstanding compensation accounts. Mr Mkhonto was cited in his official capacity as the Commissioner. The parties reached a settlement agreement. This agreement was signed by Mr Mkhonto, on behalf of the applicants, and was made an order of court on 31 July 2009. The Commissioner and other applicants failed to comply with the consent order. Contempt proceedings were then instituted against Mr Mkhonto, he was held in contempt of court for failure to comply with the court order and was committed to three months imprisonment, which was conditionally suspended for five years on condition that he not be convicted of contempt within that period.
36. Both parties appealed the orders. When the appeal came before the Constitutional Court, the Chief Justice issued the directives seeking the submissions of the parties on the joinder of Mr Lepheana and Mr Mkhonto in the proceedings in their personal capacity.
37. Relying on previous court orders in *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd*[12], *Meadow Glen Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*[13], *City of Johannesburg Metropolitan Municipality v Hlophe*[14], and *Pheko II*[15], the respondents submitted that it was not necessary to join the applicants in their personal capacity in the contempt of court proceedings.
38. Nkabinde J held as follows at para 92 - 94:

“The law on joinder is well settled. No court can make findings adverse to any person’s interests, without that person first being a party to the proceedings before it.[16] The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel,

gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors’ rights to freedom and security of the person are, in the end, not arbitrarily deprived”.

The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent

decision in *Lushaba*,[17] where the Court, per Jafta J, endorsed principles stated by Ackermann J in *De Lange*:

“[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that . . . the

other side should be heard [audi alterem partem], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. . . . Everyone

has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation.” [18]

‘It follows that the objection of non-joinder by the Municipality in Matjhabeng, specifically where the potential contemnor’s section 12(1) rights are in the balance, is not a purely idle or technical one – taken simply to cause delays and not from a real concern to safeguard the rights of those concerned. There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation

where joinder is unnecessary, for example, when a rule nisi is issued, calling upon those concerned to appear and defend a charge or indictment against them. Undeniably, in appropriate circumstances a rule nisi may be adequate even when there is a non-joinder in contempt of court proceedings. This means that the rule is not inflexible’

39. The State Respondents have established reasonable doubt for non-compliance with the court order, consequently the contempt has not been established.
40. In the circumstances, the following order is made.
 1. The Application is dismissed with costs.

L Flatela

Judge of the Land Claims Court

APPEARANCES

Date Heard:

18 March 2024

Date Delivered:

08 May 2024

For the Applicant: Adv Nongogo

Instructed by:

Dewey Mclean Levy Inc Attorneys

For the State Respondents: Adv P Magona-Dano

Instructed by:

State Attorney, Western Cape

For the Second Respondent: Mr H Smith,

Instructed by:

Henk Smith & Associates

[1] Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52.

[2] Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10.

[3] At Pheko v Ekurhuleni City [2015] ZACC 10; (Pheko II) at para 30 it was said that: "The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu."

[3] At Pheko v Ekurhuleni City [2015] ZACC 10; (Pheko II) at para 30 it was said that:

"The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu."

[4] In other words, wilfully.

[5] Ibid at para 9.

[6] Ibid, para 10.

[7] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited (CCT 217/15, CCT 99/16) [2017] ZACC 35 at para 67.

[8] Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (Tk HC) at 451D-E

[9] Ibid at at 454G-H.

[10] Supra note 7.

[11] Ibid.

[12] Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd

[2007] ZASCA 6.

[13] Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209.

[14] City of Johannesburg Metropolitan Municipality v Hlophe [2015] ZASCA 16.

[15] Supra note 3.

[16] This was stressed in Mjeni above n 70 at 454G-H where Jafta J held: “[C]ontempt of court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he wilfully and contemptuously refuses to comply with the court order.”

[16] This was stressed in Mjeni above n 70 at 454G-H where Jafta J held:

“[C]ontempt of court proceedings can only succeed against a particular public official or person if the order has been personally served on him or its existence brought to his attention and it is his responsibility to take steps necessary to comply with the order but he wilfully and contemptuously refuses to comply with the court order.”

[17] Member of the Executive Council for Health, Gauteng v Lushaba

[2016] ZACC 16 at para 15.

[18] De Lange above n 100 at para 131.

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