

SOUTH AFRICA / JUDGMENT

Astra Boerdery CC and Another v Acting Station Commander Ganyesa and Others (UM100/22) [2023] ZANWHC 164 (12 September 2023)

[2023] ZANWHC 164**COURT**

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

UM100/22

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH****WEST DIVISION – MAHIKENG****CASE****NO: UM100/22****Reportable:**

YES/

NO

Circulate

to Judges: YES/

NO

Circulate

to Magistrates: YES/

NO

Circulate

to Regional Magistrates: YES/

NO

In

the matter between:

ASTRA
BOERDERY CC 1st
Applicant
(Registration
Number:1987/00953/23)
ALWYN
SMIT 2nd
Applicant
and
ACTING
STATION COMMANDER GANYESA 1st
Respondent
THE

CLUSTER COMMANDER:

DR
RS MOMPATI DISTRICT
COMMISSIONER-
BRIGADIER TE TLOTLENG 2rd Respondent
PROVINCIAL
COMMISIONER SAPS
NORTH
WEST PROVINCE 3rd
Respondent
In

re:

ASTRA
BOERDERY CC
1st
Applicant
(Registration
number: 1987/00953/23)
ALWYN
SMIT 2nd
Applicant
JOHN
BASIL SCHRECK HARVEY 3rd
Applicant
HARVEY
BROTHERS CC 4th
Applicant
(Registration
Number 2002/009021/21
WINFRED
HARVEY N.O 5th
Applicant
SHARON
SMIT N.O 6th
Applicant
MERILYN
SEDDON N.O 7th
Applicant
MANNY

DINTJA
1st
Respondent
NEO
LEGALAMITLWA 2nd
Respondent
LEOTO
HORONG 3rd
Respondent
GOBUSAMANG
LEEDS 4th
Respondent
JARIO
SEITSHOKELO MOTHIBEDI 5th
Respondent
ALL
INDIVIDUALS FORMING PART OF THE TLANG
KA
PHULO MOVEMENT, THLAKGAMENG 6th
Respondent
ANY
OTHER PERSONS WHO ASSOCIATE 7th
Respondent
THEMSELVES
WITH UNLAWFUL CONDUCT
OF
FIRST TO SIXTH RESPONDENTS
THE

STATION COMMANDER: GANYESA
POLICE STATION 8th
Respondent
CLUSTER
COMMADER: DR RS MOMPATI

DISTRICT: BRIGADIER TLOTLENG 9th
Respondent
THE
PROVINCIAL COMMISSIONER OF
POLICE
SAPS
10th
Respondent

JUDGMENT

REDDY AJ

Introduction

- [1] The applicants approached this Court on an urgent basis calling on the respondents to show reason why they should not be committed to prison for a period of 30 days for being in contempt of the terms of the Court Orders made by this Honourable Court on 27 May 2022, 3 November 2022, and 1 December 2022 under the above stated case number alternatively that such imprisonment be suspended on condition that the respondents commit to adhering to the court orders, jointly and severally tender the costs of the application on an attorney client scale for the costs occasioned in bringing this application because of their wilful and mala fide conduct.

The Parties

- [2] The first applicant Astra Boerdery CC (“Astra Boerdery”), for purposes relevant to this application, conducts farming activities on a farm described as Harfield (“Harfield Farm”). Mr Alwyn Smit (“Smit”) the second applicant is responsible for overseeing all farming activities at Harfield Farm on behalf of Astra Boerdery.
- [3] The first respondent is the Acting Station Commander Ganyesa South African Police Service, a position previously occupied by one Captain Phiri and presently occupied by one Captain Mokgethi. In this judgment any reference to the first respondent must be construed as being to Captain Phiri. Captain Phiri was cited in the main application brought on 27 May 2022, as the eighth respondent.
- [4] The second respondent is the Cluster Commander and District Commissioner for the Dr RS Mompoti District, Brigadier TE Tlotleng, who in his official capacity, exercises control over the South African Police Service, in this cluster. In this judgment any reference to the second respondent must be construed as being to Brigadier Tlotleng. Brigadier Tlotleng was cited in the main application as the ninth respondent.

- [5] The third respondent is the Provincial Commissioner of the Police, North West Province (“the Provincial Commissioner of the Police, North West Province”) who was cited in the main application as the tenth respondent.

Litigation history

- [6] On 27 May 2022, a rule nisi was issued in the main application by Mahlangu AJ, in terms of which Mr Neo Legalamitlwa (the first respondent in the main application - Legalamitlwa), certain other identified respondents, and any other person associating themselves with the unlawful conduct of the main protagonists, were interdicted on an interim basis from

engaging in certain identified conduct. Captain Phiri, Brigadier Tlotleng and the Provincial Police Commissioner were ordered to assist the Sheriff to give effect to the order. The order reads as follows:

“...

2. A rule nisi be issued, returnable on 23 JUNE 2022 at 10h00 or soon thereafter as the matter can be heard, calling upon the Respondents to furnish reasons, if any, why the following order

should not be made:

2.1 That the First to Seventh Respondents are ordered not to enter, or invade the following farms to with:

2.1.1 PORTION NUMBER 1 FARM GOODWOOD 401 (also known as “HARFIELD”).

2.1.2. PORTIONS 0,1. (KLIPDRAAI), 5 (FAIRVIEW), 6 OF THE FARM STONEHENGE 400.

2.1.3. PORTIONS 0,6,9 OF THE FARM VAALBOSCHSPRUIT 245.

2.1.4 PORTIONS 2, 4,5,9 OF THE FARM PROSPECT located within the DR. RUTH S MOMPATI DISTRICT MUNICIPALITY (hereinafter referred to as “THE FARMS”).

2.2 That the First to Seventh Respondent are interdicted to graze any livestock on The Farms, or to in any other fashion interfere with the Applicants’ rights in respect of the properties.

2.3 In the event that any of the First to Seventh Respondents unlawfully invaded the aforesaid farms with cattle, the Sheriff is authorised to remove such cattle from The Farms and impound same at the nearest cattle pound.

2.4 That the First to Seventh Respondents are interdicted not to cause any damage to the farms including, but not limited to, cutting and/ or removing fences surrounding the aforesaid farms, or to install gates to the fences surrounding the Farms.

2.5 That the First to Seventh Respondents are ordered not to insult, threaten or assault the Second Applicant, his family or employees in any fashion.

2.6 That the Eight to Tenth Respondents are ordered to assist the Sheriff in the execution of his/ her duties, and to maintain law and order, should the First to Seventh Respondents not strictly comply to this order.

3. Prayer 2 be of interim force pending the return date.

4. The interim order be served in the following fashion:

4.1. As far as possible on the Respondents per the rules pertaining to service.

4.2 By attaching the order to a notice board on the affected farms.”

(my emphasis)

- [7] It is common cause that service of the order of 27 May 2022 was effected on the present respondents by the Sheriff of the High Court.
- [8] On 3 November 2022, Petersen J, confirmed the rule nisi granted on 27 May 2022, which now had final effect.

Background

facts

- [9] On 4 October 2022 certain incidents occurred which prompted Smit to report same to the SAPS Ganyesa that morning. Later that morning, a report was made to Captain Phiri about the presence of multiple individuals outside the boundary fence of Harfield Farm. At 07h54am two employees of Fastrak Security, Samuel Wilhelm Kieser (“Kieser”) and Jacobus Johannes Cloete (“Cloete”) met Smit at the farm Stonehenge and proceeded to Harfield Farm. On arrival at Harfield Farm, they observed that there were several individuals and vehicles adjacent to the boundary fence of Harfield Farm. Kieser duly alerted the Ganyesa SAPS.
- [10] Eleven individuals made their way onto Harfield Farm with two motor vehicles. Kieser and Cloete approached the said individuals and identified a number of the respondents cited in the main application as being among the individuals, which included Legalamitlwa.
- [11] Legalamitlwa refused to leave Harfield Farm, notwithstanding Kieser bringing to the attention of the individuals, the conditions of the Court Order of 27 May 2022. Legalamitlwa insisted that Smit addresses or speaks to him personally. One of the individuals identified as Samuel Mathe produced a knife and pointed it at Kieser, intimating that the knife was intended for Smit. As this unfolded, employees at Harfield Farm attended to the removal of cattle, to avert potential damages. The employees were threatened with harm if they persisted in removing the cattle. As a result, Smit telephoned Captain Phiri to request urgent intervention by SAPS.
- [12] After a passage of time, two police officers, Warrant Officer Sehoru (“Sehoru”) and Sergeant Mothopohotsie (“Mothopohotsie”) arrived at Stonehenge wanting to obtain a statement from Smit to register a case docket. Sehoru instead was confronted about the failure to arrest the suspects and retorted that the absence of adequate manpower circumvented same. Sehoru remained adamant that a statement had to be obtained from Smit before any arrests could be effected. Smit as a result decided to mandate the services of Bushveld Security to assist, if the situation escalated, which could be detrimental to life and property. Smit ultimately provided a statement to Sehoru.

[13] Despite further engagements between one Arthur Batchelor Koorts (“Koorts”), Sehoru and Brigadier Tlotleng, the impasse was not resolved. Brigadier Tlotleng questioned what he perceived to be conflicting accounts by Kieser and Smit regarding the location of the suspects. No arrests were therefore made. The SAPS nonetheless attended to the matter.

[14] Brigadier Tlotleng received a report that the suspects were actively trespassing on Harfield Farm in contravention of the rule nisi. Koorts reported to Brigadier Tlotleng that Bushveld Security Group arrived at Stonehenge equipped to effect civil arrests of the

suspects, if SAPS were not able to do so because of an alleged shortage of manpower. The contention that civil arrests would be

effected was discouraged and Koorts was informed that Captain Phiri, accompanied by Public Order Police Officers were en route to intervene and effect the necessary arrests.

[15] Legalamitlwa identified as the leader of the group was informed by Willem Schalk van Der Merwe of Bushveld Security Group (“Schalk”), an employee of the first applicant that he was trespassing on private property and that he was therefore in breach of the Court Order of 27 May 2022. A copy of the order was handed to Legalamitlwa, with a request that they vacate Harfield Farm immediately. Legalamitlwa acknowledged that he had knowledge of the court order which was interim in nature and that the next appearance was 23 April 2023.

[16] When Captain Phiri arrived with the Public Order Police Officers, he intervened and an exchange of words occurred between himself and Legalamitlwa, with the group in close proximity. Following this intervention, Captain Phiri decided that no arrests would be effected. As to why no arrests would be effected he explained that Legalamitlwa and Smit provided conflicting versions; that he was in the process of obtaining documents to provide to the suspects and that he should be afforded an opportunity to “adjudicate”

the matter. Given the stance of Captain Phiri, Koorts unsuccessfully attempted to contact Brigadier Tlotleng to escalate the matter to him.

[17] As a result of the failed attempt to involve Brigadier Tlotleng, Koorts once again made contact with Captain Phiri who maintained his stance and expounded on the reasons for not effecting any arrests. He explained again that based on the conflicting versions provided to him, he would liaise with the prosecutor of Ganyesa; and with Land Affairs to verify the allegation of Legalamitlwa that Harfield Farm was not Smit’s property; and to that end that the matter had to be investigated properly before any arrests could be effected. In the same pattern, an attempt once again was made to contact Brigadier Tlotleng, which again failed.

[18] Captain Phiri left the scene with other SAPS officials, whilst the suspects remained. This according to Smit led to further provocative and unlawful incidents in the days that followed.

[19] On 6 October 2022 at about 07h30am, employees of Astra Boerdery repaired the boundary fence that was cut to insert a gate which was used to gain access to Hartfield Farm, the previous day. Later that day, when the fence was inspected it was discovered that the fence had once again been cut with a gate reinstalled. When Smit and his wife returned to fetch a calf, individuals who Smit identified as respondents in the main application were present. An altercation ensued when Smit's wife started recording Legalamitlwa hurling insults at herself and Smit. An attempt at knocking her cell phone from her hand with a rock, was thwarted by Smit. Smit and his wife thereupon left with the calf.

[20] The presence of Legalamitlwa and multiple unknown individuals at Harfield Farm is alleged to be ongoing through their persistent

presence which impedes the effective utilization of Hartfield Farm, as previously enjoyed. Led by Legalamitlwa cattle continue to graze at Hartfield Farm with impunity and no intervention by SAPS. This is said to be evidenced by the fact that on a count of the cattle which totalled 14 when impounded on 15 June 2022 and the cattle subsequently released on 4 October 2022.

The court order of 1 December 2022 by Snyman J (now Reid J)

[21] On 1 December 2022, Snyman J (now Reid J) still under case number UM 100/2022, ordered on urgent application by the applicants that:

"1...

2. The Sheriff of the High Court for the district of Vryburg is authorised to deal with all cattle attached and removed [unlawfully present on Portion number 1 FARM GOODWOOD 401 (Harfield)] in terms of paragraph 2.3 of the Order of this Court made a final order on 3rd day of NOVEMBER 2022 in the following manner;

2.1. To have such cattle sold by any auction of any one of the following auctioneers:

2.1.1. Andre Kock en Seuns of Vryburg;

2.1.2. Karoo Oschee of Vryburg.

2.2. To have such cattle slaughtered by the Vryburg Abattoir.

3. Any one of the auctioneers and abattoir mentioned in paragraphs 2.1 and 2.2 hereof are authorised to deduct their costs and auctioneers' commission from the proceeds of any sales before making payment of such proceeds to the Sheriff of the High Court for the District of Vryburg and to deliver to the Sheriff of the High Court for the district of Vryburg a statement indicating the proceeds of such sale and any costs deducted from proceeds.

4. The Sheriff for the High Court for the District of Vryburg is ordered to make an inventory of any cattle attached in terms of the order of this Court made final on 3rd day of NOVEMBER 2022 in which inventory any distinctive markings or identification marks found on the cattle is indicated.

5. The Sheriff of the High Court for the District of Vryburg is ordered to deliver the inventory referred to in paragraph 4 above to the pound master at the Vlakfontein Pound.
6. The Sheriff of the High Court for the District of Vryburg is ordered to pay the proceeds of any sales of any cattle attached in terms of the order of this Court made final on 3rd day of NOVEMBER 2022 into the trust account of the firm of Attorneys, Kotze Low Swanepoel in an interest-bearing account.
7. The firm Kotze Low Swanepoel is authorised to invest any funds paid into its trust account as a result of the sale of cattle in terms of paragraph 2.1 and 2.2 hereof in an interest-bearing account.
8. The firm Kotze Low Swanepoel is authorised to deduct from the proceeds of the sale of the cattle in terms of paragraph 2.1 and 2.2 hereof:
 - 8.1. Any costs associated with the removal and attachment of the cattle in terms of paragraph 2 hereof which costs are inclusive of but not limited to:
 - 8.1.1. the Sheriff's costs for the execution of this order;
 - 8.1.2. the costs of transport of the cattle to the auctioneers or the abattoir (mentioned in paragraph 2.1 and 2.2 hereof);
 - 8.1.3. any costs incurred to keep and feed the cattle for any period between attachment and sale of the cattle.
 - 8.2. The tax costs of the main application issued under the above-stated case number granted by virtue of the final order dated 3rd day of NOVEMBER 2022, Inclusive of the execution and transport costs pertaining to the removal and impoundment of cattle on 15th day of JUNE 2022 as per the Interim Order.
9. Any lawful owner of the cattle sold in terms of paragraphs 2.1 and 2.2 hereof is authorised to lodge a claim with Kotze Low Swanepoel for the proceeds of such owner's cattle and that Kotze Low Swanepoel is authorised to make payment to such owner of the pro-rate value of such owner's cattle (after any deductions in terms of paragraph 8 hereof) upon receipt of satisfactory proof of ownership.
10. If any dispute exists about the ownership of any cattle sold in terms of this order subsequent to the lodging of a claim as envisaged in paragraph 9 above, such a dispute may at the sole discretion of Kotze Low Swanepoel be resolved as follows:
 - 10.1. by referring the dispute to the Vlakfontein pound master for determination in terms of any provisions of the North West Pounds Act 7 of 2010; or
 - 10.2. by issuing interpleader proceedings out of the Vryburg Magistrate's Court.

11. A copy of the order issued in terms of this notice of motion be served on the known address of the 1st to 7th Respondents and attached to the portion of boundary fence in which the unlawful fence was installed by the 1st to 7th Respondents.
 12. The 8th to 10th Respondent be notified of this order by delivering a copy thereof to the 9th Respondent at its address being Prime Plaza 52 Market Street Vryburg.”
- [22] Regardless of the existence of the order of 1 December 2022 Legalamitlwa and those associated with him, persisted in their unlawful occupation of Harfield Farm with their cattle. As a result

of the auctioneers being fully booked until the end of December 2022, followed by its closing, the order of 1 December 2022 could not be given effect to. In the interim, the cattle grazing at Harfield Farm grew exponentially in number to a number in excess of eighty (80), of which twenty were calves.

- [23] On 2 February 2023 Smit and Koorts met to plan the removal of the cattle to give effect to the order of 1 December 2022. On 15 February 2023, the Sheriff and members of SAPS arrived at Harfield Farm. On their arrival, Smit observed vehicles at the cattle post as well as approximately ten (10) to twelve (12) individuals trespassing at Harfield Farm. The Sheriff’s two assistants and some members of SAPS proceeded to serve legal notices on the trespassers. Smit contends that the members of SAPS were not amenable to assist at the South Boundary of Harfield Farm where there were several cattle and individuals who were extremely aggressive. The

individuals were in the process of moving the cattle towards the gate so as to remove the cattle from Harfield Farm. The cattle eventually moved onto the public road. Members of SAPS engaged the crowd across the fence, with Smit contending that they did nothing to ensure compliance of the court order. They instead indicated that they were present to remove cattle and not to effect any arrests, nor impound any vehicle at Harfield Farm. The Sheriff as a result, cancelled the execution of the court order as SAPS was not providing any protection.

- [24] On 16 February 2023, attempts were made to register a case of trespassing with SAPS based on the events of the previous day but to no avail as the SAPS was uncooperative.

The basis of the relief sought in this Court (contempt of court)

- [25] The facts which lay at the heart of the relief sought in the present application, to find Captain Phiri and- the new incumbent of the position of Acting Station Commissioner in contempt of court, are set out as follows in the founding affidavit:

“160. I point out as demonstrated by the above corroborated facts, the respondents are beyond reasonable doubt in wilful and mala fide contempt of the Order.

161. Phiri has as far as October 2022, illustrated that he would use every stratagem and excuse to avoid enforcing a lawful and valid order even though it has been flagrantly and blatantly contravened.
162. The conduct of Phiri is contemptuous to say the least.
163. The conduct of the first respondent (both Phiri and Mokgethi) as recalcitrant Police Officers had been brought to the attention of other respondents.
164. No steps were taken by them to censure this behaviour or to enforce the orders.
165. They thereby make common cause with his conduct and their association constitutes wilful and mala fide non-compliance with the order.”
- [26] In respect of Brigadier Tlotleng, the applicants contend that that he associates himself with the obstructive behaviour of his Station Commanders and the SAPS in general who refuse to enforce court orders, through his inactivity to enforce the court

orders.

The respondents version

- [27] The respondents confirm their respective capacities as members of SAPS. They assert that Dr RS Mompati Cluster is an agrarian area (relating to cultivated land or the cultivation of land). This being so, there is insufficient land for both crop farming and grazing. The combination of the latter two factors fuels conflict. The epicentre of the dissension between the applicants and implicated respondents is the ownership of land predicated on who the rightful owners are and who is entitled to the land.
- [28] The farms at the centre of the dispute and the rightful ownership thereof is the subject of disputes which are pending before either the Land Claims Commission or Land Claims Court. In respect of “entitlement” to use of the farms, the farms are government owned farms that are the leased out. As a result of these collective tensions, it has created fertile ground for breaches of the rule of law.
- [29] From about May 2022 to October 2022, Smit in person and by proxy has reported various acts of criminality which were and are being attended to by the respondents with the necessary professionalism. Some of the criminal matters have resulted in successful prosecutions, whilst others are the subject of ongoing investigation.
- [30] The respondents admit the presence of Sehoru and Mothopohotsie at Harfield Farm on 6 October 2022. However, the respondents contend that it is arguable if Sehoru and Mothopohotsie and other members of SAPS were at all relevant or material times acting under the command of Captain Phiri. The respondents avow that Smit was advised that a criminal case be registered and that members of SAPS offered to assist with that process. They further contend that arrests could not simply be effected at the whim of Smit, but only when offences envisaged in Schedule 1 of the Criminal Procedure Act 51 of 1977 were

committed, which is not the case in this matter. To this end, the respondents contend that members of SAPS at all material times acted within the confines of the law.

- [31] In respect of the presence of SAPS members at Harfield Farm on 15 February 2023, the respondents contend that it was to assist the Sheriff to execute an order of court, at the Sheriff's behest. When members of SAPS were requested to herd the cattle, they rightfully refused to do so.

The law

- [32] The Republic of South Africa is one sovereign, democratic state founded on amongst others, the supremacy of the Constitution and the rule of law. (See s1 (a)-(d) of the Constitution of the Republic of South Africa, 1996.) The rule of law envisions compliance with court orders on a horizontal and vertical plateau, binding all natural persons and organs of state. In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021
- (5) SA 327 (CC), Khampepe ADCJ, introduced the judgment of the Court with an excerpt of the address by Mr Nelson Mandela at the inauguration of the Constitutional Court on 14 February 1995, where he said:

"We expect you to stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion."

- [33] Khampepe ADCJ went on to introduce the judgement as follows:

"[1] It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally mandated function." (my emphasis)

- [34] The locus classicus on contempt of court proceedings is *Fakie NO v CC II Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA), which has mustered approval in the Constitutional Court. At paragraph [8] of *Fakie*, Cameron JA (as he then was) describes the application for committal for contempt by a private party as a 'peculiar amalgam' because 'it is a civil proceeding that invokes a criminal sanction or its threat.' At paragraph [9], he goes on to state that:

'The test for when the disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough...' (my emphasis)

[35] Wilfulness is central to any deliberate disregard which is mala fide. ‘Wilful’ or ‘Wanton’ disregard is something which is done more than casually or accidentally or unintentionally.

[36] The existence of the order and its service on the respondents is common cause as stated above. Its validity is unassailable.

Consequently, the respondents bore the evidentiary burden to satisfy this court that their failure to comply with the orders was not deliberate and mala fide.

[37] The burden of proof on the respondents is succinctly summarized as follows at paragraph [41] of Fakie:

‘... this development of the common law does not require the applicant to lead evidence as to the respondent’s state of mind or motive: Once the applicant proves the three requisites..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.’ (my emphasis)

[38] The approach to contempt of court applications is succinctly summarised at paragraph [42] of Fakie:

“a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirement.

- b) The respondent in such proceedings is not an “accused person” but is entitled to analogous protections as are appropriate to motion proceedings.
- c) In particular the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
- d) But, once the applicant has proved the order, service, or notice, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.’

[39] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC), Nkabinde J set out what contempt entails as follows:

“[30] 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 proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order...At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.”

...

[36] Therefore, the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their

existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.’

Discussion

[40] The applicants must prove the orders; service of the orders; non-compliance with the orders; and wilfulness and mala fides; beyond reasonable doubt. It is irrefutable that the various orders of this Court exist and are extant. The court orders have been duly served on the respondents and it is common cause that the respondents have knowledge of the orders. The only issues which fall for determination is whether or not there has been non-compliance with the orders and wilfulness and mala fides. Essentially, it must be determined if the alleged breach of the orders by the respondents through non-compliance has been deliberate and mala fide.

[41] The answering affidavits deposed to by the respondents are far from a model of elegant drafting. The facts deposed to are set out tersely. Be that as it may, there are sufficient facts on which this Court can make a pronouncement on the conduct of the respondents.

[42] In respect of Captain Phiri and or his successor in title, it cannot be said that his misunderstanding of the law or the incorrect application of the law constitutes non-compliance with the orders and in so doing can be equated to conduct which is wilful and mala fide to constitute malicious non-compliance with the orders of Court.

[43] This is evident from the applicants’ evidence and the explanation proffered by the respondents. Whilst it may appear at first blush that Captain Phiri acted in contempt of the court orders by wanting to “adjudicate” the impasse between the applicants and the individuals who were clearly in violation of the court orders, it cannot be ignored that he erred on the side of caution by informing Smit that he wanted to consult the prosecutor at Ganyesa. His further intention to consult Land Affairs as he referred to the Department, because of the allegation by Legalamitilwa about true ownership of Harfield Farm was misplaced and not within his mandate. The question, however, is whether this conduct by Captain Phiri was wilful and predicated on mala fides. In terms of section 40(1)(a) of the Criminal Procedure 51 of 1977 a peace officer may arrest without a warrant arrest any person who commits or attempts to commit any offence in his presence. Correctly so, arrests could not simply be effected at the whim of Smit, but only when offences envisaged in section 40(1)(a) of the Criminal Procedure Act 51 of 1977 were committed. It is

uncontroverted that arrests were effected by SAPS in relation to the matters complained of by the applicants,

where many have led to successful prosecutions. This conduct of Captain Phiri is imputed to Brigadier Tlotleng and the Provincial

Police Commissioner akin to the doctrine of common purpose.

- [44] In respect of Brigadier TE Tlotleng, he availed SAPS members, which included Captain Phiri to attend to the complaints of Smit and Koorts about events at Harfield Farm, which accords with the court orders. The fact that he could not be reached by Smit when Smit was aggrieved by Captain Phiri's intervention, is a far cry from the allegation that Brigadier Tlotleng took no steps to censure the behaviour of Captain Phiri or himself enforcing the orders and in so doing made common cause with Captain Phiri's conduct to constitute wilful and mala fide non-compliance with the orders. The applicants' evidence falls gravely shy from proving non-compliance with the court order. Even though Brigadier Tlotleng has explained his role in the matter, the applicants' failed to overcome the burden of proving non-compliance with the order on the part of Brigadier Tlotleng, beyond reasonable doubt.
- [45] In respect of the Provincial Police Commissioner who is cited in his capacity as "overseeing authority responsible for effective policing", he is cited in a remote monitoring capacity and save for the all-encompassing and broad allegation that he made common cause with Captain Phiri's conduct to constitute wilful and mala fide non-compliance with the orders, no direct evidence was presented by the applicants against the Provincial Police Commissioner.
- [46] What is in the final analysis more telling is the content of the order of Reid J in respect of the respondents. Firstly, the respondents were ordered to assist the Sheriff in the execution of his/her duties, which they did. The members of the respondents also rightfully refused to herd cattle when so requested by the Sheriff. The order reasonably cannot be interpreted to mean that the SAPS members were to assist the Sheriff to herd cattle.
- [47] Secondly, the respondents were ordered to maintain law and order, should the identified respondents who were invading Harfield Farm not strictly comply with the court order. Captain Phiri made it clear, even on the applicants' version, that he was confronted with conflicting versions from Smit and the individuals who made their way onto Harfield Farm, and that he wanted to consult the prosecutor at Ganyesa in this regard. To maintain law and order as per the court order, still entails compliance with the law by SAPS with due regard to section 40(1)(a) and Schedule 1 of the Criminal Procedure Act 51 of 1977. Arbitrary arrests at the will of the applicants correctly could not be countenanced by SAPS, which could render SAPS liable to

civil action.

Conclusion

[48] The applicants failed on their own version to make a case for this Court to find the respondents in contempt of the Court orders issued from this Court in respect of the individuals identified therein. Proof of a deliberate and mala fide breach of the court orders by the applicants was not proven beyond reasonable doubt.

Costs

[49] Costs follow suit and therefore the cost order was made in favour of the respondents.

Order

[50] These constitute the reasons for the order of 24 April 2023, in terms of which the application was dismissed with costs.

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ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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Date of Hearing: 20

March 2022

Date of order 24

April 2023

Date of Reasons of Judgment: 12 September 2023

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