

SOUTH AFRICA / JUDGMENT

Bickell v Brown NO and Other (EL 579/2010, ECD 1179/2010) [2012] ZAECELLC 7 (19 April 2012)

[2012] ZAECELLC 7

COURT

Eastern Cape High Court, East London Local Court

BEFORE

G Goosen

CASE / FILE NUMBER

EL 579/2010, ECD 1179/2010

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Source record**IN THE HIGH COURT OF
SOUTH AFRICA****(EASTERN CAPE,
GRAHAMSTOWN)****CASE NO: EL 579/2010****ECD 1179/2010****Date****Heard: 29 March 2012****Date****Delivered: 19 April 2012****NOT/REPORTABLE**

In the matter between:

ALEXA BICKELL

.....Applicant

and

SIMON AMOS BROWN NO

.....First

Respondent

SAMMY AMOS BROWN NO

.....Second

Respondent

HKM ADMINISTRATORS CC

NOThird

Respondent

JUDGMENT

GOOSEN, J:

This is an application for the committal for contempt of the respondents for alleged non-compliance with the terms of a court order granted by Smith J on 25 August 2010 sitting in the East London Circuit Local Division. The order granted by Smith J is in the following terms:

“1. THAT the (sic) subject to the certification by the appropriate Officials of the Department of Economic Development and Environmental

Affairs, Amathola Region, East London, that the following conditions applicable to the environmental authorisation issued by the said Department on the 28th of October 2009, have been fully complied with, namely:

that the existing open conference centre on Farm 762/1 (East London) be and is hereby dismantled/demolished (Condition 3.2 of authorisation); and

that a soundproofed conference and wedding centre be constructed in its stead (Condition 3.2 environmental authorisation); and

that the specifications for, and the materials to be utilised in, the construction of the said soundproofed conference and wedding centre, be determined after full consultation with and recommendation of a qualified Noise Impact Specialist (Condition 3.3 of environmental authorisation); and

that all interested and affected neighbours be and are hereby consulted by the Noise Impact Specialist, and that the concerns of all interested and affected neighbours be considered and, where appropriate, reflected in the design of the soundproofed wedding and reception centre (Condition 3.3 of the environmental authorisation); and

that the wedding and reception centre be and are hereby designed to a minimum standard of SANS10103: 2008, or higher standard where applicable in the opinion of the Noise Impact Specialist (Condition 3.4 of the environmental authorisation); and

that no construction of the soundproofed wedding and reception centre shall commence before: the final design; and

a report as to how the concerns of the interested and affected neighbours have been dealt with in the design and the material utilised, has been approved by the Department of Economic Development and Environmental Affairs, Amathola Region, East London (Condition 3.4 of the environmental authorisation); and

that the periphery of Farm 762/1 (East London) be and is hereby replanted with indigenous species of at least 1.5 metres in height in order to form a screen (Condition 3.7 of the environmental authorisation); and

that all alien species on the property be and are hereby removed, and all portions of the land not utilised for the development be and are hereby rehabilitated and restored by the planting of indigenous species (Condition 3.6 of the environmental authorisation); and

that the Respondents employ the services of an Environmental Control Officer to ensure compliance with all conditions aforesaid (Condition 4.1 of the environmental authorisation), the First and Second Respondents, nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 be and is hereby interdicted and restrained from organising and/or hosting any wedding functions, receptions, conferences and/or similar noise generating events at the said farm, with effect from 31st October 2010;

2. THAT the First and Second Respondents, nominee officio, pay the costs of this application.”

Counsel for the parties were in agreement that upon a proper construction of the order the first and second respondents nominee officio as trustees of the Amos Brown Holding Trust IT no. 268/95 (hereinafter the Trust) are interdicted and restrained, with effect from 30 October 2010, from organising and/or hosting any wedding functions, receptions, conferences and/or similar noise generating events on Farm 762/1, East London (the farm) pending compliance with the conditions stipulated in paragraphs 1.1 to 1.9 inclusive. Upon a grammatical construction the portion of paragraph 1.9 above which begins with “the First and Second Respondents ...” is not part of paragraph 1.9 but rather forms the conclusion of the introductory portion of paragraph 1 of the order. Counsel for the respondents conceded that the order was understood as such and that in evaluating this application I can accept that the respondents so understood its terms.

It appears from the papers that this matter has been the subject of protracted litigation between the parties.¹ The first and second respondents are the trustees of a trust which is the registered owner of portion 1 of farm 762, situated in Gonubie on the outskirts of East London (hereinafter “the property”). The applicant is the owner of a neighbouring property. It is common cause that the property was zoned for agricultural use. During or about 2007 the Trust commenced use of the property as a conference and wedding venue. To this end an existing structure on the property located approximately 80 metres from the boundary of the applicant’s property was converted for use as a wedding and conference venue. The use of the property as a conference and wedding venue gave rise to complaints from neighbours. These complaints concerned both the unlawful use of the property contrary to its zoning and the alleged nuisance cause by the use of the property. It appears from the papers filed in the application which came before Smith J that the Buffalo City Municipality was at some stage prevailed upon to launch interdict proceedings against the erstwhile trustees of the Trust. These proceedings were however stayed when the trust made application for the rezoning of the property and sought approval for the development of the property to be utilised inter alia as a conference and wedding reception venue. The authorisation of the development required approval in the form of an environmental authorisation which had to be obtained from the Provincial Department of Economic Development and Environmental Affairs.

In or about June 2010 the applicant launched an application against the respondent in the East London Circuit Local Division under case number 579/2010. That application was to interdict the unlawful use of the property contrary to the zoning scheme applicable to it and to abate the nuisance caused to neighbours by such unlawful use. The order which was sought was based on the terms of an environmental authorisation which had been granted by the Department of Economic Development and Environmental Affairs. Although it is not necessary for present purposes to traverse the issues which arose in that application, it is important to record that the application was directed towards abatement of the noise nuisance caused by the use of the existing facilities on the property. The Buffalo City Municipality had not yet granted approval for the rezoning of the property. I was informed by Mr Schultz, who appeared for the respondents, that although the application had been opposed an agreement had been reached which was embodied in the order granted by Smith J. The order was thereafter served personally on both first and second respondents and service was also effected on the third respondent. It is accordingly common cause between the parties that the respondents have at all times been aware of the existence of Smith J's order and had full knowledge of its terms.

The granting of the order by Smith J did not resolve matters between the parties and further litigation ensued. During February 2011 the applicant launched contempt proceedings against the respondents for alleged breaches of the court order which had occurred during December 2010. That application was apparently settled between the parties when the respondents gave certain undertakings whereby the respondents assured the applicant that they would not host any weddings or conferences "until such time as the rezoning issues have been finalised ...". It is not clear what the effect of this undertaking was since the order of Smith J prohibits conduct contrary to conditions stipulated in the environmental authorisation granted by the Department and the rezoning of the property is not addressed in the order.

In November 2011 the applicant launched a further application for committal of the respondents for contempt of Smith J's order. This application was launched out of the East London Circuit Local Division (hereinafter the East London application) and alleged breaches of the order on two further occasions, namely on 3 September 2011 and 15 October 2011. That application is still pending between the parties.

After the launch of the East London application the applicant brought a further contempt application against the respondents alleging that the respondents had again breached the court order on 26 November 2011, 3 December 2011 and 10 December 2011. It is these alleged breaches of the order of Smith J which form the subject of this application. The application came before Pickering J on 15 December 2011. It was postponed. The order, by agreement, further records an undertaking given by the first and second respondents in the following terms:

“That the first and second respondents hereby give an undertaking not to breach the order granted by this Honourable Court granted on the 25th of August 2010 by organising and/or hosting any wedding functions, receptions, conferences and/or similar noise generating events at the said farm until such time as the respondents produce a certificate from the appropriate officials of the Department of Economic

Development and Environmental Affairs, Amathole Region, East London that the conditions applicable to the environmental authorisation

issued by the said Department on 28th October 2009 have been fully complied with, as set out in the order of court dated the 25th of August 2010 save that the respondents be and are hereby authorised to hold the function for the 16th of December 2011, as referred to in paragraph 44.2 of the answering affidavit.”

The indulgence granted in relation to the 16th of December was, so I was informed, to accommodate a wedding reception that had already been arranged and so as not to inconvenience the marriage party. The application was thereafter postponed from time to time. The papers include supplementary opposing affidavits and supplementary replying affidavits. A copy of the original set of application papers which served before Smith J has also been included in the court file, presumably by way of background to the present application.

I was informed by the applicant’s counsel that the East London application has been held in abeyance pending the finalisation of this application.

The applicant’s case is the following. It is alleged that on 26 November 2011 a function was held at the respondents’ farm commencing at 13h30 in the afternoon. During the course of the afternoon there was loud singing and loud music which continued until approximately 16h30. Between 16h30 and 17h00 guests at the venue sounded the hooters of their vehicles whereafter the noise levels abated.

On 3 December 2011 another function was held which commenced at approximately 18h00. At 21h00 that evening loud music was being played at the venue and there was a great deal of shouting. This continued until midnight. At approximately 02h00 the applicant’s dogs became very agitated on the boundary of the applicant’s property when guests were leaving the function being held on the respondents’ property.

On 10 December 2011 yet another function was held which commenced at midday. There was loud cheering and ululating during the course of the afternoon which was followed by loud music which continued until 17h00.

The respondents’ opposing affidavit raises a number of contentions regarding the urgency with which the application was launched. As I understood respondents’ counsel, the challenge based on the alleged lack of urgency of the application is not persisted in as a substantive challenge to the proceedings.

In regard to the merits of the application the respondents contend that the alleged breaches which gave rise to the first contempt application occurred on the basis that the respondent had been advised that the rezoning was approved and accordingly they believed that they were entitled to host events on the farm. Since it was the respondents' intention to comply with the court order they gave the undertaking referred to earlier and thereafter desisted from organising any further events. The respondents point out that the events which form the subject matter of the East London application as well as those which form the subject matter of this application are the only events organised and that they can be fully explained. In this regard it is appropriate to quote an extract of the opposing affidavit since it seeks to set out the basis upon which the respondents have dealt with the matter:

"29. Towards the end of August 2011 I was informed by municipal officials that the Respondents rezoning application had been granted. Upon my specific enquiry, I was told that Respondents could from then onwards legally host wedding ceremonies and other events of the nature that the Applicant had previously complained of and now still complains of. I had no reason to doubt or query this information and believed it to be true and correct.

30. On or about 4 October 2011 Setplan: Settlement Planning Services, acting on the Respondents' behalf, received official communication from Buffalo City Metropolitan Municipality that the rezoning application was approved. A copy thereof is annexed hereto marked "SAB4". This confirmed the earlier advices that I had received.
31. However, upon considering the introductory portion of paragraph A and the provisions of paragraph B during the latter part of October 2011, the exact date of which I cannot recall I became uncertain as to the legal effect of the document. I thereupon contacted my attorney, Craig Kirchmann, in order to invite his views. He could not give me an authoritative answer and suggested that I contact Setplan and a responsible official from Buffalo City for orientation, advice and guidance.
32. I subsequently contacted Mr. Johan Jonas of Setplan. He advised me that the conditions in the rezoning letter were not pre-conditions, but merely had a regulatory effect and that it constituted authority and a legal premise for hosting events such as wedding ceremonies. I had no reason to doubt his advice as by the nature of his work he interacted with the responsible officials of Buffalo City Municipality on a daily basis in respect of matters of this nature.
33. Based on the information and confirmation received as stated above, the Further Respondents and I, in the firm and genuine belief that our conduct would not and did not constitute a breach of the order of Court, arranged and hosted the functions complained of. I can categorically state that, if it is found that for some reason or other the Respondents did breach the Court order, none of the Respondents ever intended to compromise and impugn the integrity status and authority of the above Honourable Court and that we at all times believed in the guidance and advice received from the parties mentioned above."

The alleged advice received from Setplan is not confirmed under oath by Mr Jonas. It is clear from the content of these averments that the respondents admit that the events complained of did occur and that they had in fact organised these events. The respondents rely upon advice received as justification for the alleged non-compliance with the court order.

Annexure “SAB4” referred to in the respondent’s opposing affidavit is a letter advising the approval of the rezoning of the property subject to conditions stipulated in that letter. Part A of the letter provides that:

“You are hereby advised that ... council has resolved to approve ... the application for rezoning of portion 1 of Farm 762, East London from Agricultural Zone 1 to Resort 1 and council’s special consent for a hotel, subject to the following conditions ...”

What follows this are 67 conditions dealing with a broad range of matters. The following are relevant:

“(12) Noise pollution raised in objections to the BAR [Basic Assessment Report] being kept within the thresholds as stipulated in BCM [Buffalo City Municipality] bylaws.

(66) The applicant adhering to all the conditions stipulated in the environmental authorisation for the development dated 28 October 2009.”

Portion B of the letter provides as follows:

“Please note that the property which is the subject of the rezoning approval may not be used for such new uses as may be allowed in such zone in terms of the Buffalo City Zoning Scheme before every condition above has been complied with to the satisfaction of the Director of Planning and Economic Development.”

The Director of Planning and Economic Development is an official of the Buffalo City Municipality. The receipt of SAB4, i.e. the notification of approval of the rezoning, caused the first respondent to enquire as to whether respondents could organise weddings and other functions. The respondents’ attorney was apparently unable to provide “an authoritative answer”. The first respondent was told to seek advice from Setplan, a firm of planning consultants. This the first respondent did and, according to the first respondent, the advice received was that the letter (SAB4) “constituted authority and a legal premise for hosting events such as wedding ceremonies”.

The stipulation in paragraph B of the rezoning approval cannot be in clearer terms and its effect is that until such time as each and every condition is met to the satisfaction of the designated official of the Buffalo City Municipality the re-zoning cannot be relied upon. This would render use other than agricultural use unlawful. Of greater significance however is the fact that clause 66 specifically refers to the environmental authorisation of 28 October 2009 which, in terms, was incorporated in the order of Smith J.

A reading of “SAB4” therefore cannot have created the impression that (a) the rezoning has been resolved and therefore that the undertaking given by the respondent was now discharged or that (b) the approval of the rezoning subject to conditions obviated compliance with any condition imposed in terms of the court order.

It is therefore hardly surprising that the respondent did not obtain legal advice indicating that he could proceed. The assertion that Mr Johan Jonas of Setplan had advised that the conditions are not preconditions, given the wording of “SAB4”, is astonishing. No doubt this explains why that fact has not been confirmed by Jonas under oath.

In the supplementary opposing affidavit filed pursuant to the order of Pickering J, the respondents state that as early as June 2011 the Department of Environmental Affairs approved the respondents’ right to continue with its operations. A letter issued by the Regional Manager of Environmental Affairs for the Amathole region is annexed where the following is recorded:

“RE: ALTERATION TO AN EXISTING WEDDING HALL FOR SOUND EMISSION CONTROL AT GONUBIE MANOR

With reference to the abovementioned application, please be advised that the Department has decided to grant the right to continue with operations. The reasons for the decision are attached herewith.

In terms of the court order, you are instructed to alter the abovementioned facility to meet the legislative sound emission levels in a smallholding area.

This has been achieved by complying with recommendations made by an Environmental Noise Impact Assessment Specialist (Mtshali-Moss Projects Africa (Pty) Ltd), which include:

Removing the existing windows and brick-up.

Installing a duel ceiling system with an immediate absorption layer for sound and heat control.

Modification of the three existing doorways.

This Department is therefore satisfied with the alterations made in the wedding hall to reduce the sound emissions.”

A second letter dated 19 January 2012 is also annexed. It states:

“This correspondence serves to confirm that this Department is satisfied, based on the site inspection conducted by an official from this Department and the contents of the audit report submitted to this Department, dated January 2012 as compiled by Carter Environmental

CC, that the conditions contained in this Department’s environmental authorisation, dated 28 October 2009 (Ref. AR/7/B/16/1/09), which was issued in respect of the proposed rezoning of Farm 762/1, Gonubie, have been adequately complied with inasmuch as they relate to wedding functions, receptions, conferences and/or other similar noise generating events.

In view of the above, this Department has no objection to the continuation of further approved activities taking place on site.”

In argument before me applicant’s counsel pointed out that the terms of the order granted by Smith J required, in the first place, that the existing conference centre be demolished and that a soundproofed venue be constructed in its stead. In this regard it is common cause on the papers that the existing venue has not been demolished. Whilst a new structure is being constructed it has, according to the respondent, not yet been completed. Secondly, the order stipulated that the specifications for and the materials to be utilised in the construction of the new venue be determined after consultation with a Noise Impact Specialist. Whilst it appears that a Noise Impact Specialist, Mtshali-Moss, has been consulted, the said consultants have at no stage consulted all of the interested and affected neighbours as is specifically required by clause 1.4 of the order. The court order further requires that no construction of the venue should commence until a report as to how interested and affected neighbours have been dealt with in the design has been approved by the Department. No report of this nature has been produced.

Applicant’s counsel further submitted that the letters now sought to be relied upon and produced by way of a supplementary opposing affidavit do not in fact address the requirements of the court order. The second letter is dated after the breaches of the order which are complained of occurred. In any event the approval is not confirmed under oath and accordingly, so it is submitted, the evidential value of these letters is limited.

Mr Schultz argued that the court order does not stipulate the form in which it is to be certified that the terms of the order have been complied with. On this basis it was suggested that some official indication of the fact is sufficient. It was therefore argued that the letters annexed to the supplementary affidavit reflect that the Department had formally indicated in June 2011 that it was satisfied.

According to the Shorter Oxford English Dictionary a certificate is “a document in which a fact is formally certified”. To certify is “1. to make (a thing) certain; to guarantee as certain; to give certain information of, 2. to declare or attest by a formal or legal certificate”.

In my view, the order of Smith J required that such a formal declaration in writing be obtained in which it was declared, on behalf of the Department, that all of the conditions stipulated in the order had been met and its terms complied with. This much is evident too from the order made by Pickering J. A plain reading of the order of Smith J makes it clear that the prohibition continues until such time as the Department certifies compliance with the order. This required a formal declaration to this effect by a relevant and authorised official of the Department.

There is no such certificate. Nor is there any affidavit in which a responsible official attests to the fact that the Department is indeed satisfied that all of the stipulated conditions have been met. The respondents are constrained to rely upon the two letters referred to above. In the first instance the letter of 23 June 2011 deals with the alterations to the existing wedding venue. Even if it is to be accepted that it constitutes a certification, it does not in point of fact address each of the provisions of Smith J’s order. It states in broad terms that the noise reduction measures

adopted are satisfactory. It does not address paragraphs 1.1 and 1.2 of the court order which require that the existing venue be demolished and that a new venue for hosting of conferences and weddings be constructed. Nor does the letter of 23 June deal with the specific terms of paragraph 1.6 of the order which require consultation by a noise specialist with interested and affected neighbours, the production of a report incorporating measures to meet the requirements of interested and affected neighbours and Departmental certification that such report is to its satisfaction.

There is in any event the further consideration raised by Mr Cole , for the applicant, namely that on the respondents' own version it is conceded that the wedding and conference venue contemplated by the court order is still under construction. Mr Schultz sought to suggest that a distinction is to be drawn between the conference venue on the one hand and the wedding venue on the other. It was argued that the wedding venue had been soundproofed to the satisfaction of the Department whereas the conference venue is still under construction. He pointed to reports and design plans which indicate the measures to be taken to ensure that the wedding venue is indeed soundproof.

As I understood the respondents' argument the "new" venue which is still under construction will in the future be utilised as the venue for hosting conferences and weddings. Until such time as it is constructed an existing venue has been "soundproofed" in accordance with the reports prepared by Mtshali-Moss and other consultants. It is this which has been approved by the Department and accordingly, so it is argued, the respondents' use of the property to host weddings does not constitute non-compliance with the order.

Attractive as the argument at first blush appears it cannot avail the respondents. The very purpose of Smith J's order was to effect an abatement of the noise nuisance generated by the respondents' use of the property for the hosting of weddings and conferences. It did so by compelling compliance with the conditions of the environmental authorisation that had been issued. That authorisation (as is apparent from the court order) did not envisage the use of an existing venue for the hosting of conferences and weddings; it did not permit the "soundproofing" of an existing venue. It stipulated unequivocally that the existing venue be demolished and that a new soundproofed venue be constructed. Smith J's order therefore required that until such a new venue had been constructed no weddings, conferences or other noise generating events may be hosted on the property.

As indicated Mr Schultz relied on a report by Mtshali-Moss as reflecting compliance with the order. That report predates Smith J's order. Mr Schultz was constrained to concede that no report such as that contemplated by paragraph 1.6.2 of the order had been produced.

The principles upon which civil proceedings for contempt of court are adjudicated are well established. The crime of contempt of court involves the unlawful and intentional violation of the authority of a judicial officer or a judicial body acting in such capacity. In *Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA), the court at 332 said:

“It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence had, in general terms, received a constitutional ‘stamp of approval’, since the rule of law – a founding value of the Constitution – ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.’”

What is required to be established, beyond a reasonable doubt, is a deliberate and intentional violation of a court order. The disobedience of the order must be not only wilful but also mala fide. As stated in Fakie (at 333C-E):

“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).

These requirements – that the refusal to obey should be both wilful and mala fide, and that the 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.”

There is no dispute regarding the fact that the respondents were aware of and had full knowledge of the existence and terms of the court order. Nor is there a dispute as to the commission of the acts which the applicant alleges constitutes non-compliance. The respondents’ contention is, as I understand the defence, that it has not acted in non-compliance with the order since the conditions set in the order have in fact been complied with. It is further alleged, in the alternative it seems, that inasmuch as it is found that the respondents did not as a matter of fact comply with the order such non-compliance was actuated by a mistaken and bona fide belief that the respondents were entitled to act in the manner in which they did. This mistaken but bona fide belief was, it is alleged, induced by advice received from professionals regarding respondents’ compliance and therefore entitlement to act as they did.

The terms of the court order are, in my view, clear. The order requires compliance with a number of conditions before any events proscribed by the terms of the interdict may be organised or arranged. The order makes it clear that compliance with the conditions is to be determined and certified by the Department of Environmental Affairs. There can be no doubt that certified compliance with conditions stipulated by the Department (in the environmental authorisation) and incorporated in the court order must first be established.

In my view the evidence establishes that the conditions stipulated in the court order have not been met. The evidence also establishes that the conduct of the respondent was in breach of the terms of the order. The only question then is whether the respondents were wilful and mala fide in their non-compliance.

Intention in the form of *dolus eventualis* is sufficient for criminal contempt of court. In this regard it must be shown that the non-complier “subjectively foresaw the possibility of his act being in contempt of court and he was reckless as to the result” (*S v van Niekerk* 1970 (3) SA 655 (T) at 657G). As noted in *HEG Consulting Enterprises (Pty) Ltd v Siegwart* 2000(1) SA 507 (C) at 518I-J, the subjective state of mind of a party can be proved by inferences drawn from conduct and from the circumstances in which the breach of the order was committed.

The respondents’ approach to the order of Smith J was to conflate its terms with the requirement that the property be rezoned. Certainly this appears to have been the basis of the undertaking given pursuant to the first contempt application brought by the applicant. That the respondents continued to conflate compliance with Smith J’s order with the resolution of the rezoning issues is apparent from the further conduct of the respondents when they received information that the rezoning had been approved. On receipt of that news the first respondent enquired whether this meant that they could legally organise wedding events. Upon consideration of the terms of SAB 4 the first respondent became uncertain of the legal effect of the document and then sought his attorney’s opinion. He was directed to Setplan who furnished the advice already mentioned.

This conduct in my view indicates that the respondents subjectively foresaw the possibility that arranging wedding events may be in breach of the order. The further question is whether the act of seeking advice and relying upon that advice establishes a reasonable and bona fide belief that the act of organising wedding events was not in breach of the court order.

In *HEG Consulting Enterprises* the following was said (at 522B) in relation to a defence based upon advice received:

“This defence requires a proper setting out of the circumstances under which the advice was given. It is incumbent upon a party relying upon such defence to ‘... testify in regard to all the circumstances relevant to the giving of such advice’ (see S v Abrahams 1983(1) SA 137 (A) at 146 H). In motion proceedings this means that all the relevant circumstances have to be set out on affidavit.”

The reference to the passage in *S v Abrahams* bears emphasis. There van Winsen JA (relying of a judgment of Tindall ACJ in *R v Meischke’s (Pty) Ltd and Another* 1948(3) SA 704 (A)) said at 146G:

In addition the Court would require to be satisfied that the advice was given on a full and true statement of the facts. In the absence of such safeguards the fact of the advice having been given was held to be of no avail as a mitigating factor. These remarks are pertinent to the present enquiry, more particularly as the attorney on whose advice the appellant claimed to have relied was not called to testify in regard to all the circumstances relevant to the giving of the advice.

In this instance the facts and circumstances in which the advice was sought and given are not set out and there is, apart from the respondents' say-so, no evidence adduced to establish the nature of the advice sought or indeed the terms of the advice given. The respondents were constrained to rely upon inadmissible hearsay evidence, including double hearsay, in order to lay a basis for the defence. It appears in fact that the respondents' attorneys were not prepared to give advice regarding compliance with the court order. The advice alleged to have been given by Setplan is not confirmed on oath. There is no allegation made that Setplan considered the terms of the court order. It is instructive too that the Department's officials were not prepared to depose to affidavits confirming the basis upon which it had been certified that the order had been complied with. In these circumstances the safeguards to which reference is made in *S v Abrahams* are not present and accordingly the mere fact that advice was allegedly sought it cannot, without more, be said to found a reasonable and honest belief that the respondents were entitled to proceed to host weddings and other noise generating events.

On the respondents' own version the events were arranged notwithstanding that the construction of a soundproof venue is not yet completed. This was known to all concerned. The order requires the demolition of the open conference centre and the construction of "a soundproofed conference and wedding centre". It is difficult to conceive of a basis upon which a professional could in these circumstances advise that the conditions set in the court order have indeed been met and that there is therefore no risk of non-compliance with the order by proceeding with such events. In my view the respondents' mistaken belief that they could proceed cannot be said to be reasonable in the circumstances. As noted in *Fakie*, even if the belief is objectively unreasonable it may nevertheless be bona fide, although unreasonableness may evidence lack of bona fides. In this instance the belief that by virtue of the approval of the rezoning (which was expressly stated to be conditional), the prohibition imposed by the court order was expunged was grossly unreasonable. The language of the rezoning approval and that of the court order could hardly have been clearer. The respondents' attorney's alleged inability to "provide and authoritative answer" – bizarre as this may be – ought at the very least to have alerted the respondents to the need to exercise caution. Instead the respondents proceeded to rely upon advice that manifestly had no bearing upon the terms of the court order. This reflects adversely on the respondents' bona fides.

I am satisfied that the applicant has proved beyond a reasonable doubt that the first and second respondents are in contempt of the order of Smith J granted on 25 August 2010. It follows that the respondents must be found to be in contempt of the court order. The question that arises is what sanction ought to be imposed.

The applicant in its notice of motion sought a committal for imprisonment for a period of 12 months. Counsel however submitted that an appropriate sanction would be the imposition of a fine with an alternative term of imprisonment. The respondents' counsel in similar vein argued that it would be appropriate given the circumstances and the fact that the respondents are first offenders to suspend the sentence on appropriate terms.

Contempt of an order of court is a very serious offence. It is an offence which by its nature undermines the very fabric of due process of law and erodes the rule of law. The administration of justice cannot be effective in the absence of proper compliance with the orders granted by courts. Where contemptuous conduct is found to have occurred the sanction imposed seeks in the first instance to vindicate the dignity and the authority of the courts and to ensure that further non-compliance is deterred.

In the circumstances of this matter it is relevant to record that the applicant felt compelled on three separate occasions to seek the intervention of the courts to give effect to the terms of Smith J's order. At the time that the application came before Smith J the respondents were using the property to host weddings and other events without first having obtained an appropriate re-zoning of the property. At that stage too the conditions contained in the environmental authorisation had not been met. This conduct reflects poorly upon the respondents suggesting that they have paid scant regard to the rights and entitlements of their neighbours.

Although all three of the trustees of the trust were cited in this application, the order granted by Smith J imposes prohibitions only upon the first and second respondents in their representative capacities as trustees of the trust. It is their committal which is sought in this application.

In my view it is appropriate that the first and second respondents should be ordered to pay a substantial fine by way of punishment for their contemptuous conduct. In addition it is appropriate too to impose a period of imprisonment suspended on certain conditions as deterrent to conduct of this nature in the future. I intend to do so in the order which I shall issue.

Finally there is the question of costs. It was submitted that whereas ordinarily the courts are inclined to make punitive costs order in circumstances such as these, the fact that the respondents had sought to comply with the order and had to that end sought advice in regard thereto, should induce this court to grant only the ordinary costs order.

The applicant was characterised by respondents as being an over-zealous litigator, presumably because the applicant has been involved in no less than four High Court applications in which she has sought to vindicate her rights. On the evidence before me there is nothing to suggest that the applicant was in any manner acting unreasonably or that the litigation initiated by her was precipitous or unwarranted. On the contrary she has legitimately and with good cause sought to vindicate her rights and interests and has sought to do so by due process of law. In my view the applicant is entitled to a full indemnity as to the costs incurred by her in vindicating her rights. For this reason I consider that it would be appropriate to order costs on an attorney-client scale.

I accordingly make the following order:

The First and Second Respondents nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 are found to be in contempt of the Order of this Court granted by Smith J under case number EL 579/2010 on 25 August 2010.

The First and Second Respondents nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 are directed to pay a fine of R20 000.00 (TWENTY THOUSAND RAND), jointly and severally, the one paying the other to be absolved, within 10 (TEN) days of the date of this Order, payable at the office of the Registrar of this Court.

The First and Second Respondents nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 are each sentenced to 6 (SIX) months imprisonment in the event that the fine is not paid timeously or at all.

The First and Second Respondents nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 are each sentenced to 6 (SIX) months imprisonment wholly suspended for a period of 3 (THREE) years on condition that the said respondents are not again committed for contempt of an order of court committed within the period of suspension of the sentence.

The First and Second Respondents nominee officio as Trustees of the Amos Brown Holding Trust IT No. 268/95 are directed, jointly and severally the one paying the other to be absolved, to pay the costs of this application on an attorney and client scale.

G GOOSEN

JUDGE OF THE HIGH COURT

APPEARANCES:

FOR THE APPLICANT: Mr. Cole

Instructed by Wheeldon, Rushmere & Cole

FOR THE RESPONDENTS: Mr. Schultz

Instructed by N N Dullabh & Co

The papers included in the court file include a copy of the applicant's papers filed in the application which served before Smith J as well as copies of the contempt application pending before the East London Circuit Local Division.

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Prepared on 12 October 2026 · Esheria