
SOUTH AFRICA / JUDGMENT

Botma and Others v Moleko and Another (1138/2020) [2020] ZANCHC 66 (11 August 2020) [2020] ZANCHC 66

COURT

Northern Cape High Court, Kimberley

BEFORE

Van Tonder

CASE / FILE NUMBER

1138/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 1138/2020

Heard on: 17/07/2020

Made available: 11/08/2020

In the matter between: -

JAKOB JACOBUS BOTMA

First Applicant

CAROLINA FRANCINA BOTMA

Second Applicant

JOSEPH ANTOON COETZEE

Third Applicant

and

MATTHEUS DITEKO MOLEKO

First Respondent

THE SOL PLAATJE MUNICIPALITY

Second Respondent

Coram: Van Tonder, AJ

REASONS

FOR JUDGMENT

1. On 14 July 2020, the First, Second and Third Applicants applied for an urgent interim interdict against the First (and Second) Respondent by way of a rule nisi pending the finalization of the proceedings for contempt of court that the Applicants intend pursuing against the First Respondent in terms of section 106 of the Magistrate's Court Act, 32 of 1944.
2. The notice of motion and annexures were served on the First, and the Second Respondent on the 10th of July 2020.
3. The First Respondent opposed the application and on 14 July 2020 the following order was made by agreement between the parties:
"1. The application is postponed to Friday, 17 July 2020, for adjudication thereof;
2. The First Respondent shall deliver his opposing affidavit before or on Wednesday, 15 July 2020, at 16h00;
3. The Applicants shall deliver the replying affidavit, if any, before or on Thursday, 16 July 2020, at 16h00;
4. The costs occasioned by this postponement are reserved for determination on Friday, 17 July 2020."
4. The answering and replying affidavits were filed by the parties, and the matter was argued before me on Friday the 17th of July 2020, on which date I granted a rule nisi for the interim relief, as prayed for, on an urgent basis, with return day on the 14th of August 2020.
5. The following order was made:
 1. The compliance with the court rules with regard to form and service is dispensed with and that the matter is heard as one of urgency in terms of the provisions of Uniform Rule 6(12).
 2. That a rule nisi is issued, calling upon the First and Second Respondent to show cause before this Honourable Court on Friday, 14th day of August 2020 at 09h30, why the following orders should not be made final:
2.1 That, pending the finalization of the proceedings for contempt of court that the Applicants intend prosecuting against the First Respondent as set out in paragraph 4 below, the following orders are made:
2.1.1 That the First Respondent, his agents and contractors be interdicted and prohibited from continuing with the further construction, in any manner or form, of the buildings and/or structures on the property of Erf 4334, Kimberley, also known as 19 Queens Way, Hadison Park, Kimberley ("the property"), which have not been approved by the Second Respondent in terms of

the National Building Regulations and Building Standards Act, 103 of 1977 ("the Act") and the Spatial Planning and Land Use Management Act, 16 of 2013, the Municipal Land Use Management By-Laws of the Second Respondent of 2016 and the Land Use Management Scheme adopted by the Second Respondent in 2008 ("the municipal land use legislation");

2.1.2 That the First Respondent be interdicted and prohibited from installing any tenants and/or third parties or allowing any tenants and/or third parties to occupy or reside in the buildings and/or structures on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation;

2.1.3 That the First Respondent shall immediately comply with paragraph 3 of the order of the Magistrate's Court for the District of Frances Baard, held at Kimberley dated 30 July 2019, under case number 1566/2019 ("the Magistrate's Court order"), by demolishing the building and/or structures erected and currently being erected on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation;

2.1.4 That, in the event of the First Respondent failing to comply with the provisions of paragraph 2.1.3 above within 10 days of the date of this order, the Second Respondent shall immediately comply with paragraph 4 of the Magistrate's Court order by demolishing the building and/or structures erected and currently being erected on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation;

2.1.5 That, failing compliance by the First Respondent with the provisions of paragraph 2.1.3 above, and of the Second Respondent with the provisions of paragraph 2.1.4, the Applicants be authorized to appoint a building contractor of their own choosing in order to demolish the building and/or structures erected and currently being erected on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation;

2.1.6 That the Sheriff of this Court and/or the South African Police Service are authorized and directed to take any lawful steps necessary in order to assist the Applicants in enforcing the order granted in terms of paragraph 2.1.5 above;

2.1.7 That the First Respondent shall be liable for all costs of and incidental to demolishing of the building and/or structures erected and currently being erected on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation, including any such costs incurred by the Second Respondent in giving effect to the provisions of paragraph 2.1.4 above;

2.1.8 That the Applicants be indemnified against any losses suffered by the First Respondent as a result of the demolition of the building and/or structures erected and currently being erected on the property which have not been approved by the Second Respondent in terms of the Act and the municipal land use legislation;

2.1.9 That the First Respondent be ordered to pay the costs of this application on the scale as between attorney and client, alternatively that such Respondents who oppose this application be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved, with the proviso that in such event the First Respondent still be held responsible for the costs of this application on the scale of attorney and client.

3. THAT the provisions of paragraphs 2.1.1 and 2.1.2 above will serve as an interim interdict with immediate effect pending the final adjudication of this application.
4. THAT the First and Second Applicants shall within 14 days of the date of this order commence proceedings against the First Respondent in terms of section 106 of the Magistrate's Court Act, 32 of 1944, failing which the interim order granted in terms of paragraphs 2.1.1, 2.1.2 and 3 above shall lapse.
5. THAT the costs of 14 July 2020 and 17 July 2020 are reserved.
6. I indicated that reasons for the order would be provided upon being requested to do so by any of the parties, which reasons were

subsequently requested by the First Respondent.

Factual

background

7. The Applicants are the neighbours (and owners) residing on erven adjoining the First Respondent's property situated at 19 Queensway,

Kimberley (also known as Erf 4334, Kimberley).

8. The Applicants allege that the First Respondent started with landscaping, earthmoving and construction works on the property during May 2019. This is peculiarly denied by the First Respondent.
9. The Applicants allege that the aforesaid construction was done in contravention of the National Building Regulations and Building

Standards Act, 103 of 1977, and that the said contravention has a direct and material effect on the properties adjacent to the property and on the property rights and interests of the owners of the adjacent properties. These allegations are admitted by the First Respondent who avers that these issues form the subject matter for the Magistrates Court proceedings in which an order was granted.

10. The Applicants furthermore allege that they had made enquiries and established that the First Respondent was also acting in contravention of the Spatial Planning and Land Use Management Act, 16 of 2013, the Second Respondent's Municipal Land Use Management By-Laws of 2015, and the Land Use Management Scheme adopted by the Second Respondent in 2008.
11. These allegations are noted by the First Respondent and he states that: "I note that the Applicants did their investigations and cannot aver anything further, except to indicate that only a court of law could find if I am in breach of any laws. "
12. The First Respondent does not deny that the First Applicant had lodged a complaint with the Building Control Department on the 17th of June 2019 but does deny that he had continued with the construction works at the time.
13. The Applicants further allege that as a result of the First Respondent's actions (in continuing with construction works, which is denied by the First Respondent) the Second Respondent had launched an application against the First Respondent in the Magistrates Court for the district of Frances Baard, held at Kimberley, under case number 1566/2019.
14. In answer thereto, the First Respondent states the following: "I deny that the Application was brought due to my actions but rather due to the complaints of the Applicants, which forms part of the Application in the Magistrates Court. "
15. The First Respondent then admits the contents of the Magistrates Court order that was granted on 30 July 2019.
16. The Magistrates Court order that was granted against the First Respondent upon the Application of the Second Respondent on the 30th of July 2019, inter alia ordered:
 1. That the building/structures currently being erected on the property known as Erf 4334, Kimberley, which is also known as 19 Queens Way, Hadison Park, Kimberley which have not been approved by the Sol Plaatje Municipality in terms of the National Building Regulations and Building Standards Act, 103 of 1977, are declared illegal in terms of the provisions of the National Building Regulations and Building Standards Act, 103 of 1977;
 2. That the Respondent, his agents and contractors are interdicted from continuing to erect buildings/structures on the property known as Erf 4334, Kimberley which is also known as 19 Queens Way, Kimberley which have not been approved by the Sol Plaatje Municipality in terms of the National Building Regulations and Building Standards Act, 103 of 1977;
 3. That the Respondent is ordered to demolish the building/structures currently being erected on the property known as Erf 4334, Kimberley which is also known as 19 Queens Way, Kimberley which have not been approved by the Sol Plaatje Municipality in terms of the National Building Regulations and Building Standards Act, 103 of 1977, within 10 days after the granting of an order by the Court;

4. That, in the event of the Respondent failing to comply with order as set out in prayer 3 above, the Sol Plaatje Municipality is authorized and ordered to commence with the buildings/structures currently being erected situated on the property known as Erf 4334, Kimberley which is also known as 19 Queens Way, Kimberley and which have not been approved by the Sol Plaatje Municipality in terms of the National Building Regulations and Building Standards Act, 103 of 1977, within 20 days of expiry of the 10 days period allowed for in paragraph 3 in terms of which the Respondent is ordered to demolish the illegal building/structures;
5. That the Respondent shall be liable for all costs of and incidental to demolishing of the illegal buildings/structures on the property known as Erf 4334, Kimberley which is also known as 19 Queens Way, Kimberley, including any such costs incurred by the Sol Plaatje Municipality in giving effect to any demolishing order granted;
6. That the Applicant is indemnified against any losses suffered by the Respondent as a result of the demolition of the illegal structures currently being erected on the property on the property known as Erf 4334, Kimberley which is also known as 19 Queens Way, Kimberley; and
7. That the Respondent be ordered to pay the costs of this application on an attorney and client scale.
17. The First Respondent admits that he ceased construction work on becoming aware of the order, but he does not deny that he, (or the Second Respondent) has not complied with the order in having the buildings or structures demolished.
18. The Applicants allege that soon after certain of the restrictions in terms of the National Covid 19 lockdown was lifted, during June 2020, the First Respondent resumed his construction activities.
19. The First Respondent again denies that he had commenced with construction activities.
20. The Applicants attached two photographs taken on the 6th of July 2020, to the founding papers, depicting the installation of windowsills, ceilings and electrical wiring on the First Respondent's premises. In the second photograph a person is apparently installing a framework for the installation of ceilings. These photographs were taken by the First Applicant's son, Frederick Botma, who also deposed to a confirmatory affidavit, confirming the contents of the founding affidavit, including the aforesaid photographs.
21. The First Respondent's denial of the photographs are illustrative of the whole tenor of the denials set out in his answering affidavit, and is formulated as follows: "I deny that the picture so taken is of me or that whoever is taken therein was acting on my instructions. "

The parties' contentions

22. The First Respondent takes a number of points in limine in opposing the application.

23. The First Respondent firstly denies that the matter is urgent, alternatively alleges that any urgency was self-created by the Applicants.
24. On the one hand the First Respondent alleges that the Applicants are not parties to the Magistrates Court proceedings wherefore they have no locus standi to prosecute contempt of Court proceedings, and on the other hand he alleges that Section 106 proceedings constitutes an alternative remedy that precludes the Applicants from succeeding with the present urgent application.
25. The First Respondent goes even further and alleges that this Court does not have the jurisdiction to hear the matter as the Applicants' rights are protected by the Magistrates Court order, and in the event of the Applicants not being satisfied with the said order, they ought to have rescinded the order, or taken it on review.
26. The First Respondent then also raised the defence of res judicata, alleging that the Magistrates Court application (and order) is premised on the same subject matter, wherein the Applicants are "interested parties", despite the Applicants not being parties to that application.
27. The First Respondent also raised the point that the Applicant had failed to comply with Uniform Rule 41A, in that the Applicants have failed to attempt to mediate the dispute between the parties. In reply the Applicants allege that a mediation meeting was held on the 13th of July 2020, but that the Applicants would have suffered irreparable harm and would not have obtained substantial redress in due course, had they not proceeded with the urgent application.
28. Mr. Eillert on behalf of the Applicants argued that the Applicants seek an interim order pending the finalisation of the proceedings that they intend to prosecute in terms of Section 106 of the Magistrates Court Act, in order to enforce compliance with the Magistrates Court order.
29. He argued that the part of the interim order with immediate effect is necessitated to ensure that the First Respondent is interdicted not to continue with (and complete) the construction of the illegal structures on his property, and that the First Respondent is interdicted from allowing any persons from taking occupation of the illegal structures.
30. He argued that the averments regarding urgency, and the merits of the matter, have been met with bare and unsubstantiated denials, as illustrated by the First Respondent's reply to the photographs attached to the founding papers, which simply indicates that it was not him in the photograph and that it was not done on his instructions, without denying the date, time, place and content of the photographs.
31. Mr. Eillert argued that the First Respondent's denials are made in such a farfetched and untenable manner that they stand to be rejected on the papers, outright.

32. In the alternative Mr. Eillert argued that even on the First Respondent's own version (and facts admitted by him) the Applicants have made out a case for the relief that they seek.
33. He stressed that the procedure in the Magistrates Court was different to the High Court in that contempt of Court proceedings are not available in the Magistrates Court, and that in order to enforce the Magistrate Court order, the Applicants can only lay criminal charges in terms of Section 106 of the Magistrates Court Act.
34. The Magistrates Courts Act 32 of 1944, provides as follows in Section 106:

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"106. Penalty for disobedience of judgment or order of court.-Any person wilfully disobeying, or refusing or failing to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects shall be guilty of contempt of court and shall, upon conviction, be liable to a fine, or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine."

35. Mr. Eillert referred to the matters of Dreyer v Wiebols & Others[1] in respect of the procedure to be followed in the Magistrates Courts, and argued that the aforesaid process will take time, during which time the Applicants require an order protecting their rights pending the completion of the process contemplated in Section 106.

1.25cm; text-indent: -1.24cm; margin-bottom: 0cm; line-height: 150%"> 36. He argued that the First Respondent will complete the construction on his property and let the premises out, if the Court does not grant an order as sought, preserving the status quo pending the finalisation of the Section 106 procedure.

37. Mr. Eillert also argued that the harm that the Applicants would suffer, if this were allowed, would be irreparable, as it would deprive them of their rights as neighbours and property owners, as well as the detriment of having occupation being taken of illegal structures, with the resultant delays of evicting the occupiers even after having successfully pursued Section 106.

1.25cm; text-indent: -1.24cm; margin-bottom: 0cm; line-height: 150%"> 38. Mr. Mongale argued all the points in limine raised by the First Respondent at length.

39. In respect of the merits Mr. Mongale argued that the Applicants have failed to establish irreparable harm, a balance of convenience and no other satisfactory remedy at their disposal, to succeed with the application.
40. Mr. Mongale also argued that there was a bona fide dispute of fact in that the First Respondent denies that he has proceeded with construction work.

Merits

41. The relief sought by the Applicants, is an interim interdict in the form of a rule nisi against the First Respondent, to preserve the status quo pending the finalisation of proceedings that the Applicants intend to institute in terms of Section 106 of the Magistrates Courts Act, 32 of 1944.
42. The First Respondent's points in limine are self-contradictory, and in my view does not hold any water.
43. In respect of the merits, the First Respondent does not dispute or deny the Magistrates Court proceedings that he did not oppose, and he does not dispute the existence and terms of the Magistrates Court order, nor his failure to comply therewith.
44. He however seems to dispute doing the initial construction work during May 2019 (as well as during June 2019 after the complaint lodged with the Building Control Authorities), that led to the Magistrates Court proceedings by the Second Respondent, and he also disputes the continuing of the construction work since June 2010.
45. Despite this, even on the facts as admitted by the First Respondent, and on his own version of events, I am satisfied that the Applicants have established the requirements for an interim interdict against the Respondents namely:
 1. a prima facie right;
 2. a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
 3. a balance of convenience in favour of the granting of the interim relief; and
 4. the absence of any other satisfactory remedy.
46. Especially in the face of the First Respondent's admissions regarding the Magistrates Court order (which have declared the structures to be illegal) as well as his admitted failure to comply with the terms thereof.
47. In view of the aforesaid order, it would be difficult to find that the Applicants are not entitled to (at the very least) an interim order, (if not a final order) protecting their rights.
48. The First Respondent's denials insofar as it relates to the continuing of construction since June 2020, is in any event so far-fetched and untenable that it stands to be rejected outright.
49. Especially in view of the manner in which these denials were couched, the lack of elaboration and substance thereon, and the failure to deny the photographs attached to the founding papers.
50. As expressly set out in the matter of Plascon Evans by the Supreme Court of Appeal:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent,

together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto*, NO, 1972 (3) SA 585 (A), at p 882 D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd*, 1945 AD 420, at p 428; *Room Hire case*, supra, at p 1164) and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg. *Rikhoto v East Rand Administration Board*, 1983 (4) SA 278 (W), at p 283E- H)."

And more specifically:

Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries case*, supra, at p 924A)."[2]

51. The test as formulated in *Soffiantini v Mould* is directly applicable to these proceedings:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device.

It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits."[3]

52. Such a robust approach was also endorsed in *Buffalo Freight Systems vs Crestleigh Trading*, where Shongwe JA cited with approval the remarks of Eloff AJ in *Truth and Verification Testing Centre CC v PSE Truth Detection CC and Others*, where he stated:

"I am also mindful of the fact that the so-called "robust, common sense approach" which was adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable."[4]

53. The principle has also been formulated thus, by Heher JA of the Supreme Court of Appeal:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed." [5]

54. Applying the aforesaid principles, it is abundantly clear that the First Respondent has made various bald and hollow denials of factual matter without fully addressing the facts that he allegedly disputes, which does not constitute a bona fide dispute of fact, and which ought to be rejected.

55. These are the reasons for the order made by me on 17 July 2020.

AG VAN TONDER

ACTING JUDGE

For the Applicant: Adv A Ellert oio Van den Reeve Attorneys

For the Respondent: Adv J. Mongale SC oio Duncan & Rothman Inc.

[1] Dreyer v Wiebols 2013 (4) SA 498 (GSD)

[2] Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635C

[3] Soffiantini v Mould 1956 (4) SA 150 (E) at 154G-H

[4] Buffalo Freight Systems vs Crestleigh Trading 2011 (1) SA 8 (SCA) at 12 A-D Truth and Verification Testing Centre CC v PSE Truth Detection CC and Others 1998 (2) SA 689 (W) at 698H-J also reported as [1998] 2 All SA 202 W

[4] Buffalo Freight Systems vs Crestleigh Trading 2011 (1) SA 8 (SCA) at 12 A-D

Truth and Verification Testing Centre CC v PSE Truth Detection CC and Others 1998 (2) SA 689 (W) at 698H-J also reported as [1998] 2 All SA 202 W

[5] Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008

(3) SA 371 (SCA) at 375G

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