

SOUTH AFRICA / JUDGMENT

Deacon Trust and Another v Ngwenya (LCC114/2008) [2025] ZALCC 21 (29 May 2025) [2025] ZALCC 21

COURT

Land Claims Court

BEFORE

SJ Cowen

CASE / FILE NUMBER

LCC114/2008

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IN

THE LAND COURT OF SOUTH AFRICA

HELD

AT RANDBURG

CASE

NO: LCC114/2008

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

NOT REVISED.

29

MAY 2025

Heard:

7 March 2025

Delivered:

29 May 2025

In

the matter between:

THE
DEACON TRUST
FIRST APPLICANT
THE
HARTEBEEFONTEIN TRUST
SECOND APPLICANT
and
MR.MANDLA
JOHN NGWENYA
RESPONDENT

Summary:

Application to compel compliance with order of Court and enforce civil contempt remedies. Civil contempt requirements not established on evidence. Applicants entitled to a compliance order and leave to supplement should non-compliance persist.

ORDER

a.

Bar is uplifted in respect of the delivery of the respondent's answering affidavit and to the extent necessary, condonation is granted for the late filing of the answering affidavit and the replying affidavit.

b.

The respondent, Mr Mandla John Ngwenya, is directed no later than 60 (sixty) calendar days from the date of this order, to comply with the order of this Court granted on 18 March 2016 under case number LCC114/2008.

c.

The applicants are granted leave to approach this Court on the same papers for further relief should it become necessary.

d.

There is no order for costs.

JUDGMENT

COWEN DJP

Introduction

- [1] The applicants are two Trusts, the Deacon Trust and the Hartebeesfontein Trust. The Hartebeesfontein Trust is the owner of Portion 3 of the Farm Hartebeesfontein 134, Volksrust, Mpumalanga Province (Portion 3). The Deacon Trust owns an adjacent property,

Portion 2 of the Farm Hartebeesfontein 134 (Portion 2). Portion 2 and 3 are farmed as a unit. The respondent is Mr Mandla John Ngwenya. Mr Ngwenya resides on Portion 3 with his family. He keeps goats.

- [2] In this application, the applicants seek to enforce an order of this Court granted by Mpshe AJ on 18 March 2016 pursuant to which, inter alia, Mr Ngwenya undertook to vacate Portion 3 (the Mpshe order).
- [3] The dispute arises originally from a restitution claim lodged in terms of the Restitution of Land Rights Act 22 of 1994 by a Mr Mehlo Nkabinde on behalf of the Kwa-Munyamane Community in respect of Portion 2 and Portion 3. According to the applicants, the claim was settled in March 2016 on the basis inter alia that the applicants would make land available for the State to acquire for the benefit of the claimants, including Mr Ngwenya. Mr Ngwenya is a member of the claimant community. The claimants, including the respondent were to vacate Portion 3 and move to the settlement land. The applicants aver that the respondent was a member of the claimant community, authorised Mr Nkabinde to act on his behalf in the land claim and that the claimants were legally represented when the matter was settled and the agreement made an order of Court.
- [4] The applicants seek to enforce an undertaking, recorded in paragraph 2 of the Mpshe order, that the respondent and all persons occupying

Portion 3 through him, would vacate their homesteads within 180 days from the registration of transfer of a subdivision in the name of the State and remove their livestock and building materials from the applicants' properties.[1]

- [5] The applicants explain that Portion 3 was duly subdivided to provide for the settlement land to become an independent portion of land, which is now known as Portion 4 (a portion of Portion 3) of the Farm Hartebeesfontein 134 (the Community land). The Community land was transferred and registered to the State on 23 July 2028. The applicants aver that they gave notice to vacate after 180 days but Mr Ngwenya failed to comply. A further notice was served on Mr Ngwenya personally on 24 May 2019 and he was requested to vacate by 30 April

2019. Mr Ngwenya still resides on portion 3 and has failed to vacate to the Community land. His livestock continues to graze on Portion 3.

- [6] Mr Ngwenya opposes the application. He confirms that he resides on Portion 3 where he says he has resided for a very long time, before the current farmer came to the land. He explains that he is the only family residing on Portion 3, which – he says – was the position when the restitution claim was lodged. Accordingly, he is the only one affected by the relocation contemplated by the agreement. He contends that he was not made aware of the settlement agreement or the condition that he relocates. He was aware that there were settlement negotiations but not that they were concluded on the basis alleged. He says that the agreement was concluded by their attorney or representative of the Commission on the Restitution of Land Rights (the Commission). He contends that he was also not aware of the

Mpshe order saying that there is no proof that the order was served on him and he was not aware of it at any stage. Regarding the Community's land, Mr Ngwenya avers that the land is where the Hartbeesfontein Trust accommodates its labourers and that none of the claimants have moved there.

[7] He states unequivocally that he has no intention to vacate the portion where he resides and that the Community land does not have enough grazing and no source of water.

[8] The applicants seek the following relief:

- a. An order directing Mr Ngwenya to comply with the order within 30 calendar days;
- b. Should he fail to do so, an eviction order is sought;
- c. An order declaring Mr Ngwenya to be in contempt of court;
- d. The imposition of a fine or a period of imprisonment suspended on such conditions the Court deems fit.

The duty to obey court orders and the law on contempt

[9]

The Constitutional Court recently held in Zuma:[2]

'It cannot be gainsaid that orders of court bind all to whom they apply. In fact, all orders of court, whether correctly or incorrectly

granted, have to be obeyed unless they are properly set aside. This, in addition to typifying common sense, the Constitution itself

enjoins. Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. This has been confirmed in multiple cases, including

Mjeni in which the Court stated that "there is no doubt, I venture to say, that [complying with court orders] constitutes the most

important and fundamental duty imposed upon the State by the Constitution". ...'

[10]

In Pheko II Nkabinde J held:[3]

'The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of State to which they apply, and no person or organ of State may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially

determined by the assurance that they will be enforced.’

[11] The approach to contempt of court was recently restated in Zuma as follows (footnotes omitted):[4]

‘As set out by the Supreme Court of Appeal in Fakie, and approved by this Court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.’

[12] To the extent that the applicants seek a committal or imposition of a fine, the standard of proof applicable to the proceedings is proof beyond a reasonable doubt, whereas proof on a balance of probabilities suffices where the remedies sought ‘do not have the consequence of depriving an individual of their right to freedom and security of the person.’[5]

The

issues

[13] In his answering affidavit, Mr Ngwenya raises a series of preliminary points. However, his representative did not persist with these at the hearing of the matter. The only preliminary question that arises for decision is whether the respondent’s late filing of the answering affidavit should be condoned and bar uplifted.

[14] On the merits, the evidence establishes without doubt that the Mpshe order was granted and that Mr Ngwenya has not complied with it. The issues distilled from the affidavits and persisted with in argument are:

- a. Whether Mr Ngwenya was served with or had knowledge of the order;
- b. If so, whether he was in wilful and mala fide breach of the Court order.

Condonation

[15] I have considered the applications to uplift bar and for condonation and the responses thereto and am satisfied that the interests of justice demand that condonation be given on the facts and circumstances of this case.[6] There is a sufficient explanation for the delays, these are contempt proceedings where the need to hear the respondent’s version looms large in view of the potential consequences of the relief sought. The answer raises important facts relevant to an assessment of the respondent’s knowledge of the order and state of mind. Moreover, the applicants had a fair opportunity to reply, which they have done.

Service or knowledge of the order

[16] The respondent contends that the application should be dismissed because the applicants have not demonstrated that the court order was served on him personally. It suffices, however, if Mr Ngwenya had knowledge of the order.

[17] The applicants allege that Mr Ngwenya knew of the order as, by his own admission, he was in Court when the matter was settled and made an order of Court. This, however, is disputed, and on Mr Ngwenya's version, he was not aware of the settlement of the matter that day. These are motion proceedings and the facts are to be determined on the principles articulated in *Plascon Evans and Wightman*.^[7] Accordingly, in these proceedings, I accept Mr Ngwenya's version. The applicants do not rely on service that alleged took

place on Mr Ngwenya's wife on 16 October 2018 as the Sheriff subsequently informed the applicants' attorney that service was on the incorrect Mrs Ngwenya.

[18] However, the applicants have in my view established, on a balance of probabilities but not beyond reasonable doubt, that Mr Ngwenya was served with and, in any event, had knowledge of the order. In this regard, they plead personal service on Mr Ngwenya of a notice on 24 May 2019. They allege: 'On 24 May 2019, a further notice was served on the Respondent personally, again informing him that [the Community land] was transferred and registered in the name of the State and stating that the Respondent had failed to comply with the Order to vacate the Farm. The Respondent was also given to 30 April 2019 to comply with the Order. A copy of the Order was also attached to the Notice served by the sheriff.' The applicants supply a copy of the Sheriff's return which confirms personal service of the notice. The return does not expressly refer to the order.

[19] The notice is headed 'Court Order dated 18 March 2016' and reads:

'We refer to the abovementioned matter and confirm that the Sheriff of the district at Piet Retief served a Notice on Ms Ngwenya on the 16th October 2018 in which Notice you and all persons occupying [Portion 3] were informed to vacate the farm and to relocate to the Portion of the farm bought by the State.

In the said letter, you were informed that the transfer and registration of the property to the State took place on 23 July 2018 and that you had to vacate the farm on/or before January 2019 in compliance with the Court Order given on 16 March 2016.

You are again hereby notified to vacate Portion 3 of the farm Hartebeesfontein together with your family members, livestock and all building materials and relocate to the [Community land].

You are hereby notified that you have failed to vacate [Portion 3] within the 180 days from date of registration of the transfer of the Portion into the name of the State.

...

You are hereby given a final opportunity to vacate the farm on / or before 30 April 2019 whereafter an application for your eviction will be launched in the Land Claims Court of South Africa held at Randburg. A punitive cost order will be requested against you as a result of your failure to adhere to the abovementioned Court order and notice thereafter.

Please find attached a copy of the said Court Order given by the Land Claims Court of South Africa on the 18th March 2016 together with the Notice dated 5 October 2018 served by the Sheriff on the 16th October 2018, attached to this further notice.'

[20] In answer, the respondent denies service pointing to the fact that the return of service does not record that the Court order was served, only the order. In argument, counsel largely pinned the defence on the absence of personal service of the order. In my view, this is not an adequate answer both because the notice refers to the order in its substantive content and the respondent would thereby have acquired knowledge of it and because the notice itself refers to the fact that the order was attached to it. On the latter, the absence of express reference to the order by the Sheriff is not in my view fatal in this case as the order was part of the notice.

Wilful and mala fide breach

[21] In my view the evidence shows without doubt that non-compliance is wilful. Indeed, Mr Ngwenya makes it quite plain that he has no intention of complying with the order. The more difficult question is what the evidence establishes on whether Mr Ngwenya is mala fide. In this regard, Mr Ngwenya in his answering affidavit takes issue with the status of the settlement agreement saying he did not consent

thereto, while the Community's lawyer or the Commission may have. In response, the applicants contend, correctly that the order stands and must be complied with unless and until set aside. The respondent has not and does not seek any such relief despite the lapse of a significant period of time. While correct, however, this does not speak to the respondent's state of mind and specifically whether he is in good or bad faith.

[22] In my view, in light of the respondent's evidence, the applicants have not established that there is mala fide non-compliance with the order. Rather it appears that Mr Ngwenya believed, incorrectly, that he was not obliged to comply with the

order in circumstances where he says that he did not consent to it. While the applicant disputes this, these are motion proceedings, and I accept Mr Ngwenya's version. At this juncture, however, these circumstances can no longer explain any ongoing non-compliance, and there can at this stage be no doubt that the respondent is now fully aware of the Mpshe order.

Relief

[23] In the result, the applicants are not entitled to any relief under the civil contempt remedy at least at this stage. They are, however, entitled to an order requiring Mr Ngwenya to comply with the Mpshe order. In view of the substantial disruption this will entail, I have extended

the time to do so. There can be no doubt at this stage that Mr Ngwenya is aware of the order. Indeed, his counsel submitted that he would comply with the order as long as it was served on him. He has not applied to have it rescinded. If non-compliance is ongoing in the face of this judgment, and in the absence of any rescission of that order, different considerations would apply.

[24] I am not satisfied that the applicants are entitled to an eviction order. These are not eviction proceedings and, assuming the Extension of Security of Tenure Act 62 of 1997 is applicable, its requirements have not been pleaded.

[25] In the absence of special circumstances, this Court does not ordinarily grant costs. I am not satisfied that there are special circumstances in view of the findings in this judgment. Again, different considerations may apply should non-compliance persist.

Order

[26] The following order is made:

- a. Bar is uplifted in respect of the delivery of the respondent's answering affidavit and to the extent necessary, condonation is granted for the late filing of the answering affidavit and the replying affidavit.
- b. The respondent, Mr Mandla John Ngwenya, is directed no later than 60 (sixty) calendar days from the date of this order, to comply with the order of this Court granted on 18 March 2016 under case number LCC114/2008.
- c. The applicants are granted leave to approach this Court on the same papers for further relief should it become necessary.
- d. There is no order for costs.

SJ Cowen

DJP Land Court

Date heard: 7 March 2025

Date of judgment: 29 May 2025

Appearances:

Applicants: CG van der Walt SC instructed by Cox and Partners

Respondent: N Gama instructed by Mavimbela Attorneys

- [1] Paragraph 2 reads: ‘Mr Mandla John Ngwenya and all persons occupying [Portion 3] with him and through him, undertake to vacate the homesteads currently occupied by him and his family on [Portion 3] within one hundred and eighty (180) days from date of registration of transfer of the subdivision in the name of the State and to remove all his; their livestock and building materials from any of the properties of the [Applicants].’
- [2]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 [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (Zuma) para 59.
- [3] Pheko and others v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10; 2015(5) SA 600 (CC); 2015(6) BCLR 711 (Pheko II) para 1.
- [4] Para 37.
- [5] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (Matjhabeng Local Municipality) para 67 in which the preceding paragraphs are summed up.
- [6] Van Wyk v Unitas Hospital and another [2007] ZACC 24; 2008(2) SA 472 (CC); 2008(4) BCLR 442 (CC) para 20 to 22.
- [7] Plascon -Evans Paints v Van Riebeeck Paints 1984
- (3) 623 (A) 634H-635C; Wightman t/a JW Construction v Headfour (Pty) Ltd and another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) para 13.

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