

SOUTH AFRICA / JUDGMENT

Diedricks v St Eve (Pty) Ltd and Others (518/2023) [2025] ZAFSHC 56 (21 February 2025) [2025] ZAFSHC 56

COURT

Free State High Court, Bloemfontein

BEFORE

Mgudlwa AJ

CASE / FILE NUMBER

518/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

FREE

STATE DIVISION, BLOEMFONTEIN

Not reportable

Case no:518/2023

In

the matter between

ANDRE

DIEDRICKS

APPLICANT

And

ST

EVE (PTY) LTD

FIRST

RESPONDENT

YVONE

MAGGY MLOZANA

SECOND
RESPONDENT
ST
EVEN LODGE & SPA
THIRD
RESPONDENT
MANGAUNG
METROPOLITAN MUNICIPALITY
FOURTH
RESPONDENT

Neutral citation: Andre Diedricks v St Eve (Pty) Ltd (518/2023)

Coram: Mgudlwa AJ
Heard: 09
May 2024

Delivered: 21 January 2025

Summary: Contempt of Court – requisites
for contempt – duty to comply with court order
ORDER

1.
The first, second and third respondents are declared to be in contempt of the court order dated 6 April 2023.
2.
The first and third respondents are ordered to pay a fine of R5000 each. The payment of this fine is suspended in whole for a period of one year on condition that the first and third respondents comply with the court order dated 6 April 2023.
3.
The second respondent is sentenced to a period of 30 days direct imprisonment which is wholly suspended for a period of one year on condition that she complies with the court order dated 6 April 2023.
4.
The first, second and third respondents are ordered to comply with the court order of 6 April 2023 immediately.
5.
The first, second and third respondents shall pay costs on this application, and such costs shall include costs of counsel on scale A as contemplated in rule 67A of the Uniform Rules of the Court.

JUDGMENT

Mgudlwa AJ:

Introduction

[1] This matter concerns the question whether the first, second and third respondents (the respondents) are guilty of contempt of court for their failure to comply with the court order that this Court granted on 6 April 2023 in case number 518/2023, per Naidoo J. The fourth respondent did not participate in these proceedings and no relief is sought against it.

[2] The applicant seeks the following relief in the notice of motion:

‘1.1 That the First, Second and Third Respondent be declared to be in contempt of the court order dated 6 April 2023.

1.2 That the Second Respondent and/or Third Respondent be committed to prison for contempt of court or such fine as the court may determine.

1.3 That the First, Second and Third Respondent comply with the court order of 6 April 2023 immediately.

1.4 That the First, Second and Third Respondent pay the costs of this application on the scale as between attorney and own client scale, the one to pay, the others to be absolved.’

The Parties

[4] The applicant is a medical doctor, residing at 19 York Road, Waverley, Bloemfontein, Free State, and an owner of the property thereof which is in close proximity to Portion [...] Erf 1 [...], Bloemfontein, Free State Province, known as 2 [...] Y [...] R [...], Waverly, Bloemfontein, Free State Province (the erf). This property is the subject of this application.

[5] The first respondent is St Eve (Pty) Ltd, a private company registered according to the laws of the Republic of South Africa being the registered owner of the erf. The second respondent is Yvonne Maggy Mlonzana, a major female and director of the first respondent. She is in control of and responsible for the subject property and the operations conducted under the name of the first and third respondents.

Background

[6] On 29 March 2023, the applicant approached this court for an application for an interdict seeking a relief against the respondents in respect of the zoning of the property which is the subject matter, wherein the matter was not opposed by the respondents and an order by agreement was made by Naidoo J on 6 April 2023 in the following terms:

‘IT IS ORDERED BY AGREEMENT BETWEEN THE APPLICANT AND FIRST AND SECOND RESPONDENT THAT:

1. The First and Second Respondents are interdicted and restrained from conducting or allowing any other person to conduct a business from or use Portion [...] Erf 1 [...], Bloemfontein, Free State Province known as 2[...] Y[...] R[...], Waverly, Bloemfontein, Free State Province, for use other than the zoning of the property, being “Residential 1”.
2. The First and Second Respondent shall pay the costs of the application on a party and party scale, such costs to exclude the appearance on 2 March 2023 jointly and severally one paying the other to be absolved.’

Applicant’s case

- [7] This application for contempt of court is predicated on the following grounds:
- i. The applicant alleged that during October 2023 he contacted his legal representative to advise him that the respondents still have not complied with the court order and continued to conduct and allow the conducting of business in the property. Consequently, his legal representative contacted the respondents’ attorney to advise him of the alleged contravention. Furthermore, he wrote a letter to the respondent’s attorney about the alleged contravention. The

letter was acknowledged by the respondents’ legal representative a subsequent undertaking was made by him to consult with his client about the matter.

ii. Despite engaging the respondents’ legal representative, on or about end of October 2023, the respondents had a sizeable function for a courier company which resulted in a variety of cars blocking the roadway and resulted in excessive noise.

iii. The applicant further alleges that on or about the weekend of 3 November 2023, the respondents held a pool party which also resulted in a variety of cars blocking the roadway and resulted in excessive noise. In amplification of the allegation, the applicant attached photos allegedly taken on the same date.

iv. Lastly, the applicant alleges that on 11 November 2023, the respondents hosted a massive function at the same premises. This prompted him to contact his legal representative with instructions to lodge an application for contempt of a court order, as the situation was getting worse.

The Respondents’ response

- [8] The respondents, in response to the allegations, deny any allegation of contempt of the court order as alleged by the applicant and deny that the second respondent deliberately refused to comply with the court order. In explicating her response, she firstly alleges that the applicant’s case is deliberately created, racially motivated and not arising from a genuine grievance (damage suffered) by the applicant. She amplified these allegations by

setting out a brief background of the property in question. According to her, she bought the property from a company called Capitaux Financial Service (Capitaux) in February 2022. Prior to the sale of the said property, Capitaux was conducting business on the premises for more than seven years and the applicant never approached the court to seek rezoning of the property. Furthermore, before the transfer into the first respondent's name, there was a joint period of almost nine years of business at the premises and the applicant never lodged any complaint against Capitaux or the respondents for rezoning of the premises.

- [9] According to the second respondent, when they bought the property from the previous owner, they genuinely believed that there was no issue with using the premises for business purpose as this was the case for the preceding combined nine years. She states further that there are many other businesses in the same street where the respondents' premises are situated which operate without proper zoning. In addition, other neighbors have also held functions at their premises without being dragged to court for zoning. It is alleged further that the applicant has also entertained his guests on his premises.
- [10] The second respondent denies being ignorant of the requirements related to zoning non-business zones into business zones. According to her, they have engaged the fourth respondent, the Mangaung Metropolitan Municipality, and are still busy with the process of rezoning. In support of this explanation, the second respondent attached the relevant application for rezoning documents.[1]

Issue

- [11] The issue for determination in this application is whether the respondents' conduct is wilful or mala fide. Furthermore, the central question is whether the respondents should be committed to prison for failing to comply with the court order made on 6 April 2023.

Applicable Law

Civil contempt of court

- [12] In *Samuels v Hlophe*,^[2] the Supreme Court of Appeal at para. 17 said the following: 'All South Africans have a duty to respect and abide by the law. As the Constitutional Court stated 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*^[3], courts 'unlike other arms of the state . . . rely solely on the trust and confidence of the people to carry out their constitutionally mandated function' which is to uphold, protect and apply the law without fear, favour.^[4] Disregard of orders is an attack on the very fabric of the rule of law.'
- [13] The locus classicus in respect of civil contempt is the decision of *Fakie NO v CCII Systems (Pty) Ltd*^[5] and *Cameron JA* indicated as follows:

- (a) The essence of contempt of court ‘lies in violating the dignity, repute or authority of the court.’[6] The offence has been approved by the constitutional court as the rule of law requires the dignity and authority of the court to be maintained.
- (b) The test for when disobedience of a civil order constitutes contempt has come to be state as whether the breach was committed

“deliberately and mala fide”. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).[7]

- (c) These requirements – that the refusal to obey should be both wilful and mala fides, and that unreasonable non-compliance, provided it is bona fides, 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.[8]

- (d) The onus is that of the criminal standard of proof being proof beyond reasonable doubt.[9]
- (e) Once an applicant shows an order in existence and that it came to the notice or attention of the respondent and that the respondent had disobeyed or neglected to comply with the order, wilfulness and mala fides will be inferred, and the applicant will then be entitled to a committal order. An evidentiary burden then rests upon a respondent

in relation to the aspect of wilfulness and mala fides. A respondent must advance evidence that establishes a reasonable doubt as to whether non-compliance with such order was wilful and mala fides. A respondent does not bear a legal burden to disprove wilfulness and mala fides. If the respondent fails in discharging such evidentiary burden, contempt of the court order will be established beyond reasonable doubt.

[14] In para 42 the Court further held the following:

‘4. But once the applicant has proved the order, service or notice, and non-compliance, 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 fides, contempt will have been established beyond reasonable doubt.’

[15] I deem it apt to mention that the following elements must be established:[10]

- (a) the order must exist;

- (b) the order must have been duly served on, or brought to the notice of the alleged contemnor;
- (c) there must have been non-compliance with the order; and
- (d) the non-compliance must have been willful or mala fide.

Analysis

[16] It is trite law that the applicant must prove all the aforementioned requirements beyond reasonable doubt and the respondents bear the evidential burden to rebut the allegation that their conduct of non-compliance was not wilful or mala fide. Gleaned from the respondents' answering affidavit, it is common cause that the first two requisites, being the existence of the order and knowledge thereof, are not in dispute.

[17] With regards to the third requirement which relates to non-compliance, the applicant's case is pivoted on the following events which were allegedly hosted by the respondents at the premises in question:

- (i) On or about the end of October 2023, a big function for a courier company which resulted in a variety of cars blocking the roadway and resulted in excessive noise;
- (ii) On 3 November 2023, a pool party which allegedly resulted in a variety of cars blocking the roadway and resulted in excessive noise.
- (iii) On 11 November 2023, a massive party which allegedly resulted in a total disregard of the neighbours.

[18] I now turn to the response given by the second respondent in her answering affidavit, with specific reference to para 21, which reads as follows:

'21. I deny the contents of these paragraphs. The Applicant alleged that there was excessive noise at the premises but submits no evidence of such noise. There is no allegation as to the type of noise, the degree of its persistence, the locality involved and the times when the noise is heard. There is further no allegation or evidence of the harm suffered as a result of noise, i.e, whether it was material or substantial and not merely slight or trivial.'

[19] In my considered view, on assessment of this paragraph, the second respondent does not categorically deny that the alleged three events were not held at the relevant premises. Instead, the response relates more to the extent of harm suffered as a result of the noise. Furthermore, the second respondent's admission[11] that there were people at the premises, and they were guests of the first respondent, buttresses the allegation that the functions were held at the premises. It is for this reason that I am satisfied that the applicant has succeeded in proving beyond reasonable doubt that there was non-compliance of the court order by the respondents.

- [20] I deem it apposite to mention that the second respondent does not categorically deny that the respondents conducted the alleged business at the premises. Instead, she alleges that the first application and the current one are malicious and racially motivated. In explicating this allegation, the second respondent asserts that the property was bought from Capitaux and they have been operating business for a period of seven years. Additionally, before the transfer of the property, they leased the property from Capitaux for a period of two years. According to the second respondent, the applicant never lodged a complaint about rezoning of the premises for the whole period of nine years. In essence, they genuinely believed that when they bought the property from the previous owner, there were no issues with using the premises for business purpose as this was the case for the preceding combined nine years.
- [21] The applicant, in response to the allegation that Capitaux conducted business for a period of seven years, correctly argued that this assertion should be regarded as hearsay since the respondents failed to attach a confirmatory affidavit by Capitaux. In my view, even if one accepts that Capitaux conducted business for the preceding period of seven years, it remains of cardinal importance to note that if the order has not been set aside or varied, the respondents had no option but to fully and diligently comply with the court order made on 6 April 2023. Additionally, the genuine belief that the premises could be used as business premises as it has been the case for the past nine years prior to the sale, does not, in my view, justify non-compliance with the court order. Similarly, if the court was to accept that the applicant delayed the application and that the matter was steeped in racism, that in itself cannot obliterate the respondent's obligation to comply with the court order.
- [22] The other reason averred by the respondents to rebut the fourth requirement, being that their non-compliance was not wilful or mala fide is the fact they have engaged the municipality and are busy with the process of rezoning. They attached documentary proof of the

rezoning application together with the municipality rezoning Residential 1 approval. On consideration of the available evidence,

the application is still pending and the order made on 6 April 2023 is still valid, and the Court therefore finds this averment to fall short of establishing a reasonable doubt that their non-compliance was wilful or mala fide.

- [23] The applicant's legal representative relied on *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[12] case regarding assessment of disputes of facts. Reference is made inter alia to paragraph 11, where the court said the following:

'The first task is accordingly to identify the facts of the alleged spoliation on basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble dispute. On that basis the appellant's application was bound to fail.'

Furthermore, he argued that the respondents have knowledge of the events complained of and the inter-relationship between them. It is expected of the respondents to play open cards with the court. I find these submissions to resonate with the alleged contempt of court. I am also satisfied that the applicant succeeded in proving all for requisites of contempt of court beyond reasonable doubt.

[24] Upon proper consideration of the evidence, I am satisfied that the respondents only provided reasons for not complying with the court order, which in my view fall short of surmounting a threshold of justifying non-compliance. The fact that they were aware of the order and that the legal representative of the applicant wrote a letter to their attorney to notify them about failure to comply with the court order, and even after the latter replied to the notification letter, they continued with their business as usual. In my view, this constitutes wilful and mala fide non-compliance. The respondents failed to provide any factual basis that their refusal to comply with the order of Naidoo J was in anyway bona fides.

[25] In my view, there is no case made for a punitive costs order. As a result, costs must follow the results.

Order

[28] In the premises, I make the following order:

MGUDLWA AJ

Appearances For the applicant: Advocate A Sanders Instructed by: Blair Attorneys 32 1st Avenue Westdene Bloemfontein For the 1st, 2nd and 3rd respondents: Advocate N Plaatjies Instructed by: Mlonzana Attorneys 12 Reid Street Westdene Bloemfontein

[1] See RA1 and RA2 of the second respondent answering affidavit.

[2] *Samuels v Hlophe*

[2023] ZASCA 49.

[3] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of the State v Zuma and Others* [2021] ZACC 18; 2021 (9) BCLR 992 (CC).

[4] See *S v Mamabolo*

[2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 BCLR 449 (CC) para 17.

[5] *Fakie NO v CCII Systems (Pty) Ltd*

[2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42.

[6] *Ibid* para 6.

- [7] Ibid para 9.
- [8] Ibid para 10.
- [9] Ibid para 33.
- [10] See *Pheko & others v Ekurhuleni City* 2015 (5) SA 600 (CC)
- [11] See. Paragraph 23 of the Second Respondent answering affidavit.
- [12] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*
- [2008] ZASCA 6; 2008 (3) SA 371 (SCA).
- [13] Ibid para 11.
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