

SOUTH AFRICA / JUDGMENT

Harmse v Bulb World Electronics and Another (UM12/2023) [2023] ZANWHC 241 (12 October 2023)

[2023] ZANWHC 241

COURT

North West High Court, Mafikeng

BEFORE

Maakane

CASE / FILE NUMBER

UM12/2023

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTH WEST DIVISION,
MAHIKENG
CASE NO: UM12/2023

Reportable:	YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO Circulate
to Regional Magistrates:	YES / NO In

the matter between: LJ
HARMSE
APPLICANT
and
THE
BULB WORLD ELECTRONICS
First RESPONDENT
(Registration
No: 2015/268616/07)
TSHOKOLO
JOSEPH TSILOANE
Second RESPONDENT

JUDGMENT

MAAKANE AJ

INTRODUCTION

[1] The applicant in this matter approached this court on urgent basis. The relief sought is set out in her notice of motion as follows:

1.1. THAT the applicant's failure to abide by the forms, time periods and manner of the service prescribed in the uniform rules of the Court, be condoned and that this application be heard and enrolled as one of urgency in terms of the provisions of uniform Rule of Court 6 (12).

1.2. THAT the first and second respondents be found to be in contempt of the order issued in the North West High Court, Mahikeng on 8 December 2022 by Petersen J under case number: M591/2022.

1.3. THAT the first respondent be ordered and directed to pay a fine of R80'000.00 by no later than 7 (seven) days after the order is made, which fine is payable at the office of the Registrar of this court, alternatively such fine and on such terms as may be directed by the Honourable Court.

1.4. THAT the second respondent be sentenced to five months imprisonment in the event of the fine mentioned above not being paid timeously, fully or at all alternatively such period of imprisonment as may be determined by the above Honourable Court.

1.5. THAT the second respondent be sentenced to five months imprisonment, wholly suspended for two years, on condition that he not again be committed for contempt of the order in the above-named case during in the period of suspension, alternative such period of imprisonment on such conditions as may be determined by the above Honourable Court.

1.6. THAT the first and second respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved, on an attorney client scale.

1.7. THAT further or alternatively relief be granted."

[2] Respondents oppose the application and have filed an answering affidavit deposed to by the second respondent. In their affidavit, respondents over and above their defence on the merits raised certain points in limine, to which I will refer later in this judgement.

[3] It is important to also point out that the respondents also launched a counter application, in which relief sought is set out as follows:

“3.1. DECLARING the COUNTER-APPLICATION to be a matter of URGENCY and dispensing in as far as is necessary in terms of Rule 6 (12) with the usual forms and service provided for in the Uniform Rules of Court.

3.2. That PENDING the final determination of the REZONING APPLICATION for PORTION 186 OF THE FARM RIETVLY 271 JQ, RUSTENBURG, under consideration by the SECOND RESPONDENT;

3.2.1. The operation of the interdict granted by Honourable Justice Petersen J on 13 December 2022 in the case number M591/2022 is hereby suspended.

3.2.2. Alternatively, to 1.1 above, the operation of the interdict granted by Honourable Justice Petersen J on 13 December 2022 in case number M591/2022 is hereby suspended for a period of 12 months.

3.3. Costs of suit in the event of opposition.”

Factual background

[4] The applicant and second respondent are respective owners of neighboring farms, being portions 187 and 186 respectively of the farm Rietvly 271 JQ, Rustenburg. Second respondent is also, the sole director of the first respondent.

[5] During or about 9 November 2022, applicant launched an application out of this court, under Case No: M591/2022 against the first respondent (the company) and the Rustenburg Local Municipality (“the Municipality”) The municipality was cited as the second respondent.

[6] I find it important to immediately point out and this is common cause that in that specific application, Tshokolo Joseph Tsiloane, the second respondent herein was not joined and was therefore, not a party to those proceedings at the time.

[7] The application under Case No: M591/2022 to which I have referred served before my brother Peterson J who on 13 December 2022 granted an order that reads:

“7.1 The first respondent, and any person acting for or on behalf of the first respondent, be interdicted and restrained from hosting any public events at the properly situated at Portion 186 of the Farm Rietvly 217 JQ, Rustenburg;

7.2. The first respondent, and any person acting for on behalf of the first respondent, be interdicted and restrained from using the property situated at Portion 186 of the Farm Rietvly 271 JQ, Rustenburg for any other purpose than the permitted usage for a zoning of “Agricultural” as detailed in the Rustenburg Land Use Scheme, 2021, being Agriculture, Commonage, Community Garden, Conservancy, Conservation Purposes, Dwelling Unit, Game Reserve, Nature Reserve, Protected Areas;

7.3. The second respondent be ordered to take all and any steps that may be necessary, and as provided in the RUSTENBURG LOCAL MUNICIPALITY

SPATIAL PLANNING AND LAND USE MANAGEMENT BY-LAW, 2008 (or other applicable statutory provisions), to ensure that the property situated at Portion 186 of the Farm Rietvly 271 JQ, Rustenburg is not used for any other purpose than the permitted usage for a zoning of “Agricultural” as detailed in the Rustenburg Land Use Scheme, 2021, being Agriculture, Commonage, Community Garden, Conservancy, Conservation Purpose, Dwelling Unit, Game Reserve, Nature Reserve, Protected Area;

7.4 The first and second respondent be ordered to the pay costs of the applicant jointly and severally, the one paying the other to be absolved, on an attorney/client-scale.”

[8] On 15 December 2022, first respondent herein brought an urgent ex parte application in this court, seeking an order among others to the effect that:

“2.1. The operation of the court granted by the Honourable Justice Peterson on 13 December 2022 in Case No: M591/2022 is hereby suspended”.

[9] This urgent application also served before Peterson J who, on that day ordered that the application for suspension of the order be served on the applicant before being enrolled in the urgent court. He for that reason, removed the matter from the roll. The application was however, not served on the applicant. Instead, it appears that first respondent did not proceed further with that application.

[10] On 27 January 2023 applicant launched this application on an urgent basis. The basis of the relief sought is mainly, to the effect that second respondent is in breach of the court order of 13 December 2022 and therefore guilty of contempt of court.

Applicant's case

[11] The grounds upon which the applicant alleges that the court order has been breached are contained in her founding affidavit and can be summarised as follows:

[11.1] On 14 December 2022 at 09h30, applicant and her husband observed that numerous members of the public were visiting a pub, which is situated and operated on, the second respondent's property. He took a cellphone video of what was happening outside the pub.

[11.2] On 15 December 2022 numerous cars were still parked outside the said pub. Later during the same day, being 15 December 2022, they observed that some individuals were in the process of erecting an outdoor stage on the property.

[11.3] An advertisement was circulating around the Rustenburg area inviting members of the public to an outdoor event. According to this advert, there will be a “DJ” and beverages will be sold. The event was scheduled to take place on the property on 15 December 2022. At 22h45 on 15 December 2022, the event at the property was still continuing.

[11.4] On 22 December 2022 at 22h00, applicant and her husband again observed that a number of members of the public were present at the pub.

[11.5] A certain Mr Masita (“Mr.Masita”) and his wife, visited the said pub on 22 December 2022. Alcoholic beverages as well as meat were sold to them.

[11.6] Mr. Masita was informed by the manager of the pub that they were “operating underground” because of a court case brought against them by a neighbour. He therefore can only sell to people he knows and trust.

[11.7] Mr. Masita’s confirmatory affidavit as well as some photographs is attached to the founding papers.

Respondents’ case and defence

[12] In their answering affidavit, respondents deny the allegations and also, their involvement in any of the activities alleged by the applicant and or that they in any way, guilty of contempt of court. By way of summary, respondent’s version is to the following effect:

[12.1] On or a 1 September 2022, second respondent concluded a lease agreement with a company known as IV Anchors (Pty) Ltd (“IV Anchors”). In terms of the lease the agreement respondents agreed to lease said farm to IV Anchors. A copy of this lease agreement is attached to the answering affidavit as annexures TTJ3.

[12.2] To the second respondent’s knowledge, IV Anchors would on one or more occasions, use the services of an event management entity to advertise and promote their, that is IV Anchors business. The logos of IV Anchors appear in almost all the of applicant’s annexures and photographs, attached to her founding affidavit.

[12.3] Following the order granted by Justice Peterson on 13 December 2022 he on 15 December 2022 launched an urgent ex parte application in a bid to have the operation of the said interdict suspended.

[12.4] In the hope and anticipation that the suspension of the interdict would be successful, the staff of IV Anchors held an operational meeting with various stakeholders, event organisers as well as their staff members. It is the vehicles of these people that the applicant alleges she saw. These are not ordinary members of the public, as the applicant seems to suggest.

[12.5] Their business planning meeting went well into the night and the following day when they received information that the urgent ex parte application has not been granted. By then, these organisers had already begun setting out and planning in preparation for the event. This is what the applicant witnessed and describes as the erection of a stage.

[12.6] Upon receipt of the outcome of the ex parte application, second respondent addressed written correspondence to IV Anchors, requesting them to cease all business activities on the farm until further notice. A copy of this letter, dated 15 December 2022 is attached to the answering affidavit as annexure TTJ5 and reads in part:

“Dear Thabo,

Following our telephonic/WhatsApp communication, we regret to inform you that the application to set aside the interdict urgently has been rejected.

We therefore instruct you to stop all business activities until further notice. The process is underway to challenge the matter in various platforms and until such time the matter is resolved, the business activities remain suspended.

A written communication regarding the commencement with business activities when the matter is concluded will be sent to you.

We trust that we will have your full support and co-operation while we waiting for the process underway.”

[12.7] Following this correspondence, IV Anchors immediately started with arrangements for an alternative venue. In this regard, he refers to two fliers. The first flyer is titled “Rustenburg Soul Picnic 2022”. It has on it names of various artists scheduled for performance to be held on 17 December 2022. According to this flyer the venue for this event is given as “IV ANCHORS; 1[...] d[...] Road Rustenburg.” This flyer is annexure TTJ6 to the answering affidavit. It appears to be common cause that this was and is the initial flyer issued prior to the unsuccessful court application of the 15 December 2022.

[12.8] The second flyer is annexure TTJ7 to the answering affidavit. The flyer is, to a large extent, substantially the same as annexure TTJ6, with regard to the nature as well as the artists that will be performing at that event. However, most importantly the main and striking difference is the new venue. The new venue for the event is reflected as “HEUWELZICHT EVENTS AND FUNCTIONS SITUATED 6KM FROM WARETFALL MALLON THE R24 JOBURG ROAD”. This is the subsequent flier issued after the unsuccessful urgent court interdict of the 15th December 2022.

[12.9] I may just add that on or across this subsequent flyer appears the words “Thank you” and at the top thereof appears a short message which reads:

“We love and appreciate you.

Thank you for your understanding. We highly apologize for the inconvenience due to the quick venue change”.

[12.10] The same happened with the event known as the “All White Party” which was initially scheduled for 15 December 2022. This event was also, as a result of the unsuccessful court challenge, cancelled. It did not take place. A few days thereafter, second respondent received a copy of a letter of apology dated 20 December 2022 from a certain Mr. Moerane addressed to the Public Servants, Municipal Workers, Public Sector. The letter reads in part:

“Subject: Apology for the 15th December 2022

Event: All White Party

Waltino Promotions (PTY) LTD under management of Walter Moerane management would like to extend its apologies to the Public Servants Management, Mine Workers, also to all Schools.

On the day of the event we experienced a serious challenge of being interdicted against hosting the event by the neighbouring farm owners. The neighbouring farm owner stopped our event through High Court Summons.

We would like to inform everyone who bought event tickets to keep them safe as we are about to host the event...soon to be announced, date and venue.

I hope you find everything in order.

Yours sincerely

Walter Moerane”

[12.11] On 22 December 2022, second respondent held a private farewell function for a friend and colleague, Amos Xheko who used to work for Impala Platinum

Holdings as an Engineering Manager. The event was held on a private portion of the farm. About 35 persons attended the event. He attaches as annexure TTJ9 pictures depicting and showing gifts being given and presented to this former colleague of his.

[12.12] With regards to the allegations made by Mr Masita, second respondent reiterates his stance and argument around material non-joinder in this regard. He states that it is clear that Masita had dealings with IV Anchors and not with any of the respondents. IV Anchors has not been joined. The actions of IV Anchors, cannot therefore be imputed to any of the respondents.

Issues

[13] The issues for determination by this court is whether:

[13.1] Whether the applicant has succeeded in discharging the onus she bears, of proving beyond reasonable doubt all the four requirements of contempt of court, and in particular that the respondents failed to comply with the court order; if so

[13.2] Whether such non-compliance with the court order is wilful or mala fide.

[13.3] As regards the counterclaim, whether the respondents have succeeded in making a proper case, justifying the granting of the relief sought.

The law

[14] Contempt of court is the wilful, that is deliberate and mala fide disobedience or refusal to comply with an order issued by a court of law having competent jurisdiction.

See: Clement v Clement 1961 (3) SA 861 (T) at 866

Consolidated Fish Ltd v Zive and others 1968 (2) SA 522 B-C.

Franklin Max Pollack Vinderne Inc V Meneli Jack Hyman Rosenberg & Co. Inc and others [1996] ZASCA 21; 1996 (3) SA 355 (A) at 367 H

[15] It is important to emphasise at this very early stage that because relief sought in these proceedings include committal of the second respondent, the required and applicable standard of proof is that of proof beyond reasonable, as is the case in criminal proceedings.

See: Matjhabeng Local Municipality v Eskim Holdings Ltd and Others: Mkhonto and Others v Compensation Solution (Pty) Ltd 2018 (1) SA

(1) (CC) at paragraph 73

[16] In Phoko v Ekurhuleni City 2015 (5) SA 600 (CC) the Constitutional Court in explaining the purpose of contempt proceedings held:

“The object of contempt proceedings is to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.”

At paragraph 28.

See also: Secretary of the Judicial Commission of Inquiry into allegations of State Capture, corruption and fraud in the Public Sector Organs of State v Zuma and Others 2021 (5) SA 327 CC (SJC v Zuma) at paragraph 7.

[17] The requirements for proof of contempt of each court of which must be proved beyond reasonable doubt are the following:

- (i) There must be a court order made against the respondent.
- (ii) The respondent has knowledge of the order, either as a result of service or notice.
- (iii) The respondent has not complied with or failed to obey the order.
- (iv) The respondent’s non-compliance with the order is wilful, that is deliberate and mala fide.

See: Fakie N.O v CC II Systems (PTY)LTD [2006] ZASCA 52; 2006

(4) SA 326 (SCA) at paragraph 6-10

[18] In Zuma (supra) the Constitutional Court summarised the legal position as follows:

“[37] A 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. [34] Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. [35] should the respondent fail to discharge this burden, contempt will have been established.”

[19] The onus rests upon the applicant to prove each of these elements beyond reasonable doubt. Once an applicant succeeds in doing so, the respondent then bears the evidentiary burden to rebut willfulness and mala fides.

[20] In Fakie (Supra) Cameron JA (as he then was) summarized the position as follow:

“[42] To sum up:

(a)

(b)

(c) In particular the applicant must prove the requisites of contempt

(the order; service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice and non-compliance, the responded bears an evidentiary burden in relation to willfulness and mala fides.”

Analysis

[21] It is common cause that there was a court order issued by this court and that the second respondent had full knowledge of it. What is now left for determination is whether the applicant has established the remaining important requirement beyond reasonable doubt that is the second respondent is in contempt or failed to comply with the court order and if so, whether the second respondent has successfully discharged the evidentiary burden he bears in relation to willfulness and mala fides.

[22] In her founding affidavit, the applicant sets out in some detail various or isolated and specific incidents that according to her took place at the second respondent's farm. In support of these, she has attached confirmatory affidavits as well as photographs. These incidents according to her occurred on different dates between 14 December 2022 and January 2023. I have already dealt with these elsewhere in this judgement and do not intend to repeat same.

- [23] In his answering affidavit, the second respondent went at length and fully explained each and every incident and on dates to which the applicant specifically referred and took pictures. In support of his version, he also attached annexures in the form of correspondence, flyers, and most importantly a lease agreement he concluded with IV Anchors. In essence, the respondent denies that he was in contempt of and or failed to comply with the court order. On the contrary he went at length to demonstrate all the steps he took to ensure that there is compliance with the order.
- [24] The starting point is that on or about 1 September 2022, he concluded a lease agreement in respect of the farm in question, with an entity known as IV Anchors. A copy of this contract is attached to his papers. There is no dispute about the existence and or validity the lease agreement. This is a very important fact. This is so because on her own version, applicant confirms that the activities complained of and to which she has referred, were throughout carried out by or through this company, being IV Anchors
- [25] After the court order issued by this court on 13 December 2022, he on 15 December 2023 approached this court on urgent basis seeking to have the operation of the court interdict provisionally suspended. He had hoped that the application will be successful. However, the order sought was not granted. He then in writing informed the lessee about the outcome and specifically instructed him to cease all business operation on the farm, until further notice. He on the totality of the evidence, second respondent took all steps to ensure compliance with the court order. Most importantly, he made sure that all major events that were initially planned did not take place on the farm. More specifically and as a result of all his efforts to ensure compliance:
- (i) The All White Party scheduled for 15 December 2022 on the farm did not take place at all. It was postponed indefinitely, to a future date and different venue to be announced by the organisers.
 - (ii) The Rustenburg Searching Party scheduled for 17 December 2023 did take place but not on the farm. An alternative venue was arranged, namely Heuwelzicht Events and Functions situated 6 km from Waterfall Mall on the R24 Jo'burg Road.
 - (iii) To his knowledge, IV Anchors are not conducting any business, and gates have been locked and written notices to that effect displayed as per pictures attached to his papers
- [26] With all the above in mind, it is important to note and have regards to the applicant's own replying affidavit. Her reply is very clear. She does not deny or dispute any of the first respondent's defences version and full explanation of each of the incidents she relies on. She was mistaken as to the true factual position. The crux of her reply to the answering affidavit is very clear. She specifically state the following under oath:

"42. As already indicated above, I was at all relevant times unaware of the fact that IV Anchors refers to a separate juristic person with whom the respondents have entered into a lease agreement.

43. I was at all relevant times until receipt of the answering affidavit under the impression that IV Anchors merely refers to the name under which the first respondent conducts business at the property.”

[27] Taking all of the above into account, I cannot find that the respondents are guilty of contempt of court and or has contravened the court order. The applicant has failed to prove beyond reasonable doubt that the respondent has contravened and or disobeyed and or failed to comply with a court order. It is important to bear in mind that contempt of court is not about issues between the parties. It is all about judicial authority.

“Contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of the court.”

See: Fakie NO (Supra) at page 38.

The counter application.

[28] Relief sought by respondent in their counter application has been fully set out in the notice of motion and also, in paragraph 3 hereof. Applicant has argued strongly that the counter application is not urgent. In order to determine whether or not the matter is urgent, I find it necessary to once again have regard to the chronology of events of December 2022.

[29] Subsequent to the granting of the order that forms the subject matter of these proceedings by Peterson J on 13 December 2022. First respondent did on urgent basis, launch an ex parte application seeking among others, suspension of the operation of the order. This was done on 15 December 2022.

[30] Peterson J on that day being the 15 December 2022 ordered that the application be served on the applicants before it could be enrolled on the urgent court roll. For this reason, the removed the matter from the roll. This was to enable first respondent to serve.

[31] It is common cause that second respondent did not serve the urgent application on the applicants as per court order. He also did not therefore again enroll the matter either on the urgent or normal roll. The only inference one can draw from this is he that clearly abandoned that application and decided to comply with the original court order. Details of all steps he took to comply with the court order have been dealt with else where in this judgment. All of a sudden, he now approaches this court, on urgent basis again, seeking the same relief he sought on 15 December 2022.

[32] In his affidavit and relief sought in the counter application second respondent relies on a pending application for rezoning of usage, pertaining to the very same farm in question. He states that there has been unreasonable delay on the part of the municipality to consider and finalise the rezoning application. The delay is due to administrative disarray on the part of the municipality. He states under oath:

“11.3. The rezoning application has been pending since May 2019”

...

11.5. The delay has been occasioned by the administrative disarray of the municipality.”

[33] I am in agreement with counsel for the application that the counter application is not urgent and that same stands to be struck from the roll.

Conclusion

[34] On the totality of the evidence presented the applicant has failed to discharge the onus that she bears, that is to prove beyond reasonable doubt that the respondent has failed to obey, and or contravened and or disregarded a court order. On her own version, she was unaware and therefore mistaken as to the true factual situation at the time she launched the application.

[35] Second respondent has fully explained and demonstrated that subsequent to his unsuccessful bid on 15 December 2022 to have the operation of the court interdict suspended, he took all reasonable and necessary steps to inform his lessee and also ensured that all initially scheduled events do not take place on the farm, in compliance with the court order

[36] Respondents have failed to show and demonstrate that the counter-application is urgent.

Order

[37] Consequently, I make the following order:

1. The application for contempt of court is dismissed with costs.
2. Such costs shall be taxed or agreed, on a party and party scale, and shall include costs consequent upon employment of one (1) Counsel.
3. The counter application is struck from the roll, with costs.

S.S MAAKANE

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION – MAHIKENG

APPEARANCES

For the Applicant: Mr. NJ Esterhuyse Instructed by: Smit Neethling Inc For the Respondent: Adv. Mwanawina Instructed By: Thuto Kgaoganyeng Attorneys Inc Date Heard: 10 February 2023 Date of judgment: 12 October 2023

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