

SOUTH AFRICA / JUDGMENT

Hermanus and Others v Liebenberg (081333/2023) [2023] ZAGPPHC 1788 (4 October 2023) [2023] ZAGPPHC 1788

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

081333/2023

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 081333/2023

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

DATE: 04 OCTOBER 2023

SIGNATURE

HERMANUS JOHANNES VAUGHN VICTOR First Applicant

HERMANUS JOHANNES VAUGHN VICTOR N.O. Second Applicant

JOHANNA NINI MAHANYELE N. O.

Third Applicant

CAROLINE MMAKGOKOLO LEDWABA N.O.

Fourth Applicant

And

LOUIS PETRUS LIEBENBERG Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives

by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 04 October 2023.

JUDGMENT

COLLIS J:

INTRODUCTION

1. On 16 August 2023, the Applicants issued an urgent application seeking the following relief as per the Notice of Motion:

1.” Take note that the abovementioned applicants intend to bring an application to the above Honourable Court on Tuesday, 5 September 2023 at 10:00 or as soon as counsel may be heard, for an order in the following terms:

2. That the applicants’ non-compliance with the Rules of Court concerning forms, service, and time periods otherwise applicable be condoned and that this application be heard and adjudicated upon as an urgent application in terms of Uniform Rule 6(12).
3. That is be declared that the respondent is in contempt of court for failing to comply with the court order granted on 9 May 2023 by the Honourable Justice Raulinga, Under case number 2023-039545.
4. That the respondent be committed to prison for a period of thirty (30) days, such imprisonment is to be served periodically from 17:00 hours on every Friday until 07:00 on Monday, such period as the Honourable Court deems fit.
5. That the sheriff, in whose area of jurisdiction the respondent may be found, be directed to take the respondent into custody and commit him to prison for a period of thirty (30) days. Such imprisonment is to be served periodically from 17:00 on every Friday until 07:00 on Monday.
6. That the respondent be directed to pay the costs occasioned by the contempt application, jointly and severally, the one paying the order be absolved, on an attorney and client scale, including the costs consequent upon the employment of two counsel.
7. Further and/or alternative relief.”

APPLICATION TO STRIKE OUT

8. The respondent opposes the relief and in addition proceeded to file an application to strike out certain paragraphs from the founding affidavit. The application to strike out was not formally argued at the hearing of the application as the applicants upon receipt of the application to strike out, proceeded to file a redacted version of the founding affidavit.

9. As a consequence it must follow that the respondent is entitled to be awarded the costs in respect of the application to strike out.

DIRECTIVE ISSUED BY THE COURT

10. As to the main application, this Court issued a Directive dated 31 August 2023, wherein it called upon the parties in all opposed

applications to file their heads of arguments before 13h00 on 02 September 2023. Only the respondent acceded to this request and no reasons were furnished by the applicants for its failure to adhere to this Court's Directive. As such the application proceeded to be argued without the benefit of any heads prepared by the applicants.

URGENCY

11. Upon perusal of the application, this Court was satisfied that the applicants will not be afforded substantial redress at the hearing in due course. It is on this basis that this Court exercised its discretion and enrolled the application in terms of Rule 6(12) of the Uniform Rules of Court.

MERITS OF THE APPLICATION

12. This urgent application is one of contempt of court wherein the applicants seek the periodical incarceration of the respondent.[1]
13. In order for the applicants to succeed with the relief they seek, the applicants must prove:
- (a) the existence of a court order;
 - (b) service or notice thereof;
 - (c) non-compliance with the terms of the order; and
 - (d) wilfulness and mala fides beyond reasonable doubt.[2]” (Compensation Solutions (Pty) Ltd v Compensation Commissioner (072/2015) [2016] ZASCA 59 (13 April 2016) par [15]; Talacar Holdings (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others (44294/2020) [2023]

ZAGPJHC 250 (8 March 2023) par [25]; E.K v P.K and Others (53105/2021) [2023] ZAGPPHC 69 (9 February 2023) par 27).

14. It is trite that a party to a civil case against whom a court has given an order and who intentionally refuses to comply with it, commits contempt of the order.
15. In Fakie [3] the court held that:

“It is a crime to unlawfully and intentionally to disobey a court order.[4] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[5] The offence has in general terms received a constitutional stamp of approval, since the rule of law, a founding value of the Constitution

requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be

maintained.[6]

[7] The form of proceeding CCII involved appears to have been received into South African law from English law – and is a most valuable mechanism.[7] It permits a private litigant who has obtained a court order requiring an opponent to do or not to do something (ad factum praestandum),[8] to approach the court again, in the instance of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

[8] In the hands of a private party, the application for committal is a peculiar amalgam, for it is civil proceedings that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.”

16. From the quoted passages above it is apparent that a civil contempt is a feature of our law as court orders need to be complied with. This ensures the rule of law is observed and embraced in our society.

17. The question on when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed

deliberately and mala fide.[9] A deliberate disregard is not enough, since the non-complier may genuinely; albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[10]

18. It has been stated that even a refusal to comply with that which is objectively unreasonable, may be bona fide (though unreasonableness could evidence lack of good faith).[11]

19. As for the sanction sought by the applicants herein, although committal for contempt of court is permissible under our Constitution, the courts should always guard against finding an accused person guilty of a criminal offence in the absence of conclusive proof of its essential elements.

20. In the *Fakie NO v CII Systems (Pty) Ltd*[12] decision mentioned above, Cameron J held as follows in dealing with the Constitutional imperatives on contempt of court:

“[23] It should be noted that developing the common law does not require the prosecution to lead evidence as to the accused’s state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disapprove willfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.”

21. In paragraph [28] further it was held that:

“[28] There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor’s committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an accused person for the purposes of s35 of the Bill of Rights. On the contrary, with respect to the careful reasoning in the Eastern Cape decisions, it does not seem to me to insist that such a respondent falls or fits within s35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only to be detained without trial,[13] but not to be deprived of freedom arbitrarily or without cause.[14] This provision affords both substantive and procedural protection,[15] and an application for committal for contempt must avoid, infringing it.”

22. As already stated, once the applicant has proved the existence of the order, the service thereof and failure to comply with the order, mala fides requirements are inferred and the onus will be on the respondent to rebut the inference on a balance of probabilities.[16]

23. This onus which the applicants carry is to prove that the respondent was aware of the terms of the court order, which the applicants allege the respondent to have breached.

24. The order in question, emanates from urgent proceedings initiated by the applicants and granted by Raulinga J on 9 May 2023.[17]

Existence of the court order.

25. It is common cause between the parties that Raulinga J granted the order in casu on 9 May 2023.

Service or notice of the order

26. It is the applicants’ case that albeit that the order was given in the absence of the respondent, the order so given was taken in the presence of his erstwhile legal representative and as such it is their case that the respondent bears knowledge of the order granted by Raulinga J.

27. The respondent confirmed that the court order was taken in his absence and that his erstwhile attorney merely informed him that the order was taken, without explaining the terms of the order to him. He denies ever having received the order from his attorney or being served with the order itself.[18]

28. In reply the applicants deny that the respondent was not aware of the relief granted against him in terms of the court order as he was legally represented during the proceedings and his attorney also had access to Caselines.[19] The access to Caselines, I take it is somehow a justification for not having served the court order as the respondent at any given time could access the Caselines platform to have regard to the order granted by Raulinga J. It is significant that the applicants have not simultaneously with their affidavits filed a confirmatory affidavit by the erstwhile attorney of the respondent to confirm as to whether the attorney had explained the terms of the court order to the respondent.

29. The presence of the respondent's erstwhile attorney when the order was given at best dispenses with the obligation by the applicants to have complied with the requirement of service of the order but not with the requirement of notice of the order. Notice being that the terms of the order was explained to the respondent, i.e the party against whom the order was given. Before this Court there is no evidence presented that indeed the order given by Raulinga J was brought to the notice of the respondent.
30. The respondent as mentioned, denies that the terms of the order of Raulinga J was explained to him and as a such there exists a factual dispute which in view of the final relief sought, must be resolved on the basis of the respondent's version.
31. It is on this basis that I am not persuaded that the order by Raulinga J came to the notice of the respondent.

Non-compliance of the order

32. The respondent, not having received notice of the order could not be said had failed to comply with the terms of the order. As such, non-compliance in the absence of such notice could not be said to have occurred. Differently put, unless the non-complier was made aware what the Court had directed him to desist from doing, it cannot be said that he deliberately refrained from adhering to the order of Raulinga J.

Wilfulness and mala fide

33. A respondent only carries an onus to rebut wilfulness and mala fides beyond a reasonable doubt, in circumstances where an applicant has met the first three requirements. In casu the applicants have failed to established at the very least notice and non-compliance of the order of Raulinga J.
34. As the applicants have failed to prove the requirements of notice together with non-compliance of the order, this court need not determine whether the actions of the respondent were wilful and mala fide beyond reasonable doubt.
35. In *Liu Quin Ping v Akani Egoli (Pty) Ltd t/a Gold Reef City Casino* 2000 (4) SA 68 (W) at 86 it was held that:

"Deprivation of one's liberty is always a serious matter", a contention reflected in section 12(1) of the Constitution which stipulates: "Everyone has the right to freedom and security of the person".

36. The applicants as mentioned seek the imprisonment of the respondent for his alleged contempt of court, more specifically that the respondent acting both willfully and mala fide disobeyed the terms of the interim interdict granted on 9 May 2023.[20]
37. The relief sought by the applicants albeit that a Court will have a discretion cannot easily be granted especially where the applicants in casu have failed to discharged its onus. [21]
38. It therefore must follow that the application falls to be dismissed with costs.

COSTS

39. The respondent sought costs on a punitive scale in the event of the applications being determined in his favour. I am of the view that a punitive cost order is not warranted under the circumstances.

ORDER

40. In the result the following order is made:

40.1 The applicants' non-compliance with the Rules of Court concerning forms, service, and time periods otherwise applicable is condoned and this application is heard and adjudicated upon as an urgent application in terms of Uniform Rule 6(12);

40.2 The respondent is awarded costs for the application to strike out including costs of two counsel where so employed.

40.3 The applicants' contempt application is dismissed with costs including costs of two counsel where so employed.

COLLIS J

JUDGE OF THE HIGH COURT, PRETORIA

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RESERVED: 6 SEPTEMBER 2023 DATE OF JUDGMENT HANDED DOWN: 4 OCTOBER 2023

[1] Notice of Motion Case Lines 01-2/3.

[2] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 30.

[3] [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) at para 6

[4] S v Beyers 1968 (3) SA 326 (SCA)

[5] See Melius de Villiers The Roman and Roman- Dutch Law of Injuries (1899) pg 166; Attorney – General v Crockett 1911 TPD 893 at 925 -6

[5] See Melius de Villiers The Roman and Roman- Dutch Law of Injuries (1899) pg 166; Attorney – General v Crockett 1911 TPD 893 at 925 -6

[6] Coetzee v Government of the Republic of South Africa [1995] ZACC 7; 1995 (4) SA 631 (CC)

- [6] Coetzee v Government of the Republic of South Africa [1995] ZACC 7; 1995 (4) SA 631 (CC)
- [7] Attorney- General v Crockett (Supra) pg 917 - 922
- [8] Bannatyne v Bannatyne [2002] ZACC 31; 2003 (2) SA 363 (CC) at para 18
- [9] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 602 (SCA) paras 18 and 19.
- [9] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I; Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 602 (SCA) paras 18 and 19.
- [10] Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524 D
- [11] Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 692 E-G
- [12] Supra at paras 23 and 24.
- [13] Bill of Rights s12 (1)(b)
- [14] Bill of Rights s12(1)(a)
- [15] Bernstein v Bester NO [1996] ZACC 2; 1996 (2) SA 751 (CC) para 145 -146.
- [16] Frankel Max Pellak v Menell Jack Hyman Rosenburg [1996] ZASCA 21; 1996 (3) SA 355 at 367 E
- [17] Founding Affidavit Annexure "FA5" 02-90.
- [18] Answering Affidavit para 31 p
- [19] Replying Affidavit para 3.16 p 10-9.
- [20] Founding Affidavit par 27 Case Lines 02-8 read with par 107.3 Caselines 02-32. 3 Answering Affidavit par 2.15 Case Lines 09-10.
- [21] Talacar Holdings (Pty) Ltd v City of Johannesburg Metropolitan Municipality and Others (44294/2020) [2023] ZAGPJHC 250 (8 March 2023) par [21]-[28]

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