

SOUTH AFRICA / JUDGMENT

Khumalo v Len Smith Investment Holdings CC and Another (LCC175/2016) [2024] ZALCC 25 (2 September 2024)

[2024] ZALCC 25

COURT
Land Claims CourtBEFORE
CowenCASE / FILE NUMBER
LCC 175/2016

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IN
THE LAND COURT OF SOUTH AFRICA
HELD
AT RANDBURG
Case
No.: LCC 175/2016
1. REPORTABLE: NO
2. OF INTEREST TO OTHER
JUDGES: NO
3. REVISED.
2 September 2024
In

the matter between:

MUNTU
WELCOME KHUMALO
Applicant
and
LEN
SMITH INVESTMENT HOLDINGS CC
First
Respondent
ANDREW
WILSON DOTT
Second
Respondent

JUDGMENT

COWEN J

Introduction

1. The applicant, Muntu Welcome Khumalo, is a farm dweller, who resides on Kilham Farm, Bergville, in KwaZulu-Natal Province (Kilham Farm). The first and second respondents are, respectively, Len Smith Investment Holdings CC and Andrew Wilson Dott, a member of the first respondent. The first respondent is the owner of Buffelskloof, Bergville, KwaZulu-Natal (Buffelskloof Farm), which neighbours Kilham Farm.
2. In the application before me, the applicant seeks to hold the respondents in contempt of an order of this Court granted on 3 March

2020. The order was granted in an application the applicant instituted seeking access to a route across Buffelskloof Farm leading

to his homestead on Kilham Farm. The first respondent opposed the application.

3. On 3 March 2020, Canca AJ made an order substantially in the following terms:

3.1. Directing the first respondent to provide the applicant with unhindered access to his homestead situated on Kilham Farm through

its farm, Buffelskloof Farm;

3.2. The directive issued in paragraph 1 of this order shall be executed by the first respondent upon forty-eight (48) hours' notice by the applicant of his intention to use the route on Buffelskloof, Bergville, KwaZulu-Natal;

3.3. The applicant and the respondent are directed to engage meaningfully, within five (5) days from the date of this order, with due regard to their respective rights and interests, on the applicant's future use of the route on Buffelskloof, Bergville, KwaZulu-Natal;

and

3.4. There is no order as to costs.

4. The applicant contends that the respondents are in contempt of the order and seek inter alia declaratory relief to that effect, as well as a committal to prison alternatively the imposition of a fine, suspended for purposes of compliance. The respondents oppose the application, contending that they are not in breach of the court order alternatively if there is any non-compliance, it is neither wilful nor mala fide.

Background

facts

5. The events giving rise to the application, as set out in the founding affidavit, can be briefly stated. On 5 March 2020, two days after the order was granted, the applicant's attorney, Mr Motsa of Ntshalintshali Attorneys, wrote to the first respondent's

erstwhile attorneys, Allen and Associates, to propose a meeting by end of business on Tuesday 10 March 2020. The judgment was attached

to the letter. The same day, Allen and Associates responded acknowledging receipt and advising that the correspondence had been

forwarded to their client. On 16 March 2020, Mr Motsa wrote again to Allen and Associates advising that the applicant required access via the access route by Friday 20 March 2020.

6. On 17 March 2020, Allen and Associates responded advising that access would be granted. However, the letter also advised: 'Inasmuch

as our client has not previously given notice, formal written notice is hereby given of the withdrawal of consent to access our client's property to gain access to the temporary structures occupied by one of your client's employees which structure is situated on the neighbour's farm.'

7. On 27 November 2020, Mr Motsa wrote a further letter to Allen and Associates which refers to the 9 March 2020 correspondence (presumably intended as a reference to the 10 March 2020 correspondence). The letter stated that they had not had a response and advised that the applicant was still being denied access to the route. The letter records that Ntshalintshali Attorneys hold instructions to file a court application for contempt of court and demanded compliance. On 30 November 2020, Allen and Associates delivered a notice of withdrawal as attorneys of record.

8. Shortly thereafter, and also on 30 November 2020, the second respondent sent an e-mail attaching the correspondence of 17 March

2020. On 7 December 2020, Mr Motsa wrote to the second respondent, advising him that his client had not been assisted as per the letter of 17 March 2020 and requested access on 10 December 2020. On the same day, the second respondent responded contending that any right of access had long expired and that no further access would be tolerated.

9. The applicant contended in his founding affidavit that the respondents had from the outset evinced an intention not to comply with the court order.

10. In the answering affidavit, the second respondent inter alia, contends that any right of access was terminated on 17 March 2020, which was given having regard to the portion of the

judgment

of Canca AJ in which the Court dealt with the nature of the right held by the applicant. In the portion relied upon, the Court concluded that the right of access that the applicant acquired over the years to use the route on Buffelskloof Farm is akin to a

precarium, 'a species of contract where the subject is lent at the pleasure of the lender, and which can be redeemed at any time' and that can be terminated on reasonable notice. Inasmuch as it may have been contended that the notice given was not reasonable, notice of termination was given in the answering affidavit. The first respondent contended that the termination of rights was done in the genuine belief that it was lawful to so terminate the rights and accordingly, even if the Court were to find that there is any breach of the court order (which the respondents deny) there was no wilful or mala fide non-compliance.

The

legal framework

11. The test for contempt of court was recently restated in Zuma as follows (footnotes omitted):
[1]

'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. The Constitutional Court held further (footnotes omitted):[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". ...'

13. To the extent that the applicant seeks, as relief, 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.'[3]

Issues

for decision

14. At the hearing, the respondents defended the application on both technical and substantive grounds. I deal with the following central issues that arose for decision:

14.1. Whether the founding affidavit was correctly commissioned.

14.2. Whether condonation should be granted for the late filing of the replying affidavit.

14.3. Whether the respondents are in contempt of court and any appropriate relief.

Whether the founding affidavit was correctly commissioned

15. The respondents contended that the founding affidavit is fatally defective as it was commissioned by a person associated with the applicant's attorneys. A dispute of fact in this regard emerged on affidavit and the Court was ultimately informed that the respondents' attorneys would be lodging a related complaint with the Legal Practice Council. So as not to unduly prejudice the applicant, I accepted a further affidavit from the applicant confirming his evidence in his founding affidavit, which was commissioned before a commissioner of oaths within the South African Police Services.

Late filing of the replying affidavit

16. The applicant sought condonation for the late filing of the replying affidavit. The respondents opposed the application. The affidavit was due on 11 August 2021 and the replying affidavit was delivered two months later on 12 October 2021. The applicant explains that he fell ill 'during July until towards the end of August 2021' suffering a terrible bout of flu. The applicant, born in 1951, is elderly and he deemed it unwise to see his attorney during this period, given his age and the prevalence of Covid-19 at the time. The applicant was able to see his attorney on 27 August 2021 and his attorney contacted him in early September 2021 indicating that the affidavit had been prepared. However, the applicant's condition then regressed and he informed his attorney of his position and that he would be in touch when he was better. He contacted his attorney when he had recovered in early October 2021, and his attorney then arranged to bring the affidavit to him.
17. The respondents oppose the grant of condonation on the basis that the explanation is lacking in candour and uncorroborated by documentary evidence from a doctor. I am unpersuaded by the respondents' contentions regarding candour. For example, much is

made of a suggestion that the applicant fell ill only at the end of August when the affidavit was due in mid-August. However, the applicant explains that he had fallen ill in July. Moreover, I am unpersuaded in this case that the absence of a medical certificate is decisive in the circumstances of that time, mindful specifically that the applicant is a rural litigant and South Africa was still in a national state of disaster relating to the Covid pandemic.

18. I am satisfied in the circumstances of this case that it is in the interests of justice that condonation be granted for the late filing of the replying affidavit having regard to the considerations referred to in *Van Wyk v Unitas Hospital*.^[4] There has been a satisfactory explanation for the delay over the relevant period, the issues are of profound importance to the

parties, there are prospects of success, the dispute concerns access to a place of residence and security of tenure and there is no prejudice to the respondents or any other person.

Contempt of court and any appropriate relief

19. There can be no dispute that the respondents were aware of the order of this Court. Rather, the respondents' case rests on two central submissions. First, that the applicants had not demonstrated non-compliance with the court order. Secondly, that even if they had, the respondents had refuted the requisite state of mind to demonstrate contempt of court.
20. The applicant submitted that there had been non-compliance with the court order on two main grounds. First, as a matter of fact, the applicant submitted that he had not been given access to the route when it was sought in March 2020. That may be true, but that case is not adequately made in the founding affidavit. It is only adequately made in the replying affidavit. In this regard, the first time the applicant's attorney referred in correspondence to the fact that access 'is still being denied' was several months later, in November 2020. The founding affidavit cannot in those circumstances reasonably be understood to raise the material facts.
21. Secondly, the applicant submitted that it was established on the affidavits that the respondents had failed to comply with the part of the order that required the parties 'to engage meaningfully, within five (5) days from the date of this order, with due regard to their respective rights and interests, on the applicant's future use of the route on Buffelskloof, Bergville, KwaZulu-Natal.'
22. Ms Blumenthal submitted that that case too was not made in the founding affidavit. I disagree. While I agree that the founding affidavit could be more fully fleshed out, and relies on the correspondence exchanged between the parties' attorneys, the failure to engage emerges vividly and starkly from what transpired in March 2020 and is effectively common cause. It is quite plain that the applicant, through his attorneys, sought to engage on 5 March 2020 in accordance with the court order. The first respondent simply failed to respond substantively to that request. On 16 March 2020, the applicant requested access and on 17 March 2020, the first respondent unilaterally gave notice terminating the right of access.

23. In the answering affidavit, the second respondents simply says: 'I respectfully submit that no meaningful engagement was possible, despite the parties' respective attorneys' attempts, and that this section of the order is no longer relevant or extant.' But when regard is had to the correspondence exchanged, there was no attempt on the part of the respondents, through their attorneys, to engage meaningfully in accordance with the court order. Nor can it seriously be suggested that no meaningful engagement was possible.
24. Indeed, in my view, it is quite clear that the respondents wilfully ignored that part of the court order. The order required engagement within five days of the date of the order. The applicant's attorney requested such a meeting on 5 March 2020, two days after the order was made. The respondents then declined to engage within that time frame. When they did respond, they merely advised that the right was terminated. That this stance was wilful is borne out further by the failure of the respondents to deal squarely with this issue in the answering affidavit and because the respondents, rather, dedicate significant attention to contending that the applicant does not require access.
25. As the applicant submitted, on a proper interpretation of the order, the purpose of that engagement concerns the applicant's future use of the route, having regard to the parties' respective rights and interests. The duty placed on the respondents to so engage was distinct from the duty to restore possession by providing unhindered access to his homestead via the route on 48 hours' notice. At the least, it required the parties to embark upon genuine efforts to find an accommodation having regard to both parties' respective rights and interests.
26. However, Ms Blumenthal submitted that the respondents had rebutted any suggestion not only of wilfulness but of mala fides. While I have concluded that the non-compliance was wilful, the question remains whether the respondents were mala fides in this conduct. In this regard, the submission advanced is that the respondents bona fide believed that they were entitled to terminate the right of access on reasonable notice having regard to the judgment of Canca AJ. In my view, that interpretation of the court order is not correct. I accept, however, that on the affidavits there is reasonable doubt on the issue of mala fides.
27. During the hearing I engaged Ms Blumenthal on how the Court should approach the matter should the Court conclude that there is non-compliance but entertains doubt on a feature of the requisite state of mind. I have considered various possible approaches at this stage including a referral to oral evidence on whether the respondents were mala fides, directing the respondents to further address various concerns on affidavit or whether it would suffice to deal with the matter by considering whether a civil standard of proof is nonetheless met. I have also considered whether the respondents are correct when, in their answering affidavit, they claim that 'this part of the order is no longer relevant or extant.' In my view, the meaningful engagement portion of the order has ongoing relevance and remains extant. This is because whatever the status of the right of precarium following the correspondence of 17 March 2021, which I need not decide, there is no reason why there cannot be meaningful engagement regarding the applicant's future use of the route.

28. That is what the order requires and the order must be complied with. Moreover, it warrants emphasis that meaningful engagement must be duly pursued and that cannot be done by paying mere lip service to the order.
29. In my view, the appropriate remedy at this stage is to direct the respondents to comply with the meaningful engagement order and if they fail to do so, to afford the applicant an opportunity to approach the Court on the same papers, duly supplemented where necessary, for any further relief. If there is still non-compliance, the issue of remedy can then be further addressed, if need be by way of a referral to oral evidence.

Costs

30. This Court only orders costs in special circumstances. In my view, this is such a case as it concerns non-compliance with a court order. The stance of the respondents to the applicant's access is, moreover, troubling and evidences an absence of concern for the rights and interests of the applicant. Indeed, at times, the stance appears demeaning of the applicant's position and station in life.
31. I make the following order:
- 31.1. Condonation is granted to the applicant for the late filing of the replying affidavit.
- 31.2. The respondents are directed to such steps as are necessary to comply with the meaningful engagement order within 30 (thirty) days of the date of this order.
- 31.3. The applicant is granted leave to approach the Court on the same papers supplemented where necessary for further relief.
- 31.4. The respondents are ordered to pay the applicant's costs on a party and party scale.

Date reserved: 4 June 2024

Date of Judgment: 2 September 2024

Appearances:

Applicant: MM Chithi instructed by MC Ntshalintshali Attorneys

Respondents: R Blumenthal instructed by NVDB Attorneys

[1] 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 (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021) (Zuma) at para 37

[2]Zuma at para 59.

[3]Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited (CCT 217/15, CCT 99/16) [2017] ZACC 35; 2017

(11) BCLR 1408 (CC); 2018

(1) SA 1 (CC) (26 September 2017) (Matjhabeng Local Municipality) at para 67 in which the preceding paragraphs are summed up.

[4] Van Wyk v Unitas Hospital and Another

[2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and 22.

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