

SOUTH AFRICA / JUDGMENT

Lujabe v Maruatona (35730/2012) [2013] ZAGPJHC 66 (15 April 2013) [2013] ZAGPJHC 66

COURT

South Gauteng High Court, Johannesburg

BEFORE

Molahlehi

CASE / FILE NUMBER

35730/2012

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THE

REPUBLIC OF SOUTH AFRICA

the SOUTH GAUTENG HIGH

COURT, JOHANNESBURG

Case

no: 35730/2012

In

the matter between:

LUJABE

MATSHELISO XOLISWA

Applicant

and

MARUATONA

SHIBISHI SAMUAL

Respondent

Heard:

14 February 2013

Delivered:

15 April 2013

Summary:

Contempt proceedings- Failure to comply with a settlement agreement made an order of Court. The effect of a settlement agreement made an order of Court. The general principles governing contempt and unenforceable orders.

JUDGMENT

Molahlehi AJ

Introduction

- [1] This is an application in terms of which the applicant seeks an order committing the respondent for contempt of Court. The Court order in question arises from an agreement which the parties concluded and was subsequently made an order of the Court.

Background**facts**

- [2] The parties were involved in an intimate relationship for several years, during which period they jointly purchased an immovable property, ERF 260 Sunning Hill (the Sunning Hill property). The parties are also joint owners of the property described as Erf 94 Monaghan (the Monaghan property).
- [3] The parties concluded an agreement concerning the division of the assets, after their relationship broke down. The relevant parts of the agreement which was subsequently made an order. In relation to the Monaghan property the relevant clause for the purposes of these proceedings reads as follows:

“2.1.1 The parties are the joint owners of a property situated in the Monaghan Estate and more fully described as Erf 94 Managhan Extention 1 (“the Monaghan property”). In this event, the Applicant and the Respondent are jointly, in equal share liable for Mortgage Bond, Assessment Rate & Taxes and Levies account payable to the Body Corporate/ Home owner Association and Municipality having jurisdiction on the Monaghan Property.

And in relation to Sunninghill property the relevant clause reads as follows:

2.2.3 The Respondent shall keep the property in good condition. In this event, the Respondent shall continue to be liable for all payments in respect on any Mortgage Bond, Municipal Rate and Taxes, Levies Water and Electricity account in respect to the Sunning Hill Property and shall fully indemnify the Applicant against any claims arising from the Sunninghill Property during the Respondent’s occupation on the property.’

- [4] The applicant alleges that the respondent has failed to comply with the provisions of the agreement and, accordingly, is in contempt of the court order in that:

‘9.1 He has failed to pay his equal share of the mortgage bond as per clause 2.1.1;

9.2 He has failed to pay his equal share of assessment rates and taxes and levies as per clause 2.1.1;

9.3 He has failed to pay his equal share of the mortgage bond as per clause 2.2.3;

9.4 He has failed to pay his share of the municipal rates and taxes, levies, water and electricity as per clause 2.2.3.'

[5] Another agreement which was also made an order of Court was concluded by the parties which they referred to as "revised agreement." That agreement does not seem to have any bearing on the present matter.

Legal principles

[6] The broad approach to adopt when dealing with the issue of contempt of Court order or judgment is well established in our law. The critical and starting point in contempt proceedings is whether there exists a Court order which is the subject matter of the complaint concerning non-compliance. The other aspects of the inquiry into the contempt proceedings entail determining whether the respondent was served with or notified of the order in question. Once these procedural aspects have been satisfied, the further onus is on the applicant to prove beyond reasonable doubt that the failure to comply with the order was wilful and mala fide on the part of the respondent. In general, wilfulness will be inferred once the applicant has established failure by the respondent to comply with a Court order.

[7] It is trite that once the applicant has made out a case of wilfulness and mala fide of the non-compliance with the order, the respondent bears the onus of showing on the balance of probabilities that non-compliance was not wilful or mala fide.[1] The general test to apply in considering contempt applications is set out in out in *Fakie No v CCII Systems (Pty) Ltd*, [2] in the following terms:

'The test for when obedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately

and mala fide. A deliberate disregard is not enough, sings the non-complier made genuinely, albeit mistakenly, believe him or herself entitled to act in the wake linked to constitute contempt. In such a case, in good faith avoids infraction. If a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of faith).'

[8] After setting out the above test the Court in *Fakie's* case proceeded later in its judgment to summarise the general principles governing the approach to adopt when dealing with contempt as follows:

'1 The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

2 The respondent in such proceedings is not an 'accused person', but is entitled to analogous protection is appropriate to motion proceedings.

3 In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and mala fides) beyond reasonable doubt.

4 But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidentiary 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 fide, contempt will have been established beyond reasonable doubt.

5 A declaratory and other appropriate remedies remain available to a civil applicant on proof on the balance of probabilities.'

[9] The other important requirement in dealing with contempt proceedings is that the Court has to determine whether the order upon which the contempt application is based is one ad factum praestandum and not pecunium solvendum. A Court order that will attract committal for contempt is one ad factum praestandum.[3]

[10] The issue of the effect of a settlement agreement made an order of the Court was not raised by the respondent. The respondent seems to have accepted that the settlement agreement which was made an order of Court has the same effect as if the merits of the matter were determined. The respondent, however, contended that the order was not enforceable and, therefore, he could not be guilty of wilful non-compliance with the order.

[11] There have over the years been divergent decisions of the Courts as to whether a settlement agreement made an order of the Court is in fact an enforceable order or a mere record of the settlement agreement between the parties. The essence of the issue in this regard has been whether a settlement agreement made an order of Court assumes the same status as that of an order made by the Court after considering the merits of the matter. In other words, a settlement agreement made an order of Court can be enforced in the same way as any other order made by the Court.

[12] In *Johannesburg Taxi Association v Bara-City Taxi Association and Others*,[4] the Court held that a settlement agreement made an order of Court was nothing but a record of what the parties agreed to which for purposes of administration of justice, the Court would not necessarily order compliance with. In following this approach and endorsing the decision, in *Thutha v Thutha*,[5] the court held that:

'If a court is asked to enforce its order, the first question is, as stated above, whether the court is faced with a valid court order. If not, and if found that it is merely a recording of a settlement agreement between the litigants, without an element of a court requiring obedience with its terms as a court order (*Johannesburg Taxi case supra*), it cannot and should not be treated as a court order. In such a case the remedy of an applicant/plaintiff is to sue on the contract and for the court to decide the matter on contractual principles. If the applicant elects to treat the contract as an order of court and asks for the enforcement of the order, the application will fail simply on the ground that 'the order' which the applicant seeks to enforce is not an order of

court, but a contract. If, on the other hand, the court is satisfied that the order which is sought to be enforced by committal for contempt is indeed a court order requiring obedience, the matter should be decided on such basis without recourse to contractual principles. However, the scenario postulated in the first instance should ideally never arise if our courts, as a matter of practice, refuse to incorporate deeds of settlement into their orders.’

[13] The question of the correctness of the above approach was raised in *Simon N.O. and Others v Mitsui and Co Ltd and Others*.^[6] In this respect, the Court in that case observed:

‘Let it be stated in the clearest possible terms that an undertaking to the Court is as solemn, binding and effective as an order of the Court in the like terms and that the contrary has never been suggested.’

[14] The converse approach to the one that says the settlement agreement made an order of Court was not an order was adopted in *Dadel Vlak Boerdery v Greyling and Another*,^[7] where the Court held that once a settlement agreement is made an order of Court, it ceases to be a settlement agreement and becomes a court order. The Court, further, held that such an agreement can be enforced through contempt of court or execution proceedings.

[15] The same approach was adopted in *York Timbers Ltd v Minister of Water Affairs and Forestry and Another*,^[8] where the Court held that:

‘In my view there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment.’

[16] In my view, the correct approach is the expressed in the later cases discussed above, which says that a settlement agreement made an order of Court has the same effect as that which is made after the determination of the merits of case by the Court.

[17] The issue that arises in a case where the settlement agreement has been made an order of Court and in the context of contempt proceedings is whether such an order is executable or enforceable. The basic principle is that for an order to be executable or enforceable, its wording must be clear and unambiguous. An order that lacks clarity in its wording or is vague is incapable of enforcement.^[9] The other basic principle is that the order should as soon as it is made, be readily enforceable.^[10] In other words, the order must give finality to the dispute between the parties and not leave compliance therewith to the discretion of the party who is expected to comply with such an order.

Evaluation/analysis

[18] In the present instance, the complaint of the applicant regarding the alleged non-compliance with the Court order relates mainly to the provisions of clauses 2.1.1 and 2.2.3 of the settlement agreement which was made an order of Court. The question that needs to be answered in this regard is whether these two clauses present a readily executable or enforceable order. An answer in the affirmative would mean that the respondent is faced

with having to adduce evidence that shows that the non-compliance with the order was not wilful or mala fide.

- [19] In my view, these clauses are not readily executable or enforceable for the following reasons: Clause 2.1.1, simply, records the fact that the property is jointly owned by the parties. It further provides that both are jointly liable for the payments of the rates and taxes including the municipal levies. There is nothing in this clause that says what the respondent should or should not do. There is no indication as to the specific amount of his liability in relation for instance to payment of the mortgage bond or the municipal levies.
- [20] The same applies to clause 2.2.3 of the order. The amount to be paid by the respondent in relation to the mortgage bond, the taxes, levies water and electricity account for the Sunning Hill property is not stated in this clause. It is also not clear as to when can it be said that the respondent has defaulted in his duties, this is so particularly when account is taken of the last part of that clause which reads as follows: ‘... and shall indemnify the Applicant against any claim arising from the Sunning Hill property.’
- [21] In essence, the two clauses relied upon by the applicant in seeking committal for contempt created an obligation on the respondent to pay unspecified amounts of money to third parties with no specified time frame. In my view, these clauses do not constitute an order which is one ad factum praestandum and, accordingly, cannot be enforced by way committal for contempt.
- [22] As concerning, in case she was unsuccessful the applicant contended that an order should not be made against her in that regard because the issue of the enforceability of the order in question was not raised in the papers but raised for the first time in argument. I do not agree with this argument. The issue of the enforceability of an order of Court is a legal matter that, in my view, can be raised even at the hearing of the matter.
- [23] In light of the above, I am of the view that applicant’s claim stands to fail and there is no reason why costs should not follow the results.

Order

- [24] In the premises, the applicant’s application is dismissed with costs.

Molahlehi, AJ

Acting Judge of the South Gauteng

High Court.

APPEARANCES

For the Applicant: Advocate RWM Kujawa

Instructed by: Simpson–Masenamela Attorneys

For the Respondent: Mr Angelo Christophorou of Biccari Bollo Mariano Inc

[1] See Du Plessis v Du Plessis 1972

(4) SA 216 (O) at 220A-D.

[2]

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

[3] See Ferreira v Bezuidenhout 1970 (1) SA 551 (O).

[4] 1989 (4) SA 808 (W) at 811E.

[5] 2008 (3) SA 494 (TkH) at para 53.

[6] 1997 (2) SA 475 (W) at 498I-J.

[7]

[2007] JOL 19050 at para 9.

[8] (2003) 4 SA 477 (T) 500F-G.

[9] See Joss v Barclays Western Bank Ltd 1990 (1) SA 575 (T) at 579E.

[10] Weiner NO v Broekhysen 2001 (2) SA 716 (C) at 722J-723A.

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