

SOUTH AFRICA / JUDGMENT

Mellet v Kampherbeek and Another (3093/2013) [2014]

ZAFSHC 29 (13 March 2014)

[2014] ZAFSHC 29

COURT

Free State High Court, Bloemfontein

BEFORE

Lekale

CASE / FILE NUMBER

3093/2013

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 3093/2013

In the matter

between:

BLUCHER

HAUMAN

MELLET.....Applicant

and

CARL

FREDERICK

KAMPHERBEEK.....First

Respondent

GRAND

PALACE TRADING 217 (PTY)

LTD.....Second

Respondent

CORAM:

LEKALE, J

HEARD ON:

27 FEBRUARY 2014

JUDGMENT

BY: LEKALE, J

DELIVERED ON: 13 MARCH 2014

INTRODUCTION**AND BACKGROUND:**

- [1] This is an opposed motion for an order calling upon the first respondent to show cause, if any, why the following orders should not be made:

“1.1 Dat die eerste respondent skuldig bevind word aan minagting van hierdie Agbare Hof se hofbevel, uitgereik op 6 Augustus 2013 onder saaknommer 3093/2013, en wel bevel 3 daarvan;

1.2 Dat, indien eerste respondent skuldig bevind word, soos vermeld in bede 1.1 supra, die eerste respondent sodanig gevonniss sal word as wat die Agbare Hof onder die omstandighede billik mag ag;

1.3 Dat die eerste respondent gelas word om te voldoen aan die bepalings van voormelde hofbevel, bevel 3 daarvan;

Dat die eerste respondent gelas word om die koste van hierdie aansoek te betaal.”

- [2] On the 6th August 2013 the parties secured an order by agreement under the above case number in terms of which the first respondent, inter alia,

“3. ... onderneem om alle rekords, insluitende finansiële verslae, finansiële instrumente, notules van jaarvergaderings en Direkteur vergaderings aan die applikant te oorhandig saam met die opponerende verklaring, voor of op 28 Augustus 2013.”

- [3] The applicant and the first respondent (the respondent) hold equal shares in the second respondent and the first respondent is, further, the sole director of the second respondent. No relief is sought against the second respondent and, as such, there is no appearance for it.

- [4] The respondent, however, did not hand over the documents referred to in the court order to the applicant and, on the 11th November 2013, the applicant commenced the instant proceedings by filing a notice in terms of rule 6(11) of the Uniform Rules of Court.

- [5] The respondent resists the motion mainly on the ground that the order relied upon to sustain the proceedings is not legally recognised as giving cause to contempt proceedings.

DISPUTE:

- [6] The respondent, effectively, disputes that the order in question saddles him with a duty towards the court so as to expose non-compliance with the same to contempt proceedings.
- [7] He, further, contends that, in the event of contempt proceedings being competent on the relevant order, then and only in that eventuality, he did not act deliberately and maliciously when he failed to comply with the same.

CONTENTIONS FOR THE PARTIES:

- [8] Adv. Van Rhyn SC, appearing with Adv. Greyling for the applicant, submits that it is clear from decided cases that a settlement agreement which has been made an order of court, is as much a court order as an order made by the court after hearing and dealing with the merits of a case. Such an order, therefore, has the same legal consequences as any other court order. In his view the respondent has failed to create a reasonable doubt as to his intention and mala fides when he failed to deliver the relevant documents as ordered by the court.
- [9] On behalf of the respondent Mr Loubser submits that the respondent deliberately insisted on the word “onderneem” being substituted for “gelas” in the draft order which was eventually made an order of court because he did not want to fall foul of a court order in

circumstances where he was not in possession of the documents in question. According to him the effect and essence of the word

“undertake” in a court order is to record reciprocal contractual obligations of the parties as opposed to burdening them with duties towards the court. Such a court order only serves to render the agreement between the parties binding inter partes and, as such, does not lay the basis for contempt proceedings in his view. In his opinion the respondent was, in any event, not mala fide and did not intend to hold the court order in contempt regard being had to his insistence on the word “onderneem” in the draft order.

APPLICABLE LEGAL PRINCIPLES:

- [10] It is correct, as effectively contended for the applicant, that in proceedings seeking the committal of the alleged offender to prison for contempt of a court order the applicant, as the prosecutor, must establish the existence of the order, its service on the respondent and non-compliance with the same. Once the foregoing have been established, the evidentiary burden shifts to the respondent alleged offender to raise a reasonable doubt as to whether non-compliance was wilful and mala fide. Failure to adduce evidence raising such a reasonable doubt results in the offence having been proved beyond reasonable doubt.

(See: Fakie NO v CCII Systems (Pty) Ltd

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

- [11] For a court order to lay the basis for contempt proceedings it must be one ad factum praestandum in the sense that it can be gathered from its terms that it compels the respondent to either perform or refrain from something as opposed to simply effecting payment. See *Ferreira v Bezuidenhout* 1970 (1) SA 551 (OV Lujabe v Maruatona
- [2013] ZAGPJHC 66(Lujabe) and compare *Tasima (Ptv) Ltd v Department of Transport and Others* 2013
- (4) SA 134 (NGP) at para [71](*Tasima*) and *Johannesburg Taxi Association v Bara-City Taxi Association and Others* 1989 (4) SA 808 (W) (*Johannesburg Taxi Association*).)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS:

- [12] The dispute between the parties is limited to the question whether or not the relevant court order is one ad factum praestandum and if so, whether or not the respondent's account for non-compliance with the same is reasonably possibly true so as to cast a reasonable doubt on the wilfulness and maliciousness of his non-compliance.
- [13] The question with regard to the nature of the order in the instant matter and its competence to sustain contempt proceedings entails, as a starting point, interpretation of its terms in order to establish if they oblige the first respondent to deliver the relevant documents to the applicant.
- [14] The fact that the draft order was made an order of court, simply means that it has the authority and force of law in the sense that its terms are imputed to the court, which has effectively ordered as set out in the draft order. (See *York Timbers Ltd v Minister of Water Affairs and Forestry and Another* 2003
- (4) SA 477 (T) at 500 and *Simon NO and Others v Mitsui and Co Ltd and Others* 1997 (2) SA 475 (W) at 498 I - J)

[15] In his contention that the court order in the present matter does not expose non-compliance with the same to committal for contempt, the respondent relies on decisions such as *Johannesburg Taxi Association*, supra, and *Tasima* supra, that hold to the effect that in order to sustain contempt proceedings the relevant court order should specify the content of the respondent's obligation towards the court. On the authority of such decisions, the court order in the instant matter would be interpreted as only noting reciprocal contractual obligations between the parties and as an

"order in terms of what parties contracted without an element of a Court requiring obedience because of the administration of justice's own interest in compliance with the order."

(See *Johannesburg Taxi Association*, supra, at 811 E - F.

- [16] In my view, what decisions such as *Johannesburg Taxi Association* appear to lose sight of is the very essence of a court order which lies in the fact that it is both authoritative and compulsive without necessarily having to demand obedience expressly or warning, in so

many words, that non-compliance exposes the offender to contempt proceedings. The fact that the relevant draft order or settlement agreement has been made an order of court means that when its terms are read, they are to be understood as having been ordered by the court. I agree with the decision in *Lebeloane v Lebeloane* 2001 (1) SA 1079 (W) that the approach in such decisions is overly technical. The respondent's duty towards the court arises from the fact that the order is one by the court and the duty he owes to the court is to comply with the same.

[17] Mr Loubser, further, contends that the decision in *Tasima* is binding on this court because it emanates from a full bench.

The legal position is, however, that such a decision, emanating as it does from the full bench of another division, is of great persuasive value on this court but is not binding (See *Levitt v Schwartz* 1938 CPD 47). I am, further, persuaded by Mr Van Rhyn that the present matter is distinguishable on the facts from the *Tasima* decision insofar as the court in that matter found that the relevant order was couched in general terms which were not specific enough to inform the respondent of the content of his or her obligations towards the court which the order requires him or her to perform, while in the present matter the relevant term is clear and specific with regard to what the first respondent has undertaken to you and is ipso facto obliged to do. I am, thus, not inclined to follow that decision.

[18] The order in the instant matter is, in my view, the kind that compels the respondent to perform something and, as such, competently sustains contempt proceedings. The next enquiry is whether or not non-compliance by the first respondent was deliberate and malicious regard being had to his explanation that he was never in possession of the relevant documents and, for that reason, he insisted on the wording "onderneem" as opposed to "gelas" in the draft order which was eventually made an order of court. I am not satisfied that this version by the first respondent is reasonably possibly true regard being had to the fact that he was always free to point out that some of the documents did not exist because no directors' meetings and annual meetings were held. It was equally within his power to

point out that he was not in possession of financial statements and not to agree to an order effectively requiring him to provide non-existent and unavailable documents with full knowledge that he was not in a position to comply with the same. The only reasonable conclusion is that the relevant documents were in existence and available as at the date of the order. It is, furthermore, not apparent ex facie the respondent's papers that he took any steps whatsoever to trace and acquire the financial statements from the auditors in Somerset West. As Mr Van Rhyn correctly points out cheques are financial instruments and from the first respondent's own deposition it is clear that some property belonging to the second respondent was leased out and generated rental income. It can, therefore, reasonably be accepted that the second respondent was trading and had a cheque account to which the respondent, as the sole director, would have access.

COSTS:

- [19] The applicant moves for costs against the first respondent on a scale as between attorney and client inclusive of costs attendant on employment of two counsel. In support of this prayer Mr Van Rhyn refers to the conduct of the first respondent in agreeing to submit documents which, on his own version, were either non-existent or not in his possession with full knowledge that he would not be able to comply with a court order to that effect. Mr Loubser, on the other hand, submits that no cause exists for punitive costs order and for employment of two counsel.
- [20] I am, however, satisfied that reason exists for a special order as to costs in the form of the respondent's conduct which, in my judgment, is indicative of malice on his part and was displayed as early as the date on which the order was made. In this regard it is worth observing that, on his own version, when he consented to the order he was alive to his handicaps and knew that he would not reasonably possibly be able to overcome them in order to comply with the same. I am, further, convinced that sufficient reason existed for employment of two counsel regard being had to, inter alia, the question raised by this matter.

ORDER

- [21] The first respondent is guilty of contempt of an order emanating from this division and issued on the 6th August 2013 under case number 3093/2013, particularly order number 3 thereof.
- [22] The first respondent is fined R10 000.00 or 4 (four) months imprisonment which sentence is suspended in whole for four years on condition that the first respondent shall not be found guilty of contempt of court order committed during the period of suspension.
- [23] The first respondent is further directed to comply with the provisions of paragraph 3 of the court order of the 6th August 2013 within 15(fifteen) days of the date of this order.
- [24] The first respondent is, furthermore, ordered to pay the costs of this application on the scale as between attorney and client inclusive of the costs attendant on employment of two counsel.

L. J. LEKALE, J

On behalf of applicant: Adv A J T van Rhyn SC

With him:

Adv P du P Greyiing Instructed by:

Eugene Attorneys BLOEMFONTEIN

On behalf of first respondent: Adv Loubser

Instructed by:

JG Kriek& Cloete 66B King Edward RD

BLOEMFONTEIN

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