

SOUTH AFRICA / JUDGMENT

Mohamed v Thair and Another

(A30/2020; 37/2019) [2024]

ZAMPMBHC 12 (12 February 2024)

[2024] ZAMPMBHC 12

COURT

Mbombela High Court, Mpumalanga

BEFORE

JL Bhengu

CASE / FILE NUMBER

A30/2020

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HIGH

COURT OF SOUTH AFRICA

MPUMALANGA DIVISION,

MBOMBELA (MAIN SEAT)

Case No.: A30/2020

A Quo Case No.:

37/2019

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE:

15 February 2024

SIGNATURE

In

the matter between: ZAMIRA
 MOHAMED
 APPLICANT
 and
 AMOD
 MOHAMMED
 THAIR
 FIRST RESPONDENT
 CITY OF
 MBOMBELA
 SECOND
 RESPONDENT

JUDGMENT

BHENGU AJ

- [1] The applicant is seeking a contempt order against the first respondent for his failure to comply with the judgment and order of the full court of this division dated 07 October 2022. The First respondent is opposing the application. The second respondent is cited herein as an interested party in the proceedings. No relief is sought against it.

Background facts

- [2] The dispute that gave rise to the contempt proceedings stemmed from an agreement of sale of an undivided share of Portion 57 of the Farm Karino, 134 JU (the property) situated within the jurisdiction of the second respondent. in terms of the agreement of sale, the first respondent was the seller of the property and the applicant's deceased husband was the purchaser of the property. The property is still zoned as agricultural land. The applicant is unable to take transfer of the land because the property is not yet rezoned, and her portion is not yet excised from the parent property. There is an ongoing litigation between the parties relating to the sale agreement itself and the improvements erected by the applicant on the property

without approval from the first and second respondent.

- [3] I will not deal with the issues raised in the appeal save to say that both parties were partially successful. In the judgment of Roelofse AJ, the following orders found in paragraph 49(b)(i), (ii) and (iii) form the basis of these contempt proceedings:-
- (i) The first respondent is directed to do all things necessary to finalize the change in land use and subdivision of portion 57 of the Farm Karino 134 JT;
- (ii) Pending the final approval of building plans for construction on the yet to be created Portion 2 of the Farm Karino, 134 JT (Portion 2), the appellant is interdicted from continuing with any construction

works on Portion 2;

(iii) The appellant is ordered to finalize the approval of the building plans within 180 (One Hundred and Eighty) days of this order failing which the appellant is hereby directed to demolish all structures she has constructed on Portion 2 within 10 (Ten) days of the expiry of the 180 – day period.

[4] It is important to note that paragraph 49(b)(i) of the court order imposed an obligation to the first respondent to do all things necessary to finalize the change in the land use and subdivision of the property. Paragraph 49(b)(ii) and (iii) interdicted the applicant from continuing with any construction on the property and to finalise the approval of the building plans within 180 days of the order failing which she was ordered to demolish all the structures that she had constructed on the property.

Applicant's case

- [5] In her founding affidavit, the applicant alleges that despite having been granted a further 180 days extension by this court to comply with the order, she is however, unable to comply with the order. According to the applicant, she submitted an application for approval of the building plans to the municipality and paid the necessary fees. Her application was however rejected by the municipality as it did not contain an approved SG Diagram for the subdivision of the property.
- [6] It is common cause that in order for the applicant to obtain approval of the building plans, the first respondent had to first apply for the rezoning of the property and obtain the approved SG Diagram for the subdivision. The applicant avers that her attorneys of record directed correspondence to the first respondent's attorneys reminding the respondent of his obligations in terms of the court order and requesting him to comply. In a letter dated 27 January 2023, the respondent's attorneys responded as follows:- "...Furthermore, our client has decided not to subdivide the property at this stage and accordingly, they do not intend finalising the application in this regard".
- [7] It is this stance of the first respondent that prompted the applicant to approach this court for relief. The applicant avers that she approaches the court with clean hands because she has done all things possible to comply with the court order, but she cannot discharge her obligations in terms of the order until the first respondent complies with his obligations first.
- [8] The applicant seeks an order declaring that the first respondent is in contempt of the court order; that he be ordered to comply with paragraph 49(b)(i) of the order within (30) days after service of the order and that a Warrant of arrest is to be issued committing the first respondent to imprisonment for a period of 6 months in the event that the first respondent fails to comply with the order.

- [9] The applicant is also seeking an order extending the time period referred to in paragraph 49(b)(iii) by 30 days after compliance by the first respondent and costs on a punitive scale.

Respondent's case

- [10] In resisting the application for contempt, the first respondent denies that he is in wilful contempt. In his answering affidavit he attacks the validity of the order of the appeal court. According to the first respondent, the order is unenforceable, *contra bonos mores* and was not made in the interest of justice because it is coercing him to give up a portion of his property to an illegal occupier. In paragraph 4.1 of his affidavit, he states that "I have no intention and will not give my consent to the applicant to build on the property, thus any extension of time will meet with the same difficulty".
- [11] There are many other grounds argued by the first respondent relating to why he believes the order is wrong and unconstitutional, however, same will not be repeated as this court is not sitting as an appeal court. The first respondent stated that he intended to appeal the order but could not do so because of lack of funds. Counsel for the first respondent confirmed that he has received formal instructions to appeal the order and that he is busy preparing appeal papers.

The Law

- [12] It is trite that an applicant who seeks a contempt of court order must satisfy the court that an order was granted against the alleged contemnor, that he has knowledge of the order, that he has failed to comply with the order and that the non-compliance have been wilful or *mala fide*. (*Fakie NO v CCII Systems (Pty) Ltd*)[1]. In this judgment, the court held further that:- "But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential 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.[2]

Analysis

- [13] It is clear from the facts of the case that the applicant has satisfied the test for contempt. It is common cause that the order was granted by this Court on 07 October 2022. The order was served on the first respondent and the first respondent confirms noncompliance with the order. The question for determination by this court is whether the first respondent has succeeded in rebutting the presumption that his non-compliance was wilful and *mala fide*.
- [14] In order for the court to make a determination on this issue, the court has to consider the explanation given by the first respondent for his failure to comply with the order. In his answering affidavit, the first respondent launched a scathing attack on the judgment. To illustrate this point, paragraph 4.1 and 9.1 of his answering affidavit reads as follows:-

“I have no intention and will not give my consent to the applicant to build on the property, thus any extension of time will meet with the same difficulty”. (para 4.1)

“The applicant refers to her rights that are at stake. She does so armed with nothing other than what is humbly referred to by me as being an unenforceable order.” (para 9.1)

- [15] It is clear from the above paragraphs that the first respondent never had any intention to comply with the order. Our Courts frown upon such recalcitrant attitude displayed by the first respondent. In the matter of the 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[3], the Constitutional Court remarked that “If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak”. The court further held that all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.
- [16] The order under attack by the first respondent was granted on 07 October 2022. It has since been over one year from the date that the order was issued, and the respondent has not taken any steps to appeal the order. The rules of court provide processes to be undertaken by any litigant who is aggrieved by a court order to contest the order, whether by way of an appeal or review. To date there is no such application to appeal the order. The first respondent avers that he intended to appeal the order but was unable to do so due to lack of funds. Counsel for the first respondent submitted that he has since been placed in funds and is under instructions to proceed with the application for leave to appeal. It is important to note that the first respondent has always had legal representation after the order was granted. Even the letter dated 27 January 2023 advising the applicant that he does not wish to proceed with application for subdivision was drafted by his attorneys of record. I therefore do not find merit to this argument. I find that his conduct is wilful, mala fide and justifies an order for contempt.
- [17] Regarding sanction, counsel for the first respondent argued that imprisonment will infringe the respondent’s rights protected by the constitution. He submitted that if the Court finds that the respondent is in contempt, the Court should order that the contempt order should be suspended pending the application for leave to appeal to be launched by the first respondent. While I agree that a sanction of imprisonment itself infringes upon the respondent’s constitutional rights to liberty, however as the Court held in in Fakie N.O. at para 42 that “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”.
- [18] In Matjhabeng Local Municipality v Eskom Holdings Ltd[4], the Court held that:-

“the relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamuses, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance.”

- [19] I have considered all the other alternatives to committal; however, I could not find any other suitable sanction. It appears that a declarator or imposition of a fine will not yield any positive result because the first respondent has already declared his intention not to comply with the court order despite knowing the possibility of committal into prison as a result thereof. His statement that the order is “unenforceable” without taking any further step to appeal the judgment, shows just how much disregard he has of the rule of law, a conduct that cannot be condoned.

Costs

- [20] Taking into consideration the fact that the applicant had to approach this court to enforce compliance with a court order which was issued more than a year ago, I am satisfied that costs should be awarded in favour of the applicant on a punitive scale as between attorney and client to show the courts displeasure at the conduct of the first respondent.
- [21] In the result, it is ordered that: -
1. The first respondent is found to be in contempt paragraph 49(b)(i) of the Court Order issued by Roelofse AJ dated 07 October 2022.
 2. That a warrant of arrest be issued committing the first respondent to imprisonment for a period of 30 days for his non-compliance with the order of this Court.
 3. That the whole sentence is suspended on condition that that the first respondent complies with paragraph 49(b)(i) of the Court order dated 22 October 2022 within 90 (ninety) days of this order.
 4. That the first respondent is ordered to pay the applicant’s costs on an Attorney and Client Scale.
 5. That the time period referred to in paragraph 49(b)(iii) of the Court Order dated 7 October 2022 is extended for a further 30 (thirty) days from the date of compliance by the first respondent.

JL BHENGU AJ

JUDGE OF HIGH COURT

For the applicant: Adv K Van Heerden briefed by Swanepoel & Partners Inc For the respondent:
Adv JJ Venter briefed by WDT Attorneys Date of Judgment: 12 February 2024

[1]Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 42(c)

[2] Para 42 (d)

[3] 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 [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021

(9) BCLR 992 (CC) (State Capture) at para 87.

[4] Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited 2018 (1) SA 1 (CC) para 54

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