

SOUTH AFRICA / JUDGMENT

Prinsloo NO and Others v Hlongwane (LCC39/2009B) [2023] ZALCC 24 (21 July 2023)

[2023] ZALCC 24

COURT

Land Claims Court

BEFORE

Ncube

CASE / FILE NUMBER

LCC39/2009B

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REPUBLIC OF SOUTH

AFRICA

IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT RANDBURG

CASE NO: LCC39/2009B

In

the matter between:

JOACHIM

JOHANNES PRINSLOO N.O.

First

Applicant

MAGDALENA

MARIA PRINSLOO N.O.

Second

Applicant

SALOMON

GERHARDUS CHRISTOFFEL PRINSLOO N.O.

Third

Applicant

JAN

DANIEL HENDRIK MICHAU N.O.

Fourth

Applicant

PRISMA

BOEDERY (PTY) LTD

Fifth

Applicant

And
MINAH
NGCONGWANE
Respondent
This
judgment was handed down electronically by transmission to the
parties' representatives by email. The date and time for
hand
down is deemed to be at 17h00 on the 21st
July 2023

JUDGMENT

NCUBE J

Introduction

[1] This is a two-fold application. Firstly, the applicants seek an interdict in a form of mandamus against the respondent directing her to demolish a structure which the respondent erected on her homestead without the consent of the applicants. Secondly, the applicants seek an order declaring the respondent to be in contempt of this court's order of 4 May 2010, in terms of which the respondent was ordered not to construct further dwellings on the Reenenshoop farm ("the

farm") without the prior written permission of Joachim Johannes Prinsloo ("Mr Prinsloo") or any other person authorised by him. The order was obtained by consent between the parties. Both parties were legally represented. The respondent opposes the application on the basis that the court order of 4 May 2010, was not explained to her in her language which is IsiZulu. On the allegation of building without consent from the applicants, the respondent makes a bare denial which is not substantiated.

Background Facts

[2] The respondent ("Mrs Ngcongwane") arrived at the farm with her now deceased husband ("Mr Ngcongwane") in 1990. The owner of the farm by then was one Mr Hugo Wessels. ("Mr Wessels"). Mr Ngcongwane was working for Mr Wessels, earning hundred rand (R100,00) per month. Mr Wessels allowed Mr Ngcongwane to establish a home and stay with his family on the farm and he had consent to keep cattle. Mr Wessels, was Mr Prinsloo's father in law. Mr Wessels died in April 1991. Mr Ngcongwane continued working on the farm until December 2007 when he passed away, leaving behind his wife Mrs Ngcongwane and children. One Johannes Urbanus Geldhenhuys ("Mr Geldhenhuys") took over the operations on the farm after the death of Mr Wessels. Mr Ngcongwane continued working under Mr Geldhenhuys and at that time he was earning three hundred rand (R300,00) per month.

- [3] On 4 May 2010, the applicants obtained an order against Mrs Ngcongwane from the Land Claims Court, for her to remove all the cattle in excess of the number of ten. In terms of the court order, if Mrs Ngcongwane failed to remove livestock mentioned in the order, the sheriff was authorised to remove the livestock and take it to the place pointed out by Mrs Ngcongwane or if no such place was pointed out, the sheriff would take livestock to the pound. In terms of paragraph 8 of the court order, Mrs Ngcongwane was ordered not to construct further dwellings on the farm without the prior written permission of Mr Prinsloo or any other person authorised by him. Paragraph 11 of the court order records that the court order was explained and interpreted to Mrs Ngcongwane who acknowledged that she understood the court order. The order was obtained by consent between the parties.
- [4] Despite the fact that the court order was explained and interpreted to Mrs Ngcongwane on 4 May 2010. On 18 May 2010, the Deputy Sheriff (“Mr Stols”), again served the order to Mrs Ngcongwane personally. On 8 February 2011, Mr Stols again served the same court order on Mrs Ngcongwane and then removed livestock mentioned in the court order, to a plot of land in Tshiame, belonging to one Mr Makeli Dlamini, being the place indicated by Mrs Ngcongwane to Mr Stols. On 25 April 2023, the Deputy Sheriff Hardy Duvenhage (“Mr Duvenhage”) served on Mrs Ngcongwane, a letter from the applicants’ attorneys instructing her to demolish the unlawfully constructed structure. Mr Duvenhage was making use of the services of an interpreter Mr Felix Mnguni from Ballet Security. Mrs Ngcongwane indicated that she understood the explanation.

Issues

- [5] The primary issues for determination are whether Mrs Ngcongwane has constructed a new structure on the farm without permission from Mr Prinsloo. The second issue is whether Mrs Ngcongwane was aware of the court order of 4 May 2010. The allegations are made in the founding affidavit that Mrs Ngcongwane has erected a building outside the original premises of her homestead but within the unlawfully extended homestead area. The allegation is that Mrs Ngcongwane would put up a structure and extend the fence of her homestead to cover that structure. In that manner, it would appear as if the newly erected structure is within her premises. Mrs Ngcongwane’s response to these allegations is a bare denial without further ado, putting the supplicants to the proof thereof.
- [6] On the second issue, Mrs Ngcongwane also tendered a bare denial and put the applicants to prove the allegations. However, she admits in her answering affidavit that there was a court order given against her in 2010, but she avers that the said court order was never explained to her in the Zulu language, which is the language she is conversant with.

The Law

- [7] In my view, there is nothing much to say about the newly constructed structure outside Mrs Ngcongwane’s original premises. Mrs Ngcongwane has tendered a bold statement of denial without any substantiation whatsoever. The next point will be to look at contempt of court.

The contempt of court sanction exists mainly in order to vindicate the rule of law and not just to punish the contemnor. Contempt of court is any act or omission which is calculated to display disrespect for the authority of the court including wilful disobedience or resistance to lawful court orders. In *Pheko and Others v Ekurhuleni City*[1] Nkabunde J expressed himself in the following terms:-

“The rule of law, a fundamental value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply and no person or organ of state may interfere, in any manner, with the functioning of the court order or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”

Requirements for contempt of court

[8] The following are the requirements for contempt of court: -

- (a) The existence of the court order;
- (b) The order must have been duly served on or brought to the notice of the alleged contemnor;
- (c) There must have been non-compliance with the orders, and
- (d) The non-compliance must have been willful or mala fide.

Therefore, to succeed, the applicants must prove at least the first three elements of contempt. Once the applicants have proved the existence of the court order, the service thereof and non-compliance, the onus shifts to the contemnor to show on a balance of probabilities that non-compliance was not willful or mala fide.[2]

[9] Test for a civil contempt is whether the breach was committed deliberately and mala fide. In *Fakie*[3] Cameron JA said:

“The test for when disobedience 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, 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. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith) These requirements- that the refusal to obey should be both willful and mala fide and that reasonable non-compliance, provided it is bona fide, does not constitute contempt, accord with the broader definition of the crime, of which non-compliance with civil orders in a manifestation. They show that the offence is committed not by were disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that

intent.”

Discussion

[10] In casu, Mrs Ngcongwane admits the court order handed down on 4 May 2010. She also does not deny that the court order was served on her. Mrs Ngcongwane also does not deny that she did not comply with the court order. However, she says the order was not explained to her in Zulu which is the language that she understands. In other words, Mrs Ngcongwane contends that the non-compliance was not willful or mala fide.

[11] The applicants in this case need not prove the first three requirements which are already admitted by the respondent. That being the case, the onus is now on her to show on the balance of probabilities that her non-compliance with the court order was not willful or mala fide. The contention by Mrs Ngcongwane that the court order was not explained to her in Zulu does not carry water. She was legally represented by an African attorney. There is no indication in the respondent’s answering affidavit that the attorney

concerned could not speak Zulu or that there was communication breakdown between the two of them. In the contrary paragraph 11 of the court order records that the contents of the court order were explain and interpreted to Mrs Ngcongwane, who then acknowledged that she understood the court order.

[12] As Mrs Ngcongwane did not remove the cattle herself from the farm, in compliance with paragraph 1 of the court order, on 8 February 2011, eight months

after the date of the court order, Mr Stols again served and explained the order on Mrs Ngcongwane and removed the cattle to the place indicated by Mrs Ngcongwane herself. There is no indication that she was surprised by the removal of cattle, in fact she was aware all along that there was a court order in place which required her to remove the cattle. Therefore, it is highly improbable that Mrs Ngcongwane was not aware of the contents of the court order.

[13] On 25 April 2023 Mrs Ngcongwane was served with a letter from the applicants’ attorney requiring her to demolish the unlawfully constructed structure, but she did not do so. The contents of the letter were interpreted in Zulu to her, but still she did not demolish the said structure. Therefore, I find that Mrs Ngcongwane is in contempt of the order of this court dated 4 May 2010.

Costs

[14] Ms Oschman, counsel for the applicants, asked the court to award costs to be paid either by Mrs Ngcongwane herself or by her legal representative Mr Deyi. This submission is based on the fact that the matter had to be adjourned on 26 May 2023 as Mr Deyi contended that he had not received the applicants’ Heads of Argument although such Heads were sent by e-mail address to the address they provided. The second reason why Ms Oschman argued for the award of costs was the manner in which Mr Deyi conducted the proceedings. Firstly, Mr Deyi raised the issue of rescission of the order of 4 May 2010 as a point in limine without

making a substantive application. Secondly Mr Deyi raised constitutional issues where none existed. Thirdly, he asked that inspection in loco be conducted late in the proceedings during closing arguments, not before the start of the hearing.

- [15] The practice in this court is not to award costs unless there are exceptional circumstances justifying an award of costs. That practice has been confirmed by the Supreme Court of Appeal.[4] Mrs Ngcongwane is an elderly woman. In 2010, according to the Probation Officer's report, which was compiled in the eviction application, she was fifty-five (55) years old. It is now thirteen (13) years later and she must be sixty-eight (68) years old now and she is not employed. In these proceedings Mrs Ngcongwane is legally assisted by Legal Aid South Africa as she cannot afford an attorney of her choice. Mr Deyi was instructed by Legal Aid to assist her. I am not persuaded to believe that the circumstances mentioned by Ms Oschman are exceptional enough, compelling this court to deviate from its normal practice of not making costs orders.

Order

- [16] In the result, I make the following order: -

1. The rule nisi granted by this court on 8 April 2023 is hereby confirmed.
2. The respondent, her family members, all persons acting under their authority are hereby interdicted and restrained from holding out to be the owner or person in charge of the First Applicant's farm described as the farm Reenenshoop No. 1823, district Harrismith, Free State Province ("the farm") measuring 2,857,9404 hectares in extent be and are hereby directed to forthwith comply with the Court order granted on 4 May 2010 by this Honourable Court, under the aforesaid case number, and in particular

in paragraph 8 interdicting her from giving consent, enabling or assisting persons to erect or establish new structures and/or

dwelling on the farm and to take occupation of the farm, without the prior written permission of Joachim Johannes Prinsloo, or any person authorised by him, now and in future.

3. The respondent together with her family members, all persons acting under her authority and any other unknown persons including builders and/or contractors who have unlawfully erected upon and/or commenced with construction and erection of structures on the farm, are interdicted and restrained from performing and/or carrying out and/or causing to perform any construction work on the farm by erecting additional and/or new structures or dwellings, now and in future, without the prior written permission of Joachim Johannes Prinsloo, or any other person authorised by him.
4. The respondent, together with her family members, all persons acting under her authority and any other unknown persons including builders and/or contractors who have unlawfully entered upon the Applicants farm are interdicted and restrained from occupying the erected structures on the farm.

5. The respondent together with her family members, including builders and/or contractors who are in the process of erecting the structures on the farm, which have been unlawfully brought onto the farm, in contravention of the court order granted on 4 May 2010, are hereby ordered and directed to rehabilitate the area where construction has commenced, to forthwith demolish all structures erected and to remove all building materials, including but not limited to wooden poles, fencing, roof sheeting, sand, and building equipment and to remove all building material and rubble from the farm, within two (2) calendar days from the date of service of this order on them.
6. In the event if the respondent fails to comply with the orders set forth in paragraphs 2, 3, 4 and 5 above, the Sheriff or his Deputy, with the assistance of the South African Police Services, alternatively, the Applicants and/or with the assistance of their own contractors, are granted leave to immediately ensure compliance with paragraphs 2, 3, 4 and 5 above.
7. The respondent is held to be in contempt of the court order granted on 4 May 2010 in terms of paragraph 8 of the said order.
8. The respondent is committed to a period of imprisonment for thirty (30) days which is suspended on condition the respondent complies with paragraphs 2 to 5 of this order.
9. There is no order as to costs.

NCUBE J

Judge of the Land Claims Court of

South Africa, Randburg

Appearances

For First to Fifth Applicants:

Ms Oschman, I

Instructed by:

Moolman & Pienaar Incorporated

57 Maree Street

c/o Suené Meyburgh Incorporated

Ruimsig Office State, Gauteng

For Respondent:

Mr Deyi, MA

Legal Aid South Africa

Bethlehem Local Office

c/o Legal Aid South Africa

National Office

29 De Beer Street

Braamfontein

Date of hearing: 14 June 2023

Date judgment delivered: 21 July 2023

[1] 2015

(5) SA 600 (CC) para 1

[2] Fakie N.O. v CC11 Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 9

[3] Fakie above n2 paras 9 and 10

[4] Haak Douthmbly Boerdery CC v Mpela 2007 (5) SA 596 (SCA) at 618

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