

SOUTH AFRICA / JUDGMENT

Richards v Mgojo and Others, Mgojo v Richards and Others (919/2013, 372/2013, 1559/2013) [2013] ZAFSHC 172 (26 September 2013)

[2013] ZAFSHC 172

COURT

Free State High Court, Bloemfontein

BEFORE

M.B. Molemela

CASE / FILE NUMBER

919/2013, 372/2013, 1559/2013

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 919/2013

372/2013

1559/2013

In the appeal between:-

TERTIA RICHARDSApplicant

and

CAROLINE KEKEUOE MGOJO1st Respondent

WELKOM, RIGGING & LABOUR HIRE CC2nd Respondent

[Registration Number: 1996/061149/23]

THE SHERIFF, WELKOM3rd Respondent

In Re: Application No.: 919/2013

CAROLINE KEKEUOE MGOJOApplicant

And

TERTIA RICHARDS1st Respondent

WELKOM, RIGGING & LABOUR HIRE CC2nd Respondent

STANDARD BANK OF SOUTH AFRICA3rd Respondent

HEARD ON: 12 SEPTEMBER 2013

DELIVERED ON: 26 SEPTEMBER 2013

MOLEMELA, J

- [1] This is the return day of a rule nisi granted on the 29th August 2013.
- [2] The applicant and the first respondent are the only members of a close corporation known as Welkom Rigging & Labour Hire CC (“the close corporation”). On the 7th March 2013 the first respondent moved for and obtained an Anton Pillar order on an ex parte basis authorising the sheriff of the High Court, Welkom, to inter alia search for and attach the documents of the close corporation in question.
- [3] In those proceedings the first respondent described the purpose of the application as follows:
- “The purpose of this application is to seek an order authorising the search, seizure and attachment of documents in the possession of the respondents and to preserve such documents to serve as evidence in the matter between applicant and the five respondents in the matter under case number 372/2013 in this Honourable Court.”*
- [4] The salient parts of the order granted by the court on the 7th March 2013 are the following:
- “ [4] Subject to paragraph 6 hereof, the sheriff is authorised to attach any document which is printed out by any of the aforesaid persons and is directed to remove any attached document in respect of which the applicant or the applicant’s attorney does not give a different instruction. The sheriff is directed to keep each removed item in his/her custody until the applicant authorised (sic) its release to the respondents or this court directs otherwise.*
- [8] Unless a different direction is obtained from the court, Applicant and the Applicant’s attorney will, two days after this order has been executed, become entitled to inspect any of the removed items in order to assess whether it provide (sic) evidence relevant to the present application or to further legal proceedings envisage in the application.”

The order was executed and documents were seized and attached by the sheriff.

- [5] It is common cause that during March 2013 the first respondent’s attorneys removed the documents that were seized and attached by the sheriff from the latter’s custody. It is also common cause that correspondence was exchanged by the parties regarding removal of such documents from the sheriff by the first respondent’s attorneys. It is clear from such correspondence that the parties were at loggerheads regarding the interpretation of the court order. The respondent’s attorneys were adamant that the removal of the documents was in accordance with the court’s order, hence applicant’s launching of the application on an urgent basis.

- [6] On the 29th August 2013, the court granted condonation of non-compliance with court rules and issued a rule nisi calling upon the first respondent to show cause why certain orders should not be granted. The court also granted an order with immediate interim effect in respect of the return of the removed items.

POINT IN LIMINE

- [7] The first respondent contended that this court lacks jurisdiction to entertain this matter because the application brought by the applicant was practically the same as the application for reconsideration which was previously brought by the applicant and directed at the order granted on and ex parte basis on the 7th March 2013. It was contended that the application ought to be dismissed on the basis of res iudicata, given that the matter reached finality when the applicant unsuccessfully applied for reconsideration of the order that was granted on an ex parte basis on the 7th March 2013. It was also contended that the matter ought to be dismissed on account of a lack in urgency. I dismissed both points for lack of merit. It was clear that whereas the applicant had previously sought a reconsideration of a portion of the court's order granted on the 7th March 2013, she, in this application sought the enforcement of that order. On the aspect of urgency, it is clear from the court's order that the court (Daffue, J) had, on the 29th August 2013, granted condonation of non-compliance with rules, meaning that the court had already accepted that the matter was

urgent. There was a dispute between the parties pertaining to whether the respondent had, on the day of the granting of the rule nisi, acquiesced to urgency or not. In my view, it is immaterial whether there was an acquiescence or not as the court, wrongly or rightly, made a decision on that aspect on the 29th August 2013 already. Thus, a consideration of urgency was water under the bridge. In any event, the first respondent, in her affidavit expressly conceded urgency when she stated as follows:- "I submit that the only issue that is urgent is that applicant has to comply with the statute relating to BEE legislation and CC Act".

EVALUATION OF THE PARTIES'

SUBMISSIONS

- [8] I agree with the applicant's contention that the contents of the order are clear and unambiguous. The meaning of the word "inspect" is clear. The ordinary meaning of this word entails looking at something and certainly does not entail removing the item being inspected. Expressed differently, inspecting and removing have two distinct meanings and could never be mistaken for synonyms. The same applies to the meaning of clause 8 of the order, which makes it clear that the removal of the items at the

applicant's instance would be for purposes of returning the items to the applicant in this matter. I am thus not persuaded by the first respondent's attempts at inserting or reading words into the court's order, when such words are not contained in that order. The order clearly states that the items that have been removed must be kept in the sheriff's custody.

[9] Another reason why the interpretation attached by the first respondent to the order is not sustainable is that the general approach to Anton Pillar orders is that such orders normally provide for retention by the sheriff of all items in his possession. As Anton Pillar orders are a drastic remedy that is usually granted on an ex parte basis, courts demand strict compliance therewith.

[10] I now turn to deal with the prayer for the respondent to be held to be in contempt of court and to be sentenced accordingly. The test to determine whether a party is in contempt of court or not was eloquently stated as follows as follows in *Fakie NO V CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA): -

“[41]... Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established... is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.”

[11] Although the first respondent initially disputed the terms of the settlement negotiations entered into by the parties subsequent to the issuance of the rule nisi, it is clear from the papers that the parties did in fact agree that some of the documents seized by the sheriff would be taken to an independent auditor so that the close corporation could be valued, alternatively so that the first respondent could value her member's interest in the close corporation. It is also clear from the papers that the first respondent considered herself to be entitled to remove the documents in question not only for inspection purposes but also for purposes of an auditor's assessment of her member's interest in the close corporation. The applicant's own averment that she was at some point informed by an employee of the first respondent's attorneys that some of the documents she was seeking had already been taken by the first respondent's auditors serves to disprove any mala fides on her part. Although the interpretation attached by the first respondent to the court's order was obviously erroneous, I am of the view that the parties' own agreement to deviate from the strict provisions of the order serves to disprove any wilfulness on the first respondent's part and it cannot be said that she deliberately disobeyed the court's order. In my view the first respondent has established a reasonable doubt as to the wilfulness disobedience of the court order. I am thus satisfied that under such circumstances, I am unable to find that the first respondent was or is in contempt of court of the order granted on the 7th March 2013.

Costs

- [12] It was argued on behalf of the first respondent that since she is unemployed and is being represented in the current proceedings on a pro bono basis, a cost order should not be made if her opposition of the application turns out to be unsuccessful. The applicant contended that this application relates to a commercial matter and there is thus no reason to depart from the general rule that costs must follow the result. In considering this issue, I have taken into account that both parties to the dispute agreed to a deviation from the court's order in that they agreed that the documents could be removed from the sheriff's custody and be taken to the auditors for purposes of finalising the audit and hopefully settling the dispute. This agreement between the parties is most probably what influenced the sheriff (third respondent) to agree to release the seized items to the first respondent's attorneys. Considering that the origin of non-compliance was the parties' settlement negotiations, I am of the view that an appropriate order under such circumstances is one requiring each party to pay its own costs.
- [13] Having considered all the circumstances I am of the view that only those parts of the rule nisi that were made to have immediate legal effect on the 7th March 2013 need to be confirmed.

[14] I therefore grant the following order:-

The first respondent is ordered to return all documents which were under attachment in the third respondent's custody in execution of the Court order by this Court under civil application cover number 919/2013, to the Sheriff's custody without further delay.

The third respondent is ordered to, without delay after receipt of the documents from the first respondent, prepare an inventory of the documents received from the first respondent and to report to the Honourable Court with regards to any documents that were under attachment in the third respondent's custody prior to the removal by the first respondent, which have not been returned by the first respondent.

There is no order as to costs.

M.B. MOLEMELA, J

On behalf of applicant: Adv N Snellenburg

Instructed by:

Honey Attorneys

BLOEMFONTEIN

On behalf of respondents: Mr Mostert

Bokwa Attorneys

/sp

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