

SOUTH AFRICA / JUDGMENT

Rustenburg Platinum Mines Limited v Lesojane (UM44/2022) [2022] ZANWHC 36 (21 June 2022)

[2022] ZANWHC 36

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

UM44/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

CASE

NO: UM44/2022

Reportable:

NO
Circulate
to Judges: NO
Circulate
to Magistrates: NO
Circulate
to Regional Magistrates: NO
In

the matter between:

RUSTENBURG
PLATINUM
MINES
LIMITED
APPLICANT
and
MANOKO
DANIEL LESOJANE
RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time of the handing down of judgment is deemed to be 10h00 a.m. on 21 June 2022.

ORDER

1.
The respondent is found guilty of being in contempt of the Court Order of 10 March 2022.
2.
The respondent is sentenced to thirty (30) days' imprisonment.

JUDGMENT

PETERSEN J:

Introduction

- [1] This application to find the respondent in contempt of a court order was enrolled for hearing on 17 June 2022. The respondent delivered no notice of opposition to the relief sought and as at the date of the hearing no indication was given of any opposition. At the time the matter was heard, there was no appearance for the respondent, notwithstanding an invitation link to the MS Teams Virtual platform having been sent to the respondent's attorneys of record. Having heard Adv Smit for the applicant, I reserved judgment, anticipating the handing down of judgment on or before Tuesday 21 June 2022.
- [2] The Registrar of this Court later received a telephonic call from the respondent who allegedly intimated that he was at the Rustenburg Magistrates' Court, seemingly believing that the application would be heard at that court. I instructed the Registrar to contact the applicant's legal team and similarly to make attempts to contact the respondent's attorneys of record, so as to recall the matter. At 10h55 a.m., Adv Mokgoatsane appeared on the virtual platform for the respondent, tendered apologies for the non-appearance earlier and informed the Court that the application was not opposed. Judgment was accordingly reserved as earlier anticipated.
- [3] The relief sought by the applicant against the respondent is framed in the following terms:
- "1. Dispensing with the forms and service provided for in the Uniform Rules of Court and disposing of this matter in such a manner, and in accordance with the procedure in terms of Rule 6(12) of the Uniform Rules of Court and permitting the matter to be dealt with as an urgent application.

2. That the Respondent is found guilty of being in contempt of the court order handed down by this court on the 10 March 2022 and as a result of such contempt is sentenced to imprisonment for a period of 3 months, alternatively such other sentence as the above Honourable Court may deem appropriate."

[4] The application is premised on an order granted on 10 March 2022 by Judge President Leeuw in the following terms:

"1. THAT: A Rule Nisi do issue calling upon the First, Second and Fourth Respondents, hereinafter referred to as the "Respondents" to show cause why an order should not be made on or before the 22nd day of JULY 2022 at 10am in the following terms:

1.1 That the First Respondent is interdicted and restrained from purporting to sell to any person any immovable property, or portions of such immovable property, owned by the Applicant.

1.2 That the Respondents are interdicted and restrained from:

1.2.1 Entering upon the immovable properties of the Applicant, without the consent of the Applicant, described as portions 67, 69, 70, 71, 73, 82, 83, 85 and 86 of the Farm Waterval 303 JQ, hereinafter referred to as the "Property".

1.2.2 Demarcating any portion of the Property as property belonging to them or on which they wish to erect their homes.

1.2.3 In any manner erecting upon the Property any structure.

1.2.4 Threatening, assaulting, harassing, or intimidating any of the Applicant's employees, security contractors or agents.

2. THAT: Prayers 1.1 and 1.2 shall operate as an interim order pending the return day of the Rule Nisi.

3. THAT: Service of any court order handed down in this matter or any process issued in this matter shall be effected upon the Respondents by:

3.1 Affixing the process/order at prominent and visible places on the Property.

3.2 By reading the process/order to those present on the Property when service is taking place in both English and a Local language spoken by those present."

The parties

[5] The applicant is the owner of the Property identified the order of 10 March 2022 where it has, inter alia, infrastructure which is utilized in the smelting and refining operations of the company. The Property further comprises vacant land zoned for agricultural use where the respondents in the main application are staking their claims and erecting shacks for residential use.

- [6] The respondent appears to be the main protagonist in the land invasion and sale of stands on the vacant land.

Urgency

- [7] Contempt of court is inherently urgent and a case has been made on the papers for urgency.

The background facts relied on by the applicants in support of the relief sought

- [8] The facts on which the applicant relies to prove that the respondent is in contempt of the order of 10 June 2022 is set out at paragraphs 17 to 58 to 70 of the founding affidavit. By way of summary, the following is alleged by the applicant. The respondents in the main

application invaded the Property of the applicant and during the course of the invasion marked certain pieces of land on the Property as their own, by either placing stones on same or erecting poles. They had in addition, started grading the land for roads and clearing same. The order of 10 June 2022 was applied for and consequently granted on the basis that the respondents in the main application, which includes the applicant in the present

application, had in fact invaded the Property of the applicant.

- [9] The order of 10 March 2022, was served in accordance with the directions set out there in between 10 and 12 March 2022, albeit not personally on the respondent, who refused to accept the order. On 12 March 2022 the order with an explanation thereof was sent to the respondent by way of WhatsApp message by the applicant's attorneys. The respondent replied to the WhatsApp message on 13 March 2022, in which he attached photographs of inter alia, a group of ladies and other persons keeping vigil on the Property; the respondent speaking to members of the South African Police Service ("SAPS") whilst he was on the Property. The applicant contends that the photographs are a clear indication that the respondent has no intention of complying with the order of 10 March 2022. Further on 12 March 2022, certain of the respondents in the main application arrived at the Property and entered there upon whilst the court order was visibly displayed at prominent places on the Property. At 12h18 on 12 March 2022, a group of men are seen constructing a shack on the Property.

- [10] By 17h00pm on 12 March 2022, two (2) structures were being erected on the Property with a group of ladies seen sitting on the Property, with photographic evidence of such fact. The respondent was also photographed whilst on the Property. Whilst at the Property, a certain Glen Francis, in the employ of the applicant as Superintendent in the Protection Services Division spoke to the respondent who told him that he did not care for the Court order and that he would continue to erect structures on the Property. When SAPS members arrived at around 18h00pm the court order was handed over to them. A contempt of court case was opened at the Property against the offending parties with no arrests or action taken. The SAPS members left the Property at around 19h00pm whilst certain of the offending parties remained seated at The Property around fires and left around 20h00pm.

- [11] At 19h32pm on 12 March 2022, the applicant's attorney engaged, inter alia, Brigadier Pheto, who advised him that he had spoken to a Colonel Steyn at Legal Services and that as the occupiers stated that the land belonged to them, the applicant must proceed with a contempt application. The attorney further spoke to Colonel Govender, the Station Commander who informed him that he was awaiting a response from Legal Services as he had provided them with the court order.
- [12] On the morning of 13 March 2022, certain of the respondents, led by the respondent returned to the Property and entered there upon. An urgent contempt application was brought on 17 March 2022, but struck from the roll on the basis that personal service of the application was not effected upon the Respondent.
- [13] The urgent contempt application was not persisted in as the Sheriff assisted by SAPS evicted the respondents in the main application who were acting in contempt of the court order on the 25 April 2022.
- [14] The respondent has given notice of his intention to oppose the relief sought in the main application and he has further filed an answering affidavit and notice of motion for reconsideration of the order of 10 March 2022, which was delivered on 10 May
2022. The applicant contends that these actions on the part of the respondent is indicative of the fact that he is aware of the court order and its contents.
- [15] Following the eviction of the respondents from the Property by the Sheriff of the Court, the respondents in the main action did not persist in the invasion of the Property until 5 June 2022. According to Siphwe Richard Zulu of Security Solutions Group a sub-contractor providing security services to the Applicant, he was on duty on Saturday 5 June 2022. When he arrived at the Property with his team at approximately 09h15am, he noticed approximately sixty (60) community members of the local community lead by the Respondent on the Property erecting shacks. He and his team were threatened by the community members on the Property that, inter alia, their security vehicle would be burnt if they did not leave the Property.
- [16] SAPS were called to the scene, after Wayne Kemp, the Operational Support Team Commander, representing the applicant, arrived at the Property, where he also noticed the community members erecting shacks on the Property, with the respondent in charge. When he spoke to the respondent and advised him that he was not allowed to be on the Property as a result of the court order, the respondent claimed that the Property belonged to Sibanye and not the applicant. Notwithstanding discussion on the issue, the respondent demanded proof that the applicant was the owner of the Property. Mr Kemp left and returned with the proof as requested by the respondent. On his return he observed that the police were leaving, indicating that could not get involved, after obtaining a statement.

- [17] Tshepang Elliot Lesoetsa, a security officer in the employ of Security Solutions Group, a sub-contractor employed by the applicant deposed to an affidavit in which he states that he was patrolling near the Property with his colleagues on 5 June 2022 when he noticed members of the Sporong Community erecting shacks on the Property. They greeted certain members of the community and took photographs, which have been attached to the papers. In these photographs, the Respondent is on the Property and his Hyundai Tucson motor vehicle is seen on the Property as well. A partially erected shack is further evident having been erected by the land invaders. The community members invading the land are also visible.
- [18] As Mr Lesoetsa and his colleagues were about to leave to report the incident to his manager, the respondent blocked their security truck from leaving the Property with his Hyundai Tucson motor vehicle. As he approached the security vehicle, he advised the driver to exit the truck as he wanted to burn the truck, but the driver managed to drive away.
- [19] The driver of the security truck who was with Mr Lesoetsa, Mthokozisi Desire Musipa, confirms the version of Lesoetsa and states on oath that the respondent threatened to kill him, in the words that it was his last day of life. The respondent went as far as phoning other community members to render assistance. The respondent further stated that the Property belonged to Sibanye and not the Applicant.
- [20] Skhumbuzo Bhekumuzi Mahlaba, a security officer in the employ of Security Solutions Group, a sub-contractor employed by the applicant states on oath that on 5 June 2022 whilst patrolling near the Property he received a report that people were building shacks on the Property. Whilst at the Property, the respondent with a large group of persons arrived at the Property and told him that if he should leave failing which he and those accompanying him would see what would happen. A threat was further uttered that the security truck would be burnt if they did not leave the Property.
- [21] The aforesaid security officers left the Property for fear of their lives.
- [22] On 6 June 2022, the attorneys of the applicant caused a letter to be addressed to the respondent's attorneys seeking an undertaking that the unlawful occupation led by the Respondent, immediately be ceased and that he desists from erecting any further structures on the Property, entering upon the Property and that the Property be vacated immediately. The Respondent was advised that should he fail to give such undertaking by close of business on Monday, 6 June 2022, the applicant would proceed with an urgent contempt of court application against him and seek an order for his committal to jail for contempt of court. No response was forthcoming from the respondent.

The prevailing authorities in cases of contempt of court

- [23] I turn to the prevailing authorities in respect of contempt of court. In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*[1], Nkabinde ADCJ writing for a unanimous Court said the following about the nature of contempt of court applications:

"[1] At their core, these applications raise procedural and substantive issues concerning the requirements of contempt of court, specifically when allegations of contempt *ex facie curiae* (occurring not in the presence of the court while sitting), are made. Frequently, the resultant committal to prison violates the right to freedom and security of the person - which includes the right not to be deprived of freedom arbitrarily or without iust cause and not to be detained without trial - in terms of section 12(1) and the fair trial rights in terms of section 35(3) of the Constitution.

(my underlining and emphasis)

- [2] Cases concerning contempt of court are now brought to our courts with more frequency. There is a widely held view that contempt of court is neither criminal nor civil. As a result, the standard of proof required in contempt has become somewhat blurred. Not only that. Courts often employ summary contempt procedures followed by imprisonment in motion proceedings. It is thus necessary for this Court to reflect on and clarify the applicable principles in the process of determining the two matters before us."
- [24] The Matjhabeng judgment went on to clarify the law on contempt of court at paragraphs [46] to [67]. The position can be summarised thus. Section 165(5) of the Constitution "makes orders of court binding on all persons to whom and organs of state to which it applies. The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority." Non-compliance with court orders may violate the right to freedom and security of the person in terms of section 12 of the Constitution, which includes the right "not to be deprived of freedom arbitrarily or without just cause" and the right "not to be detained without trial".
- [25] To unlawfully and intentionally violate a court order or otherwise stated wilful disobedience thereof is not only contemptuous but a crime. All forms of contempt of court, including civil contempt may be punishable as a crime. Civil contempt as opposed to criminal contempt invariably involves the disobedience of court orders. The procedure and processes for contempt proceedings seeking committal should deviate from criminal prosecutions only to the extent necessary to make allowance for its unique status. Section 35(3) of the Constitution which applies to criminal matters is equally applicable to civil contempt.
- [26] In Matjhabeng, the Constitutional Court endorsed findings of the majority in the judgment of *Fakie NO v CCII Systems (Pty) Ltd*[2], that the respondent is not an accused person, but is entitled to analogous protections as are appropriate to motion proceedings. The majority held that an applicant in contempt proceedings must prove all the requisites of contempt beyond reasonable doubt. However, it stated that. "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".

[27] In *Fakie*, the Supreme Court of Appeal, found that the test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *ma/a 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).

[28] The approach to be adopted in dealing with civil contempt was summarised as follows in *Fakie*:

"39 To sum up:

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 protections as are appropriate to motion proceedings.
3. In particular, the applicant must prove the requisites of contempt (the order: service or notice; non-compliance: and wilfulness and *ma/a fide*) beyond reasonable doubt.
4. 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 *ma/a fide*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *ma/a fide*, contempt will have been established beyond reasonable doubt.
5. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

Application of the law to the facts

[29] The applicant has, on the evidence set out *supra*, in my view, proven service of the order of 10 March 2022 and non-compliance with the order with specificity as to the acts constituting contempt of the order. The respondent who bears an evidential burden in relation to wilfulness and *ma/a fide* considering the fact that service and non-compliance has been proven, has elected not to oppose the relief sought.

Verdict

[30] In the absence of any evidence to the contrary, I am satisfied that the evidence proves overwhelmingly that the respondent is guilty of contempt of the order of 10 March 2022 and he is accordingly found guilty of being in contempt of the said court order.

Sanction

[31] The applicant seeks an order of direct imprisonment of three (3) months alternatively such other sentence as this Court may deem fit. The evidence demonstrates that notwithstanding the removal of the respondent and other persons pursuant to the order of 10 March 2022 on 25 April 2022, he returned to the Property on 5 June 2022 in flagrant disregard of the court order. The undisputed evidence demonstrates that the respondent is on record that he would not comply with the Court order and has demonstrated this through returning to the Property on 5 June 2022. The evidence further demonstrates that the respondent has not only returned to the Property, but has uttered serious threats against employees or agents of the applicant tantamount to killing them and destroying their motor vehicles. This is further exacerbated by the fact that he has incited community members to assist him in these actions. The respondent's actions are inexplicable considering the fact that he on 22 July 2022 will have an opportunity to show cause why the interim order should not be made final. I am satisfied that the flagrant disregard of the order of 10 March 2022, which is aggravated by the threats of violence which are prohibited in terms of the order, merits direct imprisonment as prayed for, save for the term sought.

Costs

[32] No cost order is sought.

Order

[33] It is accordingly ordered that:

3. The respondent is found guilty of being in contempt of the Court Order of 10 March 2022.
4. The respondent is sentenced to thirty (30) days' imprisonment.

A H PETERSEN

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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Date of hearing 17

June 2022

Date of Judgment 21

June 2022

[1] 2018 (1) SA 1 (CC) at paragraphs [1] and [2].

[2] (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA)

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