

SOUTH AFRICA / JUDGMENT

Sefiri and Another v Mhlanga and Others (59307/2021) [2022] ZAGPJHC 277 (4 May 2022)

[2022] ZAGPJHC 277

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

59307/2021

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 59307/2021

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Yes

DATE:

4th May 2022

In

the matter between:	SEFIRI, WALTER First Applicant MHLANGA, MTHUNZI N O Second Applicant and MHLANGA, EUNICE NTOMBIZODWA First Respondent THE UNLAWFUL OCCUPIERS OF ERF 2223, MOFUTSANYANE STREET, ORLANDO EAST Second Respondent CITY OF JOHANNESBURG Third Respondent MINISTER OF POLICE Fourth Respondent
Heard:	6 April 2022 – The ‘virtual hearing’ of this opposed urgent application was conducted as a videoconference on Microsoft Teams.
Delivered:	4 May 2022 – This judgment was handed down electronically by circulation to the parties’ representatives by email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 4 May 2022.
Summary:	Contempt of court – urgent application – duty to comply with court orders – disobedience of court order – a contemnor’s non-compliance must have been deliberate and mala fide – order should be served on alleged contemnor – whether requirements for contempt of court proved beyond reasonable doubt. ORDER (1) The first and second applicants’ application is urgent. (2) The applicants’ application to hold the fourth respondent in contempt of court is dismissed. (3) It is declared that the first respondent has not complied with the order of Wepener J of 25 January 2022 in that she has not purged her

contempt of the order of Mia J within two calendar days from the date of the order of Wepener J, which means that the suspensive condition contained in the order of Wepener J was not complied with.

(4)

It is further declared that the first respondent, having failed to comply with the order of Mia J, as directed by Wepener J, also failed to submit herself to the South African Police Service, as directed also by the order of Wepener J, at Johannesburg Central Police Station, within two calendar days from the date of such failure, which means that the sentence of twelve months' imprisonment imposed by Wepener J took effect and that she should be arrested and detained for a period of twelve months.

(5)

The Minister of Police is directed to, within fourteen days from date of this order, take all steps that are necessary and permissible in law to ensure that the first respondent is arrested and delivered to a correctional centre in order to commence serving the sentence of twelve months' imprisonment, imposed in paragraph 2 of the order of Wepener J.

(6)

There shall be no order as to costs in relation to this urgent application.

JUDGMENT

Adams J:

[1]. In this opposed urgent application, the applicants apply for an order declaring the Minister of Police to be in contempt of an order of this court (per Wepener J) dated 25 January 2022, which required 'the

Minister of Police ... to effect the arrest of the first respondent within two calendar days of [her] failing to hand herself

over at the Johannesburg Central Police Station'.

[2]. The background to the urgent application is that, until Monday, 20 December 2021, the first and the second applicants lived at and occupied the residential premises at Erf 2223, Orlando East Township, Registration Division IQ, Gauteng Province, situate at 2223 Mofutsanyana Street, Orlando East, Soweto ('the property'), which is owned by the estate late of their deceased mother, who died during 2003. During 2006 the first respondent, through fraudulent means and crookery, was able to have the property transferred into her name. The registration of the transfer of the

property into the

name of the first respondent was however nullified and set aside by this Court (per Siwendu AJ) on 4 December 2015. This means that the property is or should presently be registered in the name of the deceased estate of the applicants' mother. The second applicant is the Executor of the said deceased estate.

[3]. On the aforesaid day, namely Monday, 20 December 2021, the first respondent, in the company of about fourteen men, arrived at, or, as the applicants put it, 'stormed' the property and – in Mafia style – had the applicants callously and by force and under threat of violence evicted lock, stock and barrel. The eviction was unlawful. The first respondent and the men accompanying her did not have a court order to evict the applicants and they acted in a manner which epitomises lawlessness and their conduct was in complete disregard of the rule of law.

[4]. On 30 December 2021, the first applicant and the second applicant obtained an urgent court order from this Court (per Mia J) based on the mandament van spolie. The first and second respondents were ordered and directed by the order of Mia J to permit the applicants, their family members and their children to have unrestricted access to the property. They were also ordered to allow the applicants and their family members 'undisturbed possession of the dwelling' on the property. The first respondent was furthermore ordered to immediately provide the applicants with the keys to the gate and to the property. And finally the order directed that the applicants, their family members and their children 'may not be evicted from the property without an order of court'.

[5]. Not surprisingly, the first respondent, who appears to regard herself as being above the law, did not comply with the order of Mia J. And, because of her contemptuous conduct and lawless actions, the applicants on 25 January 2021 obtained a further court order by this Court (per Wepener J), holding her in contempt of a court order. It may be apposite to cite the order of Wepener J in full. It reads as follows:

'(1) It is declared that the first respondent is guilty of the crime of

contempt of court for failure to comply with the order granted by Honourable Justice Mia on 30 December 2021 under case number:

59307/2021.

(2). The first respondent is sentenced to undergo twelve months' imprisonment for being in contempt of an order mentioned in paragraph 1 above.

(3). The sentence imposed in paragraph 2 above is suspended subject to the first respondent purging her contempt of the order of court granted by the Honourable Justice Mia, under case number: 59307/2021, within two calendar days of the service of this order.

(4). In the event of the first respondent failing to comply with the order of Honourable Justice Mia, under case number: 59307/2021, within two calendar days of the service of this order as required in paragraph 3 above, the first respondent is directed to submit herself to the South African Police Station, at Johannesburg Central Police Station, within two calendar days from the date of failing to comply with this court order.

(5). Should the first respondent fail to hand herself over to the Police Station as per paragraph 4 of this order, the fourth respondent, the Minister of the Police, is ordered to effect the arrest of the first respondent within two calendar days of failing to hand herself over at Johannesburg Central Police Station.

(6). The first respondent is to pay the costs of this application on an attorney and client scale.'

[6]. It is this order by Wepener J, which is the subject of the opposed urgent application, which came before me on Wednesday, 6 April 2022, and which is, in the main, directed at the fourth respondent, the National Minister of Police, who the applicants allege is in contempt of the order by Wepener J in that his employees have failed to arrest and commit to prison the first respondent, who, by all accounts, is in contempt of the order of Mia J. That much has been found by this Court as per Wepener J – it is not an issue with which I need to concern myself. The simple fact of the matter is that, in terms of the order of this Court dated 25 January 2022, the first respondent should be arrested and committed to prison for a period of twelve months. And the South African Police Services, represented by its Political Head, the fourth respondent, was ordered to effect the arrest and to ensure that the first respondent is detained in a Correctional facility for a period of twelve months.

[7]. The first respondent opposed the urgent application and she did so on the basis that the order of Mia J of 30 December 2021 was erroneously granted. In any event, so the first respondent alleges, she intends

applying to this Court to set aside the said order. She also raises issues relating to the ownership of the property and claims that the property was a family home, which the deceased mother of the applicants had unlawfully misappropriated to herself many decades ago. As for this latter issue, that is a ship which has sailed a long time ago. As already indicated, in terms of an order of this Court (per Siwendu AJ) dated 4 December 2015, the property belongs to the estate late of the deceased mother of the applicants. That dispute is therefore, in my view, a non-issue.

[8]. As regards the first respondent's assertion that the order of Mia J should be set aside, the simple fact of the matter is that the order, as we speak, stands. Moreover, in terms of the Wepener J court order, the first respondent is in contempt of the order of Mia J. Therefore, for purposes of this application, the first respondent's

purported intention to apply for a setting aside of the Mia J order is of no moment. Until both the previous orders are in fact set aside, they stand. And the first respondent is required to comply with them. Her failure to do so amounts to contempt of court, as has already been held by Wepener J.

[9]. What is more is that the urgent application before me is aimed and directed at the Minister of Police and the South African Police Service and is not against the first respondent. No relief is sought against her in this application, in which, as already indicated, the applicants simply request that the Minister be declared to be in contempt of the order of this court of the 25 January 2022.

[10]. The first respondent, although she has an interest in this application, as she says, could not and should not have opposed the application. Her grief is with the two previous court orders granted against her and the second respondent.

[11]. The fourth respondent (the Minister of Police or the Minister) also opposed the applicants' urgent application and he did so on the grounds set out in the paragraphs which follow. Importantly, the Minister contends that the relief sought by the applicants in this application is not competent and that the application amounts to an abuse of the processes of this court.

[12]. In limine, the Minister disputes that this matter is urgent and he submits that the application should be struck from the roll for lack of urgency. The point made by the Minister is that, in terms of Wepener J's Order, the first respondent was required to comply with the Mia J order within two days, failing which she was to be arrested by the Minister. The applicants, so the Minister contends, waited more than two months before pursuing the contempt of court application. This matter, so I understand the Minister's

argument, became urgent only because the applicants waited so long to move the application. Their urgency is therefore self-created.

[13]. I disagree. This application has its genesis in the applicants' spoliation application launched during December 2021. The very nature of spoliation proceedings demands a speedy remedy, as do related contempt of court proceedings. It is necessary to prevent members of the public from taking the law into their own hands or to resort to self-help, and to do so expeditiously. The rule of law requires that the brazen conduct of the first and second respondents be frowned upon. Therefore, I am persuaded that the matter is urgent. The point is simply that, unless the applicants are granted relief on an urgent

basis, the first and second respondents will be allowed to engage in impermissible acts of self-help. The right of access to court is the bulwark against vigilantism and the chaos and anarchy which it causes.

[14]. The second point raised by the Minister is that he was not a party in the first application when the orders were granted by Mia J against the first and the second respondents. Also, so the argument goes, in the application before Wepener J, although he was cited as the fourth respondent, the Minister claims that he was never formally joined as a party to the proceedings. The Minister's point is that in this urgent application, he is now cited in his official capacity as the Minister of Police and only in his representative capacity, and yet, so he contends, the applicants ask for his committal in his personal capacity.

[15]. The Minister also claims that the ‘extraordinary’ relief sought by the applicants is in flagrant disregard of his constitutional right to dignity, freedom and security of a person; freedom of movement; freedom of trade, occupation and profession; although not an accused person, but entitled to the protection in section 35(3) of the constitution and most fundamentally the constitutional right to a fair trial and access to courts. It is also contended on behalf of the Minister that the order by Wepener J is per se a constitutional matter and that the order is unconstitutional. In particular, so the Minister argues, the order of Wepener J was sought and granted without him being properly joined as a party to the proceedings.

[16]. There is merit in some, but not in all of the Minister’s contention. So, for example, his view that the order of Wepener J can be ignored supposedly because it is unconstitutional, is not sustainable. It is trite that court orders, until they are set aside, should be obeyed. To hold otherwise would amount to a subversion of the rule of law.

[17]. The Minister’s contention that he is not in ‘wilful disobedience’ of the order of Wepener J, nor is he disregarding

the said order, requires further scrutiny. As rightly submitted on behalf of the Minister, one of the essential requirements for

contempt of court is that the court order, as well as the contempt application, must have been served on the person who is alleged to be in contempt of court. Additionally, for contempt of court to exist, the contemnor’s non-compliance with the court order must have been deliberate and mala fide. So, for example, the Supreme Court of Appeal in *Fakie v CCII Systems (Pty) Ltd*[1], held as follows:

‘The essence of contempt of court *ex facie curiae* is a violation of the dignity, repute or authority of the court. ... Deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe that he is entitled to act in the way he claimed to constitute the contempt. ... Even a refusal to comply that is objectively unreasonable, may be *bona fide*.’

[18]. In that regard, the Minister contends that his alleged non-compliance was not mala fide. He is of the view that it would have been impossible to give effect to the order of Wepener J in that the court ‘did not issue a warrant of arrest to the police’. Whilst at first blush this contention appears meritless simply because that order itself can and should be interpreted as a warrant, it affords support for the submission that the Minister was not acting mala fide. There may very well be merit in the contention by the Minister that the order should have spelt out that the arrest should be effected in accordance with the law. This is an issue that can and should be rectified in this urgent application, and an appropriate

order to that effect can and should be crafted. I intend doing exactly that.

[19]. The Minister furthermore contends that he was never formally cited and/or joined in the application before Wepener J. This contention is not sustainable for the simple reason that the urgent application, which came before Wepener J, was duly served on the Minister, albeit on the office of the State Attorney. And the Minister was also clearly cited as the fourth respondent in

that application in which the notice of motion indicated that an order to the effect that the Minister would be required to arrest the first respondent, would be sought. The Minister was therefore undoubtedly a party to the application before Wepener J. And, in fact, on the day preceding the date of the hearing of the application, namely 24 January 2022, the Minister served a formal notice to abide, which implies that he had no difficulty with the Court granting an order against him, which required him to effect the arrest of the first respondent in the event of certain suspensive conditions not being fulfilled. This ground of opposition is therefore ill-advised and lacks merit.

[20]. There is however merit in the contention by the Minister that the Wepener J order was not served on him. The case of the applicants is that they, through their attorneys, had emailed the State Attorney's office and advised them that the first respondent had not complied with the order of Wepener J. He was therefore requested to effect the arrest. This, in my view, was not sufficient and wholly inadequate for two reasons. Firstly, the requirement is that the order should be formally served on the contemnor. The reason for that is clear. Convictions for civil contempt of court are axiomatically very serious. This requirement therefore ensures that the contemnor has knowledge of the order, because, without such knowledge, it cannot possibly be said that his non-compliance with the order was deliberate or mala fide. Secondly, the order, as well as the application for contempt of court, should be brought to the attention of the contemnor and not to the attention of his attorney. This therefore means that the order and the application for contempt should have been served – preferably through the office of the Sheriff – on the Minister, before it can be said without fear of contradiction that he had knowledge of the court order.

[21]. For all of these reasons, I am not persuaded that the applicants have made out a proper case of contempt of court against the Minister.

[22]. Furthermore, there is the added problem that the Minister's obligation to have the first respondent arrested was made subject to two suspensive conditions. Firstly, in terms of the Wepener J order, the first respondent was afforded a further two days within which to comply with the order of Mia J. And secondly, in the event of such non-compliance, the first respondent was directed to hand herself over to the Johannesburg Central Police Station. It was only in the event of these two eventualities not materialising, that the Minister was under an obligation, in terms of the Wepener J order, to attend

to have the first respondent arrested. There is therefore undoubtedly something to be said for the Minister's contention that he could not arrest the first respondent without knowing that she had firstly not complied with Mia J's order and secondly that she had not handed herself over to the South African Police Services. I therefore agree that it cannot be said that, in these circumstances, the Minister was deliberately and mala fide not complying with the order of Wepener J.

[23]. In the circumstances, I find that the applicants have not made out a case to have the Minister declared to be in contempt of court. However, in the interest of justice, and now that the Minister is indubitably before Court in this urgent application, I am of the view that an order should be

fashioned so as to give effect to the intention of the court order of 25 January 2022. Unless that is done, the first respondent will be allowed to continue with her contemptuous conduct. In that regard, it needs to be borne in mind that she has already been found to be in contempt of the Mia J order.

[24]. What remains is the issue of the costs of the urgent application. In that regard, the general rule is that the successful party should be granted his costs. In casu, it cannot be said that the applicants have been successful with their urgent application. On the flipside though the order that will be granted herein will assist in progressing the matter further. However, this does not mean that the Minister should be lumped with a costs order in this application.

[25]. The correct costs order would, in my view, be one of no order as to costs.

Order

[26]. Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:

6th April 2022 as a videoconference on Microsoft Teams

JUDGMENT

DATE:

4th May 2022

FOR THE FIRST AND

SECOND APPLICANTS: Mr M Marweshe

INSTRUCTED BY:

Marweshe Incorporated, Centurion, Pretoria

FOR THE FIRST

RESPONDENT:

Ms Similo Silwana

INSTRUCTED BY:

Legal Aid South Africa, Johannesburg.

FOR THE SECOND

RESPONDENT:

No appearance

INSTRUCTED BY:

No appearance

FOR THE THIRD

RESPONDENT:

No appearance

FOR THE FOURTH

RESPONDENT:

Advocate Lithole

INSTRUCTED BY:

The State Attorney, Johannesburg

[1] Fakie v CCII Systems (Pty) Ltd

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

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Prepared on 12 October 2026 · Esheria