

SOUTH AFRICA / JUDGMENT

Basfour 3327 (Pty) Ltd v Thwala and Others (LCC 160/2017B) [2023] ZALCC 23 (30 June 2023) [2023] ZALCC 23

COURT

Land Claims Court

BEFORE

Flatela

CASE / FILE NUMBER

LCC 160/2017B

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

**IN THE LAND CLAIMS
COURT OF SOUTH AFRICA
HELD AT RANDBURG
CASE NO: LCC 160/2017B**

In the matter between:

BASFOUR
3327 (PTY) LTD
Applicant
and
ROBERT
THWALA
First
Respondent
LUCY
THWALA
Second
Respondent
MINENHLE
MAHLANGU
Third
Respondent
FEZEKA
THOMO
Fourth
Respondent

JUDGMENT

FLATELA J

Introduction

- [1] This is a contempt of court application against the Respondents for failing to comply with Judge Ncube's order granted on 5 October 2022 under case number 160/2017 (the main Application). The Applicant also seeks an order that the Respondents be sentenced to an appropriate term of imprisonment; If suspended, such suspension should be for 5 (five) years on condition that they do not again during that period of suspension contravene paragraphs 2,3 and 4 of Judge Ncube's orders.
- [2] On 9 June 2017, the Applicant approached this Court on an urgent basis seeking an order declaring a structure that the respondents were building on the Applicant's property without his consent unlawful. The Applicant also sought a prohibitory interdict against the Respondents from constructing a new structure without the express written permission of the Applicant or the person in charge. An interim order was granted on 9 June 2017 against the Respondents. The Respondents opposed the Application.
- [3] In opposition, the Respondents contended that they were entitled to build the structure without the Applicant's consent as they were merely improving the dilapidated, old mud houses in which they lived. The matter was referred to trial after the parties failed to engage meaningfully.
- [4] On 5 October 2022, after considering the matter, Judge Ncube granted the following order:
1. It is declared that the construction of an entirely new dwelling or structure by the Respondents on a portion of the farm U [...] [...] HS, in the District of Volksrust, Mpumalanga without consent of the Applicant or person in charge, is unlawful.
 2. The Respondents are prohibited and restrained from building entirely new dwellings or structures on the farm U [...] [...] HS, without the express written permission of the Applicant or person in charge.
 3. The Respondents are prohibited and restrained from proceeding with the construction of the entire new dwelling or structure on the farm U [...] [...] HS.
 4. The Respondents are prohibited and restrained from enabling or assisting an unauthorized person from establishing entirely new dwellings on the farm U [...] [...] HS, without the express written permission of the Applicant or Mr. Hatting as a person in charge.
 5. The Respondents are ordered to demolish the unlawfully constructed building foundation on the farm U [...] [...] HS, within ten (10) days from the date of service of this order upon them.

6. The Sherriff for the District of Volksrust is authorized to demolish the unlawfully constructed building foundation should the Respondents fail to comply with paragraph 5 of this order.
7. There is no order as to costs.

The recent conduct of the parties

- [5] On or about 13 April 2023, the Applicant noticed that a substantial amount of building materials, such as river sand and building blocks, were delivered to the Respondent's homestead. Upon inspection of the homestead, the applicant found that the Respondents had, yet again started constructing an entirely new dwelling structure on the farm, with brick and mortar, without his consent.
- [6] On 17 April 2023, the Applicant instituted these contempt of court proceedings on an urgent basis under case number 160/2017B for inter alia, a declarator that the Respondents are in contempt of paragraph 2 of Judge Ncube's judgment. I granted an interim order.
- [7] The Respondents admit they have started to build a house on the property to improve their living conditions. However, they deny that their actions amount to contempt of Court; they contend that they align themselves with Ncube J's judgment.
- [8] At issue in this matter is whether the respondents are in contempt of Judge Ncube's order.

Parties

- [9] The Applicant is BASFOUR 3327 (PTY) LTD, a company duly registered and incorporated in terms of the Company Laws of the Republic of South Africa and with a registered address at 24A Taute Street, Ermelo, Mpumalanga Province. The Applicant is the registered owner of the Remaining Extent of Portion 7 of the Farm Uitkyk 121, registration division HS, district Volksrust, Mpumalanga Province (hereinafter, "the Farm").
- [10] Mr. Louis De La Rey Hattingh, an adult businessman, director, and shareholder of the Applicant, deposed to the Applicant's founding affidavit.
- [11] The first Respondent is Robert Thwala, and 63 years of age, he came to live with his parents on the farm in 1991 when he was 22. He regards the farm as his home.
- [12] The second Respondent is his sister, Lucy Thwala. Although the evidence suggests that she did not immediately move to the farm with her parents, she has been living on the farm openly for over three years.
- [13] The third and fourth respondents are the first Respondent's children. They regard the farm as their home.
- [14] In the main Application, Judge Ncube held that the respondents are Occupiers as envisaged by ESTA.

Factual Background

- [15] The facts of this matter are summarized by Judge Ncube in the main Application. I do not intend to repeat them here, but I will briefly summarize them for context. The Applicant is the registered property owner. He became the property owner in 2008.
- [16] In 1991, the first and second Respondent's late parents and their children were granted consent to reside on the farm by Mr. Jan De Beer, the previous farm owner, when their father, Kantoor Thwala, arrived at work. The first and second Respondent's mother, the late Lethy Khanyi, was cited as the fourth Respondent in the main Application. The Thwala family occupied a cluster of homesteads on a portion of the farm. The homestead consisted of mud structures which Ncube J later found to be inhabitable. Mrs. Thwala passed away in 2018.
- [17] On 25 October 2018, Barnes AJ issued a second order (the "engagement order") in terms of which, the parties were ordered to engage with one another and to try and resolve the dispute. The engagement would include the use of the services of a mediator if necessary. The parties failed to engage each other meaningfully as ordered.
- [18] On 31 October 2019 this Court issued a third order (the referral order) in which the disputed issues were referred for hearing to oral evidence.
- [19] The trial commenced in 2022. The Respondents opposed the main application on one ground, namely that they were entitled to build a new structure to improve the existing mud structures which were debilitated and inhabitable. The Respondents conceded that they had built the new structure without permission from the Applicant; however, they contended that the Department of Rural Development and Land Reform officials advised them that they could build the new structure in the designated area in their homestead. They contended that since they constructed the new structure to improve the old mud houses they required no consent from the Applicant. For this proposition, the Respondents relied heavily on the Constitutional Court's decision in *Daniels v Scribante and Another*.^[1]
- [20] Before the trial, the Court and all the parties conducted an inspection in loco on the farm, and the Court's findings are reflected in paragraphs 9 and 10 of the judgment, which reads as follows:

Inspection in Loco

- [9] On 24 January 2022, an inspection in loco was held at the farm with the Court and all parties present. The parties prepared the joint record of the inspection in loco. That joint record was handed in and marked exhibit "B." A cluster of mud houses with corrugated iron was observed. The mud houses are very old, with cracks in the walls. The corrugated iron roof is held tight with rocks on top in order to prevent the roof from being blown away by the wind. Photographs of all the mud structures and brick and mortar foundations were taken and depicted on the inspection record in loco.

[10] The mud houses depicted on the photographs and observed at the scene are unsuitable for human habitation. Those mud houses are also not in keeping with human dignity, guaranteed and enshrined in our Constitution. The cracked walls and loose iron roof pose a danger to the occupants of those houses.

[21] Judge Ncube rejected the Respondent's reliance on Scribante. He held that Scribante is no authority for the proposition that an Occupier can build new structures on the farm without the consent of the owner or person in charge. The learned Judge held that Scribante concerned itself with improving an existing structure, in the case of improvements, Scribante requires meaningful engagement between the Occupier and the owner or person in charge therefore the Occupier does not have an untrammelled

right to effect improvements to a property, but s/he is entitled to effect improvements reasonably necessary to render his/her dwelling habitable in conformity with his/her rights to human dignity.

[22] The Court's finding was made notwithstanding its observation immediately recorded in the succeeding paragraph of the above finding, that:

'[31] In casu, the existing mud structures are clearly old and have cracks on the walls. The corrugated is iron roof pressed down with rocks on top. Occupation of those structures is clearly not in harmony with the Respondents' right to human dignity. Had the Respondents

demolished the mud structures, levelled the same site, and rebuilt the same, strong, and durable structure using concrete or cement

blocks, they would have brought their structure within the meaning of improvements which render the structure habitable and concomitant

with their right to human dignity. This they could do even without the consent of the Applicant or Mr Hatting, if after a meaningful

engagement the Applicant, or Mr Hatting unreasonably withheld consent. The Respondents, on the contrary, are building a totally new structure without the consent of the owner or person in charge. That is not allowed. It is therefore up to the Respondents what they intend doing, from now moving forward. What is clear is that the Respondents urgently need proper dwellings, the occupation of which will be in keeping with their right to human dignity.

[23] The Court granted the relief sought.

[24] In April 2023, the respondents demolished the mud house used for traditional ceremonies and started to build a brick-and-mortar house from the ground up without the Applicant's consent. The first to the third respondents were served with letters of demand to desist from building the structure, and despite demand, they continued with construction.

[25] The matter served before me on 17 April 2023 on an urgent basis. The Applicant sought an order, that I paraphrase in some respects, on the following terms:

‘2. That it be declared that the construction of the unauthorized dwelling or structure by the Respondents on a portion of the farm

Uitkyk 121 HS..., as depicted on annexures “A” and “B” hereto, unlawful.

3. That an interim order [be] granted with a return date to be determined by this honourable Court in terms of which the Respondents are called upon to show cause why the following order should not be made final:

3.1. A declaratory order that the construction of an entirely new dwelling or structure by the Respondents on the farm ... without the consent of the Applicant or person in charge, unlawful;

3.2. That the Respondents are prohibited to construct any dwellings or other structures on the farm without the express written permission of the Applicant.

3.3. That the respondents are prohibited to continue or commence with any further construction on the farm ... or to allow any other person to continue with or commence any construction work on the farm without the express written permission of the Applicant.

3.4. That the Respondents are prohibited to enable or assist unauthorized persons to establish any new dwellings on the said farm without the express written permission of the Applicant.

4. That the interim orders as set out in paragraph 3 operate with immediate effect pending the outcome of this Application.

5. That the Respondents are ordered to demolish the unlawfully constructed building on the farm within 10 (ten) days from date of this order being granted.

6. That the Respondents [be] ordered to remove all building material for purposes of constructing the unlawful building on the farm within 2 (two) weeks after the date of this order.

7. That the Sheriff [of the district be] authorized to demolish the unlawfully constructed building and to remove all building material on the farm in the event the Respondents fail to comply with paragraphs 4 and 5 above.

8. A declaratory order that the Respondents are in contempt of [Judge Ncube’s order dated 5 October 2022].

[26] On 18 April 2023, I issued directives in terms of Rule 34(3)(b) wherein the interim orders in terms of the Applicant’s Notice of Motion were granted.

[27] This application is opposed by the Respondents on two grounds, namely that the matter is res judicata in that the relief sought by the Applicant is similar to the relief sought and granted in the first main application. Secondly, the Respondents contend that the structure they are currently building is an improvement of the mud structure, which they demolished to improve it and make it habitable. The Respondents are relying on paragraphs 10 and 31 of Judge Ncube’s Order and aver that they are not in contempt of the Court order. Instead, they

contend, their conduct aligns with the Judgment by Judge Ncube.

Issue

- [28] I am called to determine whether the Respondents are in contempt of the court Order granted by Judge Ncube on 5 October 2022.
- [29] Additional prayers in the Applicant's Notice of Motion seek the same cumulative effect flowing from Judge Ncube's order, namely, declaring the building of the new structure unlawful, ordering its demolishment, and further interdicting the Respondents from erecting any new structures on the Applicant's farm without the express written permission of the Applicant. All these prayers hinge on the issue this Court is called to determine. Therefore, I deal with them last.

Law

- [30] Section 165 (5) of the Constitution provides that "An order or decision by a court binds all persons to whom and the organ of state to which it applies"
- [31] At the end of this judgment, I propose to assess the Applicant's complaint of the Respondent's alleged contemptuous behaviour and

action in terms of the relevant test of contempt of court. The reason for this is that it is a crime to wilfully disregard and disobey a Court Order because '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'.[2]

- [32] In other words, 'Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow.'[3] Therefore, if contemptuous behaviour were allowed to go unchecked without sanction from the courts, the might of its orders would not bear any worth, even on paper.

- [33] Nkabinde J said in *Pheko and Others v Ekurhuleni Metropolitan Municipality (Pheko 2)*[4] that –

Contempt of Court is understood as the commission of any act or statement that displays disrespect for the authority of the Court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders.[5] (internal footnotes omitted).

The object of contempt proceedings is to impose a penalty that will vindicate the Court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.[6] (internal footnotes omitted).

The Court's treatment of contempt has been developed over the years. Under the common law, there are different classifications of

contempt: civil and criminal, in facie curiae (before a court) or ex facie curiae (outside of a court). [7]

[34] The Applicant's case is that the Respondents are guilty of the crime of civil contempt. The term civil contempt is a form of contempt outside of the Court and refers to contempt by disobeying a court order. [8]

[35] The requirements of contempt of Court were neatly summarised in *Fakie v CCII Systems (Pty) Ltd*[9] and approved by the Constitutional Court in *Pheko II*. An applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged

contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the Respondent bears an evidentiary burden to establish a reasonable doubt. Should the Respondent fail to discharge this burden contempt would have been established.

[36] Cameron JA went on to outline the defences to a charge of contempt of Court. He said:

‘The test for when disobedience of a civil order constitutes contempt[10] 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).[11] (internal footnotes omitted).

These requirements – that the refusal to obey should be both willful and mala fide, and that unreasonable 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 is a manifestation. They show that the offence is committed not by mere 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.’[12]

Discussion

[37] The Applicant seeks an order for the demolition of the new structure. This court is further requested to find the respondent guilty of contempt of Court in respect of Judge Ncube's order. This prayer shall be ventilated against the test set out above. However, it suffices to dispose of the Respondents’ first two defences.

Res Judicata

- [38] The Respondents contend that, except for the prayer to find the Respondents in contempt of Ncube J's order, the relief sought in this Application is similar to that granted by Judge Ncube. Therefore, the interim order granted cannot stand, meaning that the final relief sought by the Respondents should not be granted because there is a similar court order to the same effect whereby the Applicant has already been granted the relief it seeks.
- [39] Res judicata means "a matter already judged." The doctrine of res judicata is founded upon the principle that matters should reach finality and that the party referring to the dispute should not be allowed to bring the same action again to the same or different forum. The principle of res judicata further contemplates that an Applicant needs to raise all the issues upon which he/she seeks relief, once and in the same Application. This is referred to as the "once and for all rule".
- [40] This defence is misplaced and cannot stand. Indeed, the relief sought by the Applicant in prayers 1 to 7 is substantially similar to that sought by the Applicant in the earlier 2017 application and finally granted by Judge Ncube on 5 October

2022. However, Judge Ncube dealt with another structure different from the one before me.

Compliance with Judge Ncube's order

- [41] The Respondents confirm that they were duly served of Judge Ncube's order and aware of their obligations in terms of it. However, relying on paragraphs 10 and 31 of the Judgment, the respondents argue that they do not breach the judgment; instead, their actions align with it.
- [42] Firstly, they were ordered to demolish the foundations of the new structure. They say they did but admit that the Sheriff did come to demolish about 4 meters of the foundation, which was declared unlawful. The Respondent disputes this and says that he incurred costs of about R48, 350.00 (forty-eight thousand, three hundred and fifty thousand rands), which amount had to be paid to the Sheriff before he executed the warrant. The case before me concerns contempt of Judge Ncube's order in that the Respondents are building a new structure on their homesteads on the Applicant's farm despite being prohibited from doing so without the Applicant's express written permission. Therefore, this dispute is of no relevance to this Application.
- [43] Secondly, the respondents submit that in keeping with the observations made by Judge Ncube in paragraphs 10 and 31 of his judgment, the building in question is an improvement of the old building made from mud to make it a habitable dwelling. They allege that they have demolished the old mud dwelling, which was not habitable and posed a danger to human habitation. The newly improved building is at the same place where the mud dwelling was. Therefore, there is no damage to the Applicant's property caused by demolishing

the old mud dwelling and the construction of the new structure at the same spot.

- [44] The Applicant denies that the old mud building that was demolished was ever habited by the Respondents. It is now common cause that the demolished mud structure is a hut used for ancestral ceremonies and was not habited, However, the Applicant concedes that the Respondents are entitled to improve their dwellings to make them habitable as concomitant to their right to human dignity. The applicant aver that the respondents could have done this even without the Applicant's consent, but only after consulting or meaningfully engaging the Applicant, which they failed to do. In any event, the new structure in issue does not improve an existing inhabited dwelling.
- [45] Furthermore, it is the applicant's contention that had the respondents engaged the Applicant or requested consent to improve their present dwelling, the Applicant could not have lawfully refused them such permission, and neither has the Applicant ever denied the Respondents their rights to improve and renovate their present dwellings.
- [46] Interestingly, the Applicant avers that he does not know whether the Respondents have improved their existing traditional structures in which they reside, as they should have done regard being had to the observations made by Judge Ncube that the structures of the dwellings were, in the Court's opinion, uninhabitable. From this statement, it seems that the nub of the Applicant's complaint is that the Respondents are so-called "improving" a structure that they do not stay in but rather being used and will continue being used for purposes of conducting ancestral ceremonies.
- [47] On the applicant's version, the Respondents are entitled to make improvements and upgrades to their dwellings as concomitant to their human dignity. This they could do without his consent but only after meaningful engagement with the Applicant. The use and purpose distinction which the Applicant seeks to draw of dwelling covered by this right is arbitrary. It is neither here nor there whether the Respondents live in the dwelling or use it for traditional ceremonies.

Application of law to the facts

Are the Respondents guilty of contempt of Ncube J's order?

- [48] The additional relief sought to sentence the respondents for the term in prison was sought for the first time in the Applicant's heads of arguments. In its Notice of Motion, the Applicant had only sought a declaratory of the contempt and ancillary orders.
- [49] Cameron JA in *Fakie* stated that for contempt to be founded against a respondent, a deliberate disregard of the Court order is not enough since the non-complier may genuinely, albeit mistakenly, believe he- or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. The non-compliance and accurately captured disobedience of the Court's order needs to be with *mala fides*. This means the disobedience needs to have been a malicious and intentional violation of the Court's dignity, repute or authority.[13]

- [50] It follows that a Respondent who discharges his/her evidentiary burden that their non-compliance with the Court order was without malice intent casts a reasonable doubt and cannot be found to have been in contempt of the law. The Respondent, who genuinely believes they have complied with the Court order, may be mistaken. However, should they have good cause as to why they believe that, in their view, their actions complied with the Court order, they avoid the infraction of being found in contempt.
- [51] In paragraph 31 of Judge Ncube's Judgment, the Court observed that the Respondents urgently needed a habitable dwelling. The Court went on to say that had the Respondents demolished the mud structures, levelled the same site, and rebuilt the same strong and durable structure using concrete or cement blocks their actions would have been within the meaning of improvements which would render their structure habitable and in line with their right to human dignity.
- [52] This is exactly what the Respondents contend that they have done. The issues which arise in this respect are that they have done this but without meaningfully engaging the Applicant nor obtaining his consent. These two issues need to be delineated. To not have engaged the Applicant to build the new structure on the face of a Court order expressly prohibiting them from erecting any new structure without the consent of the Applicant is indeed in breach of the Court order. But breach alone is not sufficient to find for contempt. The Respondents' actions need to be read in line of the findings and observations of Judge Ncube J and his obiter. It is these that the Respondents rely on for their defence. To my mind, this raises reasonable doubt and therefore I

cannot find the Respondents to have been acting with malicious intent to violate the Court' dignity and repute and authority of its Order.

- [53] Furthermore, on the issue of consent and engagement, a question of substance arises. On the Applicant's own papers, he says, "had [the Respondents] engaged me or requested to consent to improve their present dwelling, which they had not done, I could not have lawfully refused them such permission. I do not know whether they have improved their existing traditional structures in which they reside, as they should have done in view of the observations of the Court that those structures were ...uninhabitable". From this statement, the implication given is that the problem here is two-fold. Firstly, that the respondents are erecting a whole new structure as improvements, but said structure not being the dwelling that they inhabited, uninhabitable as it was; and secondly, that had the case been the latter, i.e., that they were improving the dwelling that they inhabited, then there is an implication (from the Applicant's statement) that the Respondents could have done this without his consent. And even if I am wrong by inferring this implication, then the implication that he would not and could not have lawfully withheld such consent. The logical conclusion of this concession goes back to the arbitrary distinction and problem statement that the Respondents are affecting improvements to a structure which they used for traditional ancestral purposes rather than inhabit. As I have held above, this takes the Applicant's

case nowhere.

- [54] The Applicant contends that the improvements could have been done without building a new structure. He goes on to say that improving the traditional mud dwellings is relatively easy to make them habitable. However, in what structural engineering ways the Respondents could have done this to a rundown and dilapidated mud dwelling is not said by the Applicant. And it must be said, the above statement evinces the Applicant's muscle flex of what in his view, is adequate shelter for the Respondents. This is an unjustifiable limitation to the Respondents constitutional right, as enshrined by section 26 of the Constitution, to adequate housing which is safe and concomitant with human dignity. It cannot be left to the Applicant to solely determine what is adequate and reasonable accommodation measures to be implemented by the Respondents for the safety of the roof over their heads. To do so, would be too reminiscent of a painful past.
- [55] The Applicant avers the Respondent's conduct is in contravention of section 6(3) (b) and (d) of ESTA in that they have intentionally and unlawfully caused material damage to the Applicant's property and would further constitute a fundamental breach of the relationship between them and the Applicant. The Applicant has resolved to instruct his attorneys to start the formal eviction proceedings. Other than the allegation of malicious damage to property, which I return to shortly, the Applicant's intent to evict the Respondents on alleged breaches of section 6 of ESTA find no bearing in this application.
- [56] In paragraphs 59 and 60, respectively, Justice Madlanga disavowed the notion that an Occupier needed the consent of the landowner before effecting upgrades to their homesteads that would bring their dwelling to acceptable standards within their human dignity. He stated as follows:
- [59] Not inconceivably, the interests of an occupier and those of an owner or person in charge may remain the same. The Occupier may believe that the dwelling requires improvements to an acceptable standard. The owner may disagree. Alternatively, as is the case in the instant matter, the owner may accept that the dwelling's condition is not consonant with human dignity but still not be receptive to the idea that improvements be made. If consent were a requirement, none would be forthcoming in those circumstances. Must the Occupier then be content with that? No. If the wishes of the owner or person in charge were to carry the day, the Occupier's rights would be completely denuded. Ultimately, the Occupier must reside under conditions that afford her or him as wholesomely as possible all the rights in ESTA. A simple stratagem like the refusal of consent by the owner cannot be allowed to render nugatory an occupier's right that is primarily sourced from the Constitution itself.
- [60] This leads to the conclusion that in the final analysis, an owner's consent cannot be a prerequisite when the Occupier wants to bring the dwelling to a standard that conforms to conditions of human dignity.

[57] Although consent of the owner is not a prerequisite to the Occupier affecting upgrades to their dwellings, the Occupier does not have an untrammelled right to effect upgrades without meaningful engagement between him/herself and the landowner or person in charge. Hence, the Court qualified this right by holding that there should first be meaningful engagement between the Occupier and the landowner or person in charge. Justice Madlanga expressed himself as follows: -

'[64] It is necessary that an occupier should approach the owner or person in charge to raise the question of the proposed improvements. That may – not will – make it possible for the Occupier and owner or person in charge to engage each other meaningfully. This may yield any number of results. The owner or person in charge may actually grant consent. The owner or person in charge may convince the Occupier that the dwelling is, in fact, of an acceptable standard and that the proposed improvements are not reasonably necessary. The owner or person in charge may demonstrate that the improvements do not have to be to the extent the Occupier had in mind. The owner or person in charge may show that the proposed improvements will probably compromise the physical integrity of the structure to the detriment of the owner. In that event, there might be further engagement in bringing the dwelling to an acceptable standard. The Occupier may agree in writing that, upon eviction, she or he will not be entitled to compensation for the improvements. That said, the need for meaningful engagement does not detract from the conclusion that the existence of the Occupier's right is not dependent on the owner's consent.'

[58] It is common cause that the Respondents did not engage the Applicant before proceeding to act on paragraph 31 of Judge Ncube's Judgment. To not have done so also infringed on the Respondent's property right in terms of section 25 of the Constitution and enjoyment of his property in terms of the common law. But as I have alluded above, and as our Courts have time immemorial pronounced, sometimes the property interests of a landowner could be subject to limitation, justified of course in terms of section 36 of the Constitution, to give way to the protection of other socio-economic rights, in this instance, being the right to adequate housing, a right which flows directly from the Constitution and afforded to the protection of the Respondents.

[59] Therefore, their non-engagement with the Applicant cannot be viewed in isolation away from the facts. One should be mindful that the litigation's subject issue, the construction of a new structure to upgrade and make habitable the Respondents' dwellings, has been dragging as far back as 2017. Furthermore, despite an engagement order by Barnes AJ 2018 on 25 October 2018, the parties failed to find each other.

[60] In these proceedings, after the Respondent's legal representative came on board, albeit late, he started the process of engaging with the Applicant's attorneys. Unfortunately, the negotiations did not yield any positive results. The settlement negotiations collapsed. And yet the Applicant contends that he never had a problem with the Respondents' upgrading and improving their dwellings. He however takes umbrage to the fact that this was done without his consent and/or meaningful engagement. This seems like an issue of form over substance to me.

[61] I stress however, that I must not be understood as saying that the Respondents owed no duty and obligation to engage the Applicant before effecting their upgrades. The respondents should have explained why they did not engage the Applicant first before the demolition of the mud structures and construction of the new structure in its place. That they should have done so is stated in the very same paragraph 31 of Judge Ncube's Judgment that they rely on. But to find them in contempt because of this omission and for reasons mentioned above would be overly too formalistic and unjust. The same was held in *Scribante*. In that matter, Justice Madlanga found Ms. Daniels' engagement of the respondents wanting. However, he also said,

'[67] Must Ms Daniels be nonsuited for her failure to approach the respondents for the purpose of meaningful engagement? On the facts, that would be too formalistic and unjust. The respondents were not free of blame either. As I demonstrated when setting out the factual background in the beginning, at every turn they made life intolerable for Ms Daniels. This would have tested the patience of many a mere mortal. Every step they had to take – which was quite obvious in the circumstances – was taken only after they had been ordered by a court. Also, issues concerning the parties' respective rights have been ventilated fully. If we were not to grant effective relief, we would be causing Ms Daniels to continue to live in conditions that are accepted by all to violate her human dignity. Of importance, the respondents are not taking issue with the nature of the proposed improvements.'

[62] In this matter, the Applicant testified during the trial that when he became the property owner, he called a meeting with the Respondents

wherein the farm rules were formulated. One of the rules was that the Occupiers were not allowed to construct any dwelling on the farm without the consent of the Applicant.[14] He also reduced the number of cattle occupiers could own to six and grazing rights .

[63] The Applicant has fiercely resisted and litigated at every turn to thwart the construction of a new structure to the Respondents' homestead. He resists the construction of the new structure because it will cause material damage to this property. How it will do so is not stated and should have been stated by the Applicant. Furthermore, the Applicant fears that the Respondents' conduct would incite other Occupiers on the farm to begin building additional dwellings and structures on the farm without the Applicant's consent.

[64] The Applicant also objects to the new structure's building because of the lack of approved building plans. One wonders if the debilitated mud structure the Respondents habit have any building plans. This shows the need for meaningful engagement between the Occupier and the landowner or person in charge. However, in this case, that ship of meaningful engagement between the two seems to have long sunk. But lest I be misunderstood, this Court does not condone the Respondents' failure of not meaningfully engaging the Applicant. However, the point being made is that their failure, even in the absence of reasons to this Court, needs to be read in the context of the facts and history of the matter.

- [65] The Applicant seeks relief that this Court finds the erection of the new structure unlawful and orders its demolition. However, this relief is not standalone. It follows from the Applicant's main point of the Application to find the Respondent in contempt of Judge Ncube's Order. If it was not obvious already, this is a finding I make in the negative. Contempt of the Respondents to Ncube J's order is not established.
- [66] Even if one were to treat the relief sought by the Applicant to have the newly erected structure unlawful and demolished as separate relief from the contempt application, it would be nonsuited for this Court to grant said relief. The interests of justice dictate that there be finality to litigation. The Respondents are entitled to make their structure habitable concomitant with their right to human dignity. From the inspection in loco, there is no other way of doing this other than demolishing the mud dwelling and erecting a new structure in the same space where the old structure was per Judge Ncube's observations. This is what the Respondents contend they are doing, and nothing before me from the Applicant gainsays it. Yes, they should have done this by first meaningfully engaging the Applicant, but as said elsewhere here, '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.' Therefore, the rule nisi is not confirmed.

[67] In the circumstances, I make the following order:

1. The Application is dismissed with no order as to costs.

L Flatela

Judge of the Land Claims Court

APPEARANCES

For the Applicant: Adv Havenga SC Instructed by: Peet Grobbelaar Attorneys For the Respondents: Mr. T. Ramollo Legal Aid South Africa

Date Heard: 9 June 2023

Date Delivered: 30th June 2023

- [1] Daniels v Scribante and Another 2017 (4) SA 341 (CC)
- [2] 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), para 87.
- [3] Ibid, para 26.
- [4] Phoko and Others v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10
- [5] Ibid, para 28.

[6] *id.*

[7] *Ibid*, para 29.

[8] As more fully set out in *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 30 it was said that: "The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*'.

[8] As more fully set out in *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 30 it was said that:

"The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*'.

[9] *Fakie v CCII Systems (Pty) Ltd* [2006] SCA 54 (RSA)

[10] At *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 30 it was said that: "The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*."

[10] At *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 30 it was said that:

"The term civil contempt is a form of contempt outside of the Court and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which

characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings mero motu.”

[11] Ibid, para 9,

[12] Ibid, para 10.

[13] Supra, fn 10, para 9 – 10.

[14] Paragraph 6.2.2 of the founding affidavit in the main Application

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCC/2023/23.html>

CASE PAGE https://chat.esheria.ai/case-law/south-africa/unknown-plaintiff-v-unknown-defendant-contempt_of_court-alcc-2023--6a3ea5203b1caa91298165e6

Prepared on 12 October 2026 · Esheria