

SOUTH AFRICA / JUDGMENT

Van Rensburg NO and Another v Naidoo NO and Others (2732/11) [2012] ZAECPEHC 94 (20 December 2012)

[2012] ZAECPEHC 94

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J.E Smith

CASE / FILE NUMBER

2732/11

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION –

PORT ELIZABETH

Case no:2732/11

Date Heard: 18/10/2012

Date Delivered: 20/12/2012

In the matter between:

WILMA EMMERENTIA VAN RENSBURG N.O

.....1ST

APPLICANT

PHILIPPUS STEPHANUS VAN RENSBURG

N.O2ND

APPLICANT

AND

PERAPANJAKAM NAIDOO N.O

.....1ST

RESPONDENT

PURSOTAM NAIDOO N.O

.....2ND

RESPONDENT

SHASI NAIDOO N.O

.....3RD

RESPONDENT

ANTOSH NAIDOO N.O

.....4TH

RESPONDENT

NELSON MANDELA BAY METROPOLITAN

MUNICIPALITY

.....5TH
RESPONDENT

JUDGMENT

SMITH J:

Introduction

[1] In terms of section 34 of the Constitution everyone has the right to have his or her legal disputes resolved by a court of law, or where appropriate, by another independent and impartial tribunal or forum. The necessary corollaries of this fundamental constitutional right are: the entitlement of successful litigants to enforce final court orders; and the concomitant legal obligation on those who are subject to court orders to comply with them. If these legal principles are not vigorously enforced by our courts, the aforementioned constitutional right would have no substance, would be rendered meaningless and the dignity and authority of our courts would be compromised. An aggrieved litigant who wishes to challenge an unfavourable judgment has various effective remedies available. He or she may, in an appropriate case, apply to court to have the judgment rescinded, take it on review, or appeal against it. Once these remedies have been exhausted however, and the unsuccessful litigant has reached the end of the road, so to speak, the court order must be observed, both in letter and in spirit. The Applicants contend that the First to Fourth Respondents find themselves in this position in respect of an order granted by Froneman J (sitting in the South Eastern Cape Division) on 3 April 2007, under case number 1668/2006.

[2] In terms of that order the First to Fourth Respondents were, inter alia, compelled to:

take all necessary steps to demolish the entire northern buildings situated on Erf 105, Summerstrand, Port Elizabeth, within 60 days of the date of the order; and

- (b) take all necessary step to demolish and remove the top storey and the staircase leading to the building situated in the north western corner of the Shan Trust's property situated at Erf 105, Summerstrand, Port Elizabeth, and which abuts the eastern boundary of Erf 107, Summerstrand, Port Elizabeth, within 60 days of the date of the order.

The Applicants contend that the Respondents have exhausted all their legal remedies, but have nevertheless willfully and intentionally failed to comply with the demolition order. They therefore seek an order declaring them to be in contempt thereof, and for their committal.

[3] The First to Fourth Respondents are the trustees of the Shan Property Trust which is the owner of Erf 105, Summerstrand. The Applicants are the trustees of the Hobie Property Trust which owns an adjacent property, namely Erf 104.

- [4] The Respondents have been relentless in their attempts to contest Froneman J's judgment, and have tenaciously pursued almost every conceivable legal (and for that matter, political) remedy to have it set aside. They have, *inter alia*:

successfully applied to this court (Van der Byl AJ sitting) for an order suspending the operation of certain portions of Froneman J's order. That judgment was however subsequently overturned by the Supreme Court of Appeal; and

unsuccessfully applied for leave to appeal to the Supreme Court of Appeal and the Constitutional Court.

- [5] They have opposed the application on the following grounds:

the demolition order is null and void, alternatively voidable, and therefore incapable of implementation because it seeks to vindicate restrictive conditions in a title deed which are *contra bonis mores* or contrary to public policy. The First to Fourth Respondents were therefore entitled to ignore the judgment. They have also applied for this issue to be referred for oral evidence and have filed a counter-application, *ex abundanti cautela*, for the rescission of Froneman J's judgment.

they have not willfully disobeyed the demolition order because they believed, on reasonable grounds, that the order was unlawful and unenforceable for the above-mentioned reason, and in addition, the First Respondent has since September 2010 attempted to find a "workable and equitable solution to bring an end to the level of discourse and acrimony caused thus far."

- [6] The Applicants have, at the commencement of the hearing, applied for the late filing of their replying papers on 19 June 2012 to be condoned. I was satisfied that the Applicants have shown good cause and that the Respondents' would not suffer any prejudice which could not be remedied by an appropriate costs order. I accordingly condoned the late delivery of the replying papers.

The legal principles

- [7] In order to succeed the Applicants must prove: (a) a valid court order; (b) that the Respondents have been notified of the order;
- (c) that they have failed to comply with the order; and (d) that their non-compliance was willful and *mala fide*.
- [8] Once the Applicants have established the requisites mentioned in (a), (b) and (c), above, the Respondents bear an evidential burden in relation to willfulness and *mala fides*. In *Fakie N.O v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 42 (d), Cameron JA (as he then was) stated that:

"Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond reasonable doubt."

- [9] Cameron JA furthermore held at paragraph 42(b) that even though a respondent in contempt of court proceedings is not an accused person he or she is "entitled to analogous protections as are appropriate to motion proceedings", and that "in particular, the applicant must prove the requisites of contempt (the order; service of notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt". (Fakie N.O. (supra) at paragraph 42(c).

Is Froneman J's judgment void or voidable?

- [10] Mr Singh SC, who appeared for the Respondents, argued that the judgment cannot be immune from challenge in contempt of court proceedings because such an approach would amount to an irrebuttable presumption on an essential element of the offence of contempt of court, namely, the existence of a valid court order. He argued further that even when considered on the principles applicable to res judicata and issue estoppel, such an approach results in unfairness and inequity. He submitted that the Respondents should therefore not be prevented from ventilating the issue of the Applicants' entitlement to the order in the present application.
- [11] Mr Singh placed heavy reliance on the judgment of Ponnan JA in *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala N.O and Others 2012 (3) SA 325 (SCA)* for his submission that a litigant is entitled to ignore an invalid court order. In that matter the North Gauteng High Court (per Kruger AJ) had issued an order appointing joint judicial managers in terms of s. 430 of the Companies Act, no 61 of 1973. Ponnan JA held that the power to appoint a judicial manager, in terms of s. 429 of the Companies Act, vested in the Master. He furthermore held that the learned judge in the court a quo had therefore acted contrary to a direct statutory prohibition, and that the order was accordingly of no force and effect. Being a nullity there was no need for a declaration to that effect. The Master was therefore entitled to ignore the court order and his actions could therefore not amount to contempt of court.
- [12] Mr Breitenbach SC, who appeared for the Applicants, has however in my view, correctly submitted that there can be no doubt that Froneman J had authority to grant the order on 3 April 2007, and that there was no question of the order having been made contrary to a direct statutory prohibition as was the case in the *Master of the High Court v Motala* (supra).
- [13] In our law all court orders, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside. In *Master of the High Court v Motala*, at paragraph [11] (supra), Ponnan JA recognized the importance of this principle and stated that "[no] doubt there are important policy considerations why that must be so". It is only in certain circumscribed circumstances that a court order would be void ab initio, with the consequence that a person subject thereto could ignore it without first having it set aside. These are:
- (a) where legal proceedings have been initiated against a party, and that party has not been cited, any order given against such a party is null and void and may be disregarded;
 - (b) where an order has been made in contravention of an express statutory prohibition;

- (c) where legal proceedings have been conducted by someone on behalf of a party without a mandate; and
- (d) where the court which granted the order lacked jurisdiction.

(Master of the High Court v Motala (supra); and Todt v Ipser 1993 (3) SA 577 (A) at 589 C-E)

I am unable to conceive of any other circumstances which would entitle a person to ignore a court order without first having it set aside. There are in my view no such circumstances present in this case, and the First to Fourth Respondents were therefore not entitled to ignore Froneman J's order, on the assumption that the order is void or voidable.

- [14] The question which now arises is whether or not I should accede to the Respondents' request to refer the issue relating to the validity of the judgment for the hearing of oral evidence. The Respondents contend that the validity of the restrictive conditions was not argued before Froneman J and, in addition, "there have been significant developments in our law which have a material bearing on the lawfulness of the Order itself". They therefore applied for the matter to be referred for the hearing of viva voce evidence to allow these issues to be properly ventilated.
- [15] The Respondents are essentially seeking permission to argue points of law which they failed to raise when the matter came before Froneman J. Even though they sought a postponement to enable them to file further papers, they had known since February 2007 that the Municipality would not persist with its opposition and therefore had more than sufficient opportunity to file papers, and to raise any other factual issues or legal points. It is in my view untenable that litigants, who have exhausted all appeal procedures in respect of a judgment, should be allowed to challenge the validity thereof in a court of equal standing on the basis of legal points that they have failed to raise when the matter was initially argued. Such an approach will undoubtedly have the effect of impermissibly clothing a court of equal standing with appellate jurisdiction. I am certainly not aware of any legal principle in our law which would sanction such an approach, nor has counsel for the Respondents been able to refer me to any authority in this regard. If such an approach is countenanced there would never be an end to litigation.
- [16] I also do not think that there is any legal basis for me to refer this issue for oral evidence. Mr Breitenbach has in my view correctly submitted that there are in any event no prospects of viva voce evidence affecting the outcome of the application. In the Supreme Court of Appeal judgment, which has been reported as *Van Rensburg and Another NNO v Naidoo and Others NNO; Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA), Navsa JA stated the following at paragraph 37 regarding the title deed restrictions:

"Restrictive conditions of the kind in question enure for the benefit of all other erven in a township, unless there are indications to the contrary. They are inserted for the public benefit and, in general terms, to preserve the essential character of a township. In this regard see Malan at 38B-C and 39F-G. If landowners across the length and breadth of South Africa, who presently enjoy the benefits of restrictive conditions, were to be told what their rights, flowing from these conditions, could be removed at the

whim of a repository of power, without hearing them or providing an opportunity for them to object, they would rightly be in a state of shock.”

In summary therefore: I am of the view that I have no discretion in terms of the law to reconsider issues which were not raised when the matter was argued before Froneman J; another court of equal status would similarly not have this power if the issue were to be referred for hearing of viva voce evidence; and, in any event, the Supreme Court of Appeal has already expressed the view that the restrictions were inserted for

the benefit of the public. Viva voce evidence would therefore not affect the original decision.

The Principle of reciprocity and the unclean hands argument

[17] The Respondents contend that the Applicants, in their capacities as trustees of a different trust, namely the Magruser Trust, which owns erf 85, are also in breach of the restrictive conditions in various respects, and are therefore prevented by the principle of reciprocity from enforcing compliance by the Shan Trust with the restrictive conditions. They have therefore approached the court with unclean hands, and cannot be granted any relief.

[18] In my view this argument cannot be upheld. First, this application arises from the Respondents' alleged non-compliance with Froneman J's order. There is no reciprocal duty on the Applicants in this regard. Second, the principle that an applicant must approach court with clean hands would disentitle an applicant to relief only if his conduct can be regarded as fraudulent or dishonest. (*Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another* 2006 (4) SA 355 (C) at page 395, paragraph 140). There has not been any such allegation in this case and this legal principle can therefore not avail the Respondents.

Court's jurisdiction over Fourth Respondent

[19] The Fourth Respondent contends that any relief granted against her in this matter will be ineffective because she has left South Africa and now lives permanently in the United Kingdom.

[20] I am of the view that this argument is without merit and cannot be upheld. The order made by Froneman J concerns immovable property which is situated within the area of jurisdiction of this court. The Fourth Respondent has been cited as a party and has filed an affidavit opposing the proceedings. It is common cause that the Second to Fourth Respondents have mandated the First Respondent to deal with “all matters concerned with the improvements to the property and to the court order dated 3 April 2007”. The Fourth Respondent said the following in this regard in her affidavit:

“I am unable to deal with these matters due to my being overseas and for practical expediency left the handling of all issues connected with the property in the hands of the first respondent.”

- [21] I also agree with Mr Breitenbach that this court has jurisdiction to compel compliance with its orders and the Fourth Respondent, having also been a party to the original proceedings before Froneman J, remains subject to its jurisdiction. She did also not object to the court's jurisdiction in those proceedings. There is in any event no reason why an order of this court cannot be effective in impelling her to comply with the demolition order.

Counter-application for rescission

- [22] This application is in my view totally devoid of any merit. It is common cause that the demolition order was not made in the absence of the Shan Trust. The Nelson Mandela Metropolitan Municipality, which was also a party to those proceedings, had apparently filed comprehensive opposing affidavits. The Respondents were initially content to rely on the Municipality's opposition. The Municipality however withdrew their opposition during February 2007. At the hearing of the matter the Respondents were represented by senior and junior counsel and applied for a postponement at the commencement of the hearing. That application was however dismissed and Respondent's counsel proceeded to argue the matter on the merits on the basis of the opposing affidavits filed by the Municipality. Under these circumstances none of the legal grounds for rescission of the judgment has been established.

Has there been willful or mala fide non-compliance?

- [23] I am satisfied that the Applicants have established beyond reasonable doubt that Froneman J's order is valid; that the First to Fourth Respondents have been notified of the order; and that they have failed to comply with it. All that remains to be considered is whether their non-compliance was willful and mala fide. In respect of this issue the Respondents bear an evidential burden. (Fakie N. O supra). The Respondents claim that they have not been in willful default of the order because they had the bona fide belief that Froneman J's judgment was null and void, alternatively voidable, for the reason that it seeks to enforce restrictive conditions in a title deed which are contra bonis mores or against public policy. Mr Breitenbach's main argument in this regard was that the Respondents' version is so improbable and uncreditworthy that it should be rejected out of hand. He has however, in the alternative, applied for this issue to be referred for viva voce evidence. Mr Singh has also submitted that the issue should not be decided on the papers but that it should be referred for the hearing of oral evidence.
- [24] In an attempt to show that she has not willfully disregarded the order, and that she has tried to find "a workable and equitable solution to bring an end to the level of discord and acrimony", the First Respondent said the following in her answering affidavit:
- (a) during September 2010 she had met with a councillor who referred her to the legal advisor of the Fifth Respondent, namely Advocate Tshamase;

- (b) during November 2010 she had met with, amongst others, the mayor and Mr Tshamase, who promised her that they would assist “and through such intervention the Hobie Trust would not bring any further proceedings against the Shan Trust”;
 - (c) she was thereafter informed by Mr Tshamase that the Municipality would bring proceedings against the Hobie Trust if the Applicants persisted with contempt of court proceedings. He also consoled her by informing her that he would prevent “any further litigation proceedings against the trust”;
 - (d) Tshamase contacted her again shortly thereafter and told her that if she agreed to remove the staircase at the back of her property he would see to it that the matter was settled on that basis. He has however never confirmed this in writing despite the fact that she had requested him to do so;
 - (e) when she thereafter enquired from him why the settlement letter was never forwarded to her, or why no proceedings had been instituted against the Hobie trust as promised, he told her that the municipality intended to bring a blanket application to remove the restrictions. The municipality was accordingly of the view that it would serve no purpose to institute proceedings against the Hobie Trust only;
 - (f) that application is however now on hold as the Municipality does not have the necessary funds for such an application; and
 - (g) she has also had meetings with various politicians in an attempt to persuade them to investigate the matter and to assist in finding an amicable solution.
- [25] Mr Breitenbach has in my view correctly submitted that it was clear that the Respondents had known, at least since 20 October 2010 and after the dismissal of the application by the Shan Trust for leave to appeal against the Supreme Court of Appeal’s reversal of Van der Byl AJ’s judgment, that they had reached the end of the road, and had in effect exhausted all their legal remedies. It is common cause that during October 2010 the Respondents circulated a petition canvassing support to approach Parliament to quash the demolition order. That petition contained various vexatious and malicious statements which in my view are defamatory of Froneman J. Mr Breitenbach has furthermore argued persuasively that the language employed by the Respondents in that petition compels the inference that the Respondents’ non-compliance with the order is based on disdain for Froneman J, and the judiciary in general.
- [26] It is a well known principle of our law that bona fide disputes of fact in application proceedings are resolved on the facts averred by the respondent, together with those admitted facts in the applicant’s affidavit. (Plascon-Evan Paints v Riebeeck Paints [1984] ZASCA 51; 1984 (3) SA 623 (A).

- [27] The court may however reject out of hand, and without referring the matter for oral evidence, bald denials, averments which are patently implausible or uncreditworthy denials. (*Fakie v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at paragraph 55.
- [28] In my view it is abundantly clear that the Respondents never intended to demolish the property in compliance with Froneman J's order. Even after they realized that they had exhausted all their legal remedies, they were nevertheless determined to avoid compliance with the order through political intervention. To this end they have resorted to enlisting the assistance of various political office bearers.
- [29] This much is evident from the First Respondents' narration of the interaction between her and the Municipality's legal advisor, as well as various vituperative statements concerning Froneman J and the judiciary, contained in their petition. In that document the First Respondent stated, *inter alia*, that she wanted to enlist the support of the public because she has "...exhausted all legal and judicial systems and now hope to petition parliament to assist in resolved this grave injustice". There can therefore be no doubt that the Respondents had known by then that they had exhausted all their legal remedies.
- [30] The Respondents' assertion to the effect that their non-compliance was not willful also sounds hollow and unconvincing in the face of the truculent and contemptuous statements contained in the petition. It is clear from the following excerpts from the petition that Mr Breitenbach was correct in his submission that the Respondents' refusal to comply with Froneman J's order was based on disdain for the learned judge and the judiciary in general:

"The legal system, with prejudicial judges has failed us completely in not allowing us a fair hearing.

Judge Froneman elected to give his judgment without knowing all the facts, especially entertaining untruths as indicated in the annexures...

When I learnt that he was on the verge of being appointed as a Constitutional Court Judge, I phoned the hot line of the President (ref. 1877767). My question was how can a judge be in the Constitutional Court who has no compassion (knowing fully well 71 other Summerstrand residents will be affected by his judgment). He is a racist, knowing fully well that he was applying for a post in the Constitutional Court he rule in the next high court, third time round, application of the van Rensburgs, that the Ellis' home needs to be totally demolished."

- [31] I am also not convinced that the Respondents could genuinely have believed that Froneman J's judgment was void after leave to appeal against it had been refused by both the Supreme Court of Appeal and the Constitutional Court. First, this assertion is contradicted by the explicit and unambiguous statements in the petition (which in my view constitute incontrovertible proof of their states of mind at the time); and second, the Respondents' desperate attempts to find a political solution were inconsistent with their claim that they had genuinely believed the judgment to be void. There can be little doubt that even at that stage they were aware that they were compelled to demolish the property in accordance

with a valid and binding court order, hence the frantic attempts to secure political intervention. The legal advice to the effect that the judgment was void, or voidable, was in any event so patently wrong and ill-considered that the Respondents could not have genuinely believed in its correctness. In *S v Longdistance (Natal)(Pty) Ltd and Others* 1990 (2) SA 277 at 283I-J Nicholas AJA (as he then was) said that:

“Legal advice has no magic which justifies the recipient in jettisoning his common sense.”

This dictum is in my view apposite to the facts in this case. I therefore agree with Mr Breitenbach’s submission that the Respondents’ version in this regard is farfetched, untenable and demonstrably unworthy of credence.

[33] In the event, it must have been clear from the foregoing that even if the allegations in the Respondents’ answering allegations were to be established through the hearing of viva voce evidence, the following ineluctable inferences would remain undisturbed:

the Respondents realized they had exhausted all their legal remedies;

they never intended to comply with the order; but

instead sought to avoid its consequences by enlisting the assistance of politicians.

In my view these inferences compel the conclusion that the Respondents’ non-compliance with Froneman J’s order was willfull and mala fide.

[34] In my view the Respondents have failed to present evidence that establishes reasonable doubt, and I am therefore satisfied that the Applicants have proved beyond reasonable doubt that the Respondents’ non-compliance with Froneman J’s order was willful and mala fide.

[35] The Respondents’ willful and mala fide non-compliance with Froneman J’s order has in my view been particularly brazen and egregious. It was based on boldly stated disdain for Froneman J; “the legal system”; and “prejudicial judges”, who, according to them, have failed them by not allowing them a fair hearing. This is the type of behaviour which Plasket J has categorized as aimed at bringing “the administration of justice into disrepute by undermining one of the most important foundations of an ordered and civilized society respect for, and obedience, to, the law. “

(*Victoria Park Ratepayers Association v Greyvenouw CC and Others* 2004 (3) All SA 641-642 at 624 [61].

[36] Under these circumstances the only suitable punishment in my view is a term of imprisonment, which I intend to suspend on the condition that the Respondents comply with the order.

[37] In the result the following order shall issue:

Interlocutory application

1. The time for the delivery of the Applicant's replying papers is extended to 19 June 2012.
2. The Applicants shall pay the costs of the application for condonation of the late delivery of their replying papers;
3. The First to Fourth Respondents application for referral to oral evidence is dismissed with costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

Main Application

4. It is declared that the First to Fourth Respondents are in contempt of paragraphs 2 and 3 of this Court's order dated 3 April 2007, in case number 1668/2006.
5. The First to Fourth Respondents are sentenced to six months; imprisonment each;
6. The operation of the sentences referred to above is suspended for a period of two months from the date of this order.
7. The sentences referred to above will not be implemented if, within a period of two months from the date of this order, the First to Fourth Respondents comply with paragraphs 2 and 3 of this Court's order of April 2007, in case number 1668/2006, by demolishing the structures and buildings referred to therein.
8. Should the First to Fourth Respondents not comply with paragraphs 2 and 3 of this Court's order of April 2007, in case number 1668/2006, by demolishing the structures and buildings referred therein within a period of two months from the date of this order:

8.1 the suspension of the operation of their sentences will be lifted and such sentences will become fully operative; and

8.2 the deputy sheriff, assisted by such contractors and other persons as are necessary for the task, shall be authorized to demolish the said structures and buildings forthwith.

9. The First to Fourth Respondents shall pay the costs of this application on the attorney and client scale, including the costs of two counsel and the costs attendant upon the demolition by the deputy sheriff should this become necessary, jointly and severally, the one paying the other to be absolved.

Counter-application

10. The First to Fourth Respondents' counter-application, dated 21 October 2011, is dismissed with costs, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

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