REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 9278/2016

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED.

16.4.19
Date:

WHG VAN DER LINDE

In the matter between:

Susan Caroline Ochse	Applicant
and	
Winston Marcus Kgaudi Matlala	1st Respondent
Bridgette Lerato Matlala	2nd Respondent

JUDGMENT

Van der Linde, J:

[1] This is an application brought by way of urgency, in recess, to declare the 1st and 2nd respondents in wilful contempt of an order of court issued on 29 March 2018 and varied on 11 October 2018. The order was initially granted by way of interim order by Matojane, J on 1 March 2016 with a return date; it then came before Molahlehi, J who gave a judgment and order on 29 March 2018; and thereafter the parties came before Mashile, J who, pursuant to

the provisions of Rule 49(1)(b) of the Uniform Rules of Court, varied the order of Molahlehi, J by substituting therefor an amended order in the terms set out on pages 6 and 7 of the applicant's notice of motion.

[2] That order was to interdict the 1st to 3rd respondents from further proceeding with the construction of the proposed three-storey house – or undertaking any other construction works - on Portion 1 of Erf 1148, Bryanston Township, Gauteng Province prior to the 1st and 2nd respondents completing the construction of a retaining wall and the boundary wall along the western boundary of Portion 1, so that the top of that boundary wall was not less than three metres but no more than four metres above the top level of a deck on the applicant's immovable property known as the remainder of Erf 1148, Bryanston; and also a boundary wall along the southern boundary of Portion 1, which is not less than three metres in height.

[3] It is not insignificant that the reference to the height of the southern boundary wall does not indicate whether the three metres should be measured from the inside (northern side) of the wall or from the outside (southern side) of the wall, from the perspective of the respondents' property. That makes a difference, since the ground level of the wall within the respondents' property is apparently lower than the ground level of the wall outside of the respondents' property. I return to this issue below.

[4] In addition to that interdict, the 1st to 3rd respondents were interdicted and restrained from commencing or further proceeding with the construction of the house until such time as the 1st and 2nd respondents had caused the excavation and levelling of Portion 1 to such an extent that the floor level of the proposed basement level of the house, excluding foundations, was no higher than 1 488.12 metres above sea level ("MSL").

[5] The applicant's case is that the respondents have breached this court order wilfully, and so they seek not only fresh interdicts in the same terms, but also an order committing both

respondents alternatively the 1st respondent to imprisonment for a period of 90 days, with or without suspension; and a special costs order.

[6] The respondents' case is not that the building operations have not commenced, nor that the floor level of the basement level of the house was not in fact higher than 1 488.12 MSL. But they say that they did not act wilfully; and in any event, they submit that the application is not urgent. I deal with these issues in reverse order.

[7] Applications that involve contempt of court are usually regarded as urgent because it is in the interests of justice that the rule of law be respected, in particular in the form of court orders. In this case the alleged contempt of court consists of continuing to construct a building on top of a level that exceeds the maximum level permitted by the order of Molahlehi J. If the court order is to be respected, further construction should be stopped immediately, because the potential partial demolishment becomes greater by the brick. In my view - for that reason - the matter is sufficiently urgent to be heard out of term.

[8] As to the breach of the court order relating to the height of the western boundary wall, it is not in dispute that the western boundary wall ranges between 2.2 metres and 2.25 metres above the top of the deck (as measured by Mr Coulthard, the applicant's land surveyor), whereas the court order required that it was not less than 3 metres but no more than 4 metres above the top level of the deck on the applicant's property.

[9] As to the southern wall, the argument by Mr Laka SC for the respondents was that the court order did not contain any reference point. With respect to learned counsel, that appears to be correct when regard is had to the express terms of the court order; but on the respondents' own version the southern wall is not at least three metres high.

[10] The respondents rely on their own land surveyor, Mr Clark, who deposed to an affidavit saying that on 5 April 2019 he measured the height of the southern wall to be 3.7 metres at

the highest point on the western end and 2.7 metres towards the eastern end. He explains that the measurements were made to the present ground level on *"the northern side of the wall"*. The diagram would indicate that the northern side of the wall is within the property of the respondents, and therefore, on the respondents own version, the southern boundary wall is lower than it should be.

[11] As it happens, Mr Clark in any event does not dispute the measurements of Mr Coulthard, whose report and survey plan demonstrate that the southern boundary walls are lower than three metres in height in six of the eight points measured on the boundary.

[12] As to the level of the basement floor, Mr Coulthard says that the basement floor of the respondents' house at one point is measured at 1 488.23 MSL and at another point, 1 488.28 MSL. Mr Clark says that he measured the height of the slab in three places and got a result of 1 488.18 MSL. The court order requires it to be no more than 1 488.12 MSL. Therefore, on any version, the slab is above the level of the court order.

[13] The offence of contempt of court and its proper enforcement by the courts is indispensable for the administration of justice and for the rule of law. An applicant for relief applies for relief by way of application procedure. The offence must be proved on the usual criminal law standard, that is beyond a reasonable doubt. The elements of the offence are a court order, the respondent's knowledge of it, breach of the order by the respondent, and wilfulness and mala fides. There exists a reverse evidentiary burden: once the applicant has shown the first three elements, an evidentiary burden shifts to the respondent to show absence of wilfulness and mala fides.

[14] As to the requirements of wilfulness and mala fides: what is required is disdain for the court's order, and not mere deliberate non-compliance in the bona fide belief that the conduct is justified. This element is put as follows by the Supreme Court of Appeal in Fakie

NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) (emphasis supplied, footnotes omitted):

"[9] The test for when disobedience of a civil order constitutes contempt 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).
[10] These requirements – that the refusal to obey should be both wilful 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."

[15] Has it been shown that the two respondents are in wilful default in this sense? In Clipsal Australia (Pty) Ltd and Others v Gap Distributors and Others, 2010 (2) SA 289 (SCA) the Supreme Court of Appeal set aside a narrow discretion exercised by Joffe, J in the court a quo in which the learned judge stayed a contempt of court application. A narrow discretion is one with which a court of appeal can interfere: *"... only if the court below exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons, or materially misdirected itself."*

[16] It is instructive to consider the reasons why Streicher, ADP (then) came to the conclusion to which he did:

"[20] The court below held that 'eise van geregtigheid' indicated that the contempt application should be stayed pending the outcome of the review application because if the contempt application 'were to be determined prior to the review application, enforcement of a court order could be ordered in circumstances where the enforcer of the court order was not entitled to the court order in the first instance'. The court would, according to Joffe J, in the circumstances 'knowingly compound the problem'. He added that the determination of the review was important insofar as issues of mala fides and wilfulness were concerned.

[21] However, the outcome of the review application is irrelevant to the question whether the respondents were acting in contempt of court. In terms of the court order Gap Distributors and Trust Electrical Wholesalers are interdicted from infringing registered design A96/0687. That court order is a final order and has to be obeyed even if it is wrong as is alleged by the respondents. Should the review application be successful and the registration of the design be set aside, the interdict would come to an end as there would no longer be a registered design, but until that happens the interdict stands and has to be obeyed. As was said by Herbstein J in Kotze v Kotze 1953 (2) SA 184 (C) at 187F - G:

'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'

[22] In its judgment the court below itself refers to Culverwell v Beira 1992 (4) SA 490 (W) at 494A - E where Goldstein J said that orders of court have to be obeyed until set aside and that chaos may result if people were allowed to defy court orders with impunity. It also refers to the judgment of Froneman J in Bezuidenhout v Patensie Sitrus Beherend Bpk 2001 (2) SA 224 (E) at 228F - 230A where, relying on Culverwell and Kotze, Froneman J said that an order of a court of law stands and must be obeyed until set aside by a court of competent jurisdiction. Having done so with apparent approval and having stated that it is obliged to apply the judgment of this court, it is inexplicable how it could then, on the basis that the judgment could be wrong, have considered the outcome of the review application to be of any relevance to the contempt application."

[17] In this matter, on 8 March 2019 the applicant sent a demand through her attorney to the respondents demanding compliance with the court order. That demand spelt out the respects in which the court order was being breached. No response was received. On 29 March 2019 the applicant's attorney wrote a further letter to the respondents, again spelling out in detail the none-compliance with the court order, and again demanding compliance with the court order. It threatened too that absent an unconditional undertaking to cease with the construction of the house and to comply with the court order, the applicant would have no option but again to approach the court for appropriate relief, and on an urgent basis. No satisfactory response was forthcoming.

[18] The court order, the respondents' knowledge of it, and its breach, have all been shown. Have the respondents, in attempting to discharge the evidentiary burden, and in the light of this background, shown that their conduct was not wilful? I believe not, for the following reasons. First, the founding affidavit asserts pertinently in paragraph 26 that the

respondents have acted in wilful default of the court order. That paragraph is not pertinently traversed in the answering affidavit.

[19] Second, the respondents were throughout advised by their land surveyor, Mr Clark, and they will have known precisely what the issue in dispute is. The prohibition against continuing with the construction of the house unless the walls have attained the identified heights, and the interdict relating to the basement level, are not overly technical matter. Mr Clark is able to provide the respondents with the relevant measurements, and he has in fact done so. The respondents expressly admit that the construction of their house has commenced, and they knew that the court order interdicted that very activity unless the wall measurements and the levelling of the basement had respectively first been attained and procured.

[20] Third, as to the basement level, the respondents expressly admit that on Mr Clarke's measurements, the level is 6 cm higher than the court order permits. That appears from paragraph 21 of Mr Clark's affidavit, read with paragraph 9.25 of the respondents' affidavit. So they must have known that the house was being constructed when it ought not to have been.

[21] Fourth, as to the southern boundary wall, there was an email exchange between the parties concerning the height. The court order did not state on which side the wall had to be measured, as already alluded to above. The ultimate outcome of the exchange was, on the respondents' version, that the applicant *"was comfortable with almost all the heights of the southern boundary wall."* The applicant disputes the respondents' interpretation of the emails, and calls it disingenuous. But even on the respondents' own version, the wall was not built to the required height *throughout*. So they could not have believed that they had complied with the court order.

[22] As to the western wall, the papers raise a dispute about the yardstick that was to be used to measure the height of the wall. Mr Clark seems to suggest that the deck which is currently in place is not the same as the deck that is referred to in the court order. The applicant disputes that there was any change to the deck, and the contingent nature of Mr Clark's averments must defer to the detailed explanation given by the applicant: the deck has always had two levels, and the court order expressly acknowledges this (emphasis supplied): *"... so that the top of such boundary wall is not less than 3 metres but no more than 4 meters above the top level of the deck ...".*

[23] Motion proceedings and the affidavits deposed to in them, must be carefully scrutinised. They may not be allowed by transparent strategies to disable the dispensing of justice. Although there appear to be a factual dispute relating to the pool deck in the matter, and although the applicant is seeking final relief on affidavit, it is submitted that the factual disputes can be disposed of on these papers. In Fakie NO v CCII Systems (Pty) Ltd (653/04)[2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) the following was said in this context (emphasis supplied, footnotes omitted):

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.
[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly

untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

[24] See also Wightman t/a J W Construction v Headfour (Pty) Ltd and Another (66/2007) [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008):

"[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[25] In these circumstances I do not believe that the ostensible factual disputes relating to the pool deck are real. It follows that as regards the western boundary wall too, I do not believe that that the evidentiary burden has been discharged.

[26] Finally, the two letters of demand that preceded the bringing of the application make it expressly plain in which respects the court order was being ignored. To persist with construction of the dwelling in the face of these explicit pointers is, as I see it, conduct in disdain of the terms of the order of Molahlehi, J.

[27] There is a final matter to be dealt with. Mr Laka argued the applicant has not shown prejudice, because the deviation from the standard laid down by the order of Molahlehi, J was so little. Reference was particularly made to the basement level which – on Mr Clark's version – was only 6cm out. The argument was that the view of the applicant would ultimately not be impinged but the excess of only 6cm.

[28] The difficulty with the submission, as I see it, is this. First, the argument is not that 6cm is *de minimis non curat lex.* That would have negated the unlawfulness aspect of the offence. Second, whether or not the order of Molahlehi, J was to be complied with in exact terms, is a matter of interpretation of the order. And second, I suggest that given the precise measurements, down to the last centimetre, laid down in the court order, what was required was exact compliance.

[29] In my view a case has accordingly been established for the relief claimed and I make an order in terms of prayers 2 to 6 of the notice of motion dated 1 April 2019, paragraph 5 to read as follows:

"The respondents are declared to be in contempt of court of the order of Molahlehi J dated 29 March 2018 under the above case number, and are committed to imprisonment for a period of 30 days, suspended for a period of 12 months on condition that the orders of this Court set out in the previous paragraphs are complied with."

WHG van der Linde
Judge, High Court
Johannesburg

Date argued:	10 April 2019
Date judgment:	16 April 2019
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