

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|-------------------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER
JUDGES: NO |
| (3) | REVISED: |

Signature:  Date: 4/11/2022

CASE NO: 30540/2017

In the matter between:

SHARNEE NOIK

First Applicant

BRIAN NOIK

Second Applicant

And

MARY CAROL LOUISE MASON

First Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Second Respondent

JUDGMENT

NICHOLS AJ

Introduction

[1] This is an application for contempt of court wherein the applicants, Sharnee Noik and Brian Noik (the applicants) seek an order that the first respondent, Mary Carol Louise Mason (the respondent) be found to be in contempt of the court order, which was handed down by the Honourable Justice Mdalana-Mayisela on 20 March 2020 (the March 2020 order).

[2] Pursuant to a finding of contempt, the applicants seek punitive relief ordering the respondent to pay a judicial fine of R500 000; directing that the respondent's plea in the action under the same case number (the action) be struck out in its entirety; and following such striking of the respondent's defence, an award of judgment in favour of the applicants in the action.

[3] The applicants and respondent are the plaintiffs and first defendant, respectively, in the action. The Registrar of Deeds (the Registrar) who is cited as the second defendant in the action is not a party to this application and no relief is sought against the Registrar.

[4] Mr Groenewald who appeared for the applicants, informed the Court at the hearing of the matter that the applicants abandoned the alternative relief premised on constructive contempt of court.

Background

[5] The common cause and relevant facts that may be distilled from the prolix application papers are succinct. The genesis of the matter as reflected in the pleadings and the various requests for further particulars are fully addressed in judgment consequent upon the March 2020 order. Due to the nature of civil contempt proceedings *ex facie curiae*, it is not necessary to traverse this entire history again as it is irrelevant to the determination of the issues between the parties, save to record that the parties are engaged in a litigious dispute regarding an immovable property that was sold by the respondent to the applicants.

[6] The March 2020 order, which was granted pursuant to an opposed application, directed the respondent to, within ten days, provide further and better particulars to the applicants to the following paragraphs of the original request for trial particulars:

- (a) 1.1 to 1.1.4;
- (b) 2.1 to 2.2.1 and
- (c) 3.1 to 3.3

[7] Due to the national lockdown imposed in terms of the Disaster Management Act 51 of 2005, which was occasioned as a result of COVID-19, the applicants provided various extensions to the respondent to comply with the March 2020 order culminating in their final

extension that the response be provided by 15 May 2020. The respondent's response was finally provided on 18 May 2020.

[8] The respondent resides on a farm in the Eastern Cape with her husband. The farm has intermittent cellular and internet reception. The respondent was informed by email on 24 March 2020 of her obligations to deliver a further response to the applicants. The respondent's attorneys were in possession of all the documents which had been discovered and which she required to prepare her response.

[9] The soonest the respondent was able to travel to Johannesburg to arrange to collect the lever arch files of documents was 5 May 2020. Thereafter she arranged with her attorneys to have the files delivered to her from Pretoria. It then took the respondent and her husband in excess of three days to prepare her response in a schedule titled 'Non-Exhaustive list of tasks' done at the immovable property (the schedule). This descriptive schedule was compiled after the respondent and her husband conducted the exercise of considering, analyzing and categorising all the discovered documents in the files.

[10] It is apparent from the judgment to the March 2020 order that the respondent was required to supply further and better particulars to three different paragraphs of the applicants' request for further trial particulars. The applicants contend that the respondent has still failed to deliver the required particulars and her response is therefore non-compliant with the March 2020 order.

[11] The first set of required particulars relate to the exact repairs undertaken at the immovable property, when and by whom. The second set of required particulars relate to when alleged defects in the immovable property were repaired and by whom. In response, the respondent provided the schedule. The schedule consists of a list of 209 repairs undertaken at the property; the areas at the property where the repairs were effected; the reason for the repairs being undertaken; the dates on which those repairs were effected; and the details of who effected each repair, where this is known and readily ascertainable.

[12] The third set of required particulars required the respondent to detail the defects in the property that were known to her and which were disclosed by her to the applicants. In response, the applicants are referred to the defects listed in annexure 'POC3.2' to the

particulars of claim in the action. The respondent states that she cannot recall which, if any, defects would have been disclosed to the applicants prior to the conclusion of the sale for the immovable property as she was, at that stage, in the process of completing various repairs to the property. Accordingly, all defects, known to her and which existed at the time of the sale were recorded and disclosed in annexure 'POC3.2'.

The Issues

[13] The issue for determination is whether the applicants have established the requisite elements for civil contempt of court entitling them to an order declaring the respondent in contempt of the March 2020 order. Further, and in the event that the applicants are entitled to an order declaring the respondent in contempt of the March 2020 order, whether in that event, the applicants are entitled to the further punitive relief sought.

The law and its application

[14] In *Pheko and Others v Ekurhuleni Metropolitan Municipality*,¹ Nkabinde J reiterated 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. . . Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. 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.'

[15] The nature of the relief sought in these civil contempt proceedings are not coercive but rather punitive. This is evident from the fact that the applicants seek orders that the respondent pay a judicial fine of R500 000; that her plea in the action be struck out in its entirety; and following such striking of the respondent's defence, an award of judgment in the applicants favour in the action.²

¹ *Pheko v Ekurhuleni Metropolitan Municipality* (No 2) [2015] ZACC 10 ;2015 (5) SA 600; (CC);2015 (6) BCLR 711 (CC) (*Pheko II*) para 28.

² *Pheko II* ibid para 34.

[16] In clarifying the principles applicable to contempt proceedings in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*³ Nkabinde ADCJ stated that:

‘. . . I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.’⁴

[17] Accordingly, the applicants bear the onus of establishing the requirements for contempt, namely that the order exists; the order has been served on, or brought to the notice of the alleged contemnor; there has been non-compliance with the order; and the non-compliance must be willful or *mala fide*. Since the relief sought is punitive and includes the imposition of a judicial fine, the criminal standard of proof of beyond a reasonable doubt is applicable.⁵

[18] It is common cause that the March 2020 order exists and that it was brought to the respondent’s attention. The applicants are therefore required to demonstrate the respondent’s non-compliance with the March 2020 order and that such non-compliance is wilful or *mala fide* in order to succeed with the first aspect of this application, which seeks a finding declaring the respondent in contempt of the March 2020 order due to non-compliance.

³ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017).

⁴ *Matjhabeng Local Municipality* *ibid* para 63.

⁵ *Matjhabeng Local Municipality* fn3 above paras 63 and 73.

[19] The court's view of what constitutes material non-compliance in *Consolidated Fish Distributors (Pty) Ltd v Zive and Others*⁶ is apposite. The court stated that:

*'Contempt of court, in the present context, means the deliberate, intentional (i.e. willful), disobedience of an order granted by a court of competent jurisdiction. In Southey v Southey it said was said that applicant for an attachment had to show a willful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases, however probably for the reason that in 99 percent of the cases the whole order was disobeyed, which is obviously a 'material' non-compliance. It is reasonable to suggest where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the court would take the substantial compliance into account, and would not commit for the minor non-compliance.'*⁷ (authorities omitted)

[20] The applicants contend that an analysis of the respondent's response reveals that she has not complied with the March 2020 order and that she effectively refuses to provide the particulars they require. She has failed to provide the exact, precise and unambiguous responses they required.

(a) The applicants complain about the wording of the heading to the schedule describing it as a 'non-exhaustive list of tasks' done at the immovable property. They contend that although the schedule lists 209 tasks, the respondent may have chosen to exclude tasks since it is a non-exhaustive list.

(b) The schedule does not address the applicants' request, which relates to defects and repairs and not tasks. The applicants contend that 'tasks' are clearly different in meaning and substance and cannot be equated to a 'defect' or 'repair'.

(c) They contend that incomplete information is provided in relation to some tasks for which dates are not specified; some for which the details of who undertook the task is not specified and some for which the details provided for the contractors is insufficient.

(d) The defects that have been repaired are not defined, identified or particularised. The applicants contend that they are now required to trawl through the schedule in order to guess which task qualifies as a repair. This has and will hamper them in their preparation for trial.

⁶ *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (C).

⁷ *Consolidated Fish* ibid at 522B-E.

(d) The respondent's response to the third issue is contended as being self-evidently non-compliant because it will require the applicants to go through annexure 'POC3.2' with a fine toothcomb to determine for themselves what the respondent seeks to rely on as a response when she could and should have provided the direct answers without obscuring and confusing the issues.

[21] The applicants' conclusion and its papers in this matter are replete with descriptive and inflammatory invective and references to the respondent's response as non-compliant and deficient therefore entitling them to the orders sought on the basis that the respondent has been wilful and *mala fide* by her non-compliance with the March 2020 order. The words used include 'flagrant disregard', 'intransigent', 'obstructive' and 'obdurate',

[22] The respondent contends that the schedule was intended to and does in fact inform the applicants of the number of tasks completed on the property; the nature of those tasks; the dates upon which they were completed; who completed them and the reason for the task. This means that the applicants do not need to trawl through the receipts, invoices and documents that were discovered by the respondent to ascertain their relevance. The respondent also contends that she cannot be bound to produce information beyond her knowledge. She has endeavoured to provide all the information known and available to her in a user-friendly format and any omissions of information or documentation at this stage are *bona fide*.

[23] Mr Mundell, who appeared for the respondent, argued that it is apparent that the respondent will not be able to satisfy the applicants because they have launched these unnecessary proceedings for an ulterior purpose, which is to avoid ventilating the actual dispute at trial. He submitted that the respondent's response is clearly a complete and adequate response to the March 2020 order.

[24] The respondent contends that not only have the applicants failed to discharge the clear onus which rests upon them in the context of a contempt application, but that they have not remotely demonstrated that she failed to comply with the March 2020 order or that such non-compliance was willful disobedience on her part.

[25] Mr Mundell correctly argues that the applicants have not engaged meaningfully and genuinely with the respondent's response in order to determine whether it complies with the March 2020 order. The applicants confine themselves to a linguistic critique of the schedule and then contend for prejudice flowing from these semantic disjunctures.

[26] It has been emphasised by our courts that '*contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority*'.⁸ Upon a proper analysis of the facts, it cannot be said that the respondent failed to comply with the March 2020 order let alone that such non-compliance was wilful or mala fide. The respondent's undisputed evidence regarding her reasons for delivering her response on 18 May 2020 are not unreasonable given the challenges faced by all residents in the country during that period. Nevertheless, the applicants do not seriously take issue with the respondent's delivery of her response three days after the agreed extended date because they contend and maintain that the response is non-compliant with the March 2020 order.

[27] Turning to the nature of the response itself, it was readily apparent from a brief perusal of the schedule that the description of each task sufficiently, cogently and adequately identified whether the nature of that task constituted a repair and / or replacement of an item. The term 'task' is clearly and obviously used as an all encompassing term and it is difficult, if not impossible to attribute the nefarious motives to the respondent that the applicant would have this Court do. The schedule is compiled in a manner that does not make it difficult to ascertain the nature of the repairs effected to various sections of the immovable property and whether that repair was undertaken pursuant to a defect such as damp or termites, for example.

[28] Mr Groenewald conceded that the respondent's response constituted *prima facie* compliance with the March 2020 order. He argued however, that the applicants' complaint is essentially that the respondent has not prepared her schedule the way the applicants would have and / or that she has not cross-referenced each task to the discovery bundle of invoices and receipts. This complaint does not come close to meeting the standard required for non-compliance of the March 2020 order.

⁸ *Pheko II* fn1 above para 42.

[29] I am satisfied that the respondent has provided an adequate and reasonable explanation for the delivery of her response on 18 May 2020. On a conspectus of the common cause facts, I am further satisfied that the respondent's response is in compliance with the March 2020 order and the applicants have failed to establish beyond a reasonable doubt that she has not complied with the March 2020 order.

Costs

[30] Both parties urged this Court to exercise its discretion in favour of a punitive costs award. The general rule in matters of cost is that the successful party should be awarded her costs, and this rule should not be departed from except where there are good grounds for doing so.⁹

[31] In determining whether, punitive costs should be awarded, I have taken account as relevant considerations that these application papers were unnecessarily prolix and littered with inflammatory and needlessly emotive invective. A further relevant consideration is the fact that civil contempt is a crime for which a contemnor may be prosecuted in criminal proceedings.¹⁰

[32] In the result, the following order is made:

- (a) The application for the respondent's contempt of court is dismissed.
- (b) The applicants are ordered to pay the respondent's costs on an attorney and client scale.



T NICHOLS

ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

⁹ *Myers v Abramson* 1951 (3) SA 438 (C) at 455.

¹⁰ *Pheko II* fn1 above para 30.

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h30 on 4 November 2022.

HEARD ON: 9 September 2021
JUDGEMENT DATE: 4 November 2022
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