IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

DATE 27/6/2014 SIGNATURE

Case Number: 44390/2014

27/6/14

In the matter between:

IMATU	First Applicant
SUZANNE TERRY	Second Applicant
ELIZNA ROUCHELLE VON MOLLENDORT	Third Applicant

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	First Respondent
JASON NGOBENI	Second Respondent
STEVEN KHAZUMULA NGOBENI	Third Respondent

JUDGMENT

POTTERILL J

[1] The first, second and third applicants are on an urgent basis applying that the three respondents are to be found in contempt of court of an order granted by Vorster J on 10 June 2014. They are specifically seeking an order that:

> *"2.2 That the respondents are ordered to comply with the provisions of paragraph 3 of the order under case no. 39452/2014 with immediate effect, but in any event, not later than 25 June 2014 in that they must:*
>
> *2.2.1 Reinstate the Second and Third Applicants as trainees in terms of the training agreements entered into between Second and Third Applicants and First Respondent on 28 November 2013; and*
>
> *2.2.2 Reinstate the Second and Third Applicants into the training programs in which the Second and Third Applicants participated prior to their removal from the training program on 17 June 2014.*

2.3 Should the respondents fail to comply with the provisions of paragraph 2.2 above, that they be incarcerated for a period of 6 months or fined or both in such amount or for such period as determined by the Honourable Court, which period is to commence on 30 June 2014."

[2] I am satisfied that this matter is indeed urgent.

[3] It is common cause that Vorster AJ refused to accept the opposing affidavit at the hearing of the urgent applicant and thus proceeded to grant the order on unopposed facts. The content of the order reads as follows:

"IT IS ORDERED THAT:

1. *The forms and service and ordinary time periods provided in the rules are dispensed with and this application is disposed of as one of urgency;*
2. *Termination by Respondent, on 22 May 2014, of the training agreement entered into between Second Applicant (Suzanne Terry) and Respondent on or about 28 November 2013, is unlawful;*
3. *Termination by Respondent, on 22 May 2014, of the training agreement entered into between Third Applicant (Ilizna Rochelle Von Mollendorf) and Respondent on or about 20 November 2013, is unlawful;*

4. *Respondent must comply with the training agreements entered into between itself and Second and Third Applicants on 28 November 2013 and must reinstate the Second and Third Applicants, as trainees in terms of the said agreements, and reinstate them into the training program in which Second and Third Applicants participated prior to termination of the training agreements on 22 May 2014;*
5. *Respondent to pay the Applicants' cost on an attorney and client scale."*

The applicants have accordingly proven that the court order exists, the content thereof and that the first respondent is aware of the court order.

[4] The first respondent has filed an application for rescission of the judgment of Vorster AJ. In view of this rescission application the respondents submitted that they are not in contempt of court as the rescission application suspended the order of Vorster AJ.

[5] The applicants submitted in the founding affidavit that as the training agreements are valid from 1 December 2013 to 31 May 2015 non-compliance with the order will render the training an impossibility within the limited time frame. This reflects on the respondents' *bona fides* and the respondents are wilful and *mala fide.*

[6] The only issue thus is whether the respondents are in contempt of court. Much was made in argument as to whether the respondents are entitled to ignore the court order of Vorster AJ because of the rescission application. On behalf of the applicants it was argued that in terms of Rule 49(11) the rescission application does not automatically suspend the court order. On the other hand, it was argued on behalf of the respondents that the rescission application in terms of Rule 49(11) is automatically suspended pending the outcome of the rescission application. The applicant relied heavily on the matter of ***United Reflective Converters (Pty) Ltd v Levine*** **1988 (4) SA 460 (W)** whereas the respondent relied heavily on the matters of ***Peniel Development (Pty) Ltd and Another v Isak Smolly Pietersen and 5 Others*** case number 34819/2013, an unreported matter of my brother Vally J. The respondents also relied on the reported matter of ***Khoza and Others v Body Corporate of Ella Court*** **2014 (2) SA 112 (GSJ).**

[7] The short answer to whether the respondents are in contempt of the court order is no. The reason is simply that when respondents apply for the rescission of a judgment it can never be found that they were wilfully in contempt of the court order. This is pronounced in ***Fakie NO CCII Systems (Pty) Ltd*** **2006 (4) SA 326 (SCA)** as follows on p333 specifically paragraphs [9] and [10]:

"[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).

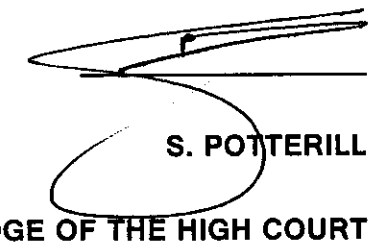
[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show 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."

[8] There is no averment in the founding affidavit nor can I make such a finding on the papers that the filing of the rescission application is *mala fide* or for the purposes of delaying tactics. This is substantiated by the common cause fact that the first respondent intended to oppose the urgent application and in fact had an opposing affidavit prepared. The reliance on the filing of the rescission application as a suspension of the order of Vorster AJ is supported by the ***Peniel*** and ***Khoza*** matters ***supra***. No court can on these facts find the honest belief of the first respondent that non-compliance is justified or proper is compatible with the intent required for contempt of court.

[9] I accordingly do not find it necessary to make a finding on whether an application for rescission automatically in terms of Rule 49(11) suspends a court order or not. As there was much debate I will however *obiter* remark that I agree with my brother Vally J in the ***Peniel*** matter and his reasoning set out therein.

[10] I accordingly make the following order:

The application of the applicants is dismissed with costs.



S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 44390/2014

HEARD ON: 24 June 2014

FOR THE APPLICANTS: ADV. G.L VAN DER WESTHUIZEN

INSTRUCTED BY: Savage Jooste & Adams Inc

FOR THE RESPONDENTS: ADV. K. TSATSAWANE

INSTRUCTED BY: Gildenhuys Malatji Attorneys

DATE OF JUDGMENT: 27 June 2014