IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 38024/2010

Date: 9/6/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

.....9/6/2016..... .....
DATE SIGNATURE

In the matter between:

SABLE HILLS HOME OWNERS' ASSOCIATION (AN ASSOCIATION INCORPORATED UNDER SECTION 21)

APPLICANT

And

ANDRIES JACOBUS VENTER

FIRST RESPONDENT

SABLE HILLS WATERFRONT ESTATE CC

SECOND RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This is an application for the imprisonment of the first respondent due to the second respondent's continued contempt of the court order, which was issued under this case number on 20 March 2014 by Thlapi J. The first respondent is the managing member of the second respondent. The court order was issued making a settlement agreement an order of court.

(2) The part of the order the applicant relies on in the present application is:

> *"8. An order that Defendant is to secure the release of the properties identified in clause 1.1 of the said agreement from the operation of any of the mortgage bonds within 8 (eight) months of date hereof."*

(3) The agreement mentioned in the order lists the relevant erven the second respondent had to release from the operation of any mortgage bond as follows:

> *"From date of signature hereof the Developer grants the Home Owners Association (for the benefit of its members) a usufruct for an indefinite period over Erven ..3, ..5, ..6, ..1, ..2, .93 and .95. (The properties)"*

(4) It is common cause and conceded by the respondents that the order came to the knowledge of the first and second respondents and that the second respondent has failed to comply with the terms of the order in respect of erven ..1 and .93. The first respondent was not a party to the previous application, but as managing director is responsible for the actions of the second respondent.

(5) The first respondent alleges that he had consulted with attorney Boshoff concerning the court order and the obligations that the second respondent has in terms thereof. The first respondent's argument is that he was not involved in the arbitration proceedings in his personal capacity and therefor the court order does not bind him.

(6) The first respondent explained the reasons for the second respondent's inability to secure the release of erven ..2 and .93, as the second respondent, according to the respondents, was unable to procure alternative security to satisfy the bond holder and due to financial constraints the properties could not yet have been released.

(7) The argument by the applicant is that the second respondent agreed to the 8 months period in the award, which was made an order of court, and that 18 months later these two properties are still not released, hence the present application.

(8) The applicant's attorneys wrote a letter to the second respondent's attorneys on 22 May 2015 and a further letter on 29 May 2015, and again on 4 June 2015, alerting the respondents that the second respondent has not complied with the terms of the reward and thus the court order. The second respondent failed to reply to any of those letters.

(9) The respondents dispute that nothing was done after the letters were received, as there was, according to the respondents, extensive interaction by Mr Boshoff, the attorney on behalf of the respondents and the applicant's attorneys to try and settle the matter. The respondents aver that Dr Fourie the deponent to the founding affidavit, was present during a number of these discussions and negotiations, which he failed to mention in his founding affidavit. This fact is admitted by the applicant, although it is contended that the first respondent did not disclose on which date these meetings and negotiations with Mr Boshoff had taken place, without supplying a date and indicating the relevance of when these meetings and negotiations took place.

(10) The further problem, according to the respondents, to release these two erven is that there is a *caveat* registered in respect of the essential services obligations at the request of the City of Tshwane Municipality

which specifically sets out in a letter to the Registrar of Deeds on 6 May 2015:

> *"We also request that a caveat must be placed on the transfer of any of the erven in the township to third parties as well as the issuing of Certificates of Registrar of Title to the developer.*
>
> *This caveat may only be lifted once a CoT has confirmed in writing that the developer has complied with paragraph 1 of the Court Order as attached as Annexure B."*

(11) The main reason for not complying with the award which had been made an order of court, according to the respondents, was that the second respondent could not raise the finance to uplift the bond on erven ..2 and .93.

THE LEGAL POSITION:

(12) In **Fakie NO v CCII Systems (Pty) Ltd**[1] the Supreme Court of Appeal confirmed that it is a crime to unlawfully and intentionally disobey a court order. The non-complier must *"deliberately and mala fide"* disobey the court order. The test is whether the non-complier had acted unreasonably in the circumstances. The onus in a contempt of court application is on the applicant to prove the elements of contempt beyond a reasonable doubt.

[1] 2006(4) SA 326 (SCA) at paragraph 6

(13) It was also established in **Fakie's case**[2] that the respondents in the present case only have to prove a reasonable doubt on a balance of probabilities to avoid conviction.

(14) The reason for granting such orders was set out by Cameron JA at paragraph 8:

> *"…And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law."*

The applicant has to prove that the respondents were both wilful and *mala fide* in their non-compliance with the court order. The applicant has to show deliberate and intentional violation of the court order.

(15) It was once more reiterated in paragraph 63 of **Fakie's case**[3] in respect to dispute of facts on the papers:

> *"…The accepted approach requires that, subject to 'robust' elimination of denials and 'fictitious' disputes, the Court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny…"*

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[2] *Supra*
[3] *Supra*

I will deal with this application according to these principles.

(16) In **Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan Municipality and Another**[4] the court held:

> *"That obliged it to make serious good-faith endeavours to comply with it...* ***If it experienced difficulty in doing so then it should have returned to court seeking a relaxation of its terms****. If there were a dispute between them and the appellants regarding the scope of the order and what needed to be done to comply with it, it was not appropriate for the municipality to wait until the appellants came to court complaining of non-compliance in contempt proceedings.* ***It should have taken the initiative and sought clarification from the court. Its failure over a protracted period to take these steps is to be deprecated.****"* (Court emphasis)

These are the actions expected from respondents in matters such as these.

(17) The principle set out in the **Fakie case**[5] was once more confirmed that once the applicant had proved the order, service and non-compliance, as was done in the present matter, the respondent bears the evidential

[4] 2015(2) SA 413 (SCA) at paragraph 8
[5] *Supra*

burden in relation to wilfulness and *mala fides*. It is common cause that the applicant had proved that both respondents were aware of the order and its contents and that the respondent did not comply with the order as set out above.

(18) This court has to consider whether the first and second respondents were wilful and *mala fide* when not complying with the court order. The applicant argues that the respondents' argument and refusal to comply with the terms of the court order is unreasonable and far-fetched.

(19) The applicant further argues that the reason provided for the respondents as regards to the usufruct should not be entertained by the court. The Registrar of Deeds set out in a letter dated 2 September 2015 to the respondents the way forward as:

> *"1. The provisions of section 66 of the deeds act 47/37, stating that no personal servitude of usufruct usus or habitation purporting to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.*
>
> *2. A home owners association is a juristic person and the usufruct can be registered for a period of 100 years or*

until the home owners association does not exist anymore.

3. *The draft notarial deeds as it is cannot be registered for an unlimited period (indefinite) over the mentioned properties; our suggestion would be to change the wording of the period from unlimited to 99 years, for the notarial deed to be registered."*

(20) It is clear that the respondents' remedy is to approach the court and to seek an order in terms of which the question of the usufruct is dealt with. The respondents should request the court to deal with the fact that the respondents cannot perform in terms of the court order due to financial constraints and request relaxation of the relevant clause of the award as set out in the **Meadow Glen case**[6].

(21) No reason is afforded to the court why the respondents did not follow this course of action.

(22) It is so that the second respondent should have approached the court in an application to deal with the financial constraints it was experiencing and to seek an indulgence. It is evident that the respondents interacted with the Registrar of Deeds to try and solve the problem of registration, and did refrain from trying to solve the

[6] *Supra*

problem. However, I cannot find under the circumstances where the respondents instructed an attorney to deal with the applicant's attorney and to endeavour to solve the impasse, that the respondents were wilful and *mala fide*.

(23) I have considered all the arguments, affidavits and facts placed before the court. I find that the respondents did not comply with the court order, but cannot find that it was wilful and *mala fides* for the reasons set out above.

(24) I therefor make the following order:

1. The application is dismissed;
2. The applicant to pay the costs.

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Judge C Pretorius

Case number	: 38024/2010
Matter heard on	: 26 May 2016
For the Applicant	: Adv BC Stoop SC
Instructed by	: Coetzer & Partners
For the Respondent	: Adv WJ Vermeulen SC
Instructed by	: Van Zyl Le Roux Inc
Date of Judgment	: 9 June 2016