


**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 18813/2021**

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
<u>02/11/2021</u>	
DATE	SIGNATURE

In the matter between: -

**TSELA ROAD MAINTENANCE (PTY) LTD**

Applicant

and

**NZK FOOTPRINT CC**

First Respondent

**KENNY MAKHUDU**

Second Respondent

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**JUDGMENT**

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**MBONGWE J**

## INTRODUCTION

- [1] This is an application for the respondents to be held in contempt of a court order restraining them from proceeding with the road maintenance and resurfacing work for which the first respondent, represented by the second respondent, had sub-contracted the applicant to perform. In terms of the relevant contract, the respondent was to invoice and request payment from the first respondent for work done at various stages.
- [2] During February 2021 the respondents failed to payment the applicant an amount of R6 852 315.62 for work the applicant had allegedly performed and had invoiced the First Respondent for. This led to the applicant withholding its services until the amount was paid. While withholding its services, the applicant had not removed its equipment and material from the site, but had warned the respondents not to proceed with the work assigned to it nor to engage the services of anyone else to do so and to use the equipment and material it had left on site.
- [3] Despite the failure to pay the applicant, the respondent commenced tarring the road on 10 April 2021. This resulted in the applicant approaching the court on urgent basis in terms of rule 12(6) of the Rules of the Court seeking interdictory relief against the respondents. The relevant application was heard on the 4<sup>th</sup> May 2021 and both parties were duly represented. The proceedings culminating in the Court granting the following orders: -
- (a) That the First Respondent is interdicted from appointing an alternative subcontractor for purposes of executing the applicant's subcontract with the First Respondent dated 6 March 2021 in respect of the tarring of the R511 Road to wit section 3 from D2720 to Beestekraal or completing the Applicant's obligations in terms of the said subcontract himself;

- (b) That the First Respondent be interdicted from placing on the site of the R511 an alternative subcontractor for purposes of performing the Applicant's obligations I terms of the contract;
- (c) That the First Respondent be interdicted from utilising the material (480 tons of stone and equipment belonging to the Applicant or permitting any other party from utilising same.
- (d) That the First Respondent be interdicted from using the stone on site belonging to the Applicant.

[4] After hearing the matter the Court had found that;

- 4(a) That the Applicant had not abandoned the work;
- 4(b) That the applicant had retained possession of the work by virtue of its equipment and material remaining on site, and
- 4(c) That the material belonged to the applicant and that the Respondents could not use the material.

The effect of these findings was that the relief granted was of a final nature.

[5] On the 5 May 2021 the First Respondent's attorneys wrote a letter to the Applicant's attorneys, inter alia, accusing the applicant of acting in breach of the contract by not proceeding with the work it was subcontracted for and having earlier on inflated its invoice resulting in an undue overpayment.

[6] In the same letter the Applicant was given seven days to resume work or the contract will be cancelled. In the event that the contract is cancelled, the applicant was to remove its equipment and material from the site. With regard



to the material, the respondent advised that unless removed, a surveyor will be engaged to quantify the value of the material and the applicant will be reimbursed.

- [7] In response, the Applicant denied that the First Respondent was entitled to cancel the contract and further advised that it would resume work upon payment of the amount due and that its equipment and material will remain on site. In the relevant letter, the Applicant's attorneys wrote to the respondent's attorneys stating, in part, as follows;

*"We reiterate that the interdict against your client is final in nature and until that interdict is discharged in some fashion, the position is that your client will be precluded in law from taking any of the actions prohibited. Should your client wish to change the status quo it is incumbent upon your client to take appropriate steps to have the interdict discharged in law."*

## **APPLICATION FOR LEAVE TO APPEAL**

- [8] The respondent subsequently brought an application for leave to appeal against the judgment and orders of the 4 May 2021, albeit out of time in terms of the rules and absent an application for condonation of the late filing of the application for leave to appeal. This resulted in the application for leave to appeal being dismissed.
- [9] On the 12 May 2021 the respondents' attorney sent a letter to the applicant's attorney conveying the respondent's cancellation of the contract. At that stage the respondents had allegedly commenced tarring the road the applicant had been contracted for. No proof of this allegation was furnished by the applicant. The only cogent proof that the respondents were indeed continuing to tar the road are photographs Mr Dekker, the sole director of the applicant, alleges to

have taken when he visited the site on the 12 May 2021, the date the letter terminating the contract was dispatched, to verify if the respondents were indeed in the process of tarring the road. The applicant has attached photographs of the site showing that the respondents were indeed proceeding with the tarring of the road. This gave rise to the present hearing of the contempt proceedings.

## **THE APPLICANT'S CASE AND RELIEF SOUGHT**

[10] In a nutshell, the applicant relies on the judgment and interdict of the 4 May 2021 in seeking that the respondents be held to be in contempt of the court orders. It is not in dispute that the respondents did commence and were continuing with the tarring work. The applicant seeks orders, in the present application, that the respondents be found guilty of contempt of the court orders. The applicant further prayed that a fine in the amount of R500 000.00 and a term of imprisonment for 90 days be imposed on the first and second respondents, respectively.

## **RESPONDENT'S ANSWERING AFFIDAVIT**

[11] The respondents deny that they acted in contempt of the court order stating that the contract had been terminated subsequent to the applicant's failure to resume work within the seven days the applicant had been given. In this regard the respondent states the following at para 14 of the answering affidavit:

*"Let me pause to say that the interdict didn't stop the First Respondent from enforcing contractual obligations on the Applicant, failure of which resulted in the sub-contractor agreement being terminated, which then automatically means there is a change in circumstances since the granting of the interdict. It is my submission that the actions of the First and Second Respondents are not contemptuous, as the First Respondent terminated the subcontract."*

[12] The respondent alleges that it had continued to work on the site after the granting of the interdict, but had carried out work other than that it was interdicted from performing. The respondent avers that it commenced tarring the road subsequent to the expiry of the seven days period within which it had demanded that the applicant to resumes its work in terms of the contract.

[13] It is common cause that the respondents have, subsequent to the granting of the interdict, sought to bring an application for leave to appeal against the decision and orders of Neukircher J. However, the application was brought out of time and was dismissed due to the absence of application for the condonation of the late filling of the application for leave to appeal.

#### **ISSUES FOR DETERMINATION**

[14] It is apparent from the arguments presented by the parties that this Court is called upon to determine.

14.1 Whether the respondents commencement and continuation with the tarring of the road constitutes contempt of the court interdict against them;

14.2 What implications and effects, if any, the cancellation of the contract by the first respondent subsequent to the granting of the interdict has.

#### **THE LAW**

[15] It is trite that an order of the court stands until set aside by a competent court. This principle was aptly enunciated in *BEZUIDENHOUT v PATENSIE SITRUS BEHEREND Bpk* 2001 (2) SA (E) as follows:

*"A court order stands and must be strictly obeyed until set aside by a higher court...."*



It is not in dispute that the interdict against the respondents has not been set aside. The respondent's version that the work they did on the road after the granting of the interdict excluded the work they were prohibited from performing. This has not been disputed by the applicant. Even if it was, the Plascon Evans principle will weigh in favour of the respondents' version. The only uncontested evidence before me is that the respondents were in the process of tarring the road on the 12 May 2021 when the applicant went to the site. Contempt of the court orders does not therefore arise.

[16] I pause to state that the applicant's attorneys had prior to the 12 May 2021 the applicant had advised its attorneys that the respondents were continuing with the work on the site, This resulted in the respondents' attorneys addressing a letter to the respondents' attorneys demanding that the respondents ceased working on the site in light of the interdict against them. The version of the respondents is as stated in the preceding paragraph, namely, that they performed work other than that they were interdicted from performing. It is curious that the applicant, despite the advice to its attorneys, did not visit the site to verify what work the respondents were performing on site as it did and took photographs on the 12 May 2021.

[17] The turn of events from the 12 May 2021 when cancellation of the contract and the undisputed verification by the applicant that the respondents were tarring the road is in the heart of these proceedings. The apt question to be answered is whether the respondents, by their actions, were in contempt of the orders against them.

## **ANALYSIS AND FINDINGS**

- [18] It is important to note that the 12 May 2021 marked the 8<sup>th</sup> day since the demand for the applicant to resume work was made on 5 May 2021 (both first and the last day included, or the seventh day if the first day the demand was made is excluded). Either way, the applicant did not yield to the demand, ostensibly maintaining its stance that it will resume work once it has been paid.
- [19] Of importance at this stage is the status of the interdict on which the applicant relies in the present proceedings.
- [20] There can be no doubt that the interdict had still not been set aside as at the 12 May 2021. However, the contract to which it applied had, in my view and finding, been validly terminated.
- [21] There was clearly a dispute between the parties regarding the amount the applicant alleges was owed to it by the first respondent. A dispute of that nature cannot be resolved on motion proceedings. It was therefore incumbent on the applicant to resume work as demanded and institute action proceedings to recover what it believed was owed to it. Mere reliance on the interdict was, in my view ill advised. contract, despite the interdict. Surely the interdict did not prohibit cancellation of the contract. Where the requirements for cancellation have been met, as is the case in this matter, nothing in law prevented the first respondent from demanding that the respondent performs in terms of the contract, failing which to face cancellation thereof.
- [22] A lawful cancellation of the contract in this discharged the applicability of the interdict and allowed the respondents to continue with the work of tarring the road. There has to be a live or extant subject, contract in this instance, to which the interdict applies for the interdict to remain extant and effective. The interdict ceases to exist as soon as the subject to which it applies no longer exists.



## **CONCLUSION**

[23] In the light of the above finding, I conclude that by commencing to tar the road after the contract with the applicant had been validly terminated, the respondent were not acting in contempt of the order in respect of which the interdict applied.

## **URGENCY**

[24] While I agree with counsel for the applicant that a contempt of a court order is regarded as urgent or entitles the aggrieved party to seek urge relief, the absence of the alleged contempt of court in this matter did not justify the launching of this application of urgent basis.

## **COSTS**

[25] There is no reason why the general principle that costs follow the outcome of a case should not find application in this case.

## **ORDER**

[26] Following the conclusion in this case the following order is made.

1. The application is not Urgent.
2. The application for the respondents to be held in contempt of the court orders of the 4<sup>th</sup> May 2021 is dismissed.
3. The applicant is ordered to pay the costs of the application on an opposed party and party scale.



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**M. MBONGWE J**

**JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA.**

**PARTIES' REPRESENTATIVES**

For the Applicant: Adv J. Moller

Instructed by: Van Rensburg Attorneys

For the Respondents: Adv S. Nkuna

Instructed by: MI Khumalo Attorneys

DATE OF HEARING: 06 July 2021

**JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES ON 2  
NOVEMBER 2021.**