THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case **No:8526/2019**
21464/2018

Before the Hon. Ms Justice Slingers
Hearing: **15 and 17 June 2020**
Judgment Delivered: **1 July 2020 {electronically)**

In the matter between:

TREVOR NORMAN FOSTER Applicant / Plaintiff

and

CLEM PATRICK KIRST Respondent/ Defendant

JUDGMENT

SLINGERS J

INTRODUCTION

[1] Although the applicant and the respondent are neighbours, their relationship cannot be described as neighbourly. On the contrary, it would be more appropriate to describe their relationship as hostile and acrimonious. As a result hereof, the

applicant resorted to litigation and on 4 February 2019 he obtained a court order finally interdicting the respondent from causing a *"noise nuisance and/or noise disturbance"* **("the court order").**

[2] Following the granting of the court order, the applicant instituted contempt of court proceedings against the respondent for breaching the terms thereof and the respondent instituted a counter-application to rescind the court order.

[3] For the sake of convenience, in this judgment I refer to the plaintiff, Trevor Norman Foster as the applicant and to Clem Patrick Kirst, the defendant as the respondent.

[4] I deal firstly with the counter-application to rescind the court order.

THE RESCISSION APPLICATION

[5] The rescission application is brought in accordance with the provisions of Rule 42(1)(a), alternatively in terms of Rule 31(2)(b) and the common law.

RULE 42(1)(a)

[6] Rule 42(1)(a) reads as follows:

> *'The court may, in addition to any powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
> *(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby.'*

[7] The respondent resorted to bringing the rescission application in terms of Rule 42(1)(a) as he allegedly did not receive the summons instituting the nuisance action against him nor was he afforded a sufficient opportunity to deal with the default judgment application. This, he alleges constituted a fundamental and material procedural flaw in the granting of the final interdict.[1]

[8] It is common cause that after the respondent received notice on 31 January

[1] Paragraph 17 of the respondent's combined affidavit, page 107 of the record

2019 of the default judgment application, which was to be heard on 4 February 2019, his legal representative directed a request to the applicant's legal representatives for a postponement. The postponement was requested to afford the respondent an opportunity to consult and take legal advice. However, this request was refused but when the default judgment application was called on 4 February 2019 there was no appearance for the respondent. Furthermore, no notice of opposition to the default judgment application was served and/or filed. No reasons and/or explanations for these omissions are furnished in the rescission application and during the hearing of the application, advocate Cutler for the respondent, was unable to furnish any explanation therefor. In the circumstances, the papers do not furnish a proper explanation for the respondent's default.

[9] As the respondent received the default judgment application which informed him that:

> *'BE PLEASED TO TAKE NOTICE that the plaintiff intends to make application ...on Monday, 4 February 2019, or so soon thereafter as Counsel for the Plaintiff may be heard for Default Judgment against the Defendant on the following terms:*
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> *1. The Defendant is finally interdicted from causing* a *"noise nuisance and/or disturbance" by shouting or raising his voice, including but not limited to uttering any profanity, near or on the premises known as […] Avenue, Camps Bay such that the Defendant's utterances can be heard by the Plaintiff, guest or other occupant whilst the Plaintiff, guest or other occupant is on the premises known as […] Road, Camps Bay, Western Cape;*
>
> *2.* ..
>
> *3.*

he was adequately informed of the relief that may be granted in his absence. Furthermore, in the absence of an explanation for the failure to attend at court on 4 February 2019 as well as the failure to file and/or serve a notice of opposition, it may be said that the respondent failed to take the necessary steps to protect his interests.[2] In the circumstances, the applicant was procedurally entitled to the granting of the final interdict.

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[2] Freedom Stationery (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA)

[10] Judgments granted against a party as a result of that party not defending the action, notwithstanding its intention to do so, does not constitute an erroneously granted judgment.[3] Further, as the applicant was procedurally entitled to the granting of the court order it cannot be said that it was granted erroneously in the absence of the respondent[4] and the respondent's reliance on Rule 42(1)(a) is misplaced and without any merit.

RULE 32(1)(b)

[11] Rule 32(1)(b) reads as follows:

'A defendant may within 20 days after acquiring knowledge of such judgment apply to court upon notice to the plaintiff to set aside such judgment and the court may, upon good cause shown, set aside the default judgment on such terms as it deems fit.'

[12] The respondent learnt of the court order on 6 February 2019[5] and brought the rescission application on or about 13 September 2019. Where the application is brought outside the 20 day period, the applicant may, on good cause, seek condonation for the late bringing thereof. In the present matter no condonation is sought for the late bringing of the application and the non-compliance with the prescribed 20 day period. Consequently, the rescission application is not properly before court in terms of Uniform Rule 31(2)(b).

[13] In the circumstances, the respondent's reliance on Rule 32(1)(b) in bringing the rescission application is also misplaced.

THE COMMON LAW

[14] The respondent may also avail himself to the common law to rescind the court order. To succeed with rescission in terms of the common law the respondent must show good cause by:

(a) giving a reasonable explanation for the default;

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[3] Lodhi 2 Properlies Investments CC and Another v Bandex Investments (Ply) LTD 2007 (6) SA 87 (SCA)

[4] Freedom Stationery (Pty) Ltd and Others v Hassam and Others 2019 (4) SA 459 (SCA)

(b) showing that the application is *bona fide;* and

(c) establishing a *bona fide* defence which has some prospect of success.[6]

[15] As set out above, the respondent has failed to establish a reasonable explanation for his default.

[16] In terms of the common law a rescission application must be brought within a reasonable time-period[7], and the circumstances of each case would dictate what would constitute a reasonable time period within which to bring the application. However, as stated in *Nkata v Firstrand Bank Ltd & Others* 2014 (2) SA 412 (WCC), the 20 day time period prescribed in Rule 31(2)(b) provides some guidance as a starting point as to what would constitute a reasonable time period.

[17] In dealing with the delay in bringing the rescission application the respondent states that he consulted with his attorney after receiving the contempt of court application and with counsel on 22 May 2019. However, at that stage they were not in a position to effectively answer the allegations contained in the founding affidavit in the contempt application.[8] He then proceeds to set out the steps taken to enable him to do so. Whilst this explanation may explain the delay in furnishing a response to the founding affidavit in the contempt application, it fails to explain why the rescission application was not brought sooner.

[18] I turn now to consider whether or not the application is *bona fide.* The respondent took no steps to rescind the final interdict nor did he consult a legal representative about the final interdict until he received the contempt of court application. He unequivocally states that:

(i). 'I have at all times since receiving the final interdict order tried my best to comply with it';

(ii). 'I didn't think the existence of the final interdict would be a *problem';*

(iii). 'I thought I could simply comply with it'; and

(iv). 'The problem which has *now arisen* is *the fact that the Plaintiff* is *of the*

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[5] Paragraph 11 of the combined affidavit, page 105 of the record
[6] Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA (1) SCA
[7] Nkata v Firstrand Bank Ltd & Others 2014 (2) SA 412 (WCC)

view that I am *in breach of the final interdict order.'*

[19] Based on the above excerpts it is questionable whether or not the respondent would have instituted the rescission application had he not been faced with the contempt application. It is common cause that the rescission application was brought as a counter-application to the contempt application and not because the respondent took issue with the court order being granted against him. This brings into question the *bona tides* of the application.

BONA FIDE **DEFENCES**

[20] The respondent alleges that the summons giving rise to the default judgment is excipiable in that it fails to allege that his conduct is unreasonable. However, the particulars of claim pleads that '... *the Defendant's conduct referred to above constitutes a nuisance and* is *actionable by the Plaintiff ("the nuisance').* In his combined affidavit, the respondent states that a *'nuisance* is *only actionable in the event that my* use *of my property* is *in the circumstances unreasonable.'*

[21] The unreasonableness of the respondent's conduct is contained in the allegation that his conduct is actionable. The manner in which the nuisance is pleaded allows the respondent to fully answer thereto and therefore, cannot be said to be vague and embarrassing or lacking the averments to sustain the cause of action.

[22] In the circumstances, the particulars of claim is not excipiable and there is no merit in this defence.

[23] The respondent states that his conduct has never been unreasonable nor that it constitutes a noise nuisance. He goes on to state that the term *'noise nuisance'* is set out in the Western Cape Noise Control Regulations 2013 and that it is defined as a noise, excluding the unamplified human voice, which exceeds the rating level of 7dBA or exceeds the residual level where the residual level is higher

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[8] Paragraph 25 of the combined affidavit, page 110 of the record

than the rating level. Furthermore, the respondent argues that the applicant has put up no noise measurements and has failed to make the necessary averments or to provide the necessary evidence to bring the respondent within the definition of the Noise Control Regulations. However, this argument fails to consider that the applicant's claim is not based on a contravention of the Western Cape Noise Control Regulations, 2013 but on the common law of nuisance. The respondent's reliance on the applicant's failure to provide evidence to bring his conduct within the definition of the Noise Control Regulations is also misplaced.

[24] Having regard to the respondent's failure to explain his default, the absence of *bona fide* defences, the failure to satisfactorily explain the delay in bringing the rescission application together with the questionable *bona tides* thereof, I find that the respondent has failed to establish the good cause necessary to succeed with the rescission application in terms of the common law.

THE CONTEMPT APPLICATION

[25] I turn now to the contempt application.

[26] The court order which forms the subject matter of the contempt application reads as:

'Having read the papers and having heard Counsel for the Plaintiff, the Court orders as follows:

1. *The Defendant is finally interdicted from causing a "noise nuisance and/or disturbance" by shouting or raising his voice, including but not limited to uttering any profanity, near or on the premises known as 2 Theresa Avenue, Camps Bay such that the Defendant's utterances can be heard by the Plaintiff, guest or other occupant whilst the Plaintiff, guest or other occupant is on the premises known as Camps Bay Villa situated at 48 Franco/in Road, Camps Bay, Western Cape;*
2. *Costs of suit.'*

[27] In order to succeed with the contempt application, the applicant must prove (i)the existence and service or notice of the final interdict and (ii)non-compliance with the terms thereof. Thereafter, the respondent bears an evidentiary burden to show

that the non-compliance was not wilful nor ma/a *fide.*[9]

[28] It is common cause that the court order was served on the respondent on 6 February 2019. Thus, the existence and service or notice component of establishing the contempt is established.

[29] Before it can be determined whether or not the applicant established non-compliance with the terms of the court order, the exact conduct that was prohibited must be identified. The same rules applicable to interpreting the construction of documents are applicable to the interpretation of court orders. In terms hereof, the court's intention has to be ascertained primarily from the language of the order read as whole. If on reading of the order, the meaning is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the granting thereof may be investigated and regard may be had thereto in order to clarify it.[10]

[30] Upon a reading of the order it is clear and unambiguous that the conduct that is being prohibited is the creation of a *noise nuisance and/or disturbance.* This much is clear from the sentence -*'The Defendant is finally interdicted from causing a "noise nuisance and/or disturbance".* The shouting or raising of the voice and/or the use of profanity is simply the means by which the noise nuisance/ disturbance is created.

[31] During the hearing of the matter the question was posed to advocate Gassner, for the applicant, whether or not the court only had to find that the respondent had shouted or raised his voice or whether or not the court had to find that the respondent had caused a noise nuisance and/or disturbance. Advocate Gassner submitted that it would be sufficient for the court to find that the respondent had shouted or raised his voice. It was put to the applicant that on this reasoning if the respondent shouted a warning of *"fire"* he would have contravened the terms of

[9] Mathabang Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited [2017] ZACC 35
[10] Administrator, Cape, And Another v Ntshwaqela And Others 1990 (1) SA 705 (A); Etan Boulevard

the final interdict. In response hereto, it was submitted that the element of *wilfulness* would ensure that the respondent was not incorrectly found guilty of contempt. However, this argument conflates the different elements required to establish contempt and ignores the fact that the applicant must first establish a contravention before the respondent is called upon to show that the contravention was not wilful nor ma/a *fide.* Furthermore, this argument presupposes that the conduct amounted to a breach of the final interdict without establishing same. This approach would absolve the applicant from discharging its onus necessary to establish contempt.

[32] Had the respondent been prohibited from merely shouting and/or raising his voice, the order would have read differently and quite possibly as the defendant is finally interdicted from shouting or raising his voice, including but not limited to uttering any profanity, near or on the premises known as […] Avenue, Camps Bay such that the Defendant's utterances can be heard by the Plaintiff, guest or other occupant whilst the Plaintiff, guest or other occupant is on the premises known as […] Road, Camps Bay, Western Cape;

[33] Therefore, to establish the respondent's contempt, the applicant must show that he created a noise nuisance and/or disturbance.

[34] Nuisance is conduct which is defined as *'conduct whereby* a *neighbour's health, well-being or comfort in the occupation [and use] of his or her land is interfered with* ...as *well* as *the causing of actual damage to the neighbour.*[11] Private nuisance has been described as *'an act or omission or state of affairs that impedes, offends, endangers or inconveniences another in the ordinary comfortable use or enjoyment of land or premises.'*[12]

[35] Therefore, to establish a contravention of the order, the applicant must show that the respondent's shouting and/or use of profanity negatively affected his well-being or comfort in the use of his property and/or that it negatively impacted his ordinary use and enjoyment of his property.

(Ply) Ltd v Fnyn Investments (Pty) Ltd and Others 2019 (3) SA 441 (SCA)

[11] PJ Badenhorst, JM Pienaar & H Mostert Silberg & Schoeman's The law of property 5 ed (2006) 111

[12] J Church & J Church 'Nuisance in WA Joubert, JA Faris & LTC Harms (eds) The law of South

[36] Although the founding and supplementary founding affidavits set out numerous incidents of the respondent shouting and/or speaking loudly and/or using profanity, it fails to set out how this conduct impeded the applicant's well-being and/or comfort and/or ordinary use and enjoyment of his property.

[37] In the circumstances, the applicant has not established that the respondent committed a noise nuisance and/or a noise disturbance and accordingly, failed to establish that the respondent breached the order thereby rendering him guilty of contempt.

CONCLUSION

[38] In the circumstances, I make the following orders:

(i). the application to rescind the order granted on 4 February under case number 21464/2018 is dismissed with costs; and

(ii). the application to hold the respondent in contempt under the order granted on 4 February under case number 21464/2018 is dismissed with costs.

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SLINGERS J

Africa vol 19 2ed (2006) para 163