

REPUBLIC OF SOUTH AFRICA



**IN THE GAUTENG HIGH COURT
(LOCAL DIVISION JOHANNESBURG)**

CASE NO: 09/21910

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

Date: _____ **Signature** _____

In the matter between

OLIPHANT, GIDEON JACOBUS

Applicant

And

JONCK, MAURITZ

Respondent

J U D G M E N T

MOSIKATSANA AJ

Introduction:

[1] This is an application for a civil committal order for non-compliance with a Court Order granted on 18 May 2010 in the above Honourable Court under the above case number directing the respondent to produce under oath, within seven days from the date of the said Order, certain documents detailed in the Order, reflecting the cost of repairs of a number of vehicles as well as other documents including bank statements.

[2] The applicant seeks an order for the committal of the Respondent for an unspecified period.

Common Cause

[3] It is common cause that pursuant to an oral agreement between the applicant and the respondent, they embarked on a joint business venture whereby they would purchase used vehicles and after repairing them, place them on the market for sale at a profit.

[4] In terms of the oral agreement reached between the parties, the applicant was to provide the seed capital for the joint business venture and the respondent was to assume responsibility for the management of the business and the keeping of financial and related records.

[5] As the business activity increased, a dispute arose with respect to the accounting for the finances of the joint venture and the keeping of records. The dispute culminated in litigation, whereby the applicant issued notice of motion in the main application dated 26 May 2009, wherein he sought an order directing the respondent

to provide the applicant with full and proper statements of account of all transactions in respect of the agreement that existed between them.

[6] The applicant also sought an order that after debatement of the accounts, the respondent be ordered to make payment to the applicant of all amounts due to him, plus interest at the rate of 15,5% *per annum*.

[7] Before final determination of the main dispute, the applicant brought interlocutory proceedings in terms of Rule 35(11) of the Uniform Rules of Court for the delivery of specified documents in the power and control of the respondent relating to the issues in the main application.

[8] The respondent issued notice of intention to oppose the Rule 35(11) application but he did not file a reply. The matter was set down for hearing on 18 May 2010. Subsequent to the matter being heard in the absence of the respondent a default order directing the respondent to produce under oath and within seven days of the order certain specified documents was issued by this Honourable Court on 18 May 2010.

[9] Two days after the default order was issued, the applicant received notice that the respondent's attorneys of record, then Claassen Coetzee Attorneys withdrew on the date of the hearing of the Rule 35(11) application.

[10] It is also not in dispute that the respondent did not comply with the Rule 35 order of the above Honourable Court. It is as a result of the respondent's failure to comply with the Rule 35 Court Order issued 18 May 2010 that the present application for a civil committal order for contempt of court is before me.

Disputed Facts

Applicant's contention

[11] The applicant contends that the respondent is in wilful non-compliance with the default Order granted on 18 May 2010 for the following reasons:

[11.1] It is alleged that the Notice of set Down was properly served on the respondent's attorneys on 18 April 2010, a month prior to the hearing, and that the respondent's attorneys provided the applicant's attorneys with a notice of withdrawal signed on the date of the hearing two days after the hearing. No explanation was given for the withdrawal by the respondent's attorneys.

[11.2] After having served a notice of intention to oppose the Rule 35 application, the respondent did not file an answering affidavit, nor did he take steps to timeously appoint another attorney. He also did not enquire about the outcome of the application on 18 May 2010.

[11.3] After becoming aware of the existence of the default order either on 6 March 2012 or 12 October 2012 as alleged by the respondent, he did not take measures to have the order rescinded.

[12] The applicant contends that the only inference that can be drawn from the above facts is that the applicant's non-compliance is wilful.

Respondent's Contention

[13] Respondent contends that the applicant is not entitled to the relief sought for the following reasons:

[13.1] The applicant's pleading is defective in that it does not specify a period for committal being sought and that presumably the committal may be for an indefinite period tantamount to 'life imprisonment', which is unconstitutional.

[13.2] It is contended that the applicant's failure to specify the relief sought and to provide for alternative relief is fatal to the application as the application effectively seeks 'life imprisonment.'

[13.3] It is contended that the applicant only enforced the order two years after it was granted and that at best for the applicant, it is assumed that the respondent had knowledge or received the order, prior to service of the Rule 35 application.

[13.4] Based on the content of the founding affidavit, it is alleged that the applicant has failed to prove its service of the default order on the respondent.

[14] It is contended that as the applicant failed to clearly formulate in the founding affidavit the relief sought and to prove service of the default order, the application must fail.

[15] The respondent accordingly seeks punitive costs against the applicant and his attorneys as they know the requirements set out in the Fakie judgement that it is essential to prove knowledge of the order and its content before an applicant may succeed with contempt of Court proceedings.

[16] With respect to wilful disobedience of the court order, it is contended that the respondent has been under the misapprehension that as he was not present and not represented at the hearing when the Rule 35 order was granted, he is not bound by the order.

[17] It is also contended that the respondent's belief that he had a defence of prescription on the merits, which allegedly was also a basis for non-compliance, does not reflect wilfulness on his part.

[18] Based on the respondent's misapprehension, it is contended that his disobedience of the Rule 35 order cannot be regarded as wilful or *mala fide*. And, that in the absence of a finding of wilfulness, the respondent cannot be held to be in contempt.

[19] It is further contended that it was impossible for the respondent to comply with that part of the Rule 35 order pertaining to invoicing because the applicant refused to provide his credit card bank statements that would reflect the relevant transactions, which would have enabled the respondent to obtain the invoices from the suppliers.

[20] It is finally contended that the respondent has no other documents at his disposal thus confirming impossibility of performance.

Issue for Determination

[21] This Court is required to determine from the facts, whether a proper case has been made for the granting of a civil committal order for contempt of court.

Applicable Law

[22] For a successful claim of committal for civil contempt, the applicant has to prove the following:

[22.1] The terms of the order;

[22.2] knowledge of the terms of the order by the respondent; and

[22.3] a failure by the respondent to comply with the terms of the order¹.

Upon proof of these requirements by the applicant beyond reasonable doubt the presence of wilfulness and bad faith on the part of the respondent may be inferred, but the respondent may rebut this inference by rebuttal evidence on a balance of probabilities.²

Whether a Proper Case has Been Made by the Applicant for the Granting of the Relief Sought

[23] As appears from paragraphs 10 and 11 of this judgment and the plaintiff's founding documents, the requirements for the granting of a committal order for contempt of court have been satisfied and the only inference to be drawn is that the non-compliance was in bad faith.

Whether Reasonable Doubt has Been Established by the Respondent

[24] The respondent's arguments in rebuttal are that:

[24.1] The respondent was under a misapprehension or ignorant of the fact that the terms of the Rule 35 order were binding on him because he was not present nor was he represented at the hearing of the Rule 35 application;

[24.2] in view of the fact that he believed that he had a defence of prescription on the merits, he believed that he was therefore not bound by the Rule 35 order; and further that

¹ *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) (SCA) at 344 .

² *Frankel Max Pollak Vinderine v Menell Jack Hyman Rosenberg* 1996 (3) SA 355 (A) at 367H-368A.

[24.3] It was impossible for him to comply with the order as the applicant did not provide him with his bank statements from which the respondent could glean some of the financial records.

[25] The respondent's rebuttal evidence or defences may for convenience be categorised as mistake of law and legal impossibility defences.

Mistake of Law

[26] Though in South African law ignorance of the law is a defence,³ the ignorance must be genuine or bona fide.

This principle has been eloquently articulated by Didcott J (as he then was) in *S v Waglines (Pty) Ltd and Another*⁴ where he stated:

'Ignorance of or a mistake about the law is indeed an excuse cognisable by our courts. The excuse does not always amount, however, to an acceptable one. That the ignorance or mistake must first be both genuine and material goes without saying. Less obviously, but in principle no less necessarily, it has to be reasonable in addition whenever *culpa* enters the reckoning, whenever that serves as *mens rea*. It cuts no ice otherwise, since the unlawful act which it explains is then committed through *culpa*. The question therefore posed by such a case is whether the person concerned should reasonably have realised that what he was doing or about to do might well be unlawful. And the answer depends largely on the care he took or did not take to acquaint himself with the true legal position. The duty to investigate this is clear, to speak generally at all events and not of any area where the law's reach is suspected so little that the possibility of trouble and the consequent need for caution would never occur to a prudent mind. *Strong demands are placed, by comparison, on all those engaged in trades, occupations or activities which are legally regulated and known by them to be. They are expected to learn the rules and obliged to make the effort.*

Sometimes, to be sure, the duty to investigate will be performed satisfactorily when advice on the lawfulness or otherwise of the course envisaged is obtained from a source ostensibly qualified to furnish such, and to think it lawful will be reasonable once the assurance has thus been given that it is.' [Emphasis mine].

³ See *S v De Blom* 1977 (3) SA 513(A)

⁴ 1986 (4) 1135 at 1145 paras H/I -1146 C/D

[27] Indeed the respondent's ignorance of the unlawfulness of his conduct was wilful and in bad faith in that having failed to attend the Rule 35 proceedings, he did not take the trouble to enquire about the outcome of the Rule 35 hearing as would be expected from someone engaged in a highly regulated and complex legal process as he was. He did not even seek legal counsel to guide him on an appropriate course of action.

[28] the respondent did not investigate the correctness or otherwise of his erroneously held view that the Rule 35 order was not binding on him because it was granted in his absence during Rule 35 proceedings at which he was not represented. This in my view reflects total disregard for the Rule 35 application process and wilful ignorance on the part of the respondent.

[29] Further, the respondent, after being duly and timeously informed of the pending Rule 35 proceedings against him, failed to inform the court of his counsel's most curious last minute withdrawal from the case.

[30] He also failed to obtain alternative counsel to represent him at the Rule 35 application proceedings. Such conduct on the part of the respondent can hardly be interpreted as genuine or in good faith.

Impossibility of Performance:

[30] In his invocation of the defence of impossibility, the respondent adduces evidence that it was impossible for him to comply with the Rule 35 order because he could not obtain certain bank records from the applicant that would have enabled him to pursue further paper trails.

[31] The defence of impossibility though readily available, will not avail where the impossibility is as a result of the respondent's fault.⁵ The respondent undertook in terms of the business agreement reached with the applicant, to manage the financial records of the joint enterprise. He in terms of the agreement became the repository of all the information relating to the financial records of the joint enterprise. Failure to properly maintain and keep the financial records of the partnership will not avail as a defence.

[32] In my view the respondent's rebuttal evidence does not raise reasonable doubt. The applicant has satisfied the standard of proof beyond reasonable doubt.

The Order:

[33] In the result I make the following order:

[33.1] It is declared that the respondent is in contempt of the court order dated 18 May 2010 in respect of the production, under oath, of documents specified in the order;

[33.2] The respondent is granted a further ten days from the date of this judgment to purge the contempt set out in paragraph 1 above, failing which the applicant may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling upon the respondent to show cause why:-

⁵ *R v Close Settlement Corp Ltd* 1922 AD 294 at 300.

[33.2.1] a further order should not issue in terms of which the respondent would be prohibited from proceeding in any other litigation in any other matter that he may be involved with in the High Court until he has purged the said contempt;

[33.2.2] he should not pay the costs of any further proceedings on an attorney and client scale;

[33.2.3] further sanctions to ensure purging of the contempt should not be imposed against him.

[33.3] The respondent is ordered to pay the costs of the application.

[33.4] The applicant may, in any event, within ten days of the date of this judgment, set the matter down as stated above for argument on whether the matter should be referred to oral evidence on the issue of whether the respondent wilfully disobeyed the court order of 18 May 2010, for the purposes of determining whether the respondent should be committed to jail for the crime of contempt of court.

TL MOSIKATSANA AJ

APPEARANCES:

Applicant's Attorney

KLINKENBERG INCORPORATED

Applicant's Counsel

JJW HAYES

Respondents Attorney

T.G. BOSCH-NAIK ATTORNEYS

DATE OF HEARING 24 March, 2014

DATE OF JUDGMENT 30 March, 2016