Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 16977/2009

In the matter between:

MARIN SOLOMON	**First Applicant / Plaintiff**
KAY SOLOMON	**Second Applicant / Plaintiff**
and	
MOHAMED SEDICK VAN DER SCHYFF	**Respondent / Defendant**

JUDGMENT DELIVERED : 9 DECEMBER 2010

MOOSA, J:

The Contempt of Court proceedings:

[1] In this matter the applicants sought the following relief:

(a) That the defendant is declared in contempt of this honourable Court's order dated 3 September 2009 and

(b) That a warrant is authorised for the arrest and detention of the defendant.

The contempt proceedings arise from judgment in default of plea ("default judgment") granted by the court in action proceeding instituted by the applicants against the defendant for specific performance based on a building contract. The applicants were the plaintiffs and the respondent was the defendant in such proceedings. For the sake of convenience the parties shall be described as in the action, namely, plaintiffs and defendant respectively.

The Facts:

[2] Most of the facts are either common cause or undisputed and are as follows:

(i) On 7 February 2007, the plaintiffs and the defendant entered into a building contract ("contract") in terms of which the defendant agreed to complete a partially completed dwelling ("the building") at an agreed contract price.

(ii) On 15 October 2008, the plaintiffs sued the defendant for breach of contract arising from defective workmanship.

(iii) On 9 March 2009, the plaintiffs obtained default judgment against the defendant in terms whereof he was compelled to remedy the defects in the building as set out in the "Property Diagnostic Services" report, which was annexed to the Summons.

(iv) On 3 September 2009, an order was taken by agreement between the parties. In terms of such order, the defendant was found to be in contempt of court of the default judgment and was ordered, *inter alia*, to provide the plaintiffs within one week with a detailed schedule and timelines when the work will be completed. Should the defendant fail to perform, as stipulated, the Sheriff of this Court was authorised to arrest and detain the defendant for contempt of court.

(v) On 21 September 2009, the defendant provided the plaintiff with a schedule and timelines in terms of the said court order dated 3 September 2009.

(vi) On 27 October 2009, the parties concluded a written agreement in terms of which the timelines were extended and provision was made that the failure to comply with such timelines would tantamount to contempt of court and a warrant of arrest shall be authorised for the defendant. The latter agreement was not made an order of court.

(vii) Both the father of defendant, Ismail van der Schyff and the defendant approached the plaintiffs for financial assistance to complete the work as the defendant did not have the necessary financial resources to pay his workers or complete the work in accordance with the timelines agreed to. The plaintiffs refused to give the defendant such financial assistance.

(viii) On 21 January 2010 the defendant, while busy with a labourer to remedy the defects in the garage, was ordered off the site and was prevented from continuing with the work.

The Law:

[3] Civil contempt has been described as the "*wilful and mala fide*" refusal by the offender to comply with an order of court of competent jurisdiction (**Consolidated Fish Distributors (Pty) Ltd v Zive** 1968 (2) SA 517 (C) at 522B-C). **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) is the "*locus classicus*" on contempt of court in civil proceedings. In describing it as a civil proceeding that invokes a criminal sanction or its threat, the court sets out the test for disobedience of a civil order as follows in para 9: "*...whether the breach was committed 'deliberately and mala fide'*". The court went on to say that:

> *"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 case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable, may be bona fide."*

[4] The onus is on the plaintiffs to prove that the defendant is in contempt of the court order, but once the plaintiffs establish (a) the existence of the court order; (b) its service on the defendant and (c) non-compliance with such order, the evidential burden shifts to the defendant to establish, on the basis of a reasonable doubt, that non-compliance was not wilful and/or *mala fide* or if it is wilful, it is not *mala fide.* Mere refusal to perform in accordance with an order of court does not necessarily amount to challenging the authority of the court. If the defendant fails to discharge that evidential burden, the offence would have been established beyond reasonable doubt (**Fakie NO** *(supra)* at paras 9 and 22 and **Consolidated Fish Distributors** *(supra)* pages 522E-H and 524A-D).

The Evaluation:

[5] It is common cause that on 3 September 2009 the parties obtained a court order by agreement in terms of which the defendant was found to be in contempt of the default judgment. The defendant was not legally represented and appeared in person. The judgment was granted for specific performance, but did not have an alternative claim for damages. I will leave open the question of whether an unrepresented litigant can agree to be declared in contempt of a default judgment. I will, for the present purposes, assume in favour of the plaintiffs, without making a formal finding that the order obtained on 3 September 2009 was valid and enforceable.

[5] It is further common cause that on 27 October 2009, the parties entered into a subsequent agreement in terms whereof the dates provided for in the said court order for compliance with the building activities were amended by extending the dates of compliance thereof. The said agreement also contained certain additional clauses which were not covered by the court order dated 3 September 2009. The said agreement was not made

an order of court. I will once more assume in favour of the plaintiffs without making a formal finding in respect thereof, that the said agreement did not supersede the court order of 3 September 2009 and for all intents and purposes were valid and enforceable.

[6] It is also common cause that the defendant was a party to the court order of 3 September 2009 and I will assume in favour of the plaintiffs, without once more making a formal finding in respect thereof, that the defendant was aware and had knowledge of the contents of such order. I will also assume in favour of the plaintiffs, without making a formal finding in respect thereof, that the defendant had failed to comply with the terms of such order.

[7] In the circumstances the evidential burden shifted to the defendant to show that his non-compliance was not wilful and/or *mala fide*. I will examine the facts to show whether or not the defendant has discharged such burden.

[8] It is common cause that the defendant had substantially completed the work, in terms of the contract, by 18 December 2009 when the plaintiffs were handed possession of the dwelling. It appears that what remained was the "snag" list of remedial work. It is common cause that the defendant's father returned to the site after 18 December 2009 to attend to some of the items on the snag list. The undisputed evidence is that prior to 18 January 2010, defendant found himself in financial difficulties and was unable to pay his workers nor able to complete the work as agreed. He requested financial assistance from the plaintiffs but such assistance was refused.

[9] It also appears from the contents of the agreement of 27 October 2009, that the defendant found himself in financial difficulties as this is clearly reflected in clause 7 of the

agreement which states the following:

> *"Defendant shall ensure that he secures the required funds to comply with the court order and PDS reports, Council plans and the original contract. A lack of funds or insufficient funds shall not be a valid reason for any delay in the completion of the contract or reason for late compliance of the court order."*

[10] It is common cause that on 21 January 2010, while the defendant was attending to remedy items on the snag list, the plaintiffs ordered the defendant off their property and accordingly prevented him from carrying out further work on the property. The conduct of the plaintiff effectively prevented the defendant from completing compliance with the provisions, if any, of the court order dated 3 September 2009. I agree with the defendant that the plaintiffs continually shifted their goal posts and introduced new terms to the agreement.

The Finding:

[11] I am satisfied that on the undisputed evidence, the defendant has substantially complied with the provisions of the court order dated 3 September and such provisions that he was not able to comply with, was due to circumstances beyond his control. I am satisfied that he has discharged the evidential burden of showing that his non-compliance with the court order dated 3 September 2009 was not wilful and/or *mala fide*. In the circumstances the plaintiffs have failed to prove beyond reasonable doubt that the defendant is guilty of contempt of court. In the premises the plaintiffs' application is dismissed with costs.

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