

IN THE NORTH GAUTENG HIGH COURT – PRETORIA
(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER: 71827/09

THE HONOURABLE ACTING JUSTICE ROELOF DUFFIELD
In the application of:

ROGER BAYLIS DUFFIELD

and

MINISTER OF POLICE
SUPERINTENDENT GERRIE AGENBACH
INSPECTOR MTIMKHULU
CAPTAIN SHONGWE
CAPTAIN MASITE
CAPTAIN MASEKO

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent

JUDGMENT

INTRODUCTION AND BACKGROUND

- [1] In this matter an application was brought originally by the applicant in terms of which the applicant's undisturbed possession of certain

15/1/2010

DATE WHICH THIS IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED. ✓

15/02/2010

Applicant

DATE SIGNATURE

items and documents which were confiscated by the third respondent should be restored immediately and without delay.

- [2] A second court order was issued instructing the second to fifth respondents to immediately comply with the court order I had previously granted. The second to fifth respondents are the specific policemen who should have complied with the original court order. Both court orders referred to above were granted on 23 November 2009.
- [3] The second, third and fourth respondents refused to comply with the first court order after it was served on them. The fifth respondent was presented with the court order and it was served on her after 20h00 on 23 November 2009. She stated that she did not have the key to the so-called SAP13 office which held the confiscated items. She said that the applicant had to return on 24 November 2009, which the applicant duly did together with relevant sheriff. The second order was then served on the first, second, third and fourth respondents. The second, third and fourth respondents again refused to give adherence to both the court orders and referred the applicant to the sixth respondent who was apparently in charge of the so-called SAP13. The sixth respondent then chased the applicant and the sheriff from his office uttering the following words: "I am not giving these goods back, get out of my

office". The applicant states that he was extremely aggressive and they had no alternative but to leave.

- [4] In the answering affidavit the deponent, Mtsibile Joseph Seloane, a senior superintendent and a senior legal administration officer for the provincial legal services for the Mpumalanga South African Police Services, states that the court order granted against the first respondent, the Minister of Police, was not an order against any member of the SAPS or the Minister of Police. Since the court order was against the Minister of Police, the second respondent referred the matter to the deponent. That was apparently the basis on which the respondents refused to comply with the court order.
- [5] In the affidavit it is stated that an inspector Ngwane was responsible for the SAP13 items, that he was only working office hours, and that he did not have a cellphone. Only he could apparently comply with the court order. It is stated that the respondents could not therefore comply with the court order as they had no access to the SAP13 storeroom.
- [6] As a result of this it is stated that the respondents had no authority over the items which were kept in the SAP13 storeroom, and that the respondents could therefore not comply with the court order and had no intention to comply therewith.

- [7] It is also stated that the second respondent understood the court order simply as a draft, as the court order indicated that it was a draft order. I find that explanation in the light of the fact that the sheriff accompanied the applicant, simply untenable and far-fetched. The order was properly signed and stamped, and she could have phoned the after hours number of the court to determine the veracity of the court order. Both my clerk and I would have been able to have verified it.
- [8] The respondents have not dealt with properly with the allegations that the second, third and fourth respondents refused to adhere to the court orders on 24 November 2009.
- [9] The denial by the deponent pertaining to the actions of the sixth respondent also, without any further explanation, appears to me to be not sufficient. The sixth respondent does not at all deal with the allegations made in the founding affidavit pertaining to his attitude to the court order and his refusal to abide by the court order.
- [10] When the application was brought, it was not clear if the court orders had at that time been complied with or not. There was however an undertaking given that the court orders would be complied with.

- [11] In the light of the decision of *Fakie No v CCII Systems (Pty) Ltd*¹ I must be convinced that the respondents acted wilfully and *mala fide* by not complying with the two court orders.
- [12] I am of the view that the applicant has made out a case in the founding affidavit in this regard pertaining to the second, third, fourth and sixth respondents.
- [13] The defence raised in the answering affidavit that it was actually the Minister of Police himself who had to comply with the court order and that because they, the respondents, were not cited by name they did not have to comply with the court order is so ludicrous that I have no hesitation to reject that version. There is simply no possibility that any member of the SAPS could ever have reasonably thought that the Minister of Police was ordered by this court to drive over to their police station to personally hand over the relevant items to the applicant. In fact this defence is so ludicrous, ridiculous and without foundation that it justifies a special costs order under the circumstances.
- [14] I am of the view that there is clear and unequivocal evidence that the second, third, fourth and sixth respondents did not comply with the two court orders, while they had full knowledge of the effect and contents thereof, and under circumstances where they should have

¹ 2006 (4) SA 326 (SCA)

taken steps to attempt to comply therewith. If they had explained to me that they had attempted to get hold of the sixth respondent, and that they could not do so after hours, their situation may have been different. However they simply did not attempt to do anything regarding the first court order. They had an arrogant and unacceptable attitude pertaining to the first court order which culminated in the refusal of the sixth respondent to comply with the court order.

[15] There is no doubt in my mind that the applicant has shown beyond reasonable doubt that the second, third, fourth and sixth respondents had acted wilfully and *mala fide* in respect of both the court orders. This is in particular so regarding the sixth respondent.

[16] I therefore have no hesitation whatsoever in coming to the conclusion that, in the absence of any evidence casting reasonable doubt upon my conclusion, the relief sought by the applicant should be granted².

[17] I am therefore of the view that the following order should be made:

- (1) That the sixth respondent be joined as a party to the application;

² *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 41 to 42

- (2) That the second, third, fourth and sixth respondents are found to have been in contempt of court of the orders granted by this court on 23 November 2009;
- (3) That second, third, fourth and sixth respondents be incarcerated for a period of 30 days which order is suspended for 5 years;
- (4) That first, second, third, fourth and sixth respondents be ordered to pay the costs of this application jointly and severally on an attorney and own client basis.

BY ORDER OF COURT:

REGISTRAR

Rm Plessis, AJ