

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

15/1/2010  
CASE NUMBER: 67934/2009

THE HONOURABLE ACTING JUSTICE ROELOF DU PLESSIS

In the application of:

MOOIPAN BOERDERY CC

and

UFUDU TRANSPORT (PTY) LTD

First Respondent

PERCY NDABA MASINGA

Second Respondent

JUDGMENT

INTRODUCTION AND BACKGROUND

- [1] This matter has a long history of approximately 16 court orders which have all been granted in the applicant's favour since February 2008. Not one of the court orders has satisfactorily been executed. I do not regard it necessary to refer

|                                         |                                                                                                 |
|-----------------------------------------|-------------------------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE      |                                                                                                 |
| (1) REPORTABLE: YES/NO                  | NO                                                                                              |
| (2) OF INTEREST TO OTHER JUDGES: YES/NO | NO                                                                                              |
| (3) REVISED: ✓                          | Applicant                                                                                       |
| 15/01/2010<br>DATE                      | <br>SIGNATURE |

- [2] An application was brought by the applicant, Mooipan Boerdery CC, for an order in terms of the relief sought in the notice of motion which was set out as follows:

- "1. That this application be heard as an urgent application in terms of Rule 6 (12) of the rules of the above Honourable Court, and that all requirements pertaining to service and the time periods provided for in the rules of the above Honourable Court may be dispensed with.
  2. That the third respondent be and is hereby ordered to proceed with the sale in execution scheduled for 25 November 2009 in terms of which the second respondent's shares in the first respondent is to be sold in execution.
  3. That the order granted on the 19<sup>th</sup> of December 2008 under case number 10288/2008 be and is hereby set aside and/or rescinded.
  4.
    - 4.1 That an order for the eviction of the first and second respondents and all persons occupying the premises, as described in annexure "A" to the court order in case
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*number 10288/2008 granted on 16 May 2008 annexed to the founding affidavit as annexure J" is hereby granted.*

- 4.2 That the first and second respondents be and are hereby ordered to vacate the said premises by not later than 2 days after the date of this order.*
  - 4.3 In the event that the first and second respondents have not vacated the said premises within 2 days, the third respondent is hereby authorised and required to carry out the eviction order immediately by removing from the said premises the first and second respondents and all persons who occupy the premises through them.*
  - 5. Declaring that the first and/or second respondents are in contempt of court.*
  - 6. Ordering the second respondent to be incarcerated for a further period of 60 days, alternatively for a period the court determines, for contempt of court.*
  - 7. That the fourth respondent be and is hereby ordered to:*
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7.1 *ensure that the court orders granted in case number 10288/2008 annexed to the founding affidavit as annexure "F" to "H", "J", "K" and "M" and this order is promptly enforced against the first and second respondents; and*

7.2 *assist and protect the applicant and its employees against the unlawful and intimidating conduct of the first and second respondents and their associates.*

7.3 *assist the third respondent in the eviction of the first and second respondents from the premises.*

7.4 *arrest and detain and/or arrange for the detention of the second respondent for a period of 30 days.*

8. *That the respondents, jointly and severally, be and are hereby ordered to pay the costs of this application on an attorney and client scale."*

[3] After having heard argument, I granted an order on 24 November 2009 in terms of a draft order in which I ordered the following:

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- \*1. The order granted on the 19<sup>th</sup> of December 2008 under case number 10288/2008 be and is hereby set aside and/or rescinded.*
  - 2. The third respondent be and is hereby ordered to proceed with the sale in execution scheduled for 25 November 2009 in terms of which the second respondent's shares in the first respondent is to be sold in execution.*
  - 3.*

    - 3.1 That an order for the eviction of the first and second respondents and all persons occupying the premises, as described in annexure "A" to the court order in case number 10288/2008 granted on 16 May 2008 annexed to the founding affidavit as annexure "J" be and is hereby granted.*
    - 3.2 That the first and second respondents be and are hereby ordered to vacate the said premises by not later than 2 days after the date of this order.*
    - 3.3 In the event that the first and second respondents have not vacated the premises*
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*within 2 days, the third respondent is hereby authorised and required to carry out the eviction order immediately by removing from the premises the first and second respondents and all persons who occupy the premises through them.*

*4. The fourth respondent has undertaken and shall:*

*4.1 assist the third respondent in ensuring that the court orders granted in case number 10288/2008 annexed to the founding affidavit as annexures "F", to "H", "J" and "K" and "M" and this order are promptly enforced against the first and second respondents, if so requested by the applicant and/or the third respondent; and*

*4.2 assist and protect the applicant and its employees against the unlawful and intimidating conduct of the first and second respondents and their associates, if so requested by the applicant and/or the third respondent; and*

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- 4.3 *assist the third respondent in the eviction of the first and second respondents from the premises, if so requested by the third respondent; and*
- 4.4 *arrest and detain and/or arrange for the detention of the second respondent in respect of any existing court order.*
5. *Ordering the first and second respondent, jointly and severally, be and are hereby ordered to pay the costs of this application on an attorney and client scale including the costs of two counsel one of which is a senior counsel.*
6. *No cost order is granted against the fourth respondent.\**

- [4] The relief sought in the notice of motion, set out in prayers 5 and 6 of the notice of motion stood down until later in the week during which I heard urgent applications for final determination. I have already given reasons for the aforementioned order.
- [5] An application for leave to appeal, as has been the usual approach by the first and second respondents in respect of court orders, was filed immediately thereafter. It was then dealt with together with
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adjudication of prayers 5 and 6 of the notice of motion. There was no appearance when this relief was considered and I therefore granted an order in terms of another draft order on 26 November 2009, in terms of which I ordered the following:

- "1. The application, dated 16 December 2008, for rescission of the order of Bertelsmann J granted on 27 October 2008 is dismissed with costs, such costs to be on an attorney and own client scale, including the costs of senior and junior counsel.*
- 2. The second respondent is declared to be in contempt of court.*
- 3. The second respondent is to be incarcerated for a period of 120 days for contempt of court.*
- 4. The following officers and/or members of the South African Police Services are specifically tasked to execute the order for the incarceration of the second respondent, namely:*
  - 4.1 Senior Superintendent Moodley (Station Commander Midrand) Tel 011-3471600 Cel 082 828 6032 Faks 011 312 0595*

4.2 Senior Superintendent Nyati (Ermelo Station Commander).

5. *The second respondent be and is hereby ordered to pay the costs of this application on an attorney and own client scale, including the costs of senior and junior counsel."*

[6] I also dismissed the application for leave to appeal against my previous order and ordered that the first and second respondents' application for leave to appeal dated 25 November 2009 did not suspend the sale in execution of the shares in the first respondent, that took place at approximately 10h00 on 25 November 2009. In any event the application for leave to appeal was served and filed after the sale had already taken place.

[7] I was also requested to grant an order that the application dated 16 December 2007 for rescission of the order of Bertelsmann J that was granted on 27 October 2008, should be dismissed with costs, as reflected in the second order I had given referred to above. These are the reasons for that order.

[8] It is apparent from that application that there were no prospects of success demonstrated to have that order rescinded, either in terms

of rule 42 (1) (a) of the rules of this court, or in terms of the common law or on any other basis. No real defence was illustrated to substantiate the application for rescission of the order of Bertelsmann J, which order was granted on 27 October 2008. On 27 October 2008 there was an application for postponement which was dismissed and a well considered order was given by Bertelsmann J, which included an order for the incarceration of the first respondent. It was not clear on what basis the application for rescission was brought and there was no reference in the application to the fact that the order was erroneously sought or erroneously granted in terms of rule 42 (1) (a). On a proper reading of the application, that could have been the only basis for seeking rescission of that judgment.

- [9] I was therefore satisfied that no proper application on the merits for rescission of that judgment was made out by the first and second respondents and I therefore ordered that the application be dismissed with costs, such costs to be on an attorney and own client scale including the costs of senior and junior counsel, as referred to in the order above. I granted the costs order on the basis of the continuous misuse and abuse by the first and second respondents of the court procedures, as are clearly reflected in the approach of the first and second respondents to the litigation explained above, and which appears in the papers of all the

previous proceedings and in my previous judgments<sup>1</sup>. I also came to the conclusion that second respondent should be declared to be in contempt of court and that he should be incarcerated for a period of 120 days for contempt of court. These are the reasons for the order.

- [10] The history of the facts of this matter show clearly the second respondent's total disregard and contempt for court orders. Wherever the respondents could, they utilised delaying tactics to frustrate hearings of matters, and to avoid incarceration. The applicant stated that the first and second respondents have frustrated every inch of the execution process regarding sale of the property. The order of incarceration granted by Bertelsmann J was not executed. The second respondent operated freely and had in fact, before the matter came before me, unlawfully evicted the applicant from the relevant business premises without a court order. The applicant attempted to execute cost orders that he obtained against the first and second respondents, without success, and he failed to execute an order for payment of R1,3 million against the first respondent. Notwithstanding all the court orders that were obtained, the applicant had been evicted again from the premises and the first and second respondents were again operating from the premises. Neither the SAPS nor the sheriff of the court rendered

<sup>1</sup> AC Cilliers: *Law of Costs* pages 3-8 to 3-14; 4-18 (2) to 4-24; *Judin v Wedgewood* 2003 (5) SA 472 (W); *Giovagnoli v Di'Meo* 1960 (3) SA 393 (D); *Phillips v Botha* 1999 (2) SA 555 (SCA); *Benash v Wixley* 1997 (3) SA 721 (SCA); *Brunner v Gorfil Brothers Investments (Pty) Ltd* 1999 (3) SA 399 (SCA)

any assistance to the applicant to have the existing previous court orders executed, including the court order of Bertelsmann J.

- [11] Masinga is apparently a very influential businessman with links to the SAPS and the government and in particular the local SAPS office in Ermelo as well as the sheriff's office. He apparently acts as if he is above the law.
- [12] In fact, the SAPS, instead of arresting Masinga in terms of the court order of Bertelsmann J, visited the business premises and attempted to arrest and lock up Mr Cilliers of the applicant. Furthermore high-ranking officials of the Department of Trade and Industry threatened the applicant that he should not carry on with business from the relevant business premises. Such behaviour is deplorable.
- [13] The following paragraph in the founding affidavit is also of extreme importance, namely:

*"There is a current order for the incarceration of Masinga for a period of 30 days because of Masinga's contempt of court. Masinga has been evading and/or avoiding his arrest and the implementation of the order since 27 October 2008."*

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[14] The applicant further states that Masinga has since that date been represented by Attorneys TP Moloto & Co of Benoni/Gauteng, notwithstanding the fact that an order for second respondent's incarceration was in existence.

[15] The second respondent filed an opposing affidavit on behalf of himself and the first respondent, wherein he dealt with the relief sought pertaining to contempt of court against him. Regarding the paragraph referred to above, he simply stated the following:

*"The contents of the said paragraphs are noted."*

[16] Therefore, in a brazen and totally contemptuous way, the second respondent states and admits under oath in his answering affidavit that he has been evading and avoiding his arrest and implementation of the court order since 27 October 2008.

[17] He, and the first respondent, of which he is the director and driving force, have therefore filed applications for leave to appeal and applications for rescission of judgment in respect of most court orders that have been granted. Other orders were simply ignored. Second respondent was allowed by the SAPS and the relevant sheriff to act as the applicant states, with impunity, as a result of his apparent high level connections in the SAPS, and in the government. Forced sales in execution to execute the many orders

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had been arranged, which could not be proceeded with as first and second respondents in an unlawful and underhand manner frustrated the execution process time and again. The second respondent is also apparently not averse to acting without legal sanction as appears from the fact that on 25 September 2009 he, with force, evicted the applicant from the relevant business premises. That was done on 26 February 2008 as well, through second respondent personally and six bodyguards, who simply threw the applicant out of the business premises, with an aggressive and intimidating approach.

- [18] The first and second respondents have ignored court orders, they refused to adhere to court orders, and the way in which the order of Bertelsmann J was approached, illustrates that the second respondent knew very well what the court orders entailed. He simply refused to comply with the court orders. There is no doubt in my mind that his refusal was intentional and wilful.
- [19] Although his attorney was notified of the fact that this part of the relief would be heard and dealt with simultaneously with the application for leave to appeal against the first order that I had granted, his attorney chose to write a letter to the court indicating that the attorney had become ill and that he was not able to attend at court. I granted an opportunity until the next day for the respondents to obtain other legal representation, which they did not
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do. They therefore had ample opportunity to appear before me to state their views, and their attempt to have the matter postponed again in this fashion did not succeed.

[20] I therefore granted an order that the second respondent was declared to be in contempt of court and that he should be incarcerated for a period of 120 days for contempt of court.

[21] In *Fakie NO v CCI Systems (Pty) Ltd*<sup>2</sup> the Supreme Court of Appeal finally laid to rest all the different disputes pertaining to contempt of court proceedings in a criminal environment, and a civil environment. The Supreme Court of Appeal came to the conclusion that in a civil matter, the onus is that of proof beyond reasonable doubt, similar to the burden of proof in a criminal matter. The test to determine contempt of court has been stated as whether the breach was committed deliberately and *mala fide*. The non-compliance should be both wilful and *mala fide* and must be a deliberate and intentional violation of the court's dignity, reputation and authority. There must therefore be conclusive proof of the requisite elements beyond reasonable doubt. Unless a respondent then provides evidence raising reasonable doubt as to whether non-compliance was wilful and *mala fide*, the requisites of contempt will have been established<sup>3</sup>.

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<sup>2</sup> 2006 (4) SA 326 (SCA)  
<sup>3</sup> *Fakie v CCI Systems* para 6-10, 19-24, and 41

[22] In my view there is no doubt that such a case was made out by the applicant in this matter, and therefore I granted the order that the second respondent was declared to be in contempt of court and that he should be incarcerated for a period of 120 days. I am of the view that the history of this matter, the actions of the first and second respondents, the wilful and *maia fide* disregard and disobedience to the court orders, attempts to avoid court orders, and on the second respondent's own affidavit, the admission that he had been evading and/or avoiding his arrest and the implementation of a court order since 27 October 2008, leaves me with me with no doubt that the second respondent has committed contempt of court and that he should be incarcerated for the time period provided for in the order. The character of the incarceration order in question is of a punitive nature. It is necessary for the court to assert its authority and dignity as an example for others. In this particular instance, it is necessary to set an example. I have experienced, during two weeks of hearing urgent applications, a huge number of instances where court orders were simply ignored, not abided by, and treated with contempt. It is necessary to send the message that court orders should be adhered to, as it is one of the pillars of our modern democratic constitutional dispensation, and forms an integral part of the principle of the rule of law.

[23] In my view the time period of 120 days under these circumstances, and with reference to the particular facts of this matter, is

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appropriate. It is of no use to refer to other matters to obtain a comparative indication of time periods applicable to contempt proceedings, as the facts differ in each case. In my view the second respondent should experience the authority of the courts, and be taught respect for the courts and the rule of law.

BY ORDER OF COURT:

 Rodn Plessis AJ

REGISTRAR

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