

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 3714/2022

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

E LABUSCHAGNE

DATE: 21 JULY 2023

In the matter between:

ARCADIA RESIDENTS AND RATEPAYERS ASSOCIATION Applicant

and

FLORAP (PTY) LTD

(Registration Number: 2[...])

First Respondent

MOLEKOA MAKHESA JOE

(ID Number: 7[...])

Second Respondent

GRACE KELLY YINEYESU

(Passport Number Uganda: A[...])

Third Respondent

CITY OF TSHWANE METROPOLITAN MUNICIPALITY

Fourth Respondent

**THE MUNICIPAL MANAGER: CITY OF TSHWANE
METROPOLITAN MUNICIPALITY**

Fifth Respondent

JUDGMENT

[1] The applicant is the Arcadia Residents and Ratepayers Association, a community-based organisation established to preserve local heritage. The applicant applies for an urgent order against the first and second respondents in the following terms:

"2. That it be declared that the first respondent is guilty of contempt of court for failure to comply with the orders of this court dated 8 February 2022 and 21 March 2023 under case number 3714/2022;

3. That the second respondent as the sole director of the first respondent be sentenced to imprisonment for no longer than 30 days, such sentence to be suspended on the condition that:

3.1 The first respondent complies with the orders dated 8 February 2022 and 21 March 2023 under case number 3714/2022 within 14 days from the date of this order being served on it;

3.2 The first respondent not be found to be in contempt of a court order within a period of 24 months from the date of this order being granted."

[2] The third respondent is not before court and could not be traced. The applicant has settled with the fourth and fifth respondents.

[3] The question is whether the order against the first and second respondents should be heard in the absence of the third respondent. This is so particularly in the

light of the first and second respondents contending that they are not in possession of the immovable property and that the third respondent is. The first and second respondent therefore contend that they cannot access the property and therefore cannot give effect to the court orders. In those circumstances, they deny that they are guilty of contempt.

[4] The two court orders referred to in the notice of motion are Annexures E1 and E2 to the founding papers. Annexure E1 is a copy of a court order by Collis J of 8 February 2022. The applicant, the first respondent, the City of Tshwane and the Provincial Heritage Resources Authority Gauteng were the parties to those proceedings.

[5] By agreement between the current applicant and the current first respondent, the following order was made an order of court:

"1. The first respondent shall immediately cease all building and construction works at Erf 724, Arcadia situated at 1[...] P[...] Street, Arcadia, Pretoria ("the Property"? pending:

1.1 The approval of the building plans and rezoning of the Property by the second respondent;

1.2 The issuing of a permit by the third respondent for the alterations of the property;

1.3 Compliance with any other statutory requirements pertaining to the building works at the property.

2. In the event of the first respondent failing to submit the requisite applications to the second and third respondents respectively within a period of four months from this order to obtain the necessary approvals and permit as set out in Prayer 1 above, the applicant is granted leave to approach this court on the same papers, amplified as necessary, for demolition of the structures illegally erected at the property.

3. The first respondent is interdicted from giving occupation to any person or persons of the outbuilding being erected behind the main dwellinghouse on the property, pending compliance with Prayers 1.1, 1.2 and 1.3 above.

4. The costs of this urgent application set down for 8 February 2022 shall be costs in a contempt application, should such contempt application be instituted by the applicant against the first respondent."

[6] The second court order is dated 21 March 2023, granted by Holland-Muter J. In terms thereof par 1 of the order of 8 February 2022 is amended to read:

"1. Any person as envisaged in section 4(1) of the National Regulations and Building Standards Act 103 of 1977, shall immediately cease all building and construction works at Erf 724, Arcadia, situated at 1[...] P[...] Street, Arcadia, Pretoria ("the Property") pending:"

[7] The further relief is not relevant to the current proceedings.

[8] The applicants contend that construction continued on the property notwithstanding the aforesaid court order and therefore approached the court on a semi-urgent basis for a declarator relating to contempt and consequential relief, which includes 30 days incarceration.

[9] The property was acquired in 2019 by the first respondent. In 2021 extensive construction was conducted on the property and the buildings were expanded to such an extent that, inclusive of the outbuildings, it could accommodate up to 21 people.

[10] The applicant approached the municipality and the Heritage Council to determine whether there were approvals for the extensive construction on the property, but both responded in the negative. This gave rise to the proceedings culminating in the first court order of Collis J quoted supra.

[11] The first respondent did file an application with the Heritage Council, which application was subsequently rejected on 30 March 2023. The finding of the Provincial Heritage Resource Authority Gauteng declines partial demolition and alteration to the structure.

[12] On 31 January 2023 the applicant enquired from the municipality whether or not any changes recurred in the approval of building plans or whether application had been made for permits. It was informed on 7 February 2023 by the municipality that the only approved plans for the property were those issued in 2007 for an outbuilding. Despite the fact that no further applications had been brought or approval is given by the municipality, the building works on the property continued. This gave rise to a further urgent application on 21 March 2023. The first and second respondents filed opposing papers. They denied that they were in contempt and claimed that they are no longer the owners of the property pursuant to an agreement of sale with the third respondent. This agreement of sale was concluded on 18 November 2021. The property was purchased for R1,3 million but transfer has not yet been effected. Occupation of the property was given to the third respondent by virtue of the sale agreement of 18 November 2023, prior to the first respondent consenting to the first court order.

[13] The applicant says that the sale was only disclosed in March 2023. The first and second respondents contended that the transfer was being delayed by a pending application with the Heritage Council. The first and second respondents also stated that they requested the third respondent to adhere to the court order and to cease any building works. They denied having access to the property after the date on which they gave occupation to the third respondent.

[14] Thereafter the applicant and the first and second respondents agreed to the draft order before Holland-Muter J quoted *supra*.

[15] A copy of the court order was sent to the third respondent.

[16] A firm of attorneys came on record on 3 April 2023 on behalf of the third respondent. In a letter to the applicant, it was contended that the third respondent

had been a victim of a crime and that the building operations were aimed at putting doors and repairing a fence that were damaged in the process of the crime.

[17] Despite the third respondent's undertaking sent through her attorneys of record, the construction and building activities on the property continued unabated. This gave rise to a further letter of 24 April 2023 to the attorneys of the third respondent. During the course of May 2023 further construction was documented by photographs taken by Mrs Van Biljon. Cease and desist letters were dispatched on 14 June 2023, failing which contempt proceedings would commence. No response had been received and therefore the applicant approached the court.

[18] Significant building occurred over the Youth Day long weekend from Friday, 16 June 2023 to Sunday, 18 June 2023. On the northern boundary the builders were working on what appear to be a lower roof level. Further, the perimeter wall was built to an illegally high level of over 5 metres, and it has become difficult to obtain further photographs. The noise levels were such that residents laid complaints with the Metro Police.

[19] The first respondent has knowledge of the court orders, and despite such knowledge building on the premises continue unabated. The applicant was aware that the first respondent, which shift blame to the third respondent, on the basis that it does not have control over the property. The applicant contends that the first respondent, as registered owner, should be taking active steps to prevent its tenant from conducting illegal activity.

[20] An applicant in contempt proceedings has the same onus as the State in criminal proceedings, namely the contempt must be established beyond reasonable doubt (*Fakie NO v CCII Systems (Pty) Ltd* 2006(4) SA 326 (SCA) at par [42], [63] to 651).

[21] In a full set of affidavits, the first and second respondents requested this matter to be postponed, to be heard together with the case against the third respondent, alternatively to dismiss this application. The dismissal is premised upon the continued denial of the first and second respondents of being in possession of

the property, denying that they have access to it and therefore contending that they do not act in wilful defiance of the court order. The first and second respondents have filed a draft order which avoids the piecemeal hearing of these proceedings. Its terms will be incorporated into what follows.

[22] It is more convenient to have this matter finalised as far as the first, second and third respondents are concerned in single proceedings. In the light of the settlement with the fourth and fifth respondents, it is convenient to finalise the matter in respect of the fourth and fifth respondents and to postpone the remainder.

[23] Consistent with the order offered by the first and second respondents, the following order is therefore made:

1. The contempt of court relief sought against the third respondent is postponed sine die pending personal service of this application on the third respondent.

2. In the event that the applicant cannot effect personal service within 30 (thirty) days of this order, the applicant is authorised to serve the application on the third respondent by means of substituted service by one advertisement in the Government Gazette and one advertisement in an English Newspaper circulating in Gauteng.

3. The first to third respondents are hereby interdicted from:

- 3.1 Making any alterations to any structure or part of a structure on the property at Erf 7[...] A[...] situated at 1[...] P[...] Street, Arcadia, Pretoria ("the Property");

- 3.2 Allowing any building workers or contractors onto the property to illegally alter any structure or part of the structure on the property as stated in par 3.1 above.

4. The interim interdict at par 3 supra shall operate until:

4.1 The issuing of a permit by the sixth respondent for alterations to the property;

4.2 The approval of building plans of the property by the fourth respondent;

4.3 Compliance with any statutory requirements pertaining to the building works at the property.

5. The South African Police Services must enforce the provisions of this, as well as the previous court orders under case number 3714/2022 and must prevent further unlawful building on the property by removing workers or labourers as well as their equipment and tools from the property as and when necessary.

[24] By agreement between the applicant and the fourth and fifth respondent, the following order is made:

1. The fourth respondent shall bring an application in terms of section 21 of the National Building Regulations and Building Standards Act 103 of 1997 ("the demolition application") within 14 (fourteen) days of this order being granted, seeking an order that all illegal structures at Erf 7[...] A[...], situated at 1[...] P[...] Street, Arcadia, Pretoria, not in conformity with the building plans filed and approved by the fourth respondent, are to be demolished.

2. As between the applicant, the fourth respondent and the fifth respondent, each party shall pay its own costs.

3. As between the applicant and the first and second respondents, each party shall pay its own costs.

E. LABUSCHAGNE
ACTING JUDGE OF THE HIGH
COURT

GAUTENG DIVISION, PRETORIA

APPEARANCES

Applicant's Counsel:	Adv. Mouton
Instructed by:	Dreyer & Dreyer Inc
First Respondent's Counsel:	Adv. C Harms
Instructed by:	Jacques Van Der Merwe Attorneys