



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Application no.: 4777/2022

In the matter between:

TEBOHO CLEMENT KHEPENG

1st Applicant

HOUSE PHOLA (PTY) LTD t/a HOUSE POLA LOUNGE

(Reg. no.: 2020/729013/07)

2nd Applicant

and

BONGA PAUL MASEKO

1st Respondent

JAPPY JACOB MASANGANI

2nd Respondent

CORAM:

VAN ZYL, J

HEARD ON:

18 OCTOBER 2022

DELIVERED ON:

13 MARCH 2023

[1] This matter first served before me on an urgent basis on 11 October 2022. It was then postponed by agreement between the

parties to be heard on 18 October 2022, the wasted costs to stand over for later adjudication.

[2] In terms of the notice of motion the applicants initially sought the following relief:

- “1. That the rules pertaining to form, service and notice be dispensed with and that the application be heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.
2. That the first and second respondents be declared in contempt of the order of 30 September 2022.
3. That a fine be imposed upon the first and second respondents jointly and severally.
4. That a period of incarceration be imposed on the first and second respondents for such a period as the Court deems appropriate.
5. Enforcement of the order of 30 September 2022 and the further order interdicting the respondents' event of 8 October 2022.
6. Directing the respondents to pay the costs of this application on an attorney and client scale.”

Background:

[3] The first applicant, who is the sole director and accounting officer of the second applicant, deposed to the founding affidavit.

- [4] The property relevant to the dispute between the parties is 1707 Petsana, Reitz. I will henceforth refer to it as “the property”.
- [5] The first applicant entered into a lease agreement with the respondents on 1 April 2020. Due to reasons which are not relevant for purposes of this application, the first applicant later entered into a further lease agreement pertaining to the property with Mr Mokoena and thereafter with Lorraine and Precious Mahamotsa. What is of importance is that the first applicant has been conducting a restaurant business at the property under the second applicant’s name since 1 April 2020 until July 2022 when the respondents evicted the first applicant from the property. The first applicant has since lodged an application for spoliation in this court under case number 4751/2022.
- [6] On 28 September 2022 it came to the knowledge of the first applicant that the respondents were to host an event at the property under the name of the second applicant on 1 October 2022. The applicants consequently approached Court on 30 September 2022 on an urgent basis and Loubser, J, granted the following order (the order):
- “1. The normal rules pertaining to form, service and notice are dispensed with and this matter is heard as one of urgency in terms of Rule 6(12) of the Rules of the above Honourable Court and enrolled as such.
 2. The respondents are interdicted from hosting the public event as scheduled for 1 October 2022 at House Phola Restaurant situated at 1707, Petsana, Reitz.

3. The respondents are ordered to unreservedly retract any posters and/or notices published pertaining to the public event scheduled for 1 October 2022 as disseminated on their Facebook account and any other public platform.
4. The respondents are interdicted from hosting any other public event at House Phola Restaurant pending finalisation of the motion proceedings with Bloemfontein High Court, case number 4751/2022.”

[7] It is not in dispute that the respondents were informed about the order. On their own version their legal representatives read the order to them telephonically on 30 September 2022 and enquired from them whether they knew what a public event is, which they confirmed. The order was also later served on the respondents by the sheriff on Tuesday, 4 October 2022.

[8] The respondents do also not dispute that despite the order, they went ahead and hosted the event on 1 October 2022 at the property under the name of the second applicant. The respondents also failed to remove the posters and/or notices on Facebook with regard to the event scheduled for 1 October 2022. They even made mention of the interdict on some of the Facebook pages, the detail of which I will refer to hereunder.

[9] It is also not in dispute that to date of the filing of the present application, the respondents have been continuing to organise and host events in the name of the second applicant at the property.

[10] The defence raised by the respondents are that they have not and do not intent to host a public event as prohibited by the order.

According to them the 1 October 2022 event and the subsequent events they have been hosting are not “public events”. In this regard the first respondent stated as follows at paragraph 3 of the answering affidavit:

“On the 30th September 2022 I was interdicted from hosting public events from the 1st October 2022. I only hosted one public event on the 24th September 2022 at Petsana Stadium prior to the order being issued. I have been hosting events since 2016 and in terms of the Safety at Sports and Recreational Events Act, no. 20/2010 (SASREA) are to be held at the stadium and must comply with further requirements in terms of this Act. All other events I am hosting are part of Restaurant Licence issued by Free State Liquor Board and not public events. I attach hereto my licence for the premises issued on the 1st November 2022 marked ‘BM8’.”

[11] The first respondent further stated the following at paragraph 15 of the answering affidavit:

“15.1 The applicants knew on the 15 July 2022 that I will be using my business again. Events are part and parcel of that business. I again observe that the applicant is now using the word event instead of the Public Event he applied interdict for Public event and event are different.

15.1.1 I hosted an event as part of restaurant activity in terms of the license.

15.2 I am advised to place the following differences of the two events and hereby do.

- 15.2.1 A restaurant marketing events similar to the one I have are not public events. As we make them every weekend. Some places call them Karaoke Nights, comedy night etc.
- 15.2.2 A Public event is an event regulated in terms of the Safety at Sports and Recreation Events Act and these are events that are organized at the stadiums and venues that are for public events such as Pacofs, ICC etc where events such as the recent Macufe were held.
- 15.2.3 In the event that I were to want to hold a Public Event at House Phola Lounge, I would be required to have compliance certificate in terms of SASREA law and also get a Special Event Certificate from the Liquor Board.
- 15.2.4 The respondents therefore did not hold a public event and did not disregard and was not disobedient to the Court order granted by Loubser J on 30 September 2022.”
(sic)

Ad urgency:

- [12] The first applicant stated that as part of his contractual obligations, he is still responsible for the monthly payment of the rental of the property. However, the respondents are carrying on business at the property in the name of the second applicant and are therefore gaining financially to the detriment of the applicants. The applicants have suppliers who have been supplying them for the past two years at the property and in the name of the second applicant. Considering that the respondents are conducting business at the very same property, also in the name of the second applicant, the applicants are running the risk that the respondents

may conclude agreements with those suppliers in the name of the second applicant. This may result in the applicants being held liable in terms of such agreements and possibly become embroiled in litigation at the expense of the applicants.

- [13] As holder of the lease agreement pertaining to the property, the first applicant is liable for any damage to the property. Considering the events that are being hosted by the respondents at the property, the first applicant is running the risk of being responsible for payment of damages to the property which occurs during such events.

Legal Principles: Contempt of Court

- [14] It is trite that the requirements for a finding of contempt of court are the following:

1. The order by the Court.
2. Service of the order on the respondents and/or knowledge of the order by the respondents.
3. Non-compliance of the order by the respondents.

See **Fakie N.O. v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at para [42].

- [15] A material failure to comply with the order has to be shown. In **Consolidated Fish Distributors (Pty) Ltd v Zive** 1968 (2) SA 517 (C) at 522 this was applied:

“Contempt of Court, in the present context, means the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction... In *Southey v Southey*, 1907 E.D.C. 133 at p. 137, it was said that applicant for an attachment had to show a wilful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases, however, probably for the reason that in 99 per cent of these cases the whole order was disobeyed, which is obviously a 'material' non-compliance. It is reasonable to suggest that where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the Court would take the substantial compliance into account, and would not commit for the minor non-compliance.” (Own emphasis)

- [16] The requirements have to be proven by the applicants beyond reasonable doubt. See **Fakie N.O. v CCII Systems (Pty) Ltd**, *supra*, at para [42]. See also **Tasima (Pty) Ltd v Department of Transport** [2016] 1 ALL SA 465 (SCA).

- [17] In order for a person to be found guilty of contempt of court, the disobedience must not only be wilful, but also *mala fide*. See **Clement v Clement** 1961 (3) SA 861 (T) at 866A.

- [18] As soon as the first three elements for contempt of court exist, a presumption exists that contempt has been established and *mala fides* and wilfulness are presumed, unless the respondent is able to lead evidence sufficient to create reasonable doubt as to its existence. Should the respondent be unsuccessful in discharging the evidential burden, contempt will be established. See **Matjhabeng Municipality v Eskom** 2018 (1) SA 1 (CC) at para [63].

Consideration of the urgency and the merits of the application:

Urgency:

[19] In my view the applicants have fully set out the reasons in substantiation of their request that the application be heard on an urgent basis.

[20] As correctly pointed out by Ms Nyezi, there is in any event an element of urgency in contempt proceedings. In this regard she referred to the judgment in **Victoria Park Ratepayers' Association v Greyvenouw CC and Others** (511)/03) [2003] ZAECHC 19 (11 April 2003) at para [5]:

“... Contempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that the party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency.”

[21] In **Wright v Saint Mary's Hospital, Melmoth and Another** 1993 (2) SA 226 (D) at 228E – F the court held as follows with regard to continued disregard of a court order:

“In *Protea Holdings Ltd v Wriwt and Another* 1978 (3) SA 865 (W) it was held that if it is established in committal proceedings that the guilty party continues to disregard the order of court the element of urgency sufficient to justify seeking relief by way of urgent application is thereby established. I am *prima*

facie in agreement with this conclusion and the reasoning of Nestadt, J in arriving thereat.”

Also see **Secretary, Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others** 2021 (5) SA 327 (CC) at paras [31] – [34].

- [22] In the totality of the circumstances of the application, also considering the findings regarding the merits of the application I am to make hereunder, I am satisfied that the applicants have made out a proper case with regard to the urgency of the application.

Merits:

- [23] Like I have already indicated, it is not in dispute that the contents of the order came to the knowledge of the respondents on the day it was issued. This is further confirmed by the post that was made on Facebook with regard to the order, the contents of which I will refer to hereunder.
- [24] With regard to the respondents’ failure to have removed the posters and/or notices from Facebook as ordered in paragraph 3 of the order their continuation of the hosting of the event on 1 October 2022 at the property and their continued hosting of events at the property up to date of the filing of the application, it is the respondents’ case that their conduct did not constitute non-compliance with the order, since the event they hosted on 1 October 2022 and the further events thereafter, were not public events as stipulated in the order.

[25] In the urgent application which served before Loubser J, a letter of demand which was addressed by the applicants' attorney of record to the respondents was attached to the application as annexure "K15", which letter was dated 28 September 2022. In the said letter the following was stated:

- "2. It is out instructions that you are intending on hosting an event at House Phola Restaurant, with business address 1707 Petsana, Reitz on 1 October 2022.
3. ...
4. It is therefore our instructions to demand of you, as we hereby do, that you refrain from hosting any entertainment event at House Phola Restaurant pending the finalisation of the Spoliation Application. Furthermore, that you unreservedly retract any posters and/or notices made publicly for the said event. ..."
5. ... Should we not receive your timeous response hereto we hold instructions to approach the court on an urgent basis."

[26] A letter in response to the last-mentioned letter from the respondents' legal practitioner of first instance at the time addressed to the applicants' attorney of record, dated 29 September 2022, which was attached to the urgent application which served before Loubser J as annexure "K18", stated, *inter alia*, as follows:

"We have instructions to vehemently oppose your envisaged application with punitive costs as it is both unmeritorious and lacks urgency. Our client will proceed with its operations and planned events."

[27] In the urgent application which followed subsequent to the respondents' refusal to comply with the applicants' aforesaid demands, which served before Loubser J, the first applicant stated as follows in paragraph 10.1 of the founding affidavit:

"... I have a *prima facie* right and/or clear right to protect the reputation and goodwill of my business which the respondent has infringed and will continue to infringe if they are not interdicted from hosting the 1 October 2022 public event and any other public event pending the finalisation of the application for spoliation."

[28] In paragraph 10.3 of the said founding affidavit the event was even more clearly described by referring to it as the "*1 October 2022 public event ('THE RE-OPENING')*". From a perusal of the copies of the posts on Facebook which were attached to the mentioned founding affidavit as being the posts with regard to the said event, more specifically annexure "K12.2" thereto, it is evident that the event was also described as the "Reopening of Official House Phola Lounge". (Own emphasis)

[29] It is important to be mindful of the fact that the application which served before Loubser was not only emailed to the respondents' legal representative at the time, but was also served personally upon both respondents. In the absence of any allegation or indication to the contrary, it should therefore be accepted that the respondents duly read and understood the application papers.

[30] In my view the event which was scheduled for 1 October 2022 was so clearly described in the founding affidavit of the application

which served before Loubser J, read with the Facebook posts in relation thereto, that it must have been evident to the respondents that it is the said event which had been interdicted. The alleged issue about a public event and a private event could therefore not have caused the respondents not to know that the aforesaid event of 1 October 2022 is the one which had been interdicted and that the “*posters and/or notices*” on Facebook pertaining thereto were the ones which the respondents were ordered to “*unreservedly retract*”.

- [31] When considering the defence raised by the respondents regarding the 1 October 2022 and further events not to be public events, I again return to consider the posts made on Facebook of which copies were attached to the founding affidavit of the application which served before Loubser J. Annexure “K11” thereto reflects an advertisement regarding and invitation to the said event. It lists the “DJ’s” who were lined up to perform at the event and also reflects the following “Event Information”:

“Time: Gates open at 4pm.

Venue: House Phola Lounge (Petsana)

Rules: No weapons, no under 25, dress smart, no outside booze allowed at the venue, free wifi, 24-hour surveillance, tight security.”

- [32] Annexure K12.1 to the said founding affidavit reflects a further Facebook post under the name “*Petsana House Phola Lounge*” and under the heading “*About*” the following description appears:

“House Phola Lounge. It’s a club based in Reitz Petsana 9810 under management of Maseko and Masangani Family. We also have SOUNDS OF

ELOKSHIN WHO WILL CATER ALL THE MARKETING AND EVENTS MANagements. DEEJAY FOMBO AS OUR RESIDENT DEEJAY WILL SERVE GOOD MUSIC FOR THE PLACE. WE ALSO HAVE A CLOTHING BRAND OF CAVA ELOKSHIN BRANDING.

LETS ENJOY MUSIC." (*sic*)

- [33] The following post was made on the relevant Facebook page, attached to the founding affidavit filed in the present application. as annexure "TK4.1":

"Please note that the event is NOT and was NEVER a public event.

House Phola is a Private Company and the event is Strictly Admission Reserved and therefore not a public event.

As we are all aware a public event are organised in terms of Public Gathering Act as well as Safety At Sports and Recreation Events Act.

All patrons of House Phola are invited.

House Phola is not interdicted from operating. We are interdicted from holding public events which we don't intend to hold.

The event is a Private and all House Phola patrons are invited.

All admitted persons will be stamped on entry.

Right of Admission Reserved."

(*sic*)

- [34] The post on the Facebook page attached to the present application as annexure "TK5", was apparently made after the 1 October 2022 event and reads as follows:

"We would like to take this opportunity to thank everyone who broke their schedule to find time to come and celebrate the re-opening of House Phola Lounge.

We have heard your complaints about prices and we have re-adjusted them accordingly. We deeply apologise for the inconvenience caused.

Let's meet again this weekend at the only place to Phola!!

Remember without you and yours we are nothing.

Re a leboha.

Rights of admission were reserved." (*sic*)

[35] In my view it is evident even from the abovementioned Facebook posts that the public were invited to the event of 1 October 2022, that liquor was to be sold, that DJ's were lined up to perform at the event and that strict security arrangements were to be in place. With regard to the general information regarding "House Phola Lounge", it is in my view clear that it operates as a club which hosts public social events.

[36] Even on the first respondent's own version, as contained in the answering affidavit and which I have already quoted earlier, they have been hosting events "*as part of restaurant activity in terms of the licence*"; hence, events to which the public is invited.

[37] In **HLB International (South Africa) (Pty) Ltd v MWRK Accountants and Consultants (Pty) Ltd** 2022 (5) SA 373 (SCA) at paras [25] – [29] the rules and principles pertaining to the interpretation of court orders were authoritatively stated:

"[25] Since *Firestone* there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. The modern approach to interpretation was set out thus by this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the

context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the purpose of the document. . . . The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

And in *Bothma-Batho Transport v S Bothma & Seun Transport* this court made the point that '(t)he former distinction between permissible background and surrounding circumstances, never very clear, has fallen away'; that interpretation is now 'essentially one unitary exercise'; and that it 'is no longer helpful to refer to the earlier approach'.

[26] The now well-established test on the interpretation of court orders is this: 'The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual, well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'

[27] The manifest purpose of the judgment is to be determined by also having regard to the relevant background facts which culminated in it being made. For as was said in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*, 'context is everything'.

[28] A fairly recent illustration of the linguistic, contextual and purposive approach to the interpretation of a judgment or order is to be found in *Elan Boulevard v Fnyn Investments*, in which it was said that '(a)n order is merely the executive part of the judgment and, to interpret it, it is necessary to read the order in the context of the judgment as a whole', and —

'(a) part of the "usual well-known rules" of interpretation, according to Olivier JA, is —

"dat mens jou nie moet blind staar teen die swart-op-wit woorde nie, maar probeer vasstel wat die bedoeling en implikasie is van wat gesê is. Dit is juis in hierdie proses waartydens die samehang en omringende omstandighede relevant is." [Footnotes omitted.]

Loosely translated:

'One should not stare blindly at the black-on-white words but try to establish the meaning and implication of what is being said. It is precisely in this process that the context and surrounding circumstances are relevant.'

(Own emphasis)

- [38] When the background facts as set out in the application papers which served before Loubser J are considered in totality, which facts culminated in the order, it is in my view evident that the purpose of the order was to interdict the event of 1 October 2022, which event was clearly described in the application papers, the Facebook material in relation thereto and all subsequent similar events to be held at the property. The order is to be interpreted accordingly.

- [39] There is absolutely no basis upon which the respondents can allege that the event of 1 October 2022 and the events thereafter, were not public events and were not prohibited by the interdictory order.

- [40] There was, in my view, therefore clear non-compliance with the order by the respondents beyond reasonable doubt. The respondents have not made any allegation that the said non-compliance was not wilful and *mala fide*. Especially in view of the

clear description of the event of 1 October 2022 as to which event was interdicted, the respondents' non-compliance therewith could not have been *bona fide*.

- [41] Despite the very able arguments by Ms Ngubeni, on behalf of the respondents, it is in my view evident beyond reasonable doubt that the respondents have been deliberately failing to comply with the court order and are therefore in contempt thereof.

The sanction:

- [42] The following was stated in **MT v CT** 2016 (4) SA 193 (WCC) at para [52] with regard to a finding of contempt of court:

"[52] It has been repeatedly said that, aside from preserving the dignity and moral authority of the institution of justice, the purpose of finding a party to be in contempt is to ensure compliance with the order previously ignored. Most often the sanction will contain a punitive element (which is suspended either wholly or in part) on condition that the order is complied with."

- [43] In my view a fine which is suspended on condition that the order is complied with, is an appropriate sanction.

Costs:

- [44] The postponement of the application on 11 October 2022 was due to the fact that the application was not yet ripe for hearing. This type of situation very often occurs in instances of urgent applications and are to be considered to be part of the application

process. I therefore deem it appropriate that those wasted costs are to be costs in the application.

- [45] With regard to the scale of costs, I agree with the submission by Ms Nyezi that a punitive costs order as prayed for in the notice of motion is appropriate in order to show the court's disapproval of the respondents' recalcitrant conduct.

Order:

- [46] The following order is consequently made:

1. Condonation is granted for the non-compliance with the Rules pertaining to form, service and notice and the matter is heard as one of urgency in terms of Rule 6(12).
2. The respondents are declared to be in contempt of the order of Court granted by this Court on 30 September 2022.
3. The respondents are ordered to each pay a fine of R10000.00 (ten thousand rand), the payment of which is suspended for the time period until the finalization of the motion proceedings in this Court under case number 4751/2022, on condition that the respondents comply with paragraph 4 of the Court order granted on 30 September 2022.
4. The respondents are ordered to pay the costs of the application, which costs include the reserved costs of 11

October 2022, and which costs are to be paid on a scale as between attorney and client.

5. The applicants' attorney of record is to have this order served upon the respondents, the costs of which are to be paid by the respondents, jointly and severally, payment by the one the other to be absolved.

C VAN ZYL, J

On behalf of the applicants:

Adv. Z. Nyezi
Instructed by:
Wesi Attorneys Inc
Bloemfontein

On behalf of the respondents:

Adv. T. Ngubeni
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