



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

CASE NO: 27 / 2021

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

06 September 2022

DATE

SIGNATURE

In the matter between:

CITY OF MBOMBELA LOCAL MUNICIPALITY

APPLICANT

And

MASAKHE MEDIA (PTY) LTD

RESPONDENT

(Formerly known as Satobe Outdoor (Pty) Ltd)

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 06 September 2022.

[1] This is an interlocutory application in which the Applicant is the Respondent in the main application, and the Respondent is the Applicant. For ease of reference, parties are referred to in this judgment as they are in the main application. In this application, the Respondent seeks a declaration that the Applicant is in contempt of court and that a sanction should be imposed in which the Municipal Manager of the Applicant is sentenced to imprisonment for 30 days, which is suspended on condition that he complies with the court order within 10 days.

[2] Background.

Following is a brief background leading to the current application. In January 2021, the Applicant brought an application against the Respondent seeking an declaratory order to the effect that the contract it had with the Respondent has been terminated and for the removal of advertising boards that were installed by the Respondent. The Respondent filed a notice of intention to oppose and served a Rule 35 notice on the Applicant in which it required access to various documents necessary to enable it to respond to allegations in the application. The notice went unheeded by the Applicant. An application was as such brought by the Respondent to compel the Applicant to furnish the documents required. The application was opposed by the Applicant, on the basis that the documents were irrelevant. However, on 26 October 2021, an order was issued

by this court in which the Applicant was ordered to comply with the Respondent's Rule 35 notice within 10 days.

[3] In an answering affidavit, Mr. Mosala who is the Municipal Manager of the Applicant alleged that "in order to comply with paragraph 1 of the order, the Applicant discovered all documents in its possession in respect of the appointment of the new service provider, and all other documents incidental thereto."¹ The Applicant discovered the said documents on 09 November 2021 through electronic means, he averred. He therefore contended that the Municipality complied with the court order. The Respondent however submitted that the Applicant has not fully complied with the order as some of the required documents were not discovered. To this, Mr. Mosala responded that "the requested documents exist on the mind of the Respondent and or the Respondent thinks that this documents exist despite the discovered documents (sic)."

[4] Mr. Mosala further averred that the instructing attorneys for the Applicant had written to the Respondent informing them that the documents discovered were the only documents in the Applicant's possession. The Respondent's contention against this standpoint is that if the documents did not exist, the Applicant would have indicated to the court when opposing the application to discover, instead of raising "irrelevance" as the only basis for its opposition. To this, Mr. Mosala said, "the Applicant's defence in respect of Rule 30A of the Uniform Rules was never about misleading the court that the documents exist, but grounded on the principle of relevance."²

¹ See para 7 of the answering affidavit on p. 203 of the paginated bundle.

² See para 13 of the answering affidavit on p. 204 of the paginated bundle.

[5] The Respondent went to great lengths to demonstrate that the documents would under normal circumstances be available and in possession of the Applicant, in an attempt to convince the court to reject the Applicant's version to the effect that the documents do not exist or that they are not in its possession. For example, the Respondent argues that the Applicant attached a contract but did not attach the annexures referred to therein. Those annexures remain undiscovered. The Respondent believes that some of these documents could be under the care of the Applicant's employees. Failure by the Municipal Manager to indicate the steps taken to search them or to attach confirmatory affidavits by these employees confirming their absence makes the Applicant guilty of contempt of court, it argued.

[6] The crime of contempt of court.

Civil contempt, as it is commonly referred to, was revisited by the Supreme Court of Appeal (the SCA) in *Fakie NO v CCII Systems (PTY) LTD*³ wherein the requirements for a conviction for contempt of court emanating from a court order in civil proceedings were laid down. In that case, coincidentally failure by the Auditor-General to furnish required documents as ordered by the court was revisited as to whether it was contempt of court. Before dealing with the requirements for a conviction, the SCA indicated that making such a determination in an application "depends on the circumstances of the admitted default."⁴

[7] The statement above is a reminder that applications are not a means through which the courts make factual findings where there are disputes. I shall revert to the impact of disputed facts in applications later in this judgment.⁵ It suffices

³ (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006).

⁴ See *Faki (supra)* at para 5.

⁵ See paragraphs 10-12 below.

for now to merely highlight that this position was fully elucidated in *National Director of Public Prosecution v Zuma*⁶ when the SCA stated,

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[8] As for the requirements for a conviction in civil contempt, the SCA held in *Fakie*⁷ as follows:

[6] It is a crime unlawfully and intentionally to disobey a court order.⁸ This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional ‘stamp of approval’, since the rule of law – a founding value of the Constitution – ‘requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained’

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’.⁹ 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 a case good faith avoids the infraction. Even a refusal to

⁶ 2009 (2) SA 277 (SCA) at para 26.

⁷ *Supra* at footnote 3 at para 6, 9 & 10.

⁸ *S v Beyers* 1968 (3) SA 70 (A).

⁹ *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 367H-I; *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA) paras 18 and 19.

comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).¹⁰

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces.¹¹ Honest belief that non-compliance is justified or proper is incompatible with that intent.

[9] In order to be successful, the Respondent should therefore prove that the Applicant did not only deliberately disobey a court order, but that its conduct was wilful and *mala fide*. That finding should be made from the admitted facts. The only time a court may make findings on disputed facts in applications is when a respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.¹²

[10] The Applicant avers that it discovered all the documents in its possession and that the rest do not exist or that if they do, they are not in its possession. The Respondent raises two urgings to counter this possibility. First it argues that if they did not exist, the Applicant would have said so in its opposition to

¹⁰ *Noel Lancaster Sands (Edms) Bpk v Theron* 1974 (3) SA 688 (T) 692E-G per Botha J, rejecting the contrary view on this point expressed *Consolidated Fish v Zive* (above). This court referred to Botha J’s approach with seeming approval in *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc* 1996 (3) SA 355 (A) 368C-D.

¹¹ See the formulation in *S v Beyers* 1968 (3) SA 70 (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’) and CR Snyman *Strafreg* (4ed, 1999) page 329 (‘Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van ‘n regterlike amptenaar in sy regterlike hoedanigheid, of van ‘n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande ‘n aanhangige regsgeding wat die strekking het om die uitslag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding’).

¹² See *National Director of Public Prosecution v Zuma* (*supra*: fn 6).

the application for discovery. This argument ignores the fact that the style in litigation adopted by the Applicant may differ from the one preferred or would have adopted by the Respondent if it was in its place. While it may be a wiser approach in litigation for a party to raise all the defences at its disposal, or in the alternatives; it is not unheard of for litigants to raise only what they consider to be a strong defence while all other defences are left out. This is usually motivated by the confidence a party would have that the court would rule in its favour. I therefore conclude that failure to put this as a defence does not establish the existence of the required documents.

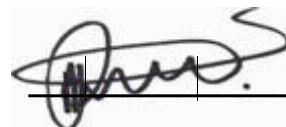
[11] The second argument is all about reasonable inference from the circumstances. If the Agreement makes reference to annexures, it can be inferred under normal circumstances that the annexures are kept with the said agreement. This inference, ignores the reality on the ground. Practically, documents do go missing through theft, corruption or misfiling. In other instances, they can exist but being possessed by other parties than those expected or supposed to keep them. After all, the court order referred to above, did not make a finding on what documents the Applicant had in its possession, but simply ordered it to discover them.

[12] The Respondent was aware that there was dispute on whether the Applicant had the required documents in its possession even before launching this application. This dispute cannot be categorised as bald or uncreditworthy denial or fictitious dispute of fact. The Respondent cannot say it as a fact that the documents exist or that they are in the Applicant's possession, except to raise doubts on the Applicant's denials. The common facts of this case do not sustain the Respondent's case as there is no bases upon which the court can reject that the Applicant discovered all the documents in its possession. Since this is not a trial, no matter how doubtful the version of the Applicant may be

painted, the court cannot make findings on disputed facts through motion proceedings.

[13] It follows therefore that the Respondent has failed to show that the Applicant's failure to discover all the documents it had required was a conduct meant to disobey the court order and that it acted with wilfulness and *mala fide*. I cannot, with the facts presented, hold that the Applicant withheld some of the documents that it was ordered to discover, in a deliberate act of defiance of a court order.

[14] For the aforesaid reasons, I make the following order:
The application is dismissed with costs.



TV RATSHIBVUMO
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION
MBOMBELA

FOR THE APPLICANT : ADV L ZWANE

INSTRUCTED BY : QQ MKHATSHWA INC

: MBOMBELA

FOR THE RESPONDENT : ADV MJ ENGELBRECHT SC

: ADV PANTAZIS

INSTRUCTED BY

: SIM ATTORNEYS INC

**C/O: DU TOIT-SMUTS &
PARTNERS**

: MBOMBELA

DATE HEARD

: 30 AUGUST 2022

JUDGMENT DELIVERED

: 06 SEPTEMBER 2022