



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

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO OTHER JUDGES: YES/NO
 (3) REVISED No

DATE: 3 MAY 2019.....

SIGNATURE: *E. e. e. S.*

Case No. 24505/2019

In the matter between:

JR209 INVESTMENTS (PTY) LTD

FIRST APPLICANT

IDLEWILD FARM (PTY) LTD

SECOND APPLICANT

IDLEWILD FARM CC (PTY) LTD

THIRD APPLICANT

LIBERINI 112 CC

FOURTH APPLICANT

HY-LINE SOUTH AFRICA (PTY) LTD

FIFTH APPLICANT

MALUUVHA KWEKERY (PTY) LTD

SIXTH APPLICANT

And

**HOMELESS PEOPLE HOUSING COOPERATIVE
LIMITED**

FIRST RESPONDENT

**THE EKHURULENI METROPOLITAN
MUNICIPALITY**

SECOND RESPONDENT

**THE UNLAWFUL INVADERS OF PORTIONS 8,
10 AND 39 OF THE FARM WITKOPPIES 393
EKHURULENI**

THIRD RESPONDENT

THE GAUTENG DEPARTMENT OF
AGRICULTURAL AND RURAL DEVELOPMENT
THE MINISTER OF THE SOUTH AFRICAN
POLICE SERVICES
COLONEL RAKGALAKANE, STATION
COMMISSIONER OF SAPS OLIFANTSFONTEIN
SAMUEL MANDLHA SONGO

2
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT

JUDGMENT

MILLAR, A J

1. On 19 April 2019, the applicants brought an urgent application against the first and third respondents seeking *inter alia* to interdict what they contended was the unlawful occupation of portions 8, 10 and 39 of the farm Witkoppies 393. This occupation, it was contended, was instigated and facilitated by the first respondent and its employees.
2. After hearing the parties, the court granted an order. Paragraph 3.3 of that order read:

"The First Respondent is ordered and directed to take any and all steps necessary to enforce compliance with this order on and in respect of the invaded properties, to desist from any further unlawful use of the invaded properties or granting consent to do so, to prevent any further invasion of the invaded properties by the third respondents, unlawful use, unlawful conduct on or in respect of, unlawful occupation, unlawful erection of dwellings and particularly shacks at the invaded properties."

3. It is the contended breach of this paragraph of the order that precipitated the bringing of a further urgent application, a week later on 26 April 2019 against the first and the seventh respondents. After the hearing I granted an order. The first and seventh respondents have requested reasons for paragraphs 2, 3 and 6 of that order and that is what is set out herein.
4. When the application was called, counsel for the first and seventh respondents, there being no appearance for any of the other respondents, indicated that they had not had sufficient time to prepare an answering affidavit. Having regard to the urgency of the matter, it was decided that the seventh respondent would testify so as to put the first respondent's as well as his own version as to what had transpired since the 19th of April before the court.
5. The seventh respondent testified that he is the chairperson of the board of directors of the first respondent. He testified that the first respondent procures land for housing homeless people. Land is identified for purchase and then it is put before "the community". If the community agrees to the purchase of the land, then it is purchased, and they are shown the title deed. The purchase is financed by "the community", each of whom pay R4 000,00 towards it. The ultimate aim is to have the property proclaimed as a township and to thereafter allocate a piece of land to each of those who contributed. In respect of the properties in question he acknowledged that they were zoned for agricultural use at present but stated that a town planner briefed by the first applicant had already submitted applications for the establishment of townships on each of the properties in question.

6. He testified that he had been in court on 19 April 2019 when the first application had been argued and was aware of the terms of the court order. After the granting of the order he had gone to the properties and informed the persons there of the terms of the order.
7. Of the three properties only portion 8 is fenced and has a gate that can be locked. That property already has a house on it and that house is occupied by an employee of the first respondent, Mr. Titus Manamela ("Manamela"). He is in control of the property. Having informed the occupiers, including Manamela of the court order, he heard nothing further until the next day when he received a call from Manamela advising him that there were persons wanting to move onto portion 8 and erect structures there. He instructed him to send them away and to lock the gate and furnish proof that he had done so. Manamela complied and took a photograph of the locked gate.
8. His next attendance at the properties was on 23 April 2019 when the sheriff had arrived at the properties to serve the order and to execute. The sheriff was unable to do so that day and subsequently only did so on 25 April 2019.
9. The seventh respondent was cross-examined on the number of structures that had been present on the properties on the 18th of April when the urgent application had been launched - according to the applicant only 1 on that day, the 19th of April when the order had been granted - according to the applicant approximately 100 by the end of that day and the 25th of April when the sheriff had executed the order approximately 200. He was evasive and refused to commit himself to an answer. When pressed he answered that

"there could have been more than 1" and when pressed further became argumentative and said, "maybe 50". On consideration of the evidence of the seventh respondent as a whole, I found him to be an unimpressive witness who tailored his evidence. I formed the view that I could not rely on his evidence on this aspect save where it was corroborated by the allegations made by the applicants in their papers.

10. The seventh respondent clearly understood that the number of structures on the properties on the dates referred to in paragraph 9 above was a crucial element in determining whether either he or the first respondent were in contempt or not.
11. In considering an application, such as the present one, the Supreme Court of Appeal has held in the case of *FAKIE NO v CCII SYSTEMS (PTY) LTD*,¹ as follows:

"[42] To sum up:

- (a) *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- (b) *The respondent in such proceedings is not an 'accused' person, but is entitled to analogous protections as are appropriate to motion proceedings.*

¹ 2006 (4) SA 326 at 344G – 345B

- (c) *In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt.*
- (d) *But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to willfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was willful and mala fide, contempt will have been established beyond a reasonable doubt.*
- (e) *A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities”.*

12. The Constitutional Court has held further in *Matjhabeng Local Municipality v Eskom Holdings Limited & Others*² that:

“[67] Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual’s freedom and security of the person. However, it is necessary in some instances because

² (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017)

disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

13. In other words, in respect of the first respondent, a juristic person which cannot be committed for contempt, the civil remedies will find application in the event of a finding on a balance of probabilities and in respect of the seventh respondent in respect of whom an order for committal was sought, such order could only be made in the event of a finding beyond a reasonable doubt.
14. In respect of both the first and seventh respondents, it was not disputed that the first respondent was represented in court when the order was granted on 19 April 2019 or that the seventh respondent was also present. The seventh respondent on his own evidence understood the order and went to the properties to convey its contents.
15. The seventh respondent also instructed Manamela, the person in control of portion 8 and an employee of the first respondent to implement the order. Was the order breached and

if so, was any party in contempt? The evidence of the applicant in the form of photographs which showed the number of structures on the properties on the 3 different days was not challenged. The applicant however was unable to demonstrate whether the additional structures that had been erected between the 18th of April and the 19th of April were erected before or after the court order had been granted that day and following from that whether the additional approximately 100 structures were there when the seventh respondent went to convey the terms of the order. On this aspect as I have stated above the seventh respondent was evasive.

16. What is undisputed however is that the seventh respondent conveyed the terms of the order to Manamela on the 19th. At the very least and assuming in favour of the first respondent that the additional 100 structures that had been erected between the 18th and the 19th were there by the time the order was granted, there was no evidence led in regard to how a further approximately 100 structures appeared on the property between the 19th and the 25th. If the property is indeed fenced and the gate was locked, then the additional structures could only have been erected with the knowledge of Manamela who must have allowed access to the property for that purpose. Having been told by the seventh respondent of the terms of the order and at least initially on 20 April 2019 having sought to comply, there can be no doubt that his subsequently allowing further persons to unlawfully enter onto the property to erect structures in contravention of the court order was both willful and *mala fide*.

17. For these reasons I found that the first respondent was in contempt of the court order.

18. During the argument the applicant placed on record that it had ascertained that subsequent to the sheriff's execution of the order on 25 April, no further breach of the order had taken place. Having regard to the nature of the order sought against the seventh respondent, I was mindful of the fact that the application had been brought as a matter of urgency and that the seventh respondent had not had the opportunity to file any papers. The order sought for his committal is a drastic one.

19. In this regard the Constitutional Court has held:

"[92] The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it.[117] The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.

[93] The principles which are fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent decision in Lushaba,[118] where the Court, per Jafta J, endorsed principles stated by Ackermann J in De Lange:

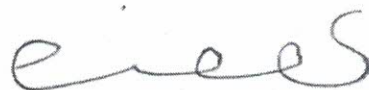
"[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that . . . the other side should be heard [audi alterem partem], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. . . . Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation."

20. The seventh respondent although he is the chair of the first respondents board, was not cited in the original application. His citation and joinder were effected on such short notice that were I to have decided that part of the order sought on the papers filed by the applicant and the evidence of the seventh respondent, this may to my mind have amounted to a summary conviction of and an injustice to the seventh respondent.

21. Having said that, it was asserted by the applicants that the seventh respondent was the driving force behind the breach of the order. If this were indeed so then the seventh respondent has a case to answer for contempt. This together with the unsatisfactory evidence tendered by him militates against the determination of this issue at this stage,

without the filing of further papers and/or the hearing of further evidence. Hence the order to postpone the relief sought against the seventh respondent *sine die*.

22. Having found that the first respondent was in contempt of the order granted on 19 April 2019, the applicants were successful in their application and hence the costs were ordered in accordance with the result.
23. For the reasons set out above, I granted the order, a copy of which is annexed hereto marked "X", in respect of paragraphs 2, 3 and 6.



A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	26 APRIL 2019
JUDGMENT DELIVERED ON:	26 APRIL 2019
REASONS REQUESTED IN RESPECT	
OF CERTAIN ORDERS:	29 APRIL 2019
REASONS FURNISHED:	3 MAY 2019

COUNSEL FOR THE APPLICANTS:

ADV. P LOURENS

INSTRUCTED BY:

ROESTOFF ATTORNEYS

REFERENCE:

MR JJ ROESTOFF

COUNSEL FOR THE 1st & 7th RESPONDENTS:

ADV. WR DU PREEZ

INSTRUCTED BY:

LE ROUX & DU PLESSIS INC.

REFERENCE:

MR G DU PLESSIS

NO APPEARANCE FOR THE 2ND, 3RD, 4TH, 5TH & 6TH RESPONDENTS

"X" ead
26/4/2019

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

ON THIS THE 26TH DAY OF APRIL 2019 BEFORE MILLAR AJ IN COURT 4D

CASE NO: 24505/2019

In the matter between:

J R 209 INVESTMENTS (PTY) LTD

First Applicant

REGISTRATION NUMBER: 2000/020447/07

IDLEWILD FARM (PTY) LTD

Second Applicant

IDLEWILD FARMS CC (PTY) LTD

Third Applicant

LIBERENI 112 CC

Fourth Applicant

HY-LINE SOUTH AFRICA (PTY) LTD

Fifth Applicant

MALUVHA KWEKERY (PTY) LTD

Sixth Applicant

and

HOMELESS PEOPLE HOUSING

COOPERATIVE LIMITED

First Respondent

(REGISTRATION NUMBER: 2014/013419/24)

THE EKURHULENI METROPOLITAN MUNICIPALITY

Second Respondent

THE UNLAWFUL INVADERS OF PORTIONS 8, 10 and 38

Third Respondents

OF THE FARM WITKOPPIES 393, EKURHULENI

THE GAUTENG DEPARTMENT OF AGRICULTURE

Fourth Respondent

AND RURAL DEVELOPMENT

THE MINISTER OF THE SOUTH AFRICAN POLICE

Fifth Respondent

SERVICES

COLONEL RAKGALAKANE, STATION COMMISSIONER

OF SAPS OLIFANTSFONTEIN

Sixth Respondent

SAMEUL MANDHLA SONGO

Seventh Respondent

DRAFT ORDER

**HAVING READ THE PAPERS, CONSIDERED THE MATTER AND AFTER
HAVING HEARD COUNSEL:**

1. That this matter be treated as one of urgency in terms of Rule 6(12) of the Rules of this Honourable Court and that the applicants' non-compliance with the rules of court concerning form, manner of service, prescribed time periods and such rules that would otherwise have been applicable.
2. The application is postponed *sine die* insofar as relief is sought against the seventh respondent.
3. The first respondent is declared to be in contempt of the court order granted by Tuchten [J] on 19 April 2019 under the above case number.
4. A fine is imposed on the first respondent in the amount of R100,000.00 [ONE HUNDRED THOUSAND RAND] and the payment thereof is suspended:
 - 4.1 on condition that the first respondent forthwith complies with the aforesaid order and continues to do so in future;
 - 4.2 until the the establishment of townships on the subject properties and/or the first respondent ceases to be the owner of any one of the

properties, in which case that property is released from the operation of this order but that the remainder of the order will be continue to the effective.

5. The sheriff is hereby instructed to forthwith attend on the subject properties and:

- 5.1 establish the precise number of dwellings and structures erected on the subject properties since 19 April 2019 and allocate a number to each such constructed structure/dwelling;
- 5.2 demolish each structure/dwelling erected since 19 April 2019 on the subject properties;
- 5.3 report to each of the parties and the court on the amount of structures/dwellings that were constructed on the subject properties as at 19 April 2019 and confirm the precise details of the occupants, which must include the full names and identity numbers of such individuals, if any, of such dwellings;
- 5.4 to the extent that the structures/dwellings constructed on the subject properties prior to 19 April 2019 are unoccupied, the sheriff is instructed to demolish those structures/dwellings and the respondents reserve their rights in relation to each decision so taken;

- 5.5 each party undertakes to co-operate with the sheriff in each and every respect required for the enforcement of this order.
6. The first respondent is ordered to pay the costs of this application to date.

BY ORDER OF COURT