

IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION – MTHATHA]

CASE NO. 4496/2018

Heard on: 28 October 2019

Delivered on: 12 November 2019

In the matter between:

THEMBINKOSI TSHANGELA

Applicant

and

NOGOLIDE XHOBISO

Respondent

JUDGMENT

ZONO AJ

[1] The applicant instituted these proceedings seeking mainly, that the respondent be held to be in contempt of the court order dated 10 January 2017. He further seeks that the respondent be committed to imprisonment. Sheriffs' fees incurred during demolition in the amount of R10 500-00 as well as an order of costs on an attorney and client scale are sought.

[2] The respondent opposed the application and in so doing she filed her Notice to Oppose and answering affidavit which has been followed by replying papers.

[3] The court order alleged to have been contravened is part of the applicant's papers as annexed as Annexure "TT1. It reads as follows:

- (1) *"The Rule Nisi granted in 6 December 2016 be and is hereby granted;*
- (2) *The dispossession of the piece of land described as Site No. 365, Zitatele Administrative Area, Corana Location, Libode belonging applicant by the respondent be and is hereby declared wrongful and unlawful.*
- (3) *The fencing of the piece of land described in Paragraph 2 above by the respondent be and is hereby declared wrongful and unlawful.*
- (4) *The respondent be and is hereby ordered to return possession of the said piece of land forthwith to the applicant.*
- (5) *The respondent be and is hereby ordered to remove the fencing from the said piece of land within 7 days from date of this order, failing which*

the sheriff of this court with the assistance of the South African Police Service, if need be, be ordered to remove the fencing forthwith.

(6) *There shall be no order as to costs.”*

[4] The respondent disclosed to the court different court order which is alleged to have been served with the application papers as the order that is alleged to have been contravened. This court order, despite that it is different from the one mentioned above, appear to have been granted contemporaneously with the one mentioned in Paragraph 3 above. Similarities between the two court orders are as follows: They were both granted on 10 January 2017 by Dawood J. Mr Zilwa was an attorney appearing for the applicant and the respondent appeared in person, and the court orders were granted by consent. The first paragraph of both court orders reads as follows: *“That the Rule Nisi granted on 6 December 2016 be and is hereby granted.”* All other paragraphs are different.

[5] Contents of Paragraph 2 to 4 of the other order read as follows:

“2. That the dispossession of the piece of land described as Site No. 365 the respondents to file their answering papers on or before the 16 January 2017.

3. The applicant shall file its replying affidavit on or before the 20 January 2017.

4. *Costs be in the cause*". The respondent therefore argued that no compliance with the court order (the other order) may conceivably give rise to contempt of court proceedings.

[6] The issue of two substantially different orders requires attention of this court before any other issue. This issue shall be dealt with obviously with reference to the principles governing contempt of court proceedings and the papers before court.

[7] Fundamental requisites for the granting of an order of committal are that the applicant for such an order must show the following:

"(a) That an order was granted against the respondent;

(b) That the respondent was either served with the order or informed of the grant and could have no reasonable ground for disbelieving that information;

*(c) That the respondent has either disobeyed the order or neglected to comply with it.*¹ It is sometimes required that applicant must show wilfulness in the form of mala fides. Counsel for the applicant correctly submitted that standard of proof in matters of this nature is proof beyond reasonable doubt.

[8] Whilst it is quite clear that both court orders appear to have been granted by the court on 10 January 2017 in the presence of both parties. It is plain that their existence is definitely proved. With regard to the court order sought to be enforced by the applicant, the applicant set out its contents in Paragraph 4 of the founding

¹ Fakie NO v CC11 Systems (Pty) Ltd 2006(4) SA 326 (SCA) at 344; Civil Practice of the High Courts of South Africa, 5th ed, VOL 2, Herbstein & Van Winsen Page 110G

affidavit and annex same as Annexure TT1 to the founding papers. Sequel to that the applicant makes the following allegations in Paragraph 6.2 of the founding affidavit:

“It will be noted from the order that the respondent appeared in person and the order was explained to her by the time it was taken.” In dealing with these allegation the respondent, in her answer states as follows:

“it is admitted I was at court in person when the order was granted.” From this it is clear that there can be no illusion about which court order the applicant and the respondent are talking about. The allegations specifically relate to Annexure TT1 and its contents that are specifically set out in and transposed onto Paragraph 4 of the founding affidavit and Paragraph 1 of the Notice of Motion. The existence of another court order in the light of the pleaded contents of the court order in question is irrelevant. Both parties are aware of the court order which is the subject matter of these proceedings.

[9] The question of service or notice of the court order is dealt with in Paragraph 6.2 and 6.3 of the founding affidavit. The allegations are couched in the following terms:

“6.2 I may mention that days before the matter appeared in court on 10 January 2017, the respondent visited my attorney’s office for purposes of explaining that she does not intend opposing the application and that she acknowledges that the piece of land belongs to me. 6.3. She further indicated that she will go to court and confirm that she consents to the order being taken. Indeed on the day of hearing she came

to court and the Presiding Judge engaged her so that the court can be satisfied that she understands the nature and import of the order. In appreciation of her attitude towards the matter and the way she appeared to have acted innocently, the Presiding Judge felt that she should not be mulcted with costs hence there was no order as to costs.” In answer the respondent deals with these allegations as follows:

“AD 6.2. I admitted having visited the applicant’s attorney but dispute I ever acknowledged the ownership of the applicant as I know that the applicant is being evicted by the owner of the allotment in a matter pending before this Honourable Court.

AD 6.3 I admit the contents herein.”

[10] In the light of the admissions made by the respondent, that she was in court on 10 January 2017, and her failure to deny a pertinent allegation that the court explained the contents of the court order marked as Annexure “TT1” I find that the requirement of service or notice was satisfied. I accept applicant’s version as correct.² On **Wightman t/a J W Construction v Headfour (Pty) Ltd 2008(3) SA 371 (SCA) at 375F – 376B** the following expression was made *“there is thus a serious duty imposed upon a legal advisor who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”*

[11] This brings me to the element of noncompliance. In Paragraph 7 of the founding affidavit the applicant alleges that *“in compliance of the order the sheriff of*

² Moosa v Knox 1949(3)SA 327 (N) at 331.

the court visited the piece of land and had the fencing demolished because the respondent had failed to take out the fencing. That was in January 2017.” The respondent disputes that she ever fenced at the place where the sheriff demolished. The sheriff pertinently submitted that he removed the fence three times and in each time he restored possession of the land to the applicant. The sheriff states that the removal of the fence and restoration of the land was for the sole purpose of executing the court order dated 10 January 2017.

[12] Two issues arise from the contents of the preceding paragraphs, namely: Firstly whether or not there was noncompliance with the court order or its terms; and secondly whether or not the court order was fully discharged or executed. These have a bearing on whether or not the applicant has a complete cause of action against the respondent.

[13] Whilst applicant’s founding affidavit expressly set out that the sheriff removed fencing in January 2017, it fails to disclose when that happened so that this court is able to appreciate whether or not there was contempt. It is essential to set out the date in January 2017 when the contempt of court order was committed especially in the light of the contents of Paragraph 5 of the court order in question, which required that removal must be effected within 7 days of the order. This court is groping in the dark as to whether the removal was effected within the prescribed 7 day period. The applicant has not proved this point beyond reasonable doubt and on that basis I am unable to find that there was contempt of Court order dated 10 January 2017.

[14] The problem compounded when the applicant's papers fail to specifically set out a term of the court order alleged to have been contravened. There is no specific term of the court order alleged to have been contravened by the respondent. When counsel for the applicant was pointed out to this deficiency he submitted that it must be assumed that the entire court order was transgressed. There is no basis laid for that assumption. It is trite that the whole purpose of pleadings is to bring to the notice of the court and the parties the issue upon which reliance is to be placed for the rivalling contentions. The object of the pleadings is to define and ascertain definitely what the question at issue between the parties is, and this object can only be attained when each party states his case with precision. Accordingly a pleader cannot be allowed to direct the attention of the other party to one issue and then, at trial, attempt to canvass another.³ In motion proceedings affidavits constitute evidence in support of the relief and or the defence, raised. They form the foundation upon which each cause of action or defence is anchored. It is now plain that applicant poorly pleaded his cause of action.

[15] Whether the purpose of the court order dated 10 January 2017 was achieved during January 2017 when the sheriff removed the fencing needs clarity. The court order in question is the one “*ad factum praestandum*.” Such orders can be divided into two categories, namely, those which direct certain things to be done and those that direct abstinence from doing particular acts.⁴ The first category of such orders can often relate to mandamus, mandatory interdicts and orders for specific

³ *Impreferd (Pty) Ltd v National Transport Commission* 1993 (3) SA 19 (A) at 107 C-H.

⁴ *Herbstein & Van Winsen* (supra) Page 1106.

performance without an alternative for payment of money. The second category of these orders relate to prohibitory interdicts.

[16] Orders *ad factum praestandum* in the form of mandatory interdicts or mandamus often serve as a redress for wrong doers past conduct (anteriority). It often addresses itself to wrong doers past conduct and brings about a remedy to the aggrieved party. On the other hand prohibitory interdicts are future directed in the sense that they address themselves to posterity. It is of cardinal importance to understand the target of the order in question so as to enable us to understand the perceived breach. If we miss to understand the target, we may as well misunderstand the contravention complained of, and ultimately not understand the nature of remedy available for such breach

[17] Having said that, applicant's counsel strongly argued that Paragraph 4 and 5 of the court order in question represents mandatory interdict which required removal of the fencing of and restoration of possession of a particular piece of land. Paragraph 4 and 5 of the court order are a consequential relief flowing from the contents of Paragraph 2 and 3 of the court. Paragraph 2 of the order declares as unlawful dispossession of a specified piece of land. Flowing directly from this, an order granting restoration of possession was granted. Paragraph 3 of the court order declares as unlawful the fencing of the same piece of land. As a direct result of that an order granting removal of the aforesaid fencing was granted.

[18] It is my considered view that on every possible interpretation that can reasonably be attached to the court order, it is manifestly clear that the court order merely focused its attention to the respondent's past conduct and declared that conduct unlawful. It could not have declared as unlawful a conduct that was still anticipated to be done in future. There would be no legal basis for that. Had the court wanted to deal with a future anticipated conduct as a target of the order it would have granted a prohibitory interdict clearly restraining or prohibiting a conduct of a particular nature. It would obviously do that based on the papers and the nature of the case serving before it. Clearly there was no case before court for prohibitory interdict.

[19] The sheriff of the court removed the fencing as directed by this court and further restored possession of the property to the applicant as early as January 2017. The sheriff subsequently did the same thing on two other occasions. All of this occurred before the institution of this application. From this it is so manifest that the purpose of the court order was achieved. The purpose of the court order was to get the offending fencing removed and to ensure restoration of possession to the applicant which had been done. The court order was fully executed and discharged. No further benefit or advantage would be expected to flow from it.

[20] I was urged on behalf of the applicant to understand that the court order to be prohibitory in nature. That interpretation would not only be contrary to the spirit and purport of the court order but also defeat "*funtus officio*" doctrine. Papers serving before me are only in respect of a contempt of court proceedings, which by no mean

seek to vary the court order in question. In a nutshell, there is no basis for extending the scope of what sought to be achieved by the court order. On the conspectus of what I have said above, I find that subsequent fencing and dispossession, if there was any, constituted a fresh cause of action which ought to have been pursued by fresh proceedings for suitable remedy.

[21] There is a massive dispute of facts regarding the property which is the subject matter in these proceedings. No application was made for referral of the matter for hearing of oral evidence.

[22] The court order describes the land in question as Site No.365 Zitatele Administrative Area, Corana Location, Libode. The respondent, who is also a resident at Zitatele Administrative Area, Libode disputes that there is such land demarcated as Site 365 in the locality. The respondent does not only dispute dispossessing the applicant of the land in question but also dispute that he fenced the property. The respondent notes that there was removal of fence but he further states that no further erection of fencing subsequently ensued. The respondent disputes having breached terms of the court. The respondent develops this dispute by alleging that the property which was the target of the court order is different from the land she fenced on the permission of the land owner. She further states that the sheriff removed the fencing that was erected on a piece of land that is different from hers. Her piece of land is not a piece of land contemplated in the court order. And to that effect she attaches photographs of the lands in question. In reply the applicant disputes everything the respondent is alleging. This is a perfect case for

application of what is commonly known as Plascon Evans Rule.⁵ The dispute of facts is irresolvable on the papers and accordingly respondent's version must prevail. In the amalgam of all the issues in this case applicant's application stands to fail with costs.

[23] In the result the following order shall issue:

(a) The application is dismissed with costs.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES

For the applicant : Mr H. Zilwa

Instructed by : ZILWA ATTORNEYS

MTHATHA

For the respondent : Mr S. Mgxaji

⁵ Plascon – Evan Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634I.

Instructed by

:

MGXAJI & COMPANY

MTHATHA