

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION-MTHATHA**

Case No. 3351/2018

In the matter between

**NOMAKHWEZI MTSHIZANA-BASE
BUYISWA ZWEDALA
MBIKO LINDISWA
NOBELUNGU LUMKWANA
LELETHU LUMKWANA
MBAMBELELI SIWAPI
MBAMBELELI SIWAPI**

**First Applicant
Second Applicant
Third applicant
Fourth applicant
Fifth applicant
Sixth Applicant
Seventh Applicant**

and

**NOSIZWE MAXHWELE AND SIX OTHERS
ONKE NYATHI
VUYANI MADUBELA
THEMBISILE MKHANZI
MTETELELI MKHOHLI
SISA MANYADU
KING SABATA-DALINDYEBO
LOCAL MUNUCIPALITY**

**First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent**

JUDGMENT (CONTEMPT OF COURT)

MNYATHELI AJ

Introduction

[1] Before me is an application brought on the 11th September 2018, on the basis of urgency to declare or hold the Respondents in contempt of an Order of Court issued on 6 September 2018 under Case number 3351/2018 (**“the Order”**). The Order, per Notice of Motion (**“the Notice”**) is, in the main, to the following effect:

‘1.1 That the Respondents are declared to be in contempt of the order granted by Dawood J on 6 September 2018 under Case Number 3351/2018;

1.2 That the Respondents be directed to remedy and cease such contempt with immediate effect upon service of the court order;

1.3 That should the Respondents fail to remedy and cease the contempt that the Respondents be committed to prison for a period of thirty (30) days;

2

1.4 That the First and Sixth Respondents be ordered to remove the wall that has been constructed on the site of the First Applicant within 48 hours of service of the order;

1.5 Should the Respondents fail to remove the wall on the property of the First Applicant that the Respondents be committed to prison for a period of thirty (30) days;

1.6 The costs of suit;

1.7 Further and/or alternative relief.’

[2] An affidavit of the Applicant with annexes accompanies the Notice. Respondents oppose the Application and have filed an Answering affidavits to which the Applicant filed a Replying affidavit.

[3] The application follows a series of events and shenanigans between the warring parties regarding allegations of contempt, postponements and interpretation of orders obtained from and before colleagues and other processes which apparently necessitated the instant application.

[4] In opposing the application Respondents deny all the factual allegations of the Applicant. They also put in issue the validity of the Order on the strength of which the contempt application is brought.

[5] Due to that, and lack of clarity and stark contradictions in the positions and

affidavits of the parties I elected to afford myself sufficient time to meticulously look into the facts and attendant issues, in order to decide the matter.

- [6] It will be apparent that, although the matter initially came as urgent, it had all but lost such lustre of urgency, at the time that it came as an opposed application before me in the afternoon of 19 September 2018, unless one would redefine and attach a new meaning to what urgency is. The application is brought against only First and Sixth Respondents.
- [7] I mention that the matter has its genesis on a main application for an interdict which was allegedly also ripe for hearing, but by agreement between the parties, the instant one (the contempt component thereof) was given priority. I will, therefore, confine myself to the exigencies of the instant application.
- [8] To navigate my way through the mire of papers before me and in order to place the matter in perspective it is necessary to set out the chronological background to the pertinent events that led to this application and eventually the order or orders that are a feature, and lie at the heart thereof before this court, and perhaps then venture a decision.

Background

- [9] On **31 July 2018**, pursuant to an application by Applicants, this court per Griffiths J issued an Interim Order, (“the Interim Order”) as it seems, returnable on the 28 August 2018 to the following effect:

‘It is ordered by consent that:

1. *The applicants be and are hereby granted leave to bring this application as one of urgency in terms of uniform rule 6(12) and the court dispenses with the forms and service provided for in the uniform rule 6(5).*
2. *A rule nisi do hereby issue calling upon the respondents to show cause, if any, before this Court on **Tuesday, 28 August 2018 at 10h00** in the forenoon or so soon thereafter as Counsel may be heard why the following orders should not be made final:*
 - 2.1 *The first, second third, fourth, fifth and sixth respondent’ (“the respondents”) be and are hereby interdicted and restrained from intimi-*

*dating, threatening, and evicting applicants from their homesteads and/or plots in **Bhongweni Phase 1, Zimbane Administrative Area, Mthatha;***

2.2 *The respondents be and are hereby interdicted and restrained from preventing the applicants' access of (sic) their homesteads and/or plots in **Bhongweni Phase 1, Zimbane Administrative Area, Mthatha.***

2.3 *The respondents be and are hereby directed to forthwith restore undisturbed and unhindered possession and access to the applicant (sic), of their homesteads and/or plots in **Bongweni Phase 1 Zimbane Administrative Area, Mthatha***

3. *That paragraph 2.1, 2.2, and 2.3 shall operate as interim relief and/or mandamus in the applicants, favour pending he (sic) finalization of this matter.*

4. *In the event that the respondents and any other person(s) acting in concert with them failing to pay heed and / or abide by the terms of this order the **Sheriff** of the **High Court** duly assisted by members of the **South African Police Services** under the directive of the Sheriff, be granted leave to take all reasonable steps to assist the Sheriff in effecting the orders as per paragraphs 2.1, 2.2 and 2.3*

5. *Costs are reserved*

BY ORDER OF COURT

REGISTRAR'

[10] On **16 August 2018**, from what I can gather from the papers and material filed of record, Nhlangulela DJP, apparently faced with a request for a certificate for directions, directed that applicants issue papers and serve them on the respondents on 21 August 2018 @ 10h00 or so soon thereafter as a duty Judge may direct.

[11] On **21 August 2018** the matter came before Tokota J and was postponed to 28 August 2018 with the issue of costs to be costs in the cause. There is a date stamp

affixed on the letter of the Order of Tokota J indicating a date of **24 August 2018**. It is not immediately clear what the purport of the stamp and the date thereon is¹.

- [12] On **28 August 2018** the matter came before Naidu AJ and was again postponed to 04 September 2018.
- [13] On **04 September 2018**, Mbenenge JP ordered that the matter be stood down till 6 September 2018.
- [14] From this point onwards, it seems that the matter was attended by some confusion when it came before Dawood J, in that the latter did not find the full letter of the order on the basis of which the contempt proceedings could be proceeded with. What was before her was an incomplete order that did not give her to conclude that contempt of an Interim Order had occurred. This confusion appears to have taken place on **06 September 2018**.
- [15] Upon examination of the situation it appears from the notes and inscription of my Sister Dawood J, that the Interim Order (of 31 July 2018 per Griffiths J) before her did not indicate that an interim order had been granted and/or served. From what I can decipher from her notes she concluded that *even if such an order existed it was not an order that was issued and served, unfortunately*.
- [16] I pause here to refer to the pertinent averments in the Founding affidavit of the applicants:

Paragraph 23 thereof:

“While preparing the application for contempt, our attorneys of record became aware that the incomplete order had been served. She instructed our correspondent attorneys to find the court file so that the order can be rectified (the underlining is mine). Our correspondents were, however, advised by the Registrar that the court file was missing. This file only became available on 5 September 2018, the day before our hearing, and the order was rectified. In the meantime we had no choice than to institute proceedings based on the served, but incomplete order, as our rights

¹ There is also a copy of a letter apparently emanating from the Legal Resource Centre (Applicants’ representatives) dated 28 August 2018 and addressed to the Registrar requesting that the interdict and the contempt matters be set down for hearing either the **04 September 2018 or 06 September 2018**. Regrettably this letter is not located within any pagination, and it is not clear what sequence it is intended to follow, save for the fact that its contents are relevant to the matter and its date stamp is the **28 August 2018**, being the return day of the rule *nisi* issued by Griffiths J.

were continuously being infringed (sic) by the first and the sixth respondents' in contravention of the court order" (own underlining)

- [17] This 'incomplete order' appears to be what Dawood J was referring to in her notes. The deponent to the Founding Affidavit continued:

Paragraph 24 thereof:

"On 6 September 2018 the court dismissed our application for contempt as the complete order had not been served on the first and the sixth respondents. Dawood J then granted the original order of Griffiths J and instructed that it be served on the first and the sixth respondents in its rectified form. The order is attached as NB3" (own underlining).

Paragraph 25 thereof:

"The order was served on the 6 September 2018 and the returns of service are already attached as NB 2. We have no choice other than to institute fresh proceedings as the conduct of the first and the sixth respondents persists. We are begging this court to please hear this matter as one of urgency and to finally give us some form of justice, which has so far been denied us."

- [18] From the above narrative it appears that there may have been quite a number of anomalies that took place on the date of the 6th September 2018, not the least the following:

18.1 An application for contempt was brought before Dawood J based on the order of Griffiths J;

18.2 The letter of the above order was found to be defective or incomplete yet it had been served on the First and Sixth Respondents (on Applicant's own averment (supra));

18.3 This application for contempt was dismissed by Dawood J for want of a clear interim order and proper service;

18.3 The same (dismissed) order was 'rectified' (it's not clear by whom);

18.4 The same order was granted but not as an order of Dawood J but as the rectified order of Griffiths J. See Paragraph 39 of Applicant's Founding Affidavit under the Heading:

Events following the Order of the 06 September 2018:

“It is important that I advise this honourable Court, that the rectified order was served on the first and sixth respondents shortly after the court had adjourned. The respondents were served with the rectified order so as to augment (sic) the interim order granted by Griffiths J and not that a new interim relief was issued by Justice Dawood!”

- [19] Applicants’ position is, in summary, that they bring the instant application for contempt on an urgent basis, as a fresh application because the earlier application for a committal for contempt, suffered from a legal defect, in that the letter of the order showed an incomplete essaying of the same, with the result that it was dismissed. Applicants have also sought to bring new allegations that the conduct of the respondent in perpetrating the very things that they had been restrained from, are continuing. They also attached copies of photographs about which they allege respondents are continuing to build a wall around applicants’ property contrary to the prohibition given by the interim order. They allege that a rectified order was properly served on the Respondents, First and Sixth.
- [20] Respondents’ case, on the other hand, is that of a denial of all the facts and allegations made by Applicants. They deny that they have acted in contempt of the order of the 31 August 2018 and assert that they have, ever since the order of the 31 August 2018, acted in compliance therewith. Respondents, however, seem to refer to an order of the 31 August 2018 and not that of the 6th September 2018 that Applicants are complaining about. I am not certain whether this was a mistake on their part; but there are some difficulties also with Applicants’ reference to the various orders.² More on this below, though.
- [21] Respondents have, on the very pertinent issue of whether there is evidence that what is alleged against them did take place, to use their adverb: ‘vehemently’

² See paragraph 17 of Applicants’ Founding Affidavit

denied having been in contempt of the order, whichever order. They have sought to provide facts which, objectively viewed, put the proverbial cat among the pigeons and rendered doubtful, as to be a nullity, the allegations of the Applicants.

- [22] On behalf of the Sixth Respondent it is averred on the papers that it only acted in furtherance of its trade as a builder in the area regarding other properties not connected with the applicants, without interfering with the Applicants' property or acting in contravention of the order (of the 31 August 2018); for example, where the applicant averred that Sixth Respondent was telephoned by the applicants' attorneys and warned to stop building a wall before the house of applicant (s), they have denied this flatly and raised improbabilities of that happening.

The Issue (s)

- [23] The issues are crisp and have been alluded to by both counsel for Applicant and the Respondents as such. They are:
- 23.1 whether there was a valid order;
 - 23.2 whether such order was known by, or the respondents were aware of the order;
 - 23.3 whether the valid or validly issued order was served on the respondents
 - 23.4 whether despite such awareness they acted in disobedience or contempt thereof;
 - 23.5 whether Sixth Respondent would be liable for contempt based on process served on the First.

These are issues of fact to be ventilated in evidence.

The Law

- [24] It is trite that non-compliance with an interdict granted by a civil court constitutes a contempt of court.³ The same observations were made in the *Protea Holdings Ltd v Wriwt* ⁴
- [25] The following are in summary the basic principles that govern a charge of contempt of court requiring committal by a court:
- 25.1 *Contempt of Court* is a criminal offence. It is classified as an offence against the administration of justice. It consists in the unlawful and intentional violation of the dignity, repute or authority of a judicial officer, in his or her judicial capacity or publishing information or comment concerning a pending proceeding which has the tendency to influence the outcome of the proceedings or to interfere with the administration of justice in such proceedings⁵
- 25.2 It is the kind of a criminal offence that requires, *inter alia*, for its commission, specific intent or *dolus* for it to have been proved. The element of intention in the commission of this crime is of particular significance since it ordinarily refers to the mental attitude of the alleged perpetrator. This is to be distinguished from cases of criminal liability based on *culpa* or negligence as no one cannot be said to have been *negligently* contemptuous in our law (my emphasis).
- 25.3 This is in consonance with the general principle of criminal liability in our criminal jurisprudence; that of *actus non facit reu nisi mens sit rea* (an act is not punishable unless its commission was accompanied by a blameworthy state of mind).⁶ Fault or blameworthiness in this case is a conscious, as opposed to a negligent element of the offence.
- 25.4 It is trite law that the standard of proof of guilt in all criminal offences is that of proof beyond all reasonable doubt. This is an immutable and time-honoured principle of our criminal jurisprudence;

³ See *S v Beyers* 1968 (3) SA 70 (A)

⁴ 1978 (3) SA 865 (W)

⁵ See Snyman Criminal Law 5th Edition Lexinexis 2008 p325

⁶ Burchell & Hunt South African *Principles of Criminal Law Vol. 1*

25.5 For an application for committal for contempt of court to succeed, it is required that it must satisfy all the elements on the criminal standard of beyond reasonable doubt. Once the applicant has proved a [valid] court order, service of notice and Non-compliance, the Respondent will bear the evidentiary burden to show a reasonable possibility that non-compliance was not wilful or *mala fide*. ***See Fakie N O v CC 11 Systems (Pty) Ltd***⁷.

25.6 *Mens rea* is a critical element for criminal responsibility either in the form of *dolus directus*, *dolus indirectus* or *dolus eventualis* but not culpa. (*own emphasis*).

[26] As a general rule he (or she) who alleges must prove.

[27] Failure to comply with an order of court is an offence under this rule and a party to a civil case against whom a court has given an order, and who intentionally refuses to comply with it, commits contempt. To hold any party therefore to be in contempt one must satisfy the above elements and an application to hold any party to be in contempt of court requires not only evidence of an act committed by the respondent but that such act was committed with a specific intent (*dolus*), not negligently (*culpa*).

Analysis

[28] The first enquiry to be made in my view, is whether, on the facts of this matter, there is evidence or admissible proof that there was a valid order or an order validly issued and served on the First and Sixth Respondents, which was consciously flouted by them.

[29] In so far as the First Respondent is concerned, it is common cause that she is a community leader and a Head-woman in the area concerned. The allegation against her is that she was personally served with an incomplete order of the 31 July 2018 that was urgently interdicting her from evicting the Applicants from their

⁷ 2006 (4) SA 326

homesteads, and restraining her or preventing the Applicants from accessing their homesteads.

- [30] Applicant has alleged that on being personally served with the Order she also accepted service on behalf of the Sixth Respondent. Proof of this service is per Attachment **NB 2** on page 26 of the Founding papers being a Deputy Sheriff L Msindo's Return of service dated 6 September 2018 at Bongweni Location, Zimbane Administrative Area Mthatha (Place of Residence).
- [31] The allegation is then made that the application for holding the Respondents in contempt was dismissed as the complete order had not been served on the First and Sixth Respondents. Then goes the alleged 'granting' of the original order of Griffiths J, with an alleged instruction that it be served on the First and Sixth Respondents 'in its rectified form' The order is attached as **NB3**.
- [32] NB3 is the incorrect or incomplete order. If Applicants base their contempt application on such an order, there will be a definite problem as an application based on such an order was dismissed.
- [33] Apart from the technical points addressed above, there is the issue of evidence of the actual commission of the contempt. This should consist of evidence of conduct of either a positive action or an omission on the part of the Applicants to comply with a valid order of court, in a conscious way. I use the epithet, 'conscious' in order to account for the element of *dolus* for an offence of contempt.
- [34] I have not found any evidence of an act consistent with or showing perpetration of contempt on the part of the First Respondent in the allegations of Applicants both in their Founding papers and in their Reply, except an allegation that on 7 August 2018, the contractor, the Sixth Respondent in this matter 'arrived at the site of my tenants and continued building a wall around the property'. Not only would this not be admissible against First Respondent it relates to events that would have taken place before the impugned order of the 6th September 2018.
- [35] The question of liability for committal for contempt, of the Sixth Respondent, also brings with its train, a series of problems, some of which have already been referred to above, namely:
- 35.1 contempt is a criminal offence;
 - 35.2 liability for contempt requires specific intent (*dolus*);

35.3 for criminal liability the standard of proof is one of proof beyond all reasonable doubt

35.4 no vicarious liability can be discerned in respect of a charge of contempt of court.

[36] Secondly the evidence sought to be used in support of allegations of flouting an order of court by the Sixth Respondent is inadmissible as it relies on the First Respondent's alleged acceptance of service on behalf of the Sixth Respondent as well. This cannot be countenanced: even if First Respondent is a royal head with authority over the Sixth. Service of the notice intended for the Sixth Respondent on the First, in other words, means that no service was effected on the Sixth Respondent. In any event, Sixth Respondent denies that he stated that he was ordered by the First Respondent to erect the wall in issue. He denied the alleged conversation with Applicants' attorneys.

[37] I have myself found it hard to believe, as to how an attorney would decide to call the Sixth respondent (a lay-person) when he has a counterpart, on record; another attorney or legal practitioner, about such a crucial matter. It is also not clear why, if Applicant had deemed it proper to serve the notice on the First Respondent they do not then call her, when things seemed to go wrong. I do not, however, need to investigate that in any detail for purposes of this application, save to find that in the absence of concrete evidence of the telephone call, it is difficult to accept the allegation of the applicants on this score.

[38] Applicants have argued, however, that the Oder was rectified and that Dawood J did not make a new one but rectified an existing order. That is very difficult to comprehend. A dismissed order can scarcely be rectified.

*See Purchase v Purchase*⁸

[39] Quite honestly I have serious difficulties with the above scenario. Firstly, an order once dismissed ceases to exist and it cannot later be rectified. A new application ought to have been presented before a Judge, whether it is Dawood J or another Judge for another order, whether interim or final, on the strength of which contempt proceedings could then be prosecuted, if it becomes necessary, possibly with new

⁸ 1960 (3) SA 383 (N)

evidence.

- [40] It is also difficult to understand how the rectification was effected; who effected it and what legal process was followed in effecting it. An application would have been an obvious approach, with all the formalities of an application for rectification, if and when the earlier contempt application was dismissed on account of it being defective.
- [41] In the applicant's papers no such application is apparent and it is unclear to me how the Griffith J's order was '*augmented*'. One cannot conceivably augment a non-existent order, having been dismissed by Judge Dawood. There are other difficulties: NB 3 is the wrong or incomplete, but the served order. The latter service having taken place AFTER the alleged 'rectification' and alleged instruction of my Sister Dawood J.
- [42] The above scenario is both incomprehensible and inconceivable; and as pointed out above, a dismissed application for contempt cannot revive or perfect an otherwise defective or invalid order. This application for contempt did not only need to be based on new or continuous facts of alleged contraventions, but on a new order altogether.
- [43] There is also the issue of service. It does not come out clearly that service was effected properly. On the one hand it is alleged that there was service of NBS 3, yet NBS 3 is the wrong and incomplete Order; the question must therefore be: What exactly was served or sought to be served on the Respondents? On her own admission the deponent on behalf of applicants says, "*we had no choice but to institute proceedings based on the served, but incomplete order as our rights...*". The absurdity of this assertion is not hard to find. In my view, for as long as this 'fresh' application for contempt relies on the 6 September 2018 processes, it cannot have legal efficacy, for on that date no valid order was served.
- [44] Assuming, for any reason, that the conclusions I make, based on the legal defects and anomalies I point out hereinabove are not correct, there is the issue of evidence of the commission of the contempt complained of. I have not found any admissible or reliable evidence to support the complaint of the applicants. The deponent on behalf of the applicants alleges that service of the order was effected on the first respondent, who is apparently a local community leader there. It, thereafter, does not say what

the first respondent did as a manifestation of contempt of the order of court, whether valid or not valid.

- [45] Further, the allegation, which has not been gainsaid is that the sixth respondent was served through the first. This is most unusual, and assertion that sixth respondent said he was instructed by the first to continue erecting a wall cannot be admissible against the first respondent. It is in any event denied by the sixth respondent. What then are the issues that call for decision in this matter?

Dispute of facts

- [46] I have considered whether the apparent dispute in the facts of this matter warrants that the matter be treated in terms of the principles enunciated in, *inter alia*, **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd**⁹. I came to the conclusion that such an approach would not be in accordance with justice, and would unduly strain and delay the justice direly needed to dispose of this matter. Secondly the question before me is finally whether there was a valid order that was consciously contravened. On the analysis of the objective facts above, regarding this question, I do not think that it is necessary to refer the matter to evidence. The pertinent issues attendant upon this case do not require leading of oral extraneous evidence beyond the papers on motion. The disputes are not germane to the issues, to necessitate leading of oral evidence. The main application is still pending.

Conclusion

- [47] The conclusions to which I therefore come, are that the applicant has failed to convince this court that at the material time there was a valid court order which was then flouted by the respondents or that the Respondents acted *mala fide*. Even if such an order did exist, service thereof on the Respondents, or awareness of its existence has not been proved. Even the evidence of commission of the offence complained of is either parlously inadequate and/or inadmissible in respect of both the First and the Sixth Respondents. No acceptable proof therefore, of the commission of an offence in terms of the principles governing criminal contempt has been demonstrated. The

⁹ [1984] 2 All SA 377 (A); also in 1984(3) SA 362 (A)

photos are themselves not only illegible but they are strongly disputed and are unhelpful to this court. It is suggested that the applicants pursue their case on the return day of the rule (if valid) and ventilate their issues there, minus the contempt issues.

Order

[48] In the result the following order is made:

The application is dismissed with costs

M MNYATHELI

ACTING JUDGE OF THE HIGH COURT

On behalf of Applicants: Adv Sambudla

Instructed by the Legal Resource Centre

Grahamstown

On behalf of the Respondents: Mr Qina

Instructed by T Qina & Sons

Mthatha

Matter heard on: 20 September 2018

Judgment delivered on: 20 November 2018