

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

Case no: 170/2012

In the application of:

FREE STATE AGRICULTURE

Applicant

and

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA & 13 OTHER
RESPONDENTS**

Respondents

CORAM:

MOLOI J

HEARD ON:

05 AUGUST 2015

DELIVERED ON:

08 OCTOBER 2015

[1] This is an application for contempt of court in which matter the Applicant seeks the following relief:

1.1 Directing that the Third and Tenth Respondents be committed to prison for Thirty (30) days and jointly and severally pay a fine of Two Hundred Thousand Rand (R200 000-00) to the Applicant, due to their wilful breach of the Court Order dated 20 September 2012 which order should be suspended on condition that

1.1.1 The Tenth Respondent constructs/repairs the patrol road by the end of June 2015.

1.1.2 The Third Respondent takes all reasonable steps within its available resources to patrol the Lesotho/Free State boarder.

In the alternative

1.2 Ordering the Third and Tenth Respondents to identify the officials responsible for complying with the court orders within FIFTEEN (15) days and for the identified officials to appear on a return date to show cause why, failing compliance with the orders identified in 1.1.1 and 1.1.2 above, they should not be:

1.2.1 Committed to prison for THIRTY (30) days,

1.2.2 Ordered to, jointly and severally, pay a fine of Two Hundred Thousand (R200 000-00) to the Applicant within Thirty (30) days.

In the future alternative

1.3 Ordering the Third and the Tenth Respondents to comply with the obligations arising from the Court Order within the following time frames:

1.3.1 The Tenth Respondent to construct/repair the patrol road within Six (6) months.

1.3.2 The Third Respondent to immediately take all reasonable steps within its available resources to conduct border patrols along the Lesotho/Free State border.

BACKGROUND:

[2] The matter originates in 2009 when the Applicant was compelled to seek an order under case number: 1751/2009 to compel the Respondents, in their various capacities, to attend to the plight of the farmers in the Free State particularly those whose farms are situated near the border with Lesotho. The farmers were perturbed by on-going illegal activities perpetrated by Lesotho citizen/inhabitants which included violent crimes, livestock and vehicle theft, trafficking in drugs and other illegal substances, arson, diamond smuggling and vandalism of properties. The cause of all this problem was identified as poor condition and/or total lack of border fence, the poor state of border patrol road and the absence of border patrol between Lesotho and the Free State. For many years the Applicant and other members of the farming community adjacent to the border between Lesotho and the Free State Province communicated their plight to the South African Government authorities without receiving any joy. The national and

provincial authorities were obliged in terms of sections 10, 11, 12 (1)(c) and 25 (1) of the Constitution of South Africa to heed the complaints of their citizens and to offer them the necessary protection.

- [3] After discussions between the parties an agreement was reached pointing out the responsible parties, namely, the Third and the Tenth Respondents as affected parties and time frames within which their respective duties would be completed as per paragraphs 1.1.1 and 1.1.2 above. The Respondents failed to meet the target dates. With regard to the “remaining borderline” in the agreement, a Project Planning Committee was formed and agreement was reached on the location of the border fence but the respondents’ member of the committee, Mr Van Goller, was unable to obtain a final approval. Only 50 kilometres of the patrol road was repaired. The SAPS members who patrolled the border were substituted by members of the SANDF by a cabinet decision and a significant lower number of SANDF members were deployed insufficient to comply with the terms of the Agreement. Furthermore, though the necessary equipment to enhance the patrolling obligations was acquired, it was not being used. No resolution could be found despite several correspondence between Applicant’s attorneys and the State Attorney.
- [4] The failure to comply with the terms of the agreement by the Respondents which was made an order of court, led to the filing of the present application in 2012 under case number 170/2012. The Respondents filed notices to oppose but no answering affidavits. Protracted negotiations ensued resulting in the conclusion of a

second agreement on 31 August 2012 which agreement was made an order of court on 20 September 2012 replacing the previous agreement. The new court order, provided that the Third Respondent (SANDF) was responsible for patrolling the border, the Tenth Respondent the (DPW) was responsible for the erection of the border fence and the building of the patrol road and the Thirteenth Respondent (DIRCO) was responsible for liaison with the Lesotho government in relation to the border control and cross-border crimes.

- [5] In terms of the Court order based on the Agreement between the parties, the SANDF, SAPS and DIRCO would undertake all reasonable steps to perform their duties; by 31 August 2012, SANDF, SAPS, DPW and DIRCO would each identify a central liaison officer to deal with the Applicant's representatives; the Tenth Respondent would assume responsibility for constructing/repairing the patrol road so that by the end of June 2015 the entire patrol road would be capable of being used effectively for the patrol of the border by any 4x4 vehicles including five (5) ton SAMIL 20 4x4 vehicles; complete the design and specification for repair by 15 October 2012; initiate the relevant procurement processes by not later than 15 November 2012 and produce a non-detailed project plan by 15 November 2012 identifying segments of the patrol road to be completed by specified dates. The further salient points of the court order were that should the Respondents fail to meet the agreed time frames through no fault on their part, such failure would not constitute a breach and new time frames would be negotiated within a reasonable time and, if the negotiations failed, mediation process would be engaged; the

patrol road and fence aspect would be enforced in the case of a breach on the same basis as an ordinary contractual obligation; if any party alleged that the terms of the agreement have been breached mediation as agreed would take place and that the Respondents shall be entitled to approach the Free State High Court on 21 days' notice to the Applicant, on good cause shown (being a material change of facts) for an order varying the terms of the agreement, alternatively, rescinding the order in which such fact is embodied.

POINTS OF CONCERN TO THE APPLICANT

- [6] On 28 March 2013 during a Steering Committee meeting Mr Malan of the DPW indicated that the target dates for the rehabilitation of the road might not be met. By May 2013 the Respondents had failed to adhere to several time frames agreed to. The design and specification of the road due to have been completed by 15 October 2012 were handed to Mrs Louis van der Heever of the Tenth Respondent, two days before the meeting of 28 June 2013. On 30 September 2013 the matter was referred to mediation but remained unresolved. On 08 September 2013 the State Attorney informed that in terms of the Project Plan of a certain Mr Blackmore, the Tenth Respondent would not be able to construct/repair the road by the end of June 2015 but Mrs Van den Heever would try to obtain permission for the patrol road to be provisionally constructed/repared. It became clear that the Respondents were raising an ever increasing list of new issues during several meetings and engagements held between October 2013 and November 2014.

On 4 November 2013 Mrs Van den Heever reported that the SANDF had provided GPS co-ordinates for the most critical areas of the road to be repaired and a site inspection of the road would be conducted during that month which would be attended by a Project Manager, Town Planner and Road Engineer. On 12 November 2013, a year after the 2012 Settlement Agreement was made an order of court, Mrs Van den Heever raised issues such as servitudes, water licenses and the requirements from the Department of Environmental Affairs. The Tenth Respondent had to follow the NEMA regulations and engage SANRAL as well. On 16 January 2014 Mrs Van den Heever again raised the issue of servitudes and stated that the Tenth Respondent was not allowed to work on private property. On 6 February 2014 it was mentioned that a number of consultants would have to be appointed i.e. Town Planner, Flood Line Specialist, Geologists, Environmental Assessment Practitioners, Heritage Specialists and a Civil Engineer. On 12 March 2014 a tender for *“Road Infrastructure: Multi-Disciplinary Service with a Town Planner as the Land Consultant”* was published. This tender was intended to obtain the services of consultant(s) in order to undertake the planning and preparation necessary for the eventual construction of a new road. On 1, 8 April and 8 May 2014, despite the pending tender, it was agreed between the SANDF and DAFF that a scraper would be made available to make the road accessible and that the SANDF would pay for the diesel. De-bushing would begin by 15 June 2014 in compliance with the 2012 Settlement Agreement, so it seemed. On 31 October 2014 Mr Ngcobo of the Tenth Respondent confirmed that the possibility of repairing the road had been discussed, but informed that the work could not be done because it

subsequently transpired that Government had not secured servitudes for the road. He further stated that after consulting with user departments, it was determined that a 4x4 access road will not be adequate. The costs also militated against a 4x4 road. Due to the requirement to secure the servitudes and the NEMA prescripts, no work could commence. On 6 November 2014 it was announced that Delta had been appointed in terms of the tender. Ms. Van den Heever confirmed that no repairs would be done to the road and the de-bushing and use of the scraper was not going to happen anymore. The Tenth Respondent was proceeding with the building of a "new road" the pre-planning of which would take up to 24 months according to Delta. According to the Applicant these concerns were indicative of the unwillingness/reluctance of the Respondents to comply with the Court Order based on a Settlement Agreement.

AUTHORITY OF DEPONENTS GELDENHUYS AND DELPORT

- [7] The applicant submitted that the answering affidavits of Geldenhuys and Delport on behalf of Minister of Defence and Military Veterans and Minister of Public Works, respectively, should be struck out alternatively be disregarded as evidence because they failed to allege that they had authority to act as agents for the ministers nor did they indicate the ministers were aware of their affidavits and ratified the same since there were no confirmatory affidavits filed. The two deponents failed to do so even after the Applicant raised the issue in its replying and opposing affidavits to the counter application. It was contended on behalf of the applicant that it would be sufficient if the deponents

averred they were acting as agents of the Ministers – Herbstein and Van Winsen – The Civil Practice of the High Court of South Africa, 5th edition Juta Vol. 1 page 437 but they had not. See also Erasmus Superior Court Practice B1-38A Footnotes 1-4; Millman v Goosen 1957 (3) SA 141 (O) consequently their affidavits were as good as they were not present at the various meetings alternatively they should be struck out or disregarded. For the Respondents it was argued that the correct approach to be adopted when authority is challenged was by way of application of Rule 7 (1) of the Uniform Rules of Court as set out in Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA) par 13 – 15 where the following was stated, *inter alia*,

“If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised.”

Furthermore, it was pointed out that the deponents were officials of their respective ministries and not agents. I reject the claim of lack of authority of Messrs Geldenhuys and Delpont accordingly.

The Parole Evidence Rule and Interpretation

- [8] The applicant contends that the parole evidence rule excludes the interpretation of a written agreement from being contradicted, altered, added to or varied by extraneous evidence. *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd.* 1941 AD 43 at 47. It

further contends that in interpreting an agreement the context, the provision under consideration and the background to the preparation and production of the document in question are fundamental to the process of interpretation of the document.

The applicant contends that the evidence of previous applications, meetings, communications and interaction between the parties is essential to sketch a complete picture for the court to assess whether or not the Respondents are in wilful contempt.

Principles Relevant to Contempt of Court and Requirements

9.1 According to the applicant once an applicant has proved service of an order of court or that it was brought to Respondents notice and that Respondent failed to comply with it the evidential burden in relation to wilfulness and *mala fides* shifts to the Respondent. The Respondent must then advance evidence that establishes a reasonable doubt whether the non-compliance was wilful and/or *mala fide* failing which he will be guilty of contempt because contempt of court constitutes a "deliberate and intentional violation" of the courts dignity, repute or authority.

9.2 The Respondents have knowledge of the court order since the Settlement Agreement was made an order of court by agreement.

9.2.1 The Third Respondents non-compliance consists of his failure to identify a liaison officer by 31 August 2012 as this was only done in July 2013.

9.2.2 The border is still not effectively patrolled.

9.2.3 The Third Respondent was satisfied to repair the existing road so that it would be suitable for use by 4x4 vehicles, agreed to de-bushing, use a scraper and supply diesel but later indicated the agreed repairs would not be sufficient because they (SANDF) did not exclusively use 4x4 fleets.

9.2.4 The defence that they (SANDF) could not comply on even date with the signing of the agreement posed an impossibility to perform should be dismissed.

9.3 The non-compliance by the Tenth Respondent lies therein that:

9.3.1 The Tenth Respondent admitted non-compliance with various of the agreed time frames in terms of the 2012 Settlement Agreement in letter by the State Attorney tendering apologies;

9.3.2 The Tenth Respondent formally informed it no longer intended to repair the road but would rather plan and construct a road that can be used for the intended purpose;

9.3.3 There was no agreement for the construction of a new road but that the road that was used for “for many years” to patrol the border would be repaired as a matter of urgency and within the agreed time frames.

THE RESPONDENT'S CONTENTION

[10] The Respondents contend that for the Court to make a finding that a party is guilty of contempt of court the Applicant must prove beyond a reasonable doubt that

10.1 There is a court order in existence;

10.2 That the order has come to the notice of the Respondent

10.3 That there has been non-compliance with the terms of the order and

10.4 That such non-compliance must have been wilful and/or *mala fide*.

If the applicant has proved the first three requirements the evidential rebuttal shifts to the Respondent to show that the non-compliance occurred in circumstances that were not wilful nor *mala fide*. The Respondents argue that the situation of the Third and Tenth Respondents differ and that in as far as the Third Respondent is concerned there has been compliance with the court order. It is argued that the applicant has failed to give details of the alleged non-compliance by the Third Respondent. The order that the Third Respondent had to comply with was that:

"The Third Respondent to, as from the date of this order, take all reasonable steps within its available resources to conduct border patrol along the Lesotho / Free State border" (my emphasis)

The applicants' complaint against the Third Respondent is that –

"I refer the Honourable Court to my previous remark that the road is crucial for patrolling the Lesotho border and that the SANDF and SAPS cannot patrol the border without the road being prepared."

(my emphasis)

and

"I reiterated that the SANDF is unable to efficiently patrol the border if the patrol road is not accessible." (my emphasis)

and

"I again requested the SANDF to deploy two additional companies on the border. The reason for this request was that there were approximately 120 members of the SANDF deployed on the border. This included administrative personnel. One third of the members of the SANDF deployed as such, are at any relevant time, not on duty. This leaves about 80 members of the SANDF to patrol the border of approximately 500 kilometres. With these numbers deployed, proper border patrol is impossible even if the patrol road was accessible by 4x4 vehicles" (my emphasis)

- [11] It is contended that the above statements provide no evidence that the Third Respondent has failed to comply with the court order that clearly states that it must perform within its available means and not to the applicant's liking. It is argued that the folly of the Applicant's complaint is demonstrated by what the founding affidavit contains, namely

"His comment was in reply to a complaint from the farmers near the border that the SANDF inter alia does not properly patrol the border and the attempted theft of a transformer on a farm" (my emphasis)

and

"The same goes for the SANDF who, despite taking on the responsibility for border control (patrol), fails to so and wilfully disobeys the said Court order dated 20 September 2012."

(my emphasis)

Even the last quotation provides no proof beyond a reasonable doubt that the Third Respondent is guilty of non-compliance with the court order. On the contrary, the minutes attached by the Applicant shows that there was a significant decrease in respect of illegal grazing, stolen vehicles, undocumented persons and a significant increase in dagga confiscated and illegal weapons seized due to the SANDF patrol efforts of the border. Arrests and criminal statistics further confirm the effectiveness of the SANDF's patrols. This was also confirmed in a letter by the State Attorney which was not challenged stating:

"Furthermore, I am advised that some issues relating to gaps in patrolling by the SANDF, due to troop rotations, have been sorted out. My understanding is that your client also seems satisfied with the progress made by the SAPS. Increased SAPS activity has impacted positively on vehicle and cattle theft, as well as drugs, copper wire and uncut diamond smuggling."

POSITION OF THE TENTH RESPONDENT

[12] In as far as the Tenth Respondent is concerned it is conceded by the Tenth Respondent that its obligations of having to construct/repair the patrol road within the agreed time frames has not been done in conflict with the court order. Two defences, however, are advanced to negate the finding of contempt of court. The first is objective impossibility to perform within the stipulated time frames which impossibility existed at the time the agreement was concluded and the court order was made (*ab initio*). This impossibility consequently resulted in the agreement (and the subsequent court order being void *ab initio*. The second or alternative is that there was no wilfulness and/or *mala fides* on the part of the Tenth Respondent ignoring the agreement/court order to perform. These two defences form the subject-matter of the Counter Application that seeks to declare the Court order and the underlying agreement void *ab initio*. The time frames agreed to and ordered were as follows:

- (a) The designs and specifications for the repair (construction) of the patrol road would be completed by the DPW before 15 December 2012;
- (b) by 15 November 2012 the DPW would produce a non-detailed project plan that would identify segments of the patrol road that would be completed by set dates;
- (c) that by 15 November 2012 the Third to Tenth Respondents would initiate the relevant procurement processes and

- (d) by the end of June 2015, at the latest, the entire patrol road would be capable of being used effectively.

It is contended that the DPW is still continuing with the necessary things to be done and has spent lots of money to deliver as agreed and ordered by the Court.

THE CHALLENGES FACED BY THE TENTH RESPONDENT

[13] The following are the challenges the Tenth Respondent is facing in order to comply with the court order and which render the completion of the patrol road within the abovementioned time frames objectively impossible and indicate the lack of wilfulness and/or *mala fides* on its part:

- (a) The proposed patrol road is 500 km long, runs alongside the Caledon river forming the border between Lesotho and the Free State: the area has challenging geographical features: only approximately 75 km is flat and fairly usable for patrol and none of the land where the road is to be built/repared belongs to the State or has any servitudes or real rights registered in favour of the State;
- (b) There is a myriad of legislation directly applicable to building or repairing such a road, e.g. National Water Act No 36 of 1998; National Environmental Management Act No 107 of 1998, the Mineral and Petroleum Resources Development Act No 28 of 2002; and their Regulations requiring

authorisations, to begin to build a road, compliance with several requirements which cannot be obtained within the time frames set. Furthermore the owners of the farms where the road is to be built must provide certain rights and/or servitudes for the State to build a road on their properties which rights/servitudes cannot be registered within the time frames set. In places bridges must be built to cross the rivers etc.

- [14] The applicant relies on the time frames to support its application for contempt of court by the Respondents. The Respondents contend that what needed to be done within those time frames could never have been and still cannot be fulfilled and completed within those time frames. The Respondents in the Counter Application contend that the terms of the agreement, the time frames, cannot be severable from the rest of the agreement/court order and thus the court should find that the entire agreement was consequently a nullity *ab initio*: Fogel, N.O v Volke 1977 (1) SA 537 (T) where it was held at p548 C-F that regard must be had to the probable intention of the parties as appears in or can be inferred from the terms of the contract as a whole. This approach was confirmed in Sasfin (pty) Ltd v Beukes 1989 (1) SA 1 (A). In this matter the intention of the parties was that all the Respondents had to do was to be done within the stated time frames but it was objectively impossible to be met. According to Christie's Law of Contracts in South Africa where it was stated that "a contract is void if at the time of its inception its performance is impossible: impossibilium nulla obligatio (D 50 17 185) provided

- (a) the impossibility is absolute as opposed to probable;
- (b) the impossibility is absolute as opposed to relative;
- (c) the impossibility must not be the fault of either party and
- (d) the principles must give way to the contrary common intention of the parties. Furthermore p99 Christie states that

"An agreement that, by consent, has been made an order of Court will be no more binding than any other contract if it proves to be effected by initial impossibility"

See Rossouw v Haumann, 949 (4) SA 796 (C)

See also LAWSA, Vol 9 Par 330 Footnote 3, p214 where it is stated that

"Consequently, although both parties intended to bind themselves by their contract neither is in fact bound."

CONTEMPT OF COURT

[15] Contempt of court in civil proceedings is committed when a court order has been made, brought to the notice of the party who must comply therewith and such party has failed to comply with the terms of the order. The party ordered to perform the terms of the order must have failed to do so wilfully and with *mala fides*: Fakie N O v CGI Systems (Pty) Ltd 2006 (4) SA 326 SCA; Nthabiseng Pheko and 776 Occupiers of Bapsfontein Informal Settlement v Ekurhuleni Metropolitan Municipality, Case No CCT 19/11 (2015) ZACC 10. The object sought to be protected in such proceedings

is the supremacy of the courts in administering justice by the constitutional imperative that courts have the authority to decide issues and bind “*all persons to whom and organs of State to which it applies*”. Sec. 165 (5) of the Constitution of South Africa Act No. 108 of 1996. See also the *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402 (24/6/2015) where Mlambo remarked as follows at 37.2:

“A democratic State based on the rule of law cannot exist or function if the government ignores its constitutional obligations and fails to abide by court orders. A court is the guardian of justice, the cornerstone of a democratic system based on the rule of law. If the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone-by-stone until it collapses and chaos ensues.”

- [16] Contempt of court committed by unlawfully and intentionally disobeying a court order is a crime: *Fakie N.O. supra par. 6.* It is “*a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat: Fakie N.O supra par. 8 if committed*” deliberately and mala fide. *Fakie N.O par.9* and the standard of proof required to prove contempt of court is proof beyond a reasonable doubt: *Fakie NO, supra at par 42 (c).* The respondent need only to offset wilfulness and *mala fides* by leading evidence that establishes a reasonable doubt: *Fakie N.O at par.41.* See also *S v Kubeka 1982 (1) SA 534 (W) at 537 D-H* where it was held “whether I subjectively disbelieve him is, however, not the test. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exist a reasonable possibility that his evidence may be true.” In *R v Matsoso*

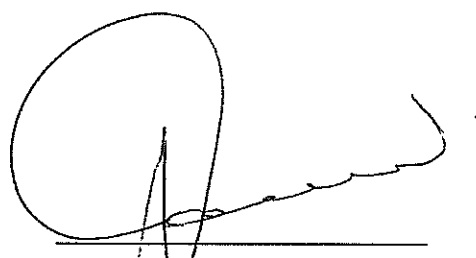
1950 (4) SA 178 (O) at 185 F was held that the court must be satisfied that the accused's explanation is not only improbable but that it is beyond a reasonable doubt false to can reject it.

- [17] In the light of the foregoing I find that the applicant has not succeeded in proving the Third Respondent in any manner failed to comply with the court order. In its own words the applicant, on the contrary, confirms the Third Respondent performed as ordered but not to the applicants liking or satisfaction which was not part of the order
- [18] In as far as the Tenth Respondent is concerned, it is evident that it failed to comply with the terms of the order to construct/repair the patrol road within six (6) months. Although the Tenth Respondent was capably supported by qualified legal practitioners throughout, it seems the requirements preceeding the construction/repair of such patrol road were out of their sight when the agreement was negotiated and settled. Only when the practical implementation of the agreement was to be embarked on, did it become apparent that the time frames agreed to are objectively impossible to be met. This was clearly an oversight from both parties. This oversight brought about an absolute impossibility as opposed to probable or relative impossibility and cannot be attributed to any party's fault. The eagerness to settle the matter blinded the eyes of all as to the legal requirements to meet before a road can be built as agreed to. This absolute impossibility was there *ab initio* and consequently repels the wilfulness and/or *mala fides* on the part of the Tenth Respondent. In the circumstances the counter application ought to succeed.

[19] There being nothing compelling the court to deviate from the rule that costs follow the cause, reluctantly the court must make a cost order which could have been avoided if the hurdles to be crossed to building/repairing the patrol road were considered with cool heads and the application not rushed.

[20] In the result the following orders are made:

1. The application for contempt of court is dismissed with costs which costs shall include costs of two counsel.
2. The Counter Application succeeds with costs which costs shall include the costs of two counsel.



KJ MOLOI. J

On behalf of appellant : Adv Van Rhyn SC: Naudes Attorneys
Adv Johnson

On behalf of the state : Adv MM Rip SC: State Attorney
Adv S Webster