



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL LOCAL DIVISION, DURBAN**

CASE NO: 14231/14

In the matter between:

PETER McHENDRY

APPLICANT

and

WYNAND LOUW GREEFF

FIRST RESPONDENT

RENSCHE GREEFF

SECOND RESPONDENT

J U D G M E N T

Date of Judgment delivered: 17 September 2015

MARKS AJ

- [1] The applicant Peter McHendry seeks an order holding the respondents, Wynand Louw Greeff and Rensche Greeff, in contempt of an order granted in this Court by Lopes J on 27 September 2013 under Case Number 11039/2012.

- [2] The first and second respondents seek an order granting condonation for the late filing of a supplementary affidavit.
- [3] The applicant seeks an order that the entire contents of the first and second respondents' answering and confirmatory affidavits are struck out.

All the above applications are opposed by the respective parties.

For the purpose of clarity the parties will be referred to as they are stated in the main application. Before dealing with the merits of the abovementioned applications, it is necessary to give a brief summary or background.

[4] **BACKGROUND SUMMARY – FACTS NOT IN DISPUTE**

- 4.1 On 27 September 2013 an order was granted per Lopes J, which contains reciprocal interdicts between the applicant and the respondents from certain conduct, action and activities.
- 4.2 On 10 December 2014, the applicant launched the main application for contempt of court flowing directly from this order.
- 4.3 On 16 February 2015 Balton J adjourned the application to 10 April 2015 and an order was granted by consent relating to the filing and service of supplementary affidavits and annexures which specified time frames. The respondents filed and served their supplementary affidavit

two days late which was not accepted by the applicant. The respondents therefore seek condonation from this Court for the late filing of their supplementary affidavit, which is opposed.

- 4.4 The applicant has launched an application to strike out the entire contents of the respondents' replying affidavit and confirmatory affidavit, which in turn is opposed. The matter was set down on the opposed roll on 8 September 2015.

[5] **ARGUMENT**

- 5.1 The applicant Mr McHendry represented himself and Mr *Crots* SC represented the respondents. Before the matter proceeded Mr McHendry brought the Court's attention to the letter that had been delivered to the registrar for the Judge President's attention and sought clarity thereon. The letter had not been served on the respondents. Mr *Crots* was shown the letter in court. The Court then ruled that all the applications would be heard together.
- 5.2 Notwithstanding the fact that the applicant had not filed its heads of argument or practice note as per the Practice Directives, there being no prejudice to either party, the Court deemed it expedient to condone the non-adherence to the Practice Directives. Moreover Mr McHendry is a lay person and indicated he was prepared to proceed to argue the matter which he did most eloquently. The matter was ripe for hearing and in the interests of the administration of justice proceeded and was argued by the parties.

- [6] It is expedient to deal with the condonation and striking out applications before dealing with the main application of contempt of court.

[7] **APPLICATION FOR CONDONATION**

- 7.1 The respondents had filed the supplementary affidavit two days late. The reason for the late filing advanced by the respondents and Mr *Crots* in oral argument was that logistical problems were experienced. The second respondent was in Cape Town and the instructing attorneys experienced difficulty in obtaining her signature. Mr *Crots* argued further that if condonation was not granted the respondents would be prejudiced in that it effectively would close the door to their opposition of the main application and the issues would not be properly ventilated.
- 7.2 The applicant opposed the application and in oral argument he advanced the reason that this Court should not grant condonation is that the instructing attorneys are legally qualified and should strictly adhere to court orders, the rules and the practice directives. He went on to explain that in various ongoing litigation between him and the respondents, this same Court has not afforded him any indulgences in the past.
- 7.3 It is in the interests of the administration of justice that the well-known and well established general rules regarding the number of sets and the proper sequence of affidavits should ordinarily be observed. Where an affidavit is tendered late the party tendering it is seeking an indulgence and must advance valid reasons why the affidavit is out of time.

7.4 It is trite that the court should be slow not to grant condonation as it would effectively close the door on a litigant. The main application in this matter is a serious charge being contempt of an order of court with serious penalties which could be imposed. If condonation is not granted, it would be seriously prejudicial to the respondents' case. Moreover, this would prevent the matter being properly ventilated and goes against the *audi alterem partem* rule. To condone the late filing of the respondents' supplementary affidavit on the other hand will not cause prejudice to the applicant's case. Moreover, the reasons advanced for the late filing are acceptable. The reason advanced by Mr McHendry that he has not been afforded such indulgences in the past is not valid in law. Therefore the Court grants condonation for the late filing of the respondents' supplementary affidavit.

[8] **STRIKING OUT APPLICATION**

8.1 The applicant seeks an order that the entire contents of the respondents' affidavits be struck out as they do not deal with the allegations and averments in the applicant's founding affidavit as is required in Rule 6(15) of the Uniform Rules of Court. The applicant argued that it is incumbent upon the respondents to deny or admit each and every allegation or averment in the applicant's founding affidavit. Moreover the second respondent was to file her own answering affidavit and not a confirmatory affidavit as she is the main culprit in the contempt application.

8.2 The respondents contend, and Mr Crots argued, that the first respondent deposed to the answering affidavit dealing with the averments contained in the applicant's papers and the second

respondent clearly deposed to a confirmatory affidavit confirming all the averments which related to her. Further that this is sound legal practice in order to prevent unnecessary duplications.

- 8.3 There are two requirements to be satisfied in order for the matter to be struck out. The matter sought to be struck out must indeed be scandalous, vexatious or irrelevant and the Court must be satisfied that if the matter is not struck out, the party seeking such relief will be prejudiced thereby.¹
- 8.4. Rule 6(15) of the Uniform Rules of Court state that the requirements for a respondent's answering affidavit, which deals with the allegations contained in the opponent's founding affidavit, are the same as that for the applicant. If the respondents' affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit, the Court will for the purposes of the application, accept the applicant's allegations as correct. However, a statement of lack of knowledge coupled with a challenge to the applicant to prove its case does not amount to a denial.
- 8.5 The answering affidavit merely denies all the alleged allegations and averments in the applicant's founding affidavit. Further a point *in limine* is raised that the annexures referred to in the founding affidavit are not attached to the papers and due to these facts and the fact that the allegations are vague, lack clarity and are unsubstantial, they are unable to answer each and every allegation. This they are entitled to do. The applicant has failed to prove that the contents of the affidavit are scandalous, vexatious or irrelevant and therefore the application to strike out falls to be dismissed.

¹ NDPP v Zuma 2009 (2) SA 277 (SCA) at 308.

[9] **MAIN APPLICATION - CONTEMPT OF COURT**

- 9.1 During argument the applicant handed in a further supplementary affidavit relating to another matter where the parties are cited as Omnium Investment Trust represented by the applicant and the same respondents. Mr Crots, having had sight of the affidavit for the first time in court, objected to the handing in thereof.
- 9.2 This further supplementary affidavit of the applicant pertains to a tenant cancelling a lease due to the respondents defaming him. It was received and stamped by the registrar on 4 September 2015 but never served on the respondents. The contents of this further affidavit are speculative and based on suspicion. The annexures attached purporting to be electronic cellphone messages, are nonsensical and in no way assists the applicant in this application. In any event, notwithstanding the fact that the applicant is a layman, the Court cannot grant this further indulgence to the applicant. The applicant has already received an indulgence in filing a supplementary affidavit with annexures by the Court on 16 February 2015. Moreover, the affidavit does not assist the applicant's case for the reasons aforementioned.
- 9.3 The legal position relating to contempt of an order of court was succinctly stated by Cameron JA in *Fakie NO v CCII Systems (Pty) Ltd*² that to disobey a court order unlawfully and intentionally is an offence referred to as contempt of court. The standard of proof required is for the applicant to prove all the elements of contempt beyond a reasonable doubt. Put differently, the test which disobedience of a civil court order constitutes contempt has come to be

² 2006 (4) SA 326 SCA para 42.

stated as whether the “breach was committed deliberately and *mala fide*”.³

- 9.4 The issues that require determination are whether the applicant has proved beyond reasonable doubt that firstly there was non-compliance with the court order and secondly whether the non-compliance was unlawful and *mala fide*.
- 9.5 The contents of the court order and the respondents’ knowledge of the contents thereof have been admitted. Non-compliance and wilfulness and *mala fides* is disputed. The respondents deny all the averments relating to the alleged contravention of the court order.
- 9.6 In motion proceedings the affidavits constitute both the pleadings and the evidence. The issues and the averments, in support of the parties’ cases, should appear clearly therefrom.
- 9.7 To state that the founding affidavit of the applicant is unclear is an understatement. For the most part it mentions the history of the acrimonious relationship between the parties, and accuses police officials and others of being corrupt, and contains scandalous and vexatious matter. The applicant does however aver that the respondents have stolen and opened his mail, listened to his cellphone conversations, intercepted his electronic data, harassed and physically assaulted him, committed fraud and corruption and other serious transgressions. The affidavit refers to annexures which are not attached to the papers either. Besides the generality and vagueness of these serious averments, it is also prudent to note that most of these

³ *Fakie NO v CCII (supra)* para9 .

averments are based on inadmissible unsubstantiated hearsay evidence, speculation and suspicion.

- 9.8 The applicant's supplementary affidavit does not add any content to the claims made in the founding affidavit. Instead, the supplementary affidavit objects to the first respondent's answering affidavit and requests the court to order the respondents to answer allegations pointedly.
- 9.9 The applicant argued that the hearsay evidence could be rendered admissible if the witnesses who have informed him of these transgressions could be subpoenaed to give oral evidence as they are unwilling to depose to any affidavit. He requested to refer the application for oral evidence in order for the Court to investigate as he merely wants to get to the truth of the matter. However, the purpose of motion proceedings is not to investigate cases for the litigants. Motion proceedings are used by the litigants to resolve their disputes because it is considered to be more expeditious and less expensive when the material facts are not in dispute.
- 9.10 The only admissible evidence in the applicant's founding affidavit pertains to the allegations of assault. Moreover, it is common cause that this alleged assault took place BEFORE the order was granted by Lopes J on 27 September 2013.
- 9.11 It is trite that the applicant must prove his case in his founding papers. For the reasons aforementioned, the applicant has failed to prove any of the alleged transgressions of the court order granted on 27 September 2013. Moreover, the calling of oral evidence of reluctant witnesses who have not deposed to any affidavit, to be cross-examined

in court will not tip the scales in the applicant's favour. Moreover, it is not the function of this Court to allow this process for investigative purposes. The applicant has failed to discharge the *onus* upon him and therefore the application for contempt of court falls to be dismissed.

[10] **COSTS**

10.1 In considering the issue of costs, the Court has a discretion which is to be exercised judiciously. The Court is required to take into consideration the circumstances of the case, the issues at hand, the conduct of the parties and any other relevant circumstances.⁴

10.2 The general rule is that the costs follow the result. In other words, the party which is successful should also be entitled to a cost order. I see no reason to deviate from this principle.

10.3 Mr *Crots* requested the Court to consider a punitive order as to costs on the scale of attorney and client as he contended that the applications brought by the applicant were vexatious and the respondents should not be out of pocket.

10.4 The applicant contended that the Court should not grant a punitive order as his contentions were in good faith.

10.5 When proceedings are found to be vexatious this may justify a costs order as between attorney and client. The courts have given an

⁴ *Fripp v Gibbon & Co.* 1913 AD 354.

extended meaning to the expression “vexatious proceedings” such as when the conduct of a litigant has resulted in “unnecessary trouble which the other side ought not to bear”.⁵

10.6 However, the Court must guard against censuring a party by way of a special cost order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause.⁶

10.7 Whilst the Court should express its displeasure in an obvious abuse of its process in punishing those who bring unsubstantial applications to court, the Court is mindful that each person is equal before the law and has and should have access to justice.

10.8 For the abovementioned reason, the Court is not going to grant a punitive cost order in this matter. The costs will be awarded on a party and party scale.

[11] **ORDER**

11.1 The application for condonation for the late filing of the respondents’ affidavit is granted.

11.2 The applicant is directed to pay the costs of the respondents’ application for condonation.

⁵ *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and another* 1997 (1) SA 157 (A) 177D-E.

⁶ *Johannesburg City Council (supra)* 177E-F.

- 11.3 The application for striking out the entire contents of the first and second respondents' answering and confirmatory affidavits is dismissed.
- 11.4 The applicant is ordered to pay the costs of the application to strike out.
- 11.5 The application for contempt of court is dismissed.
- 11.6 The applicant is directed to pay the costs of the application for contempt of court, including the reserved costs occasioned by the adjournments on the 16 of February 2015 and 10 April 2015.

MARKS AJ

APPEARANCES

Appearing on behalf of the applicant: Mr McHendry in person.

Counsel for the respondents: Mr E Crots SC, instructed by Garlic & Bousfield Inc, Durban.

Date of Hearing: 8 September 2015.

Judgment handed down on: 17 September 2015.