

**IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA**

CASE NO: 12375/2012

In the matter between:

IMPERIAL CROWN TRADING 176(PTY) LTD

FIRST APPLICANT

HARESH OUDERAJH

SECOND APPLICANT

And

LAHAF (PTY) LTD

FIRST RESPONDENT

KWADUKUZA MUNICIPALITY

SECOND RESPONDENT

CONSTRUCTION ID (PTY) LTD

THIRD RESPONDENT

BRUCE RENKEN

FOURTH RESPONDENT

PAUL RENKEN

FIFTH RESPONDENT

JUDGMENT

SISHI J

Introduction

[1] This is an application for contempt of an order issued by this Court on 21 August 2012, against the respondents.

[2] The first applicant is the Landlord of the premises situated at Ballito Bay Shopping Mall in Ballito KwaZulu-Natal which is a short distance from the building owned by the first respondent at Ballito Lifestyle Centre in main road Ballito, KwaZulu-Natal. The second applicant is the managing director of the first applicant. The first respondent is a company which carries on business as a property owner and property developer in Balito KwaZulu-Natal. The second respondent is KwaDukuza Municipality which has been joined in as an interested party in this application. The third respondent is a construction company which carries on business as builders with its principal place of business at 40 Randwood Close, Glenashley, Durban, KwaZulu-Natal. The fourth and the fifth respondents are brothers, they are directors and shareholders of the first respondent.

Background

[3] The first respondent is the registered owner of the immovable property, Lot 3761, Main road Ballito on which the Ballito Lifestyle Centre, has been built. The first respondent is also the owner of Ballito Lifestyle Centre.

[4] On 6 July 2012, under case No. 6960/2012, the applicants launched an urgent application heard on the same date against the first, second, and third respondents for an interdict stopping certain alleged unlawful building works that were allegedly taking place upon the premises at the Ballito Lifestyle Centre owned by the first respondent.

[5] It is common cause that an order was granted by this court interdicting the respondents from conducting any building work until plans were approved and that the respondents had had notice of the court order.

[6] In terms of this court order, the respondents were interdicted and restrained from conducting any further building work and which interdict was to operate as long as the respondents did not have any building permission authorising construction or other building work. It is also common cause that the respondents have not obtained such authority or permission.

[7] The court order issued on 21 August 2012, read as follows:

“It is ordered,

(a) That the first and the third respondents be and are hereby interdicted and restrained from performing any further building any further building work on the property described as Lot 3671 Ballito, known as the Balito Lifestyle Centre, Ballito, KwaZulu – Natal, with immediate effect;

(b) That this interdict shall operate for so long as the first respondent does not have approved building plans or early building permissions, in terms of section 7(6) authorising construction or other building work that may be undertaking on the property in question in terms of the National Building Regulations and Building Standards Act 103 of 1977”.

[8] The applicants' case is that the first, third and fourth respondents were ordered by this Court, not to conduct any building operations until such time that they were in possession of the said building plans. The respondents proceeded to conduct building operations regardless of the court order and in defiance of two stop work notices issued by the second respondent. According to the applicants they had no alternative but to institute contempt proceedings.

[9] The respondents argued that the activities carried out by the first respondent on the building site and the centre did not constitute building work, as contemplated in the court order and the National Building Regulations and Building Standard Act 103 of 1977 (the Act).

[10] It is evident from the correspondence exchanged between the parties that the respondents' attitude is that of denial that any building work is taking place on the site.

[11] In paragraph 45 of the answering affidavit of the fourth respondent, he has alleged:

"It is relevant to note that all work performed since the interdict was imposed:

(1) is of a temporary nature and will be demolished and removed if and when building operations resume;

(2) was for cleaning, site safety and security, health, drainage and tenant operations;

(3) is not reflected in the construction drawings/specifications;

(4) has not furthered the building process.”

[12] In paragraph 46 of the same answering affidavit, the following is alleged:

“The work that has been performed on the site is essentially described in my letter dated 26 October 2012 to the second respondent being annexure “N1” and “N2” to the applicants’ founding affidavit.”

[13] Paragraphs 3 and 4 of the letter referred to above reads as follows:

“... any activity taking place on site is to effect this decision and to ensure the safety and security of the site and of the tenants, their assets, operations, employees, customers and suppliers.

A detailed list of the activities being conducted on site is listed below:

- General cleaning of site;
- Removal of building materials, such as sand, stone etc, from site;
- Removal of rubble and excess soil from site;
- Removal of equipment, such as scaffolding etc from site;
- Relocation and storage of equipment and building materials on site;
- Reconnection and/or diverting existing storm water drainage which has been damaged in the construction process;

- Installing two new temporary storm water drains to manage flooding in the building site area;
- Removing soil from open foundations and excavations and replacing this soil with crusher (to manage flooding and allow access to Super Spa, receiving area and supplier deliveries).
- Removal, repair and/or reinstatement of existing shade cloth, fencing and hounding.
- Installation of new shade cloth, fencing, hoarding and access gates where this is required from a site safety, security and management perspective and from a tenant and their safety, security and operational perspective. ...”

[14] In paragraph 47 of the answering affidavit the fourth respondent made the following allegations:

“In addition thereto, three other items of work were undertaken namely:

- (1) Coating the exposed re-enforcing rods (rebar's) with anticorrosive material to preserve their structural integrity. Such treatment was only required because of the site shutdown;
- (2) Filling the dangerous cavities being the open trenches, foundations and column bases with G5 crusher. This was also for safety and health purposes;
- (3) Applying pre-mix to the G5 crusher which was introduced to the open trenches, foundations and column bases. This was for site safety, security, health, drainage and tenant operations.

[15] The fourth respondent further alleged in the answering affidavit that, not only was all of this work reasonably required but also essential to the exercise of shutting down the site indefinitely in terms of the decision taken at the meeting of the professional team on 16 October 2012.

[16] It is common cause that two stop work notices were issued to the respondents by officials of the second respondent. These were issued on 26 October 2012 and 9 November 2012 respectively. Paragraphs 1, 2 and 3 of the first notice to stop building work reads as follows:

“The KwaDukuza Municipality is empowered in terms of Section 2 of the National Building Regulations Act 103 of 1977 (“the Act”) to enforce the observance of all the provisions of the Act with respect to land within the jurisdiction of the KwaDukuza Municipality.

In terms of section 4(1) of the said Act, no person shall erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act, without the prior approval in writing of the Local Authority in question.

Recent inspections of the property described as Lot 3671 BA reveal that work had commenced without the prior written approval of the Kwa Dukuza Municipality, nor any indication of any application currently lodged with this Municipality. Accordingly, you are hereby instructed in terms of Section 4(4) read with Regulation A25 (6) and A25 (7) of the Act to cease the erection of the building work on your property WITH IMMEDIATE EFFECT and you are requested to obtain the relevant approvals from the aforementioned body within a period of 14 calendar days. ...”

[17] The respondents have contended that in this notice, there is no detail of what “building work” was being referred to and what it was precisely that the second respondent wished the first respondent to stop doing.

[18] There had been an inspection of the site, prior to the issue of this notice to stop work.

[19] On 13 September 2012, the fourth respondent had a site meeting with Mr Ngwane, a building inspector representing the second respondent. In this meeting, the fourth respondent requested permission to complete certain works on site. Mr Ngwane requested him to submit his request in writing. This he duly did on the same day. He never received a reply to this letter notwithstanding two reminders when no response was received from the second respondent to his request, they did not proceed with any of the work for which early permission was sought.

[20] There was a further site meeting at the request of Mr Nkwakhwa on 25 October 2012. On this day they had a detailed inspection of the site and he gave Mr Nkwakhwa a detailed account of exactly what measures they were taking to shut down the site. He told Mr Nkwakhwa that the few workers on site were there purely to tidy it up. Mr Nkwakhwa at no time suggested that the first respondent had in anyway breached the court order. The second respondent’s official has, however, alleged in the affidavit that he told the fourth respondent at the site inspection that he was in breach of the court order.

[21] I have already referred to annexure “N1” to the applicant’s founding affidavit which is a letter from dated 26 October 2012 dealing with the site meeting of 25 October 2012, the notice to stop work dated 25 October 2012. In this letter, a detailed list of the activities being conducted on site is recorded. These have been referred to earlier on in this judgment. The said email was dispatched directly to Mr Nkwakhwa, with a copy to Mr Ngwane, the second respondent’s building control officers. The third last paragraph of the said letter reads thus:

“Should I be required to cease any of the listed activities, I ask that I be advised accordingly”.

[22] Neither a formal acknowledgment nor a substantive response was received to this letter. As indicated above, a second notice to stop building work was delivered on 9 November 2012. Again, the notice was a standard document that had no detail of any wrong that the first respondent was allegedly committing in the building site. This notice was received by email and responded to by email on the same date to Mr Nkwakhwa and copied to his colleague Mr Ngwane.

The Law on Civil Contempt

[23] The leading case on the principles of civil contempt of court is *Fakie NO v CCII Systems (Pty) Ltd*¹ to which both parties have referred to. This case has been cited with approval in a number of other cases that followed.

¹ 2006 (4) SA 326 (SCA)

[24] In *Graham v Park Mews Body Corporate and Another*², civil contempt of court has been described as follows:

*“The definition of civil contempt of court proceedings is the deliberate and intentional disobedience of an order granted by a court of competent jurisdiction. There has to be the element of non-compliance. This needs to be proven by the applicant beyond reasonable doubt.”*³

[25] The other case also referred to by Counsel for the respondents, which also refers to *Fakie* case, is *Els v Weideman*⁴. Heher JA States at 138 (D):

“This obedience of a court order will constitute contempt when the breach is committed deliberately and in bad faith; *Fakie* para 9:

“A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).”

(53) Thus, “the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that evinces⁵. Where there is an honest belief that non-compliance is justified or proper, that is incompatible with the required state of mind (*ibid*)”.

² 2012(1) SA 365 (WCC), para 36

³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

⁴ 2011(2) SA 126 (SCA)

⁵ *Fakie* para 10

[26] The other case is *Lan v OR Tambo International Airport Department of Affairs Immigration Admissions and another*⁶ where in *Fakie*'s case was cited with approval, the Court in dealing with the civil contempt of Court stated the following:

“(60) I have also considered the decision in *Fakie NO v CCII (Pty) Ltd*, where contempt of court in civil proceedings was considered by the Supreme Court of Appeal.

(61) I have taken into account that the standard of proof is ‘beyond reasonable doubt’ and not a ‘preponderance of probabilities’ such as in the normal civil proceedings.”

[27] The following principles were enunciated from the *Fakie* decision, *supra*, dealing with civil contempt of court:

“At para [63] he quotes Cameron JA in paras 6-10 of his judgment:

[6] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional stamp of approval, since the rule of law – a founding value of the Constitution – “requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained”.

[7] The form of proceeding CCII invoked appears to have been received into South African law from English law and is a most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not to do something (*ad factum*

⁶ 2011 (3) 641 (GNP)

praestandum), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

[8] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).

[10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[28] Furthermore, the principles of civil contempt of court were summarised as follows in *Fakie's case, supra*,

“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.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness 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 wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.
- (e) A *declaratory* and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.

[29] It is clear from the case law referred to above that the requirements for the civil contempt of court are:

- (1) The grant of an order;
- (2) Service or notice of the orders;
- (3) Non-compliance;
- (4) Wilfulness and *mala fides*.

[30] In the applicant's heads of argument, it is submitted that in a contempt application, once the applicant has proved the requisites of contempt, the

respondents bear the evidentiary burden to establish beyond reasonable doubt that their conduct was not wilful, *mala fide*, in the absence of which contempt would be established. Clearly this submission cannot be correct in the light of the principles enunciated from the above cases including the leading case of *Fakie NO supra*.

[31] It is clear from the above that once the applicant proves the existence of the court order, the service of an order, and non-compliance, the respondent bear the evidentiary burden to show reasonable possibility that non-compliance was not wilful or *mala fide*. The applicant is required to prove the elements of contempt beyond reasonable doubt.

[32] In the present matter, it is not in dispute that, an order of court was granted on 21 August 2012 by the Durban High Court, directing the first, third and fourth respondents to desist from continuing with their building operations until such time that their building plans had been approved by the second respondent, Municipality. It is also not in dispute that the respondents have been served or notified of the court order.

[33] The issues for determination by this court are:

- (a) Whether it has been proved beyond reasonable doubt that the said respondents have in fact breached the court order dated 21 August 2012, and
- (b) Whether, if any such breach is proven to have occurred, such breach has been proved beyond the reasonable doubt to have been

committed deliberately and mala fide by the one, the other or all of the aforesaid respondents.

[34] The respondents argued that the activities carried out by the first respondent on the building site at the centre did not constitute building work as contemplated in the court order and the act. The applicants misconstrue certain activities as constituting building work. There is no doubt that, the mere presence of workers, the delivery of storage materials and the placement of refrigeration containers cannot objectively constitute building work, in terms of the order or under the Act.

[35] Counsel for the applicants submitted that the nature of the order is one of interdictory relief which entails that the respondents were required by this court to desist from certain conduct. Reasonably construed, the first paragraph of the order contains the prohibition operable upon respondents. The second paragraph of the order specifies the time during which the prohibition would operate against the respondents, i.e. for so long as the first respondent does not have approved building plans or early permission in terms of section 7(6) of the Act.

[36] Counsel for the applicants submitted further that what the respondents were ordered by this Court not to do, constitute the following:

- (a) They were ordered to stop any further building;
- (c) They were restrained from executing any further building work;
and

(c) With immediate effect.

[37] Counsel for the applicants submitted further that the phraseology of the order of this Court is wider in meaning and import than that occurring in section 4 of the Act. The word “any” is meant to be all embracing. The prohibition of the Court is not limited in its reach over certain categories or types of building work or building that the respondents were ordered to stop. It does not exclude building work or building for which no plans were required in terms of section 4 of the Act. The word “any” bears a wide meaning and covers all work and building whether plans were required or not. It contemplated a stoppage of all building work with immediate cessation.

[38] Counsel for the respondents submitted that the ordinary meaning of “building” is to construct the structure by putting parts of material together. It is apparent that none of the first and third respondents’ activities fall on this definition as no structure was built at the site after 12 July 2012. He goes on to submit that the interdict does not permit “building work” until it is approved by the second respondent, Municipality in accordance with the submitted plans. Conversely, it certainly follows as a matter of logic that any building work which does not require approval in terms of the act, would not be unlawful and could not be curtailed by a court order in the ordinary courts. The meaning of “building work” must therefore be informed by the Act.

[39] Counsel for the respondent submitted further that section 4 of the Act prevents the “erection” of a “building” in respect of which plans and specifications are to be drawn and submitted in terms of the Act, without prior

approval of the local authority. From an analysis of section 1 of the Act, which defines the words “erection” and “building” it is readily apparent on an ordinary interpretation of these provisions that none of the activities performed by the first and third respondents breach the act:

- (a) The activities are not of a nature that requires plans and specifications to be drawn and submitted;
- (b) The activities do not involve an act of erecting a building.

[40] The fourth respondent has admitted that after the grant of a court order, three additional items of work were undertaken, namely;

- (1) Coating the exposed reinforcing rods (rebar's) with anti-corrosive material to preserve their structural integrity. Such treatment was only required because of the site shutdown;
- (2) Filling the dangerous cavities being the open trenches, foundations and column bases with G5 crusher. This was also for safety and health purposes;
- (3) Applying pre-mix to the G5 crusher which was introduced to the open trenches, foundations and column bases. This was for site safety, security, health, drainage and tenant operations.

[41] According the respondents, not only was all this work reasonably required but also essential to the exercise of shutting down the site indefinitely in terms of the decision taken at the meeting of the professional team on 16 October 2012.

[42] I have looked at the photographs submitted on behalf of both parties depicting the site at various angles but, these are not of any assistance in determining the issues before Court.

[43] It was submitted on behalf of the respondents that the Court should appreciate it that when the work was halted in July 2012, no roof was in place over the partially completed structure and a large catchment area was created for storm water accumulation that required urgent diverting to avoid flooding to tenants' premises. The temporary drain facilities to assist in storm water control were installed. Eventually drains and the premix strips leading to it will be removed and a new 300 millimetre thick floor slab cast over it, in accordance with the plans awaiting approval.

[44] The wording of the court order is clear, it prohibits the performance of any further building any further building work on the property described as Lot 3671 Ballito with immediate effect.

[45] According to applicants reasonably construed the first paragraph of the court order contains the prohibition operable upon the respondent. The second paragraph of the order specifies the time during which the prohibition would operate against the respondents, i.e. for so long as the first respondent does not have approved building plans or early permission in terms of the Act.

[46] Counsel for the applicant submitted, correctly in my view that the phraseology of the order of this court is wider in meaning and import than that

occurring in section 4 of the Act, and that the word “any” in the court order is meant to be all embracing. The prohibition of the court is not limited in its reach over certain categories or types of building work or building that the respondents were ordered to stop. It does not exclude building work or building for which no plans were required in terms of section 4 of the Act. The word “any” bears a wide meaning and covers all work and building where the plans were required or not. It contemplated the stoppage of all building work with immediate effect.

[47] In my view, counsel for the respondents’ interpretation of the court order, namely, that “any” building work which does not require approval in terms of the Act would not be unlawful and could not be curtailed by a court in my view is erroneous.

[48] The respondents have admitted that they have performed building work on site which included the items referred to earlier on in this judgment. According to the respondent, this work was done allegedly for the purpose of implementing the decision taken of 16 October 2012 to close down the site.

[49] Mr Rowan’s argument regarding the interpretation of the first part of the court order concentrates only on the word “building” as defined in the Act. He submitted that the ordinary meaning of “building” is to construct a structure by putting parts or material together. In my view, his argument loses sight of the fact that two phrases have been used in the first part of the order, namely, performing “any” further “building”, any further building work on the property.

Mr Rowan has not said anything in his argument about the phrase “building work”. All he says about the phrase “building work” is that the interdict does not permit building work until it is approved by the second respondent, Municipality.

[50] In the circumstances, I am satisfied that the applicant has proved the order, service or notice and non-compliance beyond reasonable doubt.

[51] It is trite that once the applicant has proved the order, service notice and non-compliance, the respondents bear an evidential burden in relation to wilfulness and mala fides. Should the respondents fail to advance evidence that establishes reasonable doubt, as to whether non-compliance was wilful or mala fide, contempt will have established beyond reasonable doubt⁷.

[52] The issue therefore at this stage is whether the respondents have advanced evidence that establishes a reasonable doubt as to whether non-compliance was wilful or *mala fide*.

[53] In *Fakie case, supra*, the Court stated:

“... however robust a court may be inclined to be, a respondent’s version can be rejected in motion proceedings only if it is (fictitious) or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of

⁷ See *Fakie case, supra*, para 42.

credence⁸. This passage was cited with approval in *Else v Weideman*⁹ (per Heher JA).

[54] It is clear that a lot of correspondence has been exchanged between the second respondent and the first and forth respondents after the issue of the court order.

[55] It was submitted on behalf of the respondents that whereas the applicants make no substantive allegation that the respondents breached the court order deliberately and in bad faith. The respondents allege that any non-compliance with the court order was unintentional and in good faith. The fourth respondent took legal advice from his attorneys before the activities shutting the site were performed.

[56] It is also clear that the respondents were at all material times of the mind-set that what was done at the site after 12 July 2012 was lawful and in compliance with the Court order. Further it is also clear that before the respondent communicated with the municipality, at all material times to explain that it was merely adapting measures to close down the building site. The municipality at no stage responded to the fourth respondent's communications in this regard and failed to specifically explain in what respect the shutting down activities were in breach of the Court order and the Act.

⁸ Para 56

⁹ 2011(2) SA 126 (SCA) at 139

[57] I will refer to one such correspondence, reflecting the words used by the fourth respondent in a letter to the second respondent on 26 October 2012 reflecting the intention of the fourth respondent:

“I assure you that no building works in terms of progressing a building towards completion in terms of the plans submitted for approval is taking place on site, none of the activities constitute building works and none are of a permanent nature but are necessary for, safety, security and operational perspective.

To support the fact that no building work is or has taken place since the first order, I have photographs taken on or about 15 July 2012 which are available for your scrutiny to compare to the current status.

Furthermore, to your notice to stop building work dated 25 October 2013, should you require that I cease all of the above activities until you have heard an opportunity to consider and grant approval, please advise me accordingly and I will instruct the constructor.

Should you require that I cease any of the above activities, please advise me urgently when we could schedule a meeting to discuss.

I further wish to re-affirm that I will not do anything to compromise either my position or the position of the Kwa-Dukuza Municipality. Should you have any queries or concerns please advise me accordingly”.

This is but one example of the many letters exchanged between the parties but were not responded to by the second respondent.

[58] Counsel for the respondents submitted, correctly in my view, that the words used in the letter are not the words of one who is either deliberately setting about breaching a court order, and more certainly do not reflect the wilfulness and mala fides. As indicated above, there were also site meetings between the first and the fourth respondent and the officials of the second respondent on the other hand.

[59] Furthermore, as indicated above, on 13 September 2012 an email was sent from the fourth respondent to the second respondent following a site meeting with Mr Njabulo Ngwane the building control officer of the second respondent, and titled, request for permission. This letter contained request to do certain work from site. They requested the permission to proceed with building works as per the plans submitted under submission No.12/08/523. According to the fourth respondent, it failed to elicit a response from the second respondent, let alone its acknowledgment. There are further similar letters which were in the applicant's application papers.

[60] It is also clear from the papers that the respondents have been labouring under the impression that the interdict does not permit building work until it is approved by second respondent in accordance with the submitted plans. The respondents erroneously concluded that it certainly follows as a matter of logic that any building work which does not require approval in terms

of the Act would not be unlawful and could not be curtailed by the court order in the ordinary cause. I have already made a pronouncement in this regard.

[61] In *Victoria Park Ratepayers v Grayvenouw CC (2004) 3 All SA 623 (SE)*, Plaskett J stated in paragraph [5]:

“It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has its heart the very effectiveness and legitimacy of the judicial system. ... That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest”.

[62] Counsel for the respondents submitted correctly in my view that civil contempt of court proceedings cannot be used as an instrument by a vindictive and selfish motivated civil litigant wage personal war against an opponent and or attempt to bring him into disrepute which is submitted:

- (a) All or an analysis of evidence the utterances and the swearing and the spitting and the publications by the second applicant concerning the first and fourth respondents which have not been denied, and
- (b) The explanation by the fourth respondent well supported by correspondence and documentary evidence is indeed, what the applicants are seeking to do.

[63] One cannot lose sight of the background set out in the founding affidavit relating to the applicants and the respondents, namely that they have competing interest, the second applicant being the owner of a shopping mall not far away from the respondent's shopping mall.

[64] In *Fakie's case, supra*, the court stated:

"The acceptable approach requires that, subject to the robust elimination of denials and fictitious disputes, the court must decide the matter of the facts stated by the respondent, together with those of the applicant, to those the applicant averred and the respondent does not deny".

[65] Applying this approach, since the first and fourth respondents' version cannot legitimately be robusted away, their factual assertions, including those regarding their state of mind must be accepted as established. In this matter the proven facts establishes more than a reasonable doubt but a factual picture that entails acceptance of the respondent's version.

[66] Applying the accepted test, it is impossible to reject the respondents' version as fictitious or as clearly not credit worthy.

[67] In my judgment, the respondents have advanced sufficient evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide. Contempt has therefore not been established beyond reasonable doubt.

[68] In my view, the application should be dismissed.

[69] On the issue of costs, counsel for the applicants argued that should the application succeeds, the respondent should be ordered to pay the costs. Counsel for the respondents on the other hand, submitted that the application should be dismissed with costs and, that such costs should be on the punitive scale.

[70] In my view, there is no reason why the costs should not follow the result. This matter does not warrant that the costs be awarded on a punitive scale.

[71] In the result, I make the following order:

The application is dismissed with costs.

SISHI J

APPEARANCES

Date of hearing	:	14 May 2013
Date of judgment	:	30 July 2013
Counsel for the Applicants	:	RBG Choudree SC
Applicants' Attorneys	:	KRISH NAIDOO GOVENDER & CO. C/O ANAND NEPAUL ATTORNEYS 9 TH FLOOR, ROYAL TOWERS 30 DOROTHY NYEMBER STREET DURBAN Ref: R Govender/SB/1226
Counsel for the Respondents	:	PAC Rowan SC
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