

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2767/2012

In the matter between:-

A.E. DROTSKé N.O.

1st Applicant

W.M. DROTSKé N.O.

2nd Applicant

and

ETTIENE COETZEE

Respondent

HEARD ON:

13 SEPTEMBER 2012

JUDGMENT BY:

EBRAHIM, J

DELIVERED ON:

20 SEPTEMBER 2012

- [1] The applicants who are brothers and trustees of a Trust, the Monte Bello Trust, apply for an order for the committal of the respondent for contempt on the grounds of his alleged failure to comply with the terms of an order of court granted on 27 June 2012. The Trust owns a guest house and conference centre in an area called Vaalbank Suid just outside Bloemfontein. It is called the Monte Bello Estate and is really a popular wedding venue. That is its main business although it does also cater for the holding of conferences. Initially the business was wholly owned and run by the respondent. In

April 2011 he sold 50% of the business to the applicants for R3,5 million. The business is located on a small holding, described on a municipal map of the area as portion 7 of erf 2876 Vaalbank Suid. The erf has been subdivided. The respondent owns and lives on an adjoining property described as portion 12 of the same erf. No doubt as a result of their proximity to one another, the applicants and the respondent share a municipal water supply pipeline, which runs across the respondent's property, so that the water supply connection to the Monte Bello Estate is of necessity one and the same as that of the respondent's, their actual water connection pipe being opposite the respondent's house.

[2] On commencing the running of the business of the Monte Bello Estate the applicants were initially "sleeping partners", being merely investors, whilst the respondent as the other 50% member/partner actually ran the venture. Problems then arose as a result of which the applicants bought out the respondent. Unfortunately this did not restore cordial relations between them.

[3] On the 27th June 2012, the applicants obtained a spoliation

order against the respondent in this court in the following terms:

“4. A *rule nisi* is issued, returnable upon **26 July 2012** as this Court deems meet, whereby the First and Second Respondents are called upon to show cause, if any, why the following order should not be made final:

4.1 The First and/or Second Respondents be ordered to immediately restore the flow of water to the Applicants’ business premises, situate at Erf No. 7/2876 of the farm Tafelkop No. 2876, Vaalbank Zuid, district Bloemfontein, better known Monte Bello Estate.

4.2 That the First Respondent be ordered to pay the costs of the application, in the event of it being found on the that he was in fact responsible for the cessation or disconnection of water supply to the Applicant, as well as the costs occasioned by the Second Respondent in opposing/supporting the relief sought by the Applicant herein. In the event of it being shown that the Second Respondent is responsible for the cessation of water supply to the Applicant, then in that case that the Second Respondent be ordered to pay the cost of the application, such costs to include the costs incurred by the First Respondent in

opposing/supporting the relief sought by the Applicant herein.

5. This order is served personally upon the First Respondent and Second Respondents in accordance with Rule 4 of the Court Rules.
6.
7. The sheriff instructed and authorised to serve this order personally upon the first respondent and immediately after the granting of this order and outside the time limits set in the rules by means of telephone, telefax, e-mail or other means of communications.”

The respondent was cited as first respondent in the application, the municipality being the second respondent. The order was obtained *ex parte* and on an urgent basis. The Rule *nisi* was extended on 26 July 2012 to the 23rd August 2012 and on that date further extended to 13 September 2012 when it was confirmed by agreement between the parties. The respondent was ordered to pay the costs of the spoliation application.

In the intervening period between the granting of the Rule *nisi* and its confirmation, and more specifically on 3 July

2012, the applicants instituted civil contempt proceedings against the respondent for his alleged failure to comply with the provisions of the order granted on 27 June 2012 and costs on the scale as between attorney and client. The facts upon which these proceedings are based, are briefly the following:

- (i) On 27 June 2012 after the Rule *nisi* was granted, the first applicant and his attorney, being unable to raise the sheriff in order to effect service of the order upon the respondent, drove personally to his home where the first applicant's attorney handed to the respondent a copy of the court order relating to the spoliation application.
- (ii) The respondent, on the applicants' papers, is alleged to have indicated that he would restore the applicant's water supply at 8h00 am on the following morning, the 28th June 2012. This however did not happen.
- iii) On the 28th June 2012, the applicants' attorneys, in addition, forwarded a copy of the spoliation order to the respondent's attorney, who acknowledged receipt on even date.
- iv) Despite this the respondent persisted in his failure, according to the applicants, to turn on their water

supply. In desperation and on 28 June 2012, the applicants sought the assistance of an employee of the municipality who, after conducting an investigation, was able to open up the main municipal tap connection providing water to both the applicants, as well as the respondent. Further investigation of the submerged water pipeline in an area approximately 200 metres from the respondent's property revealed a blockage in the actual water pipe in the form of a "stop" which had been inserted into the water pipe restricting the flow and supply of water to the applicants' property.

- v) The next day, 29 June 2012, it is alleged by the applicants that the respondent once again acted in contravention of the spoliation order by arriving on their property in their absence and releasing all the water from the reservoir tanks. He threatened one of the applicants' employees with physical violence should he close the reservoir taps. The second applicant on receiving this news immediately returned to the applicants' property and closed off the taps. As he was driving away after having done so, he saw the respondent sitting on his porch. The respondent shouted out to him that he would continue disrupting

the water supply to the applicants' property throughout the day. The next morning, 30 June 2012, the applicants allege that they were once again without water. Once again they inspected the water pipe, this time in the company of a member of the South African Police Service and again found that in precisely the same position on the pipeline, their water supply had been blocked by the insertion of a stop.

- [5] The background which I have set out in this judgment is common cause between the parties. The respondent has seen fit not to file opposing papers but to confine himself to taking issue on a point of law with the applicants on the basis of a notice delivered in terms of Rule 6(5)(D)(iii) of the Uniform Court Rules, which reads as follows:

- “3. Hierdie Hof se bevel gedateer 27 Junie 2012 het geen tussentydse regswerking gehad op 29 Junie 2012 of enige ander datum relevant tot die aansoek nie;
4. Die Respondent het onder die omstandighede nie hierdie Agbare Hof se bevel gedateer 27 Junie 2012 geminag nie.”

- [6] 6.1 Consequently the only issue for adjudication before me

is on a point of law *viz* whether the order dated 27 June 2012 had any interim effect between 27 June 2012 and 29 June 2012 and any other date/dates on which it is alleged by the applicants that the respondent acted in contempt of its provisions.

6.2 On behalf of the respondent, Mr Reinders concentrated his submissions on two aspects, the first being the lack of proper service of the order by the sheriff and the second, the omission from the order of a provision that the Rule *nisi* was to operate as an interim interdict with immediate effect. The effect of both these challenges he contended, was that the applicants had abrogated to themselves the powers of the court issuing the order and, in doing so, had reserved to themselves the right to amend and vary the order so as to enable them to execute it in a manner wholly unauthorised by the learned Judge who had made the order. Having done so, he argued, it could not legitimately be expected of the respondent that he abide by and/or comply with an order which the applicants had not seen fit to obey themselves.

[7] The applicants' case, as Mr Grobbelaar put it, was that there

was no need for service by the sheriff to ensure respondent's compliance with the order; all that was required is that he be notified of its terms by some acceptable means as eg. by the applicants' attorney handing over to him a copy of the order so that he had knowledge of the contents of the order. He also urged me to find that the Rule *nisi*, given its proper, ordinary grammatical meaning, especially if one had regard to the words "why the following order should not be made final" was a sure indication that the order was an interim and provisional order operating with immediate effect, confirmation thereof to follow on the return date, should respondent fail to appear to show cause or, in the event of appearance, fail to make out a case for the discharge of the interim order.

- [8] 8.1 The applicants are, off course, correct; whether the respondent disobeyed the court order deliberately and wilfully, which is the test for the offence of civil contempt, depends ultimately on whether he had knowledge as a fact of the provisions of the order. (**FAKIE NO v CCII SYSTEMS (PTY) LTD** 2006 (4) SA 326 (SCA) par [42].)

It was pointed out by Innes CJ in **MEIKLE v SOUTH**

AFRICAN TRADE PROTECTION SOCIETY 1904 TS

94 at 97

“... when an order of Court issues, operative as against the whole world, then any person, however *bona fide*, intending to take action contrary to that order, who is warned of its existence by some responsible person, like a solicitor or officer of the Court, goes on at his peril.”

8.2 That the enquiry into the knowledge of the party alleged to be in contempt is a factual one, was emphasised as a general Rule by the same learned Judge in **BURGERS v FRASER** 1907 TS 318 at 320:

“I think that where a man has information, which he has no reasonable grounds for disbelieving, to the effect that an order of Court has been granted against him, he is bound to act as if that order has been duly served. In every case it is a question of fact. The point is whether a man when he receives information, had any reasonable grounds for disobeying it. It is not contended here that the appellant did not believe that the information supplied to him was correct. He stood upon a technicality and demanded that the order itself should be produced to him. I do not think he was justified in taking up that position. We must have regard to the facts... He was not

justified in disregarding that information and acting in defiance of the order of Court on the technical ground that the written order had not been produced.”

8.3 On the undisputed facts of the applicants’ case, the respondent certainly had knowledge of the contents of the order, for a copy thereof was actually given to him on the evening of 27 June 2012 by the applicants’ attorney, Ms Sunel Pienaar, who explained the contents thereof to him. In doing so, however, it is the respondent’s case that she incorrectly conveyed to him information which did not form part of the provisions of the order granted by the learned Mocomie J.

[9] It is not the respondent’s case that Ms Pienaar committed any fundamental error in conveying the information contained in the court order. It is agreed that the order in the precise terms given by the learned Mocomie J was explained to the respondent. What is crucial to the respondent’s case, is that the order did not prohibit the respondent from interfering with applicants’ water supply between 27 June 2012 and the original return date, 26 July 2012.

[10] I proceed now to deal with this issue. Intrinsic to our system of constitutional *juris prudence* is the *audi alteram partem* rule. A court will normally not grant an order directly affecting the rights of a person and which may involve far reaching consequences to him/her without giving that person an opportunity of being heard. This principle has found expression in a rule of practice that in *ex parte* applications brought without notice, the court will order a Rule *nisi* to issue where the rights of other persons may be affected by the order sought. Herbstein and Van Winsen: **The Civil Practice of the Superior Courts**, 5th Edition at 455 defines a Rule *nisi* thus:

“an order directed to a particular person or persons calling upon him or them to appear in court on a certain date to show cause why the Rule should not be made absolute; or, in other words, why the court should not grant a final order. In a proper case, for example, an urgent application for an interdict, the court may grant interim relief by ordering that the Rule *nisi* will operate as a temporary interdict. This rule of practice should be applied and followed unless sound reasons exist to depart from it.”

10.1 The Rule *nisi* is therefore fundamental to both procedural and substantive fairness, that is its main

purpose, for it allows flexibility in circumstances where a rigid application of the *audi alteram partem* rule might have the effect of defeating the very rights sought to be enforced or protected.

- 10.2 Where a temporary interdict is necessary to prohibit a party from doing something until cause is shown by him against it, the court is asked to make a specific order that the Rule *nisi* should act immediately as a temporary interdict, pending the return day.

The utility of the Rule *nisi* acting at the same time as an interim order has been endorsed by the courts.

(SAFCOR FORWARDING (JOHANNESBURG) (PTY)

LTD v NATIONAL TRANSPORT COMMISSION 1982

(3) SA 654 (A) at 674 H – 675 A)

- 10.3 Consequently I do not agree with Mr Grobbelaar's interpretation that the Rule *nisi* is but one of two options which an *ex parte* applicant for interim relief has on approaching the courts, i.e. either to ask for it indirectly through and by virtue of a Rule *nisi* or directly by spelling it out coupled to a Rule *nisi* ("the rule *nisi* is

to operate as a temporary interdict with immediate effect pending the return date”).

10.4 On his interpretation, the omission of the interim order in Mocumie J’s ruling of 27 June 2012, is not fatal to the applicants’ case because the Rule *nisi* is an interim order. But he is not supported by authority for as was made clear by Corbett CJ in SHOBA v OFFICER COMMANDING, TEMPORARY POLICE CAMP, WAGENDRIFT DAM, AND ANOTHER; MAPHANGA v OFFICER COMMANDING, SOUTH AFRICAN POLICE MURDER AND ROBBERY UNIT, PIETERMARITZBURG, AND OTHERS 1995 (4) SA 1 (A) at 19 D – H where the learned Judge discussed the distinction between a Rule *nisi* and an Anton Piller order:

“A rule *nisi*..., contemplates that the relief sought will only be granted at some future date after the respondent has had time to show cause that it should not be granted... the interim interdict attached to a rule *nisi* usually seeks to maintain the *status quo ante* whereas an Anton Piller order gives instant relief subject to the possibility of a later variation or discharge of the order.”

10.5 Shoba makes it clear that the Rule *nisi* is not another name for an interim order/interdict. The two are not interchangeable. That is the law and the applicants must show that the respondent has acted wilfully and deliberately in contravention of the court order of 27 June 2012 to succeed with their contempt application. They have not done so. Whilst I find that knowledge of the court order of 27 June 2012 on the part of respondent has been proved by the applicants, that in itself is of no moment in light of the failure of the order to inform the respondent that the Rule *nisi* was to operate as an interim interdict with immediate effect pending the return day. Had the order been correctly formulated in this way, the respondent would then have been prohibited from interfering in any way whatsoever with the applicants' water supply as from the moment the copy of the court order was handed to him. This flaw and omission in the court order of 27 June 2012 left it open for the respondent to continue with his unlawful conduct of closing off the applicants' water supply with impunity, had he so wished, until the return day when the Rule was confirmed.

[11] The application for the committal of the respondent for civil contempt is accordingly dismissed with costs. Mr Reinders has asked me to make a punitive costs order against the applicants. I do not consider such an order warranted in the circumstances of this case. The respondent has suffered no prejudice at all and it was his conduct, in the first place, which warranted the spoliation order. This much he acknowledged by agreeing to the Rule *nisi* being confirmed on the return date. A proper order is therefore one on which his costs are awarded to him on the ordinary party/party scale.

S. EBRAHIM, J

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