

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 5688/2010

In the matter between:-

MARTHINUS JOHANNES NAUDE N.O.

First Applicant

PHILNA NAUDE N.O.

Second Applicant

(In their capacities as Trustees of the MP Trust,
IT 1153/08)

and

MATEBESI CONSTRUCTION (PTY) LTD

First Respondent

t/a **C G CIVILS**

JOHN PETRUS COX

Second Respondent

HEARD ON:

25 NOVEMBER 2010

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

20 JANUARY 2011

[1] The matter came by way of an urgent application in terms of rule 6(12). In these motion proceedings the relief sought by the applicants is to have the respondents convicted and sentenced for contempt of court. The application is opposed by the respondents.

[2] This court (per Claasen AJ) granted a provisional order on 12 November 2010 calling upon the respondents to show cause on

18 November 2010 why they should not be found guilty of contempt and sentenced. Today is the extended return day.

- [3] These contempt proceedings are an offshoot or an interlocutory dimension of the main action between the applicants and the first respondent. The applicants, as the plaintiffs, obtained summary judgment against the first respondent, as the defendant, for the payment of an amount of R207 765,00 on 14 October 2009 under case number 4424/2009.
- [4] The applicants subsequently caused a writ to be issued on 22 October 2009 against the first respondent's property. They were entitled *ex debito justitiae* to levy execution upon the judgment in their favour. On 21 January 2010 the sheriff (Vrede) served the writ upon Mr. John Petrus Cox, the managing director of the first respondent. At the same time the sheriff attached a certain Samsung Excavator SE 210, served a notice of judicial attachment upon the same gentleman and drew up an inventory relative to such attachment.
- [5] On 14 October 2010 the applicants applied in terms of rule 49(11) to have the attached excavator removed and sold at the public auction scheduled for 20 October 2010. The first

respondent opposed the application. The application was heard on 19 October 2010. The court (per Van der Merwe J) made the order which reads:

“WORD DIT GELAS DAT:

1. Die aansoek word uitgestel *sine die*.
2. Enige party mag die aansoek ter rolle plaas nadat uitslag gegee is ten opsigte van die respondent se aansoek om verlof om te appelleer deur die Hoogste Hof van Appèl.
3. Die balju word gemagtig om die onderhawige SAMSUNG SLOOTGRAWER (EXCAVATOR) SE 210 in besit te neem en te verwyder of andersins te beveilig.
4. Hangende die beregting van hierdie aansoek word die respondent verbied om die genoemde slootgrawer enigsins te gebruik of te laat gebruik.
5. Die koste van vandag is koste in die aansoek.”

The public auction was obviously called off by virtue of this order. This then is the common cause and history of the matter.

- [6] It is the foregoing court order which is now central to the current dispute. In these proceedings the sole director of the first respondent, Mr. J.P. Cox, was joined as the second

respondent. Previously he was not cited as a party to any of the other proceedings. It is the case of the applicants that the respondents are in contempt of the aforesaid order. The respondents put up the defence that they did not deliberately disobey the order.

[7] Seeing that the respondents admitted the sheriff was not able to take possession of the excavator and that they continued to use the excavator, the issue for determination was a narrow one. The issue was whether the respondents had excusable reason(s) for their non-compliance with the order.

[8] Mr. Van Rhyn, counsel for the applicants, submitted that the explanation of the respondents was not only ridiculous, but also false. Counsel argued that the respondents wilfully disobeyed the order of 19 October 2010. He urged me to confirm the provisional order.

[9] Mr. Zietsman, counsel for the respondent, disagreed. He submitted that the respondent had shown that they were not in wilful default or contempt of the order. He urged me to acquit them by discharging the provisional order by Claasen AJ.

[10] It was incumbent upon the applicants to show that the respondents' non-compliance with the court order was beyond reasonable doubt intentional and *mala fide* - **FAKIE NO v CCII SYSTEMS (PTY) LTD** 2006 (4) SA 326 (SCA) at 333 B – C:

“[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*'. 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).

Noel Lancaster Sands (Edms) Bpk v Theron per Consolidated Fish Distributors v Zive Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc

[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.”

- [11] The decision was elucidated as follows as regards the onus in proceedings of contempt of court:

“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.”

See Herbststein & Van Winsen: **The Practice of the High Courts in South Africa**, Fifth Edition, Volume 2, p. 1104.

- [12] The second respondent, who, until this urgent application was launched, was not a party to the main action and subsequent interlocutory proceedings, had to be joined in these contempt proceedings. This was done because he singularly ran the business affairs of the first respondent, a juristic person. He was the sole director of the respondent's company - **TWENTIETH CENTURY FOX FILM CORPORATION AND OTHERS v PLAYBOY FILMS (PTY) LTD AND ANOTHER** 1978 (3) SA 202 (W).

[13] Being an artificial person, the first respondent is naturally incapable to disobey a court order. The order primarily binds the first respondent, and not the second respondent, for no judgment was given against the second respondent in his personal capacity. However, a juristic person functions through its director(s). That being the case, the law looks upon those whose duty it is to direct the business operations of a company to see to it that a company complies with court orders. A director who knowingly disregards terms of an order granted against the company whose affairs he directs and even undertakes on behalf of the company to ensure that the company complies with the terms of the order, but dishonours such undertakings, is just as responsible for the compliance and liable for the breach as if the disobeyed order was given against him personally.

[14] The courts are supposed to act as vigilant sentinels of the orders they make. The dictates of any civilised system of civil justice demand that the courts must jealously guard the orders they make. It is in the interests of the community at large to do so. Respect for court orders is the hallmark of any civilised system of civil justice. The administration of justice would be

brought into disrepute if directors of companies, who deliberately disobey the court orders with impunity, were not severely punished - **TWENTIETH CENTURY FOX**, *supra*, at 202 A – H, 203 C – D and 203 G – H.

[15] The underlying purpose of contempt proceedings was aptly described as follows:

“The object of proceedings that are concerned with the unlawful and intentional refusal or failure to comply with an order of court is the imposition of a penalty in order to vindicate the court’s honour consequent upon the disregard of its order and/or to compel performance in accordance with the order.”

Herbstein & Van Winsen: **The Practice of the High Courts in South Africa**, Fifth Edition, Volume 2, p. 1100.

See also **FAKIE NO v CCII SYSTEMS (PTY) LTD**, *supra*.

[16] The courts frown upon individuals who undermine their authority. Where a party has displayed a high degree of moral blameworthiness in his disobedience he may, in addition to a criminal sanction, be saddled with a punitive order of costs.

Herbstein & Van Winsen: **The Civil Practice of the High Courts of South Africa**, Fifth Edition, Volume 2, p. 1112, fn 122 – 123.

[17] That the order was made against the first respondent on 19 October 2010 is common cause. The order was made in the presence of the first respondent's legal representatives, attorney and advocate. At that stage Mr. Dieperink Möller of Symington & De Kok acted for the first respondent. He was obviously appointed by the second respondent. Therefore the attorney's knowledge of the order can be constructively imputed to the respondent's knowledge. This much the respondents admitted in the answering affidavit. The order was, for all intents and purposes, deemed to have been effectively served upon the respondents.

[18] The order authorised the sheriff to take possession of the excavator and to remove it from the first respondent for preservation. Moreover, the order prohibited the first respondent from using or causing the excavator to be used pending the adjudication of the application in terms of rule 49(11), which currently stands postponed. The order, notwithstanding, the sheriff was unable to take physical possession of the attached excavator for safekeeping in

accordance with paragraph 3 of the order and the first respondent continued using the excavator in contravention of paragraph 4 of the order. These matters are common cause.

[19] The motivation which prompted Van der Merwe J to make the order he did, was that although the excavator had been attached by the sheriff as far back as 21 January 2010, some nine months earlier, the first respondent carried on using the excavator, seemingly on almost daily basis. This is expressly admitted.

[20] After the grant of the order on 19 October 2010, the sheriff made fruitless attempts to remove the attached excavator from the first respondent's premises, but the excavator was nowhere to be found. On 21 October 2010 the second respondent's wife, Ms Mellet Cox, informed the sheriff that the excavator was either at Kuruman or De Aar. The response of the respondents to the averment was that Ms Cox had in fact informed the sheriff that she was not an employee of the first respondent; that she did not know much about the first respondent's excavators and that the sheriff should take the matter up with the second respondent. She also added that all she knew was that one of the excavators was at Prieska.

- [21] Although the lady and the sheriff seemed to differ about certain insignificant aspects of the discussion, such as the exact whereabouts of the excavator which was under judicial attachment, they were implicitly agreed about one significant aspect and that was that there was virtually no Samsung Excavator SE 210 on the premises of the first respondent at the time. Therefore, wherever the attached excavator really was at the time, was immaterial. What mattered in law was that, the first respondent had removed or caused to be removed an excavator, which both respondents knew the sheriff had placed under judicial attachment. From the moment of such attachment, the excavator was *de iure* in the constructive possession of the sheriff, although it was physically left on the premises of the first respondent.
- [22] On 1 November 2010 the sheriff again endeavoured to remove the excavator (annexure “H”, founding affidavit) but on that occasion Ms Mellet did not know where the excavator was. Apparently, she hardly knew where the excavator was, which on 21 October 2010 was supposed to come back from Prieska:

“... binne die volgende dag of twee na Vrede behoort te kom.”

(*Vide* para 15: 6 – 7, answering affidavit.)

Her conduct was suspect. It created a strong suspicion that she had something to hide.

- [23] Three days later, on 4 November 2010 to be precise, the sheriff met Mr. John P. Cox, the second respondent, at the first respondent's premises situated at 25 Fleck Street, Vrede. In the return of service (annexure "I", founding affidavit) Mr. G.M. Strydom, the sheriff, reported to the registrar and Messrs Honey Attorneys as follows:

“Op hierdie 4de dag van NOVEMBER 2010 het ek gepoog om die SAMSUNG EXCAVATOR SE 210 te verwyder by die perseel van MATABESI CONSTRUCTIONS (EDMS) BPK h/a CG CIVILS te FLECKSTRAAT 25, VREDE, Provinsie Vrystaat.

Ek is meegedeel deur mnr JOHN COX, Besturende Direkteur, en nie jonger as 16 jaar nie, meegedeel dat die implement tans iewers in Zambië is, maar kon nie presiese adres aan my gee nie.”

- [24] The very next day (5 November 2010) the sheriff yet again met the same gentleman, the managing director of the first respondent. The response he received from the second respondent was precisely the same as that of the previous day

(annexure “J”, founding affidavit). The striking feature of similarity on these two further encounters between the sheriff and the second respondent is that the second respondent refrained from saying what happened to the excavator which was judicially attached in his presence. Moreover, he said no word about the excavator, which his wife and apparently he too had expected to be back at Vrede from Prieska on 22 October 2010 of 28 October 2010 at the very latest.

- [25] On 8 November 2010 the sheriff once again made another futile attempt to remove the excavator in accordance with the terms and conditions of the order (annexure “A”, founding affidavit). Eventually the sheriff reported as follows as per his return (annexure “K”, founding affidavit):

“Op hierdie 8ste dag van NOVEMBER 2010 het ek gepoog om die SAMSUNG EXCAVATOR SE 210 te verwyder by die perseel van MATABESI CONSTRUCTIONS (EDMS) BPK h/a CG CIVILS te FLECKSTRAAT 25, VREDE, Provinsie Vrystaat.

Mnr JOHN COX, Besturende Direkteur, en nie jonger as 16 jaar nie, het egter geweier om my enige verdere inligting omtrent die betrokke implement te gee.”

- [26] The respondents did not pertinently deal with this encounter in

the answering affidavit. I can see no reason and none was given why the sheriff, a person with no interest in the matter, would have given such a report unless it was a true and accurate return of his encounter with the second respondent. It has to be accepted, therefore, that the second respondent was uncooperative, obstructive and disinformative in his dealings with the sheriff concerning the excavator.

[27] I am of the view: that the applicants have made out a *prima facie* case; that this court made the order; that the sheriff served the order on the respondents; that the respondents did not comply with the order; that instead the respondents prevented the sheriff from removing the judicially attached excavator and that the respondents were actuated by wilfulness and *mala fides* in their persistent and prolonged refusal to surrender physical possession of the excavator to the sheriff. The applicants have, in my view, discharged the initial onus of showing wilfulness and lack of *bona fides* on the part of the respondents – Herbstein & Van Winsen, p. 1103.

[28] Now the respondents bear the evidential burden to rebut wilfulness and *mala fides* which have *prima facie* marred or characterised their proven non-compliance with the order –

FAKIE's-case, *supra*.

[29] The crux of the respondents' defence was that they did not spitefully disobey the court order and that their non-compliance was unfortunately occasioned by the fact that the first respondent owned 19 similar excavators all of which fitted the manufacturing model description of Samsung Excavator SE 210. The particular excavator, which the sheriff attached on 21 January 2010, was on the first respondent's business premises at Vrede. The second respondent was hospitalised two months afterwards from March to July 2010. In his four months absence the first respondent's operations were managed by his wife, Ms Mellet Cox, as well as the managers.

[30] On 4 November 2010 he informed the sheriff that the specific excavator which the sheriff had attached was in Zambia where it was busy with some excavations. He also informed the sheriff that it was not practically possible to have that particular excavator brought back to the country within a matter of days. The delays of a number of days were expected to be caused by officially stringent cross-border requirements. He raised as an excuse the allegation that during the discussions he had with the sheriff, the sheriff did not furnish him with the chassis

number of the excavator he was looking for.

[31] Subsequent to the service of the current application for the preservation of the excavator, he, the second respondent, ascertained that the specific excavator was somewhere at Memel here in the Free State Province. He undertook to have it brought back to Vrede as soon as possible. When the matter was argued before me for the confirmation or discharge of the provisional order, the sheriff had still not regained physical possession of the excavator.

[32] Some critique of the version of the respondents is called for. On 21 January 2010 the sheriff placed a particular excavator under judicial attachment. The attachment took place at the first respondent's business premises. The second respondent was present at the time the excavator was judicially attached. So was the first respondent's manager, a certain Mr. J. van der Merwe. The notice of attachment was served on the second respondent. The legal effect of judicial attachment was that the first respondent was precluded from using, removing, letting or in any other way alienating the excavator. Although the excavator remained on the premises of the first respondent, it was in law under the control of the sheriff by virtue of such

judicial attachment. Nobody was therefore allowed to have it removed without the knowledge of the sheriff.

[33] The sheriff described the equipment he attached as a Samsung Excavator SE 210. It seemed he was unaware that the first respondent had a fleet of 18 other excavators with identical description. The second respondent did not draw the attention of the sheriff to that fact. Instead, the second respondent withheld the information. He knew that each excavator had a unique chassis number. If he acted in good faith in his dealings with the sheriff, he would have brought this matter to the sheriff's attention immediately so as to avoid any further confusion in the future.

[34] The second respondent's complaint that the sheriff did not furnish him with the chassis number of the attached excavator, was therefore ridiculous. He knew that the chassis number was an important feature through which he could identify the attached excavator from the rest. Chassis number or no chassis number, the second respondent knew very well which excavator the sheriff had placed under judicial attachment. All he had to do, was to respect and obey the judicial attachment. It was not his case that he ever drew it to the special attention

of the first respondent's managers, that the particular excavator was no longer supposed to be used or removed because it was *de iure* in the constructive possession of the sheriff. Again his failure to do so demonstrates lack of *bona fides*.

[35] The version of the respondents is riddled with vagueness. They do not say which manager caused the excavator to be removed; who was the operator assigned to the excavator when it was so removed; to which place it was taken; when it was taken away from Vrede; to whom it was hired out and for how long. The deponent obscurely seemed to suggest that the excavator was removed without his knowledge while he was in hospital. However, he gave no specific details.

[36] He vaguely insinuated that he was not personally responsible for the removal of the excavator. The explanation failed to impress me as a good excuse. If that was indeed the case, the second respondent would have expressly mentioned the steps, which he took on his own accord, from 7 July 2010, after his discharge from the hospital, to have the attached excavator traced and returned to Vrede. We know he did not. His apparent omission to do anything about the matter, after his release from the hospital, suggested that the excavator in

question might as well have been removed, on his instructions or with his full knowledge, before he was even hospitalised.

- [37] On two consecutive days the second respondent told the sheriff that the excavator was in Zambia. He gave no specific details of the exact town, let alone the exact address in Zambia. When on the third occasion the sheriff pressured him to give accurate and meaningful information about the wanted excavator, the second respondent obstinately refused to divulge any constructive information. His obstructive attitude or behaviour towards the sheriff was pretty much the same as that of his wife. It will be recalled that she met the sheriff on two occasions. Initially she said the excavator was at Prieska. On the very next occasion she did not have any clue concerning its whereabouts. None of them ever made the sheriff aware that there was a fleet of excavators or gave him any information of the exact whereabouts of the other 16. They claimed that one of the fleet was in the Western Province, another in Zambia far beyond the borders of this province. The third and the nearest was somewhere at Memel. Where were the rest? Since they all have the same description the second respondent could simply have pointed anyone of them to the sheriff as the one the sheriff had attached and there would have been no dispute.

[38] The second respondent averred that, after the sheriff had served this application on him, he established via Mr. Jaco van der Merwe that the attached excavator was busy with excavations somewhere in the vicinity of Braamhoek outside Memel. It seemed to me that all along this particular manager knew the whereabouts of the attached excavator. However, the second respondent gave no explanation as to why he did not, sooner than he did, enquire from this manager about the attached excavator. Moreover, he did not explain why he did not instruct the same manager to see to it that the attached excavator was grounded or at least not removed from Vrede at all.

[39] In the circumstance I am persuaded that the vagueness of the explanation of the respondents, coupled with the obstructive conduct of the second respondent and his wife, strongly suggested that they deliberately removed the judicially attached excavator and deliberately concealed it to frustrate the rights of the applicants to execute the judgment. Their version, which was plagued by vagueness and their actions which were bedevilled by disobedience, demonstrated their wilfulness and *mala fides*. I firmly reject as false their defence that they

innocently failed to comply with the order by Van der Merwe J. There was no *bona fide* mistake, confusion or uncertainty as to the excavator placed under judicial attachment.

[40] The legal position is clear. The law imposed the evidential burden on the respondents to show that their disobedience was not tainted by wilfulness and *mala fides*. They have failed to show the innocence of their non-compliance. Since they have failed, the *prima facie* onus discharged by the applicants now becomes proof beyond reasonable doubt that the respondents were indeed in wilful and *mala fide* breach of the order in question – **FAKIE's** decision, *supra*.

[41] I have therefore come to the conclusion that the respondents have shown no good cause why the provisional order by Claasen AJ should not be confirmed as a final order. I am inclined so to confirm it.

[42] Accordingly I make the following order:

42.1 The provisional order of 12 November 2010 is confirmed.

42.2 The respondents are found guilty of contempt of the order of this court dated 19 October 2010.

42.3 The second respondent is sentenced to R4 000,00 fine or

4 (four) months imprisonment plus a further 3 (three) months imprisonment which is wholly suspended for 3 (three) years on condition: firstly, that the respondents are not again found guilty of contempt of court committed during the period of suspension and secondly, that they comply with paragraph 4 of the aforesaid order.

42.4 The respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

M.H. RAMPAL, J

On behalf of applicants: Adv. A.J.R. van Rhyn SC
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of respondents: Adv. P.J.J. Zietsman
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