

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Case No.: 3814/09

In the case between:

**JUAN PIETER SONNENBERG**

Applicant

and

**MZWANDILE SHWABABA**

First Respondent

**GRAVEN MINING BK**

Second Respondent

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**CORAM:**

LEKALE, AJ

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**JUDGMENT:**

LEKALE, AJ

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**HEARD ON:**

4 MARCH 2010

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**DELIVERED ON:**

11 March 2010

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[1] This is an application for an order:

[1.1] effectively declaring the respondents to be in contempt of an order of this court issued on the 4<sup>th</sup> June 2009 by Jordaan J under case number 2575/2009;

- [1.2] committing the First Respondent to imprisonment for such a period as the court may deem appropriate and directing the Second Respondent to pay such a fine as may be determined by the court for being in contempt of the said Court order;
- [1.3] suspending the operation of the penal order in [1.2] above on condition that the respondents shall do the following within 10 days of judgment herein:
  - [1.3.1] remove the gates installed by them in the fence around the applicant's farm, being the Remaining Portion of the Farm Diamant 631, Boshof district;
  - [1.3.2] repair or cause to be repaired the said fence together with all the equipment regulating and activating the electricity flow therein so as to restore it to the condition it was in prior to the 22<sup>nd</sup> May 2009;
  - [1.3.3] fill and limit the excavations made by them on the surface of the said farm to the condition the ground was in before the 22<sup>nd</sup> May 2009.

[2] The parties are effectively in dispute over whether or not the respondents failed to comply with the relevant order. The applicant contends that the order in question effectively required the respondents to undertake the tasks set out from paragraph [1.3.1] to and including paragraph [1.3.3] above. The respondents, on their part, effectively maintain that the order, in effect, only directed them to vacate the farm thereby leaving the applicant in peaceful and undisturbed possession or occupation of his farm.

[3] The issue before the court, therefore, revolves around the proper interpretation of the relevant order. In my view and as correctly submitted by Mr Van Niekerk for the applicant, a finding that the construction attached to the order by the respondents is the correct and proper one would bring the enquiry to an end. On the other hand, a finding for the applicant in this regard would usher in a further enquiry into whether or not the respondents are guilty of contempt of court.

**BACKGROUND:**

[4] On the 23<sup>rd</sup> May 2009 the applicant caused an interim order to issue directing the respondents to place the applicant forthwith

in undisturbed possession of the property viz. the Remaining Portion of the Farm Diamant 631, district Boshof, Free State Province.

- [5] The said order was, eventually, confirmed by the Court on the 4<sup>th</sup> June 2009 after the parties had delivered answering and replying affidavits.
- [6] In support of the order in question the applicant effectively deposed, inter alia, that the respondents had invaded his property, which he has developed into a game farm, and cut the fence, installed two gates and used heavy machinery to make some excavations. In his replying affidavit he also disputed the lawfulness of the prospecting licence which the first respondent has apparently secured in respect of the relevant property.
- [7] In their opposing papers the respondents, on their part, insisted that they had the right to enter and prospect for diamonds on the property in question by virtue of the prospecting licence issued to the first respondent by the Department of Minerals and Energy.

- [8] The said prospecting licence is currently the subject matter of a review application between the parties pending before this court

**CONTEMPT OF COURT ORDER:**

- [9] In the proceedings seeking the committal of the alleged contemnor to prison for contempt of a court order, the applicant must establish the following beyond reasonable doubt:

[9.1] the existence of the court order;

[9.2] its service on the respondent; and

[9.3] non-compliance with the order.

- [10] Once the foregoing have been established the evidentiary burden shifts to the respondent alleged contemnor to raise a reasonable doubt as to whether non-compliance was wilful and mala fide. Failure on the part of the respondent to adduce such evidence raising a reasonable doubt results in the offence having been proved beyond reasonable doubt.

(see generally **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)**).

### **COURT ORDER AND INTERPRETATION THEREOF:**

[11] In its technical legal usage the word “**judgment**” refers to the formal order drawn up by the Registrar of the court and embodied in a separate document signed by him. The Court order as embodied in that document gets served by the Sheriff on the respondents and constitutes the substantive order which can be appealed against and not the reasons for the judgment. (see generally **Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd** 1948(3) SA 353 (A) @ 355 and **Administrator, Cape & Another v Ntshwagela & others** 1990(1) SA 705 (A))

[12] The effect of a court order is ascertained from reading the order or judgment as a whole by giving words their natural and ordinary meaning as the case is when interpreting other documents. As the Court in **Firestone South Africa (Pty) Ltd Genticuro AG** 1977 (4) SA 298 (A) pointed out per Trollip JA at page 304 D-H):

“... The basic principles applicable to the construction of documents also apply to the construction of a court’s judgment or order. The Court’s intention is to be ascertained primarily from the language of the judgment or order as

**construed according to the usual well-known rules.”**

- [13] The order must be read as a whole by reference to its context and objects. If the meaning is clear and not unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it.

(see **Simon NO and other v Mitsui & Co. Ltd and others**  
**1997(2) SA 475 (WLD))**

- [14] The *ipsissima verba* of the relevant order is as follows:

**“dat die respondente [word] gelas [...] om onverwyld die applikant in ongestoorde besit te plaas van die eiendom synde Resterende Gedeelte van die plaas Diamant 631, distrik Boshof, Provinsie Vrystaat.”**

- [15] The wording of the relevant order was not chosen and formulated by the court. It came from the Notice of Motion and is, as such, directly attributable to the applicant who couched it as, inter alia, the primary relief he sought when he caused the relevant rule nisi to issue.

**DISPUTE:**

- [16] The parties are effectively at variance over the meaning of the phrase “**undisturbed possession**” as used in the order. The applicant effectively contends that, in the context of a spoliation order, the phrase means the restoration of the *status quo ante* in the sense that the applicant should be placed in the possession he had prior to the spoliation. Where the acts of spoliation resulted in some damage to the property the necessary repairs or adjustments have to be effected in order to restore the *status quo ante*.
- [17] On their part, the respondents effectively contend that the relevant phrase does not require them to do anything other than to vacate the farm. Where the order required them to, inter alia, remove the gates the court would, according to them, have specifically made mention of that fact as the position was in other cases in *pari materia*. Their view is that the court has the power and, in fact, does make such specific orders in appropriate cases in the context of **mandament van spolie**. They argue further that the relevant order is clear and unambiguous and, as such, there is no cause for extrinsic evidence to be introduced so as to supplement it.



**FINDINGS:**

[18] The parties are **ad idem** with regard to the nature, effect and purpose of an order for **mandamentem van spolie**. They are further in agreement that in appropriate cases the courts are not reluctant to direct the respondents to perform specific acts necessary for the restoration of the status quo ante.

(see **Rikhotso v Northcliff Ceramics (Pty) Ltd 1997(1) SA 526 (W)** among others).

[19] Their dispute is related to whether or not the doing of specific acts desired by the applicant, in order to restore the farm to the condition in which it was prior to spoliation, is implied in the words “**undisturbed possession**” as used in the context of a spoliation application. The applicant answers this question in the affirmative while the respondents maintain that such acts should have been ordered specifically as ancillary orders.

[20] When all is said and done I am satisfied, as correctly and effectively pointed out by the parties, that the word “**undisturbed**” as used in the relevant order qualifies possession and not the relevant property. The effect of the foregoing is that the respondents were required to place the applicant in **unhindered** or **unencumbered** and peaceful possession of the farm. It did not and does not require them to

deal with the property so as to ensure that it is not “**disturbed**” or changed from what it was when they invaded it.

[21] As correctly contended by Mr Grobler for the respondents, the wording of the order is clear and does not require and allow for any elucidation by way of, inter alia, introduction of extrinsic evidence. The order is, further, silent on the doing of any act other than restoration of peaceful and undisturbed possession of the farm to the applicant.

[22] In my view it is necessary for the specific directives to be apparent **ex facie** the relevant order before the respondents can be required to perform the acts that the applicant is desirous of. In my judgment, the interpretation attached to the order by the applicant would, with respect, have the effect of supplementing the order so as to make it cover the areas which my brother Jordaan J was not requested to and, in fact, did not cover when he first issued the rule nisi and, eventually, confirmed the same on the 4<sup>th</sup> June 2009.

[23] To accede to the applicant's request for an order declaring the respondents to be in contempt for failing to perform the acts in question would strain the words of the court and amount to putting words in the court's mouth.

[24] As an alternative to the contempt order, Mr van Niekerk argued for the making of an order declaring that the relevant Court Order required the respondents to do the acts desired by the applicant. It is, however, clear from the above findings that the wording of the order is not elastic enough to permit of and accommodate such a liberal construction.

[25] The respondents are, thus, not guilty of contempt of court order.

**ORDER:**

[26] In the result the application is dismissed with costs.

  
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**L.J LEKALE AJ**

On behalf of applicant:

Adv Van Niekerk  
Instructed by: Lovius Block

On behalf of respondents:

Adv Grobler  
Instructed by: Kramer,  
Weihmann & Joubert