



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT PRETORIA)

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

CASE NO: 55752/08

DATE: 2009-06-25

In the matter between

TOVANI TRADING 260

Applicant

CC t/a BERLO CONSTRUCTION

and

M CHIKALA

Respondent

JUDGMENT

PRINSLOO, J: This urgent application comes before me in the urgent court. Mr Oosthuizen appears for the applicant and Mr Louw for the respondent. The case has an unfortunate history which also brought the same parties to this urgent court, as it happens before myself, in December last year, some 6 months ago.

The applicant was contractually bound in terms of a

contract entered into with the respondent to build a house for the latter. At one stage towards the end of last year, to put it in very broad terms, the respondent locked the applicant out of the building premises and indicated that he would engage other builders to continue with the work. This inspired the applicant to approach this urgent court on two legs, namely on the basis of spoliation and also on the basis of infringement of his builder's lien. Having heard the matter in December, I gave an order, the first paragraph of which reads as follows:

“Dat die eerste respondent onmiddellik die applikant se besit van die bouperseel bestaande uit ‘n woonhuis en pad gelee te plot 89 Lewisstraat Laezonia Agricultural Holdings Gauteng herstel.”

The second leg of the order deals with authority to the sheriff to assist the applicant in the event of non-compliance. It appears that there was compliance in the sense that the respondent left the applicant in peace to exercise undisturbed possession of the partly completed building [which I will refer to as “the shell”] for a number of months.

The applicant set about placing his foreman in the shell every day to maintain possession and the respondent refrained from interfering with that undisturbed possession. Towards May of this year, about a month ago if I understand the allegations correctly, the respondent started placing independent or alternative building contractors on the premises and engaged them to start doing what the respondent calls remedial work to the shell, including some structural changes involving partial breaking down of the walls, installation of window frames and also electrical wiring.

The applicant, through his attorney, wrote two letters of demand warning the respondent to refrain from encroaching on the undisturbed possession that the applicant enjoyed in terms of the court order. These letters went unanswered. Both of them were written to the attorneys of record of the respondent. The respondent denies that these letters were brought to his attention. I find that difficult to accept. The applicant then approached this court on an urgent basis. The question urgency was not attacked before me today.

The case of the respondent, in a nutshell, is that he denies having infringed or acted in contempt of the order. He states that the quotation in terms of which the shell was erected does not contain items such as, for example, electrical wiring which includes the work now done on the shell by the respondent. The respondent's attitude is that he is entitled to continue doing work not covered by the quotation and that he is therefore not in contempt of the order. In the alternative the respondent says that he was in the *bona fide* belief that what he did was not in contempt of the court order, so that no *mala fides* have been shown to exist and for that reason, as an alternative, he ought not to be found guilty of contempt of court.

On the first leg Mr Oosthuizen argued, and in the end persuaded me, that on the respondent's argument it would mean that the respondent can carry on and occupy the shell and complete the building without ever paying for the building work, which I understood last year to run into something in excess of R1 million, and then simply proceed to occupy the completed building with impunity and never pay for it. I understood Mr Louw to agree that

that was also his interpretation. I cannot accept that that would result in the effective compliance with a court order under these particular and perhaps somewhat unusual circumstances. It seems to me that there was non-compliance with the order for the reasons I have mentioned.

Mr Oosthuizen argued that if the respondent wants to avoid the adverse effects of my order of December he has various options. He can either pay, which he has up to now steadfastly refused to do, or he could pay under protest or he could approach this court to substitute the spoliation order and allow him to give security for payment. No authority was quoted for this proposition. Mr Oosthuizen did not have it available but he says he found this authority and I accept it on that basis.

That brings me to the second leg of whether *mala fides* have been proved. The leading case is that of *Facie NO v CCII Systems [Pty] Ltd* 2006 (4) SA 326 (SCA). The portion of the head note which I deem to be relevant and which can also be found at paragraphs 42 and 63 to 65 at 344H to 345B and at 350C to F reads as follows:

“In particular, the applicant had to prove the requisites of contempt (the order, service or notice, non-compliance and wilfulness and *mala fides*) beyond a reasonable doubt. But, once the applicant had proved the order, service, or notice and non-compliance, the respondent bore an evidentiary burden in relation to wilfulness and *mala fides*: Should he fail to advance evidence that established a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt.”

I find that the applicant, for the reasons I illustrated, proved the order, service or notice and non-compliance. I find, however, that the respondent discharged the evidentiary burden by establishing at least a reasonable doubt as to whether his non-compliance was wilful and *mala fide*. The result is that I find that the applicant failed to prove contempt of court. It seems to me that to ensure that some sanity prevails in this matter, and that some clarity is provided to the parties, it was necessary to deal with these issues as I did and to

prevent a recurrence, or in an attempt to do so, I would make the following order.

1. It is found that the defendant failed to comply with the order of 12 December 2008 but established a reasonable doubt as to whether there was *mala fides* on his part.
2. This application for contempt of court is suspended on condition that the respondent refrains from the actions complained of and which he admits having perpetrated.
3. If the defendant repeats his actions or other actions which may lead to be seen as non-compliance with the spoliation order the applicant is given leave to re-approach this court on the same or supplemented papers.
4. Each party is ordered to pay its own costs.

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