

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 4206/2006

In the matter of:

MANGAUNG LOCAL MUNICIPALITY

Applicant

and

ISAAC COSMOS JAMES

Respondent

JUDGMENT: EBRAHIM, J

HEARD ON: 15 FEBRUARY 2007

DELIVERED ON: 29 MARCH 2007

- [1] On the 25th of May 2006 the applicant in these proceedings brought an urgent application in this court against the respondent, a builder, to interdict respondent from proceeding with building operations on erf 27921, Namibia, Mangaung. The order was granted and, in addition the respondent was ordered to demolish the structures already erected on the said erf and remove all building materials, rubble and any other material brought onto the said erf by or

on behalf of the respondent within 14 days of the date of that order. The respondent was also prohibited from commencing any further building operations on his property and ordered to pay the costs of that application.

[2] On the 26th of October 2006 the applicant brought an application for an order that the respondent be convicted of contempt of court for not complying with the order of the court dated the 25th of May 2006. In addition, the applicant requested the court to order the respondent to pay the costs of the application on a punitive scale.

[3] When this matter was placed before me on the 15th of February 2007 I was informed by Mr. Heymans that the matter was not proceeding as a memorandum of agreement had been entered into by and between the applicant and the respondent, the exact terms of which are not necessary for me to enumerate upon in this judgment. It suffices to say that the principle issue relating to the respondent's building

operations in contravention of building bylaws was resolved in terms of the agreement between the parties. I was informed that the only issue remaining between the parties was that relating to the costs of the application. Quite correctly Mr. Heymans pointed out that the question of whether or not the respondent was going to be convicted of contempt of court was a question of law to be decided upon by the court.

- [4] On a perusal of the applicant's founding papers as well as the photographs attached thereto there can be no question of the fact that the building by laws were in the process of being contravened. The respondents put up an answering affidavit in which he sought to defend his conduct in persisting with building operations on the basis that he had not received a copy of the court order dated the 25th of May 2006 interdicting him from doing so. In reply the applicant annexed the return of service dated the 8th of June 2006 from which it was quite clear that the sheriff for the district of

Bloemfontein-East had personally served a copy of the court order dated the 25th of May 2006 on the respondent. That being the case it was not necessary for me to go into further disputes of fact and credibility issues which were apparent from the papers.

- [4] An applicant for an order of committal must show:
- (a) That an order was granted against the respondent;
 - (b) That the respondent was either served with an order or informed of a grant of the order against him and can have no reasonable ground for disbelieving that information; and
 - (c) That the respondent has either disobeyed the order or neglected to comply with it.

All these requisites have been satisfied in the case of the present respondent on the facts of the case. In the circumstances there can be no question that the respondent is in fact guilty of civil contempt of court. From the fact that the respondent has blatantly lied under oath that he had not

received service of the order of court dated 25th May 2006 the inference must be drawn that the respondent was in wilful and intentional disobedience of the order. His action in ignoring the order of court was thus *mala fide* and no questions of negligence arise.

- [5] When it comes to the question of the onus to be proved it was held that once a failure to comply with the order has been established wilfulness would be presumed. The onus would then rest on the party who had failed to comply with the order to rebut the inference of wilfulness. Because the disobedience of a court order could constitute the subject of both civil and criminal proceedings, two different standards of proof would apply depending on the remedy which the applicant happened to have chosen; in other words whether the applicant chose to move the court by way of the laying of a criminal charge or by way of notice of motion. It has been held that the summary procedure by way of notice of motion placed an onus upon the alleged offender and required proof of guilt only upon a balance of probabilities. The

constitutionality of the summary procedure by way of notice of motion was discussed in the case of **UNCEDO TAXI SERVICE ASSOCIATION v MANIENJA AND OTHERS** 1998 (1) Butterworths Constitutional Law Reports at 683 (E). The court held that the summary procedure was a reasonable and justifiable measure.

- [6] In ignoring the order of court dated the 25th May 2006 the respondent was openly contemptuous of the court granting the order. His actions were grossly disrespectful of the court and amounted to a serious undermining of the dignity and the integrity of the court as well as a show of contempt for the rule of law. Such reprehensible conduct on the part of the litigant cannot be ignored. The respondent was duty bound to act within the law and did not do so. That is a sufficient reason to justify the imposition of the punitive cost order sought by the applicants. Added to this is the fact that the respondent blatantly lied about the fact that he had not received a copy of the court order and so did not know that he had been barred from continuing building operations on

the said erf. In the circumstances the order I make is the following:

1. The respondent is committed to undergo a sentence of three (3) months imprisonment for failure to comply with the order of court dated the 25th of May 2006 issued in case number 5124/2005. This sentence however is wholly suspended for a period of three (3) years on condition that the respondent immediately ceases all building operations on erf 27921 Namibia and further demolishes the structures already erected on the said erf and removes all building material and rubble brought onto the said erf by or on behalf of the respondent within fourteen (14) days, of the date of this order.
2. Respondent is prohibited from starting any building operations on the said erf.
3. The respondent is ordered to pay the costs of the application under case number 4206/06 on a scale as

between attorney and client.

S. EBRAHIM, J

On behalf of applicant:

Adv. P. J. Heymans
Instructed by
E G Cooper Attorneys
BLOEMFONTEIN

On behalf respondent:

Adv.
Instructed by:

BLOEMFONTEIN

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