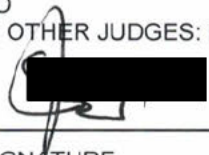


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2023-053773

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>30/1/2025</u> 	
DATE	SIGNATURE

In the matter between:

SERCU, CARL (SNR)

First Applicant

SERCU, CARL (JNR)

Second Applicant

SERCU, CHARLES

Third Applicant

and

BOTA, SUHAIL

First Respondent

CREATIVE LINK ENGINEERING (PTY) LTD

Second Respondent

JUDGMENT

Mahomed J

- [1] The Appellants, the Respondents in the main application, apply for leave to appeal the judgement¹ I delivered on 7 November 2024. I shall refer to the parties as they appeared before me in the main application. The applicants approached the court for an order for contempt of court on an urgent basis, I found that the matter was urgent and granted the order. Although urgency was disputed in the main application, counsel for the respondents Advocate Hollander advised that urgency is no longer an issue before this court.
- [2] I found on the objective facts, as per the allegations set out in the answering affidavit,² coupled with the Respondents refusal to purge their contempt, when afforded an opportunity to do so on the day of the hearing before me, that the requirements to prove contempt, were met.
- [3] On 4 July 2023, an order was granted which provided that the respondents were:
- “not to affix in respect of both gates any locking mechanism or in any manner restrict the free and undisturbed access to and use of the gates.”*
- This order was confirmed by agreement between the parties and there was no dispute as to its meaning and import.
- [4] in the application for leave the Respondents argued that the Applicants relocated the security fence off a wall and placed them over the moving main gate, which they allege compromised security. No further details were before me on the nature of the alleged security breach. I considered that the security would no doubt be a concern for the applicants themselves, they too operated their business from the premises, they would not deliberately endanger their property. Furthermore, the Respondent complained that the Applicants were driving heavy trucks on the driveway and had damaged the area, where the Respondent's conduct their business, a photograph was before me but unhelpful as more evidence would be required to determine fault and the nature and extent of damage, if any, done by the Respondents, outside of the usual wear and tear.

¹ CL 19-7

² CL 19-9 and 10 paras 4 and 5

- [5] Mr. Hollander for the Respondents submitted that the moving of the security fence and the driving of the trucks were “changed circumstances”, and therefore “*the Respondents could no longer allow the enforcement of the order granted*”, he persisted with his argument that the contempt was bona fide and justified. It was submitted that at the time the order was granted by agreement/consent, the Applicants were not driving heavy trucks on the driveway. He submitted I was wrong when I found that the Applicant’s had proven the requirements for contempt beyond reasonable doubt as I failed to consider the “changed circumstances”. Counsel argued that there was sufficient evidence from the photographs and video footage to justify the Respondents’ actions. (I disregarded the video footage as counsel for the Applicants proffered that his attorneys did not know of the video until the morning of the hearing, and they had no opportunity to view it). In my view not much turns on this evidence. Mr. Hollander argued that his clients the Respondents were forced to put in place other measures, which necessitated a violation of the court order, they were not mala fides.
- [6] Mr. Hollander further argued that I failed to fully analyse facts and that on the evidence, in terms of the rule in Plascon Evans, the Respondent’s version must prevail, he argued that another court would arrive at a different finding, his clients were justified in violating the order, they had good prospects of success and they satisfied the test for leave to appeal as required by s17(1)(a)(i) of the Superior Courts Act 10 of 2013.
- [7] I noted that the contempt was ongoing and agreed with Mr. Edwards for the Applicants that the allegations of compromised security and damage to the driveway, were vague. Moreover, I agreed that neither of the complaints could have necessitated or “*forced*” the locking of the interleading gate, which effectively impeded all access to the property and violated all the provisions of the other.
- [8] Mr. Hollander argued that the Applicants were using the interleading gate comfortably, they ought to have continued he contended that his clients put in place remedial measures and therefore had to lock the interleading gate and reprogramme the remote for the main gate. I have difficulty with this argument,

which suggests that the Applicants were comfortable with compromising their own security, when they relocated the camera, still over the entrance but off the wall onto the gate. Furthermore, this argument cannot assist the Respondents, as in my view they had other remedies, they could have approached a Court for an order even on an urgent basis if their security was seriously compromised.

[9] The Respondents even in their notice to appeal appear to suggest that it is “*in their discretion if an order of court can be implemented or not*”. This cannot be countenanced, it would lead to anarchy and sets a very dangerous precedent, this mindset has no place in our constitutional democracy and is an attack on the rule of law and undermines orders of court.

[10] I am not persuaded that the Respondents have reasonable prospects of succeeding before another Court against the objective evidence I referred to earlier. There must be a sound rational basis for the conclusion that there are prospects of success. There are no compelling reasons why an appeal should be heard. In **MEC for Health, Eastern Cape v Mkhitha and Another**³, the court stated:

“[17] *An applicant for leave to appeal must convince a court on proper ground that there is reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound rational basis to conclude that there is reasonable prospects of success on appeal.*” In my view, the Respondent's had taken the law into their own hands⁴, they failed to take up an opportunity to purge their contempt. The application for leave cannot succeed and is refused.

[11] In regard to costs, I share the same view as set out in in re **Alluvial Creek Limited**, where the court stated:

“*now sometimes such an order is given because something in the conduct of a party which the court considers should be punished, malice, misleading the court and things like that, but the order may also be granted without any reflection upon*

³ [2016] ZASCA 176 (25 November 2016)

⁴ CL AA para 81

the party where the proceedings are vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought to bear.”

[12] Costs on an attorney client scale is appropriate, the continued litigation of this matter does not serve the interests of either party, they are neighbours, with similar business and financial objectives.

Order

[13] In the result, the following order is made:

1. The application for leave to appeal is dismissed with costs on an attorney client scale.


S A B MAHOMED

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing:

24 January 2025

Date of Judgment:

30 January 2025

For the Applicant:

BR Edwards instructed by
M'crystal & Co Attorneys

For the Respondent:

L Hollander instructed by Birgit
Cronau