

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **68088/2017**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHERS JUDGES: NO

(3) REVISED

DATE: 31 May 2024

SIGNATURE

In the matter between:

FESTYN CC T/A PICASSO'S PUB AND PIZZERIA

Applicant

And

JACOBUS JOHANNES VAN DER MERWE

Respondent

This matter was heard in open court and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The applicant approached court seeking an order to declare the respondent in contempt of the interim court order handed down on 13 September 2018 by Mosopa AJ, as he then was.

[2] Ancillary to the contempt order, the applicant sought an order for the imposition, upon the respondent, of a sentence of 30-days imprisonment, alternatively that the court impose such sentence as it considers to be appropriate, provided that the respondent complies with the interim court order, unless the interim court order is not made final. In the event that the respondent continues not to comply with the interim court order, the applicant seeks an order directing it to approach the Police Station nearest to the respondent with the contempt order whereby the Police Station will immediately employ all lawful measures to lawfully ensure compliance with that court order.

[3] As will appear later in the judgment, the respondent had initially opposed the application on the ground that he was not in deliberate contravention of the interim court order and that he had not acted *mala fide* in any way whatsoever. Nevertheless, because of the ruling made in respect of the point *in limine* taken by the applicant, the respondent's answering affidavit was scrapped from the record. The application is under those circumstances, decided on the applicants' papers only.

FACTUAL BACKGROUND

[4] By way of background, the applicant has since 1994 conducted business as a restaurant and a pub under the name and style Picasso's Pub and Pizzeria ("Picasso"). The current owners took ownership of the business during 2008. The Respondent resides in a property situated right across the road from the applicant's business premises, and the two properties, that is, the applicant's business premises, and the respondent's residential premises, are divided by a road.

[5] From the papers filed off record, it is apparent that the applicant and the respondent have not afforded each other good neighbourly relations, with the respondent having on numerous occasions, reported the applicant to the authorities for allegations of various contraventions. The applicant ended up launching an application to interdict the respondent on allegations that the respondent was interfering with the applicant's business activities and intimidating, threatening, assaulting and harassing the applicant's patrons, clients, employees and/or soliciting third parties to do so. On 13 September 2018 Mosopa AJ delivered a judgment and

made an interim court order to the effect that pending the finalization of the matter, the respondent was prohibited and restricted from, *inter alia*:

- 5.1 harassing, intimidating and/or threatening the applicant, the applicant's staff and/or the applicant's patrons in any way whatsoever;
- 5.2 verbally intimidating or harassing the applicant, its employees and/or the applicant's patrons by *inter alia* threatening to beat them;
- 5.3 harassing the applicant, its employees and/or its patrons by laying false complaints with the South African Metro Police and/or the Tshwane Health Services and/or the South African Police Services and/or any other statutory body at the business premises of the applicant being Picasso's situated at P[...] Street, Villiera, Pretoria, Gauteng; or
- 5.4 spreading false rumours, making false allegations and/or making false allegations against the applicant, its employees and/or patrons.

[6] The respondent is said to have disregarded some of the aforementioned paragraphs of the interim court order, which now renders him to be in contempt.

PRELIMINARY ISSUE

[7] An *in limine* point arose during argument in court. The point was taken by the applicant in oral argument, contending that the respondent's answering affidavit was filed out of time and no condonation was applied for, as such, the respondent was not properly before court. In response to this submission, the respondent's counsel argued that there was consent between the parties for the answering affidavit to be filed out of time. This counsel argued was so because the applicant did not send a letter to the respondent informing the respondent that he was out of time in filing the answering affidavit. In addition, counsel argued that the applicant ought to have filed a replying affidavit and placed the point *in limine* at issue, which the respondent would have dealt with.

[8] The contention by the respondent, was rejected by the applicant on the basis that there was no consent between the parties. The applicant's counsel argued that it was not for the applicant to make the respondent aware that he was not in compliance with the rules, and that the responsibility lies with the respondent to follow the rules of court and to satisfy the court that he was properly before court. Counsel submitted further that where filing of an answering affidavit is out of time, and condonation, which is an indulgence, has not been applied for, the effect is that the respondent was not properly before court.

[9] The requisites for the condonation for non-compliance with the rules are regulated in terms of rule 27. The salient provisions of the rule for purposes of this judgment, provide that –

- “(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time period prescribed by these rules or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet. . .
- (3) The court may, on good cause shown, condone any non-compliance with these rules.”

[10] The sub-rules clearly envisage that an application for an order either extending or abridging any time period prescribed by these rules or fixed by an order of court or condoning any non-compliance with the rules, is a necessity. Rule 27(3) on its own, unlike rule 27(1), does not give allowance for an agreement between the parties. The sub-rule simply authorises the court to condone any non-compliance with the rules. An application for condonation for non-compliance with the rules is a requirement and the court can only exercise the wide discretion it has been given by the sub-rule, on good cause shown by the applicant. A practice has, however, developed that parties would reach an agreement between themselves to have pleadings filed out of time, even where condonation for non-compliance with the

rules is required. Where such an agreement has been reached, a court would normally grant the condonation.

[11] The common cause facts, in this matter, are that the application was served on the respondent on 8 February 2022 and the notice of intention to oppose was supposed to have been filed within ten (10) days thereafter. The notice of intention to oppose was filed more than three months later, on 18 May 2022. The answering affidavit was delivered much later on 10 June 2022. It is, also, not in dispute that despite having filed the answering affidavit out of time, the respondent did not apply for condonation for such late filing.

[12] The respondent wanted to rely on the fact that there was an agreement (consent) between the parties to file the answering affidavit out of time because the applicant did not indicate that it had a problem with the answering affidavit being filed late. This argument by the respondent has no merit and the argument by the applicant that the responsibility for compliance lies with the respondent, is convincing.

[13] The general rule is that unless there is an agreement between the parties, it is only a court that can make an order permitting the filing of pleadings outside the time period prescribed in the rules. This is done by the court making an order extending or abridging any time period prescribed by the rules or by condoning non-compliance with the rules. No litigant may take it upon himself or herself simply to file a pleading out of time without first agreeing with the other party to do so, or without having obtained leave of the court.

[14] As argued by the applicant's counsel, condonation for non-compliance with the rules is an indulgence, it is not there for the taking. In order that there should have been an agreement and/or consent between the parties, as the respondent sought to argue, the respondent should have asked the applicant for such indulgence, without the request, there can never have been an agreement. It was not for the respondent to assume that because the applicant has not said anything about the non-compliance, either by means of a letter or by filing a replying affidavit raising the issue therein, that the applicant had acquiesced to the filing of the answering

affidavit out of time. Without such an agreement, the next step for the respondent was to apply to court for condonation.

[15] In this matter, there is no agreement (or consent as the respondent put it) between the parties, nor was leave of the court sought or was being sought to have the answering affidavit filed out of time. In the circumstances, the respondent is not properly before court and the answering affidavit should be regarded as *pro non scripto* and be scrapped from the record.

ISSUE ON MERITS

[16] The applicant wants the respondent to be found in contempt of the interim court order on the ground that the respondent has blatantly disregarded the order in a vexatious, *mala fide* and deliberate manner by continuing to interfere with the applicants' business activities, and intimidate, threaten, assault and harass the applicant's patrons, clients, employees and/or soliciting third parties to commit these acts which are clearly prohibited by the interim court order.

[17] The main issue for determination is whether the respondent is in contempt of the interim court order. Underlying that issue is whether the respondent has disregarded the order in a vexatious, *mala fide* and deliberate manner by continuing to interfere with the applicants' business activities, and intimidate, threaten, assault and harass the applicant's patrons, clients, employees and/or soliciting third parties to commit these acts which are clearly prohibited by the interim court order.

APPLICABLE LAW

[18] It is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to

establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.¹

[19] The law is settled, the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) must be proved beyond reasonable doubt.²

DISCUSSION

[20] In this matter, pursuant to the ruling made in relation to the *in limine* point, there is no version of the respondent before court. This means that the matter is to be determined on the basis of the version provided by the applicant. The facts as set out in the founding affidavit are not disputed and will have to be taken as correct. This, however, does not mean that a determination should not be made of whether the applicant has proved its case for contempt beyond reasonable doubt. Even though there is no other version before court, the applicant must still, in its papers, prove its case beyond reasonable doubt.

Proof of the order and service of the order on the respondent

[21] There is no doubt that on 13 September 2018, Mosopa AJ issued an interim court order against the respondent. The respondent was legally represented at the hearing of the matter which was on an opposed basis. There is, thus, no doubt that the respondent is unequivocally aware of the interim court order and had knowledge of exactly what it required of him. The interim court order is not ambiguous, vague or incomprehensible. Undoubtedly, the applicant has been able to prove the first two requirements beyond reasonable doubt.

Proof of non-compliance with the interim court order

[22] The interim court order prohibits and restricts the respondent from doing certain things, namely,

¹ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others [2021] ZACC 18 para 37.

² Fakie NO v CCII Systems Ltd 2006(4) SA 326 (SCA) para 42.

- “22.1 The Respondent is prohibited and restricted from harassing, intimidating and/or threatening the Applicant, the Applicant's staff and/or the Applicant's patrons in any way whatsoever, pending the final determination of the matter.
- 22.2 The Respondent is prohibited and restricted from verbally intimidating or harassing the Applicant, its employees and/or the Applicant's patrons by *inter alia* threatening to beat them pending the final determination of the matter;
- 22.3 The Respondent is prohibited and restricted from harassing the Applicant, its employees and/or its patron's by laying false complaints with the South African Metro Police and/or the Tshwane Health Services and/or the South African Police Services and/or any other statutory body at the business premises of the Applicant being PICASSO's situated at P[...] Street, Villiera, Pretoria, Gauteng, pending the final determination of the matter;
- 22.4 The Respondent is prohibited and restricted from spreading false rumours, making false allegations and/or making false allegations against the Applicant, its employees and/or patron's, pending the finalisation of the matter.”

[23] The burden of proof is upon the applicant to prove, beyond reasonable doubt, that the respondent, by his conduct, contravened any of the abovementioned paragraphs of the interim court order. If it is to be found that the respondent contravened any one of the above mentioned paragraphs of the interim court order, he shall be found to be in contempt of the interim court order.

[24] For the non-compliance, the applicant relies on three incidents. According to the applicant, the respondent contravened the interim court order when he conducted himself in the following way:

24.1 By approaching the Gauteng Liquor Board Tshwane region in an attempt to get the applicant's liquor licence revoked which contravention was brought to the attention of the respondent through his attorney;

24.2 By harassing, intimidating and threatening behaviour including:

24.2.1 taking photographs of the motor vehicle belonging to the owner of the applicant without consent, and;

24.2.2 taking pictures of the motor vehicle owned by one of the applicant's patrons and the licence disk, without consent.

[25] In oral argument in court, the applicant's counsel contended that the respondent by these actions contravened paragraphs 22.1 and 22.3 of the interim court order.

[26] It goes without saying that the respondent did not assault the owner of the applicant, the applicant's patrons, clients and employees and/or solicited third parties to commit those acts, as alleged in the applicant's papers. The respondent has, also, not solicited third parties to harass, intimidate and threaten the applicant, the applicant's patrons, clients and employees, as it is alleged in the applicant's papers. What remains to be determined is whether the respondent has by the actions complained of, interfered with the applicant's business activities in that he harassed, intimidated and threatened the applicant's owner and one of the applicant's patrons.

Contravention of Paragraph 22.3 of the Interim Court Order

[27] The first incident that the applicant is complaining about, happened in October 2018. The applicant argued that by his actions on that day, the respondent contravened paragraph 22.3 of the interim court order. The incident is stated as follows in the founding affidavit:

“Not long after the interim court order was granted on 13 September 2018, the Respondent on or around October 2018 visited Gauteng Liquor Board

Tshwane region in an attempt to get the Applicant's liquor licence revoked. The attorneys of record for the Respondent were made aware of this breach as per correspondence sent by the Applicant's attorneys of record on 01 APRIL 2019. A copy of such correspondence is attached hereto as ANNEXURE "FA6".

[28] The conduct of the respondent which the applicant is complaining about, is that the respondent attempted to get the applicant's liquor licence revoked. Is the attempt to revoke the applicant's liquor licence, conduct which is prohibited and restricted in terms of paragraph 22.3 of the interim court order? Paragraph 22.3 of the interim court order, prohibits and restricts the respondent from harassing the applicant, its employees and/or its patrons by laying false complaints. The conduct that is prohibited and restricted by the said paragraph is 'laying false complaints'. The question that should be asked is whether the respondent attempted to revoke the applicant's liquor licence, and if so, whether an attempt to revoke the applicant's liquor licence is tantamount to laying a false complaint? On both those questions, the answer is a resounding no.

[29] The applicant wants to prove the conduct of the respondent which the applicant is complaining about by means of an affidavit of one TJ Mabusela ("Mabusela"). Mabusela alleges in the affidavit that he was informed by a certain Portia, an official at the Gauteng Liquor Board Tshwane Region ("the Liquor Board"), that there was a gentleman who came to the offices of the Liquor Board with a number of documents. Included in the documents was a copy of Picasso Liquor Licence. It appears from the affidavit that the reason for the gentleman's visit to the offices was to question the approval of that liquor licence. The gentleman claimed to be living directly opposite Picasso's venue and was not happy with the existence of that pub. He, also, wanted one of the officials of the Liquor Board to assist and testify against Picasso's venue in an ongoing court case he has against the venue. The applicant takes this gentleman to be the respondent based on the attendance register of the Liquor Board dated 16 October 2018 which shows that a person with a similar name to that of the respondent attended at the offices of the Liquor Board and signed the attendance register on that day.

[30] Besides the afore stated uncorroborated and flimsy evidence, there is no concrete evidence that establishes that the gentleman who visited the Liquor Board offices on the 16 October 2018 is indeed the respondent. The signature on the attendance register is not conclusive proof that it is that of the respondent. The signature has not been verified and/or authenticated to be that of the respondent. Portia does not say that the gentleman is the respondent as the gentleman did not provide her with his name. It is not clear from the affidavit on what basis Portia informed Mabusela about the alleged incident since Mabusela appears not to be an employee at the Liquor Board.

[31] Over and above that, the details of the Picasso bar referred to in the affidavit are not stated in the affidavit. The Picasso which is that of the applicant, is situated at 1[...] P[...] Street, Villiera, Pretoria, Gauteng. There are a number of Picasso pubs operating in the country and in Pretoria, in particular. The applicant's assumption that the Picasso referred to in the affidavit by Mabusela is that owned by the applicant, is just mere speculation, as, that Picasso can be any other Picasso operating anywhere in the country.

[32] Even if it were to be accepted that by attempting to revoke the liquor licence, the gentleman at the Liquor Board³ was laying a false complaint against the applicant, what is clear is that the said gentleman only wanted to 'question the approval of the liquor licence' and wanted one of the officials at the Liquor Board to assist and testify against Picasso's venue in the ongoing court case he has against the venue. This does not in any way amount to laying a false complaint.

[33] Under those circumstances, it has to be found that the applicant has not been able to establish without reasonable doubt that the respondent contravened paragraph 22.3 of the interim court order.

Contravention of Paragraph 22.1 of the Interim Court Order

[34] The second incident is alleged to have occurred on the 15 November 2018 when the respondent took photographs of the motor vehicle of the owner of the

³ The Liquor Board can be taken to mean "any other statutory body" for purposes of paragraph 22.3 of the Interim Court Order.

applicant without consent. When these photographs were taken, the motor vehicle was parked across the P[...] Café situated at 1[...] P[...] Road, Villiera, Pretoria, which is the stand that is directly West of the respondent's property. It is alleged that the photographs were taken in the presence of the owner of the motor vehicle who was at the time walking away from the motor vehicle. It was submitted on behalf of the applicant that this was clearly an act of harassment and intimidation as the respondent was prevented to do so by an order of court.

[35] The third incident is said to have occurred during the week of 15 November 2021 to 20 November 2021. The photographs said to be taken this time, were of a motor vehicle belonging to one of the applicant's patrons, Mr Gerhardus Francois De Villiers ("Mr De Villiers"). The motor vehicle was parked directly opposite the P[...] Street Laundromat which is across the street situated at 1[...] P[...] Street Villiera, Pretoria. It is alleged that Mr De Villiers had visited the applicant's place of business and later went to collect his clothing from the Laundromat. It is contended that Mr De Villiers was highly aggravated by this behaviour of the respondent.

[36] The applicant contends that this behaviour of the respondent, of taking photographs of the motor vehicles of the owner of the applicant and patron, is clearly an act of harassment and intimidation in direct contravention of paragraph 22.1 of the interim court order. It was submitted on behalf of the applicant that by so doing, the respondent was taking the law into his own hands in complete disregard of the interim court order that was in place at that moment.

[37] There is no direct evidence that by taking the photographs of the two motor vehicles the respondent was interfering with the business activities of the applicant. Both motor vehicles were, at the time the photographs are alleged to have been taken, not parked at the business premises of the applicant. The owner's motor vehicle was parked at 1[...] P[...] Road, Villiera, Pretoria whilst Mr De Villiers' motor vehicle was parked at 1[...] P[...] Road Villiera, Pretoria and the applicant's business premises is situated at 1[...] P[...] Road, Villiera, Pretoria.

[38] The applicant's counsel in oral argument submitted that the actions the applicant complained of initially, included the taking of photographs which formed

part of the harassment and intimidation. From the evidence on record it appears that the cameras previously complained about were the CCTV cameras which are installed at the respondent's house for security purposes. Apparently these cameras were and/or are facing the applicant's premises and the applicant wanted an order directing the respondent to redirect the CCTV cameras to face away from the applicant's business premises.

[39] The difference is that in the present application, the complaint is not about the photographs taken by the CCTV cameras, but about the photographs taken by what can be referred to as a handheld camera. The handheld camera was used to take photographs of the motor vehicles in question. In any event, Mosopa AJ did not find it appropriate to give an interdict relating to the CCTV cameras because he was of the view that an order directing that the respondent redirect his cameras [the CCTV cameras] away from the applicant's business premises will be prejudicial in the sense that to redirect the cameras will need the technicians to come and reinstall the cameras, which will result in the respondent paying for services that he already had. No interim court order was granted in respect of this prayer, thus, there can be no contravention of the interim court order. Put differently, there is no non-compliance with the interim court order in this regard.

CONCLUSION

[40] The applicant has not been able to establish the respondent's non-compliance with the interim court order. On this point alone, the relief sought by the applicant cannot be granted and the application falls to be dismissed.

COSTS

[41] The general principles for awarding costs are succinctly enunciated in *Ferreira*⁴ as follows:

“The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the

⁴ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) para 3 (footnotes omitted).

presiding judicial officer, and the second that the successful party should, as a general rule, has his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation . . .”

[42] This is a typical case where the applicant ought to be deprived of costs. This is so because although the applicant succeeded on the *in limine* point that resulted in the respondent’s answering affidavit being declared *post non scripto*, it was, however, not substantially successful, in that it was unsuccessful in relation to the merits of the application. The success is only technical. No order of costs should, therefore, be granted in the applicant’s favour.

ORDER

[43] The following order is issued –

1. The respondent’s answering affidavit is declared *post non scripto*.
2. The application is dismissed.
3. There is no order as to costs.

KUBUSHI J
Judge of the High Court
Gauteng Division

Appearances:

For the applicant:

Adv T Ellerbeck

Cell: 079 523 9142

Email: tanyae@lawcircle.co.za

Instructed by:

Jansen van Rensburg and partners inc.

Tel: 012 643 0004

Email: melanie@jorandpartners.co.za

For the respondent:

Adv HW Botes

Cell: 072 769 9221

Email: wietsbotes4@gmail.com

Instructed by:

Rorich, Wolmarans & Luderitz Inc.

Tel: 012 362 8990

Email: jswart@rwl.co.za

Date of argument:

19 March 2024

Date of judgment:

31 May 2024