IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 19524 / 2019

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO
19/12/2022 _____

DATE SIGNATURE

In the matter between:

GRACIANO MESQUITA COSTA **Applicant**

and

RUSSEL KORTE **First Respondent**

MITREWOOD PRODUCTS CC **Second Respondent**

In re:

RUSSEL KORTE **First Applicant**

MITRE VENEERING CC

(Registration No: 1997/007224/23) **Second Applicant**

And

MITREWOOD PRODUCTS CC **First Respondent**

(Registration No: 2006/131534/23)

GRACIANO MESQUITA COSTA **Second Respondent**

NEDBANK LTD **Third Respondent**

(Registration No: 1951/000009/06)

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 5 December 2022.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This regrettably delayed judgment deals in the main with two applications, the one being an application to declare the first respondent, Mr Korte, in contempt of the court order made by Pearse AJ on 09 October 2019 under case number 19524/2019

[2] The other application, by the first respondent, Mr Korte (or Veneering CC), is a counter application in the form of a *rei vindicatio* and an interdict against the applicant relating to access to the premises of the second respondent and its bank account. This application is similar to the one filed following the first urgent application. The other aspect of this application is the claim by Mitre Veneering CC (Veneering) for the return of the melamine press machine.

[3] Mr Korte has also applied to join Veneering and Nedbank in the proceedings. The court ruled at the beginning of the hearing that the issue of joinder would be determined after the hearing. There is also a pending liquidation application against the second respondent, which was brought to the attention of this court by the applicant's Counsel.

[4] The hearing commenced with the points *in limine* raised by the applicant concerning the counterclaim. The points in *limine* are dealt with in detail below.

The parties.

[5] The applicant, Mr Costa and the first respondent, Mr Korte, are co-members of the second respondent, holding membership interest on an equal basis.

[6] The second respondent, Mitre Wood Products CC, is a close corporation registered in terms of the Close Corporation Act. Its business is the supply of wooden products. As alluded to earlier, the membership interest in it is held on an equal basis by both the applicant, Mr Costa and the first respondent, Mr Korte.

[7] Mr Korte also conducts business as a sole member of the applicant, Mitre Veneering CC (Veneering), in the counter and the joinder application. Veneering is a close corporation registered as a Close Corporation in terms of

the Close Corporation Act and conducts the business of supplying wooden products.

The counter application

[8] As alluded to earlier, Mr Korte has instituted a counter-application against the applicant and the second respondent. The applicant has opposed the application and raised several points *in limine.*

[9] The affidavit in support of the counter-application is incorporated into Mr Kotze's answering affidavit to the applicant's supplementary affidavit.

[10] It is common cause that Mr Kotze delayed filing his answering affidavit to the applicant's supplementary affidavit by twenty-three days. The explanation for the delay is set out in his affidavit.

[11] There is no doubt having regard to the explanation by Mr Korte and the circumstances of this case, that it is in the interest of justice that the delay should be condoned.

[12] The brief background facts to the counterclaim are that Mr Kotze instituted a counter-application in which he seeks an order in the following terms:

> "1. That the First, Second and Third Respondents be interdicted to restore dual authorisation of all banking transactions and dual access

to the business banking account of the First Respondent held with the Third Respondent under account number 1698077572 at the Third Respondent's Northgate Branch, to the First Applicant;

2. That the First and Second Respondents be interdicted to provide the First Applicant with the following financial information of the First Respondent on a monthly basis:

2.1. income statement (including the supporting documents to each expense and income item);

2.2. balance sheet;

2.3. management accounts;

2.4. debtors age analysis;

2.5. creditors age analysis; and

2.6. monthly bank statements.

3. That the Second Respondent is interdicted from taking any material business and/or financial decisions and/or any material business transactions in relation to the Second Respondent, without a resolution signed by the First Applicant and the Second Respondent jointly.

4. That the First Respondent is ordered to forthwith return possession of the Second Applicant's Hot Melamine Press Machine with model number BY666xg/150 to the Second Applicant."

[13] It is apparent from prayer four above that the counter application is in the form of a *rei vindicatio* for the return of the possession of the melamine press machine possessed by the second respondent or applicant. The other aspect of the counter-application is an "interdict" prohibiting the applicant from

allegedly denying Mr Korte access to the second respondent's premises and using the Nedbank account of the second respondent.

[14] The melamine press machine that is the subject of this dispute was, according to Mr Korte, installed on the premises in Honeydew, Johannesburg, in a building occupied by Veneering. Both the second respondent and Veneering operated on the same premises, however, in separate buildings.

[15] The property upon which both entities conducted the business belongs to Mitre Properties. Mitre Properties and Veneering concluded a lease agreement in October 2016. The second respondent also concluded a separate lease agreement with Mitre Properties in October 2016.

[16] On 20 February 2019, Veneering cancelled the lease agreement with Mitre Properties, but the melamine press machine remained on that property.

[17] Mr Korte further alleges that on 28 May 2019, the parties held a meeting where the following options were given to the applicant regarding the melamine press machine:

i. "39.1 The Second Respondent would relocate to Troyeville premises, and the melamine press would be sold by Veneering to the Second Respondent at cost price or,

ii. 39.2 The Second Respondent moved to premises situated at Cosmos City and made payment of R500.000.00 for the melamine press to an entity named Corkl Enterprise . . . I (Mr Kotze) am the sole

member of Conkyl. Conkyl, which acted as a collecting agent for Veneering; or

iii. 39.3 The Second Respondent make payment in the amount of R28,000.00 per month to Veneering for the melamine press."

[18] The second respondent, according to Mr Korte opted to rent the melamine press machine and was subsequently invoiced on 17 May 2019. It is alleged that the second respondent breached the agreement by not paying for its rental for the use of the machine. Mr Kortze then informed the applicant that he would be collecting the melamine machine consequence of the failure to comply with the lease agreement. It is alleged that the applicant refused to release the machine.

Access to financial and business information and the premises of the second respondent.

[19] Mr Korte complains that the applicant prevented him from exercising his duties and obligations as a member of the second respondent by preventing him from having control over the affairs of the second respondent. This includes accusing the applicant of preventing him from accessing the banking account of the second respondent with Nedbank. He is, as a result, unable to transact on behalf of the second respondent in the bank account.

[20] Mr Korte alleges in his affidavit that the applicant removed his authorisation to transact with the bank in February 2018 after he transferred from the account of the second respondent an amount of R234 107.76 to the

Veneering account. He contends that the applicant did this without the necessary resolution supporting his action. He further argued that the conduct of the applicant and Nedbank was unlawful.

[21] The other complaint of Mr Kotze is that the applicant refuses to provide him with financial information and other matters related to the second respondent's affairs, including total sales and bank statements.

[22] The first respondent has yet to dispute that he has not withdrawn the first counter application. He contends that the application fell away because of the agreement between the parties. The court has neither determined the application. On the proper reading of the papers, the question of law and fact in both the first and second counter-application are materially the same regarding the ownership of the melamine press machine. The issue in both applications concerned the following:

(a) the ownership of the melamine press machine.

(b) the alleged rental agreement for the melamine machine.

[23] Mr Korte contends in the counter application that Veneering is the owner of the melamine press machine. It is important to note that Mr Korte claims in the first counter application that he is the owner of the melamine press machine and in the other that the owner is Veneering. The applicant disputes this.

[24] On the other hand, the version of the applicant (the applicant in the contempt application) is that the melamine press machine was added to the

assets registrar of the second respondent following the instruction to do so given to the financial manager of the second respondent by Mr Korte. After that, the second respondent indicated the cost of the machine as being in the amount of R500,000.00. This amount was then loaded onto the capital loan account of Mr Korte. Mr Korte has not filed a replying affidavit to the applicant's answering affidavit.

Access to the premises of the second respondent and participation-the bank account.

[25] As alluded to earlier, Mr Korte and the applicant have an equal business interest in the second respondent. According to the applicant, the conflict that arose between the two was due to a disagreement over the value of Mr Korte's interest in the business. The value was for determining the purchase price of buying him (Mr Korte) out of business.

[26] It is common cause that the applicant was responsible for the day-to-day running of the affairs of the second respondent for several years. There is further no dispute that Mr Korte, although still a member of the second respondent, has for some time not been active in the affairs of the second respondent. He confirmed this in the first counter application, where he indicates that he no longer has objective input in the financial matters of the second respondent and has, for the last four years, left the running of the day-to-day of the business to the personnel. This is also in line with the averment

made by the applicant that Mr Kotze is not an active member of the second respondent.

Points in limine

[27] The first point *in limine* raised by the applicant is that Mr Korte arbitrarily seeks to join Veneering and Nedbank in contempt of court proceedings without following the proper procedure. In the notice of motion, the applicants (Mr Korte and Veneering) seek the following order:

i. "1. That the First, Second and Third Respondents be interdicted to restore dual authorisation of all banking transactions and dual access to the business banking account of the First Respondent held with the Third Respondent under account number 1698077572 at the Third Respondent's Northgate Branch, to the First Applicant."

[28] The applicants' (Mr Korte and Veneering) Counsel argued that it was not necessary to join Nedbank because its function is to act as an agent of the parties. In other words, it only acts upon the instruction of the parties.

[29] The above argument is not sustainable when regard is had to the fact that paragraph 1 of the notice of motion quoted above explicitly seeks relief against Nedbank. However, the papers as they stand, Nedbank has not been joined to the proceedings, and thus any order made against it would be of no force and effect as it is not a party to these proceedings. Nedbank was unilaterally inserted by Mr Korte when the answering affidavit to the

supplementary affidavit was filed. The answering affidavit, as stated earlier, incorporated the counter application.

[30] In prayer 4 of the notice of motion, the applicants seek an order in the following terms:

> "4. That the First Respondent is ordered to forthwith return possession of
>
> the Second Applicant's Hot Melamine Press Machine with model number BY666xg/150 to the Second Applicant (Veneering CC)."

[31] It should be noted that until 3 May 2022, there was no proper application to join Veneering. It should also be noted that Mr Korte uploaded an unsigned and unissued application on the caselines platform on 29 April 2022. In this regard, the applicants (Mr Korte and Veneering) also failed to file a practice note as required by the Practice Directive of the Court.

[32] As indicated earlier, Mr Korte delivered a combined affidavit under the same case number as the contempt of court application. He cited Veneering as a co-applicant and Nedbank as another respondent. He then, without making a formal application to join Veneering and Nedbank into the existing proceedings, refers to rule 6(7) of the Rules. The counter application was not brought as a separate application.

[33] The purported unilateral joinder of both Nedbank and Veneering is irregular; thus, until Veneering and Nedbank are formally joined to the current application, they are not properly before the court. In the circumstances, I am

inclined to strike the matter of the roll for non-compliance with rule 6(7) read with rule 10 of the Rules.

The second point *in limine*

[34] The second point *in limine, lis pendens,* has its origin in the first urgent application when the applicant sought a spoliation order against Mr Korte. In this respect, Mr Korte filed an answering affidavit incorporating a counter-application similar to the one filed after the applicant filed his supplementary affidavit. In his answer, Mr Korte claimed that he owned the melamine press machine. In the same affidavit, he also referred to the applications he has made in sections 49 and 36 of the Close Corporation Act.

[35] Section 49 of the Close Corporations Act provides that a member may institute proceedings where there was an act or omission in the conduct or affairs of the business by the corporation or by the other member or members which were unfairly prejudicial to such member. 36. (1) On application by any member (of a corporation, a Cessation of memCourt may depend on any of the following grounds order that any me**mbership ~Y order of ber shall cease to be a member of the corporation:· · Court. (a)** Subject to the provisions of the association

[36] It is common cause that the first counter application was not supported by a notice of motion as would ordinarily be required in motion proceedings.

An application unaccompanied by a notice of motion is generally regarded as defective. For obvious reasons, a different approach is adopted in relation to a counter-application which is governed by rule 6(7) of the Rules. In this regard, a notice of motion is unnecessary; thus, the counter application will stand even if a notice of motion does not accompany it. See Erusmus Superior Court Practice D1-80 Rule 6(7) provides:

> "(7) (a) Any party to any application proceedings may bring a counter-application or may join any party to the same extent as would be competent if the party wishing to bring such counter-application or join such party were a defendant in an action and the other parties to the application were parties to such action. In the latter event, the provisions of rule 10 will apply."

[37] The counter application incorporated into the answering affidavit to the first urgent application was not accompanied by a notice of motion. Despite this, it sustains as a counter application in terms of rule 6(7) of the Rules.

[38] It was argued on behalf of Mr Korte that the counter application fell away because a settlement agreement was concluded between the parties. This is, however, not supported by the facts.

[39] The issues raised in the counter application were fully ventilated in the papers. It is common cause that Mr Korte did not proceed with the counter application, nor did the court finalise the application. It follows, therefore, that the counter application is still pending.

[40] The other point raised by the applicant, which is part of the *lis pendens,* concerns the liquidation application instituted by Mr Korte. The applicant argued in this regard that it would be appropriate to deal with the issue of the ownership of the melamine press machine raised by Mr Korte in the counter application in the liquidation application.

Background to the contempt application

[41] The contempt application follows the urgent spoliation application that the applicant had instituted against Mr Korte. The applicant's case in the first urgent application was that he and the second respondent were in peaceful and undisturbed possession of the melamine press machinery until Mr Korte and a certain 'Janes' wrongfully and unlawfully interfered with such possession.

[42] The dispossession of the property in issue occurred on 31 May 2019 when Mr Korte physically and unlawfully prevented the applicant and the employees of the second respondent from having access to the premises and from conducting the daily business of the second respondent.

[43] According to the applicant, the dispute between the parties arose from a disagreement about Mr Korte's demand that the applicant purchases his business interest in the second respondent. Whilst this was acceptable to the applicant, they could not agree on the value of the membership's interest in the second respondent.

[44] About the allegation of spoliation, the applicant testified in the urgent application that Mr Korte and those who were with him on the day in question broke into the premises of the second respondent and removed files and computers from the premises of the second respondent.

[45] On 31 May 2019, the applicant filed a supplementary affidavit complaining that subsequent to filing the founding affidavit, Mr Korte had contacted some of the clients of the second respondent and informed them about the conflict between the parties, thus compromising the interests of the second respondent.

[46] The applicant was successful in the urgent application, and thus Mr Korte was interdicted from entering the premises of the second respondent and removing any property from the premises. The order in this respect reads as follows:

> "1.1 The First Respondent is interdicted and restrained from:
>
> i. arbitrarily taking any steps to deprive the applicant and the Second Respondent's staff employees, customers and visitors of undisturbed access to the Second Respondent's premises situated at 63-65 Ridge Road, Laser Park, Honeydew, Gauteng ("the premises");
>
> ii. from entering or accessing the premises of the Second Respondent other than in the ordinary course of the Second Respondent's business;

iii. removing any files, documents, records and assets from the premises of the Second Respondent other than in the ordinary course of the Second Respondent's business,

iv. contacting and informing customers, suppliers, employees and visitors of the Second Respondent, or potential customers, suppliers, employees or visitors of the Second Respondent, as well as the market in general:

(a) that the business of the Second Respondent has closed down;

(b) that the Second Respondent has ceased to operate or trade;

(c) the internal and private disputes between the applicant."

[47] On 9 July 2020, the applicant instituted the second contempt of court and spoliation proceedings. In that instant, the applicant complained that Mr Korte wrongfully and unlawfully removed a critical component of the melamine press machine from the second respondent's premises rendering the plant inoperable. He also removed the keys of the second respondent's premises, including those of the two trucks.

[48] The urgent application was removed from the roll by agreement between the parties. The agreement concerned certain undertakings made by the parties. The undertakings Mr Korte made were set out in the email from the applicant's attorney of record and confirmed in another email from Mr Kotze's attorneys' of record. The email reads as follows:

a. "Dear Mr van Zyl,

Our recent telephonic discussions on 17 December 2019 between our Mr Pattansky, Advocate RJ Bouwer, and yourself refers.

We confirm that you and Mr Russel Korte will provide a written undertaking on the following terms:

2.1 That Russel Korte, or his representative, will forthwith return the following items to the premises of Mitrewood Products CC, from which same was removed by Mr Korte during the period of 12 and 13 December 2019:

2.1.1 On immediate arrangement with Graciano Mesquite Costa, who can be contacted on 083 . . ., the component of the Melamine plant machine will forthwith be reinstalled by Mr Korte, or his representative, at the cost of Mr Korte, to reinstate the plant to a full working condition;

2.1.2 The keys to the factory of Mitrewood Products CC;

2.1.3 The keys to the Truck bearing the registration number CZ09WDGP.

2.1.4 The keys to the Truck bearing the registration number DJ57ZMGP.

2.2 Russel Korte gives an unequivocal undertaking that:

2.2.1 He will not under any circumstances enter the premises of Mitrewood Products CC at 63-65 Ridge 79 Road, Lazerpark, Roodepoort unless accompanied by yourself or a representative from your office upon prior arrangement with Mr Costa and our office.

2.2.2 Russel Korte will not in any way intimidate, harass, and/or threaten and/or harm Graziano Mesquita Costa, the staff and employees of Mitrewood Products CC.

2.2.3 He will not employ or use any third party to commit the acts referred to in paragraph 2.2.2 above.

2.3 Should Mr Korte breach the terms, as set out above, our client may supplement the urgent application and proceed on an urgent ex-parte basis;

(a) Upon receipt of the written undertakings, or written confirmation thereof as set out above, our client will remove the urgent application set down for hearing on 18 December 2019 at 10:00am;

(b) The costs of the urgent application will be reserved.

(c) We await your written undertaking in this regard. Kindly also email a copy of the written undertaking to our Counsel at jrbouwer@gmail.com

(d) In the interim, all our client's rights remain strictly and expressly reserved."

[49] The email from Mr Korte's attorneys of record confirmed the above as correct and a true reflection of the agreement between the parties, dated 17 December 2019. It reads as follows:

"Dear Mr Patiansky,

Your email under reply refers.

I hereby provide the undertaking on the terms as set out in your email.

Trusting you find the above in order."

[50] The legal consequence of the above correspondence between the parties is that a binding written agreement was concluded. In compliance with the agreement Mr Korte, on 6 January 2020, returned the components of the melamine machine, keys to the factory, and the keys to the two trucks.

[51] The applicant contends that Mr Korte breached the order of 12 May 2020 by demanding the return of the Polo motor vehicle used by the second respondent. Although he did not pursue the demand, the complaint of the applicant is that this constitutes intimidation of the employees in that he threatened to have the employee jailed if he did not comply with his demand because the possession of the motor vehicle amounted to "theft."

[52] The applicant further accused Mr Korte of having removed two keys which are essential to the operation of the melamine press machine.

[53] It is common cause that Mr Korte was on that day excessively intoxicated and had to be escorted from the premises of the second respondent by his attorney of record.

[54] In brief, the applicant contends that Mr Korte breached clause 1.1.2 of the court order in that he entered the premises of the second respondent on 22 June 2020 and removed the keys.

The issue

[55] The issue in the contempt of court application is whether Mr Korte is guilty of contempt of court in that he failed to comply with the order made by Pearse AJ on 09 October 2019.

Principles governing contempt.

[56] The crime of contempt of a court arises from unlawfully and intentionally disobeying a court order. Fakie N.O. v CCII Systems (Pty) Ltd[1] It is trite that an applicant in contempt of court proceedings bears the onus to show the following: (a) that a court order was granted; (b) that the court order was served on the respondent, or that the respondent had knowledge of the court order; and (c) that the court order was not complied with by the respondent.

[57] It is also trite that once the above requirements are satisfied, a presumption arises that the respondent's non-compliance is wilful and mala fide unless the respondent can show reasonable doubt as to wilfulness and mala fide. The test in this regard was summarised in 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 (5) SA 327 (CC), as follows:

i. "once it is proven that an order exists and was served on a litigant who did not comply therewith, contempt will have been established beyond reasonable doubt unless the respondent establishes a reasonable doubt relating to wilfulness and *mala fides*."

[1] 2006 (4) SA 326 (SCA).

[58] In the present matter, Mr Korte does not deny entering the premises of the second respondent in contravention of the court order on 22 June 2022. He concedes in paragraph 167 of his affidavit that: ". . . I realise that my actions were wrongful."

[59] He further states in paragraphs 206 and 207:

i. "206 Initially, I denied that I took the keys because after a diligent search the following morning, I could not find them in my possession.

ii. 207 I, however, accept the applicant's version that I did, in fact, take keys of the melamine press."

[60] In light of the above, it is clear that there is no reasonable doubt that Mr Korte willfully and in bad faith disobeyed the order made on 22 June 2022. He is accordingly guilty of contempt of court. The next issue to determine is the sanction to be imposed.

[61] As alluded to earlier, Mr Korte was aware of the court order. There is no evidence in his affidavit that he did not understand the order or appreciate the consequence of non-compliance. Although he regrets his conduct, the non-compliance with the order occurred on more than one occasion. Although the consumption of alcohol is not a defence or an excuse, I do, however, take note that alcohol did play a role in Mr Korte's conduct of disobeying the court order.

[62] In the circumstances, the appropriate sanction is a fine instead of incarceration. The fine should be suspended for a year and on condition that Mr Korte does not in that period commit the same offence.

Applicant's expended interdict.

[63] In addition to the contempt application, the applicant seeks an order preventing Mr Korte from entering the second respondent's premises and intimidating the second respondent's employees. The order in this regard is sought on the basis that the order of 22 June 2022 is inadequate in protecting the rights of the applicant and the second respondent. The order is sought on an interim basis.

[64] The applicant further contends that he and the second respondent have a clear right to be protected from Mr Korte's conduct and that they have a well-grounded apprehension of an infringement of their rights by him.

[65] Mr Korte's Counsel correctly argued that the extended interdictory relief sought by the applicant is unsustainable because the applicant has an alternative relief in the form of a winding up of the close corporation. Accordingly, the extended interdictory relief sought in the contempt of court application stands to fail.

The costs

[66] The applicant's Counsel argued that costs in this matter should be punitive.

Law relating to attorney and client costs

[67] It is well established that a court will not order a litigant to pay the costs of another litigant on the attorney and client scale unless there are special grounds justifying this. Such grounds have been found to be present in cases where litigants have been guilty of dishonesty or fraud or where their motives have been vexatious, reckless, malicious or frivolous, or where they have acted unreasonably in the conduct of the litigation or where their conduct has been in some way reprehensible."

[68] In Gois Ya Shakespean. 's Pub v Van Zyl and Others (2003) 24 ILJ 2302 (L.C.), this Court held as follows: "....this court may make a punitive costs order such as costs on an attorney and client scale where it believes it appropriate to do so. Factors to consider whether or not to grant such punitive costs orders 'ee Erasmus Superior Court Practice st EI2-20 and the footnotes cited there.

Applying the law to the facts:

[69] The applicant seeks an order that the First Respondent pay its costs on the punitive scale of attorney and client. This is based on four cumulative considerations, namely:

[70] The deliberate and mala fide failure to comply with and the blatant contempt of the order by yet again threatening, abusing, intimidating and harassing the staff and employees of the Second Respondent and the unlawful removal and spoliation of the component essential for the operation of the First Respondent's Melanine plant and keys to the factory and 2 (two) vehicles from the premises of the Second Respondent,

[71] The applicant yet again having to seek further interim redress preventing the First Respondent from further threatening, intimidating, harassing, and/or harming the applicant and the staff and employees of the Second Respondent;

[72] To preserve and maintain the dignity, repute authority and effectiveness of the court and orders granted by the court which calls for such a costs order;

[73] On the punitive scale of attorney and client scale up to and including the hearing date of 18 December 2019;

[74] On a party and party scale from (and including) 19 December 2019 up to the date of the determination and granting of the reserved cost order.

_____

E MOLAHLEHI J

Judge of the High Court

Gauteng Local Division, Johannesburg.

For the applicant: Adv RJ Bouwer

Instructed by: Martini Patlansky Attorneys

For the respondent: Adv E Coleman

Instructed by: Ernest Van Zyl Attorneys

Hearing date: 9 May 2022

Delivered; 19 December 2022