



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 14 December 2022
Signature: _____

CASE NO: B39834/2022

In the matter between:

DR RISHI HARSHAD PEMA

First Applicant

DR PARBOO AND ASSOCIATES INC.

Second Applicant

And

HEALTHWORX MEDICAL CENTRES (PTY) LTD

First Respondent

WILLEM GERHARDUS PETRUS VAN ZYL

Second Respondent

NATIONAL COMMISSIONER

SOUTH AFRICAN POLICE SERVICE

Third Respondent

In re:

DR RISHI HARSHAD PEMA

First Applicant

DR PARBOO AND ASSOCIATES INC

Second Applicant

And

HEALTHWORKS MEDICAL CENTRES (PTY) LTD

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1] The Applicants are a dental practice which has been spoliated from their practice premises, which is owned and managed by the Respondent. They obtained an urgent spoliation order from this court on the 16 November 2022. In terms of said order, the Respondent was to forthwith restore to the Applicants full access to the premises situated at Healthworx, Shop 40 Carlswald Lifestyle Shopping Centre, 1682 New Road 8 Harry Galaun Drive, Midrand, including access to trade as a Dentist on the premises.

[2] Since then the Applicants have tried to enter the premises as per the order but were denied entry by the Respondent or people acting on its instructions. The Applicant seek relief as follows:¹

2.1 That this application be enrolled and heard as an urgent application in terms of Rule 6 (12) and that the ordinary prescribed time limits, forms and service provided for in the rules be dispensed with.

2.2 It is declared that the first and second respondents are guilty of being in contempt of court for failure to comply with the order made by this Court on 16 November 2022.

2.3 That the first respondent is fined to pay an amount of R200 000 (two hundred thousand Rand) to the Registrar of this Court within 15 days from this order.

2.4 The second respondent is committed to imprisonment for a period of 20 days.

2.5 That a warrant of arrest is authorized to give effect to paragraph 2.4 of this order.

¹ As per Applicants' Notice of Motion with the numbering of the order sought adapted to merge with the numbering in this judgment (Author's adjustments)

2.6 The second respondent is ordered to submit himself to the South African Police Service at Brooklyn Police Station, Pretoria within 2 calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in paragraph 2.4.

2.7 In the event that the second respondent does not submit himself to the South African Police Service as required by paragraph 2.6, the third respondent must, within two calendar days of the expiry of the period stipulated in paragraph 2.6, take all steps that are necessary and permissible in law to ensure that the second respondent is delivered to a correctional facility in order to commence serving the sentence imposed in paragraph 2.4

2.8 Alternatively, to prayers 2.6 and 2.7, it is ordered that:

2.8.1 the warrant of arrest authorized under paragraph 2.5 is suspended for 1 year, on condition that the second respondent during the period of suspension:

2.8.2 not be in contempt of the 16 November 2022 court order; and

2.8.3 not be in contempt of this court order, and

2.8.4 not be found guilty of contempt of court.

2.9 Should the second respondent be in contempt contemplated under paragraph 2.8 of this order, the third respondent is ordered to forthwith take all steps that are necessary and permissible in law to ensure that the second respondent is delivered to a correctional facility in order to commence serving the sentence imposed in paragraph 2.4.

[3] The Applicant then seeks costs of this application against the first and second respondents, jointly and severally, the one paying, the other to be absolved; the costs should be on the attorney and client scale.

[4] Alternatively, to the above, that the legal representatives of the Respondents should be ordered to pay costs of this application *de bonis propriis* on an attorney and client scale.

The Applicants' case:

[5] The First Applicant is a dentist and conducts his practice through the Second Applicant at the premises.

[6] The Applicants have been in undisturbed possession of the premises since at least 2018 at and until 3 November 2022, when the Applicants were spoliated by the First Respondent.

- [7] The second respondent signed the letter, which had the effect of spoliating the applicants, and the second respondent instructed the operations manager of the first respondent to have delivered the offending letter.
- [8] The spoliation order was granted by her Ladyship Bam J on the 16 November 2022 in the presence of the Respondents' legal representatives. The order was uploaded to CaseLines soon thereafter.
- [9] From 16 November 2022 to 21 November 2022 there has been an exchange of email correspondence between the legal representatives of both parties. Initially the Applicant's attorneys sought to facilitate a smooth implementation of the order. It soon became apparent that the Respondents' attorneys were not sharing a common understanding since they had evidently advised their client that the court order was suspended. They attributed the alleged suspension of the order to the fact that they had asked for the court's reasons for the judgment and same were still outstanding.
- [10] A contention to the contrary by the Applicants' legal representatives did not persuade the Respondents' legal representatives otherwise. The order has yet to be complied with.
- [11] It is this state of affairs that caused the applicants to launch this application to seek a contempt of court order.

- [12] Strangely, about two days before the hearing of this application for the Respondents to be held in contempt of the court order of the 16 November 2022, the Applicants' legal representatives filed a Rule 7(1) notice wherein they challenged the Second Respondent's authority to act.
- [13] In the throes of an urgent application, the Applicants' legal representatives were hampering the very order they were seeking. Mr Basson who appeared for the Respondent contended that the Applicant cannot approbate and reprobate at will, on this matter. This application was ill-founded and was dismissed.
- [14] On the merits of the application, Mr Lamprecht appearing for the applicants submitted that this application remains urgent since the Applicants remain spoliated. Each and every day that passes by, the wrong continues. It was submitted that the Respondents have already snubbed two opportunities to rectify the contempt.
- [15] Mr Lamprecht referred to legal authority dealing with the concept of civil law contempt of court. Reference was made to inter alia the *Fakie N.O. v CCII Systems*² Judgment which is dealt with below.
- [16] It was submitted on behalf of the Applicants that there is a valid court order which was filed as part of the application, the Respondents were aware of the court order and were wilfully in contempt of the said order due to *mala fides*.

² 2006 (4) SA 326 (SCA)

The Respondents case:

- [17] The Respondent deny that they were in wilful default of the spoliation order.
- [18] As at the date of the hearing the court's reasons for judgment were not as yet available. It was submitted on behalf of the Respondents in the main application that litigants are ordinarily entitled to reasons for a judicial decision. To this end reference was made to the decision in *Strategic Liquor Service v Mvumbi N.O. and others 2010 (2) SA 92 (CC) 96G – 97A*. The delay in Respondents applying for leave to appeal was thus occasioned by the unavailability of the court's reasons other than plain wilfulness.
- [19] The Respondent's thus sought to have the application for a contempt order dismissed with costs.
- [20] In dealing with the application for punitive costs *de bonis propriis* against the Respondent's attorneys, the submission on behalf of the Respondent was that it was misplaced and should be rejected.
- [21] Mr van der Merwe appeared for the Respondents attorneys regarding the application for costs *de bonis propriis*. He submitted that there was no basis for the application for this type of punitive order as to costs.

Analysis:

- [22] The subject of imprisonment for contempt to enforce compliance with a civil court order has occupied our courts for a while now. This is no place for a treatise on the subject, save to revisit a few decisions.
- [23] The principle formulated in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), which were confirmed in *Pheko v City of Ekurhuleni* 2015 (5) SA 600 (CC), is that an applicant who alleges contempt of court must establish that an order was granted against the respondent, that the respondent was served with the order or had knowledge of it and that the respondent failed to comply with the order. Once these three elements have been established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish reasonable doubt. If the respondent fails to do so, contempt will be established. A deliberate failure to comply with a court order is not enough if good faith is established.
- [24] In *Fakie N.O.* it was held that: “*The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and mala fide’. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).*”

- [25] What has become apparent is that due to the urgency that attended the initial application for the spoliation order, the court gave the order with reasons to follow.
- [26] The Respondent's contentions regarding its intentions to appeal the order and its need for reasons can also not be dismissed by this court which is not privy to whatever dispute is at the centre of the bad-blood between the litigants.
- [27] In *Fidelity Security Services v Mogale City Local Municipality 2017 (4) SA 207 (GJ)* the facts were that, pending any application for leave to appeal/leave to appeal by the Respondent, the order at issue remain in operation and be given effect to. The relief in terms of section 18(3) of the *Superior Courts Act 10 of 2013* was granted to obviate the court order going moot in the successful litigant's hands.
- [28] The current application is not in terms of section 18 of the Superior Courts Act.
- [29] In light of the above factual considerations, I am of the view that the Respondents' were not in *wilful* disobedience of the spoliation order as set out in the Fakie N.O. test for contempt.

[30] As regards costs, it is trite law that “*An order to hold a litigant’s legal practitioner liable to pay the costs of legal proceedings is unusual and far-reaching. Costs orders of this nature are not easily entertained and will only be considered in exceptional circumstances.*”³ These are not exceptional circumstance as contemplated in this decision and many others on the subject-matter.

[31] In the circumstances, the following order is made:

The application is dismissed with costs on a party and party scale.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 24 November 2022

Date of Judgment: 14 December 2022

APPEARANCES

³ Thunder Cats Investments 49 (Pty) Ltd v Fenton 2009 (4) SA 138 (C) 151 per Le Grange J

On behalf of the Applicant: Adv. F.C. Lamprecht

Attorneys: RS Ramsamy Naidoo & Associates

MIDRAND

072 025 2924

On behalf of the Respondent: Adv. A.A. Basson

Adv. Van der Merwe

Instructed by: Wolmarans & Susan Inc

084 514 3038

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 14 December 2022.