THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 254/2019

In the matter between:

ANNA MMAKODI THIPE	**FIRST APPELLANT**
286 DENNEBOON TRADERS	**SECOND APPELLANT**

and

CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**FIRST RESPONDENT**
ISIBONELO PROPERTY SERVICES (PTY) LTD	**SECOND RESPONDENT**
THE MUNICIPAL MANAGER: CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**THIRD RESPONDENT**
THE MAYOR: CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**FOURTH RESPONDENT**
THE CEO OF ISIBONELO PROPERTY SERVICES (PTY) LTD	**FIFTH RESPONDENT**
MOEKETSI MOSOLA	**SIXTH RESPONDENT**
SOLLY MSIMANGA	**SEVENTH RESPONDENT**
SHADRACK MTHETHWA	**EIGHTH RESPONDENT**

Neutral citation: *Thipe & Another v City of Tshwane Metropolitan Municipality & Others* (Case no 254/2019) [2020] ZASCA 131 (16 October 2020)

Coram: PONNAN, ZONDI and MOLEMELA JJA and WEINER AND SUTHERLAND AJJA

Heard: 31 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 16 October 2020.

Summary: Appeal against order upholding exception and dismissing application – the upholding of an exception disposes of the pleading not the action or defence - appeal succeeds.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Khumalo J, sitting as court of first instance):

1 The appeal succeeds.

2 The order of the high court upholding the exception and dismissing the claim against the third to eighth respondents is set aside.

3 The costs occasioned by both the hearing of the exception in the high court and the appeal shall be costs in the cause.

JUDGMENT

Zondi JA (Ponnan and Molemela JJA and Weiner and Sutherland AJA concurring)

[1] The appellants are informal traders who, until the occurrence of the events which gave rise to these proceedings, traded from the Denneboom Train Station, Mamelodi, Pretoria (the property) in terms of fixed term lease agreements with the first respondent, the City of Tshwane Metropolitan Municipality (the City of Tshwane). The second respondent, Isibonelo Property Service (Pty) Ltd (Isibonelo), is a property development company, which at the relevant time, was constructing a shopping mall on the property. MK Africa Construction (Pty) Ltd and Fencesteel (Pty) Ltd were subcontracted by Isibonelo to carry out some of the construction and bulk earthworks on the project.

[2] The third respondent is the Municipal Manager of the City of Tshwane (the Municipal Manager). He was cited both in his official capacity and in his personal capacity, as the sixth respondent, Mr Moeketsi Mosola. The fourth respondent is the Mayor of the City of Tshwane (the Mayor). He was also cited both in his official capacity as the Mayor and in his personal capacity, as the seventh respondent, Mr Solly Msimanga.[1] The fifth respondent was cited in his official capacity as the Chief Executive Officer (the CEO) of Isibonelo and in his personal capacity as the eighth respondent, Mr Shadrack Mthethwa.

[1] Neither Mr Mosola, nor Mr Msimanga are presently in office in these capacities.

[3] The third to eighth respondents were not cited as parties when the application for contempt of court was initially brought and the order granted by Janse van Nieuwenhuizen did not apply to them. They were only joined as parties in their official capacities on 1 November 2017 (first joinder application) and in their personal capacities on 7 November 2017 (second joinder application).

[4] On 3 February 2017, the Gauteng Division of the High Court, Pretoria (Rabie J) at the instance of the appellants, Ms Anna Mmakodi Thipe and what were described as 286 Denneboom Traders, issued a rule nisi, returnable on 28 February 2017. In terms of the rule *nisi*, the City of Tshwane, Isibonelo, MK Africa and Fencesteel were called upon to show cause on the return day why they should not be interdicted from demolishing any structure used by the appellants, pending their vacation of the property by agreement with the City of Tshwane or in terms of a court order. MK Africa and Fencesteel were cited as the third and fourth respondents, respectively in that application.

[5] On 10 February 2017 the matter served before Janse van Nieuwenhuizen J who, by agreement between the parties, discharged the rule nisi in its entirety and replaced it with the following order:

'1.1. The matters under case numbers 6048/17 and 7922/17 are consolidated.

1.2. The rule *nisi*, granted Friday, 3 February 2017 under case number 7922/17 is discharged.

1.3. Pending relocation of the traders to the temporary trading facility, the respondents are interdicted and restrained from:

1.3.1. demolishing any existing structure, fixed or informal, used by the traders for purposes of trading, in the area currently occupied by them;

1.3.2. unduly interfering with the traders' trade by:

1.3.2.1. obstructing delivery of stock to their stalls;

1.3.2.2. obstructing public road access to their stalls;

1.3.3. disconnecting the water and electricity supply.

1.4. The applicants are interdicted and restrained from harassing, intimidating or assaulting any employees, agents or contractors of the respondents, and from causing damage to public or private property.

1.5. If any dispute arises about the interpretation, implementation, or breach of the terms of this order, the parties will be obliged to first attempt to settle the dispute through conciliation, before approaching the Court for relief.

1.6. During the construction phase of the Denneboom Station Public Transport Interchange Development, the respondents will, at the temporary trading area, make available to the traders:

1.6.1. containers for those traders who currently occupy fixed structures;

1.6.2. trading spaces for those traders who currently occupy informal stalls;

1.6.3. proper ablution facilities, including communal water and electricity.

1.7. To give effect to the preceding order the first respondent shall within 7 (seven) days of the granting of this order:

1.7.1. allocate a number to each and every trader at the current trading facility, differentiating between traders who occupy fixed structures, and traders who occupy informal stalls;

1.7.2. allocate a corresponding number to a container or trading space, as the case might be, at the temporary facility;

1.7.3. inform the traders and their attorneys, in writing, accordingly.

1.8. After the traders have been informed, the traders are ordered to relocate to the allocated trading spaces at the temporary trading facility within 48 (forty eight) hours of having been so informed.

1.9. Commuters from the Denneboom train station shall be diverted to public transport facilities via the temporary trading area, 48 hours after the traders have relocated to the temporary trading area.

1.10. The applicants shall provide the 1st respondent with the names and identities of three people to represent them on the Denneboom Facilities Management Board.

1.11. After having been informed of the names and identities of the applicants' representatives, the 1st respondent shall forthwith ensure that the representatives are formally included in the Denneboom Facilities Management Board.

1.12. Determination of the location, layout, design, allocation criteria, and conditions of occupation and trade, of trading spaces at the Denneboom Station Public Transport Interchange, shall be done after consultation with the traders, and the parties shall endeavour to ensure that the trading conditions will in as far as possible be comparable to the traders' current trading conditions.

1.13. The parties shall act reasonably and fairly at all stages.

1.14. Costs are reserved.'

(the Janse van Nieuwenhuizen Order)

[6] On 22 September 2017 the appellants' trading facilities at the property were demolished. There is a dispute between the parties as to who was responsible for the demolition. The appellants alleged that the City of Tshwane and Isibonelo had authorised the demolition. They said that some of Isibonelo's employees actively participated in the demolition of their trading structures and used machinery belonging to Isibonelo to carry out the demolition. This occurred, the appellants contended, in full view of some of the City of Tshwane police officers and certain members of the South African Police Service from the Mamelodi West police station, who did nothing to protect them, their trading facilities and trading stock.

[7] Following the destruction of their stalls, the appellants' trading stock and building material were looted by some members of the community. The appellants alleged that they suffered damages in the sum of R5 000 each, as a result of the destruction of their trading structures and stock. The appellants further alleged that on 26 September 2017, following the destruction of their

trading facilities, Isibonelo in contravention of the Janse van Nieuwenhuizen Order, erected a fence around the perimeter of the trading area. They contended that the erection of the fence unlawfully interfered with their trade as it prevented their customers from accessing their stalls.

[8] On 17 October 2017 the appellants, brought an application in the high court seeking to hold the City of Tshwane and Isibonelo in contempt of the Janse van Nieuwenhuizen Order. On 3 November 2017 the appellants filed an amended notice of motion for the joinder of the Municipal Manager, the Mayor and the CEO of Isibonelo (the CEO) in their representative capacities as the third, fourth and fifth respondents. The appellants later, on 7 November 2017, also sought their joinder in their personal capacities as the sixth, seventh and eighth respondents respectively. The further relief sought was to the following effect:

'3. That the Respondents be and are hereby found to be in contempt of the Order of the Honourable Mrs Justice Janse Van Nieuwenhuizen under case numbers 7922/17 and 6048/17 granted on 10 February 2017;

4. That the Sixth to Eighth Respondents be committed to prison for a period of 120 days or such period determined by the Honourable Court;

5. That the committal of the Sixth to Eighth Respondents to prison be suspended for 1 (one) year on condition that:

5.1 The Respondents within 48 hours of the granting of this order comply with paragraphs 1.6 and 1.7 of the Order the Honourable Mrs Justice Janse Van Nieuwenhuizen under case numbers 7922/17 and 6048/17 granted on 10 February 2017;

5.2 That the Respondents within 48 hours of the granting of this order remove the fence they erected around the perimeter of the Applicants' trading area;

5.3 The Respondents within 14 days pay to each applicant an amount of R5000.00 as compensation for the demolishing of their stalls, loss of their stock and violation of their constitutional rights.

6. That Respondents be ordered to pay the costs, on an attorney and client scale, jointly and severally, the one paying the others to be absolved.'

[9] The joinder of the Municipal Manager, the Mayor and the CEO was sought on the basis that they had a direct and substantial interest in the subject inasmuch as they are duty bound and obliged to ensure that court orders are complied with by the City of Tshwane and Isibonelo respectively.

[10] In the answering affidavit deposed to by the eighth respondent, Mr Mthethwa in his capacity as the CEO of Isibonelo, it was denied that Isibonelo was in contempt of the Janse van Nieuwenhuizen Order. Isibonelo denied that its employees or subcontractors, were involved in the demolition of the appellants' trading structures. It stated that without their knowledge or permission, community members and taxi drivers, who had become upset with the appellants for delaying the completion of the building project, had seized some of the equipment from the construction site and proceeded to carry out the demolition. Mr Mthethwa alleged that the situation during the demolition became very hostile and when Isibonelo's employees and those of its subcontractor intervened to stop demolitions they were pelted with stones forcing them to retreat.

[11] Isibonelo admitted that it erected a fence around the perimeter of the trading area but denied that the erection of the fence obstructed delivery of stock or access to the appellants' stalls. It averred that it fenced off the area on the instruction of the City of Tshwane because of vandalism at the property. This affected the supply of water and electricity to the construction site and the neighbouring properties, occupied by the Mamelodi Shopping Centre and

a Total petrol service station. It further pointed to the several incidents of cable theft and armed robbery on the construction site. This is not disputed by the appellants though they contended that Isibonelo should have consulted them first before fencing-off their trading area.

[12] Isibonelo alleged that in compliance with the court order it supplied approximately 50 containers, each of which is able to accommodate two informal traders. In addition, it said it allocated an open space to some of the informal traders who did not want to use containers. Isibonelo contended therefore that the contempt of court application was ill-conceived, based on contrived allegations and constituted an abuse of court process.

[13] In their replying affidavit the appellants admitted that the taxi drivers were involved in the demolition of their stalls, but denied that only the taxi drivers were responsible therefor. The appellants stated that the community members did not participate in the demolition. They only took part in the looting of their property after the demolition. The appellants further denied that Isibonelo allocated containers to them.

[14] The City of Tshwane's answering affidavit was deposed to by Mr Simon Tshepo Sithole (Director Litigation Management). Mr Sithole contended that the Municipal Manager and the Mayor were not parties to the proceedings which came before Janse van Nieuwenhuizen J; that the appellants failed to set out any basis upon which they became subject to the court order; that the allegations in the appellants' founding affidavit did not establish that the Municipal Manager and the Mayor are the persons who

wilfully, and with knowledge of the court order, failed to comply with its terms.

[15] Mr Sithole alleged further that as the Municipal Manager and the Mayor were not parties to the initial application, the order did not operate against them. He contended that before the court may hold the Municipal Manager and the Mayor in contempt in their own name, the order should have first been sought and granted against them. Mr Sithole's contention was that it does not follow as a matter of course that any failure to comply by the City of Tshwane, which was denied, may be attributed to the Municipal Manager and the Mayor. Mr Sithole contended that the appellants should have joined the Municipal Manager and the Mayor as parties to the proceedings from the outset, in both their official and personal capacities and the relief should have been made operative against them personally, before the appellants brought contempt proceedings against them.

[16] Mr Sithole, moreover, alleged that meetings took place on a regular basis between the traders and various representatives from the City of Tshwane in order to implement the Janse van Nieuwenhuizen Order. He said these meetings yielded very little results, mostly because the traders kept moving the goal posts and made outrageous demands. He denied that the City of Tshwane, its officials and its functionaries had anything to do with the demolition of the structures.

[17] It is apparent that there existed a stark dispute of fact as to whether the demolition could be attributed to any conduct on the part of Isibonelo or the City of Tshwane; whether containers were allocated to the appellants and

whether the erection of a fence was in contravention of the court order. In short, whether as a matter of fact any of the respondents were indeed in contempt of the Janse Van Nieuwenhuizen Order.

[18] On 8 November 2017, the matter came before Mphahlele J, who issued the following order:

'That the issues raised in prayers 3, 4, 5, 5.3. and 6 [of the Janse Van Nieuwenhuizen Order] are referred to trial.

That the parties will be entitled to call any witness on its own behalf on condition that a statement containing the evidence of that witness is filed at least ten (10) days before the hearing.

That the normal Uniform Rules of Court with regard to trials will be applicable.

That each party must supply the other party with a list of witnesses it intends to call twenty (20) days before the hearing.'

[19] On 9 February 2018 the appellants' attorneys wrote to the attorneys for the City of Tshwane and Isibonelo regarding the further conduct of the matter. The letter reads as follows in relevant part:

'We furthermore place on record that the matter was referred to trial by agreement between the parties.

No specific provisions were made as to the standing of the papers and we propose that the normal rules apply in this regard, in that the Notice of Motion stand as a simple summons, the answering affidavits as Notices of Intention to Defend, a declaration shall be delivered within 15 days of your acceptance of this proposal and thereafter the Uniform Rules of Court shall apply.'

[20] The reference to the fact that 'the normal Uniform Rules of Court with regard to trials will be applicable' reinforces the view that the rules applicable to a trial (in relation to pleadings and discovery for example) were to apply.

That notwithstanding, no declaration or further pleading was filed. At the pre-trial conference held on 13 September 2018, it was recorded on behalf of Isibonelo that 'there has not been sufficient compliance with rule 6(5)(g) of the Uniform Rules of Court.' Further, the rule 37 minute records that the Mayor, Municipal Manager and the CEO, who had initially opposed the application for their joinder to the proceedings, consented to being joined.

[21] On 26 September 2018 the attorneys for Isibonelo addressed a letter to the appellants' attorneys in which they complained about the appellants' failure to take steps to comply with the terms of Mphahlele J's order. The letter reads:

'As discussed during our recent pre-trial conference, we are of the view that it was never competent for the parties to embark on a course of action that deviates from the clear directions in the court order of the Honourable Justice Mphahlele, which ordered a referral of this matter to trial. We accordingly wish to place the following on record:

We submit that it is important for the purposes of this letter to briefly address the chronology of events:

i. As you are aware, the Honourable Justice Mphahlele ordered on 8 November 2017 that prayers 3, 4, 5, 5.3 and 6 of your clients' notice of motion be referred to trial.

ii. On 9 February 2018, you wrote to the Honourable Deputy Judge President, requesting a special trial allocation.

iii. On 20 February 2018, the Deputy President responded with a letter directing you to approach the Chief Registrar for the allocation of a special date.

iv. We received a notice of set down of the trial on 9 March 2018.

v. A period of almost six months passed before your client delivered its notice calling on the parties to file a discovery affidavit. It is not clear, and neither has your office explained the exact reason, why your clients have been supine in pursuing this claim, when there was ample time to exchange proper sets of pleadings since that is the proper manner of dealing with an application that has been referred to trial.

vi. In between the correspondence to the Deputy Judge President, we received a letter from you dated 9 February 2018, proposing that the notice of motion stands as a summons and the answering affidavit as a notice of intention to defend with a declaration. Shortly after this letter, we received a further letter from you dated 6 March 2018 indicating that despite the court order, you proposed that the matter be referred to oral evidence.

The issues that necessitated this matter to be referred to trial are extensive and are broadly traversed by the affidavits that have been filed by the parties. These affidavits are not the pleadings contemplated or permissible within the Uniform Rules of Court when a matter is referred to trial. The affidavits, as they presently stand, do not properly establish the precise issues that are in dispute or, importantly, the precise nature of such disputes.'

[22] The matter was set down before Khumalo J on 22 October 2018. At the commencement of the hearing, the City of Tshwane and Isibonelo raised what was described as an exception on behalf of the third to eighth respondents. Despite no declaration or formal exception having been filed, the high court upheld the exception. The high court's reasoning is set out in the following passages of the judgment:

'The cause of action as set out in the summons / Founding Affidavit is devoid of any averments necessary to sustain a contempt order against the excipient-respondents justifying their incarceration. The jurisdictional requirements that are to be proven at the trial, which is the order, service, deliberate non-compliance and the concomitant *mala fide* have not been satisfied in relation to the capacity in which the Excipients are allegedly joined to the proceedings. Consequently there is no basis laid in the Applicants' Founding Affidavit / summons for conviction of the Excipient Respondents on contempt.

An official's non-compliance with a court order must be wilful and *mala fide*. In general terms this means that the official in question must, personally, be found to have deliberately defied the court order. Hence, a public official is cited for contempt in his personal capacity, the official himself or herself, rather than the institutional structures for which he or she is responsible, must have wilfully or maliciously failed to comply; see *Matjhabeng* and the

decision of the SCA in *Meadow Glen Home Owners Association and Others v Tshwane City Metropolitan and Another* 2015 (2) SA 413 (SCA) at [20]…
…The material allegations necessary against the Excipients are not in the Applicants' Founding Affidavit.'

[23] The high court then dismissed the application for contempt against the third to eighth appellants, but granted them leave to appeal to this Court. The order of the high court cannot stand. Having upheld the exception, the high court proceeded to dismiss the application instead of granting leave to the appellants, if so advised, to amend. As observed in *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited*,[2] the upholding of an exception disposes of the pleading against which the exception was taken, not the action or defence. An unsuccessful pleader is given the opportunity to amend. The rationale for this is that the pleading as such continues to exist. Ordinarily therefore the court should grant leave to amend and not dispose of the matter. Leave to amend is not a matter of an indulgence; it is a matter of course unless there is a good reason that the pleading cannot be amended.[3] No good reason was evident or asserted in this case. In those circumstances, counsel for the respondents conceded that, irrespective of the merits of the exception, the high court ought not to have proceeded to dismiss the application.

[24] Given the course that the matter had followed the high court would have been justified in declining to decide the matter on exception. It follows that the matter must be remitted to the high court. The parties would then be free

[2] *Ocean Echo Properties 327 CC and Another v Old Mutual Life Assurance Company (South Africa) Limited* [2018] ZASCA 9; 2018 (3) SA 405 (SCA) para 8.
[3] Ibid.

to take such steps, as advised, with regard to the further conduct of the proceedings.

[25] The approach adopted by the appellants to the litigation has been characterised by several procedural missteps. This has resulted in a series of piecemeal hearings. It still remains for the high court to determine whether the respondents originally cited in the Janse Van Nieuwenhuizen Order, as a matter of fact, acted in wilful disregard of that court order. They contended that they were not responsible for the demolition of the appellants' property. If that version carries the day at trial, then the contempt application against them must fail. If it fails against them, it can hardly succeed against the other respondents, who have, subsequent to the grant of the Janse Van Nieuwenhuizen Order, been joined to the proceedings. Instead of first resolving the primary factual disputes, the parties allowed the focus to shift to whether as a matter of law the Mayor, Municipal Manager and CEO can be held in contempt either in their representative or personal capacities. But, those questions depend upon the facts found to be proven. Thus as interesting as those legal questions are likely to be, one may simply not get to them if the primary factual disputes are resolved against the appellants.

[26] In any event, given the passage of time, it would appear that the construction has been completed. The appellants had applied for expedited trial dates. The motivation was inter alia that the matter is 'sensitive' because they 'seek that the Mayor of Tshwane be held in contempt of court'. The appellants also pointed out that they would 'need to subpoena contract workers of the Respondents to testify with regards to . . . the demolition of the site. Whilst they are apparently still in the employ of the Respondents, any

delay in the trial would in all probability prove to be to the detriment of the Appellants'. Whether these witnesses are still available remains to be seen. There has also been a change in the political leadership of the City of Tshwane. Accordingly, any order that issues for contempt against the third, fourth, sixth and seventh respondents is likely to be largely symbolic.

[27] As to costs: Given the general disregard shown by the appellants for the rules of court in the conduct of the litigation, which has contributed to piecemeal hearings and this appeal, as also the stark disputes of fact on the papers, which may yet be resolved against the appellants at trial, the costs occasioned by both the hearing of the exception in the high court and the appeal shall be costs in the cause.

[28] In the result:

1 The appeal succeeds.

2 The order of the high court upholding the exception and dismissing the claim against the third to eighth respondents is set aside.

3 The costs occasioned by both the hearing of the exception in the high court and the appeal shall be costs in the cause.

Zondi JA
Judge of Appeal

Appearances:

For appellants:	A de Vos SC (with her Ms M Coetzee)
Instructed by:	Lawyers for Human Rights, Pretoria
	Webbers Attorneys, Bloemfontein

For 1st, 3rd, 4th, 6th & 7th respondents:	A Vorster (with him K Bokaba)
Instructed by:	Malebye Motaung Mtembu Inc, Pretoria
	Phatshoane Henney Attorneys, Bloemfontein

For 2nd, 5th & 8th respondents:	B L Manentsa (with him Ms B B Mkhize and M Mazibuko)
Instructed by:	Adams & Adams Attorneys, Pretoria
	Honey and Partners Inc, Bloemfontein