IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 8528/2022

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 19 JANUARY 2023

SIGNATURE: ***ML SENYATSI***

In the matter between:

HUYSAMEN IZAK DANIEL	First Applicant
HUYSAMEN DENISE	Second Applicant

HUYSAMEN DYLAN Third Applicant

and

BLUECHIP RETAIL SOLUTIONS (PTY) LTD First Respondent

THULANI MAKHATHINI Second Respondent

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 19 January 2023.*

JUDGMENT

SENYATSI J:

[1] The controversy in this application is whether or not the respondent is in civil contempt of an order issued by the Tembisa Magistrates Court on the 24 February 2022 for a spoliation relief.

[2] The respondent opposes the application on various grounds, which *inter alia* include:

(a) A point *in limine* regarding lack of jurisdiction, because the order forming subject of this application was not pursued under section 106 of the Magistrates Court Act No.32 of 1944 and that the Magistrates Court is capable of enforcing its own process;

(b) Accordingly that the court should exercise its discretion sparingly in adjudicating on this matter;

(c) The respondent also raises a second *point in limine* that the matter falls within the exclusive jurisdiction of the Labour Court of South Africa;

(e) The failure to disclose material facts at ex-parte application.

I will deal with each point raised by the respondent.

[3] At the hearing of the application the respondent contended that an appropriate costs *de bonis propriis* had to be made against the legal representative of the applicant. Consequently, the court requested that the legal representative who appeared before the Tembisa Magistrates Court on behalf of the applicant should provide written submissions.

[4] This was done and the court regrets that the matter slipped through the cracks and the reserve judgement could not be delivered on time.

[5] The law pertaining to contempt of court declaratory orders is trite. In *Fakie NO v CCII Systems (Pty) Ltd*[1] the court restated the legal principle regarding the civil contempt of court order in the following terms:

> "6. It is a crime unlawfully and intentionally to disobey a court order.[2] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court."[3]

[6] The court in *Fakie N.O*.[4] continued as follows:

> "9. The test for when disobedience of civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and *mala fide*.[5] A deliberate disregard is not enough, since non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed constitute the contempt. In such a case good faith avoids the infraction.[6] Even a refusal to comply that is objectively unreasonable may be *bona fide* though unreasonableness could evidence lack of good faith."[7]

[7] Accordingly, the applicant bears the *onus*, assuming that the court has jurisdiction to hear this matter to show that the court order was deliberately disobeyed.

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[1] (653/04) [2006] ZASCA 52; 2006(4) SA 326 (SCA) (31 March 2006)
[2] See S v Beyers 1968 (3) SA 70 (A)
[3] See Melius de Villiers The Roman and Roman- Dutch Law of Injuries (1899) page 166; Attorney-General v Crockett 1911 TPD 6893 925-6
[4] Supra
[5] See Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I, Jayiya v MEC for Welfare, Eastern Cape 2004 (2) SA 602 (SCA) para 18 and 19
[6] Consolidated Fish (Pty) Ltd v Zive 1968(2) SA 517 (C) 524 D; See also Noel Lan
[7] Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 692 E-G

[8] I now deal with defence raised by the respondent that the court has no jurisdiction to adjudicate on the contempt application declaratory order.

[9] It is trite that there is no statute that grants the High Court jurisdiction to grant an order for civil contempt of court. To grant an order for the civil contempt of court, the High Court invokes its inherent jurisdiction.[8]

[10] In *Standard Bank of SA Ltd and Others v Thobejane and Others; Standard Bank of SA Ltd v Gqirana NO and Another*[9] the court held as follows regarding concurrent or inherent jurisdiction principle:

> "[27] It is also a law of long standing that when a High Court has a matter before it that could have been brought in a Magistrates' Court, it has no power to refuse to hear the matter. In *Goldberg v Goldberg*[10], the point was taken that as a Magistrate's Court had jurisdiction in respect of contempt jurisdiction concerning the non- payment of maintenance, the Supreme Court should refuse to hear the matter. After referring to a statutory provision that was unique to Natal at the time, that allowed for the transfer of cases where there was concurrent jurisdiction Schreiner J held:
>
> > 'But apart from such cases and apart from the exercise of the Court's inherent jurisdiction to refuse to entertain proceedings, which amount to abuse of its process (and that in my opinion, is not

[8] See M v M (A3076/2016) [2017] ZAGPJHC 279 (28 March 2017) at para [12]
[9] [2021] ZASCA 92; [2021] 3 All SA 812 (SCA); 2021 (6) SA 403 (SCA)
[10] 1938 WLD 83

> the case here). I think that there is no power to refuse to hear a matter which is within the Court's jurisdiction. The discretion which the Court has in regard to costs provides a powerful deterrent against the bringing of proceedings in the Supreme Court, which might more conveniently have been brought in the Magistrate's Court. Not only may a successful applicant be awarded only Magistrate Court costs, but he may even be deprived of his costs and be ordered to pay any additional costs incurred by the respondent of the case having been brought to the Supreme Court. In all normal cases, these powers should suffice to protect the respondent against the hardship of being subject to bring unnecessarily expensive proceedings.'

[11] Accordingly, I am satisfied that this Court has an inherent jurisdiction to adjudicate this matter. Consequently, the defence raised by the respondent that this Court has no jurisdiction to adjudicate on this matter cannot be supported by the law and facts.

[12] The respondent also raised a defence that his matter falls within the exclusive jurisdiction of the Labour Court because of the employment contracts concluded, copies of which were attached to the papers. This may well be the case. However, this was not the case that was before the Tembisa Magistrates Court. The case before *court a quo* was the alleged spoliation. The *ex parte* order that

was brought in that court has not been set aside or appealed against. The new facts that are now raised can only be considered, in my respective view, if the challenge is mounted against the existing order. This challenge was not done in a form of counter-application in terms of the rules of this court and as a consequence, I am not in a position to deal with the defence. It follows that the challenge on jurisdiction based on the new facts cannot be sustained.

[13] It follows that; therefore the applicant has discharged the *onus* showing an existing order which has not been complied with.

[14] In opposing this application, the respondents also raised points related to the non-compliance with the *ex parte* application. The challenge I have with those points is that they did not bring a counter application to either review or set aside the order based on the circumstances set out in the papers. I am not in a position to consider the new facts in the absence of the challenge, in terms of the rules, of the existing order.

[15] Accordingly, I am bound to consider the papers within the four corners of the pleadings, which only relate to the applicant's application and the existing spoliation order.

[16] I need not consider the prayer by the respondent that the legal representative of the applicant must be ordered to pay the costs out of his pocket because the applicants have succeeded in their case.

[17] Having considered the papers filed of record and submissions made, it is ordered that:

(a) The ordinary rules and forms of service are dispensed with so as to hear this matter, as one of urgency;

(b) The first and second respondents are in joint civil contempt of the interim order dated 24 February 2022, handed down by the District Magistrate for Ekurhuleni North held at Tembisa;

(c) The first respondent and second respondents are ordered to vindicate the aforesaid spoliation order and give immediate peaceful and undisturbed possession and access to the property situated at corner West Road and Fifth Street, Midrand Industrial Park commercially known as Sign House and to do all things necessary to give effect thereto;

(d) The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be excused on a party and party scale.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 11 March 2022

DATE JUDGMENT DELIVERED: 19 January 2023

APPEARANCES

Counsel for the Applicants:	Adv L C M Morland
Instructed by:	Rudie Kok Attorneys
Counsel for the Respondents:	Adv A Berkowitz
Instructed by:	Freyson Attorneys