

IN THE LAND COURT OF LESOTHO

HELD AT MASERU

LC/APN/30/18

In the matter between

MKM MEMORIAL PARK

1ST APPLICANT

SIMON LEBUAJOANG THEBE EA KHALE

2ND APPLICANT

AND

LERIBE POLTRY ASSOCIATION

1ST RESPONDENT

MANKA HOLDINGS (PTY) LTD

2ND RESPONDENT

LAND ADMINISTRATION AUTHORITY

3RD RESPONDENT

THE LAND REGISTRAR

4TH RESPONDENT

COMMANDING OFFICER (Maputsoe Police)

5TH RESPONDENT

THE ATTORNEY GENERAL

6TH RESPONDENT

HANIF MOOSA

7TH RESPONDENT

NARGINS MOOSA

8TH RESPONDENT

HOSEN KARIM

9TH RESPONDENT

ZUBAIR KARIM

10TH RESPONDENT

JUDGEMENT

CORAM: Banyane AJ

Date of Hearing: 14/11/19

Date of Ruling: 18/11/19

Summary

Contempt of Court - committal to jail - requisites of contempt - standard of proof - whether the applicant should prove the essentials on a balance of probabilities or beyond reasonable doubt - applicant failing to discharge the onus cast on him to establish non-compliance with the order - application dismissed.

Annotations

Cited cases

Ps Ministry of Foreign Affairs & International Relations C of A (CIV) 52 /18,

Ratsiu v Principal Secretary Ministry of Forestry C of A (CIV) No. 9 of 2017

Maphike V Pierre-Yves Sachet& 10 Others C of A (CIV) 4 of 2019

Theko V Commissioner of Police & Another LLR-LB 1991-92 p239

Meisi Nkoe v Masupha C of A (CIV) No.42 of 2016

Lebesa V Motjoka CIV/T/325/11

Fakie V CCII Systems (Pty) Ltd [2006] SCA 54

Krishna V Pillay 1946 AD 946

Books

Herbstein & Van Winsen; the Civil Practice of the High Courts of South Africa, 5th Editions, Vol II, Juta & Co 2018

Statutes

The Land Court Rules 2012

Introduction

[1] This is an application for committal of the respondents to prison for alleged defiance of an interim interdict granted by this Court on the 03rd

October 2019 barring the respondents from proceeding with construction works on a certain plot identified as No. 23123-040, situated at Maputsoe, in the Leribe District. This plot is the subject matter of the dispute in the main application.

[2] The applicants in the main application seek cancellation of transfer of rights in favour of the 2nd respondent who now holds a lease over this property, an order declaring the applicants as owners of this plot and an interdict. The 07th to 10th Respondents were later joined by consent, as directors of the 2nd respondent in this matter.

[3] Perhaps before proceeding to deal with the contempt application filed by the applicant, it is relevant, to bring to the fore the fact that; When I first became seized with the matter in July 2019, I dealt with an application for reinstatement, apparently because the application had been struck off the roll. A dummy file was presented before me because the original file reportedly went missing. An affidavit by the assistant registrar had been filed in this regard. Mr Mkhawana who appeared to move the reinstatement application told the Court that Adv. Ratau for the respondents does not oppose the application, it was accordingly granted. Matter was then postponed to 22/07/19 for a pre-trial conference. Mr Ratau never appeared and the matter was further postponed to other dates as reflected in the Court's file.

The contempt application

[4] In an application filed in this regard, the applicants aver that the 2nd, 7th to 10th respondents never ceased construction on the disputed plot despite the order granted by this Court. The respondents controverts the applicants' averments by saying the Construction on the disputed plot

ceased upon their receipt of the order of Court, that they however continued with construction on the other adjacent plots; 1039,162,167 owned by the respondents and another company, Diamond Ring Investments(Pty) Ltd.

The Law on contempt

[5] Contempt of Court is dealt with under rule 115 of the Land Court Rules. It reads;

“ where the court has given judgement against any party and the party fails to comply with the judgement within the time specified in the judgment, the judge may, on the application of a party, summon such a party to appear before the judge to answer why he has failed to comply with the judgement.

115(2) if such party fails to satisfy the judge that the failure to comply with the judgement was due to no fault on his part, the judgement may order the party’s detention until the judgement is enforced or for a period of six months, whichever be shorter period.

[6] This Rule in my view envisages enforcement of a final judgement, which is not the case before me. I cannot therefore fault the applicants for filing what would be an ordinary application for civil contempt, but for the heading “originating application” in an application for committal of jail for contempt of Court”. My understanding of the Rules of this court is that an originating application is an application that initiates litigation between parties in terms of Rule 11. Any other interim or interlocutory application envisaged under Rule 24 and 26, cannot in my view, be termed an “originating application”. That notwithstanding, the matter for consideration before me in the application for committal to prison for contempt and not the form of application, but the substance.

[7] It is trite that in a contempt application, the applicant bears the onus of proving the requisites of contempt, namely;

- a) The existence of the order of court
- b) Its service or notice to the alleged contemnor
- c) Non compliance
- d) Wilfulness and mala fides on the part of the respondents. Herbstein et al 5th ed. p 1109, **Ps Ministry of Foreign Affairs & International Relations C of A(CIV) 52/18, Ratsiu v Principal Secretary Ministry of Forestry C of A(CIV) No. 9 of 2017 , Fakie V CCII Systems (Pty) Ltd [2006] SCA 54, Maphike V Pierre-Yves Sachet & 10 Others C of A (CIV) 4 of 2019(para 63)**

[8] Contempt of Court has been categorised as a crime that violates the dignity, repute and authority of the Court. The criminal standard of proof thus applies in determining the question whether the above essentials have been proved. **Fakie V CCII Systems (Pty) Ltd [2006] SCA 54**. It was stated in this case that where the applicant seeks committal of the contemnor for deliberate disobedience of an order of court, there should be conclusive proof supplied by the applicant on these essentials and where there exists doubt about the essentials, a person cannot be committed to jail (para **19,42,43 of the judgement**)

[9] I turn now to the averments that allegedly triggered this contempt application. They appear at paragraphs 3 and 4 of the "*originating application in an application for committal of jail for contempt of court*" earlier referred to. This was filed on the 28th September 2019. They are briefly stated as follows;

Paragraph 3;

“On the 3rd October 2019, the applicants in the main application applied for an interlocutory interdict to stop the 2nd respondent proceeding with construction on the disputed plot until finalisation of the main application. This honourable Court granted such application and issued interim interdict against the 2nd respondent. The Rule is returnable on the 28th October 2019 and a pre-trial conference in the main matter is going to be held on the same date.

Paragraph 4:

“The 2nd respondent was served with an interim order in the same date and the 2nd respondent later filed an application opposing the interim order but their application failed. The 2nd respondent has however defied her ladyship’s order as the construction is seemingly still on-going on the disputed land”

[10] The respondents at paragraph 3 of their answer to this application controvert these averments and plead on the contrary that the respondents have not defied an order of Court because construction on the disputed plot has since been suspended after the interim order was granted. They aver that construction initially extended to the four plots **23123-1039, 23123-1040**, (hereafter referred to as 1039 and 1040 respectively), **162** and **167**, but has ceased on 1040 consequent to the interim interdict. They attached an aerial map on the answer depicting the location of the plots and they aver that, at the time the map was prepared by the Land Administration Authority, plots 162 and 167 had not yet been surveyed, but they are adjacent 1039 and 1040. They respondents further aver that the construction began sometime in June 2019.

[11] The respondents, in this answer also brought up certain aspects of the dispute, which in my view should be reserved for trial in the main application. They aver that the applicants have no right over plot 1040,

because the plot referred to in the deed of sale on which they rely in the main application fits the description of plot 1039 as depicted on the map. They aver that for this reason, the interim order is prejudicial to them as the holders of right over 1040 because the applicant has no connection to this plot.

[12] In their reply, the applicants made further allegations that the 2nd respondent has built a brick wall surrounding both 1039 and 1040 and that construction still continues on both these plots. The applicants vigorously deny existence of two other plots on the area. They attached photographs, which they aver, reflect the construction stages on the area as at the 29th October, 5th November and 10th November 2019 respectively.

Arguments and analyses

[13] From the highlighted averments, it appears that the 1st and 2nd requirements for contempt are not controverted. The only issue for determination is whether the third element, non-compliance, has been established by the applicants.

I proceed to consider arguments in relation to this disputed aspect.

[14] As gleaned from the contempt application, the applicant made a brief statement that “the respondents defied the order because seemingly construction is still ongoing”. No details nor description were given by them as to what type of construction existed on the disputed plot prior to the issuance and service of the interim order and what existed after the service of the order. The applicants then sought to amplify this statement by attaching the photographs in their reply filed on the 14th November 2019, the date of hearing of the application.

[15] It was further argued on behalf of the applicants that the respondents deliberately defied the order of court and a clear indication of the defiance appear at paragraph 11 of the application (by the respondents) that sought to suspend the interim order. This paragraph reads;

“The respondents have not even a prima facie right entitling them to the interim interlocutory relief, and the applicants are entitled to go on with construction as full title holders of the plots upon which construction is being carried out despite the challenge in the main relief which is bound to fail”

[16] Mr Ratau contends on the other hand that the photographs (referred to at paragraph 14 above) should be disregarded by the Court because the reply was filed out of the time specified by the Court, that is, the 1st November, and as such the averments contained in the respondents' answer should be accepted. He relied on the case of **Theko V Commissioner of Police & Another LLR-LB 1991-92 p239** in support of his contention that where a reply has not been filed, the averments in the answer must be taken to have been admitted.

[17] This position of the Law is correctly stated by advocate Ratau, however, the peculiar circumstances of this case, which I will shortly describe, render the applicants' situation different. These circumstances are described immediately below.

[18] The contempt application was served and filed on 28th October 2019 at 12; 06, before counsel appeared before Court for a pre-trial conference. This was also the return day for the rule nisi issued on the 03rd October. Mr Mkhawana insisted that the application should be heard right away despite

the fact that the respondents had been served a few minutes back. It became apparent that the respondents resisted the application. Mr Ratau was then directed to file his answer on the contempt application, and Mr Mkhawana to file his reply, if any, by the 1st of November 2019. The hearing of the application was then scheduled for the 08th November 2019. When Mr Ratau asked that a pre-trial conference be held as directed by the Court, Mr Mkhawana opposed this saying the contempt application has to be disposed first.

[19] Mr Ratau aired his view that the applicants are deliberately delaying the hearing of the main case, and this causes prejudice to the respondents who are title holders of this plot and wish to develop same.

[20] It is significant to note that before the filing of the contempt application, both counsel agreed that the main case should be speedily disposed and that we should prepare for hearing of the main case hence, on the return day, neither the discharge or confirmation of the Rule was dealt with nor was the application filed by the respondents seeking suspension of the Rule formally dealt with. In view of this agreement, I directed that while we pursue the contempt, a preparation of the main trial should go ahead by holding a pre-trial conference

[21] After a few minutes adjournment requested by Mr Mkhawana, he withdrew as the applicants' attorney. No reasons were advanced for this. One Mr Abubaker sought to address the Court after Mr Mkhawana's withdrawal and Mr Ratau correctly objected to his *locus standi* as he is not a party in these proceedings. I directed that the applicants should appear before Court on the afternoon of the same day, so they could be informed about the withdrawal as well as the Court's directives on the dates for filing of the pleadings and the date appointed for pre-trial conference. Mr Thebe

ea- khale (2nd applicant) did appear and said he would engage another counsel. He was accordingly apprised of the minutes in the Court's file.

[22] On the 08th November, the date appointed for arguments on the contempt application, Advocate Nteso filed a notice of appointment. The matter had to be postponed again, despite opposition of the postponement by Respondents' Counsel, for Mr Nteso to familiarize himself with the case. At this time, the respondents' counsel had already filed his heads of argument. The matter was postponed to 14th November 2019. On this day, Mr Nteso filed and an "originating" application for joinder of the 7th to 10th respondents and an amendment of the reliefs sought in the contempt application. The amendment sought inclusion of a prayer to the effect that: "*the 2nd, 7th-10th respondent be committed to prison for being in contempt of Court*". As indicated earlier, a reply was similarly filed on the hearing date of the application.

[23] It is clear from the above that the reply could not be filed within the stipulated time by virtue of withdrawal of applicants' attorney and engaging of new counsel in the matter. I will therefore not place emphasis on the filing date, but the contents of the reply, to which I now turn.

[24] In a contempt application, the applicant is required to set out clearly in the application, such grounds as will enable the Court to conclude that the onus resting on him of proving contempt has been discharged. (**Herbstein 5th Edition p 1103**). The applicant must show that the respondent has failed to comply with the Court's order. While It is true that the land litigation is inquisitorial and *Sui generis* (**Meisi Nkoe v Masupha C of A CIV**), this does not absolve the parties of their duty to plead the necessary facts. It is peremptory that parties should plead sufficiently, the material facts on which they rely. This is for the purpose of

informing the other party the case they have to meet and to enable them to respond accordingly as well as to bring clarity on the nature of dispute and issues that the Court is invited to resolve between the parties.

[25] I have already referred to the single unsubstantiated allegation on contempt and that this statement was fortified by the photographs attached on the reply. Regrettably, the respondents were denied an opportunity to respond to such 'evidence' because, as correctly submitted by respondents counsel, the foundation of the contempt application seems to appear in the reply.

[26] One may assume that the photographs were not available before the filing of the contempt application on the 28th. A question that arises is this; if these photographs were intended to illustrate that construction on the plot continued after the order, on what basis was the application made in the first place? I am merely posing this question to emphasise the unavailability of sufficient details in the contempt application on the nature and extent of the Construction prior and after the order was granted. Be that as it may, the central inquiry is whether these photographs prove non-compliance on the part of the respondents.

[27] The applicant attached 3 photographs. They say one was taken on the 29th October 2019, and at this time, only three steel poles had been erected. This is indicative of the initial stages of construction. The other photograph one was taken on the 05th November 2019 and the other was taken on 10th November 2019. They were marked MKM 1, 2 & 3 respectively. The picture that the applicants seek to paint is that this construction took place subsequent to service of the order on the respondents. It is significant to note however that they pleaded different dates of service. In their reply, the applicants say the order was served on

the 28th October, while in the contempt application they say it was served on the 03rd October.

[28] Notably too, there is nothing on the pictures indicating or reflecting the date on which they were snapped. This is very material in the determination of the question at hand, particularly because the nature and extent of construction that prompted the interim interdict, and the contempt application was not described. The averments in the interlocutory interdict application were also very general and lacked specificity. They are as follows;

“The applicants have established a clear right in the main application and the applicants are apprehensive that the construction by the 2nd respondent on the plot in issue is still on-going. The applicants therefore stand to suffer irreparable harm and /or damages should this matter not be given an urgent relief because the matter in the main application may be take considerable time before it may finally be determined”

[29] Of significance in this inquiry is the question whether the construction is on 1040 or the adjacent plots. Although the applicants deny existence of the plots 162 and 167, the aerial map indeed confirms the respondents’ version that there ‘is’ vacant, unsurveyed Land adjacent to plots 1039 and 1040. Mr Nteso submitted that the photographs are conclusive on non-compliance.

[30] On close examination of these photographs, plot 1040 as depicted on the aerial map is a plot near the wall erected around a site on which there appears to be some warehouse structure. I also observe from these pictures that the steel poles are concentrated on what appears to me as the vacant plot on the map, and not on the plot near the wall, which is

1040. Even if I were to conduct a loco inspection to establish whether construction continues on 1040 too, the difficulty that I would face would be to distinguish construction that existed prior to the granting of the order, from the one allegedly done after the order because material facts in that regard have not been pleaded. Had the applicants disclosed in their pleadings the nature and extent of construction before the issuance of the Court order, it would be easy to compare that version against these pictures. Absent such averments, the pictures are not conclusive of non-compliance

[31] It is a trite principle of our Law following **Krishna V Pillay 1946 AD 946** that he who alleges carries the burden of proof on assertions made by him (**Lebesa V Motjoka CIV/T/325/11**). I will therefore content myself with the map and the pictures supplied by either party.

Disposition

[32] While am of the view that the respondents are not entitled to pursue any developments on the disputed plot regardless of how frivolous they perceive the applicants' case to be, this did not absolve the applicants from setting out sufficient facts explaining the time at which construction began, its extent before and after the issuance of the order for purposes of comparison against the photographs supplied, particularly because when they filed the contempt application, they were already aware of the respondents' allegations on the time the construction began.

[33] In the absence of such evidence, I am not convinced that the third element of the crime of contempt of Court has been proven beyond reasonable doubt. Differently put, I have come to the conclusion that the applicants failed to discharge the burden of proving beyond reasonable

doubt that the respondents failed to comply with the interim order. The respondents on the other hand have provided evidence raising a reasonable doubt on the alleged non-compliance.

[34] In the result, the following order is made;

- a) The application for committal to prison for contempt is dismissed.
- b) There is no order of costs.

P.BANYANE
(ACTING JUDGE)

For Applicants: Adv. Nteso

For 1st, 2nd, 7th to 10th Respondents: Adv. Ratau