IN THE LAND COURT OF LESOTHO

HELD AT MASERU **LC/APN/16/2018**

In the matter between

TUMORE CIVILS & BUILDING CONSTRUCTION (PTY) LTD **APPLICANT**

AND

MASUPHA MAJARA	**1ST RESPONDENT**
MAHLEHLENYANE MOLETSANE	**2nd RESPONDENT**
O/C MABOTE POLICE STATION	**3RD RESPEODNET**
O/C CENTRAL CHARGE OFFICE	**4TH RESPONDENT**
COMMISSIONER OF POLICE	**5TH RESPONDENT**
ATTORNEY GENERAL	**6TH RESPONDENT**

CORAM: BANYANE AJ

HEARD: 18/09/19

DELIVERED: 25/09/19

SUMMARY

Application for committal in prison for contempt of Court-the nature of the act of contempt-prerequisites of-standard of proof-applicant bears the onus to prove non-compliance beyond reasonable doubt-insufficient evidence

implicating the alleged condemners to the contempt complained of - application dismissed

ANNOTATIONS

Books

Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa; 4th Edition, 1997, Juta & Co

Cases

Masupha V Nkoe C of A (CIV) No. 32 of 2016

Motumi V Shale C of A (CIV) No. 32 of 2017

Ps Ministry of Foreign Affairs and International Relations V The Minister of Home Affairs & Others C of A (CIV) No. 52/18

COMPOL V Lineo Manamolela & Others C of A (CIV) No.40A of 2014

Fakie NO V CCII Systems (Pty) Ltd 2006(4) SA 326 (SCA)

S V Mthewa 1972(3) SA 766

Rex V Sello Jabavu Paamo CRI/T/98/12

JUDGEMENT

Introduction

[1] This is an application for contempt of Court in respect of an interim order granted by **Sakoane J** on **18/06/19**. The applicant, a lease-holder of a certain plot identified as No. **14262-003** situated at Ha Foso in the Berea District has sued the respondents in the main application, seeking final and interim orders. The final orders sought include; an order declaring him as the lawful owner of plot number **14262-003** and an order

interdicting the respondents from interfering with his use and enjoyment of the described plot.

[2] In the interim, the applicant sought an order, interdicting the 1st and 2nd respondents from "*disrupting his preparations and development processes on the plot pending the final determination of this application"*. Sakoane J granted this relief. An order in this regard forms the crux of this contempt application.

[3] Parties are on common ground that the 1st and 2nd respondents were aware of the existence of the court order and that they had been compliant with the order at least until April 2019. What triggered this application are essentially two incidents of April 2019. It is alleged by the applicant that these incidents were calculated to violate an order of Court so granted. The incidents are; a) the first and second respondents co-authored a certain letter to the police seeking intervention against Mr Tlelai, b) the attack and destruction of the applicant's property subsequent to the writing of this letter.

[4] The respondents vigorously opposed this contempt application, by firstly denying that the letter they wrote constitutes contempt of court, and secondly that they never participated in the destruction of the applicant's property nor were they even present at the scene of crime at the material time. In other words, they vehemently deny that they failed to comply with the Court Order in question.

The procedure adopted

[5] Before I proceed to set out the issues in this case, it is apposite to state that; in view of the dispute of facts arising out of the Parties' pleadings, I sought guidance from the Land Court Rules 2012 on the approach to be adopted in handling this contempt application. Rule 115 sets out the proper procedure to be followed where a party fails to comply with a judgement. Regard being had to the inquisitorial and *sue generis* nature of Land litigation as stated in the case of **Masupha V Nkoe C of A (CIV) N 42 of 2016,** I invoked this rule in dealing with this application and thus directed that oral evidence be led. This Rule, suggests, in my view that oral evidence should be heard regarding allegations on non-compliance. In my view, it also speaks to simplicity and informality of legal procedures in the Land Courts echoed under rule 3(3) which reads;

When applying these rules full regard shall be had to informality of legal proceedings, accessibility of justice, and affordability of judicial services".

[6] *Rule 115 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 judgement, the judge may, on the application of the party, summon such a party to appear before the judge to answer why the party failed to comply with the judgement…"

Issues

[7] I proceed to identify the main issues that arise in these proceedings. They are;

a) Whether the respondents' act of seeking intervention of the police during the pendency of the main application violates the interim order granted.
b) Whether the respondents participated in the acts that resulted in damage of the applicant's property thereby violating the court order in question.
c) I propose to propose to deal with them seriatim.

Analyses

The letter of the 11th April 2019

[8] As stated earlier, The 1st and 2nd respondents co-authored a letter dated the 11th April 2019, in terms of which they were seeking intervention of the police in relation to complaints by members of the community that Mr Tlelai, (the director of the applicant) was fencing in their fields. It is prudent to reproduce the letter at this very juncture; Its fair translation reads as follows;

Khopane
Ha Foso
11.04.19

Mabote police

11.04.19

RE: unlawful occupation of Land at Ha Foso by Tumo Tlelai

Sir;

With this letter I wish to notify you that there is a person who is disturbing peace of people at Ha Foso.

This person has arrogated to himself a quarry of the people without approval. This time around he is fencing the people's fields without any agreement with them.

We tried to warn him but he ran to the Courts of Law. We went there several times but he did not show up. We are surprised that he continues without the case proceeding. This time around he continues to fence the fields of the people.

We will be appreciative of your help.

M. Moletsane Coucilllor at Ha Foso

Date stamp and sign: headman of Ha Foso Masupha Majara.

[9] My reading of the letter, reflects; a) the respondents' displeasure or disapproval of Mr Tlelai' failure to submit to their authority as community leaders, b) disappointment in the judicial process that the case is not heard but Mr Tlelai's actions continue unabated, hence the belief that the police may assist the disgruntled community members. c) The letter also reflects their ignorance about Court procedures or inability to distinguish the various stages of hearing.

[10] Of significance however, is the question whether this letter is tainted with contempt, differently put, whether there is any suggestion, either from the act of writing the letter itself and the contents thereof, that the respondents intended to violate the order of Court under review.

In order to answer this, it is pertinent to first find out the nature of contempt and its legal requirements.

The incidence of the burden of proof in contempt proceedings

[11] Both counsel referred this Court to the case of **Fakie NO V CCII systems (pty) Ltd 2006(4) SA 326 (SCA),** which has consistently been followed in our jurisdiction (see **Ps Ministry of foreign affairs and international relations V the Minister of home affairs & others C of A (CIV) No. 52/18, COMPOL V Lineo Manamolela & others C of A (CIV) No.40A of 2014** to argue the nature of contempt and the essential requirements for same. They agree that it is a crime to unlawfully and intentionally disobey a court order.

11.1 The essentials for a contempt application to succeed are three-fold; namely: **a)** that an order of Court was granted against the respondents, **b)** the respondents were served with the order or notified/informed of it, and lastly, **c)** non-compliance with the order. See Herbstein p825. The applicant is obligated to prove these requirements on a standard of "proof beyond reasonable doubt". As regards the last requirement, where non-compliance is proved, the test in determining whether the act complained of amounts to contempt is wilfulness or *malafides* on the part of the alleged contemnor. The applicant is not however required to prove the respondent's state of mind to establish liability for contempt. On the contrary, the evidential burden shifts to the alleged contemnor to disprove presence of bad faith and wilfulness on his part**. Fakie (supra at paragraphs, 6, 9, 41 and 42).**

[12] As indicated earlier, it is common cause that the order was granted and that the respondents were aware of its existence, that is to say; Parties are in agreement in respect of the first two prerequisites. The bone contention is on the last requirement; non-compliance. According to the applicant, the respondents authored the letter referred to above and damaged the applicant's structure, poles and fence, with a clear intention to defy the order of Court.

[13] According to the respondents, they simply wrote this letter to respond to the public complaints about Mr Tlelai's interference with their fields and they did so out of respect of the order that they should not interfere with Mr Tlelai.

[14] I will first deal with the argument by the applicant's counsel that the writing of the letter was a clear indication that the respondents disregarded the authority of Court because the police had no power to intervene where a dispute has already been referred to Courts of Law.

[15] The veracity and or reasonableness of the respondent's story as regards their intent of writing the letter, should, in my opinion be judged against, the incidents that prompted the main application, the reason behind writing this letter, the contents of the letter itself, and lastly, the incidents of the 19th April 2019.

[16] I will start with incidents that led to the institution of the main application. Relevant averments in this regard appear at paragraph 7 of the originating application. They are that; in May 2018, the respondents frustrated the applicant's effort to begin construction or development on the site by inhibiting his truck to reach the plot in question for purposes of delivering building material. The interim order in question was thus granted on this basis. As stated earlier, the respondents remained compliant to this order.

[17] Moving to the question of what prompted the writing of the letter, it is uncontroverted that the public complaint resulted in this letter. The

writing of the letter is thus based on a different set of facts; that is to say; some community members lodged their grievances about Mr Tlelai to the respondents. They then referred the matter to the police because this, reasonably, in their view constituted a new dispute altogether. If they had intended to disregard the order, they could have personally confronted him, which would clearly amount to contempt.

[18] I proceed to the contents of the letter. The letter itself does not in any way suggest defiance of the order but in my view, they sought to balance obedience of the interdict against them on the one hand and assisting the community on the other.

[19] The incidents of the 19th, to be dealt with below also substantiate the respondent's story that community members were disgruntled, whether rightly or wrongly, with the development, hence the attack on the 19th.

[20] I turn at this point to the incidents of the 19th as one of the actions which, if the applicant's evidence is found to be reliable, amounts to contempt of court. In this regard, I will deal with the oral evidence before Court.

Oral evidence

[21] On the incidents of the 19th April 2019, the night-watchman, Mr Monnapula, an employee of the applicant testified that he was in the guardhouse around 6;00 am when a sizeable number of people arrived on the premises and ordered him to leave the guard house because they wanted to set it alight. He obliged. They then sprinkled petrol all over the

structure and set it alight. They broke windows of the structure too after which they proceeded to cut the surrounding barbed wire.

[22] He testified that, among the many people there, he identified 2nd respondent and he subsequently conducted investigations which confirmed his identification. He told the court that this person whom he later knew as the 2nd respondent was tall and stout but it was his first time to see him. He further alleges that this man pushed him aside and he fell and injured his shoulder.

[23] Under cross examination the witness revealed that he has worked at the area for about 3 three years but does not know anyone in that village.

[24] The respondents deny presence on the scene of crime or any involvement in the said acts. In essence, the 1st respondent denies allegations that he failed to comply with the order of Court. He testified that on the 11th April 2019, he received a complaint by members of the public that Mr Tlelai was fencing in their fields, he wrote to the police to seek intervention to avoid interfering with Mr Tlelai; that he never was at the scene of crime on the day in question or any other day for that matter.

[25] The second respondent similarly denies his involvement in the criminal acts on the day in question. His evidence reveals that; he had prior to this day, had an encounter with Mr Tlelai about quarrying without the chief's authority. He confirms the incidents that led to the writing of the letter as well as the intent behind the writing of that letter.

[26] Applying the same standard of proof, the applicant bore the onus, of proving beyond reasonable doubt, the presence of the 1st and 2nd respondent on the scene, and their participation in the alleged crimes because these crimes form the basis of the contempt application. The determination of this question depends on the evidence presented before court. I will right away deal with the evidence from the pleadings as well as viva voce.

Material Contradiction in oral evidence and pleadings

[27] The respondents' counsel challenge the reliability of the night-watchman's evidence. He argues that the watchman is not a credible witness, regard being had to the contradictory versions he gave in his affidavit and during oral evidence. The court was referred to paragraphs 6 and 7 of the founding affidavit deposed by Mr Tlelai, supported by the night-watchman in the Contempt application.

[28] At paragraph 6, the deponent, Mr Tlelai who was not present on the scene alleges that the mob was led by both the 1st and 2nd respondent; that the guard house was set alight whilst the guard/night-watchman was still inside and he was rescued by the 2nd respondent.

At Paragraph 7 it is averred that the night watchman identified the 2nd respondent as his rescuer while the 1st respondent led the mob to perpetrate further criminal acts on the site.

[29] Notably, the night-watchman filed a supporting affidavit confirming the averments contained in Mr Tlelai's affidavit. In his evidence in chief, the guard/night-watchman summersaulted and said he only identified the 2nd respondent on the scene and that he ordered him to come out of the guard house because they (the mob) wanted to burn it down. Effectively he

disavowed the contents of the affidavit to the effect that the guardhouse was blazed whilst he was still inside and that 1st respondent was also part of the mob.

[30] The applicant's counsel, without reconciling the disparity in the evidence, argued that the court should ignore what is contained in the founding affidavit and consider only the oral evidence led because the oral evidence overrides the contents of such an affidavit. The problem that I have with this approach is the nature of the statement that applicant moves this court to ignore. These are sworn statements contained in an affidavit and they constitute evidence and accordingly carry weight. Even in case of an originating application and answer, which are not required to be accompanied by an affidavit, it has been held In **Motumi V Shale C of A (CIV) No. 32 of 2017** (para 9) that they are pleadings whose purpose, is to bring clearly to the notice of the Court and the parties to an action, issues upon which reliance is to be placed. I conclude that they cannot simply be ignored because these allegations are the nub of the applicant's case on non-compliance. In addition, they go to the core of the witness's credibility on identification as I will demonstrate immediately below.

Reliability of the identification

[31] The applicant's counsel argued that the respondents have been positively identified on the scene of crime and as such their actions amounted to deliberate non-compliance with the order.

[32] The respondents on the one hand argue that the guard is falsely implicating them in these crimes because they had reprimanded Mr Tlelai about his actions of quarrying without authority so they are simply made scape goats for other people's actions.

[33] I thus proceed to deal with reliability of the guard's evidence on whether the respondents were present on the scene of crime. At the heart of this determination is the question whether; on the evidence before court, it can be said there is proof beyond reasonable doubt that the 1st and 2nd respondents partook in the commission of arson and malicious damage to the applicant's property, thereby wilfully and with bad faith frustrating the application's construction preparations and clearly in contravention of the interim order of Court.

[34] The case of **S V Mthewa 1972(3) SA 766** at p 768, paragraphs A, B and C highlight the factors to be taken into account in testing the reliability of observation of an identifying witness, Holmes JA, remarked as follows;

Because of fallibility of human observation, evidence of identification is approached by the Courts with some caution…the reliability of his observation must be tested. This depends on various factors, such as lighting, visibility, eyesight, the proximity of the witness; his opportunity for the observation, both as to time and situation; the extent of his prior knowledge of the accused, the mobility of the scene, corroboration; suggestibility; the accused's face, voice, build, gait, and dress, the results of identification parade, if any. The list is not exhaustive. These factors are not individually decisive, but must be weighed against the other, in the light of the totality of evidence, and the probabilities.

[35] The guard's testimony is regrettably very sketchy on his identification of the perpetrators. I gather from his evidence that if he was forced to get out of the guard house, he must have been shocked and terrified to see a crowd in front of him. He ought to have given further details on how long he had opportunity to observe the 2nd respondent, for how long was he

close to him, where was he throughout the spectacle?, what exactly did the 2nd respondent do that "stood him out" from the crowd and attracted his attention to be focused on him? Significantly, this is a person unknown to him just like the rest of the group.

[36] It was stated in **Rex V Paamo CRI/T/98/12** that the *previous knowledge of the person sought to be identified is one of the most important factors in identification in that probability of an accurate description is much increased. The important factor is the decree of previous knowledge and opportunity for the correct identification having regard to the circumstances in which is it made.*

[37] The factors stated in the cited authorities were material in this case for the reason that the respondents were persons unknown to the guard prior to the incident. They ought to have been sufficiently proved. Over and above this, an explanation for the contradictory versions ought to have been supplied.

Conclusion

[38] In conclusion, I will deal address both the letter and the acts of the 19th. The allegations that the applicant's night-watchman was attacked by an angry mob significantly backed the respondents' story that indeed the community, whether rightly or wrongly were upset about the developments on the site. What could be a better way of addressing the complaint than by referring it to some authority to intervene because they could not? I cannot find any bad faith on the part of the respondents nor that the letter in any way suggest that they instigated the community to rebel against the order of Court. It is my considered opinion that the impugned letter was not in any manner intended to frustrate the order of Court, which for

emphasis, was issued against the respondents only. The respondents cannot be crucified for not advising the community to approach the Court to seek an interdict or intervention in these proceedings because as I have said earlier, from the tone of the letter, it can be inferred that they are not conversant with court processes or stages in trials. How would they even be expected to know remedies available to persons aggrieved or prejudiced in the enforcement of an order of Court? This letter cannot therefore lead to the conclusion that the respondents partook in the crimes that occurred on the 19th nor that they are responsible for such acts as suggested by Applicant's counsel.

[39] As regards the incidents of the 19th April 2019, I am unable to find the night-watchman as a credible witness. No weight can therefore be attached to his evidence on identification of the 1st respondent because in the first place he gave contrasting versions in his founding affidavit and evidence in chief and in the second place, failed to give a detailed a satisfactory account of the identification.

[40] Taking all circumstances into account, the respondent's presence and or participation was not proved to that degree of certainty which the Law demands and upon assessment of the evidence as a whole, I do not find the guard's evidence reliable to support a conclusion that the respondents committed the said acts. I should hasten to add that, I should not be understood to mean that the respondents are found not guilty of Arson and malicious damage to property or exonerated from prosecution should the Police have enough evidence to prosecute whoever is responsible for the said acts. All I am simply saying is that for purposes of this case, what is presented before Court is not reliable or enough to support a finding of contempt in the form of criminal acts complained of.

[41] In light of the foregoing, I have come to the conclusion that the writing of the letter does not amount to non-compliance with the order.

[42] Similarly, non-compliance in the form of the criminal acts complained of has not been sufficiently proved. In other words, the culpability for contempt has not been established beyond any reasonable doubt.

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

a) The contempt application is dismissed.

b) There is no order as to costs.

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P.BANYANE (Acting Judge)

For Applicant: Advocate Mariti

For 1st and 2nd respondents: Advocate Ntoko assisted by advocate Khoete