FILING SHEET FOR EASTERN CAPE JUDGMENTS

ECD:3984/09

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

PARTIES: **GLOBAL ENGINEERING UK LIMITED** **1ST APPLICANT**

MARK DENSON **2ND APPLICANT**

And

JOACHIM WILLEM WALLACE DEVELOPMENT **RESPONDENT**

REFERENCE NUMBERS -

Registrar : **ECD: 3894/09**

DATE HEARD: **18 December 2009**

DATE DELIVERED: **21 January 2010**

JUDGE(S): **SANDI J**

LEGAL REPRESENTATIVES -
Appearances:

- for the Applicant: **Adv. Kincaid**
  for the Respondent: **Adv. Meyer**

Instructing attorneys:

- Applicants: **N. Dullabh Attorneys**
- Respondent**:** **Nolte Smit Attorneys**

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Reportable

Case no: 3984/2009
Date heard: 18/12/2009
Date delivered: 21/01/2010

In the matter between:

GLOBAL ENGINEERING UK LIMITED FIRST APPLICANT

MARK DENSON SECOND APPLICANT

vs

JOACHIM WILLEM WALLACE RESPONDENT

JUDGMENT

SANDI J:

[1] Arising from an order for mandament *van spolie* granted *ex parte* by Kroon J on 20 November 2009, the applicant launched an application against the respondent for contempt of court.

[2] The order issued by Kroon J is in the following terms:

> "1. That a *Rule Nisi* do hereby issue in terms of which the respondent is to show cause on Thursday, 10th December 2009, at 10h00, why the following order should not be made final:
>
> 1.1 that the Respondent return to the Applicant's possession the motor vessel previously known as Shane and morefully described as an 11 meter

Sportfisher Buttcat with 2 x 250v Evinrud E-Tec's outboard motors:

1.2 that the Respondent return to the Applicant's possession, the following equipment:

1.2.1 tiagra rod and reel combination;
1.2.2 2 x tixtrtrl 80b rod and reel combination;
1.2.3 5 x tixtrstp 50/80 rod and reel combination;
1.2.4 a stand up fishing harness;
1.2.5 an assortment of sinking, dropshot, cavitator and pulsator lures approximating 40 in number;
1.2.6 an assortment of jigs approximating 13 in number;
1.2.7 2 x fishing tackleboxes;
1.2.8 2 x fishing tackleboxes;
1.2.9 fishing fillet knives, scissors and pliers;
1.2.10 3 x fishing buckets / harnesses.

1.3 that he pay the costs of this application."

2. THAT the order in paragraphs (1.1) and (1.2) will operate as an interim interdict with immediate effect.

[3] On the return date respondent's counsel, Mr *Meyer*, filed the respondent's answering affidavit from the bar. Mr. *Kincaid*, who appears for the applicant advised me that the respondent had not as yet complied with the order of Kroon J dated 20 November 2009. Mr *Kincaid* filed the application for contempt of court which reads as follows:

"Take notice that application will be made at the hearing of the main application on 10th December 2009 at 10h00 on or as soon thereafter as counsel may be heard for an order in the following terms:

1. Granting the applicant a *rule nisi,* in terms of which the Respondent is ordered to show cause why the following order should not issue:

1.1 That he be declared to be in contempt of the court order dated 20 November 2009;

1.2 That he be sentenced in the discretion of the court accordingly

2. Directing the Respondent to pay the costs of this application.

3. Further and/or alternative relief."

[4] I postponed this application to 11th December 2009 to enable Mr *Meyer* to consider his position in the light of the application

for contempt of court filed by the applicant. The following day Mr *Meyer* handed up from the bar an affidavit deposed to by his Johannesburg Attorney, Mr Nieuwoudt. I deal with this affidavit hereunder.

[5] After having heard argument from both counsel I issued a *Rule Nisi* calling upon the respondent to show cause why he should not be declared to be in contempt of the Order of Court granted on 20 November 2009; why he should not be imprisoned for contempt of court for a period of six (6) months; and why he should not be ordered to pay the costs of the application on the scale as between Attorney and own Client. Furthermore, the respondent was granted an opportunity to file answering affidavits, if any, on or before Tuesday 15th December 2009.

[6] The respondent's answering affidavit was filed on 15th December 2009 and the matter was argued before me on 18 December 2009.

[7] The applicant's case is the following: Though he ordinarily resides in England, in 2008 he became aware that the ski-boat "Shane" was being advertised for sale by a boat building company, (A and G Marine). He inspected the boat with his

friend Mike Kenny of Port Alfred. At that moment the boat was moored alongside a jetty owned by a certain Mr Les Johnson.

[8] The applicant negotiated with one Leendert Van Kempen, an employee of A&G Marine, to purchase the boat. Van Kempen advised the applicant that the boat was the property of the respondent (alias Wally Wallace). Van Kempen told the applicant that he had a mandate to sell the boat on behalf of the respondent. The applicant inspected the fishing equipment that was on the boat. He purchased the equipment because he was satisfied with it. When the applicant returned to England he transmitted funds to A&G Marine for payment of the purchase price for the boat and the fishing equipment. As proof of payment of the purchase price he annexed documents to his founding affidavit which indicated the amounts paid, the dates on which they were paid and the identity of the person/entity to whom such payment was made.

[9] In June/July 2008 the boat and fishing equipment were delivered to the applicant in Port Alfred together with the boat's key. The applicant made use of the boat and equipment for the period that he was in Port Alfred. In late July the applicant returned to England and left the boat in the possession of Van Kempen with instructions that the latter

should perform certain repairs to it. He left for England whilst the boat was moored alongside Les Johnson's Jetty.

[10] On 9 November 2009 the applicant received a telephone call from Kenny in which the latter advised that the respondent had removed the boat from its mooring. Information obtained by the applicant was that the boat would be moved to Cape Town. The matter was reported to the police. One Superintendent Van der Merwe to whom the matter was reported undertook to warn the respondent not to move the boat.

[11] On 14th November 2009, applicant's attorney, Monaghan, received a telephone call from Mr *Meyer*, counsel for the respondent. Monaghan said that Mr *Meyer* told him that he was of the opinion that the respondent was still the owner of the boat as he had still not received payment for it. Advocate *Meyer* said he had been in contact with the liquidators of A & G Marine who confirmed that the boat did not form part of the estate of A & G Marine.

[12] Mr Attorney Dullabh, the local attorney of the applicant, filed an affidavit in which he states that on 20 November 2009 he transmitted the court order to the sheriff in Pretoria for service upon the respondent. On 23 November 2009 respondent's

local attorney, Ms Sandra Amm, advised Mr Dullabh telephonically that she would be filing a notice of opposition to the application. Indeed, the notice of opposition was filed by Ms Amm on the same date whereafter Mr Dullabh served a copy of the order of court dated 20 November 2009 on her.

[13] Mr Dullabh avers that subsequent to the service of the order on Ms Amm he had telephone discussions with her with regard to the respondent's compliance with the court order. Ms Amm advised Mr Dullabh that she had telephonic discussions with her correspondent regarding the return of the boat.

[14] On the other hand, the respondent does not deny that the applicant was in peaceful and undisturbed possession of the boat "Shane" and the equipment referred to in the court order. He also does not deny that he removed the boat and its equipment from the applicant's possession unlawfully.

[15] What the respondent conveys in his answering affidavit is that the property set out in the order is his property. In his affidavit he says the following:

> "I am preserving the boat, which is my property and no prejudice will arise to the applicants. I have the financial means to make up for any loss while the ability of the applicants is unknown and suspect and I own two other boats which is (sic) in Port Alfred"

[16] In his affidavit Attorney Niewoudt states that respondent's counsel, Mr *Meyer*, was of the view that the purpose of the interdict "was that they should not remove the boat to Cape Town or at all".

[17] Further allegations made by the respondent are the following: he acted lawfully by not moving the boat as instructed by the police; the applicant has breached his fundamental right to a fair trial; the applicant usurped the powers of the National Director of Prosecutions by bringing contempt of court proceedings before this court; the applicant's interpretation of the court is erroneous because the court ordered him to comply with the instructions of the police not to remove the boat; that the applicant's case for an interim relief or interdict has not been made out on the papers; it is impossible for the respondent to comply with the court order; that the order issued by Kroon J is void and unenforceable; that motion proceedings are inappropriate in this matter and that it should be referred to trial.

[18] It is common cause that the respondent became aware of the court order issued on 20 November 2009 as well as its terms. It is also common cause that after the respondent became aware of the court order he kept the property referred to

therein in his possession. To date of this judgment the property is still in his possession.

[19] In argument Mr *Kincaid* submitted that the applicant has proved the requisites of contempt of court beyond a reasonable doubt. In this regard Mr *Kincaid* referred me to the judgment of Pickering J in *Uncedo Taxi Service Association v Maninjwa and others* [1998] 2 ALL SA 650 (E) at 661 e-f.

[20] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA326 (SCA) the following was said:

> "By developing the common law in conformity with the Constitution, the reverse *onus* the accused bore in prosecutions such as *Beyers* must now be reduced to an evidential burden (as Mbenenge AJ rightly envisaged in the second *Uncedo* decision). Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and *mala fide* , the offence will be established beyond reasonable doubt: The accused is entitled to remain silent, but does not exercise the choice without consequence. It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and *mala fide* , all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt".

[21] The argument advanced by Mr *Meyer* that motion proceedings are inappropriate to determine contempt of court in a civil dispute is without merit. It fails to acknowledge the binding authority of the judgments of this division given by Pickering J

and Mbenenge AJ, referred to above, which judgments have been cited with approval by the Supreme Court of Appeal in the *Fakie* judgment.

[22] Mr *Meyer* submitted that there was no basis for the granting of an interdict in this matter. This argument is clearly misplaced. When the matter was brought before Kroon J no papers had been served on the respondent. Had the learned Judge granted an order as prayed in the notice of motion, such order would have been final in effect and the respondent would not have been afforded a hearing.

[23] Referring again to the interdict contained in the order of Kroon J, Mr *Meyer* submitted that it is a prohibitory and not a mandatory interdict. He submitted that the prohibitory interdict was designed to enforce the undertaking made by the respondent to the police that the boat would not be moved. He submitted that in his 30 years as counsel he has never come across an order such as that issued in this case.

[24] A reading of the order in question makes it clear that it is mandatory in nature. It tells the respondent what to do with the boat and the equipment. The judgment of the *Administrator, Cape, and Another v Ntshwaqela* 1990 (1) SA 705 (A) does not assist the respondent in this case.

[25] I can find no ambiguity in the order in question which would warrant its interpretation with reference to the affidavits filed by the applicant. In my view the judgment of *Tshona v Principal, Victoria Girls High School and others* 2007 (5) SA 66 (E) is of no application in this matter.

[26] I disagree with the submission made by Mr *Meyer* that the case made out by the applicant is false and misleading. The applicant's case is clear and straightforward. He bought a boat and its equipment. After having paid for it, possession of it was given to him. He was in peaceful and undisturbed possession of this property when the respondent removed it unlawfully.

[27] The facts and circumstances which applied in the case of *S v Mamabolo (ETV AND OTHERS INTERVENING)* 2001 (3) SA 409 (CC) are quite different from the facts of the present matter. In that case the complaint against Mamabolo was that of scandalising the Court. Mamabolo had published criticism of a judicial order. In that case it was held that the ordinary mechanism of the judicial system should have been employed in bringing contempt proceedings against Mamabolo.

[28] The respondent's submission that he had cancelled the mandate of A & G Marine to sell the boat with the consent of one Reynolds is unacceptable. Van Kempen who was the salesperson of A & G Marine has deposed to an affidavit in this matter. He says he sold the boat and its equipment to the applicant on the mandate of the respondent. He says that the respondent was happy with the deal. When the applicant visited Port Alfred he was given possession of the boat and utilised it during the period that he was there.

[29.1] Two last aspects of the case need to be dealt with. Firstly, the respondent states that the order given in this matter was prohibitory in nature and that it prevented him from moving the boat in line with the undertaking given to the police. In this regard it was submitted by Mr *Meyer* that the respondent complied with the court order.

[29.2] Secondly, the respondent alleges that it was impossible to comply with the court order because the owner of the jetty alongside which the boat was moored refused to allow him to leave the boat there.

[30] If the order is prohibitory in nature and the respondent complied with it, why would the respondent attempt to take it to the mooring from where he had removed it? The

respondent could only have attempted to return the boat to Les Johnson's mooring if he accepted that he was ordered to return possession of the boat to the applicant.

[31] These two statements are contradictory and I do not accept them.

[32] If the respondent was not allowed by Les Johnson to return the boat to the jetty where it had been moored, it would have been a simple matter for the respondent to have returned possession of the boat and the equipment to the applicant. For instance, he could have handed over the keys of the boat to the applicant's attorneys or could have made arrangements for the delivery thereof at some agreed place in Port Alfred.

[33] There were other remedies available to the respondent in terms of Rule 6(8) and 6(12)(c) of the Uniform Rules of Court. The return date could have been anticipated on not less that 24 hours' notice to the applicant or the matter could have been set down for reconsideration of the order granted against the respondent.

[34] It is to be noted that the respondent does not deal with the fishing equipment which, in terms of the order has to be

returned to the applicant. His answering affidavit is silent on this aspect of the matter.

[35] On an appraisal of the evidence I find that the applicant has established the requisites for contempt beyond reasonable doubt. The respondent's version is not reasonably possibly true. What is clear from the respondent's affidavit is that he is wilfully and *mala fide* refusing to return the boat and its equipment to the applicant.

[36] In the circumstances I make the following order:

(a) The respondent is found guilty of contempt of the order of court dated 20 November 2009.

(b) The respondent is sentenced to undergo imprisonment for a period of two (2) months the whole of which is suspended on condition that he returns to the applicant all the property set out in the order dated on 20 November 2009 within three (3) days from the date of this order.

(c) The respondent is to pay the costs of this application on the scale as between Attorney and own client.

B. SANDI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant	:	Adv. Kincaid
Applicant Attorneys	:	NN Dullabh & CO 5 Betram Street Grahamstown 6140 (Ref- NND/ma/Wallace.g) Tel: 046 622 6611
Counsel for the Respondent	:	Adv. Meyer
Attorneys for the Respondent	:	Nolte Smit Attorneys 42 Beaufort Street Grahamstown 6140 (Ref: S AMM) Tel: 046 622 7209