IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO.: 5242/2017
Matter heard on: 23/05/2019
Judgment delivered on: 04/06/2019

In the matter between:

ANTHONY JOHN BOOTH — **FIRST APPLICANT**

MARETHA POTGIETER — **SECOND APPLICANT**

and

SIMON JOHN CHILDS — **RESPONDENT**

JUDGMENT

SMITH J:

[1] The applicants seek an order declaring the respondent to be in contempt of an interim order granted by Tokota AJ (as he then was) on 10 March 2016, and ancillary relief. In terms of that order the respondent was interdicted, pending the finalisation of the application, from interfering with the driveway serving the applicants' premises, the municipal water supply and drainage pipes to their property.

[2] The application was argued before Beshe J on 5 May 2016, and she delivered judgment on 2 February 2017, discharging the rule. It is also important, in the context of the issues which fall for decision, to mention that when the matter was argued before Beshe J,

the applicants abandoned the relief in respect of the driveway. In paragraph 2 of her judgment the learned judge said the following in this regard:

> "In seeking confirmation of the interim order mentioned above, applicants concede that as much as the interim order interdicts the respondent from interfering with the driveway serving the applicants' property, respondent has the right to the driveway or part thereof. It was further submitted that at this stage (final interdict stage), applicants persist only in respect of the relief sought in paragraphs 3, 5 and 6 of their notice of the motion."

[3] The first applicant is the registered owner of Erf 5581, situated at No. 7 Rietfontein Place, Grahamstown, and lives there together with the second applicant, who is his wife. Their property shares a boundary with Erf 4224, which is owned by the respondent.

[4] The history of the parties' relations is a long and troubled one. As is usually the case when persons are forced to co-exist in a state of fortuitous contiguity, their interactions have been characterised by irrational rancour and acrimonious litigation. It is thus not surprising that the applicants' founding papers are replete with references to incidents which happened more than nine years ago. They relate, amongst others, to allegations of malicious removal of lateral support structures and deliberate destruction of the applicants' driveway. Fortunately it is not necessary for me to concern myself with that history. Apart from the fact those allegations appear to be repetition of issues previously ventilated in the original application; the applicants' case is founded on an interim order which was subsequently discharged. Thus only those incidents which allegedly occurred during the time period when the interim order was operational will be relevant.

[5] The respondent's conduct, which according to the applicants constituted contempt of the interim order, relate to the alleged destruction of their driveway and paving. They have annexed to their papers photos taken during August 2016 and January 2017 which, according to them, illustrate how the respondent's repeated driving over their driveway had

destroyed the paving. They also introduced into evidence a video recording showing the respondent driving over their driveway and the extent of the damage to the paving. They furthermore alleged that the respondent has taken to parking his vehicle under a tree some 50 meters from his residence with the sole purpose of accessing his property in such a manner that he has to drive over their driveway and thereby dislodge their paving. They also allege that from time to time they could hear the respondent spinning his wheels when driving over their driveway, presumably deliberately to damage the paving.

[6] The respondent, in his answering affidavit, asserted his right reasonably to access his property and denied that he has deliberately driven in such a manner so as to damage the applicants' driveway.

[7] The respondent has also applied for the striking out of various portions of the applicants' replying papers which he contends are gratuitously abusive, defamatory, scandalous, and vexatious, as well as others which he says amount to new matter.

[8] Those portions of the replying affidavit which are impugned on the basis that they are scandalous, vexatious, or irrelevant contain wording which can, at the very least, be described as highly inappropriate in court proceedings. By way of example, the respondent is alleged to have been "deliberately deceptive", "deliberately trying to mislead this Honourable Court", and that his contentions are "contrived, disingenuous mendacious and pathetic". Even stronger language had been used to pour scorn on his explanations: namely that they are "perfidious, deceitful and feeble in the extreme".

[9] Ms *Molony* who appeared for the applicants, submitted that although the language may have been inappropriate, the strong and emotive tone is understandable in proceedings where the respondent's state of mind is relevant, and the court called upon to determine whether his actions had been wilful and mala fide.

[10] I do not agree with this submission. While it is to be expected in contempt of court proceedings that an applicant would often have to resort to strong (and even pejorative) language in order to impute an intentional and malicious state of mind to the respondent, the impugned statements went far beyond what was reasonably required in the circumstances. They have been made without first establishing a factual basis and in reply to averments by the respondent which did not justify such strong language. The statements were thus made gratuitously, irresponsibly, and apparently with the sole purpose of humiliating and embarrassing the respondent. They accordingly fall to be struck out on the basis that they constitute scandalous, vexatious and irrelevant matter.

[11] The basis on which the impugned portions of the replying affidavit are assailed as new matter is as follows. The applicants' case is founded on an interim interdict granted on 10 March 2016 and discharged on 2 February 2017. It was accordingly crucial that the alleged contemptuous behaviour of the respondent fell within the period between 10 March and, either 5 May 2016 (being the date on which the relief relating to the driveway was abandoned), or 2 February 2017, when the interim order was discharged.

[12] Mr *Cole*, who appeared for the respondent, has correctly submitted that nowhere in their founding papers have the applicants made any attempt to place the alleged contemptuous conduct within that period. On the contrary, the language used to describe the respondent's behaviour was in the present tense, and appeared to refer to incidents that happened even after 2 February 2017. What confused issues even more was the fact that the applicants' founding papers were replete with references to incidents that occurred some 10 years ago.

[13] Mr *Cole* has also correctly submitted that it appears that it was only after the respondent had mentioned in his answering affidavit that the rule had been discharged on 2 February 2017, that the applicants have attempted to place the alleged contemptuous behaviour within the period when the rule was still operational.

[14] Ms *Molony* argued in this regard that since the applicants have annexed a copy of the interim order to their founding papers, it must have been clear to the respondent that they were relying on an interim interdict, and that the alleged contemptuous behaviour would logically have fallen within that period.

[15] I do not agree. Even on a generous conspectus of the allegations contained in the founding papers, it is not clear when the contemptuous conduct was alleged to have occurred. The applicants' attempt in their replying papers to place it within the period when the interim order was still operational was a thinly veiled endeavour to make out a case in their replying papers. In the result I am of the view that the impugned portions of the replying affidavit constitute new matter and fall to be struck out as such.

[16] But there is an even more fundamental problem with the applicants' case. As I have mentioned earlier, they have abandoned the relief in respect of the driveway when the matter was argued before Beshe J on 5 May 2016. The decision to abandon the relief was, according to Beshe J's judgment, founded on the acceptance that the respondent had a right to access his property and thus to traverse the applicants' driveway.

[17] It is established law that once the applicants have established a valid court order, that the respondent was aware of the order; and that he had contravened the terms of the order; the evidential burden shifted to the latter to prove that he was not in wilful and malicious non-compliance. (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA),at para. 42)

[18] Ms *Molony* has argued that even though the applicants abandoned the relief sought in respect of the driveway on 5 May 2016, technically that portion of the order would still have been in place until 2 February 2017, when Beshe J discharged the rule. This may well be so, but even assuming that the respondent had contravened that portion of the order by continuing to drive over the applicants' driveway, it is inconceivable that his actions could

possibly be wilful and malicious in circumstances where the relief had been abandoned by the applicants.

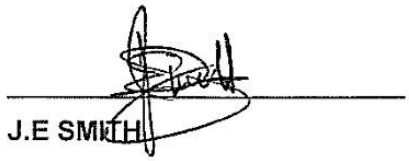
[19] While the usual standard of proof in civil matters is on a balance of probabilities, contempt of court must be proved beyond a reasonable doubt, particularly in a case such as this where the respondent's committal is sought. (*Pheko v Ekurhuleni Metropolitan Municipality* 2015 (6) BCLR 711 (CC), at paras. 36 and 37) I am not satisfied that this requirement has been established. Not only has the relief in respect of which the respondent is alleged to be in contempt been abandoned, but the applicants have also acknowledged that the respondent was entitled to traverse their driveway in order to access his property. Given this factual matrix, it would be unreasonable to impute malice and criminal intent to the respondent.

[20] In addition, apart from the fact that there are massive disputes of fact on the papers, and that I would thus in any event be constrained to decide the matter on the respondent's version, I am satisfied, that even if I were to assume the correctness of the facts averred by the applicant, it is simply not tenable in the circumstances to ascribe wilful and malicious conduct to the respondent. The application must accordingly fail.

[21] In the result the following order issues:

(a) Those portions of the applicants' replying affidavit mentioned in the respondent's application of notice to strike out, dated 17 April 2019, are struck out as being scandalous, vexatious and irrelevant, and constituting new matter, respectively.

(b) The application is dismissed with costs, including the costs of the application to strike out.



J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Advocate N Molony
Attorneys for the Plaintiff	:	Cloete & Company 112A High Street Grahamstown
Counsel for the Defendant	:	Advocate S H Cole
Attorneys for the Defendant	:	Neville Borman & Botha 22 Hill Street Grahamstown
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