IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: A228/2013

In the matter between:-

GERHARDUS JOHANNES PIENAAR Appellant

And

MATJHABENG LOCAL MUNICIPALITY First Respondent

MICHAEL RAMOHODI Second Respondent

CORAM: RAMPAI, AJP *et* POHL, AJ *et* WRIGHT, AJ

JUDGMENT BY: POHL, AJ

HEARD ON: 8 SEPTEMBER 2014

DELIVERED ON: 18 SEPTEMBER 2014

INTRODUCTION:

[1] This is an appeal to the Full Bench against:

(i) an order by the court *a quo* striking out certain portions of a replying affidavit, filed by the appellant in an application for

the conviction and sentence of the respondents for contempt of court; and

(ii) the order of the court *a quo* discharging the rule *nisi* issued in respect of the contempt application.

[2] The contempt application has its roots in a successful spoliation application brought by the appellant against the respondents. It being the appellant's case that he was spoliated by the respondents in his possession of a farm in the district of Welkom.

THE CHRONOLOGY OF EVENTS:

To put this judgment in perspective, it is necessary to list the chronology of the events and orders as it unfolded.

[3] On 17 September 2012, Van Zyl J granted the spoliation order in the form of a rule *nisi*.

[4] On 17 September 2012, the papers in the spoliation application were served at the offices of the first respondent for the attention of both first and second respondents.

[5] On 21 September 2012, Van Zyl J's court order in the spoliation application was duly served on the first respondent.

[6] On 1 October 2012, Van Zyl J's court order in the spoliation application was served on the second respondent by affixing it to the door of his "residence" on the farm. It is common cause that

the second respondent did not reside on the farm. Van Zyl J's order was that it could be served by affixing it to the main entrance to the farm in question.

[7] On 19 October 2012, both the deponent on behalf of the first respondent (Ramathebane) and the second respondent signed the opposing affidavits in the spoliation application.

[8] On 24 and 25 October 2012, an employee of the second respondent was busy working on the farm with a tractor. This action or deed, formed the basis for the contempt application.

[9] On 2 and 3 November 2012, the contempt application was served on the respondents.

[10] On 22 November 2012, Kruger J confirmed the rule *nisi* in the spoliation application, issued by Van Zyl J on 17 September 2012.

[11] On 22 November 2012, Kruger J also issued the rule *nisi* in the contempt application.

[12] On 30 May 2013 Mhlambi AJ discharged the rule *nisi* issued by Kruger J on 22 November 2012. It is against this judgment that the appeal lies.

COMMON CAUSE FASTS:

Ex facie the record it appears that the following facts are common cause:

[13] The applicant had a lease agreement in respect of this farm, which he concluded with the previous owner of the farm, for a period of five years from 1 March 2009.

[14] The first respondent bought the farm and became the registered owner of the farm on 20 July 2012.

[15] The notice of application for leave to appeal and the notice of appeal incorrectly refers to the judgment by Mhlambi AJ "discharging the rule *nisi* issued by Van Zyl J". The spoliation order issued by Van Zyl J on 17 September 2012 in the form of a rule *nisi* and which was confirmed by Kruger J on 22 November 2012, is not the subject of the appeal before this court. Mhlambi AJ discharged the rule *nisi* Kruger J issued in the contempt application.

[16] On 5 September 2012 the first respondent gave the applicant written notice to vacate the farm in question by 14 September 2012. However, the applicant did not vacate the farm.

[17] On 14 September 2012, employees of the second respondent came onto the farm and started spraying a chemical substance. This was done with the permission of the first respondent. The said spraying was done by the second respondent at the request

and on the instruction of the first respondent. This precipitated the bringing of the spoliation application.

[18] On 24 and 25 October 2012, an employee of the second respondent once again worked on the lands on the farm in question with a tractor on the instructions of the second respondent. The reason why the second respondent's employee performed this work on these dates, was because the Department of Land Affairs entered into an agreement with the second respondent, *inter alia* to cut weed under the surface of the soil with a so-called "roll staff". When the second respondent was confronted by the appellant's legal representatives on 25 October 2012, he vacated the farm in question with the tractor and everything else.

[19] On p 125 of the record in par 22 of the opposing affidavit, signed on 19 October 2012, right above the signature of the first respondent's deponent, Ramathebane, declares as follows:

> "I therefore respectfully request that the rule *nisi* issued on 17 September 2012, be uplifted and the application be turned down with costs."

[20] On p 139 of the record in par 4 of the second respondents' affidavit, which he also signed on 19 October 2012, he declares as follows:

> "I support the relief claimed in paragraph 22 of the deponent GERMAN RAMATHEBANE's opposing affidavit of First Respondent."

[21] In the application for contempt, in order to prove the respondent's knowledge of the existence of the court's order in the spoliation application, the appellant erroneously annexed the wrong returns of service to the founding affidavit. These returns related to the application papers that were served and did not relate to the service of the court order in the spoliation application. When the respondents took this point in the opposing affidavit, the appellant annexed the correct returns to the replying affidavit. The court *a quo*, *inter alia*, struck out the paragraphs in the replying affidavit where reference is made to the correct returns and in terms of which the correct returns were annexed.

[22] In the opposing affidavits in the contempt application, it is throughout denied that the court order was properly served on the second respondent, or that he had any knowledge of the order, or even the existence of the order, or that it was brought under his attention. The first respondent's deponent however declared as follows in this regard:

> "The mere fact that the first respondent filed his opposing affidavit was however not reason, or sufficient reason, for first respondent to obtain proper knowledge of the contents and effect of the order."

[23] Besides the portion of the replying affidavit that was struck out referred to in par [21], *supra*, the remainder of the allegations thus struck out by the court *a quo*, in essence, related to the applicant declaring that he finds the allegation by the respondents that they were not aware of the court order, false, disconcerting, untenable and a lie. He based this on the fact that the respondents signed

the affidavits on 19 October 2012 and that they were throughout represented by an attorney and a senior advocate.

LEGAL POSITION IN RESPECT OF APPLICATIONS TO STRIKE OUT:

[24] Rule 6(15) of the Uniform Rules of Court provides as follows:

> "(15) The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

The following dicta appears in the decision of **Vaatz v Law Society of Namibia** 1991 (3) SA 563 (Nm) at p 566B – E:

> "All those words, 'scandalous', 'vexatious', 'irrelevant' and 'prejudice' are words used almost every day in courts of law. The context in which they are used can lead to variations of meaning but basically they have the meanings allotted to them by *The Shorter Oxford English Dictionary*.
>
> In Rule 6(15) the meaning of these terms can be briefly stated as follows:
>
> Scandalous matter - allegations which may or may not be relevant but which are so worded as to be abusive or defamatory.
>
> Vexatious matter - allegations which may or may not be relevant but are so worded as to convey an intention to harass or annoy.
>
> Irrelevant matter - allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter."

[25] In the decision of **Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and Others** 2013 (2) SA 204 (SCA) at p 212 paras [26] and [27], the Supreme Court of Appeal dealt with the question of "New matter in a replying affidavit" and decided as follows:

> "[26] Counsel for Finishing Touch urged us to reject this explanation as it had been raised for the first time in the replying affidavit. It is true that the explanation was proffered by BHP in reply, but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared, and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. See *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*.
>
> [27] In this matter BHP was justified in dealing with the issue in the replying affidavit as the question of service was raised in the answering affidavit as well as in the counter-application on behalf of Finishing Touch. Before then it could have had no idea that the validity of the service by hand on the State Attorney would be challenged, especially when the State Attorney had given the assurance that they had been authorised to accept service on behalf of the state respondents. Furthermore this aspect was never challenged by the state respondents during the review proceedings. The State Attorney simply filed a notice of opposition on their behalf but they elected not to file any

> answering papers in the review application. I also cannot comprehend how the state respondents' waiver of compliance, even if there were any non-compliance with the rule relating to service, could avail Finishing Touch who could never have been prejudiced by it."

[26] The appropriate test to be applied was clearly illustrated by Nestadt J in **Shepard v Tuckers Land Development Corporation (Pty) Ltd (1)** 1978 (1) SA 173 (W) at p 177G – 178A, as follows:

> "The second part of the application to strike out, that relating to Auret's affidavit, is based on the contention that the allegations therein contained should have formed part of the applicant's founding affidavit and annexures, or, alternatively, constitute new matter. It is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits for the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavits to be struck out. (See Herbstein and Van Winsen, p.75.) In *Titty's Bar and Bottle Store (Pty.) Ltd. v A.B.C. Garage (Pty.) Ltd. and Others*, 1974 (4) SA 362 (T), VILJOEN, J., at p. 368 stated:
>
> 'It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish *locus standi* or the jurisdiction of the Court. See Herbstein and Van Winsen, Civil Practice of the Superior Courts in South Africa, 2nd ed., pp. 75, 94. In my view this practice still prevails.'
>
> This is not however an absolute rule. It is not a law of the Medes and Persians. The Court has a discretion to allow new matter to remain in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances. *Bayat and*

Others v Hansa and Another, 1955 (3) SA 547 (N) at p. 553; *Kleynhans v Van der Westhuizen, N.O.,* 1970 (1) SA 565 (O) at p. 568."

APPLICATION TO THE FACTS:

[27] The court *a quo* referred to all the applicable authorities in respect of applications to strike out, but then merely went ahead and found that the respondents would be prejudiced if the striking out is not ordered, without any reference to the factual basis for this conclusion. This clearly amounts to a misdirection which entitles this court to consider the application to strike out, afresh.

[28] It was submitted on behalf of the respondents that paragraphs 4.1, 4.2 and 4.3 of the replying affidavit were correctly struck out on the basis that it constituted new matter/facts/evidence, alternatively hearsay, alternatively argumentative or irrelevant.

[29] This submission is clearly without substance. These paragraphs, in essence, deal with the annexing of the correct returns of service in respect of the service of the court order, since the incorrect returns were annexed to the founding affidavit. It must be remembered that the respondents declare in the opposing affidavits that the court order was never properly served on the second respondent and that the first respondent allegedly did not have proper knowledge of the order. The reference to and the attachment of the returns is thus merely an amplification of the allegation already made in the founding papers that there was service of the court order. In any event, it must be borne in mind

that the sheriff would have sent his returns of service to the court and it would thus have been in the court file in any way. It was thus not necessary for the appellant to annex them to his papers. There could thus have been no prejudice to the respondents if the returns were annexed to the replying affidavit. (**Vaatz v Law Society of Namibia**, *supra*, at p 566H – I) It is not new matter and it is certainly not irrelevant. In the premises there was no basis for striking out these paragraphs.

[30] It was furthermore submitted on behalf of the respondents that paragraphs 5.3, 5.5 and 6.2 of the replying affidavit were correctly struck out on the basis that it constituted scandalous, vexatious, irrelevant or argumentative matter.

[31] Whilst it is true that the language used in these paragraphs is couched in argumentative form, it is clear that what the applicant wanted to convey was the improbability of the version proffered by the respondents that they were not aware of the contents of the court order issued by Van Zyl J. There could equally be no prejudice to the respondents if these paragraphs were not struck out. In any event, it was probably argued on behalf of the appellant during the application. To strike out such matter is in any event not an immutable rule and not the "law of Medes and Persians". In the premises, the court *a quo* should also not have struck out these paragraphs.

[32] Neither party presented arguments to this court regarding the appropriateness of such a cost order. There was no basis for the

punitive order as to costs that the court *a quo* made against the appellant.

THE LEGAL POSITION IN RESPECT OF CONTEMPT APPLICATIONS:

[33] In the decision of **Consolidated Fish Distributors (Pty) Ltd v Zive and Others** 1968 (2) SA 517 (C) at p 522E – H the court found as follows in respect of the requirements for contempt:

> "An applicant for committal needs to show -
>
> (a) that an order was granted against respondent; and
>
> (b) that respondent was either served with the order (*Godefroy v. The State*, (1890) 3 S.A.R. 113; *Eaton Robins & Co v Voges*, 19 C.T.R. 140; *Resident Magistrate, Humansdorp v Kosana and Another*, 1915 E.D.L. 4); or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information (*Burgers v Fraser*, 1907 T.S. 318; *Scholtz' Estate v Carroll*, 23 S.C. 430; *Botha v Dreyer*, 1 E.D.C. 74; *In re Cousins and Another*, 1911 CPD 463 at pp. 470 G - 471; *In re The Corinbatore*, 18 N.L.R. 179); and
>
> (c) that respondent has either disobeyed it or has neglected to comply with it.
>
> (In this instance it is undisputed that the order was duly served).
>
> Once it is shown that an order was granted and that respondent has disobeyed or neglected to comply with it, wilfulness will normally be inferred (*R v Mcunu*, 1928 NPD 237; *R v Rosenstein*, 1943 T.P.D. 65 at p. 70; *Wickee v Wickee*, 1929 W.L.D. 145 at p. 148) and the onus will then be on respondent to rebut the inference of wilfulness on a balance of probabilities (*Waterston v Waterston*, 1946 W.L.D. 334; *R v Van der Merwe*, 1952 (1) SA 647 (O) at p. 650; *Jacobs v Jacobs*, 1911

T.P.D. 768 at pp. 770 - 771; *Wickee v Wickee, supra; R ed v Reed*, 1911 E.D.L. 157; see also *Traut v Rex*, 1931 S.W.A. 29 at p. 32)."

[34] In **Fakie NO v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) the court summarised the legal position with regards to a contempt application as follows at p 344G – J:

"[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

APPLICATION TO THE FACTS

[35] The first question is whether or not the respondents had knowledge of the existence and the contents of the court order granted by Van Zyl J on 17 September 2012. If any of the respondents did not, they could not be found guilty of contempt of court. In this regard it is necessary to have regard to the exact wording of the order. It reads as follows:

> "**WORD DIT GELAS DAT:**
>
> 1.1 Kondonasie verleen word vir nie-nakoming van die Hofreëls met betrekking tot vorms en betekening en dat hierdie aansoek aangehoor word as 'n dringende aansoek;
>
> 1.2 Betekening van hierdie aansoekstukke op die Eerste Respondent geag word voldoende betekening op die tweede Respondent te wees;
>
> 2. 'n Bevel *nisi* uitgereik word wat die Respondente oproep om redes, indien enige, aan te voer op **18 Oktober 2012** om **09:30** waarom die volgende bevel nie finaal verleen moet word nie.
>
> 2.1 Dat die vrye en ongestoorde besit van die plaas bekend as **'Gedeelte 2 van die restant van die plaas Vlakplaats 125, geleë in die distrik Welkom, 191.6886 hektaar'** (hierna 'die eiendom' of 'die plaas') aan die Applikant besorg word;
>
> 2.2 Dat die Eerste en Tweede Respondent, gesamentlik en afsonderlik, die een betaal die ander kwytgeskeld te word, die koste van die aansoek betaal.
>
> 3. Die regshulp soos uiteengesit in paragraaf 2.1 *supra* sal geld as interim interdik met onmiddellike werking hangende finalisering van hierdie aansoek.
>
> 4. Hierdie bevel beteken moet word op die Eerste Respondent ooreenkomstig die Eenvormige Hofreëls en dat die bevel beteken moet word op die Tweede Respondent deur aanhegting daarvan tot die hoofingang tot die plaas."

[36] In respect of the first respondent, there was proper service in terms of the court order on 21 September 2012. From that day, the first respondent had possession of and thus knew of the existence and the contents of the court order as explained by the sheriff during service. Over and above this, the first respondent's deponent Ramathebane, on 19 October 2012, requests in the opposing affidavit that the rule *nisi* issued on 17 September 2012, be uplifted.

[37] In respect of the second respondent, there was service on him by the sheriff by "affixing it to the main entrance to the second respondent's residence on the farm". As indicated before, the second respondent did not reside on the farm. The service was also not affected by affixing it to the main entrance of the farm, as required by the court order itself. The second respondent's version was throughout that he was not aware of the existence of the contents of the court order when he allowed his employee to work the land on 24 and 25 October 2012. This version of the second respondent must be seen in the context that he was not an employee of the first respondent, but that he merely had a contractual arrangement with the first respondent to work the land. Furthermore, he vacated the land immediately when he was confronted by the appellant's legal representatives on 25 October 2012. It is however true that he also requested in his opposing affidavit that the rule *nisi* be discharged. He did this with reference to Ramathebane's paragraph 22 in the replying affidavit, referred to above.

[38] It must be borne in mind that the appellant bore the onus to prove beyond reasonable doubt that the respondents' had knowledge of the order. To my mind, the appellant failed to prove that the second respondent had the required knowledge. First of all, there was not proper service in terms of the court order itself. Secondly, the only basis for concluding that he had the required knowledge, is if it is accepted that his legal representatives told him of the existence and the contents of the court order especially with reference to the interim operation of the rule *nisi*. His reference to Ramathebane's affidavit, alluded to above, may be an indication that this was in fact done by his legal representatives. There is however simply no evidence of what was exactly explained to the second respondent, how complete the explanation was, whether he understood what a rule *nisi* meant, whether he understood what will happen on the return day. The fact that the second respondent vacated the property upon being confronted by the appellant 's legal representatives on 25 October 2012, is a further indication that he only then fully appreciated the existence and the nature of the court order. In the premises, the court *a quo* was quite correct in dismissing the application for contempt in respect of the second respondent.

[39] The next question that falls open for decision is whether the appellant proved that the first respondent, which had the required knowledge of the court order, did something which amounted to contempt of court. In this regard, it must be borne in mind that the personnel of the first respondent did not trespass onto the farm after receipt of the court order when it was served on the first

respondent. The fact that the first respondent entered into a rental agreement with the second respondent does not assist the applicant. The mere existence of such an agreement does not justify an inference that the first respondent had knowledge of the second respondent's presence on the farm after the rule *nisi* was issued. It can also not be said that the first respondent had a duty to inform the second respondent of the order or to prevent him from disobeying the order. In all the circumstances and especially in view of the above finding that the second respondent did not make himself guilty of contempt of court, there is also no basis upon which the first respondent was guilty of contempt of court. The court *a quo* was thus correct to discharge the rule *nisi*.

[40] There was however no basis why the court *a quo* should have ordered the appellant to pay the respondents' costs on the punitive scale of attorney and client. That order should thus be set aside.

[41] The appellant is thus partially successful with the appeal, since he succeeds with the appeal against the striking out. The respondents are however substantially successful, because the real subject matter and the core of this appeal related to the contempt application, with which the respondents are successful. In the premises this is a case where there should thus be a differentiation in the court's order as to costs.

ORDERS:

[42] I would therefore make the following orders:

1. The appeal against the striking out of paragraphs 4.1, 4.2, 4.3 and portions of 5.3, 5.5 and 6.2 of the appellant's replying affidavit in the contempt application is upheld and the court *a quo's* order is set aside and substituted with the following:

   1.1 The application for the striking out of paragraphs 4.1, 4.2, 4.3 and portions of paragraphs 5.3, 5.5 and 6.2 of the applicant's replying affidavit in the contempt application is dismissed with costs.

2. The appeal against the court ***a quo's*** discharging of the rule *nisi* dated 22 November 2012 is dismissed, except that the court ***a quo's*** order in respect of costs is set aside and amended. The order of the court *a* quo is therefore replaced with the following:

   "The rule *nisi* granted on 22 November 2012, is discharged with costs."

3. The appellant is ordered to pay 75% of the respondents' costs of the appeal.

L. le R. POHL, AJ

I concur.

M.H. RAMPAI, AJP

I concur.

G.J.M. WRIGHT, AJ

On behalf of appellant:	Adv P.J.J. Zietsman Instructed by: Phatshoane Henney BLOEMFONTEIN
On behalf of respondents:	Adv A.H. Burger SC Instructed by: Moroka Attorneys BLOEMFONTEIN

/spieterse