IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: A96/2016

In the matter between:

FREE STATE AGRICULTURE Appellant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA 1st Respondent

MINISTER OF POLICE 2nd Respondent

MINISTER OF DEFENCE AND MILITARY VETERANS 3rd Respondent

MINISTER OF HOME AFFAIRS 4th Respondent

THE PREMIER, FREE STATE PROVINCE 5th Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR POLICE, ROADS AND TRANSPORT FREE STATE PROVINCE 6th Respondent

NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICES	7th Respondent
PROVINCIAL COMMISSIONER, FREE STATE PROVINCE, SOUTH AFRICAL POLICE SERVICE	8th Respondent
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	9th Respondent
MINISTER OF PUBLIC WORKS	10th Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE AND RURAL DEVELOPMENT FREE STATE PROVINCE	11TH Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC WORKS	12th Respondent
MINISTER OF INTERNATIONAL RELATIONS AND CO-OPERATION	13th Respondent
MINISTER OF FINANCE	14th Respondent

CORAM: MUSI AJP, MATHEBULA J, LOUBSER AJ

HEARD ON: 27 FEBRUARY 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 14 SEPTEMBER 2017

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[1] This is an appeal against a judgment and order by Moloi J, with leave of the learned judge, in which he dismissed the appellant's application with costs and granted the respondent's counter application with costs. In a well-reasoned and careful judgment the learned judge concluded that the appellant has not proved that the Third Respondent failed to comply with the court order dated the 20th of September 2012. Further that the agreement entered into with the Tenth Respondent was void *ab initio* as a consequence of impossibility of performance.

[2] The genesis of the dispute between the parties is the terrible state of the road alongside the Caledon River. The river serves as the natural border between the Republic and the Kingdom of Lesotho. This has been a source of consternation for the farming community alongside the border who experienced countless problems of cattle rustling, drug trafficking, vandalism of property and other illegal activities. These were perpetrated by Basotho and South Africans. The prevailing conditions of the road made the containment and/or elimination of these activities a thorny issue for those communities.

[3] The parties held a series of meetings and entered into protracted negotiations in trying to resolve the issue. This culminated in an agreement being reached between the appellant and the Third as well as the Tenth Respondents which was made an order of court under case number 1751/2009 on the 17th June 2010. The respondents breached the agreement. The appellant launched another application under case 170/2012 which was settled and made an order of court on the 20th September 2012. The respondents breached the agreement because of non-performance. This resulted in the appellant launching the application which is the subject matter of this appeal.

[4] The relevant clauses of the agreement in particular clauses **4.1 to 4.3** read as follows:-

> **"4.1 The DPW will, over the 2012/2013, 2013/2014 and 2014/2015 financial years, assume responsibility for constructing / repairing the patrol road so that by the end of June 2015 at the latest, the patrol road will be capable of being used effectively for the patrol of the Lesotho / Free State border by any 4 x 4 vehicle including five (5) ton SAMIL 20 4 x 4 vehicles.**
>
> **4.2 The design and specification for the repair of the patrol road will be completed by the DPW before 15 October 2012.**
>
> **4.3 The DPW will, through the currently applicable supply chain procurement processes, appoint suitable private contractors to perform the work necessary to repair the road in accordance with the relevant design and specification either in small parcels of work, or as a single contract for the entire patrol road. To this end, the DPW will, initiate the relevant procurement processes by no later than 15 November 2012. Upon completion of the repairs of the patrol road, the DPW, as custodian of immovable State assets, will ensure that the patrol road is appropriately maintained as the circumstances require".**

[5] Mr van Rhyn raised a three pronged argument in contending that the court a quo erred in dismissing the application and granting the counter application with costs. First, he submitted that the Third and Tenth Respondents have not demonstrated that Messrs Geldenhuys and Delport possessed the necessary authority to depose to the affidavits on behalf of the respondents. Both were not part of the team when the agreement was drafted and subsequently made an Order of Court. Second, the court a quo could not have concluded that the agreement was void *ab initio* because on the evidence before the court there was no basis for such a conclusion. Third, he argued that legislation existed

empowering the Premier of the Province to fix the road or the Minister responsible for Environmental Affairs to promulgate the necessary regulations to facilitate compliance with the agreement.

[6] It was his submission that, the main issue was whether the agreement was objectively void *ab initio*. He contended that the respondents have been in contempt since the 31st August 2012. At no stage did the respondents inform the appellant that they encountered difficulties with the time frames. It appears that the only reason for failing to comply with the agreement related to funding. Although the respondents through the State Attorney acknowledged breach of contract, they did not elaborate on any other aspect including that it was objectively void *ab initio*. The respondents did nothing about the application that was served on them. Accordingly the respondents had ample time from the 31st August 2012 to perform and were well resourced with the necessary skill and advice as a party to the agreement.

[7] It was his further submission that the invocation of the **National Environmental Management Act 107 of 1998 (NEMA)** was a spurious attempt at demonstrating impossibility of performance. However he conceded that the order for contempt of court is not easily granted and implored us to consider setting new dates for the respondents to comply with the agreement alternatively order specific performance.

[8] Mr Rip submitted that both Geldenhuys and Delport were employees of the respondents who were responsible for the actual implementation of the court order. They were privy to disputes and the issues at hand.

They were better positioned to place the necessary evidence before the court.

[9] He submitted that the issue was whether impossibility of performance was there or not and whether there was a deliberate intent to circumvent the agreement. He contended that the objective facts clearly show that the respondents had every bona fide intent to comply with the agreement. This is demonstrated in the letter from the Office of the State Attorney to the appellant's attorney dated 26 July 2013 acknowledging the breach and requesting that the clauses relating to mediation should not be invoked. Further it was envisaged by the parties that the patrol road may have to be constructed or repaired. In their quest to comply about 120 kilometres out of 500 kilometres of the road was repaired in the low lying Wepener area.

[10] He pointed out that the respondents bona fide spent time and resources to construct/repair a sustainable road that will be utilised for what it was intended for. The maps were compiled to identify the farms, the distance in kilometres measured and thorough assessment of what needed to be done was embarked upon. The Delta Report stated clearly the challenges and concluded that the link between the time agreed upon and what had to be done could not be met by the respondents.

[11] The argument that the affidavits of both Geldenhuys and Delport should be struck out as both have failed to allege the necessary authority to act for respective Ministers and that no confirmatory affidavits have been filed by the latter was rejected correctly by the

learned judge. This matter was considered and conclusively decided upon in **Eskom v Soweto City Council 1992 (2) SA 703 (W).** On page 705 at paragraph F-G the court said the following:-

> **"The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority"**

The above was cited with approval in **Ganes and another v Telecom Namibia Ltd 2004 (3) SA 615** and **Unlawful Occupiers School Site v City of Johannesburg 2005 (4) SA 199 (SCA) paragraph 13 -15**.

[12] The learned judge correctly rejected the argument of the appellant in that this matter did not concern the principal agent relationship. The officials concerned were closely involved in the matter and responsible for the implementation of any decision that had been taken in the interaction of the parties. I find no merit in the submission that the court a quo erred on this aspect.

[13] Contempt of court was defined as **"…the commission of any act or statement that displays disrespect for the authority of the court and its officers acting in an official capacity"**. **See Nthabiseng Pheko and 776 others v Ekurhuleni Metropolitan Municipality and 1 other 2015 (5) SA 600 (CC) at paragraph 28**. The test for contempt

of court was laid in **Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)on page 333 at paragraph 9** as follows:-

> **"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)".**

[14] The primary object of the proceedings of this nature is to safeguard the authority of the courts. On the papers filed by the appellant, one cannot infer *mala fides* on the part of the respondents. The respondents did perform but failed to do so adequately as provided in the order. The parties are in agreement that approximately 50 km was fenced and 70 km repaired out of 500 kilometres by the Third respondent. This is in the Southern area where the topography is flat and accessible unlike the mountainous area in the Northern part. The Tenth respondent also expended time and resources to compile maps, identifying owners of farms etc. in preparation to comply with the order to construct/repair the patrol road. The learned judge was correct in finding that the appellant has not succeeded in proving that the Third respondent was in contempt for not complying with the court order. This decision is inextricably linked to the conclusion on whether it was objectively impossible for the Tenth Respondent to perform.

[15] The learned judge had concluded that the respondents could not comply because of the **"plethora of legislation"** that they had to navigate through in order to achieve the goals set in the order. Mr van Rhyn argued that legislation was in place to enable the Third and Tenth Respondents to comply with the court order. This included but not limited to Section 17(1) of the Road Ordinance Act 4 of 1968 which read as follows:-

> **"(1) The Director may, after consultation with the owner or occupier of land, enter upon such land –**
>
> **a) to take measurements or make surveys or observations or carry out any inspections for the purpose of construction or the maintenance of a road or pont for any purpose incidental thereto; and**
>
> b) **to take possession of so much thereof as may be necessary for the construction or maintenance of a public road or pont or for any purpose incidental thereto"**; and

Section 88 of the Defence Act 42 0f 2008 also read as follows:-

> **"(1) Any member of the Defence Force may enter upon private land within a strip not exceeding 10 kilometres in width along any border of the Republic for the purposes of national border control with the approval of the lawful occupier of the land.**
>
> **(2) If the approval is being withheld unreasonably or cannot be obtained after a reasonable attempt, the Minister may give written permission for such entry.**
>
> **(3)(a) No member may enter any land unless the occupier has given his or her approval or unless the occupier has been given a copy of the Minister's permission to enter such land.**

(b) If the occupier in question cannot be traced a copy of the permission must be affixed at a prominent place on the land before the border control may be undertaken.

(4) The Minister must prescribe the conditions under which compensation may be claimed or paid to such occupier for any damage or loss sustained as a result of any entry in terms of this section".

[16] In terms of the National Water Act 36 of 1998 the Minister of Water and Sanitation is the custodian of all water resources within the Republic. The Minister has the overall responsibility for and authority over water resource management, including the equitable allocation and beneficial use of water in the public interest. This includes water use which is defined broadly, and includes taking and storing water, activities which reduce stream flow, water discharges and disposals, controlled activities (activities which impact detrimentally on water resource), altering a watercourse etc. Section 67(1) provides that:-

"(1) in an emergency situation, or cases of extreme urgency involving the safety of humans or property or the protection of a water resource or the environment, the Minister may-

(a) dispense with the requirements of this Act relating to prior publication or to obtaining and considering public comment before any instrument contemplated in section 158(1) is made or issued;

(b) dispense with notice periods or time limits required by or under this Act;

(c) authorize a water management institution to dispense with –

(i) the requirements of this Act relating to prior publication or to obtaining and considering public comment before any instrument is made or issued; and

(ii) notice periods or time limits required by or under this Act.

(2)Anything done under subsection (1) –

(a) must be withdrawn or repealed within a maximum period of two years after the emergency situation or the urgency ceases to exist; and

(b) must be mentioned in the Minister's annual report to Parliament."

[17] These pieces of legislation stipulate that the owner or occupier of the land must be consulted, approval sought and obtained before any entry can be embarked upon for the purposes provided in the law. It will be simplistic to conclude that this is an easy process which can be undertaken within a period of approximately three (3) years. This aspect will be discussed more fully in the following paragraphs. Those afforded the power to apply these laws must do so in a transparent, equitable and reasonable manner based on sound reasons. If such an approval is not granted for whatever reason, then involved litigation may ensue resulting in further delays. However it is unlikely that any farmer whether a member of the appellant or not can withhold permission to repair or construct the road meant to benefit the entire community. In addition some farms are situated near watercourses or sensitive environments. Any party undertaking development in such area must obtain permission from the Ministry of Water and Sanitation in terms of the National Water Act 36 of 1998. Undoubtedly public participation in matters of this nature is of cardinal importance.

[18] The National Environmental Management Act 107 of 1998 imposes a duty of care on every person including State Organs to respect and protect the environment for the benefit of present and future generations through law and other measures. Section 28 (1) provides as follows:-

> **"Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment".**

[19] The safeguarding of the borderline is an important matter but not an emergency situation in this regard. The parties have been in negotiations for few years in trying to find an amicable solution. The provisions of Section 30A(7) of the National Environmental Management Act 30 of 2013 defines an emergency situation as a **"situation that has suddenly arisen that poses an eminent and serious threat to the environment, human life or property, …"** The situation in this matter can be described as serious but not to be categorised as an emergency. The applicant conceded that the efforts of the respondents by increasing patrols and repairing part of the road have to an extent alleviated the problem. I disagree with the notion that recognizing the situation as one that needed to be rectified on an immediate basis without delay suddenly elevated it to an emergency situation. The meticulous manner in which the reports were compiled after a thorough assessment indicate its importance and that it is in the public interest that it must be attended to.

[20] Regulation 16A6.1 and 16A6.4 published in terms of the Public Finance Management Act 1 of 1999 entitles an Accounting Officer to procure goods or services by other means where it is not practically possible to follow the normal procurement procedure(s). In addition where the interests of national security dictates, Section 3 of the Preferential Procurement Policy Framework Act 5 of 2000 provides for the exemption of an Organ of State to comply with the requirements. Public Finance issues are matters of national importance which must be approached with caution. It is encouraged and expected that there must be strict adherence to the prescripts of the law in order to ensure transparency, accountability and achievement of good governance in dealing with the public purse. In this matter, procurement processes could not be initiated before the necessary designs and specifications were in place. The Third and/or the Tenth Respondent could not have been able to procure what they did not know or budgeted for and without proper reasons. Although there are provisions for deviation, this matter did not warrant such as it did not meet the requirements of emergency or threat to national security. This is the plethora of legislation that the court a quo referred to and I agree. I respectfully disagree with the submissions of the counsel for the appellant that these laws should be applied because they exist.

[21] The respondents contended that the entire agreement was a nullity *ab initio*. The learned judge adopted the approach in **Vogel N.O. v Volke152 1977 (1) SA 537 confirmed in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A)** that **"regard must be had to the probable intention of the parties as it appears in or can be inferred from the terms of the contract as a whole"**. In this matter he concluded that it

was objectively impossible for the respondents to comply with the time frames. In their seminal work "**Christies – The Law of Contract in South Africa" by R H Christie and G B Bradfield (6th edition) on page 97**, the requirements for the principle were tabulated as follows:-

> **"First, the impossibility must be absolute as opposed to probable.**
> **Second, the impossibility must be absolute as opposed to relative.**
> **Third, the impossibility must not be the fault of either party.**
> **Fourth, the principle must give way to the contrary common intention of the parties".**

On page 99 the authors wrote that **"An agreement that, by consent, has been made an order of court will be no more binding than any other contract if it proves to be affected by initial impossibility"**.

[22] The appellant submitted that throughout the respondents did not raise the issue of impossibility of performance. At best they did nothing and raising this issue at this stage is an attempt to resile with impunity. In substantiating his submission, Mr van Rhyn referred to the depth of legal expertise in the form of six senior counsel together with attorneys who assisted the parties in carving out the agreement. However, he conceded and correctly so, that despite their wealth of experience they may have erred on this one.

[23] The central issue in this matter is the time frames that were not met by the respondents. As the parties engaged further on the matter, the magnitude of the task ahead of them became apparent. In short the reality struck home. The provisions regarding compliance with legislation in particular National Environmental Act 107 of 1998 were overlooked. A thorough Scoping and Environmental Impact

Assessment Process had to be undertaken. This required that activities like construction of canals, channels, bridges and dams had to be embarked upon. It also involved navigating through a myriad of legislation like the National Water Act 36 of 1998 and Mineral and Petroleum Resources Development Act 28 of 200 together with Regulations thereof.

[24] The **Delta Report** titled **Lesotho Border Roads Project Execution Plan** compiled by experts shed light about the magnitude of the project. The purpose of the report commissioned by the Tenth Respondent was **"to perform town planning work, as well as related work, in order to facilitate the clearance of a site for development purposes"**. The report identified no less than ten (10) key stakeholders other than the land owners or members of the public who may have an influence in the repair and/or construction of the road. The comprehensive report is part of the record contained in pages 579 – 711. Perhaps the parties believed that they had a plan to circumvent it. There was also the issue of servitudes on the farms and permission that had to be sought from individual landowners. Debushing of the various parts also crept in as one of the aspects to be considered. This made the compliance with the court order ever more complex and compliance with the time frames impossible.

[25] I disagree with the submission of counsel for the appellant that the central government is powerful and can pass the necessary regulations. Laws are not applied at the whim of the empowered person or body. Consultation and public participation in matters of this nature are cardinal. If the person or body acts to the contrary, it

may be many years before the road is constructed/repaired because of litigation.

[26] It appears that both parties did not think through the agreement properly before placing it before the court. The issue raised in the Delta Report were in existence from the beginning not a later stage. Their timelines were just too tight. Clause 4.1 quoted in paragraph 4 stated that the road must be capable of being used effectively by the end of 2015. The Tenth Respondents informed the appellant that it was impossible to comply with the court order through a letter dated the 31st October 2014. The gist of the letter is that the Tenth Respondents does not exclusively use 4 x 4 motor vehicles and that the costs of acquiring such motor vehicles to maintain the road were also prohibitive in the circumstances. As a result the Tenth Respondent has decided to **"construct a road that can be used for the intended purposes"**.

[27] In order to comply with the Court Order, the project in its pre-planning stage was to continue for approximately eighteen (18) to twenty four (24) months before everything could be in place. This was the time required after its inception and status quo analysis which was expected to last for approximately sixteen (16) weeks. About fifty two (52) weeks was to be set aside for all the approvals and legal authorisations to be in place. The next phase being the submission of the Final Clearance Report was also expected to take another fifty two (52) weeks. It therefore stands to reason that the clause that the Third and/or Tenth Respondent must initiate procurement processes within thirty nine (39) days of the court order was a serious oversight on both parties. As it is their negotiated agreement, they both stand

or fall by it. The appellant cannot dissociate from it when the impossibility of performance was in existence at the initial stages.

[28] On behalf of the appellant, we were implored to set new time lines or order specific performance. I am of the view that this will be tantamount to negotiating a new agreement for the parties alternatively usurping the powers of the executive. In the circumstances prevailing in this matter this court is not competent to make such an order. Therefore, I do not find any merit in that submission.

[29] This matter had a long and chequered history. The parties had been engaging each other over a long period with mixed results. It appears that they were all eager to reach a settlement at all cost. In his assessment of the evidence before him the learned judge concluded that the oversight by both parties **"brought about an absolute impossibility as opposed to probable or relative impossibility and cannot be attributed to any party's fault"**. I respectfully agree with him. This appeal ought to fail.

[30] The general rule is that the costs follow the event. The discretion to award costs must be exercised judicially pertinently to achieve fairness and justice to all parties. In this matter, I cannot find any reason to deviate from the principle.

[31] The following order is made:-

1. The appeal is dismissed.
2. The appellant is ordered to pay the costs of the appeal including the costs of two (2) Counsel.

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MATHEBULA, J

I concur,

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MUSI, AJP

I concur,

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LOUBSER, AJ

On behalf of applicant:	Adv. AJR van Rhyn (SC)
	Adv. JMC Johnson
Instructed by:	Naudes
On behalf of respondents:	Adv. MM Rip (SC)

Adv. S Webster

Instructed by: State Attorney

/roosthuizen