REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 144/2012

In the matter between:

JOHN PATRICK ZWIGGELAAR	**FIRST APPLICANT**
SEAWAY INVESTMENTS CC	**SECOND APPLICANT**
TABLE MOUNTAIN GRANITE (NAMIBIA) CC	**THIRD APPLICANT**
MAKAKATA FUNERAL HOME CC	**FOURTH APPLICANT**

And

JANE CHURCH	**FIRST RESPONDENT**
JONATHAN CHURCH	**SECOND RESPONDENT**
MAKAKATA STONE PROCESSING CC	**THIRD RESPONDENT**

Neutral citation: *Zwiggelaar v Church (*A 144/2012) [2015] NAHCMD 03 (23 January 2015)

Coram: KAUTA, AJ

Heard: 12 July 2012

Delivered: 23 January 2015

ORDER

The application is accordingly dismissed with costs.

JUDGMENT

KAUTA, AJ: The applicants, launched an urgent application on motion proceedings on 12 July 2012, for an order in the following terms:

[1] That the non-compliance with the Rules be condoned and that the matter be heard as urgent in terms of Rule 6(12)(a).

[2] Declaring the First, Second and Third Respondents to be in contempt of the provisions of paragraphs 3,4,5 and 7 of the Settlement Agreement made an Order of Court under case number A90/2012 on 8 May 2012.

[3] Committing the First and Second Respondents to jail for a period of thirty (30) days, or such period as this Honourable Court deems just and equitable, such term of imprisonment to be suspended until close of business, 9 July 2012, on condition that the First and/or Second Respondent complies with the order granted on 8 May 2012, or on such further and/or alternative conditions as the Honourable Court may direct.

[4] That should the First, Second and Third Respondents fail to comply with this Court order, the Applicant be granted leave to approach the above Honourable Court for an order for the First and Second Respondent's committal to prison, on the same papers, supplemented as necessary.

[5] An order directing the First, Second and Third Respondents jointly and severally to pay the Applicant's costs herein on a scale as between attorney and own client.

[6] Further and/or alternative relief.

[7] It is clear from paragraph 2 that the dispute has its origin in a settlement agreement made an order of this Court by agreement between the parties on 10th May 2012.

[8] It is necessary to quote fully the terms of the settlement agreement. It provides that:

8.1 Applicants shall withdraw their urgent application under the aforesaid Case Number and shall furthermore relinguish in favour of RESPONDENTS their right to the premises and all assets belonging to Makakata Stone Processing CC, including those referred to in the Founding Affidavit of FIRST APPLICANT and marked “JP22”

8.2 RESPONDENTS to effect payment of N$302 000.00 (THREE HUNDRED AND TWO THOUSAND NAMIBIAN DOLLAR) into the bank account of MAKAKATA MARBLE & GRANITE SOUCH AFRICA CC upon signature of this agreement by the parties.
MAKAKATA MARBLE & GRANITE SOUTH AFRICA CC
ABSA BANK
ACCOUNT NUMBER: 924 923 75 78
BRANCH CODE: 632 005

8.3 APPLICANTS to retain the right, title, interest and mark of the name of ‘MAKAKATA’.

8.4 RESPONDENTS to furnish applicants with a full version of the vinyl cutting software, and ancillary designs including generic and common place designs.

8.5 RESPONDENTS are prepared to assist APPLICANTS to have APPLICANTS assets/stock removed from RESPONDENTS premises which assets/stock shall so be removed with 14 calendar days as of date of signature of this agreement.

8.5.1 It is understood that the RESPONDENTS shall not render any assistance for the removal form the premises of any assets/stock which are under judicial attachment.

8.5.2 RESPONDENTS shall furthermore make available RESPONDENTS forklift and a driver to assist with the removal of the said assets/stock.

8.6 APPLICANTS shall make arrangements to ensure that RESPONDENTS rights to the business, premises and assets of Makakata Stone Processing CC be returned to RESPONDENTS upon date of signature of this agreement.

8.6.1 The Parties further agree that the sale agreement between them sall be of no further force and effect and shall upon signature of this agreement be regarded as null and void.

8.7 APPLICANTS shall take full responsibility for all their Namibian clients including clients generated by Table Mountain Granite (Namibia) CC and client's oeded to Table Mountain Granite (Namibia) CC by Makakata Stone Processing CC.

[9] The applicants seeks a declarator that the respondents are in contempt of the settlement agreement on the following grounds:

9.1 In respect of paragraph 8.3 the applicants alleged that the respondents at the time of the application were using the name Makakata, in trade. As prove of this averment the applicants attached photographs of the business premises of the respondents. Theses photographs clearly shows that the premises were still marked Makakata at the time the application was served.

9.2 As for paragraph 8.4 the applicants contend that even though the settlement agreement is silent on when the respondents were to comply with this term what was meant was that they would do so as soon as possible or alternatively within a reasonable time. On the 14th May 2012, the applicant's

legal practitioners requested the respondents legal practitioners to transmit by electronic mail the required software and designs. The respondents answered that their computer crashed and offered to avail the software and design on a computer disk which they would hand over to the first applicant personally at their business premises, but failed to do so when first applicant availed himself to pick up the disk.

9.3 With respect to paragraph 8.5, the first applicant attached a list of assets he claim he was entitled to and contend that on 24th May 2012, he arrived in Omaruru to give effect to this term. He was frustrated by the first respondent, especially when she failed to give him access to the premises but rather left a bag containing his personal belongings and a few other small items of nominal value outside the premises on the road for collection.

9.4 As for paragraph 8.7, the applicants alleged that respondents refused to hand over applicants client, invoice and order books. This refusal makes it impossible for the applicant to comply with paragraph 8.7.

[10] The respondents answered as follows to the applicants contentions in paragraph 9:

10.1 Firstly the respondents admit the terms in the settlement agreement, especially paragraph 8.3. However, they allege that the applicants were aware at the time the agreement was entered into that first and second respondent were busy with a sales transaction to Mr Medusalem. And that upon the successful completion of the sales transaction a name change will take place, as agreed. The respondents denied that they were using the name Makakata. As for the photographs attached the respondent argued that they are hearsay and in any event depict old signs and in any event they do not trade or use the name Makakata, in trade.

10.2 As for the software and designs the respondent answer is that is available for the applicants collection. The respondents avers that they were not available to hand it over to the first applicant because the arrangements were made through

email which they did not receive, because their server had crashed. As a result they were unaware of the arrangements made. On the 28th May 2012, they invited the first applicant to come to the premises at 16:50. The first applicant came to the premises contrary to the arrangement, late morning with the police. And the list of applicants assets was given to the police because the first applicant decided to wait outside. The first applicant refused to take any of the assets that belonged to him. It is clear to me that there is a serious dispute of fact with respect to the assets which the first applicant was entitled to take and those he was not because they were judicially attached. The respondents though pertinently allege that the first applicant took the disk which had the software and designs on the 29th May 2012, as it was in the bag which he admit to having taken.

10.3 As for the client, invoice and stock books the respondents allege that they were with the police due to pending criminal investigation against the first applicant.

[11] The full bench of this Court in Sikunda v Government of the Republic of Namibia (2) 2001 NR 86 at page 95 C relating to the incidence of proof in applications of this nature relying on Uncedo Taxi Service Association v Maniniyjiwa and others 1998(3)SA 417 (E) at 428 B held that:
'in motion proceedings the guilt of the offender must be proved beyond reasonable doubts….'

[12] It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has in general terms received a constitutional, stamp of approval, since the rule of law a founding value of the Constitution requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.

[13] The form or proceeding the applicants invoked appears to have been received into our law from English law and is most valuable mechanism. It permits a private litigant who has obtained a court order requiring an opponent to do or not do something to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction. The sanction usually, though not invariably, has the object of inducing the non-complier to fulfill the terms of the previous order.

[14] In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of courts and detracts from the rule of law.

[15] 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 disregards 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).

[16] These requirements that the refusal to obey should be both willful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.

[17] These observations bear directly on the main question of principle in this matter, on which my approach to the facts it presents must depend. This is whether civil contempt can be established when reasonable doubt exist as to any of the requisites

of the crime. The pre-constitutional approach to proof was that once the enforcer established that the order had been granted, and served on or brought to the respondents notice, an inference was drawn that non-compliance was wilful and mala fide, unless the non-complier established the contrary. The alleged contemnor bore the full legal burden of showing on balance of probabilities that failure to comply was not wilful and male fide.

[18] The full court of the Eastern Cape has subsequently upheld and elaborated on the reasoning on *Uncedo and Victoria Park*. In *Burchell v Burchell*, [2006] JOC 16722 (E) Froneman J (Sandi and Dambuza JJ concurring) held that civil contempt remains a criminal offence under the Constitution, and that a respondent in such proceedings is inevitably an accused person under s 35 of the Bill of Rights. Froneman J pointed out that committal for contempt of court orders raises no conflict with freedom of speech or other fundamental rights, but that, on the contrary, compliance with court orders is of fundamental concern to a society that bases itself on rule of law. The full court thus held that while the applicant has to prove the elements of civil contempt beyond reasonable doubt, the application procedure is constitutionally competent to accommodate the altered onus. The full court also found that since there is a purely civil aspect to the proceedings, a court may issue a declaratory that a respondent is in contempt of court, established only on balance of probabilities, together with associated civil relief (such as not suspending the order pending appeal, and barring the contemnor from access to civil courts until the contempt is purged).

Application to facts did the applicants show beyond reasonable doubt that the respondents no-compliance was willful and mala fide?

[19] I now turn to whether the applicants have proved beyond reasonable doubt that the non-compliance by the respondents of the court order of the 10th May 2012, was willful and mala fide. The ordinary meaning of the word ‘trade’ is the act of buying and selling goods and services. On the papers before me there is no prove that the respondents were buying, selling or rendering services in the name Makakata. The reliance on the photographs, even though hearsay is misplaced because the trading signs seems to have been erected before the dispute which led to the settlement

agreement relied on. Moreover, it is clear from the papers that the name Makakata, was in previous use as the citation of the parties proves. They certainly do not show that the respondents are trading at all. And the explanation of the respondents is that they are not trading and have sold the business and third respondent to a third party. The latter allegation stands undisputed.

[20] As for the non-compliance with paragraph 9.2 there is a dispute of fact whether the disk was in the bag which the first applicant took on the 29th May 2012. The applicants did not request that the matter be referred to an oral hearing. And the settlement agreement is silent at paragraph 8.4, and makes no provision on how and when the software and designs were to be furnish to applicants. It is true through that the respondents version is not very clear on this score but I am unable to rule that it is not true without a hearing. The issue relating to the assets is similarly disputed. In my view the full picture emerge on the respondents version which seems to cataloque clearly that the applicant was seeking to force the respondents to hand over some assets which were judicially attached and they were consequently not entitled to. The assertions by the applicants about which assets they were entitled to appears to have been an after thought as the list it now relies on was never given to the respondents prior to the launching of these proceedings. The allegation of a lack of assistance is frivolous if the assets on which assistance is sought are unknown.

[21] That conflicting affidavits are not a suitable means for determining disputes of fact is trite. Yet motion proceedings are quicker and cheaper than trial proceedings. Our courts though do not allow a respondent to raise fictitious disputes of fact to delay the hearing of the matter or to deny the applicant an order. There must be bona fide dispute of fact on a material matter. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984(3) SA 623 (A) at 634 -635 the court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[22] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, motion courts might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent version can be rejected in motion proceedings only if it is fictitious or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.

[23] On the affidavits alone there certainly appear to be gaps and insufficiencies in the account tendered. Despite this, I do not think that the assertions of the respondents can be rejected as fictitious or as so implausible as to warrant dismissal without recourse to oral evidence or palpably uncreditworthy, without it being afforded an oral hearing.

[24] In the light of the proper approach to deciding factual disputes in motion proceedings, I should add that on the particular form of process the parties committed themselves to in this case I do not think that it would make any difference had the onus been only proof on balance of probabilities. The accepted approach requires that, subject to robust elimination of denials and fictitious disputes, the court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny. On that approach, the respondents factual assertions, including those regarding their state of mind, must be accepted as established. The proven facts thus establish more than just a reasonable doubt, but a factual picture that entails acceptance of the respondents version; though that is incidental to the form of the proceedings before us.

[25] To summarise: On the accepted test for fact-finding in motion proceedings, it is impossible to reject the respondents version as fictitious or as clearly uncreditworthy. There is a real possibility that if a court heard oral evidence on the factual disputes between the parties, it might accept the respondents version, or at least find that there was reasonable doubt as to whether the delay in complying with the order of 10 May 2012 was willful and mala fide. The applicant therefore failed to prove that the default was willful and mala fide.

[25] The application is accordingly dismissed with costs.

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P Kauta

Acting Judge

Appearances:

For applicants: Adv. Visser
Instructed by HD Bossau

For respondents: Adv. Wylie
Instructed by Theunissen & Louw