

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11/45575

(1)	REPORTABLE <u>YES</u> / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> / NO
(3)	REVISED. ✓
	<u>5/12/2011</u> DATE
	<u>[Signature]</u> SIGNATURE

In the matter between:

DREYER, JOHAN LOUIS

Applicant

and

WIEBOLS, ROSALIND MARGARET

First Respondent

WIEBOLS, GERHARD ALEXANDER

Second Respondent

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

Third Respondent

J U D G M E N T

COPPIN, J:

[1] On 16 May 2008 the Johannesburg Magistrate's Court made the following order in favour of the applicant against the first and second

respondents, who were the first and second defendants, respectively, in the proceedings in that court:

"Judgment is given as follows against the first and second defendants, jointly and severally:-

1. *The defendants are ordered:*
 - 1.1 *To allow the plaintiff to cause to have a 1.8 meter high precast wall, with clinker brick finishing on both sides, erected on the north-eastern side of the retaining wall, between the remaining extent of Erf 98, Linden, situated at 91 Third Street, Linden, Johannesburg and Portion 3 of Erf 98 Linden, situated at 89 Third Street, Linden, Johannesburg; and*
 - 1.2 *To allow the building contractors instructed to erect the pre-cast wall referred to in paragraph 1.1 above, access to enable them to do the work.*
2. *In the alternative, and in the event of the defendants failing to perform in terms of paragraph 1 above, the plaintiff may acquiesce and claim the damages awarded, for an amount of R28 272,00 plus R7 000,00 less R1 750,00, plus interest thereon from the 14th September 2005 to date of payment.*
3. *Payment of the sum of R4 712,00 plus interest at 15,5% per annum from 14 September 2005 less R4 712,00 paid on 24 July 2007.*
4. *Payment of the sum of R1 131,00 plus interest at 15,5% per annum from 14 September 2005, less R1 131,00 paid on 24 July 2007.*
5. *Payment of the sum of R912,00 plus interest at 15,5% per annum from 14 September 2005, less R912,00 paid on 24 July 2007.*
6. *The defendants are to pay the plaintiff's costs up, and unto the judgment on the merits on the attorney and client basis and the costs in respect of the quantum portion, each party to pay his own costs."*

[2] In this application the applicant is seeking, in essence, an order that the first and second respondents be committed for contempt of that order, for

an order that the respondents be directed to comply with that order, related relief and costs¹.

¹ The relief the applicant claims in these motion proceedings in the High Court is the following:

1. *The first and second respondents are declared to be in contempt of the order of the Johannesburg Magistrate's Court under Case No 108789/2005 handed down on 16 May 2008 ('the Magistrate's Court order'). A copy of the Magistrate's Court order is attached to the founding affidavit marked as Annexure 'JLD1'.*
2. *The first and second respondents are committed to prison for a period of 30 days and a warrant of arrest is authorised for the immediate arrest for committal; alternatively the first and second respondents are committed to prison for a period of 30 days, which committal is suspended on condition that the first and second respondents appear before this Court before 30 days of the date of this order to show cause why they should not be committed to prison with immediate effect, failing which a warrant of arrest is authorised for their immediate arrest for committal.*
3. *The first and second respondents are fined R15 000,00 each, which is wholly suspended for a period of 3 years on condition that they are not found guilty again of contempt of court of the Magistrate's Court order and this Court order, committed during the period of suspension.*
4. *The first and second respondents are directed to allow the applicant's agents and builders immediate access to 91 Third Street, Linden, Johannesburg ('the premises') during weekdays between 07h00 to 18h00, excluding public holidays, in order that they may erect a boundary wall as provided for in the Magistrate's Court order and the plan approved by the third respondent.*
5. *In the event of the first and second respondents refusing or failing to provide the applicant's agents and builders access to the premises, the Sheriff is directed and empowered to take all reasonable steps to obtain access to the premises, in particular to open or break any lock to the premises; to open or break any gate to the premises; to humanly capture or incapacitate any dogs on the premises; and to disconnect the power supply to the electric fence at the premises.*
6. *In the event of the Sheriff taking the steps referred to in paragraph 5 above, the first and second respondents are ordered to pay the Sheriff's costs and disbursements in executing this order.*
7. *The first and second respondents are ordered, jointly and severally to pay the costs of this application on the attorney and client scale, the one paying the other to be absolved.*
8. *In the event of the third respondent opposing this application, the applicant shall seek the following additional costs order:*
9. *The third respondent is ordered to pay the costs caused to the applicant by its opposition."*

[3] At the hearing of the application I, *mero motu*, raised the issue of jurisdiction and requested the parties to make submissions on that point at the outset. The parties were agreed that would be the only point to be dealt with in the hearing before me.

[4] On behalf of the respondents it was submitted that this Court does not have jurisdiction to entertain the application for the following reasons. Firstly, the applicant has not pursued his remedies under the Magistrate's Court Act No 32 of 1944 ("*the Act*"). In terms of section 106 of the Act a wilful failure to comply with an order, *ad factum praestandum*, of the Magistrate's Court, is a criminal offence punishable by a fine, or imprisonment, or both². Secondly, the "*process-in-aid*" remedy, whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process³, is not an appropriate remedy in this instance, because the Magistrate's Court is capable of securing compliance with its own process. Thirdly, if the High Court is entitled to hear an application for committal for contempt of an order of the Magistrate's Court, then it is a matter which falls within the High Court's discretion. The High Court must exercise that discretion sparingly and only in

² Section 106 of the Magistrate's Court reads as follows:

"106. Penalty for disobedience of judgment or order of court.
Any person wilfully disobeying, or refusing or failing to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects shall be guilty of contempt of court and shall, upon conviction, be liable to a fine, or to imprisonment for a period not exceeding 6 months or to such imprisonment without the option of a fine."

³ See *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) par [20] at 373F-G.

exceptional circumstances⁴. It is for the applicant to show that there are good and sufficient reasons for the High Court to enforce the judgment of another court. What constitutes "good and sufficient reasons" will depend on the facts of the case at hand and whether the legislative remedies, that are available, are effective in protecting the rights of the parties.⁵ It is for the applicant to make out a case that the High Court should exercise its discretion in favour of entertaining the application and in this regard the applicant must aver facts, including facts to show, or motivate, that the legislative remedy that is available to it in the Magistrate's Court, is not effective in protecting its rights. In this case there has been no attempt by the applicant "*to acquit himself of this onus*".⁶ It was further submitted on behalf of the first and second respondents that neither the Interim Rationalisation of Jurisdiction of High Courts Act 41 of 2001, nor Uniform Rule 39(22) were applicable in this instance⁷ and that the application ought to be dismissed with costs⁸.

[5] It was submitted on behalf of the applicant that the only remedy provided in the Magistrate's Court was a purely criminal sanction by way of section 106 of the Act and that the Magistrate's Court did not have a procedure similar to that of the High Court in terms of which an application

⁴ For this point the respondent relied on the Supreme Court of Appeal's decision in *Bannatyne v Bannatyne* 2003 (2) SA 359 (SCA) at 362F par [9]. On appeal to the Constitutional Court the decision of the SCA was reversed but the Constitutional Court accepted that the High Court had a discretion that should be sparingly exercised. See in this regard the Constitutional Court's judgment in *Bannatyne (supra)* par [22] at 374G.

⁵ In this regard see the Constitutional Court's judgment in *Bannatyne (supra)* par [23] at 374I.

⁶ In this regard the respondent relied on the Constitutional Court's judgment in *Bannatyne (supra)* par [23] at 374I.

⁷ The applicant did not argue the contrary.

⁸ It was submitted that even though the jurisdiction point had been raised by the court there were no special circumstances present that justified any other costs order. See: A C Cilliers: *Law of Costs* 3rd edition at par 3.17; *Estate Breedt v Peri-Urban Areas Health Board* 1955 (3) SA 534 (T) at 540.

could be brought in the Motion Court for a person's committal for contempt of court in order to compel compliance with an order *ad factum praestandum*⁹; that the question that arises is whether there are "good and sufficient circumstances" in the present case warranting an application in the High Court¹⁰; that the relief claimed by the applicant in prayers 4, 5 and 6 of the notice of motion were, in essence, claims for specific performance based on the first and second respondents' failure to comply with the court order, without an alternative claim for the payment of damages and that in terms of section 46(2)(c) of the Act the Magistrate's Court has no jurisdiction in matters in which an order for specific performance is sought without an alternative claim for the payment of damages, except in certain specified instances which do not apply *in casu*.

⁹ *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 344H-345B par [42]:

- (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) *...*

¹⁰ In this regard the applicant relied on what was said by Mokgoro J in the Constitutional Court judgment in *Bannatyne* (*supra*) par [23] at 374I-375A, namely:

"It is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. What constitutes 'good and sufficient circumstances' warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant ..."

[6] It was further submitted on behalf of the applicant that the Act does not provide an effective remedy for the applicant in the Magistrate's Court for the following reasons: The Magistrate's Court does not have the jurisdiction to grant the relief claimed in prayers 4, 5 and 6 by virtue of the limitation of its jurisdiction imposed by section 46(2)(c) of the Act and the Magistrate's Court is limited to imposing a criminal sanction in terms of section 106 of the Act. It was further submitted on behalf of the applicant that the procedure in the Magistrate's Court entailed the laying of a charge with the police, whereafter the matter would then be in the hands of the police and the prosecuting authorities, whereas the procedure in the High Court allowed the applicant to be in control of the process.

[7] It is apparent that in paragraphs 1, 2 and 3 of the notice of motion the applicant seeks the first and second respondents' committal for contempt of the Magistrate's Court order and the imposition of a penalty in the terms stated in paragraphs 2 and 3¹¹.

[8] The relief sought in paragraph 4 of the notice of motion is, essentially, already covered by the Magistrate's Court order, save for the fact that the applicant now stipulates the times at which the applicant's agents and builders ought to be allowed to erect the boundary wall. Paragraphs 5 and 6 of the notice of motion is relief that anticipates that the first and second respondents, may, notwithstanding this Court granting the relief sought in paragraphs 1,2,3

¹¹ See footnote 1.

and 4, refuse to allow applicant the access sought. No authority has been cited by the applicant to the effect that the Magistrate's Court dealing a charge of contempt in terms of section 106 of the Act, cannot grant relief similar to the relief sought in paragraphs 5 and 6¹².

[9] The legal position regarding the issue of jurisdiction, briefly, is as follows. Proceedings for committal for contempt of court ought to be brought in the court that made the order which the respondent is alleged to have disobeyed.¹³ When a High Court entertains an application, in civil proceedings, for committal for contempt of court, it does so in the exercise of its inherent jurisdiction to ensure that its orders are complied with. Process-in-aid is a remedy by means whereby a court enforces a judgment of another court which cannot be effectively enforced through that court's own process and it is also a means whereby a court secures compliance with its own procedure¹⁴. Although it is sometimes sanctioned by a statutory provision, or a rule of court, it is an incident of a Superior Court's ordinary jurisdiction¹⁵. It is a discretionary remedy that will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that other court which can be used.¹⁶ It was held by the Constitutional Court in

¹² See footnote 1 for the relief claimed in this court. A court convicting a person of any offence has wide powers with regard to the sentence it imposes, including the power to suspend a sentence as a whole, or in part and to make the suspension subject to conditions. See s297 of the Criminal Procedure Act 51 of 1977.

¹³ See *Komsane v Komsane* 1962 (3) SA 103 (C) at 104E-F; See generally Cilliers et al in Herbstein and Van Winsen's "The Civil Practice of the High Court of South Africa" 5 edit. Vol 2 pp.1104-1106.

¹⁴ See *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) paras [7], [14], [21], [23], [26], [84] and [91].

¹⁵ See *Bannatyne v Bannatyne (supra)* par [20] at 373G-374A.

¹⁶ *Bosman v Bredell* 1932 CPD 385 at 388; *Bannatyne's case (supra)* par [22] at 374G.

*Bannatyne*¹⁷ that it is for the applicant to show that there is good and sufficient reason for the High Court to enforce the judgment of another court. It held that “what constitutes ‘good and sufficient circumstances’ warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights” of the applicant.¹⁸

[10] In this case the applicant clearly has not made out a case in his papers for the ‘process-in-aid’ remedy to be invoked. The applicant seemingly took it for granted, until raised by the court *mero motu*, that the High Court had jurisdiction to commit the first and second respondents for contempt of the Magistrate’s Court order. Counsel for the applicant submitted from the bar that the process in the High Court, whereby an application for committal for contempt is brought on motion, is more effective than the procedure envisaged in the Magistrate’s Court in terms of section 106 the Act, because there, the matter would essentially be in the hands of the police and the prosecuting authorities after the charge has been laid.

[11] The applicant has several difficulties. Firstly, he never made, or purported to make out a case at all, on his papers, that the Magistrate Court’s remedy for contempt of its orders, i.e. section 106 of the Act, was not effective, or as effective as the High Court procedure. Secondly, the applicant never made out a case in terms of which he requested this Court to exercise its jurisdiction as a ‘process-in-aid’, to supplement what is lacking in the

¹⁷ *Supra*

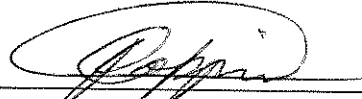
¹⁸ See *Bannatyne (supra)* at par [23] at 374I-375A.

contempt procedures provided for by the Act. Thirdly, the applicant has not made out a case (even in argument) that the remedy in the Magistrate's Court, i.e. section 106 of the Act, is, in fact, less effective in protecting his rights than the remedy in the High Court. There is no averment at all that the applicant has ever attempted to invoke section 106 of the Act, or that the procedure in terms of the Act has proved to be ineffective in protecting his rights. In my view, *prima facie*, the criminal prosecution envisaged in section 106 of the Act with all its implications for the accused person, could be very effective. Fourthly, the submissions made by the applicant's counsel from the Bar regarding the effectiveness of section 106 of the Act as opposed to the procedure in the High Court, are contentions of fact and not of law. Whether the remedy presented by section 106 is rendered less effective, because it envisages a criminal prosecution that is driven, in essence, by the police and the prosecution, is a factual issue. Factual averments must be made in the appropriate affidavits and it is not enough, or even permissible to, as it were, supplement the affidavits with factual averments, made under the guise of submissions from the Bar.

[12] In sum, the applicant has failed to make out a case that this Court has jurisdiction, or that it ought to exercise its jurisdiction in this matter. It is trite that an applicant has to make out a proper case on its papers and that includes making the necessary averments in its (founding) papers concerning the jurisdiction of the court in which it is seeking relief¹⁹.

¹⁹ *Ex parte Kaiser* 1902 TH 165; *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368H.

[13] In the result the application is dismissed with costs.



P COPPIN

JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANT

E M VAN WYK

INSTRUCTED BY

DREYER AND NIEUWOUDT

COUNSEL FOR THE FIRST AND
SECOND RESPONDENTS

J F ROOS SC

INSTRUCTED BY

ANTHONY PERLOWITZ
ATTORNEYS