

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 28772/2020

CASE NO: 2054/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES:NO
REVISED
2/06/2021

In the matter between:-

NETTUS MORAL PHONEY DIBAKOANE N.O

Applicant

and

JAN VAN DEN BOS

First Respondent

(Director of Fourth Respondent)

P GOVENDER

Second Respondent

(Director of Fourth Respondent)

M MOYO

Third Respondent

(Director of Fourth Respondent)

**TRADEWORX 148 (PTY) LTD T/A
PAL PROPERTY MANAGEMENT
& ADMINISTRATORS**

Fourth Respondent

LESWIKA GWANGWA

Fifth Respondent

(In her capacity as duly appointed trustee)

MEISIE MALAPANE

Sixth Respondent

(In her capacity as duly appointed trustee)

GIBSON NDLOVU

Seventh Respondent

(In her capacity as duly appointed trustee)

SELLO RAPHELA

Eighth Respondent

(In her capacity as duly appointed trustee)

RUTH MOTHIBEDI

Ninth Respondent

(In her capacity as duly appointed trustee)

MAGGY KOMANE

Tenth Respondent

(In her capacity as duly appointed trustee)

THE BODY CORPORATE OF QUEEN ANNE

Eleventh Respondent

(Registration number: SS105/1981)

ABSA BANK

Twelfth Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

WINDELL, J:

INTRODUCTION

[1] This is an application for leave to appeal an order granted by this court during urgent court proceedings on 9 and 10 March 2021. The order was granted in respect of a return date of a rule *nisi* that had its origin in an urgent *ex parte* contempt application, under case number 2054/202, instituted by Mr Dibakoane, in his

capacity as the appointed administrator of the Body Corporate of Queen Anne, against Mr van den Bos and eleven other respondents on 20 January 2021. In this application (hereinafter referred to as “the contempt application”) Mr Dibakoane sought an order, *inter alia*, in the following terms:

- i. Finding the first to tenth respondents in contempt of court of an order granted by Vally J under case number 28772/2020 on 1 December 2020 (hereinafter referred to as “the administration application”).
- ii. That the twelve respondent (“ABSA”) be ordered to freeze the bank account belonging to the fourth respondent (PAL Property Management & Administrators) with account number and the amounts be transferred into the administrator’s account held on behalf of the Body Corporate of Queen Anne at First National Bank.
- iii. That the first to third respondents be committed to prison for contempt of court for a period of 30 days.
- iv. That a rule *nisi* be issued returnable on 9 March 2021 calling upon the first to fourth respondents to show cause why the ABSA account should not be frozen and the amount transferred into the administrators account for the Body Corporate of Queen Anne held at First National Bank.

[2] It is common cause that Wright J only granted limited relief. He issued an order in favour of Mr Dibakoane (hereinafter referred to as “the Wright J order”) which reads as follows:

“1. A rule nisi is issued, returnable on 9 March 2021, calling upon the respondents to show cause why the following order is not to be made final:

1.1 The 12th respondent is to freeze the bank account belonging to the 4th respondent (ABSA bank account number [...]);

2. Costs reserved.

3. Pending the return date, the order in paragraph 1.1 to operate with immediate effect.”

[3] At the time of the hearing of the matter in the urgent court it was submitted that it was not only the order of Wright J that had to be adjudicated, but also the contempt application as well as an application launched by the respondents against Mr Dibakoane (hereinafter referred to as the “reconsideration application”), which I will return to later in the judgment.

[4] Mr Köhn , counsel appearing on behalf of the respondents, submitted that the contempt application was not properly before court. He contended that the respondents only obtained knowledge that the contempt application and the Wright J order were to proceed in urgent court when the consolidated roll for the week of 8 March 2021 was received on 9 March 2021. He also experienced problems accessing the pleadings on caselines as he had not been invited by Mr Seloane (Mr Dibakoane’s attorney) to the two cases (92504/2021 and 28722/20). He contended that the respondents did not received the notice of set down for 9 March 2021 despite the fact that Mr Seloane was well aware that both applications were opposed.

[5] As a result of the confusion, affidavits from both the applicant and respondents were still being filed on the morning of 9 March 2021 and 10 March 2021. Mr Chiloane in his affidavit filed on 10 March 2021, conceded that:

“I do not know which matter is to be heard on the 09th and 10th of March 2021, because in so far as I am concerned the appropriate matter to be adjudicated is the rule nisi issued on 26 March 2021 by the Honourable Justice Wright J, encapsulating the contempt of Court as the basis for freezing of the ABSA Bank Account.”

[6] After hearing the parties and considering the affidavits (approximately 1051 pages with 61 index entries), this court held that it was only the Wright J order that was properly before the urgent court and as result the court would not be dealing with the contempt application and the reconsideration application. This court consequently discharged the rule *nisi* and made the following order:

1. The ABSA bank account is released and unfrozen immediately upon granting of this order.

2. *Mr Dibakoane is to take control of the Standard Bank Account in the name of Queen Anne Body Corporate with account number [...] as per order of Vally J.*
3. *Standard Bank is directed to reopen the Standard Bank account.*
4. *The balance of the relief sought in the contempt and reconsideration application are postponed to the opposed motion court roll on 26 April 2021.*
5. *The parties to file any further affidavits if necessary on or before 24 March 2021 and heads of arguments and practice notes before 21 April 2021.*
6. *The costs occasioned in the urgent court on 9 and 10 March reserved and to be determined at the hearing on 26 April 2021.*

[7] On the same day of granting the order (10 March 2021) Mr Dibakoane filed an application for leave to appeal (which was amplified on 31 May 2021) against this court's order. It is contended that this court erred:

- i. in not dealing with the contempt of court application as far as the court order of 1 December 2020 in concerned;
- ii. in not making a final determination of the rule *nisi* on whether the rule *nisi* is confirmed or discharged;
- iii. in finding that the first to tenth respondents' affidavit filed in support of the application for reconsideration, constituted an answering affidavit to the application heard on 26 January 2021;
- iv. in unfreezing the ABSA bank account of PAL Property Management & Administrators and not making an order that the funds belonging to the Body Corporate of Queen Anne be transferred into the Standard Bank account or an account in the name of the of the Body Corporate of Queen Anne prior to the account being unfrozen;
- v. in unfreezing the ABSA bank account, by so doing allowing the first to fourth respondents to have access to the funds belonging to the Body Corporate of Queen Anne;
- vi. in seeking to deal with both the reconsideration which was struck of the roll and the rule *nisi* on the return date. The application for reconsideration cannot be dealt with on the return date;

- vii.in postponing the first to tenth respondents' application for reconsideration to the opposed motion court roll on 26 April 2021;
- viii.in postponing the application for reconsideration as once the court has dealt with the rule nisi, there is nothing left to be reconsidered due to the fact that the Respondent is now before court to deal with an order that was granted in their absence.

BACKGROUND FACTS

[8] The following facts are relevant for purposes of the application for leave to appeal and to put this court's order in context. On 1 December 2020 an application ("the administration application") was launched under case number 28772/2020 by Ms Ncala Valencia Gugulethu (the registered owner of a unit in a sectional title scheme and building known as Queen Anne situated in Hillbrow, Johannesburg) against the Body Corporate of Queen Anne. In the application an order was sought to, *inter alia*, appoint Mr Dibakoane as administrator of the Body Corporate of Queen Anne for a period of 36 months in terms of the Sectional Titles Schemes Management Act 8 of 2011. The application was unopposed. (It is averred by the respondents that the Body Corporate did not receive proper notice of this application).

[9] Vally J granted an order appointing Mr Dibakoane as the administrator of Queen Anne for a period of 36 months. In terms of the order Mr Dibakoane was to open and operate an account at a registered commercial bank in the name of the respondent, *"and/or take possession of any account open in the name of the Body Corporate or any modification thereof, and continue to operate it or transfer such funds into the aforesaid account opened by him and therefore close any such account as deems fit"*.

[10] After the order was granted the trustees of the Body Corporate of Queen Anne issued several notices to all the owners of units at Queen Anne. In one of the notices, dated 11 December 2020, the following was stated:

"We, the trustees of Queen Anne, have just been informed that some owners sneaked into the High Court on the 1st of December 2020, to have an administrator appointed, without any notice of such a date to any owners. Claiming that a notice was put under all the flat doors is an outright lie. The

way the appointment was made is not legitimate, because all the owners were not informed. We will oppose this appointment. There is no need for an administrator. We, the trustees are in full control of the body corporate affairs, we have managed to settle the municipal accounts, we are busy with various maintenance projects and getting full co-operation from our managing agent. The administrator blocked our Standard Bank account and without our knowledge opened an FNB account. Under no circumstances must owners pay into the FNB account as we will have no control as what will happen to that money. It will take some time to sort out the Standard bank account, so in the meantime, we have instructed our managing agent in terms of regulations of the Sectional Titles Schemes Management Act to collect the levy payments into their ABSA Trust account. The account number will show on your levy statement. use your flat number as reference. Do not at this stage pay into the Standard Bank, nor FNB account.

[11] It is common cause that reference to the ABSA account in the notices is the same account that is the subject of Wright J's order. It is also common cause that the Body Corporate of Queen Anne had a Standard Bank Account prior to the appointment of Mr Dibakoane as administrator and that Mr Dibakoane opened a First National Bank account after his appointment as administrator on 1 December 2020.

[12] On 20 January 2021 Mr Dibakoane instituted the *ex parte* contempt application against the respondents for alleged failure to comply with the order by Vally J. The application was brought under a different case number namely 2054/2021. As alluded to earlier, the matter came before Wright J who ordered ABSA to freeze the bank account belonging to PAL Property Management & Administrators. It is clear from the order granted by Wright J that the contempt application was not dealt with by the court.

[13] On 18 February 2021 the respondents launched an urgent reconsideration application of the *ex parte* urgent Wright J order. In the reconsideration application a host of additional relief was claimed against Mr Dibakoane and others namely:

- i. That the parties under case numbers 2054/2021 and 28722/2020 be joined and dealt with as convenience in terms of the provisions of Rule 11;
- ii. That the urgent application under case number 2054/2021 be reconsidered under Rule 6(12)(c) and set aside and that the ABSA bank account be released and unfrozen immediately.
- iii. That the appointment of Mr Dibakoane as administrator be set aside;
- iv. That an interim order be granted interdicting and restraining Ms Gugulethu, Mr Dibakoane, Nettus Real Estate, Seloane Vincent Attorneys and Vincent Seloane from interfering with the management of the Body Corporate of Queen Anne and with the contractual agreement between the Body Corporate and the managing agent, PAL Property Management & Administrators,
- v. Interdicting and restraining Mr Dibakoane and others from interfering with the collection of levies by the duly appointed managing agent PAL Property Management & Administrators;
- vi. granting a rule *nisi* returnable on 9 March calling upon the Mr Dibakoane and others to show cause why they should not be held liable for costs on a *de bonis propriis* basis and why the interim order ought not be made final.

[14] The matter came before Mudau J in the urgent court on 23 February 2021. He struck the application from the urgent court roll with costs for lack of urgency. Mudau J held that to his mind *“the application was poorly conceived”*, but stated that *“nothing stops the applicants to approach the court to seek for an appropriate relation to a reconsideration application for purposes of the rule nisi”*.

[15] On 9 March 2021 the matter came before this court. As stated earlier, the contempt application was not dealt with by Wright J on 26 January 2021 and the only issue for determination by this court on 9 March 2021 was whether the rule *nisi* should be discharged or confirmed.

[16] Mr Seloane, the attorney appearing on behalf of Mr Dibakoane, argued that there was no answering affidavit filed by the respondents in opposition of the Wright J order. He contended that the court should therefore not take cognisance of any of

the respondents' submissions or affidavits filed in the contempt and reconsideration applications, and confirm the rule *nisi* thereby granting a final order freezing the ABSA account.

[17] Mr Köhn , counsel appearing on behalf of the respondents, contended that there was a comprehensive affidavit filed on behalf of the respondents in the reconsideration application and that the court should accept the affidavit into evidence when considering the Wright J order.

[18] On a perusal of the founding affidavit in the reconsideration application, it was clear that it dealt not only with the contempt application, the reconsideration application and the administration application, but it also constituted an answer to the Wright J order. As the Wright J order was granted *ex parte*, and to give effect to the *audi alteram partem* rule, I exercised my discretion in favour of the respondents and condoned and relaxed the formal requirements, and accepted the affidavit as an answer to the Wright J order.

THE APPLICATION FOR LEAVE TO APPEAL

[19] I do not intend in dealing with each of the grounds set out in the application for leave to appeal as the bulk of the grounds of appeal are incompetent and/or incompatible with the discharge of the rule *nisi* and are not appealable.

The discharge of the rule nisi

[20] The applicant sought an order for final relief, namely to freeze the ABSA account and an order to pay the money belonging to the Body Corporate of Queen Anne in the ABSA account, into the First National Bank Account. There is a clear dispute of fact on the papers. It is trite that, being motion proceedings, disputes of fact are to be dealt with in accordance with the principles laid down in *Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd*.¹ A final interdict may therefore only be granted if the facts stated by the respondents' answering affidavits together with the admitted facts in the applicant's founding affidavit justify such an order.

¹ 1984 (3) SA 623 (A) at 634 E-I.

[21] The reconsideration application was launched with the support of the trustees of the Body Corporate of Queen Anne. In the respondents' affidavit it was alleged that the trustees were duly elected and that they concluded a valid and binding agreement with the managing agent namely PAL Property Management & Administrators on 9 October 2020. It was submitted that Mr Dibakoane, even in his capacity as administrator, may not terminate the agreement between PAL Property Management Administrators and Body Corporate of Queen Anne unilaterally without calling a meeting to be decided upon by a special resolution.

[22] It was further contended that the ABSA account is the business account of Tradeworx 148 (Pty) Ltd t/a Pal Property Management Administrators. This account is a trust account and holds various funds related to the administration and management of a number of body corporates within the greater area of Johannesburg, which are unrelated to the dispute between Mr Dibakoane and the respondents. This account is used to administer the following sectional titles: San Giulio; Stamford Hall; Queen Anne; Waters-edge and Sandy Springs. It is submitted that money in the account therefore does not belong exclusively to the Body Corporate of Queen Anne. The ABSA account is used to make payments on behalf of the body corporates, is audited each year and is compliant with all the provisions of a trust account in respect of the administration and management of body corporates. It is submitted that since the account has been frozen all the other body corporates are unable to pay their creditors. The electricity for various units, including Queen Anne, will therefore be terminated as Mr Dibakoane is unable or unwilling to pay the creditors even though he is in control of the administration and has full access to the Standard Bank Trust Account in the name of the Body Corporate of Queen Anne.

[23] It was submitted that the ABSA bank account was not created with the intention to manage the financial affairs of the Body Corporate of Queen Anne solely as made out to be the case by the applicant. It was submitted that as a result of Mr Dibakoane approaching the court on an *ex parte* basis, it was not only detrimental to the Body Corporate of Queen Anne, but the smooth administration of the other body corporates listed above and has severely prejudiced them.

[24] The applicant's main contention during argument was that the court should confirm the rule *nisi* and freeze the ABSA account as the funds in the ABSA account will be dissipated by the respondents should the order be discharged. There was no merit in this argument and there was no factual basis to give credence to the allegations that PAL Property Management & Administrators will with the assistance of the duly appointed trustees expend the funds in the ABSA trust account without accounting therefore and seeking prior approval from the trustees. If the facts stated the respondents' in their answering affidavit together with the admitted facts in the applicant's founding affidavit are considered, Mr Dibakoane had failed to discharge the *onus* to justify a final order.

[25] In discharging the rule *nisi* the court also took into consideration that there is a pending application by the respondents to set aside the appointment of Mr Dibakoane as administrator of the Body Corporate of Queen Anne, in terms of section 16(5)(a) of the Act. In that application it is contended that Mr Dibakoane has failed to make out a case in terms of the provisions of section 16 of the Act; is not qualified to administer a sectional title; is a director of a financially distressed company being Nettus Real Estates (Pty) Ltd which had been in final deregistration since 2011; is not in possession of an EAAB trust account, and does not hold a trust account in order to administrate a sectional title scheme in terms of the provisions of the Act and the Regulations.

[26] The appellant lodged an application for leave to appeal on 10 March 2021, the same day as when the order was granted. The application was filed, whilst knowing that an expedited opposed court motion date has been made available during which a court could have dealt with the reconsideration application as well as the contempt application (which includes a prayer for an order to set aside the appointment of Mr Dibakoane as administrator of the Body Corporate of Queen Anne).

[27] In light of the serious allegations against Mr Dibakoane and the pending litigation between the parties, it would have been irresponsible for this court to allow any funds to be paid over into the First National Bank account.

THE TEST FOR LEAVE TO APPEAL

[28] The test for when leave to appeal should be granted is set out in section 17(1)(a) of the Superior Courts Act 10 of 2013 which provides as follows:

“Leave to appeal may only be given where the judge or judges concerned are of the opinion that:-

- (i) The appeal would have reasonable prospect success; or*
- (ii) There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”*

[29] In *S v Smith* 2012 (1) SACR 567 (SCA) the court held that the test to be applied in an application for leave to appeal is as follows:

What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

[30] The applicant contends that the appeal has reasonable prospects of success. I disagree. I am satisfied that there are no prospects of success on appeal. The application for leave to appeal is dismissed with costs.

[31] It is trite that the noting of an appeal against the refusal of a final order where interim interdictory relief was granted (but the final relief refused) does not revive the interim order unless the parties have specifically agreed to the continued existence of the interdict pending an appeal. A party who desires further protection by way of interdict pending the determination of the appeal could also make application for the renewal of the interdict. Where an interim order is not confirmed irrespective of the wording, the application is effectively dismissed. There is accordingly no order that can be revived by the noting of the appeal and there is nothing that can be

suspended.² If an applicant seeks further protection it has to bring a fresh application which sets out the basis upon which the court should grant a temporary interdict.³

[32] The ABSA bank account [...] must be released and made accessible to PAL Property Management & Administrators upon granting of this order.

[33] In the result the following order is made:

1. The application for leave to appeal is dismissed with costs.

L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
(Electronically transmitted, therefore unsigned)

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 2 June 2021.

APPEARANCES

Counsel for applicant:	Mr V.O.M. Seloane
Attorneys for applicant:	Seloane - Vincent Attorneys
Counsel for respondent:	Adv. M.D. Köhn
Attorneys for respondent:	AM Ellis Attorneys
Date of hearing:	1 June 2021
Date of judgment:	2 June 2021

² Erasmus: Superior Court Practice Vol 2 2ed A2-66 - A2-67. See also *Tapuch v Aswagen and Others* (19960/2016) [2016] ZAGPPHC 572 (11 May 2016)

³ *Southernwind Shipyard (Pty) Ltd v NUMSA and Others* [2008] ZALCCT 7