IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO.: 49668/2020

(1) REPORTABLE: [redacted] / NO
(2) OF INTEREST TO OTHER JUDGES: [redacted]/NO
(3) REVISED.

24/03/2022

In the matter between:

JR 209 INVESTMENTS (PTY) LTD	**FIRST APPLICANT**
INDLEWILD FARM (PTY) LTD	**SECOND APPLICANT**
LIBERINI 112 CC	**THIRD APPLICANT**
HY-LINE SOUTH AFRICA (PTY) LTD	**FOURTH APPLICANT**
MALUVHA KWEKERY (PTY) LTD	**FIFTH APPLICANT**

and

HOMELESS PEOPLE HOUSING CO-OPERATIVE LTD (Registration Number 2014/013419/24)	**FIRST RESPONDENT**
SAMUEL MANDLA SONGO	**SECOND RESPONDENT**
KOLOBE VIRGINIA KGOMO	**THIRD RESPONDENT**
SELO SHARON LEHONG	**FOURTH RESPONDENT**
MADUMETSA THOMAS MOJELA	**FIFTH RESPONDENT**
KEDIBONE JOHANNES SIBANYONI	**SIXTH RESPONDENT**
UNLAWFUL INVADERS OF PORTIONS 8, 10 AND 38OF THE FARM WITKOPPIES 393, EKURHULENI	**SEVENTH RESPONDENT**

JUDGMENT

MANAMELA AJ

Introduction

[1] This is a contempt of court application against homeless people of Witkoppies. This matter is preceded by a number of inseparably intertwined litigation between the parties, mainly in the form of urgent land invasion interdicts, liquidation applications and contempt applications, challenging of certain orders, attempts to appeal against some of the orders, and all leading to the current application for contempt of court against the Respondents. This is the fifth application by the Applicants against the Respondents. Unfortunately, the exigencies of dealing with a large volume in this matter has overtaken me and I apologize for the delay in delivering this judgment.

[2] This matter was initiated in the urgent court, but could not proceed, in light of its volume of over 500 pages. Pursuant to its removal from the urgent court, the matter was set-down for hearing on 1 and 2 June 2021, on which dates the Respondents notified the Applicants of its intention to challenge the late filing of the replying affidavit. This led to the postponement of this matter to 27 and 28 October 2021.

[3] On the date of the hearing the matter was preceded by two interlocutory applications, being the condonation application for the late filing of the replying affidavit and permitting the filing of two supplementary affidavits by the Applicant as well as striking out application by the Respondents.

[4] In terms of the notice of motion, the applicants sought the following orders –

(i) *declaring the First to the Sixth Respondents to be in contempt of court of an order granted by Truchten J on 19 April 2019 under case 24505/2019,*

(ii) *declaring the First to the Sixth Respondents to be in contempt of court of an order granted by Millar AJ on 26 April 2019 under case 24505/2019;*

(iii) *that the suspension of the fine in the amount of R100 000.00 imposed on the First respondent by the order of court granted by Millar AJ on 26 April 2019 under case 24505/2019, be uplifted;*

(iv) *declaring that the First to the Seventh Respondents are in contempt of court granted by Kollapen J on 17 July 2020 under case 21712/20;*

(v) *that a further fine of R500 000.00 be imposed on the First respondent as a result of its persistent contempt of Court;*

(vi) *that the Second Respondent be committed to imprisonment for a period of six months;*

(vii) that a fine of R500 000.00 be imposed on each of the Third Respondent to Sixth Respondent for contempt of Court;

(viii) that the First respondent be placed under final winding-up;

(ix) that the First to the Seventh Respondents be ordered to forthwith remove or cause to be removed from the First respondent's properties all and any building material, tents and any other material intended to be utilized in pursuance of erecting/constructing temporary or permanent structures on the said properties failing which the sheriff be instructed and authorized to do so in their stead and at the cost of the First to the Seventh Respondents;

(x) *that the costs of the application be paid by the Respondents jointly and severally, on a scale of attorney and own client, the one paying the other to be deemed fit.*

Factual Background

[5] The Applicants and the First Respondent are owners of adjacent properties within the municipal area of Ekurhuleni Metropolitan Municipality. The First Applicant owns various properties earmarked for residential and/or

commercial development, and the Second to the Fifth Applicants are also adjacent property owners used for either business or residential purposes, respectively.

[6] The First Respondent is the registered owner of portion 8, 10 and 38 of the Farm Witkoppies, Ekurhuleni ("the subject properties") and is constituted as a housing co-operative incorporated in terms of the Co-operatives Act 14 of 2005 ("Co-operatives Act). The main objective the First Respondent's business is the facilitation of community housing development. The First Respondent's members consist of individuals from historically disadvantaged communities who have made financial contributions towards securing land for residential housing[1].

[7] The Second to the Sixth Respondents are the directors of the First Respondents. The Seventh Respondents are cited as unlawful invaders of portion 8, 10 and 38 of the Farm Witkoppies, Ekurhuleni ("the subject properties").

[8] The First Respondent purchased the subject properties on 29 October 2015, 28 July 2017 and 2 March 2018 respectively, for a total amount of R25,000,000.00 (Twenty-Five Million Rand) on behalf of its members.

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[1] Paragraph 111 of Answering Affidavit

[9] Seemingly, the First Applicant including its holding company and the First Respondent are in the space of property development, but with a totally different approach to property development. The distinct approach demonstrates two opposite worlds. As described by the applicants' counsel, '*it is a world wherein the applicants sit beyond the boundary and look into the first respondent from the outside and the second world consist of people on the inside of the first respondent looking outside'*. In simple terms, the First Applicant is a seasoned commercial developer, whilst the First Respondent is a self-sustained social group of community members who have made financial contributions towards archiving the housing needs and security of tenure in the informal settlements.

[10] In pursuit of their respective common law right of ownership and the constitutional right entrenched under section 25[2], these parties have engaged in a number of litigation matters over the years, based on these subject properties and more or less the same set of facts.

[11] The Applicants challenged, by way of the several court orders, the lawfulness of the Respondents use of the subject properties, as it observed informal structures and building material being brought to the subject

[2] Section 25 (1) of the Constitution, Act 108 0f 2008 – "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property"

properties, on the basis that the subject properties are zoned as agricultural land and not for residential use.

[12] The Applicants illustrate that the Respondents have been illegally running a 'scheme' of collecting money from members of the public as far back as 2009, and even before its incorporation, in 2014, for purchase of residential stands. The Applicants further indicate that this is not the first project of this kind[3] led by the Second Respondent. On the other hand, the Respondents deny the unlawfulness of the of these 'scheme' and in fact finds it defamatory. It is on this basis that some of the averments made by the Applicants in its founding affidavit, are sought to be struck out.

[13] From the evidence led by the applicants, the most recent alleged invasions, which let to this contempt of court application, arose on 3 September 2020 and/or alternatively on 6 September 2020 when building material were apparently delivered and some informal structures were erected at the subject properties.

[14] The sequence of the events leading to the various court orders are – that on or about 16 December 2017, the First Applicant's holding company M&T, prosecuted an interim order against the Respondents, in respect of portion

[3] The Second Respondent is the founder of other townships in and around Tembisa. such as Ivory Park, exten 4 and 5, Phomolong, with over 35000 collective members

10, in the urgent court, in terms of which Mabuse J' granted an order, *inter alia*, restraining the Respondents from taking occupation of the land, then being portion 10. Costs were reserved.

[15] On 19 April 2019, Truchten J, under case no 24505/2019, granted an interim restraining order against the Respondents interdicting the Respondents from invading, taking occupation, demarcating and/or performing any unlawful building /constructions on the subject properties, potion 8, 10, and 38 Witkoppies 393. This order further permitted that the respondents may neatly store building material on their respective properties, amongst others.

[16] The subsequent order was granted by Millar AJ on 26 April 2019, similarly in the urgent court, which incorporated an order that the first respondent is declared to be in contempt of the order granted by Truchten J, amongst others, and the suspension of a fine of R100 000.00 imposed against the First Respondent, on condition that the First Respondent forthwith complies with the aforesaid order and continues to do so in future; until the establishment of townships on the subject properties and/or the First Respondent ceases to be the owner of the any one of the properties, as well as costs order against the Respondent.

[17] In terms of the Millar J order, the Sheriff was authorized to demolish each structure/dwelling erected since 19 April 2019 on the subject properties and

to provide a report to the court on the number of dwellings and structures erected on the properties since 19 April 2019, and this report was filed on 14 May 2019. On 16 May 2022, the Sheriff attended to the properties and demolished all structures, occupied and unoccupied. The Respondents attempted to file an appeal against Millar J's judgment, which application was dismissed with costs.

[18] The Fourie J order dealt with the question of whether there was any authorization for the demolition of occupied structures on 16 May 2022, as according to the Respondents (applicants in that matter), the demolition of occupied structures was unlawful.

[19] The Kollapen J order was granted on 17 July 2020, which mainly revoked the provisional liquidation of the first applicant; ordered the payment of the legal costs due to the applicants, administration costs relating to the provisional liquidation of the first respondent and that no additional structures or dwellings are to be constructed other than the 52 that are already in existence.

[20] From the notice of motion, I would first eliminate some of the reliefs that were not proceeded with, being, "*6. that the Second Respondent be committed to imprisonment for a period of six months; and 8. that the First respondent be placed under final winding-up'.*

Issues to be Determined

[21] The issues to be determined can be summarized as follows:

1. Whether the Respondents are found to be in contempt and whether the Applicants are entitled to the relief sought.
2. Whether the Respondents' interlocutory application to strike out certain paragraphs from the Applicants' Founding Affidavit should be granted.
3. Whether a punitive cost order is warranted.

Interlocutory Applications

[22] The Applicants sought an order for condonation in the following terms:

(i) That the late filing of the replying affidavit is condoned.

(ii) That the filing of the first and second supplementary affidavits by the Applicants on 20 October 2020 and on 6 May 2021 is permitted and that same is permitted and same is accepted as forming part of the evidence before this court in relation to the application; and

(iii) That the costs of this condonation application as well as the wasted costs for postponement of the 1 and 2 June are for the Applicant."

[23] The facts leading to this application for condonation are that the application was initially set down for hearing in the urgent court on 20 October 2020.

The Respondents had until 9 October 2020 to file their answering affidavit, the Respondents' answering affidavit was delivered late on 12 October 2020, and consisted of 123 pages in length and the Respondents raised a point that they were not given sufficient time to answer to the founding affidavit.

[24] On 9 October 2020, the Respondents gave an undertaking to comply with the court orders. The matter was removed from the urgent court by agreement, in light of the over 500 pages of the application and on the strength of the Respondents' undertaking to comply with the Court orders. The Respondents were given 15 days to file a supplementary answering affidavit, being by 5 November 2020, which they did not file. The Applicants filed the supplementary affidavit on 20 October 2020 and the replying affidavit around 2 February 2021.

[25] The Applicants argued in support of its condonation applicant that the Respondents failed to forewarn them at least before the hearing date of 1 and 2 June 2021, that they will object to the lateness of their replying affidavit and the supplementary affidavits. The Respondents also did not file a notice in terms of Rule 30 upon receipt of the late replying affidavit.

[26] From the evidence led, it appears there was no agreement as contemplated in Rule 27[4] and therefore the Applicant had to seek the court's indulgence. The Respondents did not have legal representatives at some stage leading towards the 1st and 2nd June 2021 and could not have effectively invoked Rule 30. The Respondents' attorneys were reinstated on 28 May 2021. The Respondents also did not file its practice note, heads of arguments and list of authorities before the set down date of 1 and 2 June 2021 and no consequential step was taken by the Applicants either.

[27] The prerequisite for granting of an extension of time contemplated in Rule 27, is on 'good cause shown', which gives the court a wide discretion which must be exercised with regard to the merits of the matter as seen as a whole[5]. In simple terms, a Court cannot exercise discretion judicially if the Court is not told why there is a supplementation.

[28] It is trite that in the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time limit prescribed by the Rules for taking any

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[4] *Rule 27(1) of the Uniform Rules of Court – "(1) In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet."*

[5] *Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 215C*

step-in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.

[29] The Applicant is required to give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And the explanation must be reasonable[6]. The Constitutional Court is clear in *Van Wyk v Unitas Hospital*[7] that the applicant must come and explain why it is late, it is not there for the taking. A late supplementary affidavit must have a condonation application[8].

[30] The Appellate Division, in *Ferreira v Ntshingila*[9], stated that:

> *"In as much as an applicant of condonation is seeking an indulgence from the Court, he is required to give a full and satisfactory explanation for whatever delays occurred. The explanation in the present case was neither full nor satisfactory ..."*

[31] The late service and filing of a replying affidavit and supplementary founding affidavit, has been dealt with in a number of cases[10]. The Applicants, before

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[6] *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)*

[7] 2008 (2) SA 472 (CC)

[8] Standard Bank v Sewpersad

[9] 1990 (4) SA 271 (A) at para 41

[10] Watloo Meat and Chicken SA (Pty) Ltd v Silvy Luis (Pty) Ltd and others (18910/07) [2008] ZAGPHC 136; Pengbourne Properties Ltd v Pulse Moving cc and another (2009/30282, 2009/37649) [2010] ZAGPJHC 121; 2013 (3) SA 140 (GSJ) (19 November 2010); South African Broadcasting Corporation SOC Limited v South African Broadcasting Corporation Pension Fund and Others (17/29163) [2019] ZAGPJHC 86; [2019] 2 All SA 512 (GJ); 2019 (4) SA 608 (GJ) (18 January 2019)

making a concession to the contrary, relied on the judgment by, Wepener J in *Pangbourne Properties Ltd v Pulse Moving CC and Another*[11], where it was held that it is unnecessary for either of the parties to have brought a substantive application for condonation.

[32] In *Pangbourne* the court held that -

"There are a large number of matters that come before the court in which parties, for a variety of reasons, agree to file affidavits at times suitable to them. Each case must be decided on its own facts and it cannot be said that when affidavits are filed out of time that it is not, without more, before the court. Were the court to uphold the argument that the replying affidavit and consequently also the answering affidavit, fell to be disregarded because they were filed out of time, it would be too formalistic an exercise in futility, and it would leave the parties to commence the same proceedings on the same facts de novo."

[33] In *Eke v Parsons*[12] Madlanga J cautioned that:

"Without doubt, rules governing the court processes cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to the point where they are

[11] **2013 (3) SA 140 (GSJ) at para 18**
[12] **[2015] ZACC 30 at para 39**

hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '[i]t is trite that the rules exist for the courts, and not the courts for the rules'."

[34] The first supplementary affidavit relates to placing a signed confirmatory affidavit before court and the placing of colour photographs, which I have ordered in favour of the Applicants.

[35] The second supplementary affidavit relates to the Respondents' failure to pay the taxed bill of costs in the amount of R289,157.49 following the order granted on 17 July 2020 by Kollapen J ("Kollapen order"), under paragraph 5 thereof, and on the basis of which the applicants argued that it amounts to a further ground for the liquidation of the first respondent since it is both factually and commercially insolvent.

[36] This taxed bill was only settled during course of the hearing on 27 October 2021. The Respondent argued that it could not pay this when the demand was issued after taxation on 22 February 2021, in light of the pending liquidation application as it would have amounted to a compromise. I am not persuaded by this argument, as there was still no ruling on liquidation at the

time of payment, except to say that pay making payment, the Respondents have expunged the relief sought under paragraph 9 of the Notice of Motion, that "*that the First respondent be placed under final winding-up*".

[37] The events leading to the hearing of this matter around 2 June, provides a clear and justifiable explanation which justifies the granting of the condonation, and the allowance of the supplementary affidavits. I found that there is no conceivable prejudice suffered by either of the Respondents as a result of the late filing of the replying affidavit after seeking indulgence, particularly as the Respondents elected not oppose it after reading the reasons. The Applicants could have avoided this by seeking the indulgence timeously. I am persuaded by the reasoning in *Pangbourne Properties* that the Applicants should succeed, and should also bear the cost of this condonation application including the wasted costs relating to the preparation for the main application set down for 1 and 2 June 2021.

CONTEMPT OF COURT

Legal Principles on contempt of Court

[38] The common law *ex facie curiae* contempt of court, which applies in the case in point, has received a lot of attention in our courts. It is a sort of relief where the court preserves its authority more than having a winning litigant. In

Laubscher v Laubscher[13], De Vos J stated – *...where the judiciary cannot function properly, the rule of law must die. To protect this, special safeguards have been in existence for many centuries, one of these being civil contempt of Court.*

[39] The Applicant must set out clearly in the application such grounds as will enable the court to close that the onus resting on him of proving the contempt has been discharged.

[40] The most recent Constitutional Court judgment on contempt of court was in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others*[14], where the contempt order was issued against the Municipal Manager, Mr. Lepheana (Municipal Manager). The first respondent was Eskom Holdings Limited (Eskom). The second to fifth respondents, collectively referred to as the respondents, are the Member of the Executive Council for Local Government in the Free State (MEC), the National Energy Regulator of South Africa, the Minister of Minerals and Energy, and the Minister of Provincial and Local Government. The second to fifth respondents did not participate in these proceedings. The Municipality launched urgent proceedings to interdict Eskom from cutting its electricity supply pending the

[13] 2004 (4) SA 350 (t) at 367
[14] 2018 (1) SA 1 (CC)

finalization of the dispute concerning the arrear amounts. Several orders were granted by the Court leading to the Municipal Manager being also ordered to report to the Court, setting out the reasons for its failure to comply. Following his failure to comply, he was found to be personally in contempt. The Court dealt with the procedural and substantive issues concerning the requirements of contempt of court. The Court held that cases concerning contempt of court are now brought to our courts with more frequency. There is a widely held view that contempt of court is neither criminal nor civil. As a result, the standard of proof required in contempt has become somewhat blurred. It is based on the objective to ensure that the authority of the courts is effective. The primary issue for determination was whether the orders of contempt and imprisonment sentences against the respondents were just and equitable.

[41] The Court further illustrated that the provisions of Section 165(5) of the Constitution provide that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Ongoing contempt of a court by its very nature introduces an element of urgency in the proceedings[15]. In *Fakie NO v CCII Systems (Pty) Ltd*[16], Cameron JA stated that:

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[15] Blieden v Riechenberg [1996] 1 All SA 620 (W) at 634

[16] 2006 (4) SA 326 (SCA) at 333

"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 had, in general terms, received a constitutional 'stamp of approval', since the rule of law – 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.'

[42] The Constitutional Court in *Eke v Parsons* emphasized this principle, as it was stated that: "*[64] The rule of law requires not only that a court order be concluded in clear terms but also that its purpose be readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution. Furthermore, in appropriate circumstances non-compliance may amount to a criminal offence with serious consequences like incarceration."*

[43] It is common cause that a corporate like the First Respondent can only comply with a court order through its officers. The prerequisites for contempt of court have to be established before an order for contempt of court can succeed namely, there must be a court order; the offender must have knowledge of the court order; the court order must have been served on the

person; and there must be non-compliance with the court order. I am of the view that the first three requirements are common cause and the last one is the main point of contention.

[44] From the Applicants' evidence it is evident that the Respondents, through its officers had knowledge of the orders granted by the Courts, the Second Respondent attended court when particularly in that the Second Respondent was present in court when one of the orders was granted by Miller J under case number 24505/19.

Analysis of evidence relating to Contempt of Court

[45] The facts leading to the current application for contempt are, as alleged by the Applicants, that the Respondents are continuing to permit the unlawful invasion, occupation and inhibition of the subject properties as well as the erection of illegal structures or dwellings and shacks. The Respondents contend that there are no additional invasions following the Kollapen J order. In fact, none of the Applicants have clear and precise knowledge of further invasions following the undertaking to comply issued by the Respondents' Attorneys and after the Kollapen order. The order by Kollapen J stated that until such time as legally entitled to do so, no more than 52 persons shall at any time be present, and no further dwellings, shacks or similar structures

other than the once currently on the properties owned and controlled by the First Respondent shall be constructed and/or be erected. There is no clear evidence to suggest that there are additional dwellings, shacks or similar structures, even on when one considers the additional pictures provided under the supplementary affidavit.

[46] Before the Kollapen order, it is apparent from the return of service that when the Sheriff read the court order granted under case number 24505/2019, on 29 April 2020, the people were not interested and they tore the court order in pieces, and that as per paragraph 3.4 of the Court order, the unoccupied structures/dwellings/shacks that were unlawfully erected at the invaded property were demolished and removed. Kollapen order, was made out of consent or settlement between the parties which was made an order of court. In *Eke* the court held that 'once a settlement agreement has been made an order of court, it is an order like any other, It will be interpreted like all court orders'. In terms of the Kollapen order, the

[47] Applicants took issue that the deponent to the answering affidavit being another director of the First Respondent, and not Mr. Songo, the Second Respondent, stating that the version provided by Mr. Songo's co-director in the opposition of the application is different from what he has already stated under oath during the Millar J order. The recording of Mr. Songo's evidence was only brought up in the replying affidavit, and the respondents would

obviously not have an opportunity to respond therereto. I have considered some of the statements made by the First Respondent's members in a television interview on Land locked, CHECKPOINT on 5 November 2019, that '*we follow our leaders and he wants us to do things accordingly. We would have long destroyed things around here. But we listen to our leaders who wants to do things the correct way. But if we could be told that we can erect shacks here we would be happy'.*[17]

[48] It is quite clear from the evidence in the answering affidavit that the Respondents purchased the subject properties in order to ultimately enable its members to acquire residential stands. The Applicants' counsel argues that an agricultural holding cannot be converted into a township as the applicable legislation prevents the subdivision of land without the consent by the Minister of Agriculture. There is clear evidence that the first respondent commenced with the application for township opening which will obviously include, the excision of land from its current land register, ministerial consent under Act 70 of 1970, which is now repealed. I find this argument to be misleading as the First Applicant is fully aware, as a property developer, of all the steps to convert the land from agricultural holding to a farm and ultimately to a township, which it has done. The difference is that

[17] eNCA, Checkpoint, Land locked, 5 November – page 875

the Applicants' ultimate recipients of land potions do not take occupation prematurely. The Applicants take issue about the fact that the Respondents' application for the rezoning and township opening is not yet approved by the relevant authorities. I reject the argument, as it is baseless.

[49] This brings me to the point of Applicants' *locus standi*. I agree with the submission by the Applicants that the existence of the previous orders forms the basis of the applicants legal standing for purposes of the prosecution of contempt of court. I do not agree, that the Applicants' ownership right, as adjacent property owners, grants them any right to enforce by-laws or laws against the Respondents nor does it grant them an upper right to usurp the function of the municipality.

[50] I have considered the Truchten J order in line with the events purportedly leading to the current contempt application, I count not find any direct evidence proving contempt of at least orders under paragraph 3.3 and 3.4. in particular and the balance of orders have been complied with. I have also considered the facts which apparently took place around 3 to 6 September 202 leading to the current application, against the order by Millar AJ, and found that paragraph 3 already provided for a contempt against the Truchten J, and therefore it would not be justifiable to repeat the same order herein. The applicants failed to advance reasons or appropriate evidence based on the dual standard of terms applicable to contempt of court, that the the

respondents are in contempt of paragraph 4 of Millar AJ. Paragraph 4 provided for the suspension of the fine of R100 000.00 imposed against the first respondent. There is no clear evidence of who and when was the invasion discovered. Most evidence is hearsay[18] and consists of words such as "*it appears that there is a continuous invasion…*"

[51] The Respondents are expected to trawl through lengthy affidavits and annexures, and to cross reference between and to speculate relevant facts to the current application, and the most difficulty comes with the fact that the Respondents have ensured compliance by its members.

[52] I do not see why the Co-operatives Act, in particular its preamble, should not be read in the same context of striving for equality. The transformative approach to housing also calls for amelioration of conditions of disadvantages communities. Section 9 of the Constitution guarantees equality before the law and freedom from discrimination to the people. This equality right is the first right listed in the Bill of Rights, our human rights charter. It prohibits both discrimination by government and by private persons, however, it also allows for affirmative action to be taken to redress past unfair discrimination. The continuous reprimand in the form of contempt orders perpetuate social division, it tarnishes the authority of the courts,

[18] Paragraph 101, 91 Founding Affidavit

more so when it is done in multiple interim orders, which someone waters down the authority of the court, if not properly addressed. The Applicants could have assisted the First Respondent in its quest to provide housing needs instead. Business cannot continue to be an island of prosperity in a sea of poverty.

[53] To some extent, I can conclude that there is an overlap, repetition and ambiguity between the court orders, and this defeats the purpose, as it is important that court orders be concluded in clear terms, but also that its purpose be readily ascertainable from the language of the order.

[54] It is undoubted that there is no winning party in contempt of court matters, as it is purely aimed at preserving the authority of the court. I am of the view that the Applicants have failed to discharge the onus to prove any contempt of court.

Liquidation Process

[55] The Applicants contends that the winding up order sought against the First Respondent is based on the provisions of section 72 of the Co-operatives Act[19]. The basis for seeking a winding-up order of the First Respondent is

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[19] *"72 Winding up by order of court*
(1) A court or the tribunal may, on application by any interested person, order that a co-operative be would up, if –
(a) The co-operative is unable to pay its debts;

the fact that there was a cost order in favour of the applicant. At the time when the notice of motion was issued, the bill of costs was not taxed, and therefore not due and payable. The Applicants only acquired *locus standi* on the basis of existence of a debt after 7 days of taxation, and placed the First Respondents *in mora* upon issue of a demand on 22 February 2021. The Applicants relies on a contingent anticipation of non-payment. The Applicants proceeded to seek an order for the winding-up of the First Respondent. Upon settlement of the taxed bill, the Applicants still argued for the provisional winding-up of the first respondent, on the grounds of contingent claim of the current cost orders.

[56] The Applicants argue that the existence of the First Respondent and its entire arrangements of having portions of undivided agricultural land sold to indigent is fraudulent and unlawful. In an attempt to demonstrate this, the Applicants' claims to be acting in the interest of the previously disadvantaged members of the First Respondent who paid the First Respondent over R40 million in return for allocation of housing, which I find to be misleading.

(b) There is no reasonable probability that it will be able to pay its debts or bed=cone a viable co-operative; and it appears just and equitable to do so."

[57] The above-mentioned two paragraphs relate to the aspect of the Applicants' *locus standi*, which is in my view lacking, even from the onset when the first urgent order was sought. The Applicants have failed to prove factual insolvency and therefore had to abandon their claim. The Applicants' counsel changed the terms of the relief sought in terms of the notice of motion, relating to the final winding-up of the First Respondent, to order for its provisional winding-up.

[58] This is the third time the Applicants seeks a liquidation order, against the First Respondent. Previously, a provisional order was granted on 7 May 2020 by Fourie AJ. On the return date the liquidation order was '*revoked*', as illustrated under the Kollapen J order. Pursuant to the issue of a provisional order, the First Applicants were closely involved with the appointed trustees, appointed auditors and an independent expert to provide a report on the financial position of the first respondent, which evidence I have to disregard.

[59] The Respondents argue that the Applicants failed to provide new facts upon which it can rely to seek final liquidation, in the current applicant, and further the relief claimed, is *res iudicata*, in the light of the abandonment under the Kollapen J order. The Applicant argues that the abandonment of the

provisional liquidation order was made on condition that the first respondent complies with all the previous court orders, I do not agree.

[60] The attempt to liquidate the First Respondent demonstrates an abuse of court process, as there was a final order on liquidation in the previous order, having considered what the SCA said in *Eksteen v Road Accident Fund*[20] '*a court is vested with such a discretion because it is prima facie vexatious to bring two actions in respect of the same subject matter. In this case, the appellant, by instituting the high court action, was self-evidently motivated by a desire to recover as much as possible of his non-pecuniary loss…;*

Application to Strike-out

[61] The Respondent sought an order for the striking out of various paragraphs of the Applicants' founding affidavit in terms of Rule 6(15)[21]. The first category of paragraphs were challenged on the basis of it being vexatious (category 1); the second category of paragraphs were challenged on the basis of it being irrelevant (category 2); and the third category challenged on the basis of it being hearsay evidence (category 3).

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[20] (2021) 3 All SA 46 (SCA) at para 52

[21] *Rule 6(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 may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.*

[62] The category 1 paragraphs were described by the Respondents as vexatious, and scurrilous allegations, including baseless defamatory accusations, emotive language, similar fact evidence and are assertions aimed at harassing and annoying the Respondents. These paragraphs are 12, 11-15, 20, 24-25, 47-48.4, 58-59, 123, 138.1, 138.3, 138.5, 138.5.3 – 138.5.5, 138.8. 138.10 – 138.11, 147, and 154. Under category 2, the Respondents also sought an order to strike out the following paragraphs on the basis that they contain irrelevant material, namely 52-52.3, 53-55, 57 (first sentence), 58-60.1, 63 – 87.1. The last category, which we said to be hearsay evidence includes paragraphs 11, 63-65, 67, 71-74, 94-97, 101, 130, 138.6-138.7.

[63] From the introduction to the Respondents' answering affidavit, under paragraph 9 to 11, the founding affidavit is described as, amongst others, emotive, fomenting a character assassination of the first respondent and its members, extremely conclusive and renders it impossible to deal with each paragraph without either admitting contempt or committing perjury. The respondent even described their paragraphs as '*trap paragraphs*'.

[64] Counsel for the Respondents argues that the trap paragraphs are '*designed and to be crafted in such an incoherent and vague manner that it cannot be answered in any conceivable manner. Many paragraphs in the founding affidavit were so crafted to service a trap to secure success irrespective of*

the answer provided. The trap paragraph threatens abuse which cannot be countenanced'.

[65] I have allowed these paragraphs to be read in, before making a determination of its removal, based on the SCA decision in *Drift Supersand Pty Ltd v Mogale City Local Municipality*[22], which dealt with a cross appeal in relation to an application for the striking out of "new matter" contained in a replying affidavit was addressed where the court held that '*a court is required to exercise practical, common sense and flexible approach in considering whether allegations made in reply need to be struck out*".

[66] It was common cause that when dealing with striking out application, the court can either assess it after considering the evidence and the merits of the main case or to deal with it out right. When considering the averments made by the Applicant, I found that some of these averments are made in such a way that it is impossible for the Respondents to respond and had to be disregarded. The Respondents' application to strike-out is not misplaced, particularly when one simply applied common sense. The SCA in *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others 2008 (2) SA 184 (SCA)* held that it was not proper for a party in application proceedings to base an argument on passages in documents where there

[22] (1185/2016) [2017] ZASCA 118 (22 September 2017)

have been annexed to the papers where the conclusion sought to be drawn from the passages had not been canvassed in the affidavits. In motion proceedings the affidavits contain both the pleadings and evidence and the issues and the averments should appear clearly therefrom. A party could not be expected to trawl trawl through lengthy annexures to their opponents affidavits and to speculate on the possible relance of the facts therein contained. Trial by ambush could not be permitted.

[67] From a note made under the Respondent's heads of argument, it is argued that, 'the answering affidavit suggest that the respondent admit that if they are not honest if they are to honestly deal with certain allegations in the founding affidavit, it would necessitate of them to admit contempt of court'[23].

[68] After consideration of these paragraphs within the main application, I find it justifiable to strike out these paragraphs from the main application in totality.

[69] In conclusion, it would therefore not be in the interests of justice to grant the contempt of court against the first to the sixth respondents in respect of orders granted by Truchten J dated 19 April 2019 under case 24505/2019; an order granted by Millar AJ on 26 April 2019 under case 24505/2019; or an order granted by Kollapen J on 17 July 2020 under case 21712/20. The

[23] Paragraph 16 – Heads of Argument

applicants has not even sought an order for any of the interim orders granted to be confirmed as final and same cannot be proceeding under a different case number.

[70] With regards to the fines imposed under Millar AJ order and the one sought under the current application of contempt under paragraph, there is not need to address the relief for a fine, as there is no proven contempt of court.

Costs

[71] The Applicants have overburdened this court with unnecessary applications, one of them could have been confirmed as final without reinventing the wheel. In light, of that and the other reasons already stated above it would only be fair for the Applicants to bear the costs of this application, jointly and severally, on a punitive scale.

Order

1. *Contempt of court application is dismissed.*
2. *Condonation application is granted;*
3. *The Applicants are to bear the wasted costs relating to the postponement of the case from 1 and 2 June 2021 including preparation for hearing.*
4. *The following paragraphs are struck out of the Applicant's Founding Affidavit paragraphs are 12, 11-15, 20, 24-25, 47-48.4, 58-59, 123, 138.1, 138.3, 138.5, 138.5.3 – 138.5.5, 138.8. 138.10 – 138.11, 147, and 154, 52-52.3,*

53-55, 57 (first sentence), 58-60.1, 63 – 87.1, 11, 63-65, 67, 71-74, 94-97, 101, 130, 138.6-138.7

5. *Liquidation of the First respondent is set-aside.*
6. *The applicants are to bear the costs of this applicant on attorney and client scale.*

MANAMELA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

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Attorneys for the Applicants:	Roestoff Attorneys
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