IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 3954/17P

In the matter between:

ABSA BANK LTD **APPLICANT**

and

TRANSCON PLANT AND CIVIL CC **FIRST RESPONDENT**
(Reg No. 2011/007376/23)

WESLEY NAIDOO **SECOND RESPONDENT**
(I.D. No. [….]

O R D E R

In the result, the following orders will issue:

(a) The respondents are granted condonation for the late filing of their heads of argument. There will be no order as to costs in the condonation application. The respondents' attorney of record is not entitled to levy and recover any fees occasioned by the condonation application from the respondents.

(b) The respondents are found to be in contempt of court for failing to comply with the court order granted on 21 April 2016 under case number: 11081/2015 (the order).

(c) The second respondent is committed to prison for a period of thirty (30) days, such imprisonment is to be served periodically from 17h00 on every Friday until 07h00 on Monday.

(d) The Sheriff in whose area of jurisdiction the second respondent may be found is hereby directed to take the second respondent into custody and commit him to prison for a period of thirty (30) days. Such imprisonment is to be served periodically from 17h00 on every Friday until 07h00 on Monday.

(e) The operation of the orders in paragraphs (c) and (d) are wholly suspended on condition that the respondents, within thirty (30) days of the granting of this order, return to the applicant the assets referred to in paragraphs 2.4, 2.6 and 2.9 of the order.

(f) The respondents are directed to pay the costs occasioned by the contempt application jointly and severally, the one paying the other to be absolved, on an attorney and own client scale.

J U D G M E N T

Henriques J

Introduction

[1] In these current economic times, financial institutions are more and more reluctant to provide finance to small business owners. Given the state of our economy, instituting proceedings to cancel such finance agreements are often the last resort. As will become evident during the course of reading this judgment, this was one such matter and consequently, one would have expected the utmost co-operation from the respondents.

[2] This is a contempt application in which the applicant seeks to hold the respondents in contempt of a court order issued in this court on 21 April 2016 under

case number 11081/2015 (the order). The order confirmed the cancellation of the 18 instalment sale agreements concluded between the applicant and the first respondent and directed the first respondent to return the assets referred to in the instalment sale agreements to the applicant.

[3] These assets were described in paragraphs 2.1 to 2.18 of the order and it is common cause that the assets mentioned in paragraphs 2.1, 2.4, 2.6 and 2.9 of the order have not been delivered to the applicant nor have their whereabouts been disclosed to the applicant's representative.

[4] It is further common cause on the affidavits filed, that the existence of the order, service and notice of the order on the respondents is not in issue. The respondents have, in opposition to the contempt application, raised the following defences and explanation for non-compliance with paragraphs 2.1, 2.4, 2.6 and 2.9 of the order:

(a) that the second respondent was not a party to the proceedings in which the order was granted, and as such, the applicant cannot obtain an order for contempt in these proceedings;

(b) compliance with paragraphs 2.1 and 2.9 of the orders is impossible and in respect of the items in paragraphs 2.4 and 2.6, the second respondent avers that the first respondent has substantially complied with the order; and

(c) the respondents are not in wilful default of the order and have not acted in a mala fide manner.

Civil contempt of court

[5] Despite the fact that wilful disobedience of a court order in civil proceedings constitutes a criminal offence, a practice exists in the high court in which proceedings are instituted by way of an application on notice of motion for committal of a respondent for contempt of court. In D E Van Loggerenberg *Erasmus Superior Court Practice* 2 ed vol 1 at A2-170-171, the authors summarise the position as follows:

'(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.

. . . .

Contempt of court, in the present context, has been defined as "the deliberate, intentional (i e wilful), disobedience of an order granted by a court of competent jurisdiction"'.

[6] The locus classicus in respect of civil contempt is the decision of *Fakie NO v CCII Systems (Pty) Ltd.*[1] In *Fakie* the court, per Cameron JA indicated as follows:

(a) The essence of contempt of court 'lies in violating the dignity, repute or authority of the court.'[2] The offence has been approved by the constitutional court as the rule of law requires the dignity and authority of the courts to be maintained.[3]

(b) 'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and *mala fide*". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).'[4]

(c) 'These requirements – that the refusal to obey should be both wilful 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's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.'[5]

(d) The onus is that of the criminal standard of proof being proof beyond reasonable doubt.[6]

(e) Once an applicant shows an order in existence and that it came to the notice or attention of a respondent and that the respondent had disobeyed or

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[1] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42.
[2] *Fakie* para 6.
[3] *S v Mamabolo (E TV & others intervening*) 2001 (3) SA 409 (CC) para 14; *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) para 61.
[4] *Fakie* para 9.
[5] *Fakie* para 10.
[6] *Fakie* para 33; at 342B and 344D.

neglected to comply with the order, wilfulness and mala fides will be inferred and the applicant will then be entitled to a committal order. An evidentiary burden then rests upon a respondent in relation to the aspect of wilfulness and mala fides. A respondent must advance evidence that establishes a reasonable doubt as to whether non-compliance with such order was wilful and mala fides. A respondent does not bear a legal burden to disprove wilfulness and mala fides. If the respondent fails in discharging such evidentiary burden, contempt of the court order will be established beyond reasonable doubt.'[7]

[8] And at para 42 sub-para (d) the court held the following:

'(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.'

[9] In this regard, see also *Pheko & others v Ekurhuleni City,*[8] which held the following:

'[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities:

(a) the order must exist;
(b) the order must have been duly served on, or brought to the notice of, the alleged contemnor;
(c) there must have been non-compliance with the order; and
(d) the non-compliance must have been wilful or mala fide.' (Footnote omitted)

[10] A respondent can escape liability if he/she can show that he/she was bona fide in his/her disobedience of such court order, and that he/she genuinely, though mistakenly, believed he/she was entitled to commit the act or omission alleged to be in contempt of such court order. In determining this, an element of reasonableness

[7] *Fakie* at 344J-345A; para 41.
[8] *Pheko & others v Ekurhuleni City* 2015 (5) SA 600 (CC).

enters the arena specifically in relation to determining the absence of bona fides. There are degrees of reasonableness and the mere fact that such conduct was unreasonable is not tantamount to an absence of bona fides.

Issue

[11] The issue for determination is whether or not the respondents' are in wilful and mala fide default of the order. There is an evidential burden on the respondents to show beyond reasonable doubt that they are not in wilful and mala fide contempt of the order.

Factual Matrix

[12] To determine the issue in this application, a consideration of the facts which formed the basis for the institution of the initial proceedings which resulted in the order and which precipitated the current contempt application is warranted.

[13] The first respondent, a close corporation, obtained finance from the applicant to purchase the assets subject to the various instalment sale agreements. The first respondent fell into arrears in terms of the instalment sale agreements resulting in the applicant cancelling the agreements and obtaining the order for the return of the assets.

[14] Although the second respondent was not cited as a party to the proceedings in which the order was obtained, it is common cause that the second respondent is the sole member and manager of the first respondent and that the order was obtained as a consequence of the second respondent signing a consent to judgment on behalf of the first respondent in favour of the applicant. This was in his capacity as sole member and manager of the first respondent. I may add that although the order was issued on 21 April 2016, it was dated 19 May 2016 and it is not apparent from the affidavits filed what was the reason for this.

[15] On 7 June 2016, a representative of the applicant, Eben Van Wyngaardt (Wyngaardt), met with the second respondent to ascertain the location of the assets. At such meeting, the second respondent was presented with the court order and appeared co-operative and advised Wyngaardt of the location of the assets and undertook to provide proof of insurance. At the same meeting, it is common cause that the second respondent submitted the first payment proposal for consideration by the applicant.

[16] On 10 June 2016, the second respondent was informed that the first payment proposal had been rejected by the applicant and that the assets had to be returned or it would be uplifted. At that point in time, the second respondent had failed to provide any proof of insurance of the assets.

[17] Whilst the applicant was engaging with various sheriffs, as the second respondent had advised that the assets were located in various locations, on 15 June 2016 the applicant's representative met with the second respondent again, at his request, at the premises of the first respondent. At such further meeting, he proposed a further grace period until 20 June 2016 to settle the full balance outstanding under each instalment sale agreement (the second payment proposal). He undertook that by 20 June 2016, in the event of him not complying with this further proposal, all the assets would be returned to the applicant.

[18] This subsequent proposal was likewise rejected by the applicant. On 17 June 2016, within two days of the meeting of 15 June 2016, the second respondent, in his capacity as sole member of the close corporation, resolved to place the first respondent in business rescue.

[19] In the affidavit in support of the business rescue application, the second respondent indicated the following:

(a) the main business of the first respondent was reflected as the rendering of services in the civil engineering and construction industry and the "hire of plant, machinery and equipment in the building construction industry";

(b) the first respondent's indebtedness to its creditors was pegged in the amount of approximately R6 million and its assets approximately worth R12 million. The assets were described as consisting of 25 plant machinery equipment and motor vehicles of which seven were freehold and valued at approximately R450 000;

(c) in respect of the remaining 18 assets financed by the applicant, the second respondent recorded the total amount owing as being in an approximate sum of R5,7 million of which R850 000 are the arrears for a period of three months;

(d) at the time of deposing to the affidavit, the first respondent had a contract with Masemanzi Mining to hire plant machinery and equipment for five years, such contract commenced in June 2016 and an amount of approximately R750 000 was anticipated;

(e) the first respondent had no working capital as a consequence of the applicant

terminating the first respondent's overdraft facilities; and

(f) the applicant caused the second respondent to sign a consent to judgment and obtained judgment and had threatened to attach all the assets of the first respondent.

[20] In the answering affidavit in the contempt application, at paragraph 10, the second respondent concedes that he had entered into a proposed payment plan with the applicant when the first respondent was unable to meet its repayment obligations to the applicant in terms of the instalment sale agreements. Such payment proposal was accepted on condition that the first respondent signs a consent to judgment which he did on its behalf. It is common cause that the first respondent was unable to keep to the payment plan as Group Five who owed monies to the first respondent and whose undertaking to pay such monies to the first respondent informed the proposed payment plan to the applicant, did not maintain its payment arrangement with the first respondent.

[21] The second respondent concedes that as a consequence of the failure by the first respondent to adhere to the proposed payment plan, the applicant filed the consent to judgment. The second respondent indicates that he abandoned the business rescue application by the first respondent as he had received incorrect legal advice that this would stay the execution by the applicant of a warrant of execution which it had obtained pursuant to the order. He had also been advised by the business rescue practitioner that the applicant was entitled to execute upon the warrant of execution and obtain return of the assets as the first respondent was not in lawful possession of the assets as defined in s 133 of the Companies Act 71 of 2008. He subsequently considered the liquidation of the first respondent but similarly abandoned this course of conduct.

[22] As a consequence of the warrant of execution, the applicant attached and removed 14 of the items reflected in the order which it was able to locate with the assistance of various sheriffs. As indicated, not all the assets had been attached.

[23] Subsequent to receipt of the answering affidavit in the contempt application, the applicant served a rule 35(12) notice on the respondents' attorneys of record requesting copies of the documents referred to therein, these being a copy of the contract with Masemanzi Mining and copies of all documentation evidencing a criminal complaint had been opened under Cas number 35/01/2016 with the

KwaMvuma SAPS. The second respondent had indicated in the answering affidavit that items 2.1 and 2.9 referred to in the order had been stolen from various work sites. These thefts were reported to the SAPS, Witbank under Cas number 35/01/2016 and in Howick under Cas number 206/4/2016.

[24] The second respondent further describes his role in the first respondent, that being, to secure tenders, liaise with the customers of the first respondent and oversee its administration. He played no role in the operation of the various sites on which the equipment had been hired out and such responsibility for all of the operations of each of the sites at the time of the closure of the business was the responsibility of the managers and supervisors located at each site.

[25] He was advised that at the time of closure of the first respondent, the plant equipment and machinery was situated in Durban, Pietermaritzburg and Witbank. Although the second respondent does not indicate when he became aware that four of the assets mentioned in the orders were not recovered by the sheriff, he indicates that he initiated an enquiry (although he does not say when) and subsequently discovered that the assets mentioned in paragraphs 2.1 and 2.9 of the orders were stolen from the sites.

[26] In respect of the assets in paragraphs 2.4 and 2.6 of the order, he caused enquiries to be made with Masemanzi Mining and requested a detailed report from their security company .It appears that as at the date of deposing to the answering affidavit being 7 June 2017 and by the time of the hearing of the opposed motion, Masemanzi Mining had not furnished such information to the second respondent.

[27] In response to the request in terms of rule 35(12), a covering letter was sent by the respondents attorneys advising that there was no written contract but an oral contract with Masemanzi Mining for the supply of plant and machinery equipment. In respect of the details relating to the various thefts, the second respondent provided a receipt from the offices of SAPS, Ogies, a secondary page from the SAPS diary setting out the asset allegedly stolen and a statement from a manager of the first respondent, Strinivasan Addieah, dated 7 January 2016.

[28] All the documents provided in response to the rule 35(12) request all relate to the assets referred to in paragraph 2.1 of the order. In addition, from the time of deposing to the affidavit in June 2017 until the date of the opposed motion being 14 February 2018, neither of the respondents sought leave to file any supplementary affidavits placing additional information before the court in relation to the remainder

of the assets and/or any information from Masemanzi Mining in respect of the enquiries the second respondent had allegedly made.

The submissions of the parties

The applicant's submissions

[29] The applicant disputes that the items referred to in paragraphs 2.1 and 2.9 of the order have been stolen. This is as the respondents have provided no explanation as to why items 2.4 and 2.6 of the order have not been returned. All that the respondents have contented themselves with is that these have been left in the possession of Masemanzi Mining. No further explanation has been tendered in relation to these items and consequently the court must arrive at the conclusion that the respondents have merely refused to return these items to the applicant.

[30] In relation to the items mentioned in paragraphs 2.1 and 2.9, the applicant submits that only item 2.1 has been reported as stolen. Consequently, the applicant submits that the court must arrive at the conclusion that the allegations relating to the theft of item 2.9 as well as item 2.1 have been fabricated by the respondents to avoid the consequence of being held in contempt of the court order.

[31] In the practice note, the applicant indicates that there are disputes of fact in relation to the items referred to in paragraphs 2.1 and 2.9 of the order. In consequence thereof, the applicant indicates that the respondents have not presented sufficient evidence to create reasonable doubt that their conduct is wilful and mala fide.

The respondents' submissions

[32] Ms *Qono-Reddy* is quite correct when she surmises that the applicant relies on inferences to be drawn from the following circumstances to discharge the onus of showing that the conduct of the respondents was wilful and mala fide, namely:

(a) the conduct of the second respondent as sole member and manager of the first respondent in placing it under business rescue and considering the liquidation of the first respondent;

(b) the first respondent's business operations with Masemanzi Mining in relation to items 2.4 and 2.6; and

(c) the thefts of items 2.1 and 2.9 from the work sites.

Analysis

[33] I now turn to the first point raised by the respondents, specifically the second respondent.

[34] Although the second respondent indicates that he was not a party to the proceedings in which the order was obtained, it must be remembered that not only is he the sole member of the first respondent, he is also its manager. He acknowledges that he attended to the administration of the first respondent which would mean he applied for finance on behalf of the first respondent with the applicant. He concedes that he consented to the judgment which the applicant obtained against the first respondent in order to cancel the instalment sale agreements and to obtain the return of the assets mentioned in the order. He has, for want of a better word, been the alter ego of the first respondent.

[35] On his own version as submitted in the affidavit, he liaised with the applicant's representative after judgment was granted and after the warrant of execution was issued. He has also indicated the steps he has taken to resolve the matter, specifically the two proposed payment plans and the fact that he advised the applicant's representatives of the location of the assets.

[36] In *Twentieth Century Fox Film Corporation & others v Playboy Films (Pty) Ltd & another,*[9] King AJ held the following:

'A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order.'

[37] King AJ's judgment was referred to in the decision of *Ntombela v Herridge Hire & Haul CC & another.*[10] And at para 26 of the judgment Landman J expressed the view that as with a Director of a company the same considerations applied to a close corporation. Consequently, the order sought would affect him and he would be responsible for any non-compliance with the order being the sole member of the close corporation.

[38] In deciding whether or not the respondents have discharged the evidential

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[9] *Twentieth Century Fox Film Corporation & others v Playboy Films (Pty) Ltd & another* 1978 (3) SA 202 (W) at 203C-D.

[10] *Ntombela v Herridge Hire & Haul CC & another* [1998] JOL 4306 (LC) para 26 where the following was stated: 'These considerations also apply to a close corporation. See *Höltz v Douglas & Associates (OFS) CC & andere* 1991 (2) SA 79 (O)'.

burden, to establish reasonable doubt that their conduct is wilful and mala fide, this court takes the following into consideration. At all material times the second respondent was the sole member and manager of the first respondent. He liaised with and conducted all negotiations with representatives of the applicant. Although it was submitted by the applicant that prior to the warrant of execution being executed the second respondent 'actively avoided delivering the assets', in my view, this is not correct. He attempted to further negotiate with the applicant and such conduct is reasonable in the circumstances as it is not disputed that the applicant considered both proposals.

[39] It was only in respect of item 2.1 that it appears that a theft was reported. According to the documents produced in response to the rule 35(12) notice, such asset went missing in December 2015 and the respondents became aware of the theft on 5 January 2016. The statement submitted by the first respondent's employee, the manager being Strinivasan Addieah was deposed to on 7 January 2016. The theft appears to have occurred between 10 and 11 December 2015 but was only reported on 5 January 2016 to Addieah.

[40] At the time the order was taken by consent being 21 April 2016, both the first and second respondents would have been aware of the theft. Prior to the consent to judgment being filed and signed, neither the first nor the second respondent advised the applicant of the missing assets, nor was this asset disclosed as being stolen in the statement filed by the second respondent in support of the business rescue proceedings contemplated by the first respondent.

[41] In fact, after January 2016, when the respondents acquired knowledge of the theft, they misrepresented to all parties at the time of the consent to judgment that the assets were still in their possession. Furthermore, it was never mentioned to the representative of the applicant at any stage when the second respondent was approached to point out the location of these assets in May and June 2016, nor was it disclosed by the second respondent in his negotiations with the applicant after the order was granted.

[42] In addition, the reporting of the theft relates only to item 2.1 of the order. In respect of item 2.9 of the order, the respondents have contented themselves with an allegation in their answering affidavit that they have made enquiries with Masemanzi Mining as at 7 June 2017. To date, no follow up has taken place in relation to the location of item 2.9, nor has a report been filed from Masemanzi Mining indicating

the location of the asset or what transpired with such asset whilst it was in their possession.

[43] The respondents have also failed to provide any explanation in relation to the remainder of the outstanding assets referred to in the order. Most importantly, the second respondent acknowledges that the insurance in respect of these assets lapsed but blames the applicant for this as the overdraft facility was cancelled.

[44] If one considers the answering affidavit filed in opposition to the contempt application as well as the affidavit filed in support of the application for business rescue, it is evident that there is merit in the submission that the application for business rescue was a last ditch attempt by the respondents to avoid the execution and satisfaction of the order.

[45] The second respondent goes so far as admitting that the initial legal advice which he obtained was that business rescue proceedings would prevent execution and satisfaction of the order by the applicant, hence why he embarked on this course of action for the first respondent. He concedes this advice was incorrect as subsequently, business rescue proceedings were abandoned as he was advised this would not stay off execution and satisfy the order.

[46] It was then that the second respondent contemplated placing the first respondent in liquidation. Similarly this application was not proceeded with. All of this, in my view, points to the mala fides and wilfulness in the conduct of the respondents, more so the second respondent on behalf of the first respondent. As already mentioned in the judgment, both the respondents have to rebut the presumption that their conduct constitutes wilful and mala fide disobedience of the court order.

[47] In respect of the asset mentioned in 2.1, the applicant, although it places the explanation provided by the respondents in issue, and mentions that there is a dispute of fact, the applicant has not asked for the matter to be referred for the hearing of oral evidence.

[48] *Fakie NO v CCII Systems (Pty) Ltd*[11] similarly deals with disputes of fact in contempt proceedings as follows:-

'[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not

[11] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise "fictitious" disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be "a *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*, this 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.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's 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.'

[49] If one considers the documents put up in response to the rule 35(12) notice it would appear that the theft in respect of the item mentioned in paragraph 2.1 of the order was reported. The second respondent's failure to disclose this when he consented to the judgment and in his negotiations with the applicant's representative after a judgment was obtained is not an issue which this court has to decide and the applicant can explore whatever civil or criminal remedies it wishes to take in that regard.

[50] Given the test enunciated in *Fakie,* this court can only reject the version 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.'[12] I cannot make that finding on the papers and I must accept that the respondents are not in contempt of paragraph 2.1 of the order.

[51] In my view, the respondents have not discharged the evidential burden resting on them as required in the decisions referred to hereinbefore to establish reasonable doubt that they are not in wilful and mala fide default in respect of their non-compliance with paragraphs 2.4, 2.6 and 2.9 of the order. Consequently, the respondents are in contempt of the order of 21 April 2016 specifically paragraphs 2.4, 2.6 and 2.9 thereof.

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[12] *Fakie* para 56.

[52] I do not reach this conclusion lightly and in doing so I am reminded of the words of Nkabinde J in *Pheko & others v Ekurhuleni City*[13] where she held the following:

'[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.'

[53] That then brings me to the form of the order sought.

Form of the Order

[54] In the notice of motion the rule nisi which the applicant sought was the following:

'1.1 **THAT** the First Respondent is convicted of contempt of Court in failing to comply with the Order granted by the above Honourable Court on 21 April 2016 under Case No. 11081/2015;

1.2 **THAT** the Second Respondent be committed to prison for such period as this Honourable Court may determine for the First Respondent's contempt of Court of the Order granted by this Honourable Court on 21 April 2016 under Case No. 11081/2015;

1.3 **THAT** the Respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other being absolved on an attorney and own client scale.'

[55] At the hearing of the matter, I raised with Mr *Veerasamy*, who appeared for the applicant the form of the order sought. He indicated after considering the notice of motion and in preparation for argument for the opposed motion he drafted two orders which were handed in as 'A' and 'B' respectively for the court to consider. He indicated that the order sought in 'B' was preferable given the nature of these proceedings as all the applicant sought was the return of the items which form part of the order.

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[13] *Pheko & others v Ekurhuleni City* 2015 (5) SA 600 (CC).

[56] Ms *Qono-Reddy* who had cited these orders, did not oppose any of the draft orders in the event of the court being disposed to granting them. She concurred with Mr *Veerasamy* that the most appropriate order, should the court find against the respondents, was that proposed in 'B'.

[57] I have considered the orders submitted and I am of the view that "B" may not be the most appropriate in the circumstances of the matter.

Condonation

[58] A preliminary matter which arose at the hearing of the opposed application, related to the application for condonation by the respondents for the late filing of the heads of argument. This application was opposed by the applicant who filed supplementary heads of argument setting out the basis for the opposition, namely, that an applicant for condonation must provide a full explanation for the delay which must encompass the entire period of the delay and must be reasonable.[14]

[59] The basis upon which the applicant opposed the grant of condonation was that the heads of argument attempted to raise a new defence which was not raised in the answering affidavit. The applicant submitted that this was ambush litigation and that the second respondent was raising the defence that he was not part of the court order for the first time in the heads of argument.

[60] In support of the application for condonation, an affidavit had been filed by the respondents' attorneys of record, Mr Shabeer Joosab. His affidavit does not deal with the 'new' defence raised by the second respondent but focuses purely on the delay in instructing counsel to prepare the heads of argument.

[61] Insofar as the application for condonation is concerned, the affidavit of the instructing attorney provides a reasonable explanation and provides a full explanation for the period of the delay. What is concerning about the affidavit is that he indicates that he was not aware of the current practice directive in this division in relation to the time periods for the filing of heads of argument and a practice note.

[62] Given the order below, I have no doubt that after this matter this 'oversight' will not occur again. Consequently, I am in agreement that the respondents ought not to be prejudiced with such an 'oversight' and they ought to be granted condonation as the fault lies at the attorney's doorstep.

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[14] *Van Wyk v Unitas Hospital & another Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 CC para 22.

[63] The applicant's complaint that the second respondent for the first time raised a new defence in the heads of argument is not justified as the second respondent had already canvassed this in the answering affidavit and in the affidavit filed in support of the business rescue application which formed part of the allegations in the founding affidavit.

[64] On receipt of the heads of argument and practice note on 7 February 2018, the applicant's attorney of record filed the requisite letter in terms of the practice directive. It never took issue with the late filing of the heads in such letter. In addition, the applicant had sufficient time before the hearing of the application to consider the heads of argument and the contents of the affidavit. There is thus no prejudice, in my view, to the applicant and any prejudice which it may submit it suffered is ameliorated by the costs order below.

Costs

[65] It is trite that the issue of costs falls within the discretion of the court. In light of the fact that the applicant has been successful in the application, I see no reason to depart from the usual rule in relation to costs and consequently the applicant is entitled to the costs of this application. The agreements which cover the order obtained made provision for costs on an attorney and own client scale and there appears to be no reason once again to depart from that provision.

[66] In addition, in respect of the condonation application in light of the fact that Mr Joosab has acknowledged that this was an oversight on his part, he ought not to be entitled to levy and recover any fees from the respondents in respect thereof.

[67] In the result, the following orders will issue:

(a) The respondents are granted condonation for the late filing of their heads of argument. There will be no order as to costs in the condonation application. The respondents' attorney of record is not entitled to levy and recover any fees occasioned by the condonation application from the respondents.

(b) The respondents are found to be in contempt of court for failing to comply with the court order granted on 21 April 2016 under case number: 11081/2015 (the order).

(c) The second respondent is committed to prison for a period of thirty (30) days, such imprisonment is to be served periodically from 17h00 on every Friday until 07h00 on Monday.

(d) The Sheriff in whose area of jurisdiction the second respondent may be found is hereby directed to take the second respondent into custody and commit him to prison for a period of thirty (30) days. Such imprisonment is to be served periodically from 17h00 on every Friday until 07h00 on Monday.

(e) The operation of the orders in paragraphs (c) and (d) are wholly suspended on condition that the respondents, within thirty (30) days of the granting of this order, return to the applicant the assets referred to in paragraphs 2.4, 2.6 and 2.9 of the order.

(f) The respondents are directed to pay the costs occasioned by the contempt application jointly and severally, the one paying the other to be absolved, on an attorney and own client scale.

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Henriques J

CASE INFORMATION

APPEARANCES

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Instructed by	:	Shabeer Joosab Attorneys 582 Peter Mokaba Ridge Overport Durban Ref: Mr Joosab/ts/3T60 c/o Essa & Associates Attorneys 480 Church Street Pietermaritzburg Tel: 033 345 4455
Date of Hearing	:	14 February 2018
Date of Judgment	:	19 July 2019