REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6189/2019

In the matter between:

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS,	
FORESTRY AND FISHERIES	Second Applicant
and	
B XULU & PARTNERS INCORPORATED	First Respondent
INCOVISION (PTY) LTD	Second Respondent
(Reg No: 2017/157169/07)	
SETLACORP (PTY) LTD	Third Respondent
(Reg No: 2017/21874/07)	
FIRST NATIONAL BANK OF SOUTH AFRICA	Fourth Respondent
BARNABUS XULU	Fifth Respondent

INVESTEC BANK Sixth Respondent

REGISTRAR OF DEEDS, PIETERMARITZBURG Seventh Respondent

REGISTRAR OF DEEDS, CAPE TOWN Eighth Respondent

In re:

THE DEPARTMENT OF AGRICULTURE,

FORESTRY AND FISHERIES First Applicant

THE DEPARTMENT OF ENVIRONMENTAL

AFFAIRS, FORESTRY AND FISHERIES Second Applicant

and

B XULU & PARTNERS INCORPORATED First Respondent

THE SHERIFF OF THE HIGH COURT

FOR PRETORIA CENTRAL, MR TF SEBOKA N.O. Second Respondent

STANDARD BANK OF SOUTH AFRICA Third Respondent

FIRST NATIONAL BANK OF SOUTH AFRICA Fourth Respondent

BARNABUS XULU Fifth Respondent

Hearing dates: 25 February, 9 and 19 March 2021

Judgment date: 4 May 2021 (delivered via email to the parties' legal representatives)

JUDGMENT – CONTEMPT OF COURT APPLICATION

PANGARKER, AJ

Introduction and Notice of Motion

1. The second applicant, the Department of Environmental Affairs, Forestry and Fisheries **(DEA)**, seeks to hold the first respondent, B Xulu and Partners Incorporated **(BXI)**, an incorporated firm of attorneys, and the fifth respondent, Barnabas Xulu **(Mr Xulu)**, its principal member and director, in contempt of six civil Court orders granted by the Western Cape High Court. The application came before me in the urgent fast lane Court on 25 February 2021 pursuant to an order granted by Binns-Ward J on 27 November 2020, that the second applicant would be entitled to approach the urgent duty Judge for an appropriate order[1]. No relief is sought against the other respondents. I refer to Mr Xulu and BXI at various instances in the judgment as *"the respondents".*

2. The orders which form the subject matter of the application were granted by Judges Rogers, Smith and Binns-Ward during 2019 and 2020. Judge Smith is a Judge of the Eastern Cape Division of the High Court and was appointed by the Minister of Justice to act in the Western Cape High Court Division during 2020.

3. The relief sought in the Notice of Motion reads as follows:

[1] Para 5 of Binns-Ward J order of 27 November 2020, p 5136

1. Dispensing with the forms and service provided for in the Uniform Rules of Court and directing that the application be heard on an urgent basis in terms of Rule 6 (12)(a).

2. Declaring the First Respondent, B Xulu and Partners Inc., and the Fifth Respondent, Mr Barnabas Xulu, in his capacity as the sole director of the First Respondent and in his personal capacity to be in contempt of the following orders granted by this Honourable Court under the above case number:

2.1 Paragraphs 3.2.1 and 3.2.3 of the order granted by Rogers J on 21 August 2019.

2.2 Paragraph 144 (e) of the order of 30 January 2020[2].

2.3` Paragraphs 1 and 3 of the order granted by Smith J on 5 October 2020.

2.4 Paragraph 4.1.6 of the order granted by Smith J on 12 October 2020 order as amended.

2.5 Paragraphs 6 and 7 of the order granted by Binns-Ward J on 25 November 2020.

2.6 Paragraph 4 of the order granted by Binns-Ward J on 27 November 2020.

3. Imposing a fine, jointly and severally, on the First and Fifth Respondents as deemed appropriate by this Honourable Court.

[2] This order was granted by Rogers J

4. *Imposing a period of imprisonment, such as is deemed appropriate by this Honourable Court, on Fifth Respondent, Mr Barnabas Xulu, suspended on condition that Mr Barnabas Xulu, surrenders his Porsche 911 Carrera with registration [….] ("the Porsche") to the Sheriff, Cape Town, for safekeeping pending the finalisation of the matters remaining under case number 6189/19 (including appeals) no later than 17h00 hours on the date of the hearing of this application.*

5. *Directing that unless and until the First and Fifth Respondents have purged their contempt, that they are precluded from launching any further applications against the applicants in relation to any matters involving, relating to or arising from the disputes and judgements under case number 6189/19[3].*

6. *Directing the First and Fifth Respondents to pay the costs of this application on an attorney and client scale, and that until such costs are paid and that until such costs are paid the First and Fifth Respondents are interdicted from launching any further urgent interlocutory applications against the Applicants.*

7. *Granting the applicants such further and/or alternative relief as this Honourable Court may deem fit.*

Preliminary issues

[3] It is noted that the Notice of Motion wrongly refers to the case number as 6189/20 at para 4 and 5 thereof; it should read 6189/19

4. I received the Court file shortly after 14h00 on 24 February 2021, a day before the hearing, and at that stage, no replying affidavit had been filed[4]. Having apprised myself of the application and the nature of relief sought, I requested to see the legal representatives in chambers before the hearing as the record indicated that the respondents had applied for rescission of the orders granted by the abovementioned Judges and that the application was to be heard by Zilwa J of the Eastern Cape Division of the High Court, duly appointed to act in this Division. In chambers, Mr Xulu, whom I met for the first time, advised that he was unrepresented. Mr Ndumiso of Ndumiso Attorneys indicate that he had a watching brief, and Mr Manuel, together with senior counsel Ms Bawa and Mr Joseph, were present on behalf of the second applicant. I informed all present that the Court roll was very busy and that there was an opposed urgent application waiting to be heard at 14h00. At that stage, Mr Xulu remarked, without elaborating, that he was of the view that I was not seized with the application - I address this comment below before dealing with the merits of the application.

5. I requested of the parties and legal representatives to consider a postponement of the contempt proceedings pending the determination by Zilwa J of the application for declaratory relief and rescission. Zilwa J was also to hear the outstanding question of Mr Xulu's personal liability emanating from the order granted by Rogers J on 30 January 2020 in the judgment **Department of Agriculture, Forestry and Fisheries and Another v B Xulu**

[4] The record at that stage comprised 470 pages; the full record including the replying affidavit is 520 pages

and Partners Incorporated and Others ***(the Rogers J judgment)***[5]. The respondents' application for declaratory relief and rescission was delivered on 22 February 2021, three days before the hearing of the contempt application [6]. Mr Xulu and the legal representatives were excused to consider my suggestion while I continued with the urgent Court roll. Subsequently, Mr Manuel advised that the parties could not agree on a postponement and shortly after 12h00 on 25 February 2021, I proceeded to hear Ms Bawa's submissions.

6. Mr Xulu informed me that his legal representatives[7] had withdrawn the day before, that he was on his own and had no right appearance in the High Court. I informed him that as a registered legal practitioner (attorney)[8] who was the fifth respondent, he was entitled to represent himself. Mr Xulu then indicated that more time was needed to prepare for the matter and that he had only received the replying affidavit during the proceedings, although Ms Bawa submitted that the replying affidavit was served earlier. I requested of Mr Xulu to inform me of the proposed time needed for legal representation and the response to Ms Bawa's submissions. The indication was that the respondents could not proceed on the day.

7. After hearing an opposed request for a postponement, and mindful of the serious implications for the respondents were I to grant the relief sought, my view was that Mr Xulu and BXI should be afforded an opportunity to secure

[5] [2020] ZAWCHC 3
[6] P 5494-7
[7] My understanding from the proceedings is that he was referring specifically to Johannesburg counsel
[8] I have generally used the word *"attorney"* rather than *"legal practitioner"* in this judgment

legal representation. The further hearing of the application was thus postponed to 9 March 2021 with orders related to legal representation. On 9 March, a further postponement was requested, foreshadowed by earlier correspondence between Mr Xulu and Mr Manuel that the respondents' counsel was secured but not available on the suggested dates exchanged between the parties. The correspondence did not indicate that the parties had agreed to a postponement of the application. After hearing submissions, I granted a final postponement for legal representation and the further hearing of the application on 19 March 2021 at 14h00. The registrar provided Mr Xulu and Mr Manuel with copies of the transcript of proceedings of 25 February 2021 particularly so that the newly appointed counsel for the respondents could apprise himself of the proceedings on the day.

8. On 19 March 2021, at 14h00, Mr Masuku SC appeared for BXI and Mr Xulu. It seemed from the opening remarks that Mr Masuku was instructed directly by Mr Xulu, though I noted Mr Ndumiso also to be present in Court. Mr Masuku confirmed having been provided with the transcript of proceedings of 25 February 2021, and his written heads of argument were handed up. Ms Bawa handed in a supplementary note on the question of the imposition of a fine in contempt applications as, in her view, she had overreached in her previous submissions on fines[9].

Mr Xulu's view that the Court was not seized with the matter

[9] See para 3 of the Notice of Motion

9. Mr Xulu expressed in chambers and during the proceedings that that I am *"not seized with the matter"*[10]. He did not elaborate but given the attachments to the answering affidavit and his repetition of the view held, I deem it necessary to address this aspect in my judgment before considering the application. I have had regard to the very lengthy history of the dispute between the parties which I gleaned from the affidavits and annexures in this contempt application. The only part of the record and Court file in case number 6189/19 which I have had regard to and been provided with, is the contempt application which starts at page 5071 of the record.

10. It is common cause between the parties that pursuant to a written request on 12 May 2020 by Western Cape High Court Judge President Hlophe to the Minister of Justice and Correctional Services, Mr Lamola MP, the latter on 8 December 2020, appointed Zilwa J of the Eastern Cape Local Division of the High Court to act as a Judge of the Western Cape High Court *"to hear an application involving B Xulu and Partners Incorporated, additional"*[11].On 19 March 2021, counsel for the respondents was ready to proceed with argument and indeed never raised an issue that I was, for some or other reason, precluded from hearing the contempt application.

11. In the absence of any clarification, I assume from the affidavits that Mr Xulu's view is premised on the correspondence from Judge President Hlophe to the Minister requesting the appointment of Zilwa J to hear an application as Smith

[10] Transcription 25 February 2021, line 24, p 41
[11] Acting Appointment ito s 175(2) of the Constitution 1996 read with s 6(5) of the Superior Courts Act 10 of 2013, p 5313; Zilwa J letter of appointment, p 5314

J[12] *"may not hear another application involving the parties"*[13]*.* Mr Xulu's view is reflected in paragraph 52 of his answering affidavit where he states that the only Judge who may hear matters involving BXI is Zilwa J who was lawfully appointed by the Minister[14]. If indeed Mr Xulu's opinion is based on the correspondence referred to above, then I respectfully disagree that Judge President Hlophe's letter, read together with the Minister's written appointment of Zilwa J, is an indication that no other Judge or Acting Judge of the Western Cape High Court may hear a matter involving these parties. In my respectful view, the correspondence indicates that Smith J could not hear any further matters or applications as he was already seized with certain applications involving BXI, and Zilwa J was to hear *an application* between the parties – that is, the personal liability issue which stood over from the Rogers J judgment and the respondents' rescission application.

12. Furthermore, if Mr Xulu's view that I was not seized with the matter is founded upon Judge President Hlophe's correspondence dated 12 May 2020 to Judge President Mbenenge of the Eastern Cape Division, wherein Hlophe JP expresses that:

> "*In my view none of the Judges in the Western Cape High Court should sit in the matter"*[15]*,*

then Mr Xulu's reliance is, with respect, misplaced for the following reason: it is evident from the record that subsequent to the abovementioned May 2020 correspondence, no less than three Judges of the Western Cape High Court

[12] Smith J heard various applications between the parties under case number 6189/19, and granted orders on 5, 12 and 15 October 2020 respectively
[13] Annexure CEL52, P 5589-90
[14] P 5479
[15] P 5309

heard applications under case number 6189/19. To illustrate, on 16 October 2020, Magona AJ struck the respondents' urgent application from the roll[16]; on 28 October 2020, Slingers J dismissed another urgent application brought by the respondents, and on 25 and 27 November 2020, Binns-Ward J granted orders against the respondents.

13. The contempt application was set down in the ordinary course on the urgent Court roll of 25 February 2021, and pursuant to the order by Binns-Ward J granted on 27 November 2020. Counsel for the respondents did not raise an issue on 19 March 2021 that I am somehow or the other precluded from hearing the application and in the result, Mr Xulu's view that I was not seized with the application, cannot be sustained.

Further developments

14. Shortly before 10h00 on 19 March 2021[17], a Mr Ngcobo, candidate attorney at BXI handed to my registrar a special petition to the Supreme Court of Appeal (SCA) in respect of the orders of Rogers J granted on 30 January and 10 September 2020[18] respectively. I was informed that he was instructed to do so by Mr Xulu in order that I am informed of the status of the matter. The bundle was placed in the file and while I noted the relief sought in the Notice of Motion, I did not pay further attention to the documents as I was due to start the Court roll. At 14h00 I placed the candidate attorney's visit to chambers on

[16] The other respondents included entities in which Mr Xulu holds an interest (Setlacorp Pty Ltd and Incovision Pty Ltd)
[17] The final postponement for hearing was granted to 19 March 2021 at 14h00
[18] From the record, it is evident that on 10 September 2020, Rogers J dismissed the respondents' application for leave to appeal the judgment of 30 January 2020

record. Mr Masuku SC was ready to argue the respondents' opposition, which then proceeded whereafter judgment was reserved.

Brief history of litigation

15. The history of litigation between the parties in this matter is well documented. On 6 June 2019 BXI obtained an order by consent for payment of its invoices for legal services rendered in favour of the Department of Agriculture, Forestry and Fisheries **(DAFF[19])**. The services were alleged to have been rendered to the Marine Living Resource Fund **(MLRF)**. BXI subsequently levied execution when the DAFF failed to pay in terms of the settlement agreement which was made an order of Court, and writs of execution were issued totalling slightly more than R20 000 000, resulting in funds being removed from different departmental bank accounts to be paid to BXI, the execution creditor.

16. On 5 August 2019, the DAFF applied for urgent relief in the Western Cape High Court, seeking to have the writs of execution and attachment of money suspended pending the determination of relief in part B (the second part of the application). The service level agreement, purportedly concluded between the DAFF and BXI, the settlement agreement, the Steyn J order of 6 June 2019 and the writs were set aside, declared invalid and reviewed in terms of orders granted by Rogers J on 30 January 2020 under case number 6189/19[20]. Mr Xulu was joined to the proceedings as fifth respondent, and the first respondent was ordered to repay R20 242 472, 90 by 30 April 2020. Various applications followed, including the respondents' recusal applications of

[19] The first applicant in the matter before Rogers J
[20] The Rogers judgment

Judges Rogers and Binns-Ward, and applications for leave to appeal, all of which were subsequently dismissed.

17. My understanding of the Rogers judgment[21] is that most of the DAFF's functions were transferred to the second applicant, the DEA, pursuant to May 2019, and the latter was joined to the proceedings without objection. The relief sought against Mr Xulu is in his capacity as sole director of BXI as well as in his personal capacity.

Legal principles

18. Section 1 (c) of the Constitution of South Africa, 1996 recognises the supremacy of the rule of law as one of the core values upon which South Africa is founded. Civil contempt, which is at the heart of this matter, is the crime of disrespect to the Court and the rule of law[22].

19. Section 165 of the Constitution states that Courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice. No person or organ of State may interfere with the functioning of the Courts[23]. Section 165 (5) makes orders of Court binding on all persons and organs of State to whom/which it applies. Writing about the dignity and authority of the Courts in **Pheko and Others v Ekurhuleni City**[24], Nkabinde J states at paragraph 1 of the judgement:

[21] Para 5
[22] See Pheko para 31
[23] Section 165(2) and (3)
[24] 2015 (5) SA 600 at para 1

'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.'

20. In **Fakie NO v CCII Systems (Pty Ltd**[25], the SCA held that at its essence, contempt of a Court order is the violation of the dignity, authority and reputation of the Court. In **S v Beyers**[26], the Appellate Division (as it then was) held that the purpose of contempt proceedings is not so much to punish the contemnor, as it is to protect the rule of law and prevent unlawful disrespect of judicial authority. All contempt of Court may be punishable as a crime.

21. A party seeking to hold an opponent in contempt of a civil Court order has various relief available to him/her/it. Until **Fakie**, and more recently **Matjhabeng Municipality v Eskom**[27], there was much debate about the standard of proof to be applied in civil contempt applications. After considering **Fakie, Pheko and Burchell v Burchell**[28], the Constitutional Court in **Matjhabeng** clarified the position as follows: the standard of proof must be applied in accordance with the consequences of the remedies sought[29]. If the relief applied for is a declaratory order, *mandamus*, structural interdict or similar civil remedy where the contemnor's right to freedom and security is not deprived, then the civil standard of proof - on a balance of probabilities -

[25] 2006 (4) SA 326 at para 6
[26] 1968 (3) SA 70 (A)
[27] At para 67
[28] [2005] ZAECHC 33 ECD
[29] Paragraph 67 - my summation

applies[30]. Where the civil contempt remedies of committal to prison or the imposition of a fine are sought, which impact on the contemnor's freedom and security of person, then the criminal standard - beyond reasonable doubt - applies.

22. In **Fakie,** the test for contempt of Court was stated as follows: whether the breach was committed deliberately and *mala fide*[31]*.* Mere disregard of the order and non-compliance that is *bona fide*, such as occurred in **Consolidated Fish Distributors (Pty) Ltd v Zive and Others**[32], does not amount to contempt of a Court order. Thus, the requirements for contempt are:

(a) the existence of the order;

(b) the order must be served on or brought to the notice of the contemnor[33];

(c) non-compliance with the order; and

(d) the non-compliance must be wilful and *mala fide*.[34]

23. Once the applicant has proved the first three requirements, then the respondent bears an evidential burden in respect of wilfulness and *mala*

[30] See Burchell v Burchell [2005] ZAECHC 35 (ECD) – the relief sought was committal to prison for failure to comply with a maintenance order

[31] At para 9, with reference to the test for contempt, the SCA in Fakie referred to Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc 1996 (3) SA 355 (A); Jayiya v Member of the Executive Council for Welfare, Eastern Cape 2004 (2) SA 611 (SCA)

[32] 1968 (2) SA 517 (CPD) at 524 C-D, and 525 A-C

[33] A contemnor is defined as a person who disobeys or disregards a law, court ruling - www.lexico.com

[34] Matjhabeng para 76; Fakie para 12 – at para 32, Pheko states the requirement as wilfulness *or* mala fides, while Matjhabeng and Fakie refer to wilfulness *and* mala fides

fides.[35] If the respondent fails to establish reasonable doubt as to wilfulness and *mala fides*, then his contempt would be established beyond reasonable doubt[36]. In **Bezuidenhout v Patensie Sitrus Beherend Bpk**[37], it was held that an order of Court stands until it is set aside by a Court of competent jurisdiction, and until then, it must be obeyed even if it may be wrong[38]. Similar reminders about the validity of Court orders and their binding nature even in the face of allegations that the orders were invalid or incorrectly granted may be found in more recent decisions of **Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another**[39] and **Department of Transport v Tasima Pty Ltd**[40]**.**

Discussion

24. In the Notice of Motion, the DEA seeks civil remedies in the form of a declaration of contempt and a restriction on further litigation (prayers 2 and 5), and suspended imprisonment and a fine, which are criminal sanctions (prayers 3 and 4) that impact on Mr Xulu's freedom and security. During argument in reply, Ms Bawa submitted that the DEA was not asking for imprisonment *per se*, but only in circumstances where Mr Xulu fails to surrender his Porsche.

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[35] Fakie, para 42, p 344
[36] Fakie, para 42 (d), p 345
[37] 2001 (2) SA 224 (E) at 229 B-C
[38] Referred with approval in Dengetenge Holdings Pty Ltd v Southern Sphere Mining and Development Company Limited [2013] ZASCA 5
[39] [2015] ZASCA 35 at para 35, Ponnan JA refers to Dengetenge and Bezuidenhout judgments with approval
[40] 2017 (2) SA 622 (CC) at para 180

25. Mr Xulu disputes the authority of the deponent to the founding affidavit, Mr Cheslyn Liebenberg[41]. Mr Liebenberg is the Director: Corporate Legal Support (Cape Town) of the second applicant. Annexure CEL 47 is a written authorisation by the Acting Director-General of the national DEA, Mr Ishaam Abader, delegating and authorising the Director: Corporate Legal Support (Cape Town) or a functionary acting in that position, to depose to an affidavit and if necessary, any other affidavit on behalf of the Department in case number 6189/19[42]. The document is signed and dated 5 November 2020 and clearly refers to the litigation under this case number against BXI and Mr Xulu. I am accordingly satisfied that Mr Liebenberg was duly authorised to institute the application on behalf of the DEA.

26. The first requirement of existence of the order is fulfilled: there is no dispute between the parties that the six orders referred to in paragraphs 2.1 to 2.6 of the Notice of Motion were granted. Mr Masuku conceded this undisputed fact at the outset of his argument. Quite significantly, Mr Xulu as the deponent of the answering affidavit, does not dispute nor attack any of the annexures attached to Mr Liebenberg's founding affidavit, and furthermore, also does not dispute or deny non-compliance by BXI and himself with the orders but raises certain defences which bear scrutiny.

27. I am not called on to make any determinations as to the validity or correctness of any of the orders granted. In the paragraphs which follow, I deal with each of the orders which the second applicant alleges, BXI and Mr Xulu, disobeyed.

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[41] Para 5, p 5468
[42] P 5560

Paragraphs 3.2.1 and 3.2.3 of the Rogers J order of 21 August 2019

28. On 21 August 2019, Rogers J granted a *rule nisi* by agreement between the DAFF, BXI and various banks in the DAFF's urgent application. BXI has at all stages been the first respondent in proceedings under case number 6189/19. Paragraph 3 of the order reads as follows[43]:

Pending the return day:

3.1 The First Respondent shall not take any further steps to execute the judgement of Steyn J granted on 6 June 2019 and the suspension of the writs of execution and notices of attachment issued pursuant thereto shall be extended;

3.2 The First Respondent undertakes that

3.2.1 The R3 400 000 currently in a FOREX suspense account at First National Bank shall be put into an interest-bearing account as provided for in section 86 (4) of the Legal Practice Act 28 of 2014, the interest of which shall be paid as ordered by the Court hearing the matter;

3.2.2 In relation to the funds transferred to Setlacorp (Pty) Ltd ("Setlacorp")[44] during the period 5 July 2019 to 6 August 2019, the First Respondent, and its director, Mr Barnabas Xulu, undertake that the cash on hand as held by Setlacorp as at 8 August 2019, being R94 553, will not be disbursed, and that Setlacorp will make no disposal of assets and property;

[43] The underlined paragraphs are the relevant orders
[44] Setlacorp is an entity in which Mr Xulu has an interest

3.2.3 The First Respondent shall not allow the balance of his trust account to reduce to below R380 000;

and that the aforestated shall prevail until the finalisation of the matter or a court order permitting that the aforementioned interdict be discharged[45]*.*

29. It is the DEA's case that pending the finalisation of the principal proceedings between the parties or the granting of an order permitting the discharge of the interdict, BXI was obliged to preserve the R3 400 000 in an attorney's trust investment account, and secondly, the balance of its trust account could not drop below R380 000. The submission is that BXI failed to comply with paragraph 3.2.1 by having the money credited to what appears to be a business account, and from March 2020, it utilised the funds for various BXI and personal expenses of Mr Xulu.

30. Mr Xulu admitted during the proceedings before Rogers J that R3 400 000 of the more than R20 000 000 paid to BXI pursuant to the execution against the DAFF was still available, and the intention was to pay certain disbursements which BXI had incurred on behalf of the applicants. According to him, BXI had complied with the August 2019 order by retaining the funds *"in the bank account"*[46]. The defence to the contempt allegation is that proceedings regarding the R3 400 000 were finalised on 30 January 2020 when Rogers J ordered BXI to pay the R20 242 472, 90 to the applicants which amount included the R3 400 000. In the respondents' view, the order of 30 January 2020 automatically discharged the August 2019 interim order in respect of the

[45] See Order granted on 21 August 2019, p 5125-32
[46] Para 14, p 5471

R3 400 000 and the R380 000 and therefore the order cannot (or could not) be enforced as it had lapsed when the main application was finalised by Rogers J on 30 January 2020[47].

31. BXI was legally represented when the 21 August 2019 order was granted by agreement between the parties. The requirement that the order came to the notice of BXI and thus Mr Xulu, is fulfilled. Whether the order is correct or not is not the issue. Certainly, from the ordinary meaning of the words in the order, paragraphs 3.2.1 and 3.2.3 would remain until discharged by a Court or until finalisation of the matter. Paragraphs (j) to (l) of the Rogers J order of 30 January 2020 made it clear that a *rule nisi* was granted calling on Mr Xulu to show cause on a further date why he should not be held liable to pay the R20 242 472, 90, jointly and severally, with BXI. On my understanding, the 30 January 2020 order did not finalise the matter as the outstanding issue of Mr Xulu's personal liability was yet to be decided.

32. From CEL 31 attached to the founding affidavit, one sees that R3 400 000 described as *"Forex Holding"* was credited to BXI's First National Bank (FNB) Money on call account number 62587777073 on 23 August 2019[48]. The balance in the account remained at R3 400 000 until 19 March 2020, whereafter various payments were made in respect of Mr Xulu personally, BXI staff, various counsel, Millar and Reardon attorneys[49] and rates and levies in respect of Mr Xulu's residences in Fresnaye and elsewhere. The closing

[47] A copy of the rescission application is attached to the answering affidavit, BX14, p 5493-5532
[48] P 5360 - 65
[49] Millar and Reardon Attorneys of Durban have been BXI and Mr Xulu's legal representatives in this matter (case number 6189/19) at various stages

balance on 30 September 2020 was R244 720, 78[50]. I point out that the summary of transactions and schedule of interest calculated on actual transactions are not disputed[51].

33. Section 86 (4) of the Legal Practice Act[52] **(the Act)** states that:

A trust account practice may, on the instructions of any person, open a separate trust savings account or other interest-bearing account for the purpose of investing therein any money deposited in the trust account of that practice, on behalf of such person over which the practice exercises exclusive control as trustee, agent or stakeholder or in any other fiduciary capacity.

The evidence clearly points to the conclusion that the R3 400 000 was not placed in a trust account as ordered in paragraph 3.2.1, and certainly not in accordance with the requirements of section 86 of the Legal Practice Act.

34. BXI's trust account in terms of section 86 (2) of the Act is held under account number 62587780141[53] which is not the account into which the R3 400 000 was paid. The order states that the R3 400 000 must be preserved as ordered in terms of the Act *"until the finalisation of the matter or a court order permitting that the aforementioned interdict be discharged"*[54]. In my view, at the very least, this would mean that BXI had to preserve the R3 400 000 until Smith J discharged it on 5 October 2020. However, instead of preserving the

[50] P5365
[51] P 5366-71
[52] 28 of 2014
[53] P 5106
[54] Para 3 of Rogers J order of 21 August 2019 – my emphasis

funds, BXI depleted the R3 400 000 to a large extent and failed to pay over the interest as ordered. In my view, the DEA has proved non-compliance with paragraph 3.2.1 of the order.

35. I turn then to paragraph 3.2.3 of the August 2019 order which ordered BXI to maintain the balance of its trust account at not less than R380 000. Mr Liebenberg refers to the trust bank statements attached as CEL 34.1, which must naturally be read with the schedule setting out the transactions on the bank statements (CEL 34). Despite diligent search, CEL 34.1 is not attached to the founding affidavit. Given the surfeit of applications between the parties following on the August 2019 order, the probabilities are that BXI's trust account statements form part of another application contained in the rest of the Court file. My view is fortified by paragraphs 98 to 100 of the Rogers J judgment, where the learned Judge explains that BXI provided extracts of its trust account and a summary to clarify the transactions and entries in that account[55]. The absence of the trust account bank statements is in my opinion, not detrimental to the application as Mr Xulu does not question the accuracy nor correctness of the schedule indicating BXI's trust account transaction summary from 21 August 2019 to 31 October 2020. Furthermore, it is evident from the very detailed founding affidavit that the summary and schedule were exchanged previously.

36. From an assessment of CEL 34, the following balances are apparent from BXI's trust account for the period 21 August 2019 to 4 October 2020:

[55] See para 99 of the judgment - BXI provided extracts and summaries of its business and trust accounts but was required to provide further information regarding the extracts supplied

Date	Trust Account Balance
21 Aug 2019	R866 033, 17
2 Nov 2019	R350 865,97
18 Dec 2019	R375 761,67
26 Feb 2020	R308 327, 67
27 Feb 2020	R307 702, 67
15 Aug 2020	R356 466, 29
3 Sep 2020	R106 466, 29
1 Oct 2020	R46 466, 29

From the above table, one sees that on no less than seven occasions between Rogers J granting the order on 21 August 2019 and Smith J discharging paragraphs 3.2.1 and 3.2.3 thereof in October 2020, the balance in BXI's trust account fell below R380 000.

37. The detail regarding the recipients of the various payments and transactions made from the account is not relevant to this application. More importantly, there is absolutely no explanation tendered by Mr Xulu as to why the trust account balance fell below R380 000, except the same argument that the August 2019 order was discharged by the judgment of 30 January 2020. My comments on this submission in relation to paragraph 3.2.1 of the August 2019 order apply equally to paragraph 3.2.3. However, even on the *"discharge of the 2019 order"* argument, my finding of non-compliance would

remain because the trust account balance fell below the R380 000 threshold on 2 November and 18 December 2019, respectively.

38. The pertinent question is whether BXI acted wilfully and in bad faith in respect of non-compliance of paragraphs 3.2.1 and 3.2.3 of the abovementioned order. BXI agreed to the order and was thus fully aware, through Mr Xulu, of the content and ambit thereof. Yet, that fact notwithstanding, it failed to preserve the R3 4000 000 as ordered and its non-compliance continued when it disbursed monies in trust to such an extent that the account balance fell below R380 000 on seven occasions[56]. BXI could raise reasonable doubt about wilfulness if it could show that there was a misunderstanding about the meaning of the order[57], but this is not the case here as the order was taken by agreement and at a time when BXI was legally represented. Furthermore, paragraph 3 remained in effect until the matter was to be finalised or the discharge of the interdict. On my understanding, the matter (Mr Xulu's personal liability) has not yet been finalised and the discharge of paragraphs 3.2.1 and 3.2.3 occurred on 5 October 2020 on an unopposed basis. Thus, the submission that the August 2019 order was discharged by the January 2020 order, serves as no answer to the case against BXI, which has ignored the general principle that all Court orders, whether correctly or incorrectly granted, are required to be obeyed until they are set aside by a Court of competent jurisdiction[58]. It is not open to a litigant, including an attorney or law firm, against whom an order is granted, to pick and choose whether he wishes

[56] See above table of BXI trust balances
[57] Consolidated Fish Distributors (Pty) Ltd v Zive and Others 1968 (2) CPD at 525 A-C
[58] See Herbstein and Van Winsen, p 1110

to comply with the Court order. He is obligated to do so as the order binds him, whether he believes that the order was incorrectly granted or not.

39. In my view, BXI has failed to establish reasonable doubt as to whether its non-compliance was wilful and *mala fides.* I am indeed satisfied that BXI's non-compliance in respect of paragraphs 3.2.1 and 3.2.3 amounts to wilful and *mala fide* conduct which is established beyond reasonable doubt. In the result, I find that BXI is in contempt of the aforementioned paragraphs of the Rogers J order of 21 August 2019.

Paragraph 144 (e) of the Rogers J order of 30 January 2020

40. The orders of 30 January 2020 were granted pursuant to a judgment in an opposed matter. Paragraph 144 (e) ordered BXI to pay the applicants by Thursday, 30 April 2020, the amount of R20 242 472, 90 which it received pursuant to the invalid writs of execution and notices of attachment, subject to any set off arising from paragraph (g) of the order. Paragraph (f) directed the applicants to proceed with verification of BXI's invoices and to provide a report by 9 April 2020[59]. It is common cause between the parties that the applicants proceeded to have a writ of execution issued for the R20 242 472,90[60]. The parties were legally represented and the respondents had knowledge of the order.

41. Mr Masuku submitted that this order is a money judgment and as the applicants proceeded by way of execution, committal for contempt is

[59] See Rogers J order of 30 January 2020

[60] CEL 11, Writ of execution issued by the Chief Registrar on 8 October 2020, p 5324-5

inappropriate to enforce compliance with such an order. Ms Bawa submitted that the applicants were not seeking contempt because BXI or Mr Xulu had not made payment of the R20 million; if they had, they would have proceeded with liquidation or sequestration proceedings but that the DEA's focus was the preservation of the R3 400 000. I understand Ms Bawa's submissions to be a concession that an order for contempt of Court cannot be granted in respect of non-payment of a money judgment, but she has argued that on the civil standard of proof, a declaration of contempt is still competent.

42. In terms of the common law there is a distinction between orders *ad solvendam pecuniam,* which relate to the payment of money, and orders *ad factum praestandum,* which requires a person to perform a certain act or refrain from a specified action. Failure to comply with an order to pay money was not regarded as contempt of Court whereas failure to perform or refrain from a specified action was contempt of Court.[61] The authors Herbstein and Van Winsen in **The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa**[62], regarding a discussion on the applicability of contempt proceedings, confirm that committal for contempt is not appropriate enforcement for orders *ad pecuniam solvendam*[63].

43. It is common cause that BXI has failed to comply with the order to pay the R20 242 472, 90. On my understanding of the authorities, the issue of

[61] See Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elisabeth Prison and Others [1995] ZACC 7 at para 61; Matjhabeng at para 56; Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (TkH) at p 451

[62] Fifth edition, Volume 2, p1106 - 1109

[63] Non-payment of a maintenance order is treated as *ad factum praestandum* because it is the failure to maintain that is punished, and not the failure to pay a sum of money

competency of contempt proceedings for orders *ad pecuniam solvendam* seems to apply where the purpose of the contempt proceedings is committal to prison or a criminal sanction[64]. I do not understand the common law rule to exclude a declaration of contempt (the civil remedy) where there is wilful and *mala fide* non-compliance with an order for the payment of money. The declaration is not, in my view, concerned with the enforcement of the money order or punishment, but rather a declaration of disobedience of the order.

44. From the evidence, I find on a preponderance of probabilities that BXI has indeed wifully and deliberately failed to comply with paragraph 144 (e) of the Rogers J order. The money was dissipated and as at the date of this hearing, has not been paid. In the circumstances, a declaration of contempt in respect of non-compliance with paragraph 144 (e) is competent.

Paragraphs 1 and 3 of the Smith J order of 5 October 2020

45. Paragraph 1 of the order granted on 5 October 2020 discharged paragraphs 3.2.1 and 3.2.3 of the August 2019 order and BXI was ordered to pay to the State attorney, Cape Town by no later than close of business on the same day: R3 400 000 together with interest as would have been earned in an account specified in terms of section 86 (4) of the Legal Practice Act from 21 August 2019 to date of payment, and R 380 000 together with interest from the trust account from 21 August 2019 to date of payment. In terms of paragraph 3, BXI was to provide to the applicant's attorney a full copy of the

[64] Cape Times Ltd v Union Trades Directorates (Pty) Ltd and Others 1956 (1) SA 105 (N); Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (TkH)

relevant bank statements reflecting the interest earned in respect of these accounts from 21 August 2019 to date of payment. At the time that Smith J granted this order, BXI was represented by Millar and Reardon. Mr Manuel served a copy of the order per email on the attorneys on 6 October 2020[65], and in light thereof, I find that the notice requirement has been fulfilled.

46. It is common cause that these amounts were not paid as ordered and thus non-compliance has been established. In my view, paragraphs 1.1 and 1.2 of the Smith J order is for payment of money, and thus it too constitutes an order *ad pecuniam solvendam.* The funds were largely dissipated, knowingly in contravention of the order, and I am accordingly satisfied that on a balance of probabilities, BXI's wilful disobedience has been established. Accordingly, a declaration of contempt is made in respect of paragraph 1 of the order.

47. The DEA's claim that BXI did not comply with paragraph 3 of the order in that it failed to provide a full copy of the relevant bank statements reflecting interest earned on the R3 400 000 and R380 000 from 21 August 2019, is not disputed. The only answer is that the Smith J orders were a nullity because the Judge acted beyond his acting appointment. The FNB money on call account statements from August 2019 to June 2020 are attached to the founding affidavit[66]. In addition, it is also not disputed that in respect of its trust account, BXI had failed to provide a full copy of it statements in respect of interest earned on the R380 000.

[65] Email dated 6 October 2020, p 5359
[66] P5360-5365

48. The same argument that the Smith J order sought to vary the August 2019 order which was already been discharged by Rogers J on 30 January 2020, and therefore it was a nullity, was raised in respect all the orders granted by Smith J. My comments above regarding compliance with orders until they are set aside, refer. In the circumstances the explanation or justification for not complying with the Smith J order is rejected. The undisputed facts establish that BXI is in breach of paragraph 3 of the order of which it had been given notice, and I am satisfied that the first three elements for contempt have been proved beyond reasonable doubt. However, it is highly probable that BX I acted wilfully and in bad faith when it failed to comply with the order, though a finding cannot be made beyond reasonable doubt. In the result, I consider that BXI's contempt is established on a balance of probabilities and thus I shall issue a declaration of contempt (declarator) in this regard.

Paragraph 4.1.6 of the Smith J order of 12 October 2020[67]

49. The order of 12 October was an anti-dissipation order granted *ex parte.* At paragraph 4, Smith J granted various interim orders pending the final determination of *rule nisi* proceedings determining Mr Xulu's liability jointly and severally with BXI for the R20 242 472, 90. At paragraph 4.1.6, an interim order was granted directing the sheriff of Cape Town to take immediate possession of Mr Xulu's Porsche 911 Carrera GTS registration number CA 3302 *(the Porsche)* for safekeeping[68]. Email correspondence on 20 October

[67] The order was amended on 15 October 2020
[68] P 5142

2020 between Mr Manuel and Mr Xulu[69], read with Mr Manuel's letter to Millar and Reardon on 21 October 2020 indicate that the order was certainly brought to Mr Xulu's notice. I must point out that while the order required service on BXI and Mr Xulu at the firm's offices and on its attorney, the evidence indicates that Mr Manuel was having difficulty with service at BXI's offices. In the circumstances, email communication of the order suffices as giving notice of the order for purposes of fulfilment of the contempt requirement.

50. Pursuant to the order, the Chief Registrar issued a writ of attachment in respect of Mr Xulu's Porsche[70]. On four occasions the sheriff of Cape Town attempted to serve the writ but without success: an attempt on 13 October 2020 at Mr Xulu's Camps Bay address found nobody home, while earlier on the same day an attempt at his office found Mr Xulu absent and not answering his cellphone. But most importantly, on 14 October 2020 the deputy sheriff Mr Ntsibantu reported on his return of non-service that[71]:

"after several attempts, I have been unable to locate neither the 5th respondent or the vehicle in question at both provided addresses. The 5th Respondent has been absent from the office and the Camps Bay address is always locked, the vehicle could not be located at any of the parking bays there. Efforts to contact the 5th Respondent telephonically proved fruitless as he neither answers his phone nor returns missed calls, he only responded by sms saying he cannot talk".[72]

[69] CEL 17, P 5333
[70] CEL 22, p 5328-9
[71] All the sheriff's returns are typed as stated/reported
[72] Sheriff's return of non-service, p 5330

51. The deputy sheriff's efforts were fruitless and on 15 October 2020, Smith J granted a variation of his order of 12 October, by authorising Tracker (Pty) Ltd to assist the sheriff to immediately track the location of the Porsche and allow the sheriff to access Tracker's records for purposes of obtaining the location of the vehicle to give effect to paragraph 4.1.6 of his order. On the same day, the Sheriff visited Mr Xulu's residence and in another return of non-service, reports as follows[73]:

"*I was unable to locate neither the vehicle in question nor the 5th respondent at the given address, I however left a message with the house helper there, who refused to disclose her identity, for Mr Xulu to contact me. I then received a call from Mrs Xulu, who informed me that the 5th respondent has been away without notice for about 3 weeks now and she is also looking for him for maintenance issues. She further made an appointment to meet me at our office on 16-10-20 when she came to explain that Mr Xulu is currently in Johannesburg as per information which was provided to her by Mr Xulu's sister and she has not seen him driving the vehicle in question for a while before his going away, he actually is said to have borrowed her car to use for his day-to-day runnings. She also showed to me the could of messages that she received at the time that she had tried to contact Xulu which read "sorry I cannot talk right now". A diligent search of the vehicle was conducted at the parking areas at the given address as well as at the old Christian*

[73] CEL 15.2, p 5331

Barnard hospital where he is said to usually park but the vehicle was not found"[74]*.*

52. Correspondence by Mr Manuel to Mr Xulu and his attorneys on 20 and 21 October 2020 respectively, reminding him to comply with the order, requesting that the vehicle be handed over and providing the contact details of the deputy sheriff to be contacted were met with absolutely no compliance[75]. Paragraph 4.1.6 of the 12 October 2020 order, as amended on 15 October 2020, was simply not complied with.

53. This, however, was not the end of the Porsche saga. In correspondence on 10 November 2020, Mr Manuel yet again wrote to Millar and Reardon, reminding them that Mr Xulu was required to comply with the 12 October order, and attached a copy of the issued writ. Significantly, Mr Manuel makes the averment that Mr Xulu was intentionally evading the sheriff and that while aware of the order and writ, his conduct was *"not in accordance with his role as an officer of the court especially since he recently in an affidavit specifically articulated that he respects court orders*[76]*".* The tireless deputy sheriff once again attempted to serve the writ on Mr Xulu at his Fresnaye residence and reported the following:

"*I was unable to execute the process as the 5th Respondent ignored me and sped off the moment I introduce myself as the Deputy Sheriff who was there*

[74] CEL 15.2, p 5331 – it is unclear what the sheriff means by *"could of messages"*
[75] CEL 17, p 5333-5
[76] P 5336

to serve him. His wife who was in the car with Mr B. Xulu later phoned me to inform me that she took the 5th respondent to the airport. I was unable to locate the Porsche at the given address, the respondent drove off in a different vehicle[77]*.*

54. Subsequent to the above effort by the deputy sheriff, Mr Xulu provides no explanation why the Porsche was not surrendered and why it's location was not disclosed. Regardless of what Mr Xulu thought of Judge Smith's authority or the orders, he was required to comply with the order. It is of great concern that the deputy sheriff made several attempts at service of the writ of attachment, left messages at the Xulu residence, yet all to no avail. But even more alarming, is the report that the attorney fled from the deputy sheriff attempting to execute the writ. Similarly, Mr Manuel's written requests for compliance and reminders to Millar and Reardon that their client complies with the order, were met with questions about the Judge's authority, Mr Xulu's deliberate evasion of the sheriff and what I regard as a wilful refusal to disclose the whereabouts of and surrender the Porsche to the deputy sheriff.

55. The deputy sheriff's reports on the returns of service are not disputed in any way. The argument that any rescission application stays the operation of the order was correctly withdrawn by Mr Masuku when Ms Bawa pointed out that a rescission application does not stay the operation of a Court order. The further defence raised by Mr Xulu that he was instructed not to hand over the Porsche because of a pending rescission, is with respect, nonsensical and

[77] Sheriff's return of non-service 11 November 2020, p 5338

far-fetched to say the least. I must ask why an experienced attorney, who regularly litigates in the High Court, would be instructed to not hand over his vehicle which forms the subject matter of Court orders requiring it to be attached by the sheriff for safekeeping, and even if he were so instructed, why he would think that it is correct not to surrender the vehicle when the sheriff was authorised to attach it. Mr Xulu has not disclosed the identity of the person who issued the instruction to disobey the order/not co-operate with the sheriff, which leads me to conclude on the probabilities indicate that no such instruction occurred.

56. Knowing what is in store pursuant to a writ of attachment and the consequences of non-compliance with the Court order, Mr Xulu flees the scene to escape the deputy sheriff, does not respond to any of the messages to contact the latter nor the requests by Mr Manuel to comply. In my view, there was no need for Mr Manuel to have sent reminders about compliance with the Court order even if Mr Xulu thought that Smith J acted beyond the scope of his authority, which in any event, was an argument dismissed by Slingers J in October 2020.

57. Thus, the DEA has established the first three requirements for contempt beyond reasonable doubt. The evidence of the sheriff's reports taken with the email and written correspondence of Mr Manuel, establishes Mr Xulu's deliberate, wilful and utterly *mala fide* conduct in not only failing, but also refusing to comply so that paragraph 4.1.6 of the Smith J order may be given

effect to. For all the above reasons, I find that the DEA has proved Mr Xulu's contempt of paragraph 4.1.6 of the Smith J order beyond reasonable doubt.

Paragraphs 6 and 7 of the Binns-Ward J order of 25 November 2020

58. Judge Binns-Ward presided in Third Division on 25 November 2020, the return date of the Smith J *rule nisi* as referred to above. In terms of paragraph 6, the learned Judge ordered that the sheriff of Cape Town or his deputy was directed to obtain and retain possession of the Porsche for safekeeping[78]. At paragraph 7, he ordered that given the lack of success by the sheriff, Cape Town, to take possession of the vehicle and that Mr Xulu had failed to surrender it in compliance with Judge Smith's order of 12 October 2020, in the event that the Porsche was not surrendered to the sheriff by 17h00 on 26 November 2020, Mr Xulu was directed to appear in person at 10h00 on 27 November 2020 before the duty Judge and submit an affidavit fully explaining his failure to comply with the Court order of 12 October 2020[79].

59. Firstly, the events which transpired at Court on 25 November 2020 are not disputed in the answering affidavit. A junior advocate appeared for Mr Xulu and requested a postponement and after certain queries were raised by the Judge, the matter then stood down whereafter an order was granted in favour of the DEA confirming the *rule nisi.*[80]

[78] A similar order to paragraph 4.1.6 of the Smith J order of 5 October 2020 – my emphasis
[79] P 5151-2

60. In terms of paragraph 9, paragraphs 1 to 6 of the order would remain in force until finalisation of the proceedings related to Mr Xulu's personal liability (the matter before Zilwa J). I shall accept that Mr Xulu had received notice of the order as his attorney, Mr Ndumiso, confirmed in writing that he received the order from Mr Manuel (in writing)[81]. Mr Manuel reminded Mr Ndumiso that Mr Xulu was required to hand over the Porsche on 26 November 2020 and that he should contact the sheriff to make the necessary arrangements. Mr Ndumiso's instructions were that Mr Xulu was in Johannesburg and struggling to return to Cape Town due to financial constraints but was willing to appear by virtual means.

61. Despite having knowledge of the order, Mr Xulu failed to hand over the Porsche by 17h00 on 26 November 2020. In addition, he failed to appear on 27 November 2020 at 10h00 before the duty Judge (again Binns-Ward J) and failed to provide an affidavit explaining his non-compliance of the 12 October 2020 order. Mr Manuel offered to arrange a virtual hearing so that Mr Xulu could be accommodated on 27 November 2020, but Mr Ndumiso advised that his instructions from Mr Xulu were that the latter was no longer available for a virtual hearing. No explanation is provided for Mr Xulu's unavailability to attend a virtual hearing.

62. The submission that because Judge Smith, according to Mr Xulu, apparently lacked the authority to make orders in October 2020 as he had, it follows that orders granted by Judge Binns-Ward subsequently confirming the Smith J

[81] P 5347-8 – correspondence indicates that Millar and Reardon were not the instructing attorneys in the matter before Binns-Ward J; see also CEL 22, p 5342

orders are a nullity, is not a competent argument to stave off a finding of contempt. The evidence establishes notice and non-compliance with the order of 25 November 2020. The non-compliance displayed in respect of the Smith J order related to the Porsche, continued, leading to Binns-Ward J granting the order on 25 November 2020. Mr Xulu's disobedience continued on 26 November 2020 when he failed to hand over the Porsche and on 27 November when he not only failed to provide an affidavit but failed to appear in the urgent Court on 27 November 2020. It follows that Mr Xulu's contempt in relation to orders 6 and 7 of the 25 November 2020 order is established beyond reasonable doubt.

Paragraph 4 of the Binns-Ward J order of 27 November 2020

63. In the absence of Mr Xulu's appearance, his affidavit and his continued non-compliance with orders, Binns-Ward J granted an order on 27 November 2020 including an order regarding the Porsche. Paragraph 4 of the order granted Mr Xulu a further opportunity to comply by 17h00 on 30 November 2020, by handing over or making arrangements with his attorney to provide the sheriff access to the Porsche for safekeeping[82].

64. The order was sent per email to Mr Ndumiso on the same day and he acknowledged receipt, and I am thus satisfied that notice of the order was given[83]. The evidence indicates that by 1 December 2020, the Porsche had still not been surrendered and neither were any arrangements to do so

[82] See para 6 of Binns-Ward J order of 25 November 2020
[83] P 5444-5

forthcoming. Further follow up reminders in December 2020 regarding non-compliance[84] and that a contempt application would follow, had absolutely no effect. Correspondence between Mr Manuel and Mr Ndumiso demonstrates that Mr Xulu had provided his attorney with no further instructions regarding compliance with the order[85]. Rather than comply, Mr Xulu's attorneys delivered a notice of appeal. Despite Mr Manuel's contention that the orders were not appealable as they are not final but interlocutory, Mathopo Attorneys[86] advised Mr Manuel that Mr Xulu is of the view that the notice of appeal in respect of the order of 27 November 2020, suspends the operation of the order[87].

65. What becomes abundantly clear in this matter, is that on 12 October, and 25, 26, 27 and 30 November 2020 respectively, Mr Xulu was ordered to surrender the Porsche, contact the deputy sheriff, arrange with his attorney that the Porsche be surrendered and attend Court to explain his non-compliance. Three orders in total were granted regarding the Porsche, yet Mr Xulu acted in flagrant disregard and defiance of all of them. The application for leave to appeal did not suspend the order as it was not a final order. Thus, I find that the DEA has proved Mr Xulu's wilful and *mala fide* non-compliance beyond reasonable doubt and thus he is found to be in contempt of paragraph 4 of the Binns-Ward J order of 27 November 2020.

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[84] CEL 44, p 5452; CEL 45, P 5453
[85] See CEL p5451-5452
[86] A new firm of attorneys representing MR Xulu
[87] They are of the view that the Binns-Ward order of 27 November 2020 is final and thus a Notice of Appeal suspends the order. As it happens, Binns-Ward J dismissed the application for leave to appeal on 31 March 2021 in Department of Environmental Affairs, Forestry and Fisheries v B Xulu & Partners Incorporated [2021] ZAWCHC 59, holding *inter alia* that the order was not of a final nature

Concluding remarks and Costs

66. Mr Masuku has argued that the DEA has set out to embarrass BXI and Mr Xulu and that the contempt application is recklessly sought against an attorney whom it recognises as an officer of the Court whose integrity is undermined by the harassment he has faced. I respectfully disagree with this submission. The evidence, which is undisputed, paints a picture of a law firm and its director who have flagrantly, deliberately and defiantly disrespected and refused to comply with Court orders granted by the various Judges of the Western Cape High Court. Rather than comply, as required, BXI and Mr Xulu embarked on urgent applications which were ultimately dismissed.

67. The submission that Mr Xulu is entitled to question Court orders and have them placed under *"judicial scrutiny"* seems to suggest that he and BXI should somehow, unlike other litigants against whom orders are granted, be exempt or immune from the effects and implications of Court orders. This cannot be, and until such time that the orders are set aside by a Court of competent jurisdiction, they must be obeyed.

68. I must agree with Ms Bawa that it would be chaotic if litigants could decide for themselves whether they wished to obey Court orders or not. BXI and particularly Mr Xulu's continued and repeated non-compliance with the various Court orders makes a mockery of judicial authority. The evidence points to the ineluctable conclusion that Mr Xulu and BXI have appropriated to

themselves the right to disobey Court orders which they believe they are entitled to disobey as and when they see fit. If ever a litigant should be aware that orders remain in effect and must be complied with until set aside, then it should be Mr Xulu (and BXI)[88] because he is a practising attorney with years of experience.

69. The respondents have flouted section 165 (5) of the Constitution which makes Court orders binding on all persons to whom it applies. They have acted with impunity and the utmost contempt and it is of great concern that an attorney has conducted himself in continued wilful defiance and bad faith in the manner set out in this judgment. Whilst Mr Masuku reminded me that Mr Xulu is an officer of the Court and that his right to inherent integrity in terms of section 10 of the Constitution is undermined, my view is that Mr Xulu has conducted himself in a manner totally at variance with the integrity and utmost good faith principles inherent to a person who is an officer of the Court. The conclusion is that BXI and Mr Xulu have violated the integrity and dignity of the Court through their conduct. Mr Xulu's refusal to surrender the Porsche was contumacious and his conduct is to be deprecated. Ultimately, the conduct displayed by the respondents undermined respect for and obedience to the law.

70. In respect of the proposed sanctions, I was requested to grant orders which prevents Mr Xulu and BXI from approaching the Court until they have purged

[88] See Tasima

their contempt. Given the past conduct of the respondents, my view is that punitive sanctions are warranted in respect of the non-compliance of orders where findings were made beyond reasonable doubt, and such sanctions are similar to those imposed in **Victoria Park Ratepayers' Association v Greyvenouw CC and other**[89]**.** While Ms Bawa has submitted that imprisonment *per se* is not sought, it would be futile and ineffective to impose a sanction that, if disobeyed, would be ineffective. The principles involved in civil contempt proceedings should not have as its focus, punishment, but rather to bring the contemnor to his/its senses, protect the rule of law and restore and vindicate the dignity of the Court[90]. On the issue of urgency, contempt applications are regarded as inherently urgent as the Court's honour and dignity are to be restored. Considering the postponements granted in the respondents' favour, the lengthy history of the matter, consideration of the orders granted and defences raised, it was necessary to reserve judgment herein.

71. The second applicant is successful and is entitled to costs on a punitive scale as prayed for in terms of prayer 6 of the Notice of Motion. Ms Bawa has requested costs of two counsel rather than costs of two senior counsel. Finally, in view of my findings, and as the orders are granted against a firm of attorneys and its director, a practising attorney, a copy of this judgment shall be forwarded to the Legal Practice Council, Western Cape.

[89] [2003] ZAECHC 19

[90] See Meadow Glen Home Owners Association v Tshwane City Metro Municipality 2015 (2) SA 413 (SCA)

Orders

In the result, I grant the following orders:

1. It is declared that the first respondent, B Xulu and Partners Incorporated (BXI) is in contempt of the following orders granted under case number 6189/19:

    1.1 paragraphs 3.2.1 and 3.2.3 of the order granted by Rogers J on 21 August 2019;

    1.2 paragraph 144 (e) of the order granted by Rogers J on 30 January 2020;

    1.3 paragraphs 1 and 3 of the order granted by Smith J on 05 October 2020.

2. It is declared that the fifth respondent, Mr Barnabas Xulu (Mr Xulu), in his capacity as director of the first respondent and personally is in contempt of the following orders granted under case number 6189/19:

    2.1 paragraph 4.1.6 of the order granted by Smith J on 12 October 2020 as amended on 15 October 2020;

    2.2 paragraphs 6 and 7 of the order granted Binns-Ward J on 25 November 2020;

    2.3 paragraph 4 of the order granted by Binns-Ward J on 27 November 2020.

3. The first and fifth respondents are ordered to pay a fine of R30 000 jointly and severally, the one paying the other to be absolved, by no later than 12h00 on Friday 7 May 2021, such fine being payable at the office of the Registrar of this Court. Failing such compliance, the fifth respondent is sentenced to 30 days' imprisonment.

4. The fifth respondent is ordered to surrender the Porsche 911 Carrera with registration number [….] (the Porsche) by no later than 12h00 on Friday 7 May 2021 to the sheriff or deputy sheriff of Cape Town, or any other sheriff in whose area of jurisdiction the Porsche is found/located, for safekeeping by the sheriff, Cape Town, pending finalisation of the remaining matters (including appeals) under case number 6189/19. Failing compliance with this order, the fifth respondent is sentenced to 30 days' imprisonment.

5. The fifth respondent is sentenced to 30 days' imprisonment, wholly suspended for 3 (three) years on condition that he is not again committed for contempt of Court in case number 6189/19, committed during the period of suspension.

6. The first and fifth respondents are precluded from launching any further applications against the applicants in relation to any matters involving, relating to or arising from the disputes and judgments under case number 6189/19, unless and until they have purged their contempt as set out in the preceding paragraphs. This order (paragraph 6) does not apply to pending matters before Zilwa J.

7. The first and fifth respondents are ordered to pay the second applicant's costs on an attorney and client scale and such costs shall include the costs of two counsel where so employed.

8. A copy of this judgment shall be forwarded to the Legal Practice Council, Western Cape, for its information and attention.

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M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For 2nd applicant: Ms N Bawa SC with Mr B Joseph SC and Ms J Williams

Instructed by: State Attorney, Cape Town
Mr L Manuel

For 1st and 5th respondents: Adv. T Masuku SC

Instructed by: B Xulu & Partners Inc./Ndumiso Attorneys