

SOUTH AFRICA / JUDGMENT

Botha and Another v Jamanzi Live Line (Pty) Limited and Others (3453/2018) [2018] ZAGPPHC 899 (29 November 2018)

[2018] ZAGPPHC 899

COURT

North Gauteng High Court, Pretoria

BEFORE

JH Roelofse

CASE / FILE NUMBER

3453/2018

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REPUBLIC OF
SOUTH AFRICA

THE HIGH

COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION

(FUNCTIONING

AS GAUTENG DIVISION PRETORIA - MIDDELBURG CIRCUIT COURT)

CASE NO:

3453/2018

In the matter

between:

LEVINAUX

MURANDT BOTHA

First

Applicant

JAMANZI

ELECTRICAL

CC

Second

Applicant

and

JAMANZI

LIVE LINE (PTY) LIMITED

First

Respondent

MONA

HEYNS

Second

Respondent
ANDRIES
STOCKENSTROOM
HEYNS
Third Respondent
JULY
PHILLEMONT
MKHONZA
Fourth Respondent

JUDGMENT

Roelofse AJ:

[1] The first applicant and the first to third respondents (“the respondents”) are at war over the second applicant. The first applicant is the holder of 49% interest in the second applicant. The first applicant alleges that the second and third respondents have siphoned off and dissipated the assets and business of the second applicant. These allegations led to the first applicant launching urgent proceedings in the Pretoria High Court against the

second applicant, the first to fourth respondents and two commercial banks. I shall refer to that application as “the first application”.

[2] The present application was instituted under the same case number as the first application being case number 66223/2015. The first application was struck from the roll due to a lack of urgency. The first applicant proceeded to approach the court in the normal

course. The first application led to an order that was granted by His Lordship Mr Justice van der Westhuizen AJ on 17 November 2017 (“the order”). This application, being an application for contempt, the order has to take centre stage. For this reason, recite the entire order. The order provides as follows:

“(a) The first respondent is directed to pay the first respondent forthwith upon the grant of this order the sum of R1,908,830.00 (One Million Nine Hundred and Eight Thousand and Eight hundred and Thirty Rand);

(b) Pending the final determination of the initial (urgent) application under Case No. 66223/2015, alternatively any further proceedings to be instituted pursuant to such initial (urgent) application of by the applicant against first and/or second and/or third and/or fourth and/or fifth respondents within 120 days of the date of this order:

(i) The applicant is hereby declared to be the sole member and/or person entitled to represent and/or transact on behalf of the first respondent;

(ii) Second, third and fourth respondents be and are hereby interdicted and restrained from dealing

with and/or transacting on behalf of the first respondent and/or from accessing and/or transacting on any Bank Accounts held in the name of the first respondent;

(iii) Sixth and seventh respondents [two commercial banks] are directed to take all such steps as may be necessary ensure that the:

- (1) Applicant is the sole member and/or person entitled to transact on any Bank Account the first respondent may hold with the sixth or seventh respondent; and
- (2) Second and/or third and/or fourth respondents are not able to access and/or transact of any Account that the first respondent may hold with the sixth or seventh respondents;

(iv) Second and/or third and/or fourth respondents be and are hereby directed to:

- (1) Deliver to the applicant, or his duly nominated agent, in writing, any and all documents, of whatsoever nature and in whatsoever format, belonging and/or pertaining to the first respondent and/or its business that may be in their possession, including but not limited to, any and all invoices, receipts and/or receipt books, books of account, financial statements and ledgers, asset registers, income tax and value added tax returns, submissions and proofs of payment(s), tax clearance certificates, motor vehicle logbooks and/or vehicle identification certificates, motor vehicle finance agreements, bank statements, vouchers, employee records and/or employment contracts/files, job cards, time sheets, equipment logs, letter, e-mails, faxes and any written agreements (whatever their designation or nature) and to advise the applicant of the terms and conditions or any oral agreements concluded on behalf of the first respondent, of which they are aware;
- (2) Deliver to the applicant, or his duly nominated agent, in writing, any and all motor vehicles, motor vehicle keys, key cards, bank access cards, credit and/or current account cards, tools, equipment, plant or machinery belonging to and/or pertaining to the first respondent and/or its business that may be in their possession;
- (3) Advise the applicant, in writing, of the existence and/or present whereabouts of any of the items mentioned in paragraphs (iv)(1) and (iv)(2) above should they not currently be in the possession of the second and/or third and/or fourth respondents;
- (4) Provide the applicant with whatever assistance and/or explanations and/or directions as may be reasonably necessary for the applicant to locate and/or obtain possession or control of any of the items mentioned in paragraphs

(iv)(1) and (iv)(2) above;

- (c) The second, third, fourth and fifth respondents are directed to pay the costs of this application, jointly and severally the one paying the other to be absolved”.

[3] On the basis of the order, the applicants approach this court for orders declaring the respondents in contempt and for orders that

the second to fourth respondents be committed to prison, alternatively, that a fine be imposed upon them and the first respondent. The applicants are therefore seeking criminal sanctions.

[4] In support of their claim for contempt, the applicants allege that: the respondents have failed to comply with the provisions of

the order; the first respondent has not paid the second applicant and that the second to fourth respondents have not done what they were supposed to do in terms of paragraph (b) of the order; the second and third respondents have, since the granting of the order, continued to siphon of the second applicant's monies business and falsely represented that they represent the first applicant and act on its behalf; the second and third respondents are fraudulently conducting business in the second applicant's name and has attributed the second applicant's vendor number to the first respondent; and that they have attempted to execute the monetary part of the order but that the sheriff did not succeed partly due to no funds being available in the second applicant's bank accounts and the second and third respondents preventing the sheriff from executing the order with force.

[5] In proceedings for contempt of court, the following elements need to be established either on a balance of probabilities or depending upon the nature of the remedy that is sought, beyond a reasonable doubt:

- (a) the must order 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.

See: Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006

(4) SA 326 (SCA)

[6] The elements in paragraphs (a) to (c) above have been established. It was never in dispute.

[7] What therefore stands to be determined is whether or not the second to fourth respondents' non-compliance is wilful or male fide. In Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited [2017] ZACC 35, the standard of proof in contempt proceedings where criminal sanctions are sought is set out as follows:

"Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because

disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice.

There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.”

[8] The second to fourth respondents’ wilful or male fide non-compliance with the order therefore had to be established beyond a reasonable doubt.

[9] It is common cause that: the order was granted; the “initial urgent application” is still pending; no further proceedings

were instituted by the applicants; and that the respondents have not complied with the order.

[10] The respondents say that paragraph (a) of the order is incapable of enforcement through contempt proceedings. In respect of paragraph

(b) of the order, the respondents’ defence is that the order is vague and ambiguous and that, upon any interpretation of the order, there is no order capable of enforcement (paragraph 62 of the respondents’ answering affidavit). With regards to the respondents’ defence that the order is vague and ambiguous, the respondents allege in paragraph 58 of their answering affidavit that:

“The 3rd respondent and I never understood what the interim relief granted under paragraph (b) entailed, as it is with respect, ambiguous and vague.”

[11] The respondents also raise a dilatory defence, being *lis alibi pendens*. This defence is founded upon the allegation that the first respondent has been criminally charged in the Middelburg Magistrate’s court for theft and contempt. In light of the conclusion I come hereunder, it is not necessary to deal with this defence.

[12] The determination of this application depends upon the proper interpretation of the order. In interpreting the order, firstly, the manifest purpose of the order must be determined. Thereafter, the court’s intention when granting the order must be ascertained primary from the language of the order in accordance with the usual rules relating to the interpretation of documents. The order must be read as a whole and the court’s reasons directs the court’s intention – See: *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* (363/11) [2012] ZASCA 49 (30 March 2012). Also see: *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977

(4) SA 298 (A) at page 304 D-H):

"... The basic principles applicable to the construction of documents also apply to the construction of a court's judgment or

order. The Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules."

[13] The basic principles applicable to the construction of documents (and therefore also court orders) are set out in *Auction Alliance v Wade Park* (342/16) [2018] ZASCA 28 (23 March 2018) at para. 9 as follows:

"This court said in Bothma-Botha Transport: 'While the starting point remains the words of the document . . . the process of

interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being . . . Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise." 1 (Emphasis added). Reference was made in the judgment to the following passage in *Society of Lloyd's v Robinson*: 'Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretation and undue emphasis on niceties of language.'

[14] Having regard to the aforesaid principles, I commence with paragraph (a) of the order. The meaning and intention of paragraph (a) of the order is clear. The order compels the first respondent to pay the second applicant money. The order is an order ad pecuniam solvendam. Orders ad solvendum pecuniam is not capable of enforcement through contempt proceedings. In *Jaiya v MEC for Welfare Eastern Cape and Another* 2004 (2) SA 611 (SCA) at para. 18, the following was said:

"Contempt of court, even civil contempt of court, is a criminal offence (S v Beyers 1968 3 SA (A). The way our common law has developed, it can be committed only by deliberately and male fide (see Herbstein and Van Winson The Civil Practice of the Supreme Court of South Africa 4 ed

(1997) at 825 – 827) ignoring orders of court ad factum praestandum; it cannot by judicial extension be made to embrace orders ad pecuniam solvendam."

[15] In *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35 at para. 56, this position is reaffirmed as follows: "The common law drew a sharp distinction between orders ad solvendum pecuniam, which related to the payment of money, and orders ad factum praestandum, which called upon a person to perform a certain act or refrain from specified action. Indeed, failure to comply with the order to pay

money was not regarded as contempt of court, whereas disobedience of the latter order was". Also see: *Coetzee v Government of RSA*; *Matiso v Commanding Officer, Port Elizabeth Prisons* [1995] ZACC 7; 1995 (4) SA 631 (CC), at para 61.

[16] This disposes of prayer 3 in the notice of motion as the applicants sought the enforcement of the money order granted in para. (a) of the order against the first respondent which is not capable of enforcement through contempt proceedings. The relief sought must fail.

[17] I proceed with paragraph (b) of the order. In order to make a finding whether or not the second to fourth respondents are in contempt of this paragraph of the order, I have to determine what the order provided having regard to the language used in the order and the reasons for the order.

[18] Paragraph (b) of the order commences with the word "pending" in terms of the Oxford Dictionary the word "pending" means "Awaiting decision or settlement".

[19] After the word "pending" in paragraph (b) of the order, reference is made to two events. The first event is the final determination of the "initial (urgent) application under Case No. 66223/2015". The reference to this case number is peculiar as the first application and this application bears the same case number. Having granted an order in the first application, there is nothing further to be determined therein. I raised this issued with the parties during argument and I was informed that the "initial (urgent) application under Case No. 66223/2015" referred to in the first sentence of paragraph (b) of the order refers to an earlier application that was instituted by the fourth respondent against the applicants. In that application, the fourth respondent sought, on an urgent basis that: the first applicant's membership in the second respondent be suspended; and that the first applicant be interdicted from transferring or withdrawing the second applicant's funds. Those interim interdicts were sought pending the finalization of permanent relief which included that the first applicant's membership in the second applicant be terminated.

[20] The second (alternative) event is the institution of further proceedings "pursuant to such initial (urgent) application ... or by the applicant against the first and/or second and/or third and/or fourth and/or fifth respondents".

[21] It is not in dispute that none of the events mentioned in paragraph (b) of the order has materialised i.e. the "initial (urgent) application" is still not finally determined and the applicant has not instituted any further proceedings.

[22] The word "pending" is connected to either of the events happening in the alternative - the second event pursuant to (i.e following) the finalization of the "initial urgent application". The last line of paragraph (b) refers to a period of 120 days of the date of the order within which something must be done or something must happen. The question is, what must happen? Must the "initial (urgent) application" be finalized or must the further proceedings

be instituted within 120 days of the order, or both? This is an all-important issue to determine because clearly, paragraphs (i) to (iv) of the order is dependent upon the happening or not happening of either (or both) of the events. The actions that must be taken by the second to fourth respondents are set out paragraphs (ii) and (iv) of paragraph (b).

[23] In my view paragraph (b) together with its sub-paragraphs poses an interpretational difficulty. Nowhere in the order is it set out by when the respondents must comply with the provisions of paragraphs (ii) and (iv). It is not apparent from the wording of the

order when the interdicts ordered must be complied with. The word “pending” in paragraph (b) of the order tends to point thereto that the interdicts in (ii) and (iv) are interim interdicts with immediate effect and that those interim interdicts will remain in force until the happening of either one or two of the events (or both). Or it could simply mean that paragraphs (ii) and (iv) only operates after the 120-day period. After careful consideration of the entire judgment, I could find no indication that interim interdicts were contemplated or any cogent reason why same would have been granted and also no reason for the 120-day period that was stipulated.

[24] Paragraph (b) of the order is susceptible to another interpretation. Paragraph (b) of the order might also mean that the “initial (urgent) application” must be finalised before the order lapses. If that was not meant, the order is no more and there is simply nothing to be in contempt of. If the 120 days have no relation to the final determination of the “initial (urgent) application” it would mean that the only way the order would cease to exist is when the “initial (urgent) application” is finalised. This would lead to an absurdity as in the event that neither of the parties prosecuted the “initial (urgent) application” to its finality, the order would be operative for ever.

[25] A further interpretation of paragraph (b) of the order is that the operation of the order would be suspended for 120 days or until

the “initial (urgent) application” is finalised or the opposing parties have instituted further proceedings. If nothing happened regarding the finalisation of the “initial (urgent) application” and no proceedings were instituted, the order would take effect.

[26] Nothing said in the judgment points to any one of the aforesaid possible interpretations being the interpretation which the

judgment

has contemplated.

[27] Obviously, each of the parties chose the interpretation that would suit them best. The respondents sought an interpretation that

the orders had immediate effect pending the finalisation of the “initial (urgent) application” or until when proceedings are instituted by either of the parties all of which must have happened within 120 days of the order. Of course, this would suit the respondents because by the time this application was launched, the order no longer existed and as a result, the respondents could not still be in contempt of the order.

[28] On the other hand, the first applicant prefers an interpretation that the order came into operation after 120 days because the “initial (urgent) application” was not finally determined and no proceedings were instituted by any of the parties. Upon the first applicant’s interpretation, the respondents would be in contempt of the order after 120 days and would still be in contempt.

[29] In my view, paragraph (b) of the order is incapable of an interpretation because its terms are vague. Court orders must be clear as “.....Persons who are affected by court order must be able to understand exactly what are expected of them and when they are required to do the things the order requires them to do. Section 165(5) of the Constitution provides that an order or decision of a court binds all those to whom and organs of state to which it applies. This Court has held that parties who are required to comply with court orders must know with clarity what is required of them; otherwise they risk being held in contempt of court. The doctrine of vagueness, which is founded on the rule of law, is a foundational value of our constitutional democracy. It requires laws to be written in a clear manner, with reasonable certainty and not perfect lucidity. Orders of court must comply with this standard: vague provisions in a court order violate the rule of law” – See: *City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Cooper NO* (85/2017) [2017] ZASCA 177 (1 December 2017) at para. 35. Also see: *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) para 77.

[30] In the face of interpretational issues I have raised above, I am unable to find that the second to fourth respondents are in wilful

default of paragraph (b) of the order for to be in wilful default they must have appreciated and understood what the order required of them.

[31] I understand the respondents’ alternative argument to be that paragraph (b) of the order is so vague that it is incapable of compliance or enforcement. With this contention I cannot agree. Paragraphs (ii) and (iv) tells the respondents exactly what to do. However, in light of the finding that it was not established that the second to fourth respondents are in wilful or male fide non-compliance of the order, it is not necessary to determine whether or not paragraph (b) of the order was incapable of being complied with due to its vagueness.

[32] In paragraph 4 of the notice of motion, the applicants pray for the following order:

“THAT the Second, Third and Fourth Respondent be and is hereby held liable in the personal capacities for the loss suffered by the First and Second Applicants, as maybe proved by them, as a consequence of the aforesaid contempt of court”.

[33] I am not required to adjudicate prayer 4 of the notice of motion because the applicants did not press for this order to be granted during argument. I am of the view rightly so because such an order would be entirely untenable as no cause is made out for same in the founding papers. In any event, such an order would condemn the second, third and fourth respondents in respect of any cause of action as long as damage results for the first and second applicants. Consequently, prayer 4 of the notice of motion must be dismissed.

In the premises, I make the following order:

1. The application is dismissed.
2. The applicants are ordered to pay the respondents' costs jointly and severally, the one paying the other to be absolved.

JH Roelofse

Acting Judge of the High Court

APPEARANCES:

APPLICANTS: Adv J S Kayser

Instructed by Hamann Attorneys

RESPONDENTS: Adv C van der Merwe

Instructed by Marius Swart Attorneys

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