
SOUTH AFRICA / JUDGMENT

Faber N.O and Others v Jacobs and Others (2914/2019) [2020] ZAFSHC 34 (26 February 2020) [2020] ZAFSHC 34

COURT

Free State High Court, Bloemfontein

BEFORE

Van Zyl

CASE / FILE NUMBER

2914/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Application number: 2914/2019

In the application between:

CORNELIUS WILHELM FABER N.O.

1st Applicant

CORNELIUS JACOBUS FABER N.O.

2nd Applicant

ANNIKA FABER N.O.

3rd Applicant

HENTA KARLIEN DE WITT N.O.

4th Applicant

and

PIERRE JACOBS

1st Respondent

YOLANDIE JACOBS

2nd Respondent

WILLIAM GEOGE MELVILLE

3rd Respondent

CORAM:

VAN ZYL, J

DELIVERED ON: 26 FEBRUARY 2020

[1] The applicants are seeking the following relief:

1. That the respondents be found guilty of contempt of Court and sentenced appropriately.
2. That the respondents repay certain amounts of money that were unlawfully withdrawn from the relevant Trusts.
3. That the order of costs against the first applicant in his personal capacity in application 104/2019 be set aside and that the respondents in this application be ordered to pay the said costs in their personal capacity.

Background:

[2] During January 2019 the respondents, as applicants, brought an application against the first applicant, as respondent, under application number 104/2019. The said application was settled between the parties and on 15 January 2019 an order was made by agreement between the parties (“the January 2019 order”). The January 2019 order is attached to the founding affidavit as annexure “NF6” and reads as follows:

“1. The first and third applicants resign from the Dubula Trust, IT 448/2007, with immediate effect.

2. The first, second and third applicants resign from the Ja Nee Trust, IT 1098/2006, with immediate effect.
3. The applicants will provide their written resignations to the attorney of the respondent before 16:00 on 16 January 2019.
4. The respondent will pay the amount of R1 663 565.00 before 17:00 on 16 January 2019, into the trust account of Marius Muller Hendricks (Belville Inc) ...
5. The resignation, as contemplated in orders 1 and 2 supra, is to be conditional and will only have effect upon payment as referred to in order 4 supra.
6. Should no payment be made within 24 hours as contemplated in order 4 supra, the resignation of the trustees (applicants) will automatically become null and void and of no force and/or effect.

7. The settlement agreement signed between the parties on 18 and 19 December 2018 is amended to provide for the payment due in terms of clause 4.6.4 and the resignation of the applicants in terms of clause 4.6.4.1, as ordered in orders 3 and 4.
8. The applicants will provide the contracts and proof of payments and deposits made of all students for the 2018 and 2019 academic years in the accommodation at 52 Paul Kruger Avenue and 4 Scholtz Street, Universitas, Bloemfontein before 17:00 on 17 January 2019 to the respondent's attorney.
9. The applicants will provide the respondent with the banking details and access to the bank accounts of the Dubula Trust, IT 448/2007 and Ja Nee Trust, IT 1098/2006 within 24 hours after payment is made in terms of order 4, supra.
10. The respondent will honour all contracts already signed; and for which deposits and rent have been paid, for accommodation at 52 Paul Kruger Avenue and 4 Scholtz Street, Universitas, Bloemfontein.
11. The Dubula Trust, IT 448/2007 and Ja Nee Trust, IT 1098/2006 and the respondent in his personal capacity are jointly and severally liable to pay the applicants' taxed costs in their personal capacities, the one to pay the other to be absolved.
12. The Dubula Trust, IT 448/2007 and Ja Nee Trust, IT 1098/2006 will pay the taxed costs of the applicants in their personal capacities within 14 days from demand for payment.
13. Should the Dubula Trust, IT 448/2007 and Ja Nee Trust, IT 1098/2006 fail to pay the taxed costs of the applicants within 14 days from the demand for payment, the respondent will be personally liable to pay the taxed costs of the applicants."
- [3] Unfortunately the applicants set out a long history leading up to the current application, most of which allegations are irrelevant in my view. The crux of the matter appears to be that it is the applicants' case that the respondents failed to comply with the January 2019 order on the following basis:
 1. Failure to resign as trustees, as contemplated in paragraphs 1 to 3, read with paragraphs 4 and 5 thereof.
 2. Failure to provide contracts and proof of payments and deposits, as contemplated in paragraph 8 thereof.
 3. Failure to provide banking details as contemplated in paragraph 9 thereof.

Legal principles:

- [4] It is trite that the requirements for a finding of contempt of court are the following:
 1. The order by the Court.
 2. Service of the order on the respondents and/or knowledge of the order by the respondents.

3. Non-compliance of the order by the respondents.

See *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para [42].

- [5] A material failure to comply with the order has to be shown. In *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C) at 522 this was applied:

“Contempt of Court, in the present context, means the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction... In Southey v Southey, 1907 E.D.C. 133 at p. 137, it was said that applicant for an attachment had to show a wilful and material failure to comply with the reasonable construction of the order. The requirement of materiality is hardly ever mentioned in the cases,

however, probably for the reason that in 99 per cent of these cases the whole order was disobeyed, which is obviously a 'material'

non-compliance. It is reasonable to suggest that where most of the order has been complied with and the non-compliance is in respect of some minor matter only, the Court would take the substantial compliance into account, and would not commit for the minor non-compliance.” (Own emphasis)

- [6] The requirements have to be proven by the applicants beyond reasonable doubt. See *Fakie N.O. v CCII Systems (Pty) Ltd*, supra, at para [42]. See also *Tasima (Pty) Ltd v Department of Transport* [2016] 1 ALL SA 465 (SCA).
- [7] In order for a person to be found guilty of contempt of court, the disobedience must not only be wilful, but also mala fide. See *Clement v Clement* 1961 (3) SA 861 (T) at 866A.
- [8] As soon as the first three elements for contempt of court exist, a presumption exists that contempt has been established and mala fides and wilfulness are presumed, unless the respondent is able to lead evidence sufficient to create reasonable doubt as to its existence. Should the respondent be unsuccessful in discharging the evidential burden, contempt will be established. See *Matjhabeng Municipality v Eskom* 2018 (1) SA 1 (CC) at para [63].

Application of the legal principles in casu:

- [9] It is not in dispute that the respondents are aware of the existence and the contents of the January 2019 order.
- [10] I will now deal with the specific issues which form the basis for the applicants' accusation of non-compliance with the January 2019 order by the respondents. I will continue referring to the parties as in the present application.

Resignations:

- [11] In terms of paragraph 3 of the January 2019 order the respondents were to provide their written resignations as trustees to the attorney of the applicant on or before 16:00 on 16 January 2019, only in event of the applicants having paid the amount as contemplated in paragraph 4 thereof.
- [12] I have to agree with the contention by Mr Greyling, appearing on behalf of the respondents, that it is evident from paragraph 18.3 of the supplementary answering affidavit, read with annexures “PJ24(1)” – “PJ24(7)” attached thereto, that the respondents did resign as trustees on 16 January 2019. The said resignations were communicated to the first applicant at his e-mail address “Ednau Laan”. The latter fact is not disputed in the replying affidavit, with reference to paragraph 38 thereof. The complaint by the applicants in the said paragraph 38 only relates to the fact that the resignations were not furnished to the first applicant’s attorney.
- [13] The resignations of the respondents occurred on 16 January 2019 before 10:00 and the said resignations were communicated to the first applicant at his e-mail address. In my view this constituted substantial compliance with paragraphs 1 to 3, read with paragraphs 4 and 5 of the January 2019 order. The fact that the resignations were not provided to the attorney, cannot be considered to have been a material failure to comply with paragraph 3 of the January 2019 order. The resignations were provided to the first applicant.

Contracts and proof of payments:

- [14] This issue relates to paragraph 8 of the January 2019 order.
- [15] This aspect was fully dealt with by the respondents in paragraph 6 of the supplementary answering affidavit, together with the relevant annexures. It is clear that the said documentation was sent to the e-mail address of the first applicant, being ednaulaan@gmial.com. In paragraph 14 of the replying affidavit it is admitted that the said e-mail address is indeed that of the first applicant.
- [16] With reference to annexures “PJ4” and “PJ5” attached to the supplementary answering affidavit, the applicants state as follows in paragraph 16 of their replying affidavit:
- “16.1 Annexures ‘PJ4’ and ‘PJ5’ was (sic) never sent to us. If it was sent, this application may have been avoided.”*
- [17] However, as correctly pointed out by Mr Greyling, there can be no doubt that the relevant annexures, “PJ4” and “PJ5”, were sent to the first respondent on 17 January 2019, as explained in paragraph 6.2.1 of the supplementary answering affidavit, read with annexures “PJ1” and “PJ14” attached thereto.
- [18] In paragraph 16.3 of the replying affidavit the following is alleged:
- “The Court order required payment. To attach contracts did not solve the problem.”*

[19] The aforesaid averment is incorrect. Paragraph 8 of the January 2015 order does not make provision for the respondents to pay over deposits to the applicants. It only provides for “proof of payments and deposits made.”

[20] In my view the respondents consequently complied with paragraph 8 of the January 2019 order.

Banking details:

[21] This issue relates to paragraph 9 of the January 2015 order.

[22] In my view the respondents dealt comprehensively with this aspect in paragraph 19 of their supplementary answering affidavit, read with annexures “PJ26(1)” and “PJ26(2)” thereto. The protocol to be followed by the applicants, as required by Absa, in order to effect transfer of powers over the accounts were set out in detail in the last paragraph of the letter marked annexure “PJ26(2)”. The respondents also repeatedly tendered to attend to their share of the protocol-red tape, namely to go to the Port Elizabeth Absa branch for the necessary signatures. The respondents also provided a reasonable explanation as to why they could not have merely provided the applicants with a pin and password to the bank accounts.

[23] In the circumstances I am satisfied that the respondents complied with paragraph 9 of the January 2019 order.

Repayment of money:

[24] With regard to the repayment of the amounts withdrawn from the Trusts which the applicants allege was unlawfully withdrawn, the respondents set out a detailed explanation with regard thereto in paragraph 9 of their supplementary answering affidavit. From the said paragraph it is evident that the payments and withdrawals were made in the interest of the relevant two Trusts. The respondents merely exercised their fiduciary duties towards the Trusts. Detailed explanations pertaining to the said payments, together with supporting documentation, were provided to the applicants long before the present application was issued.

[25] There is no basis upon which the applicants are entitled to the relief sought in this regard.

Setting aside/amendment of order of costs:

[26] As already indicated in the beginning of this judgment, the applicants are also seeking an order that the costs order against the first applicant in his personal capacity issued in terms of the January 2015 order, be set aside and that the respondents in this application be ordered to pay the said costs in their personal capacity.

[27] In this regard the following allegation is made in the founding affidavit in support of this relief:

“I agree to a costs order because I just wanted to settle everything. I humbly ask the Court in the light of the facts before the Court to set aside the costs order.”

[28] The January 2015 order was made by agreement between the parties. In addition thereto, this Court is functus officio with regard to that order. The only remedy available to the applicants in this regard would be an appeal procedure, although it is evident that there is no basis for such an appeal.

[29] This relief can consequently not be granted to the applicants.

Other issues:

[30] Although certain points in limine were raised by the respondents and an application that certain parts of the founding affidavit be struck out was made, I do not deem it necessary to deal with those issues in view of the outcome of this

judgment.

Costs:

[31] Mr Greyling requested that the applicants be ordered to pay the costs of the application on a punitive scale. In this regard Mr Greyling referred to the prolixity, tardiness and incoherence of the application papers and submitted that unnecessary, irrelevant, vexatious and frivolous allegations were made against the respondents.

[32] Mr Heymans, appearing on behalf of the applicants, submitted that the respondents' failure to strictly comply with the contents of the January 2015 order, necessitated the application. The respondents are therefore just as much to be blamed as the applicants.

[33] I cannot agree with Mr Heyman's submission. Based on the relevant case law referred to in this judgment, it must have been evident to the applicants that the respondents could not have been considered to be in contempt of January 2015 order. In addition it should likewise have been clear to the applicants that there are also no merit in the further relief which they are seeking in terms of the notice of motion. I unfortunately also have to agree with Mr Greyling's contention that the papers contain unnecessary, vexatious and frivolous allegations. In the exercise of my discretion I consider this an appropriate instance where the displeasure of the Court needs to be expressed by means of a punitive costs order.

Order:

1. The application is dismissed, with costs, which costs are to be paid on a scale as between attorney and client.

C. VAN ZYL, J

On behalf of applicants:

Adv. PJ Heymans

Instructed by:

Myburgh Attorneys

BLOEMFONTEIN

On behalf of respondents: Adv. P du P Greyling

Azar & Havenga Inc

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAFSHC/2020/34.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/faber-no-and-others-v-jacobs-unknown-topic-afshc-2020>

Prepared on 11 October 2026 · Esheria