

SOUTH AFRICA / JUDGMENT

I.L.L v L.V.H (Appeal) (CA 95/2024) [2025] ZAECMKHC 17 (25 February 2025)

[2025] ZAECMKHC 17

COURT

Eastern Cape High Court, Makhanda

BEFORE

Nhlangulela, Norman, Nkele

CASE / FILE NUMBER

CA 95/2024

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THE HIGH COURT OF SOUTH AFRICA

JUDGMENT

(EASTERN CAPE DIVISION, MAKHANDA)

Reportable

CASE NO.: CA 95/2024

In the matter between:

I[...] L[...] L[...]

Appellant

And

L[...] V[...] H[...]

Respondent

Coram: NHLANGULELA AJP, NORMAN J and NKELE AJ

Heard: 28 OCTOBER 2024

Delivered: 25 FEBRUARY 2025

Summary: Appeal against order dismissing application for contempt of court order- mootness of the relief warranting determining the appeal in the interest of justice- onus to prove the requisites for contempt of court order thrust upon applicant on a balance of probabilities - the discharge of which obligates the contemnor to discharge evidential burden that breach of court order was not wilful and mala fide- Plascon-Evans rule reaffirmed- appeal succeeds in part- each party to pay her costs.

ORDER

On appeal from: the judgment of LOWE J sitting as a court of first instance.

1. The appeal succeeds with each party to pay her costs.
2. The respondent's cross-appeal is withdrawn with costs.
3. Each party to pay her costs of the application for leave to appeal, including the costs for the petition against refusal of leave to the Supreme Court of Appeal.
4. The order of the court a quo is set aside, and is replaced by the following new order:
 - 3.1 It is declared that the respondent is in breach of the order granted by Van Zyl J on 8 July 2022.
 - 3.2 Each party to pay her costs of the application for contempt of the court order.

Nhlangulela AJP (Norman J and Nkele AJ concurring)

Introduction:

- [1] This is an appeal against the judgment by Lowe J dismissing the appellant's application for contempt of court with costs. It comes before this court with the leave of the Supreme Court of Appeal.
- [2] The appeal raises two issues for determination. The first, is whether the relief sought by the appellant in the appeal has been overtaken by events. The second, is whether the respondent is liable to pay costs of the appeal and the application for leave to appeal the court order granted by Van Zyl DJP on 8 July 2022 compelling her to hand over to the appellant the original identity document, passport and bank card (the documents) belonging to the appellant.
- [3] The order of Van Zyl DJP reads as follows:

'1. A Rule Nisi do issue calling upon the first to fourth respondents to show cause on the 16th day of August 2022 at 10h00 or as soon thereafter as the matter may be heard, why a final order should not be made in the following

terms:-

1.1. Interdicting and restraining the first, second and/or third respondents, or any of the first and/or second respondent's related companies, which is controlled by the first and/or second respondent, from dissipating funds in the sum of R 9 120 000.00, transferred from the applicant's bank account held with the fourth respondent ("FNB") to unknown accounts by the first and/or second respondent on 1 December 2021 and 4 July 2022, respectively;

1.2. The first, second and/or third respondents to immediately pay the sum of R 120 000.00 (transferred on 4 July 2022) to the applicant's bank account held with FNB under account number: 6[...] (hereinafter referred to as "the Account");

1.3. The first and/or second respondents to immediately hand over to the applicant or her attorneys, the Applicant's original identity document, passport and/or any bank cards;

1.4. The fourth respondent to furnish the applicant and/or her attorneys of record with the detailed bank statements (inclusive of all information in relation to the names of the holders of bank accounts, bank account numbers, the amounts transferred and the name of the banking institution at which such bank accounts are held), in respect of all transactions made on the Account for the period of January-2020 to July 2022, inclusive of the details of the bank account numbers, including, but not limited to:

1.4.1. the bank account to which the sum of R 9 000 000.00 (Nine Million Rand) (under reference Investment inheritance) was transferred to on 1 December 2021;

1.4.2. the bank account to which the sum of R 120 000.00 (ONE HUNDRED AND TWENTY THOUSAND RAND) was transferred on 4 July 2022 (under reference "I[...] Safety").

1.5. Consequent upon the details and information provided in paragraphs 1.4.1 and 1.4.2 above, ordering and directing the fourth respondent to immediately freeze and/or block any and all transactions from the accounts identified in paragraphs 1.4.1 and 1.4.2 above (the recipient accounts), and provide the applicant with copies of the bank statements in respect of such account, insofar as those accounts are held with the fourth respondent ("the interdicted activities").

1.6. The aforementioned orders remain in place pending the final determination of an application for payment to be instituted by the applicant against the first, second and/or third Respondents and/or any entity or person identified in paragraphs 1.4 and 1.5 above, for:

1.6.1. A statement and debatement of the account;

1.6.2. Payment of the sum of R 9 000 000.00 or such amount that is found to be due to the applicant as a result of the statement and debatement of the account.

1.6.3. In the event of the applicant failing to institute the aforesaid proceedings within a period determined by this Court, the interdictory relief granted will lapse.

1.7. Directing the first, second, and third respondents, jointly and severally, to bear and pay the costs of this application, on the attorney and client scale.

2. Pending the final determination of this application, and on the return day of the rule nisi, the relief sought in terms of paragraphs

1.1 to 1.5 above (including all subparagraphs, except paragraph 1.7) operate as an interim order with immediate effect.

3. The applicant is authorised to supplement the papers and join such banking institution, which may become an interested party, to these proceedings on an urgent basis, and apply for an anti-dissipation order against such banking institution relevant to the investigation in 1.4.1 and 1.4.2 above...

Litigation history

In the court a quo:

- [3] Two application proceedings were brought by the appellant, an 84 year old female, against the respondent, her daughter. On 8 July 2022, she brought an anti-dissipation application on the basis of urgency, seeking a relief that the respondent's bank account be frozen and the funds therein be preserved pending an investigation as to where the appellant's funds were transferred by the respondent, and that the respondent be ordered to immediately return the appellant's documents. This application served before Van Zyl DJP, who granted a rule nisi, incorporating an interim relief calling upon the respondent to show cause on 16 August 2022 as to why the anti-dissipation application order should not be made final. The respondent opposed this application, resulting in the rule nisi being extended on numerous occasions: on 19 July 2022 before Da Silva AJ; on 16 August 2022 before Hartle J; and on 27 October 2022 before Potgieter J.
- [4] Significantly, when the matter served before Hartle J, the parties settled the order of Van Zyl J almost entirely. What remained for determination were the issues of whether the appellant was entitled to a final order for the return of her document and the costs. On 27 October 2022, the parties agreed that the remaining issues be referred to trial for the hearing of oral evidence. Accordingly, Potgieter J granted the order with the rule nisi extended to 20 July 2023[1].
- [5] Gqamana J commenced with the hearing on the disputed issues of whether the respondent's non-compliance with the court order was willful and mala fides. The oral witnesses testified. However, the proceedings were concluded without the respondent having testified to confirm her version as put to the appellant and her witnesses that the respondent was not in possession of the documents at the time when the anti-dissipation application served before Van Zyl DJP. In a judgment that was delivered on 1 February 2024, Gqamana J made a finding of fact that on the corroborated version of the appellant that the respondent was keeping the original documents in a safe for safe keeping, and the untested version of the respondent that she delivered the documents to the appellant in January 2022, the respondent failed to comply with the order of court. As a result, the rule nisi was confirmed. There is no appeal against the judgment and order of Gqamana J. Instead, the appellant brought a contempt

application against the respondent for non-compliance with the order of Gqamana J.

[6] The second application was brought by the appellant on 30 August

2022. It is a matter that was interlocutory to the first application.

The appellant sought a relief that the respondent be declared to be in contempt of the interim order that was granted by Van Zyl DJP in that she failed to deliver the documents to the appellant. The respondent opposed the application based on the allegation that she had delivered the documents before the anti-dissipation application was launched on 8 July 2022. Lowe J dismissed this application and ordered each party to pay her costs. Aggrieved by such order, on 23 February 2023 the appellant brought an application for leave to appeal. It was refused. Thereafter, the SCA granted the petition filed by the appellant against such a refusal, directing this Court to entertain the appeal.

In this Court:

[7] It was submitted on behalf of both parties that the final determination of the disputed issue in the anti-dissipation application by Gqamana J raised the issue of mootness in the relief that is likely to be made by this Court. The Supreme Court of Appeal in *The President of the Republic of South Africa v DA and Others*[2], had the following to say about mootness:

‘The question of mootness of an appeal has featured repeatedly in this and other courts. These cases demonstrate that a court hearing an appeal would not readily accept an invitation to adjudicate on issues that are of “such a nature that the decision sought will have no practical effect or result”. The Constitutional Court in *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* 2000 (2) SA 1 (CC) para 21 footnote 18 remarked:

“A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others

[1996] ZACC 23; 1997 (3) SA 514 (CC) (1996 (12) BCLR 1599), where Didcott J said the following in para [17]:

“(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become.”

There are instances where there have been exceptions to the provision, initially of s 21A of Act 59 of 1959 and presently s 16(2)(a)(i) of the Superior Courts Act 10 of 2013. The courts have exercised discretion to hear a matter even where it was moot. This discretion has been applied in a limited number of cases, where the appeal, though moot, raised a discrete legal point that required no merits or factual matrix to resolve. In this regard, the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*

[2001] ZACC 23; 2001 (3) SA 925 (CC), in paragraph 11 held:

“...A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others.”

- [8] I accept that the relief about the respondent's imprisonment for failing to comply with the court order may be regarded as moot.

However, the declaratory relief sought by the appellant in this appeal[3] can never be a moot point. The failure by the members of the public to comply with court orders is a constitutional law matter that must be vindicated at every opportunity. In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*[4] the following was stated:

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

- [2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.’

- [9] The disputes between the parties impact the business interest of FNB and Old Mutual as the custodians of the appellant's investments therein, which is subjected under a continuous threat of unauthorised withdrawal and transfer of the appellant's funds by the respondent using the original identity document, passport and bank cards belonging to the appellant. Consequently, it is in the interest of justice that the declaratory relief sought in this matter should be adjudicated.

- [10] Lowe J dealt with an application for contempt of court order. In *S v Mamabolo*[5], it was held that contempt of court consists in ‘unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’. Such proceedings are governed by principles that were established in *Fakie NO v CC 11 Systems (Pty) Ltd*[6], where the following was said:

‘(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.
- (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'

[11] It is common cause that the applicant did prove the three requisites for the grant of a contempt order. I agree with Counsel for the appellant that since the onus of proving absence of wilfulness and mala fide lay on the respondent, a relief ought to have been granted in favour of the appellant. On the papers as they stood, the dispute of fact raised by the respondent that she handed over the documents to the appellant was not genuine if regard is had to her admission that she kept the original documents in the safe to prevent the respondent from leaving the Link Centre, which she later on destroyed fully aware that without them the appellant would not be able to access funds to meet the costs of caregiving services for her stay at Link Centre. Based on this, the uncreditworthy version proffered by the respondent on affidavit was, on the application of the Plascon-Evans rule, so implausible, far-fetched, and untenable that it must have been rejected out of hand[7]. If that happened, there would have been no need for the hearing of oral evidence.

[12] In this case, a punitive contempt of court order should not have stood in the way of the court a quo because in its place a coercive contempt of court order could have been granted. It is stated in the case of Matjhabeng Local Municipality[8] that upon proof of the three requisites for contempt of court, a coercive or punitive contempt order may be granted by the court in the exercise of its constitutional power in terms of s165 of the Constitution[9]. In this regard the following was said about the distinction of the remedies of the contempt of court order at para 67:

'... on a reading of Fakie, Pheko and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, or 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 a person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of a benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof- beyond a 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.'

[13] Consequently, the appeal succeeds in part. The cross-appeal was withdrawn following the wishes of the respondent.

Costs

[14] Since the parties chose to settle their disputes out of court well before the hearing of the appeal, it will not be just to punish any of the parties with a costs order. The fact that the respondent is the appellant's daughter is a factor to be taken into account. The costs of appeal, including those incurred in the court a quo and Supreme Court of Appeal, shall be borne by each party. The payment of costs attendant to the withdrawal of the cross-appeal

shall be paid by the respondent.

Order

[15] The following order shall issue:

1. The appeal succeeds with each party to pay her costs.
2. The respondent's cross-appeal is withdrawn with costs.
3. Each party to pay her costs of the application for leave to appeal, including the costs for the petition against refusal of leave to the Supreme Court of Appeal.
4. The order of the court a quo is set aside, and is replaced by the following new order:
 - 4.1 It is declared that the respondent is in breach of paragraph 1.3 of the order granted by Van Zyl J on 8 July 2022.
 - 4.2 Each party to pay her costs of the application for contempt of the court order.

Z M NHLANGULELA

ACTING JUDGE PRESIDENT OF THE HIGH COURT

I concur:

T V NORMAN

JUDGE OF THE HIGH COURT

TA NKELE

ACTING JUDGE OF THE HIGH COURT

Appearing for the appellant: Adv. Le Roux

Instructed by:

Curthbertson & Palmeira Attorneys Inc

Gqeberha

c/o Nettletons Attorneys

Makhanda.

Appearing for the respondents: Adv. K.M. Morris

Instructed by:

Quiton Van Der Berg Attorneys Inc

Gqeberha.

c/o Huxtable Attorneys

[1] The relief sought to be confirmed is contained in para 1.3 of the order granted by Van Zyl J on 8 July 2022, which is that: ‘The

first and/or second respondents to immediately hand over to the applicant or her attorneys, the applicant's original identity

document, passport and/or any bank cards.’

[2] [2018] ZASCA 79 paras 11-12. Also see: Narius Moloto v The Pan Africanist Congress of Azania (1176/2019) [2023] ZASCA 140 (27 October 2023) at para 30.

[3] The relief appears in paragraph 2 of the Notice of motion dated 23 August 2022 that was also dismissed reads: ‘It is declared that the 1st and 2nd respondents are in breach of the order granted by the Honourable Deputy Judge President Van Zyl on 8 July 2022...’

[4] [2015] ZACC 10; 2015

(5) SA 600 (CC); 2015

(6) BCLR 711 (CC) at paras 1-2.

[5] [2001] ZACC 17; 2001

(3) SA 409 (CC) at para 14.

[6]

[2006] ZASCA 52; 2006

(4) SA 326 (SCA) at para 42.

[7] In *Fakie NO v CC 11 Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at 347B-348B it was stated appositely as follows: ‘That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise ‘fictitious’ disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be ‘a bona fide dispute of fact on a material matter’. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984 (3) SA 623 (A)] at 635C], this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent’s version can be rejected in motion proceedings only if it is ‘fictitious’ or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy.’

[7] In *Fakie NO v CC 11 Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at 347B-348B it was stated appositely as follows:

‘That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise ‘fictitious’ disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be ‘a bona fide dispute of fact on a material matter’. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984 (3) SA 623 (A)] at 635C], this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent’s version can be rejected in motion proceedings only if it is ‘fictitious’ or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy.’

[8] 2018(1) SA 1 (CC)

[9] See: Pheko and Others at paras 1-2 (above n 4) . The practical effect of the distinction as well as its application was applied in Snowy Owl Properties 284 (Pty) Ltd v Celliers and Another (1295/2021)

[2023] ZASCA 37 (31 March 2023).

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