

SOUTH AFRICA / JUDGMENT

Mkonza and Others v Western Crown Properties (Pty) Ltd and Others (87264/2015)

[2016] ZAGPPHC 1236 (16 November 2016)

[2016] ZAGPPHC 1236

COURT

North Gauteng High Court, Pretoria

BEFORE

Brenner AJ

CASE / FILE NUMBER

87264/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Date

of hearing: 2 November 2016

Case

number: 87264/2015

Date:

16/11/2016

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED.

In

the matter between:

NKOSINATHI
OWEN
MKONZA First
Applicant
BOITUMELO
CHARMAIN
MKONZA Second
Applicant
KETHUKHUTULA
MKONZA Third
Applicant
and
WESTERN
CROWN PROPERTIES (PTY)
LTD First
Respondent
BRUCE
FINNEMORE Second
Respondent
MARGARET
FINNEMORE Third
Respondent

JUDGMENT

BRENNER AJ

1. This application was brought in terms of rule 42(1)(a) or (c) of the Uniform Rules of Court. The first to third applicants have applied to set aside the order of Mr Justice Mohlamonyane, ("Mohlamonyane AJ"), granted on 30 July 2015, which declares the applicants to be in contempt of Court and commits them to terms of imprisonment suspended subject to the fulfilment of certain conditions.
2. Since a plethora of applications preceded this one, I will refer to the current application as "the rescission application".
3. For convenience, the parties are referred to by name. The first applicant is Nkosinathi Mkonza, the second applicant is Boitumelo Mkonza, and the third applicant is Khethukuthula Mkonza. The first respondent is Western Crown Properties 113 (Pty) Ltd ("Western Crown"). The second respondent is Bruce Finnemore, and the third respondent is Margaret Finnemore.
4. The provisions of Rule 42(1)(a) and (c) of the Uniform Rules are quoted below, to place matters in context:

"42. Variation and rescission of orders

- (1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
 - (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby,
 - (c) An order or judgment granted as the result of a mistake common to the parties."
5. The factual background against which the rescission application is brought is summarised below. I am constrained to provide some detail about the events over the past three years which eventuated in this rescission application.
6. At all times material hereto, Western Crown was and remains the registered owner of portion [...]3 of the Farm Nooitgedacht 534 JQ Mogale City, Gauteng ("portion [...]3 Nooitgedacht"). Bruce and Margaret Finnemore have resided on this property. A property adjacent to portion [...]3, namely, portion [...]2 of the Farm Nooitgedacht 534 JQ, Mogale City, Gauteng ("portion

[...]3 Nooitgedacht" or "the property"), was acquired by the Mkonza Family Trust ("the Trust" or "the Mkonza Family Trust"), and registered in its name on 31 August 2011.

7. Circa 2012, it came to the Finnemores' attention that portion [...]2 Nooitgedacht was being used unlawfully as a business and storage site.
6. On 4 March 2013, Western Crown and Bruce and Margaret Finnemore launched an urgent application in this Court under case number

13699/13, enrolled for 12 March 2013. It contained "Part A" urgent relief, and "Part B" relief in the normal course. Eight respondents were cited, namely: "The Trustees from time to time of the Mkonza Family Trust," Xuma Technologies (Pty) Ltd ("Xuma"), Metallux SA (Pty) Ltd ("Metallux"), Simon Chimotsotso ("Chimotsotso"), Karel van den Berg ("Van den Berg"), the MEC for the Gauteng Department of Agriculture and Rural Development ("the MEC"), the Head of the Gauteng Department of Agriculture and Rural Development, and finally, as eighth respondent, one TJ Benadie ("Benadie"). This is referred to below as the enforcement application.

7. The urgent relief sought against the Trustees of the Mkonza Family Trust, Xuma, Metallux, Chimotsotso and van den Berg was interdictory

in nature. No relief was sought against the MEC or Head of the Department of Agriculture and Rural Development.

8. The three applicants in the enforcement application called for an urgent interdict against them to:

8.1 refrain from issuing death threats against the Finnemores, including their family, visitors, friends and tenants present on portion [...]3 Nooitgedacht;

8.2 refrain from behaving in a threatening manner towards the above parties;

8.3 refrain from damaging the property of Western Crown and the Finnemores, including that of the above parties;

8.4 immediately cease the unlawful use of portion [...]2 Nooitgedacht, including the use of the residence and/or other structures on portion [...]2 Nooitgedacht, and/or the use of portion [...]2 Nooitgedacht to store or keep industrial products, including cabling, manholes and manhole covers.

9. The "Part B" relief was for an order, in the ordinary course, for the Trustees of the Mkonza Family Trust, Xuma, Metallux,

Chimotsotso and van den Berg to comply with:

9.1 all conditions of the compliance notice issued by the Gauteng Department of Agriculture and Rural Development, in terms of section 31L of the National Environmental Management Act, 107 of 1998 ("NEMA"), in respect of portion [...]2 Nooitgedacht, on 3 September 2012;

9.2 the title deed conditions applicable to the above property;

9.3 the zoning conditions applicable to the above property, in terms of the Peri Urban Town Planning Scheme, 1975, and/or the Town Planning and Townships Ordinance of 1995.

10. The application was opposed. It is not clear what happened on 12 March 2013. It was enrolled on 4 September 2013, and it is unclear what happened on this date. Ultimately, the enforcement application was argued on 28 January 2014 before Mr Justice Murphy ("Murphy J"). On this date, it appears that all parties, other than the seventh and eight respondents, were represented by attorneys and Counsel.

11. The Court heard full argument, and then handed down an order. It merits mention that the applicants in casu now dispute that the matter was argued between the parties on 28 January 2014. Of which, more later.

12. The order of Murphy J, ("the Murphy order"), directed the Trustees of the Mkonza Family Trust, Xuma and Metallux to:

1.1 remove all vehicles, materials, machines and equipment related to the unlawful use of Portion [...]2 Nooitgedacht within seven days of this Order:

1.2 immediately cease with the use of portion [...]2 Nooitgedacht for any purpose other than that permitted by:

1.2.1 The National Environmental Management Act 1998 (Act 107 of 1998) and the Regulations published in terms of that Act;

1.2.2 The Title conditions of the property; and

1.2.3 The zoning of the property.

1.3 not to commence or recommence with any use of portion [...]2 Nooitgedacht for purposes presently impermissible until and unless:

1.3.1 The title conditions of the property have been amended to permit the intended use;

1.3.2 The zoning of the property has been changed to permit such intended use, and

1.3.3 The intended change of land use of portion [...]2 Nooitgedacht has been authorised in terms of the National Environmental Management Act, 1998 (Act 107 of 1998), and the Regulations published in terms of that Act by the Gauteng Department of Agriculture and Rural Development.

1.4 pay the costs of the application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved."

14. On 25 February 2014, an application was launched for committal for contempt of Court, in respect of the Murphy order, by Western

Crown and the Finnmores, against the Trustees of the Mkonza Family Trust and Xuma, as first and second respondents ("the contempt application").

15. The application was served on the then attorneys of record for the Trust and Xuma, namely, Tshisevhe Gwina Ratshimbilani Inc, ("TGR"), on 25 February 2014. TGR had acted for them in the enforcement application.

16. The notice of motion cited the first respondent as "The trustees from time to time of the Mkonza Family Trust" and the

second respondent as "Xuma Technologies (Pty) Ltd".

17. The notice of motion sought the following relief:

1. The first and second respondents are found to be in contempt of the order of this Court granted on 28 January 2014 in Case number 13699/2013;

2. The persons listed below are committed to such period of imprisonment for contempt of Court for failing to comply with the said order of Court and on such conditions as this honourable Court determines.

2.1 the current Trustees of the Mkonza Family Trust;

2.2 The current directors of Xuma Technologies (Pty) Ltd being:

2.2.1 Boitumelo Mkonza (ID [...]) of [...], Sharon Lea, Randburg, 2194, and

2.2.2 Bongiwe Mkonza (ID [...]) of [...], Newcastle, 7700.

15. In the contempt application, Bruce Finnemore deposed to a founding affidavit to which he attached several letters exchanged between the parties' attorneys post the Murphy order. On 21 February 2014, when it was apparent that the Trust and Xuma were acting in contempt of the Murphy order, a letter of demand was sent by the attorneys for Western Crown and the Finnemores, Erasmus attorneys, to confirm the disregard of the order and to call upon the defaulting parties to rectify this conduct.
 16. TGR attorneys requested a copy of the Murphy order and made mention of a possible appeal against same. The order was sent to TGR
- and compliance again demanded. There was no response from TGR by 25 February 2014.
17. On 19 February 2015, the contempt application was argued before Mohlamonyane AJ. A comprehensive and fully reasoned judgment was handed down on 30 July 2015 ("the Mohlamonyane order").
 18. I have had the benefit of considering the papers in the contempt application before Mohlamonyane AJ, provided to me by the applicants' current attorneys, Mchunu attorneys, and supplemented by Erasmus attorneys, the respondents' attorneys. Mchunu attorneys provided me with a copy of the Deed of Trust dated 15 September 2010 in which Boitumelo Mkonza and Khethukuthula Mkonza were appointed as trustees, and a company search on Xuma Technologies (Pty) Ltd dated 25 February 2014, a date which postdates the Murphy order.
 19. In Court, I had asked Mchunu attorneys for a copy of the letters of authority of the Trust, but, to date, the letters have not been produced. Nothing turns on this.
 20. The papers in the contempt application under case number 13699/2013 are illuminating. In the founding affidavit, it is noted that, by February 2015, the lease of portion [...]2 Nooitgedacht between the owner/lessor, the Trust, and Metallux, had expired, and Metallux had vacated the property. All respondents, other than the first and second, had fallen out of the picture.
 21. Western Crown and the Finnemores asserted that the Trust and Xuma remained in contempt of court in that they had, despite the Murphy order:
 - a. failed to remove the vehicles, material, machinery and equipment related to the unlawful use of the property;
 - b. continued to use the property for business purposes, in contravention of NEMA and the title conditions, by storing businessrelated vehicles, material, machinery and equipment, and by using the property to dump waste;
 - c. commenced or continued to permit the unlawful use of the property to dump rubble.
 22. The above assertions were corroborated by photographs of the property taken by Western Crown and the Finnemores on 12 and 24 February

2014. The judgment referred to the title deed conditions of Portion [...]2 Nooitgedacht as prohibiting more than one dwelling house with outbuildings and the use of the land for purposes other than residential and agricultural. Any variations hereto would require the written approval of the Controlling Authority as defined in Act 21 of 1940.

23. A notice to oppose on behalf of, inter alia, the Trust and Xuma, was served on 26 February 2014, by Attorneys TGR.

24. Nkosinathi Mkonza deposed to the opposing affidavit, on 9 July 2014, on behalf of the Trust, and as CEO of Xuma. No other proof of

authority was given. No resolutions or confirmatory affidavits from Boitumelo or Khethukutula Mkonza were annexed.

25. Nkosinathi Mkonza averred that, when the photographs were taken, the Trust and Xuma were busy removing the material and cables from the property. This and the removal of vehicles was completed by 9 July 2014. Only one vehicle, a truck which had broken down, remained in situ on 9 July 2014.

26. Prior to the hearing, the Mkonza Family Trust and Xuma delivered a first supplementary affidavit, deposed to on 26 January 2015 by Boitumelo Mkonza as director of Xuma and as trustee of the Trust.

27. The affidavit's purpose was to satisfy the Court that there was compliance with the Murphy order. Three letters were handed up: the first, from an official of the Gauteng Department of Agriculture and Rural Development ("GOARD"), the second from another official from GOARD, and the third from the Director of Public Prosecutions in Johannesburg.

28. When, on 27 February 2015, the Trust and Xuma unsuccessfully sought to introduce a further, second supplementary affidavit, to show more photographs of the property, Boitumelo Mkonza deposed to an affidavit dated 24 February 2015, citing herself as:

47.6.1 "I am an adult female person and a director of Xuma Technologies (Pty) Ltd, the second respondent herein. I am a trustee of the Mkonza Family Trust.

47.6.2 I confirm that I am duly authorised to represent the first and second respondents and to sign all documents, including affidavits, in respect of this matter."

29. This application for leave was opposed. In reply to this second supplementary affidavit, the Finnemores attached more photographs, and an extract from Google Earth images, to controvert the above assertions. Boitumelo Mkonza deposed to the replying affidavit on 9 March 2015.

30. The application of the Trust and Xuma to introduce the second supplementary affidavit was dismissed, since, inter alia, in the Court's view, the Trust and Xuma were aware of the Finnemore's photographs since July 2014, and had done nothing about it. At the very least, the photographs should have been produced before the hearing of the matter.

31. The judgment notes that the Murphy order of 28 January 2014 was never appealed and remained "valid, binding and enforceable."
32. The Court resolved to accept the authority of deponent Nkosinathi Mkonza to represent the Mkonza Family Trust and Xuma, in the interests of justice.
33. It adverted to the leading case of Fakie NO v CC11 Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 SCA, which spelt out the requirements for an order for contempt of court. The three requisites, summarised, are: (1) the existence of the order; (2) service or notice of the order on the respondents and (3), noncompliance.
34. The judgment quoted the following instructive passage from Fakie at paragraph 23 p 338:

"23 Once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and *ma/a fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and *ma/a fides* on a balance of probabilities but to avoid conviction need only lead evidence that establishes a reasonable doubt."
35. The Court found that portion [...]2 Nooitgedacht was still being used for business purposes. It was not established that the title deed conditions had been varied, nor that the zoning had been changed.
36. At paragraph 15 of Mohlamonyane AJ's judgment, the following is stated:

"15. From the Respondents' own version, I am satisfied that they are aware of the Order, which was granted pursuant to an opposed application in which they were represented by their legal representatives."
37. The Court was enjoined to determine whether there was compliance with the Murphy order. It found that the argument of the Trust and Xuma was flawed, and that the letters produced by them could not supercede a court order, and their purpose was to consider environmental deterioration of the site. It was found that the letters did not take the respondents' case any further.
38. The photographs produced by the Finnemores were analysed and revealed, inter alia, concrete and building rubble, bricks and cables, commercial vehicles, manholes, labourers working on an industrial site on the property, all between 12 February 2014 and 29 October 2014.
39. At paragraph 28 of the judgment, the Court found that the contempt was "proven beyond reasonable doubt."
40. On 30 July 2015, Mohlamonyane AJ duly granted the contempt and committal order which appears at paragraph 46 of the judgment. (Reference to paragraph 47 from paragraph "47.6" onwards is an obvious mistake, and should read "46.7" et sequitur). It

is extensive but is quoted below for convenience:

"(46) In the result I make the following Order:

46.1 The First and Second Respondents be and are hereby found to be in contempt of the Order issued out of the Court on 28 January 2014 by Murphy J under case number 13699/2013.

46.2 Boitumelo Charmain Mkonza (ID 830418 0739 086) in her capacities as a trustee of the First Respondent and director of the Second Respondent is committed to immediate imprisonment for that contempt of this court for a period of fifteen (15) days.

46.3 The following persons being the current trustees of the First Respondent and directors of the Second Respondent are committed to imprisonment for contempt of this Court for a period of thirty (30) days:

46.3.1 Kethukuthula Mkonza (ID [...]); and

46.3.2 Nkosinathi Owen Mkonza (ID [...]).

46.4 The imprisonment ordered above, which shall also be served in full, is suspended for 2 (two) years on conditions that:

46.4.1 The First and Second Respondents fully and strictly comply with the Order issued out of this Court on 28 January 2014 by Murphy J under case number 13699/2013 within 30 (thirty) days of the date of this Order; and

46.4.2 The First and Second Respondents comply with the conditions on which they are to allow the Applicants to inspect the property to verify compliance with this Order imposed below.

46.5 The compliance with the order of Murphy J ordered above relates to the entirety of that Order and with regard to parts 1.1, 1.2 and 1.3 thereof shall include:

46.5.1 1 Regarding part 1.1 of the Order:

The removal from Portion [...]2 Nooitgedacht of:

46.5.1.1 all commercial and construction vehicles;

46.5.1.2 all material, machines and equipment related to the unlawful use of the property, including pipes, cables, cable drums, trunking, manholes, manhole covers, bricks, building materials and related rubble.

46.5.2 Regarding part 1.2 of the Order:

46.5.2.1 Cessation of the use of Portion [...]2 Nooitgedacht for any purpose impermissible in terms of the National Environmental Management Act, 1998 (Act 107 of 1998), the title conditions applicable to the property and/or the zoning of the property including:

46.5.2.1.1 Use for business and/or industrial purposes;

46.5.2.1.2 Use for the dumping and/or storage of cement, cement columns and other materials not related exclusively to agricultural or residential use; and

46.5.2.1.3 Use for accommodating persons and/or in structures/buildings erected in contravention of the title conditions of the property without

building plans approved by the local authority.

46.5.2.2 Removal of all buildings, partially completed buildings, foundations for buildings, building materials and rubble related to buildings in contravention of title condition 2 that provides that: "Not more than one dwelling house together with such outbuildings as are ordinarily required to be used in connection therewith shall be erected on the land" and for which no building plans have been approved by the local authority.

46.5.3 Regarding part 1.3 of the Order:

46.5.3.1 Removal of all cement, cement columns and other rubble introduced onto the property after 28 January 2014;

46.5.3.2 Not commencing or recommencing with the use of Portion [...]2 Nooitgedacht in any way impermissible in terms of the Environmental

Management Act, 1998 (Act 107 of 1998), the title conditions applicable to the property and/or the zoning of the property, including the uses listed in 46.5. 2.1 above.

47.6 The Applicants are herewith authorised to enter onto and inspect Portion [...]2 Nooitgedacht for purposes of verifying compliance with this Order on the following conditions:

47.6.1 Such inspection must be undertaken no less than 30 (thirty) days from the date of this Order;

47.6.2 Such inspection must be undertaken between 08h00 and 17h00 on a week's day;

47.6.3 The Applicants must give the Respondents at least forty eight (48) hours written notice of such inspection and who will be undertaking the inspection on the Applicant's behalf,·

47.6.4 The Respondents must give the Applicants and/or their representatives unfettered access to all parts of the property and all buildings thereon at the time of the Applicants' choosing subject only to the Applicants having complied with the conditions herein imposed,·

47.6.6.A A representative of the Respondents shall accompany the Applicants and/or their representatives on the inspection.

47.7 Should the First and/or Second Respondent fail to strictly comply with this Order including the conditions of inspection aforementioned and/or in any way breach the conditions of suspension imposed herein, the Applicants may approach the above Honourable Court for an order for the said person's committal to prison, on the same papers, supplemented as necessary.

47.8 The First and Second Respondents are ordered to pay the costs of this application on a scale as between attorney and own client, jointly and severally, the one paying, the others to be absolved."

41. It is common cause that there was no application for leave to appeal against the judgment of Mr Justice Mohlamonyane.
42. On 22 September 2015, Western Crown and the Finnemores brought an urgent application against the trustees of the Mkonza Family Trust and Xuma to enforce an order for committal to prison, owing to failure to comply with the Mohlamonyane order. It was struck from the roll for want of urgency.
43. An application for leave to appeal against this order, which was without merit, appears to have been abandoned.
44. On 19 October 2015, Nkosinathi Mkonza, Boitumelo Mkonza and Kethukhula Mkonza launched this rescission application under case

number 87264/2015, the relief being for the rescission and setting aside of the order of Mohlamonyane AJ, delivered on 30 July 2015 in case number 13699/2013, to the extent that such order was made to affect the applicants.

45. The application was opposed by the respondents, being Western Crown, and Messrs Bruce and Margaret Finnemore.
46. The grounds for the rescission application are adumbrated below at paragraph 4 of the founding affidavit of Nkosinathi Mkonza as:

"As can be seen from annexure "NOM1" the parties that were before Mohlamonyane AJ were the "Trustees from time to time of the Mkonza Family Trust" as first respondent and Xuma Technologies (Pty) Ltd as second respondent. None of us were involved and we were never called upon to appear before him to show cause, if any, why we should not be committed for contempt of court."

47. And further, at paragraph 16:

1. "the order of Murphy J was not made against the present applicants;
2. that order was not served on any of the applicants;
3. even if it were to be found that it was served on us, it was not binding on us;
4. to the extent that the order was made against us it is a nullity."

48. And further, at paragraph 17:

"As already stated above none of us were cited as parties to any proceedings before either Murphy J or Mohlamonyane A.J. I am advised that no court of law can make an order against a person who is not before it and if such order is made, it is not binding against such party."

49. The gravamen of the applicants' case in casu is founded on the fact that they were not personally cited, whether in the enforcement

application, or the contempt application. The citation of the Mkonza Family Trust as "The Trustees from time to time of the Mkonza Family Trust" was, in their view, "fatally defective". Their names were not specifically identified, where applicable, in their capacities as trustees of the Mkonza Family Trust, or in their capacities as directors of Xuma Technologies (Pty) Ltd.

50. In the result, therefore, they were not parties to either such application. The Murphy order was not served on them, and even if it is found that it was, it was not binding on them because of the failure to properly cite them. In other words, they were not properly before the Court when either Court order was granted, and specifically the contempt and committal order.

51. It is asserted for the applicants that the matter was not argued before Murphy J on 28 January 2014. Rather, without instructions from them, an order was drafted and was made an order of Court.

52. The respondents vehemently deny this. They assert that the matter was fully argued before Murphy J, and this is confirmed by the affidavit of attorney Gideon Erasmus who was present in Court on the day. The trustees of the Trust and Xuma were represented by Counsel, Advocate T C Tshavungwha of the Johannesburg Bar. Based on the objective facts, I accept the version of the respondents.

53. In the opposing affidavit, the respondents make a trenchant point about the statement made by the applicants in their founding

affidavit in the rescission application:

5.3 The respondents respectfully submit that in (wrongly) asserting that "without instructions from us, an order was drafted and was subsequently made an order of Court" the applicants by necessary implication admit that:

5.3.1 they were the ones giving alternatively entitled to give instructions in the application before Murphy J;

5.3.2 they were entitled to do so because they were properly before the honourable Court;

5.3.3 in being similarly cited in the contempt application, they were also properly before the honourable Mohlamonyane AJ."

54. The respondents go on to state that, on 15 January 2015, the applicants' quondam attorneys, TGR, informed the respondents in

writing that the second and third applicants were the trustees of the Trust. Finnemore points out that the applicants had always admitted, under oath, that they were the trustees of the Trust and/or directors of Xuma. The applicants, in deposing to affidavits, qua trustees and/or directors, properly placed themselves before both Murphy J and Mohlamonyane AJ. They were properly

represented by Counsel and their former attorneys, TGR, when both the Murphy and Mohlamonyane orders were granted and were consequently aware of such orders without the need for proper service thereof.

55. The contents of the replying affidavit, deposed to by Nkosinathi qua CEO of Xuma, reiterates the statements in the founding affidavit, and argues that there was no attempt to 'Join any of the Trustees in the proceedings either in his or her personal capacity or capacity as representative of the Trust.' He advances as the reason for not applying for leave to appeal against the Murphy judgment, the fact that the applicants were not parties thereto. In his view, the Mohlamonyane order was an "empty order in that you cannot imprison any Family Trust nor can you imprison a company". This is a significant concession.

56. In establishing a basis for rescission under rule 42(1)(a) or (c), I need to determine whether the applicants were indeed not parties before Court when the Murphy order and, in particular, the Mohlamonyane order was given, resulting in same being granted

erroneously in absentia, or whether there was any mistake common to the parties which justifies a variation or setting aside of the order sought to be rescinded.

57. Precursory to the above, I will briefly traverse the requirements for contempt of court proceedings considered by Mohlamonyane AJ, and then deal with the material issues raised in the rescission application by the trustees of the Mkonza Family Trust and the directors of Xuma.

58. The first requirement, that is, the existence of the Murphy order, is not in dispute. The second question in this case is whether

Nkosinathi Mkonza, Boitumelo Mkonza, and Kethukuthula Mkonza knew that they were at risk, personally, for the contempt of the Murphy

order, on behalf of the Mkonza Family Trust, and Xuma Technologies (Pty) Ltd. This poses the question as to whether it was proved by the respondents in casu that the applicants had received service or notice of the Murphy order prior to the launch of the contempt

application. I will traverse this later as it overlaps with the other points taken by them. The third requirement is whether it was proved that there was noncompliance with the order. I am satisfied from the facts outlined by Mohlamonyane AJ that he made a correct finding that there was indeed non compliance. This was not seriously challenged in the rescission application.

59. I will turn to an analysis of the evidence which pertains to these disputes. By way of preliminary observation, the applicants' own version in their affidavits in the rescission application contradicts and indeed substantially vitiates their very basis for setting aside the Mohlamonyane order.

60. The CIPRO search on Xuma reveals that Boitumelo and Bongiwe Mkonza were appointed directors on 10 April 2006, and remained so as at 25 February 2014. A Searchworks report dated 22 January 2015 indicates that Nkosinathi Mkonza was appointed as a director of Xuma at some stage.
61. Peculiarly, according to the document, he was appointed on 10 July 2014 but resigned on 22 June 2014. This information is patently incorrect.
62. I have nevertheless taken account of the admission by Nkosinathi himself that, from inception of the litigation, until at least 22 February 2016, Nkosinathi had maintained under oath that he was the CEO of Xuma.
63. A letter dated 19 January 2015 from TGR to Erasmus Attorneys confirms that, at the time, TGR represented the Mkonza Family Trust and that the trustees of the Mkonza Family Trust were Khethukuthula "Nkosi" and Boitumelo "Nkosi". It would appear that the surname "Nkosi" is a patent mistake.
64. The Deed of Trust dated 15 September 2010 reveals that Boitumelo Mkonza and Khethukuthula Mkonza were appointed as trustees. The Trust appears to have been registered with the Master, as it was allocated a registration number, namely, IT 280/2011, and this much is apparent from its title deed to portion [...]2 Nooitgedacht.
65. In this rescission application, Nkosinathi Mkonza, the first applicant, signed the founding affidavit and Boitumelo and Khethukuthula Mkonza signed confirmatory affidavits, all on 27 October 2015. This is significant, because whatever Nkosinathi says in his founding affidavit is confirmed as true and correct by Boitumelo and Khethukuthula Mkonza as the second and third applicants.
66. It is apparent from the applicants' version in the rescission application that the applicants in casu had full knowledge of the entire sequence of events leading up to the Murphy and Mohlamonyane orders, and that they were fully aware of the terms of these orders. They were even aware of the urgent committal application which was struck from the roll for want of urgency on 22 September 2015. In the result, therefore, notice of both orders was clearly given to and understood by the applicants. In effect, on their own version, they have been hoisted by their own petard.
67. In Nkosinathi's founding affidavit, he admits to knowledge of the enforcement application which resulted in the Murphy order. He proceeds to state that, in the enforcement application, on behalf of the trustees of the Mkonza Family Trust, Xuma, Metallux, Chimotsotso and van den Berg, Ntombizethu Ngoma, a legal advisor of Metallux, signed an opposing affidavit. Khethukuthula had also deposed to an affidavit for the Mkonza Family Trust and Xuma.

68. In the contempt application, both Nkosinathi Mkonza and Boitumelo Mkonza signed affidavits, Nkosinathi signing on 9 July 2014 as CEO of Xuma and Boitumelo signing on 26 January 2015 and 24 February 2015 as director of Xuma and trustee of the Mkonza Family Trust.
69. On a conspectus of the papers before me, I may safely make the following observations. Nowhere in any of the affidavits filed by the trustees from time to time of the Mkonza Family Trust, or the directors of Xuma Technologies (Pty) Ltd, in the enforcement

application, or in the contempt application, is it alleged that the applicants in casu should have been cited personally.

70. Nowhere is it denied that Khethukuthula and Boitumelo were the trustees of the Trust. Nowhere is it denied that the directors of Xuma were Boitumelo, Bongiwe and Nkosinathi. Nowhere in the rescission application do the applicants deny that the Trust and Xuma are in contempt of the orders of Murphy and Mohlamonyane. Their affidavits in the rescission application make it plain that they were at all material times aware of what was going on, from day one, and this included notice and knowledge of all applications brought by the respondents, and the notice and knowledge of the orders granted.
71. They were aware of the terms of the notice of motion in the contempt application, which were clear and unambiguous in seeking relief against them, personally, albeit qua legal representatives of the Trust and Xuma, but they never challenged the authority of Mohlamonyane to make an order against them.
72. They admit in the rescission application that they are aware that it is incompetent at law to imprison a Trust or a company. By inference, then, they could have safely drawn the conclusion that the only way of enforcing the Murphy order was through an order against the legal representatives of these bodies.
73. The attorney for the respondents, Mr Erasmus, referred to the case of Nedbank Limited v Trustees for the time being of the QC Vermeulen Trust and others case 12750/2010 (2011) ZAWCHC 382 in which, at paragraph 16 et sequitur, the Court said:

"In legal proceedings the trustees must act *nominee officii* ... it is usual for the trustees to be cited as "A, B and C" in their capacity as the trustees of the XYZ Trust" but cases in which the trust as such is cited are not unknown and there should be no objection to a citation of the "trustees for the time being of the XYZ Trust".

74. The above rationale makes sense, because it is the trust which is the litigant, and the trustees may change from time to time, so that the citation of the trustees by name may become quite academic over the passage of time, when different trustees may be appointed or removed.
75. The case of Twentieth Century Fox Film Corporation v Playboy Films 1978 (3) SA WLD 202 is pertinent. Here, Mr Justice King AJ said at paragraph D page 203:

"An order ad factum praestandum against a company should also be served on its directors if a punitive order is to be sought against the directors in order to establish knowledge of the order of Court."

76. And at page 203 paragraphs F to Hof Twentieth Century Fox:

"The contempt of Jagger (the director of the first respondent company) is a gross one. He not only caused the first respondent to fail to comply with the terms of the order, but expressly stated that he would not do so. When an application for his committal for contempt was served on him he took no steps in regard thereto and left the matter in the hands of an attorney without enquiring as to what was happening in the matter. He then proceeded to liquidate the first respondent without any regard to his personal position.

This Court must jealously guard the orders which it grants in the interests of the community at large. If persons such as Jagger were permitted to trifle with the orders of this Court without being severely punished therefor the administration of justice would be brought into disrepute and rendered valueless."

77. Reading from the headnote in Fakie, at paragraph A to Bat page 327:

In particular, the applicant (in contempt proceedings) had to prove the requisites of contempt (the order, service or notice, noncompliance and wilfulness and ma/a tides) beyond a reasonable doubt. But, once the applicant had proved the order, service or notice and noncompliance, the respondent bore an evidentiary burden in relation to wilfulness and ma/a fides: Should he fail to advance evidence that established a reasonable doubt as to whether his non compliance was wilful and ma/a fide, the applicant would have proved contempt beyond a reasonable doubt. A declarator and other appropriate remedies remained available to the applicant on proof on a balance of probabilities.

78. And at paragraph A to B page 332 of Fakie:

"It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval' since the rule of law a founding value of the Constitution requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained."

79. Plainly, the applicants confirmed their knowledge of the Murphy order and therefore the requisite notice thereof by admitting that they, as representatives of the Trust and/or Xuma:

- a. instructed legal representatives in the enforcement application in January 2014, opposed same and certain of them deposed to affidavits therein;
- b. instructed legal representatives in the contempt application in January 2015, opposed and deposed to affidavits therein;

- c. never denied that they had knowledge of both orders;
 - d. in the rescission application, all confirmed their knowledge of the tout ensemble of events since the launch of the enforcement application et sequitur.
80. Counsel for the applicants, Mr Tokota SC, relied on *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 A at 651 for the argument that a judgment cannot be pleaded as *res judicata* against someone who was not a party to the suit. He relied on various authorities to support the proposition that there was a nonjoinder of the applicants in either application. He relied on, *inter alia*, *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230 SCA, in which it was held that interested parties should be joined to the suit. But in that case, it was third party bondholders who were not joined, so the facts in *casu* are distinguishable.
81. Another case relied upon was *City of Johannesburg Metropolitan Municipality and three others v Philani Hlophe and two others* case number 1035/2013 dated 18 March
2015. When it became clear that the City of Johannesburg was not going to comply with a court order, its functionaries, namely, the Executive Mayor, City Manager, and Executive Director: Housing, were joined as further parties to enforce the order. Once again, the facts in *casu* are distinguishable. In *casu*, from the outset, the Trustees from time to time of the Mkonza Family Trust and Xuma were cited as parties. In the contempt application, the then applicants went further and claimed a committal order against the trustees of the Trust and against the named directors of Xuma. This was consistent with the principle established by the City of Johannesburg case. Indeed, the City of Johannesburg case goes as far as to hold that the functionaries for the City did not have to be joined in the original enforcement application.
82. At paragraph 22 of the City of Johannesburg judgment, the SCA had the following to say:
- "22 The argument on behalf of the functionaries is that the mandamus could only have been granted had the functionaries been joined in the eviction application from the beginning. I am unable to agree. A party that initiates legal proceedings against a municipality cannot be expected to act on the assumption that if the litigation is successful the municipality will not comply with the order against it. *Changing Tides* (the registered owner of the occupied property) was under no obligation to cite the functionaries in the eviction application. Only when the City failed to comply with the order of Claassen J did the need arise to look to the functionaries and that was the purpose of the enforcement application."
83. Reverting to the facts in the rescission application, the strength of the respondents' defence is *a fortiori* even more compelling, because the trustees of the Trust and Xuma were cited as respondents from inception of proceedings, in both the enforcement and contempt applications.
84. The case of *Premier Food (Pty) Ltd v Manoim NO and others* 2016

- (1) SA 445 SCA, quoted by Counsel for the applicants as proof that a Court would only have jurisdiction to convict a witness who was an accused before Court, is of no direct relevance. This because the case turned on the power of the Competition Tribunal to grant an order to declare the cartel activity of Premier a prohibited practice in circumstances in which Premier had secured conditional immunity

from the Competition Commission. I align myself with the dictum in *Man Truck and Bus (SA) (Pty) Ltd v Dusbus Leasing CC and others* 2004 (1) SA 454 Wat paragraphs 33 to 34 at page 469 where the Court held:

"..... the requirement of the 'same persons' did not mean only the identical individuals who were parties to the earlier proceedings, but included persons who, in law, were identified with the parties to the proceedings. Whether someone had to be regarded as a so-called privy, or as being identified with the parties, depended upon the facts of each particular case."

85. The principle of persons who, in law, were identified as parties to proceedings, was approved in *Royal Sechaba Holdings (Pty) Ltd v Coote and another* 2014 (5) SA 562 SCA at paragraph 21 where the Court said:

"As Brand JA in *Prinsloo* said, our courts have recognised that rigid adherence to the requirements of the same cause of action and same relief would defeat the purpose of *res judicata*. There is no reason why a similar approach should not be adopted for the same parties requirement."

86. The citation of the *Prinsloo* case is: *Prinsloo NO and others v Godex 15 (Pty) Ltd and another* 2014 (5) SA 297 SCA.

87. The respondents asserted that the applicants had plainly submitted to the jurisdiction of this Court and quoted the authority of *Purser v Sales and another* 2001 (3) SA 453 SCA at 453H:

"A defendant who raises no objection to a court's jurisdiction and asks it to dismiss on its merits a claim brought against him is invoking the jurisdiction of the court just as surely as the plaintiff invoked it when he instituted the claim. Such a defendant does so in order to defeat the plaintiff's claim in a way which will be decisive and will render him immune from any subsequent attempt to assert the claim."

88. It was further argued for the respondents that the doctrine of acquiescence applied to the facts in the rescission application,

because the applicants instructed their legal representatives in the enforcement and contempt applications and participated in such proceedings with full knowledge of the nature and consequences of the relief sought, including relief for their incarceration. They are accordingly estopped from denying the power of *Mohlamonyane AJ* to grant this order. As enunciated in *Botha v White* 2004 (3) SA 184 T at paragraph 23 *et sequitur*:

"regarding the doctrine of acquiescence, Friedman J,...in *Burnkloof Caterers (Pty) Ltd v Horseshoe Carriers (Greenpoint) (Pty) Ltd* 1974 (2) SA 125 C at 137 A, noted that it is really nothing more than an alternative term for estoppel."

89. In summary, therefore, the respondents contend that the application was brought in the face of the following established facts, namely:
- a. The applicants being the trustees of the Trust and/or directors of Xuma, on their own admission;
 - b. Their active participation in the enforcement and contempt applications, including giving instructions to their attorneys and Counsel, on their own admission;
 - c. Their acquiescence in and to the authority and jurisdiction of Mohlamonyane AJ;
 - d. Their failure to challenge his authority and jurisdiction until after *litis contestatio*.
90. The respondents seek the dismissal of the rescission application with an exemplary award of costs on the attorney and own client scale owing to the applicants' alleged abuse of the process of the Court, without merit, in the face of their remaining in wilful contempt of two orders of Court.
91. On a consideration of the facts traversed above, I am satisfied that the applicants have failed to prove an entitlement to rescission,

whether under Rule 42(1)(a) or (c) of the Uniform Rules. The judgment of Mohlamonyane AJ was not erroneously granted in the applicants'

absence, nor was it granted owing to any mistake common to the parties. The terms of the notice of motion seeking the contempt and committal order were unequivocal and not susceptible to any interpretation other than that the committal relief was sought

against them as representatives of the Trust and Xuma.

92. However, there remains an anomaly which warrants *mero motu* intervention, this in terms of Rule 42(1)(b). The committal order at paragraph 46.2 of the Mohlamonyane judgment correctly commits Boitumelo Mkonza to 15 days' imprisonment as trustee of the Trust and director of Xuma. The committal order against Khethukuthula and Nkosinathi Mkonza is, however, flawed, on the facts, as known, and attributable to a patent error regarding same. Paragraph 46.3 incorrectly refers to them as both trustees of the Trust and

directors of Xuma. Khethukuthula is only a trustee of the Trust. Nkosinathi was never a trustee.

93. While the CIPRO search of February 2014 does not reflect Nkosinathi as a director, he consistently maintained, under oath, in a plethora of affidavits, that he was and is the CEO of Xuma. This suffices for purposes of the committal order. I have resolved, therefore, to vary the order only to the extent of this patent error, and to reduce the number of days of imprisonment on the premise that, had the true facts been apparent at the time, a term of 15 and not 30 days would have been ordered, since each party had only represented one entity.
94. It merits mention that, based on the CIPRO report, even though Bongiwe Mkonza appears to have been a director of Xuma since 10 April 2006, her nonparticipation and noncitation in the proceedings seems to have permitted her to escape the consequences of the committal order.
95. The applicants' application was transparently without merit, on their own version, and ill considered. The applicants were expedient in their approach to the matter and their conduct appears to support a belief that they may behave with abject impunity when it comes to compliance with court orders. A special award of costs is indicated.
96. The following order is granted:
- a. The application is dismissed;
 - b. The applicants are directed, both in their representative capacities, and personally, de bonis propriis, to pay the costs of this application, jointly and severally, on the attorney and client scale;
 - c. The order of Mohlamonyane AJ dated 30 July 2015 is amended only to the following extent, namely, by the deletion of paragraph 46.3 and the substitution therefor of the following:
"46.3.1 Khethukuthula Mkonza (ID [...]) in his capacity as trustee of the Mkonza Family Trust is committed to imprisonment for contempt of this Court for a period of 15 (fifteen) days;
46.3.2 Nkosinathi Owen Mkonza (ID [...]) in his capacity as CEO of Xuma Technologies (Pty) Ltd is committed to imprisonment for contempt of this Court for a period of 15 (fifteen) days;"

Appearances

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