

SOUTH AFRICA / JUDGMENT

Pienaar and Another v Raadt and Others (2277/2024) [2025] ZANCHC 64 (25 July 2025)

[2025] ZANCHC 64

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

2277/2024

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IN

**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE
DIVISION, KIMBERLEY)**

Case

No: 2277/2024

Reportable: YES /

NO

Circulate to Judges: YES

/ NO

Circulate to Regional

Magistrates: YES / NO

Circulate to Magistrates:

YES / NO

In the interlocutory
application between: -

INNOCENTIA

MIRACLES

PIENAAR

First Applicant

MOTLALEPULA

SEGAMI

Second Applicant

and

JEROME

PHENYO RAADT

First Respondent

DERICK
CORNS
Second Respondent
SCARLET
SUN 15 (PTY)
LTD
Third Respondent
BLUE
DUST 7 (PTY)
LTD
Fourth Respondent
THE
COMMISSIONER OF COMPANIES AND
INTELLECTUAL
PROPERTY COMMISSION
Fifth Respondent
In

re:

JEROME
PHENYO
RAADT
First Applicant
SARAH
KOUS
Second Applicant
SCARLET
SUN 15 (PTY) LTD
Third Applicant
BLUE
DUST 7 (PTY)
LTD
Fourth Applicant
THOMAS
SWARTS
First Respondent
HENRY
LANGEVELD
Second Respondent
LYDIA
MODISE
Third Respondent
ZINAKILE
REUBEN
DUBE
Fourth Respondent
INNOCENTIA
MIRACLES
PIENAAR
Fifth Respondent
MOTLALEPULA
SEGAMI

Sixth Respondent
MARGARET
SWARTS
Seventh Respondent
GLORIA
PETERSON
Eighth Respondent
EVELINA
MOKHENGWANE
Ninth Respondent
ALL
THE REMAINING MEMBERS OF THE
SYDNEY
ON VAAL COMMUNAL PROPERTY
ASSOCIATION
Tenth Respondent
MOKUENA
ATTORNEYS
Eleventh Respondent
THE
DIRECTOR: TENURE REFORM
IMPLEMENTATION
IN THE PSSC: NC
Twelfth Respondent
INTELLECTUAL
PROPERTY COMMISSION
Thirteenth Respondent

Heard: 06 June 2025

Delivered: 25 July 2025

Summary: Interlocutory application. Contempt of court. Failure to comply with court order.
Application for committal for contempt of court.
Requirements to be proved beyond reasonable doubt: (a) existence of order; (b) service of notice; (c) non-compliance. Evidentiary burden to rebut non-compliance was neither wilful nor mala fide. Whether s 18 of the Superior Courts Act, 10 of 2013, suspends the operation of the order. Dispute of fact.
ORDER
In the result, the

following order is made:

1.
The respondents are not in contempt of this court's order of 11 April 2025.
2.
The application is dismissed.
3.
The applicants are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

JUDGMENT

Mamosebo, J

- [1] This interlocutory application was one of the three applications brought on an urgent basis before me at the end of the unopposed motion court roll. I allowed the parties to argue the matter in full and reserved my reasons and order.
- [2] Two crisp issues stood for determination. First, whether this interlocutory application should be heard as an urgent application as contemplated by the provisions of Rule 6(12)(a) of the Uniform Rules of Court; and secondly, whether the first to the fourth respondents are guilty of failing to comply with the court order granted by Williams J on 11 April 2025 under Case Number 2277/2024 directing them to furnish to the applicants all decisions, reports and financial statements of the third respondent taken by the board and/or the respondents in the absence of the applicants from 28 June 2024 until 11 April 2025, within 48 hours of the order.

Urgency

- [3] The applicant must persuade the court, in terms of Rule 6(12) of the urgency. The following conclusion is drawn by Van Loggerenberg in Erasmus[1] pertaining to urgent applications:
- ‘In other words, urgency (except where a statute provides for inherent urgency) is determined not by the nature of the claim brought, but by the circumstances in which the applicant seeks its adjudication. ... It is peremptory that an applicant set out explicitly the circumstances on which he relies to render the matter urgent and the reason why he claims that he cannot be afforded substantial relief at a hearing in due course.’
- [4] In light of the fact that this application is for contempt of an order of the Court the Constitutional Court has in Secretary, Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others[2] enunciated that it is in circumstances where the applicants have shown that the contempt is ongoing where the element of urgency would be satisfied.
- [5] On 11 April 2025 Williams J granted the following order in favour of the applicants:

‘1. The application is heard as an urgent application pursuant to the provisions of Rule 6(12) and Rule 6(11) of the Uniform Rules of Court, and that the applicants’ non-compliance with the provisions pertaining to the form and service are hereby condoned.

2. Pending the finalisation of the main application in the above matter, the following orders are made:

2.1 That the applicants are permitted, allowed, directed and/or instructed to exercise all applicable duties and rights bestowed upon directors of a company in terms of the Companies Act 71 of 2008 and the Memorandum of Incorporation of the third respondent in respect to the third respondent (i.e. Scarlet Sun 15 (Pty) Ltd.)

2.2 That the respondents are prevented from interfering, disrupting, frustrating and unlawfully preventing the applicants from exercising the duties and rights bestowed upon them by the Companies Act 71 of 2008 and the third respondent’s Memorandum of Incorporation.

2.3 That the first to the fourth respondents are directed, instructed and ordered to provide the applicants with all the decisions, reports and financial statements of the third respondent taken in the applicants’ absence by either the board and/or respondents individually from 28 June 2024 until 11 April 2025 within 48 hours of the order.

3. Any party opposing this application is to pay the costs of the application on an attorney and own client scale, the one paying the other to be absolved.

4. The respondent is to pay costs on party and party scale.’

[6] The order by Williams J was signed on 22 April 2025. Ms Innocentia Miracles Pienaar deposed to the founding affidavit in her capacity as a member of the Executive Committee of Sydney on Vaal Communal Property Association as well as a director of Scarlet Sun 15 (Pty) Ltd, the positions placed in dispute by the respondents in the main application. According to her the order was first served electronically by email on the attorneys of the first to fourth respondents on 23 April 2025 and thereafter by the sheriff on 23 May

2025. The applicants requested the first and second respondents for the sitting of the board on the same day that the sheriff served the order, which was denied. The respondents’ attorney, Mr Wiehan de Bruin of the firm Van de Wall Incorporated, informed them of the reason for the denial in an email dated 27 May 2025 quoted in relevant part:

‘Your statement “The appeal application does not suspend the court order of 11 April 2025 signed on 22 April 2025” is a direct contradiction of your urgent application in terms of section 18(3) [of the Superior Courts Act, 10 of 2013] in which you requested the enforcement of the order of 11 April 2025 pending the application for the appeal. As you are aware, your abovementioned application was removed from the roll with costs when it was heard on 16 May 2025. In view of the above and in view of the fact that the appeal application suspended the 11 April 2025 court order, as confirmed by your section 18(3) application, our clients will not adhere to your request or proposed meeting.’[3]

It is pursuant to this response that the applicants brought this application on an urgent basis claiming that the respondents have refused, neglected and/or failed to adhere to the court order.

[7] In as far as urgency is concerned, the application was launched on 28 May 2025. The order was already signed on 22 April 2025. There is no explanation in the founding affidavit why the application was not brought sooner. In a separate earlier interlocutory application brought on 06 May 2025 the applicants have in their founding affidavit made reference to the non-compliance with the court order by the respondents. It is inexplicable why the contempt was not dealt

with in the earlier interlocutory application. In addition, they have also dealt with the rights of the directors being continuously

frustrated by the respondents. At this point, it is unclear why the applicants maintain that they would be denied substantial redress if the matter is not heard on an urgent basis. Further, they have failed to address in the papers the irreparable harm that they stand to suffer should the matter not be heard on an urgent basis. Be that as it may, I have heard argument fully on the merits notwithstanding those shortcomings.

The contempt of Court allegation

[8] In order for an applicant to succeed in obtaining the relief sought the following requirements must be met:

- (a) the existence of a court order;
- (b) service or notice thereof;
- (c) non-compliance with the terms of the order; and
- (d) wilfulness and mala fides beyond reasonable doubt.

The respondent bears the evidentiary burden in relation to (d) to adduce evidence rebutting the inference that his non-compliance was not wilful and mala fide.

[9] Requisites (a) and (b) are common cause; that the order exists, that it was served on the respondents and that they are aware of its existence. What is challenged by the respondents is their alleged non-compliance with the order.

[10] The allegation by the applicants is that the respondents failed to comply with clause 2.3 of the order of Williams J dated 11 April 2025 which ordered them to furnish the applicants with decisions, reports and financial statements within 48 hours of the order. The question on when the order was brought to the notice of the contemnor degenerated into sterile and futile debate. The nit-picking by the parties is disappointing and will burden this judgment unduly.

[11] In the respondents' answering affidavit deposed to by their attorney of record, Mr Wiehan de Bruin, the following is asserted:

11.1 Scarlet Sun 15 (Pty) Ltd has been dormant for the whole period since the appointment of the applicants as directors. During that period there was no directors' meeting to which the applicants could have been invited. This contention was maintained in the answering affidavits of the earlier interlocutory applications.

11.2 There were neither board decisions taken in the absence of the applicants nor reports created or made during that period.

11.3 There were neither any financial statements to be considered or signed off that the respondents could have provided to the applicants within 48 hours of the court order.

11.4 In as far as the allegation that the respondents are interfering, disrupting, frustrating and unlawfully preventing the applicants from exercising the rights bestowed upon them by the Companies Act is concerned, relating to wilfulness or mala fide, the respondents counter that they have filed a Notice of Application for leave to appeal on 29 April 2025. The applicants launched an application in terms of s 18(3) of the Superior Courts Act, 10 of 2013, but was struck off the roll due to lack of urgency. The operation and execution of the order by Williams J was, in terms of s 18(1), was accordingly suspended on 29 April 2025 as it was the subject of an application for leave to appeal or of an appeal, pending the decision of the application or appeal.

[12] To settle that aspect of the debate is to invoke what the Supreme Court of Appeal said in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others*[4]:

'The defendant referenced s 18(2) of the Superior Courts Act. It does contemplate that an interlocutory order not having the effect of a final judgment may be the subject of an appeal. Section 18 regulates the suspension of decisions pending an appeal. The scheme of s 18 is simply to allow for different suspension regimes of application to decisions and interlocutory orders. The provision has nothing to say about when an interlocutory order might be appealable. Only that if such an order is sought to be appealed or leave has been given (rightly or wrongly), s 18(2) is the regime of application to the suspension of the order. Section 18 does not overturn this Court's jurisprudence as to when a decision is appealable. Nor does it enthrone the interests of justice as the overarching principle to decide when a matter is appealable.'

The SCA went on to say:[5]

'...I do affirm, though, that the doctrine of finality must figure as the central principle of consideration when deciding whether a matter is appealable to this Court.'

It is my view that order 2.3 of Williams J's order, directing, instructing and ordering the first to fourth respondents to provide the applicants with all the decisions, reports and financial statements of the third respondent from 28 June 2024 to 11 April 2025 within 48 hours is final in effect as espoused in *Zweni*.

[13] On the test of proof beyond reasonable doubt the remarks by the Constitutional Court (ConCourt) in *Pheko and Others v Ekurhuleni City*[6] are apposite:

‘After surveying the remaining case law, international sources and the arguments of either side, Fakie concluded that this standard for a finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt. Despite the fact that it is acknowledged that this mechanism (especially when employed by civil litigants) retains its civil character, the possibility of imprisonment requires the importation of protections.

These protections are mandated by the Constitution. However, in importing them we must be cognisant of the context of contempt proceedings: a respondent in contempt proceedings, Fakie said, is not an ‘accused person’ as envisioned by s 35 of the Constitution, and the protections afforded to a contemnor should not supersede the capacity of a non-state litigant who may not have the administrative might to establish motive. Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.’

[14] There seems to exist dispute of fact whether those relevant documents they claim they ought to have been provided with were in fact in existence since the respondents contend that Scarlet Sun was dormant during the period in which the records are demanded. Under such circumstances the Plascon-Evans rule[7] becomes applicable. The principle is succinctly dealt with in *Fakie NO v CCII Systems (Pty) Ltd*[8] in these terms:

‘In the light of the proper approach to deciding factual disputes in motion proceedings, I should add that, on the particular form of process the parties committed themselves to in this case, I do not think that it would make any difference had the onus been only proof on a balance of probabilities. The accepted approach requires that, subject to ‘robust’ elimination of denials and ‘fictitious’ disputes, the Court must decide the matter on the facts stated by the respondent, together with those the applicant avers and the respondent does not deny.’

[15] Once the applicant has proved that the first three requirements for contempt have been established, *mala fides* and wilfulness on the part of the respondents are presumed. The applicants have, in my view, failed to establish the third requirement of non-compliance with the order beyond reasonable doubt. In the circumstances, I can also not draw an inference of wilfulness or *mala fides* on the part of the respondents and can therefore not conclude that the respondents are in contempt of the order. It follows that the respondents have shown good cause why they should not be held in contempt.

[16] It was submitted by Mr Knoetze, on behalf of the respondents, that the applicants have brought three interlocutory applications based on the same facts and can be seen as verging on being vexatious litigants. He urged for an order by the court to mark its displeasure by ordering the applicants to pay the costs on the scale as between attorney and own client.

[17] The general rule is that costs have to follow the result. See *Gauteng Provincial Legislature v Kilian*[9]. The Court has a discretion to award costs which must be exercised judicially. I do not think that the circumstances described above can be considered so extraordinary that they warrant an order of costs on a scale as between attorney and own client against the applicants. However, the fact that there has been so many urgent interlocutory applications where the respondents had no other option but to defend the matter, there is no reason why the respondents must be out of pocket to do so.

[18] In the result, the following order is made:

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

Obo the Applicants: Adv. J.K. Mongala On instructions of: Mokuena Attorneys c/o Mosikare Attorneys Obo the Respondents: Adv. B. Knoetze SC On instructions of: Van de Wall Inc

[1] Erasmus Superior Court Practice, Second Edition, Volume 2 at D1 Rule 6-52

[2] 2021

(5) SA 327 (CC) at paras 31 to 33

[3] 18 Suspension of decision pending appeal (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal. (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[3] 18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and

execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

- (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
- (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

[4] 2023

(5) SA 163 (SCA) para 24; see also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)

[5] Ibid at para 30

[6] 2015

(5) SA 600 (CC) paras 35 and 36

[7] *Plascon-Evans Pants Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 632 (A) at 634E – 635C

[8]

[2006] ZASCA 52; 2006

(4) SA 326 (SCA) para 63

[9] 2001

(2) SA 68 (SCA) 76G – I

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