IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE LOCAL DIVISION: MTHATHA]

CASE NO. 5368/2021

In the matter between:

RHWEBA BUTTERWORTH (PTY) LTD	**1st Applicant**
RHWEBA TRADING 1120 CC	**2nd Applicant**

and

LUBABALO BROWN MNTONGA	**Respondent**

In re:

RHWEBA BUTTERWORTH (PTY) LTD	**1st Applicant**
RHWEBA TRADING 1120 CC	**2nd Applicant**

And

LUBABALO BROWN MNTONGA	**1st Respondent**
SILMA HAMDULAY N.O.	**2nd Respondent**
FAMOUS BRANDS MANAGEMENT COMPANY	**3rd Respondent**
WHIRLPROPS 46 (PTY) LTD	**4th Respondent**

JUDGMENT

JOLWANA J:

Introduction.

[1] On the 14 March 2022 the applicants approached this Court on an urgent basis seeking an order for the respondent to be found in contempt of the court order issued on 21 December 2021. If they succeed they want him to be committed to imprisonment for a period of a month or such other sentence as the court may consider appropriate. In the event that the court finds that in not complying with the said court order the respondent did not act wilfully or mala fide, the applicants apply, in the alternative, for the respondent to be ordered to immediately comply with the said order. Finally, and in either event they seek an order for the respondent to pay costs on a punitive scale as between attorney and client.

[2] One of the main issues that becomes apparent from the papers is whether the order which was issued by Griffiths J on 21 December 2021 (the court order) is an interlocutory order or not and/or whether it is just an interim order. In order to fully understand that issue and the non-compliance with the said court order being the only reason why this application was moved, it is necessary that the said order be reflected as it is. It reads:

> "1. That the applicant's non-compliance with the provisions of Rule 6 of the Rules of this Court is condoned and leave is granted to the applicants to bring this application as a matter of urgency in terms of Rule 6 (12) of the Rules of Court.
>
> 2. That a rule nisi does hereby issue calling upon the respondents to show cause, if any on 1 February 2022 at 10h00 or as soon thereafter as the matter may be heard why an order in the following terms should not be made final:
>
> 2.1 That the first respondent be required immediately to remove the security guards placed at Deboinars Pizza, Mthatha Plaza, Shop 39 Mthatha Plaza, 35 Nelson Mandela Drive, Mthatha ("the premises") on his instruction, and to hand over the premises/business to the applicants, directors, shareholders, employees and/or agents of the applicants.

2.2 That the first respondent and its agent, security guards and/or anyone acting on his instructions, be interdicted and restrained from:

2.2.1 interfering in any way whatsoever with the activities, and/or the administration and/or business of the applicants at the premises;

2.2.2 intimidating and/or threatening and/or harassing and/or causing violence and/or threatening to cause violence to any worker and/or employee and/or official and/or supplier and/or agent and/or sub-contractor of the applicants;

2.2.3 blocking and/or preventing any agent, director, shareholder and/or employee of the applicants and/or any subcontractor of the applicant from entering into the premises;

2.2.4 disrupting or any other way being a disruptive presence at or near the premises of the applicants.

2.3 That there be no order as to costs against respondents 2 – 4.

2.4 That the first respondent pays the costs of this application on an attorney and client scale.

3. That paragraph 2.1 to 2.2 above shall operate as an interim interdict/mandamus pending the finalisation of the application.

4. Today's costs shall be in the cause."

[3] The above court order was issued on 21 December 2021, however, it has what appears to be a typographical error in that it is dated 21 January 2022. That error is repeated in the date stamp which also reflects the same date. During the hearing of this application it was not disputed that the said court order was issued on 21 December 2021 and it was in fact common cause. On the face of the court order it is not reflected that the respondents were legally represented during the hearing of the matter. However, it was also common cause during the hearing of this application that respondent's counsel was in fact present when the order was granted.

[4] The applicants seek an order on an urgent basis for the first respondent to be found in contempt of that court order. To this end papers were issued on the 14

March 2022 with the matter being scheduled for hearing on the 22 March 2022 at 9:30. The respondent was required to file a notice to oppose on or before the 16 March 2022 at 16:00 and at the same date and time, file his answering affidavit. The papers were served on 15 March 2022 at 14:50. From the time of service the first respondent would only have almost exactly 25 hours or one day to the time by which it was required of him to file a notice to oppose and an answering affidavit. This time frame suggests an urgency falling into one of the categories of extreme urgency to the extent that such a short period was afforded to the respondent to file his opposing papers. The question that must follow is whether the applicants were justified in truncating the time frames for the filing of the notice to oppose and the answering affidavit in the manner in which they did. I turn now to deal this issue.

Urgency.

[5] The applicants deal with urgency in their founding affidavit by explaining that they were supposed to take over the business in June 2021 but were prevented from doing so by what they refer to as baseless applications. They have not received any return in respect of the sale of the business since May 2020. They then agreed to cut their losses with the executrix of the estate following the death of the deceased who had purchased the business on certain terms, by taking the business back. They allege that they suffer economic loss on each day that they cannot take control of the business.

[6] The respondent had filed an application for leave to appeal the above mentioned court order. The application for leave to appeal was heard and dismissed on 23 February 2022. The respondent's attorneys shortly indicated that they would be filing a petition to the Supreme Court of Appeal for a special leave to appeal within the "next day or two" but did not do so. They then indicated that they would bring an

application to stay the execution of the court order but failed to do so. It became clear after a few days that the respondent had no intentions to bring such application. Only then did the applicants' attorneys instruct the sheriff to serve the court order upon the respondent to prevent him from alleging that the order was not served. The court order was served on 3 March 2022 but the sheriff only furnished the applicants' attorneys with his return of service on 10 March 2022. The papers were drafted over a weekend. Lastly, the applicants allege that the matter is urgent and it remains urgent every day that the respondent refuses to comply with the court order and that they are losing income on a daily basis whilst the respondent receives income of a very profitable business on a daily basis. In the final analysis they allege that they will not be afforded substantial redress at a hearing in due course.

[7] After indicating the time frames provided for in the Uniform Rules of Court for the filing of documents the applicants allege that they had been advised that there are no dates in the opposed motion court roll before the third term of 2022. Therefore, the matter may only be heard in August 2022 by which time they allege that they would have lost more than a year's income from the business. They have no idea as to the financial position of the respondent but have good reason to believe that they will not be able to recoup their losses from the respondent. This is the summary of all that the applicants submit are the reasons for urgency besides the issue of urgency associated with contempt of court proceedings which they also raise. I will deal with the urgency associated with contempt of court proceedings later herein.

[8] One of the most common and yet vexing issues that has been receiving the attention of our courts for decades and still does is that of urgency. Our courts have variously explained, stated and restated the legal position on urgency and what is expected of the litigants and their legal representatives in applications moved on an

urgent basis. I do feel that even now some restatement of the legal position is warranted as the litigants continue to misapply urgency rules which are often abused.

[9] In *Luna Meubel*[1] Coetzee J gave the following salutary advice which, although it should be well known to practitioners, is either misunderstood, misinterpreted to suit individual practitioner's needs and convenience or is often not given heed to. It is commonly and often deliberately wrongly interpreted to mean anything that is convenient and beneficial to the practitioner concerned and his client when in fact that is not so and should not be so. Coetzee J said in *Luna Meubel*:

> "Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down."

[10] The Uniform Rules of Court provide for what the learned Judge referred to as the "norm". In terms thereof, from the date on which the respondent is served with the papers he has 5 days within which to file his notice to oppose and another 15 days within which to file an answering affidavit. The applicants gave the respondent 25 hours or one day within which to file a notice to oppose together with an answering affidavit. This must be juxtaposed with the twenty days that the respondent was ordinarily entitled to according to the norm. There would ordinarily be nothing wrong with this as long as the applicant makes out a case for the truncation of times in the manner in which he stipulates for the filing of the notice to oppose and the answering affidavit as well as the date for the hearing. The

[1] *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (WLD) at 137 E-F.

applicants in urgent applications should not pay “mere lip service” to the old adage of *audi alteram partem*, but must, depending on the exigencies of each case, give meaning to it.

[11] The court order issued on 21 December 2021 is the order which has not been complied with and which is the basis of this application. However, it was not served on the respondent during the remainder of December 2021, the whole of January 2022 and the whole of February 2022. It was only served some two months and thirteen days later on the 3 March 2022. The explanation for this very long delay is that on 22 December 2021 the respondent filed a notice of appeal. It appears from the papers that the reasons for the order of the 21 December 2021 were made available on 24 December 2021. The application for leave to appeal was heard on 23 February 2022 and apparently the application for leave to appeal was dismissed on that date of the hearing. The reason for dismissing the application for leave to appeal included the fact that the order of the 21 December 2021 was an interim order and therefore not appealable. On 24 February 2022 the respondent’s attorneys sent an email to the applicants’ attorneys advising of their instructions to lodge a petition against the refusal of the application for leave to appeal with the Supreme Court of Appeal (the SCA) for which the respondent had 30 days within which to file the petition in terms of the rules of that court.

[12] It is not clear on the papers why, first having decided to wait for the application for leave to appeal process to be finalized, the applicants decided not to await the petition process. There does not seem to be any rationality for the distinction between the two processes to the extent that it was not submitted that a petition does not ordinarily lead to the suspension of the order or judgment appealed against. Section 18 (1) of the Superior Courts Act 10 of 2013 provides that:

> "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 decisions of the application or appeal."

[13] The applicants submit that after the respondent had failed to serve his petition to the SCA, his attorneys indicated that they would bring an application to stay the execution of the order but did not do so. It is further alleged that it became clear to the applicants after a few days that the respondent had no intention of bringing such an application. Only then did the applicants instruct their attorneys to serve the court order. It is unclear what the "few days" refers to or from when exactly is it reckoned. However, the date on which they made the realization that the stay application was not to be brought is not stated. It is also this vagueness and lack of particularity that creates problems in determining urgency. It is unclear why it was even necessary that the service of the said court order should await anything the respondent's attorneys said or did. This is more so that the applicants' case is that the court order is not appealable. These are not explained, at least not cogently as one would have expected to the extent that reliance was placed on these issues to make a case for urgency.

[14] Whatever "few days" means and whenever it was reckoned which is also not stated as I said earlier, sheriff was eventually instructed to serve the order. It is not clear when the sheriff was instructed as this is not stated in the applicants' papers. In any event the order was eventually served on 3 March 2022. In short, on applicants' own papers, the respondent's application for leave to appeal was refused on 23 February 2022. However, the court order of the 21 December 2021 was only served by the sheriff after a week on the 3 March 2022. It is not clear what the applicants were doing from the 23 February 2022. Most importantly, why they did not consult with their legal representatives for the purposes of launching this

application instead of waiting for a petition or even waiting for a stay application that never materialized. It is unclear what prompted the later realization after a few days that the respondents had no intention to bring the stay application.

[15] Having served the court order on the 3 March 2022, it is alleged that the sheriff only provided the applicants' attorneys with his return of service on the 10 March 2022. There are other problems with the return of service having been allegedly provided to the applicants' attorneys only on the 10 March 2022. These problems arise because the applicants themselves have not given an explanation which only they could give. For instance, it appears that the deputy sheriff signed the return of service on the 4 March 2022. It must be accepted from that that as from the 4 March 2022 the return of service was sitting on the sheriff's desk waiting to be collected. Why it was not collected timeously is not explained. This, in circumstances where the sole purpose of serving the court order was to move this application on an urgent basis.

[16] Surely if the time frames referred to earlier were to be truncated in the manner that the applicants did, it was encumbent upon them to explain and justify the truncation. After all, being heard on an urgent basis is not there for the taking, it must be justified on rational basis in light of what the ordinary time frames provided for in the Uniform Rules of Court are and the exigencies of the case. The applicants' attorneys have failed in this regard as it is them, not the applicants, who know about the court rules and court processes. That is why Coetzee J, in *Luna Meubel* put it upon them and gave them the responsibility to "carefully analyse the facts of each case" to determine whether a greater or lesser degree of relaxation of the rules is required.

[17] Having received the return of service on the 10 March 2022 the applicants say that the papers were drafted over a weekend. The 10 March 2022 was on a Thursday. The drafting of the papers was therefore, not done on Friday the 11 March 2022 for reasons that have not been given. The drafting is said to have happened over a weekend, presumably on the 12 or 13 March 2022. The papers were issued on the 14 March 2022 but were only served by the sheriff in the afternoon on the 15 March 2022 at 14:50. Why it was only possible to effect service at that time is not explained. Worse still, the papers having been issued on the 14 March 2022, were only emailed to the respondent's attorneys on 15 March 2022 at 09:19 the following morning. It is not explained why the papers were not or could not be emailed immediately after they were issued.

[18] Litigants, especially the applicants in urgent applications must understand that they have to play open cards with the court and have a duty to give a proper explanation if they want the court to leave whatever else the court is busy with and attend to their application. On the 22 March 2022 when the application was heard there were no less than 13 urgent applications including this one on the urgent court roll. The answering affidavit was handed up in court during the hearing. For the many reasons stated above, there was justification for the striking of the matter off the urgent court roll which is exactly what the respondent's counsel was urging me to do. However, because counsel for the applicants indicated that they had no intention of filing a replying affidavit and his heads of argument were available I decided to hear the matter in full. I allowed the respondent's counsel to file his heads of argument at a later stage which was done a week or so later on 29 March 2022. Besides, the application concerns a contempt of the court order and therefore striking the matter off the roll would not have been appropriate. In all those circumstances and in the exercise of my discretion I heard the matter in full.

The history of the matter.

[19] The history of this matter as well as the history of the contested issues between the parties is correctly captured, quite succinctly in the reasons for the court order of the 21 December 2021 which Griffiths J made available on 24 December 2021. I will mention some of the salient features of the history and/or relationship between the parties for context as gleaned from the founding affidavit. I do so hereunder.

[20] Miss Onke Mankahla (Onke), Mr Moshe Hector Sohaba (Moshe) and the late brother of the respondent (the deceased) were members of the second applicant which owned a number of business franchises in Mthatha and Butterworth including Debonairs Mthatha Plaza (Debonairs). Onke, Moshe and the deceased entered into an agreement to part ways with the deceased. As a result of that mutual agreement the second applicant sold Debonairs to Rhweba Holdings (Pty) Ltd (Rhweba Holdings) for R1.7 million. Rhweba Holdings agreed to pay R2000 a day until the purchase price was paid in full. Until the purchase price would have been paid in full it was agreed that ownership of Debonairs would remain vested in the second applicant. The deceased, who apparently owned Rhweba Holdings defaulted with payments in March 2020 and unfortunately he passed on in May 2020.

[21] The deceased had appointed Standard Executors and Trustees Ltd to be the administrators of his estate, presumably in his will. The second respondent in the main application was the official nominee of Standard Executors and Trustees Ltd and was therefore the executrix of the deceased's estate. Moshe and Onke entered into negotiations with the executrix which led to an agreement being reached that the sale agreement in respect of Debonairs would be cancelled and that the second respondent would transfer the shares of Rhweba Holdings to the second applicant.

After the said agreement was reached the first applicant entered into negotiations with the third respondent to obtain the franchise rights of Debonairs. An agreement was reached in this regard and the franchise for Debonairs was awarded to the first applicant. The first applicant entered into a lease agreement with the fourth respondent for the premises in which Debonairs is trading. Finally, an agreement was reached with the executrix for the taking over of the control and management of Debonairs with effect from 1 July 2021.

[22] It was against this background that Griffiths J granted the court order of the 21 December 2021. In his answering affidavit the respondent does not dispute or challenge any of this background which is a very significant aspect of the whole factual matrix. Furthermore, it must be noted that the name of the respondent does not feature anywhere in these undisputed facts, during the life time of the deceased and even after his unfortunate demise. The question therefore, is under what colour of right does the respondent claim any interest in the business of the deceased? How does he come into the picture in all of this? He alludes to some entitlement to be the deceased's residual heir.

[23] One would have expected to find an explanation, in his own words, in his answering affidavit. However, the respondent does not even go anywhere near trying to place himself in the picture or explain to the court the rights that he is protecting and the basis on which he makes any contentions. He starts his answering affidavit with what he calls "Answer to the applicants' version". However, his answer does not contain any explanation of who he is in relation to Debonairs or Rhweba Holdings or what his interest is. On the contrary, his answer is nothing more than his contestations regarding his appeal against the order of Griffiths J issued on 21 December 2021.

The court order issued on 21 December 2021.

[24] The central contention of the respondent is that he cannot be said to be in contempt of the said court order because it remains a subject of an appeal. It is not clear in his answering affidavit if following the dismissal of the application for leave to appeal on 23 February 2022, the respondent has since filed a petition with the SCA. His intentions to do so are however, very clear as he indicates that his attorneys in Bloemfontein, the seat of the SCA, have been instructed to file the petition. The applicants contend very strenuously that the court order is not appealable. Because it is not appealable, so goes the submission, the respondent should have complied therewith and not await the finalisation of the appeal process.

[25] These being contempt of court proceedings, I consider it necessary to first set out the elements thereof which must be established beyond reasonable doubt in order to prove the alleged contempt of the court order. In *Zuma*[2] the court explained the elements of contempt of court in the following terms:

> "As set out by the Supreme Court of Appeal in *Fakie* and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it, and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established."

[26] There is no doubt that the court order was granted against the respondent and he was served with it. In any event, the respondent is clearly aware of it and he has

[2] *Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) para 37.

failed to comply with it. I do not intend to analyse these elements and how each of them has been established. I will not do so for two reasons. First, the respondent is not contending that the court order does not exist or that he has no knowledge of it. Second, his case is built on his right to be afforded an opportunity to appeal the said order which, for that reason, remains suspended pending the appeal process, as he contends. On the other hand, the applicants contend that the provisions of section 18 (2) afford the respondent no such suspension for the reason that the court order, being a rule nisi with an interim relief, is an interlocutory order, not having the effect of a final judgment and is therefore not suspended pending appeal.

[27] It is necessary to set out the provisions of section 18 (1) and (2). Section 18 (1) reads:

> "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."

[28] What is set out in section 18 (1) is what the respondent is contending for. He goes on to argue that section 18 (2) only deals with interlocutory orders and not interim orders. In other words, on the respondent's contentions, there is a distinction between the two and that distinction places an interim order within the ambit of section 18 (1) and not section 18 (2). Section 18 (2) reads:

> "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."

[29] It will be gleaned from subsections 18 (1) and (2) that both of them refer to what is called a "decision" which is either suspended or not suspended depending on

whether it has a final effect. What is a decision? This question was authoritatively dealt with in *Zweni*[3] by Harms AJA as follows:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. … The second is the same as the oft-stated requirement that a decision, in order to quality as a judgment or order, must grant definite and distinct relief. … <u>The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability</u>."[4]

[30] It seems to me that the question, denuded of all excess verbiage and other appendages, is not whether the order of Griffiths J is interlocutory or not which is where the applicants and the respondent are contending differently. The key word used in section 18(1) and (2) is the word "decision" which explains what a judgment or order is has been explained by Harms AJA in *Zweni* as indicated above. Is the court order of the 21 December 2021 a decision? The answer to this question is not far to seek. It is to be found in the order itself. Having granted the other prayers, Griffiths J then made the following order in paragraph 3:

> "That paragraph 2.1 to 2.2 above shall operate as an interim interdict/mandamus pending the finalisation of the application."

[31] I do not understand how the court order of the 21 December 2021, framed in those terms, can be said to be a decision when the order itself makes it clear that it will only operate on an interim basis pending the finalization of the application. That application has a return date and it has not been finalized. The respondent's contention that the interim order has effects which are final in nature against him is contrary to the legal position espoused in *Zweni* and is, with respect, not only illogical

[3] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532 J – 533A.
[4] My underlining.

but is also clearly self-serving. Therefore, the order of the 21 December 2021 is not a decision as provided for in both sub-sections 18(1) and (2). Because is not a decision, it is not suspended pending appeal. The key word in both subsections is a "decision". A decision is as described by Harms AJA in *Zweni.* It must be final in effect and not susceptible of alteration by the Court of first instance. It must also be definitive of the rights of the parties and it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. That order is an interim order and the respondent accepts this. Because it is an interim order it is not definitive of the rights of the parties and is therefore not dispositive of a substantial portion of the relief claimed for the simple reason that when that application is determined, the rule nisi might very well be discharged. It is therefore not a decision as referred to in subsections 18 (1) and (2).

[32] The relief claimed in the main proceedings is largely as contained in the court order. There is no disposing partially let alone substantially of that relief in that court order. There is no contention by the respondent that the court order is somehow definitive of the rights of the parties nor could such case be made. This is so because the respondent is entitled to show cause on the return day of the rule nisi why that order should be discharged. If the court finds in his favour the rule nisi might very well be discharged. Therefore, even a cursory glance at that court order does not lend itself to any other interpretation other than that it is not a decision as provided for in both subsection (1) and (2).

Is the respondent in contempt of the impugned court order?

[33] The applicants have conceded already in their founding affidavit that this Court may, on the facts of this case, find that the respondent is not in contempt of the said court order. This is how the concession is couched:

> "69. However, the court may found (sic) that his attorneys wrongly believes (sic) that the application for leave to appeal to the Supreme Court of Appeal suspends the operation of the order of 21 December 2022 (sic) in spite of the clear provisions of section 18 (2) of the Superior Courts Act. On the other side they had indicated that they would bring an application to suspend the operation of the order.
>
> 70. There is a possibility that this Court may find that the respondents (sic) attorneys is (sic) left under a wrong impression and the respondent is putting all his trust in his attorneys and believe (sic) that he is entitled not to obey the court order until all his remedies have been exhausted."

[34] This concession is well made, for it would be simply incorrect to deprive a person of his freedom and liberty which are guaranteed in the Constitution and find him guilty of civil contempt and thus pave a way for his possible incarceration. This, in circumstances where in essence his contempt would have arisen from his legal representatives' wrong interpretation of the law. They would have therefore conveyed to him that he did not have to obey the court order of the 21 December 2021 under the mistaken understanding that it is suspended by the appeal process. The presumption of mala fide or wilfulness under such circumstances cannot be made nor can he be expected to discharge the evidentiary burden of establishing reasonable doubt. He evidently relied on the wrong legal advice of those representing him even in these proceedings where his refusal to comply is, on the papers, clearly based on the wrong notion that he does not have to comply with the court order because it is an interim court order and not an interlocutory court order. It is encumbent upon this Court to first explain to the respondent the correct legal position before he is made to face the very serious consequences of civil contempt.

After this judgment it would have been a choice for him to continue to accept wrong legal advice from his lawyers should he continue to disobey the court order of the 21 December 2021. Such conduct, if it eventuates, will indeed establish wilfulness and mala fide whose consequences will be for him to be held responsible for his continued contempt and can expect no sympathy from the courts.

[35] As explained in *Zuma* where the Constitutional Court explained the distinction between coercive and punitive orders, this judgment is also intended to assist the respondent in understanding the legal position and in giving him an opportunity to make amends and comply with the court order without facing consequences of civil contempt. However, if he continues with his refusal to comply, he will himself have opened the doors to his prison cell as he will make himself punishable in accordance with the law as that will show mala fide and wilfulness on his part. The court said in *Zuma*[5]:

> "I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are "marked and important". A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others."

[36] This is not where this matter is at the moment. It is to be hoped that now that this judgment makes it clear that the respondent, Mr Mntonga is obliged to comply

[5] *Zuma* note 2 supra para 47

with the court order of Griffiths J issued on 21 December 2021, he will comply as directed without delay. Should he fail to do so the applicants will be entitled to approach the court on an urgent basis to prove all the elements of civil contempt in which case, the court will deal with the respondent in accordance with the law on civil contempt. That will have very dire consequences for him which may include lengthy imprisonment.

Points in limine.

[37] This brings me to the points in *limine* raised by the respondent. The first one must be rejected without further ado as being unsustainable. There is no need to cite the Minister of Justice and Correctional Services where a litigant seeks an order for the imprisonment of any person for civil contempt. The Minister simply has no interest in the matter. In detaining the respondent, the Minister will be complying with his constitutional duty to do so. That he is constitutionally the person responsible for the imprisonment of offenders does not make him an interested party in civil contempt of court proceedings. He simply has no interest in whether the respondent is imprisoned or not. In this regard the respondent's legal representatives got the legal position wrong.

Are contempt of court proceedings urgent?

[38] The other point in *limine* raised by the respondent is the issue of urgency. Contempt of court proceedings are, as a general rule, urgent. The degree of urgency will always depend on the facts of each case. I have dealt with how the degree of urgency has been misapplied by the applicants to the extent that they gave the respondent effectively 25 hours or one day to file a notice to oppose and an answering affidavit. That degree of urgency was not justified and was in fact unfair to the respondent as it gave him literally no time to read the papers and seek legal

advice as explained earlier. It was, in those circumstances, understandable that the respondent could not file their papers on the time frames set by the applicants. However, none of that derogates from the general rule that contempt of court orders is an urgent matter and must be dealt with expeditiously. The submission of the respondent that "there is nothing urgent in applications to declare a person in contempt of court" misses the point.

[39] In explaining why it would be inappropriate to deal with contempt of court proceedings and treat them like any other motion court proceedings and not on an urgent basis, I must again make reference to the legal position as explained in *Zuma*[6] in which Khampepe ADCJ, as she then was, writing for the majority said:

> "Not only is Mr Zuma's behaviour so outlandish as to warrant a disposal of ordinary procedure, but it is becoming increasingly evident that the damage being caused by his ongoing assaults on the integrity of the judicial process cannot be cured by an order down the line. It must be stopped now. Indeed, if we do not intervene immediately to send a clear message to the public that this conduct stands to be rebuked in the strongest of terms, there is a real and imminent risk that a mockery will be made of this Court and the judicial process in the eyes of the public. The vigour with which Mr Zuma is peddling his disdain of this Court and the judicial process carries the further risk that he will inspire or incite others to similarly defy this Court, the judicial process and the rule of law.
>
> It is not insignificant that his assaults and his alleged contempt are ongoing and relentless, as this underscores urgency. In *Protea Holdings*, the Court said that "if there was no continuing contempt of court … then the hearing of this application as a matter of urgency in the Court vacation would not be justified". It held that –
>
> > 'the element of urgency would be satisfied if in fact it was shown that [the] respondents were continuing to disregard the order …. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.'
>
> A similar point was made in *Victoria Park Ratepayers' Association*, in which it was stated that -

[6] *Zuma* note 2 supra paras 30 – 33.

> '[c]ontempt of court has obvious implications for the effectiveness and legitimacy of the legal system and the judicial arm of government. There is thus a public interest element in each and every case in which it is alleged that a party has wilfully and in bad faith ignored or otherwise failed to comply with a court order. This added element provides to every such case an element of urgency.'

In that case, the Court went further to state that –

> 'it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency. This, in my view, is the starting point: all matters in which an ongoing contempt of an order is brought to the attention of a court must be dealt with as expeditiously as the circumstances and the dictates of fairness allow.'[7]

[40] In light of this legal position as expounded at different times and in different matters in our courts and confirmed recently in *Zuma*, the submission that this matter should be struck off the urgent roll is unsustainable. To do so would not only be incongruous with the above stated legal position. It would also lead, inevitably, to the wanton disregard of court orders until some lose purpose and meaning, thus causing chaos and the unravelling of our constitutional framework which is based on the rule of law. Compliance with court orders is an integral part of the rule of law and a highly crucial one. In all these circumstances the alternative prayer in the notice of motion must succeed. The order of Griffiths J issued on 21 December 2021 is not suspended pending any appeal processes. It must be complied with as soon as possible.

The costs.

[7] My underlining

[41] A punitive costs order which the applicants have asked for against the respondent would not be appropriate where it is accepted that he might very well be acting on the wrong legal advice of his legal representatives. In the exercise of my discretion an ordinary order for costs on a scale as between party and party is the most appropriate order for costs in the circumstances.

The result.

[42] In the result the following order will issue:

1. The respondent, Mr Lubabalo Brown Mtonga is directed to immediately comply with the court order of Griffiths J issued on 21 December 2021 and must do so not later than 3 days from the date of service of this court order.

2. This court order must be served together with the court order referred to in 1 above which was issued on 21 December 2021 upon the respondent and upon the manager or person in charge at Debonairs Pizza, Mthatha Plaza or any responsible employee thereat.

3. The respondent is ordered to pay the costs of this application on a scale as between party and party.

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M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the applicants: D.C. BOTMA

Instructed by: GRAVETT SCHOEMAN INC.

c/o BNI ATTORNEYS

MTHATHA

Counsel for the respondent: S.G. ZWANE

Instructed by: MNDIYATA B.D. ATTORNEYS

c/o MAQAMBAYI ATTORNEYS

MTHATHA

Date Heard : 22 March 2022

Date Delivered : 03 May 2022