**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **YES**

Date: 28 February 2024

Signature: _____

**CASE NO**: 2021/58758

**DATE: 28 February 2024**

In the matter between:

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| **AFHCO HOLDINGS (PTY) LIMITED** | Applicant |
| and | |
| **CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY** | First Respondent |
| **CITY POWER JOHANNESBURG (PTY) LIMITED** | Second Respondent |
| **JOHANNESBURG WATER (PTY) LIMITED** | Third Respondent |
| **FLOYD BRINK** | Fourth Respondent |
| **BRYNE MADUKA** | Fifth Respondent |

**Coram:** M Van Nieuwenhuizen, AJ

**Heard on**: 4 December 2023

**Delivered: 28 February 2024**

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**JUDGMENT**

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**M VAN NIEUWENHUIZEN, AJ**:

[1] This is an application brought by the applicants (the respondents in the main application) for leave to appeal to the Full Bench of the Gauteng Division, Johannesburg, alternatively to the Supreme Court of Appeal against the judgment of this Court delivered on the 18th of May 2023.[1]

[2] To avoid confusion, I shall refer to the parties as they are cited in the rectification and contempt applications.[2]

[3] The factual matrix has been dealt with in my reasons for judgment requested by the respondents.[3]

[4] The application for leave to appeal was initially premised on the following two grounds, namely that:

[4.1] At the time of the hearing of the contempt application, the respondents had complied with the rectification order, and had presented evidence thereof to the Court;

[4.2] Had I had regard to this evidence, I would have found that the respondents were not in contempt of Court for failing to comply with the rectification order.[4]

[5] Following my reasons, the respondents delivered supplementary grounds for leave to appeal.[5]

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1 Application for leave to appeal, CaseLines 059.1 (059-1 to 059-11); Judgment, CaseLines 061-1 to 061-31

2 In their heads of argument, the parties have also referred to the parties as they were cited in the rectification and contempt applications

3 Judgment, CaseLines 061-1 to 061-31

4 CaseLines, 059-1 to 059-11

5 CaseLines, 058-1 to 058-3 (request for reasons) and CaseLines, 059, Item 3, 059-13 to 059-19 for the supplementary grounds

[6] The supplementary grounds can be summarised as follows:

[6.1] I misdirected myself in joining the fifth respondent, in his personal capacity, to the contempt application, without affording the fifth respondent the opportunity to answer to the contempt application thus offending the principle of *audi alteram partem*;

[6.2] I misdirected myself by erroneously granting orders against the fifth respondent and not against the fourth respondent, who the respondents now allege was the Municipal Manager at the time and not the fifth respondent;

[6.3] The order granted by me in sub-paragraph 2.5 of the contempt order amounts to anticipatory contempt;

[6.4] I misdirected myself in finding the respondents to be in contempt of Court, in circumstances where the Court had been placed in possession of a compliance notice;

[6.5] I erred in my application of the law more particularly when it comes to the wilful and *mala fide* conduct on the part of the respondents.

**REQUIREMENTS FOR AN APPLICATION FOR LEAVE TO APPEAL**

[7] Applications for leave to appeal are regulated by section 17 of the Superior Courts Act.[6] Section 17(1) of the Act reads as follows:

> *"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a)(i) the appeal would have a reasonable prospect of*

[6] Act 10 of 2013 (as amended)

*success; or*

*(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

*(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a);*

*(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

[8] The bar for the granting of leave to appeal has been raised by this section. The Court hearing the application must be satisfied that the appeal would have a reasonable prospect of success.[7] The use by the legislature of the word *"would"* indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. The use by the legislature of the word *"only"* in section 17(1) of the Act is a further indication of a more stringent test.[8]

[9] Leave to appeal should be granted only when there is a sound and rational basis for doing so.[9]

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[7] ***MEC for Health, Eastern Cape v Mkhita*** 2016 ZASCA 176 at para 17; ***The Mont Cheveaux Trust (IT2012/28) v Tina Goosen*** (Unreported) LCC Case No. 14R/2014 dated 3 November 2014, cited with approval by the Full Court in the ***Acting National Director of Public Prosecutions v Democratic Alliance*** (Unreported), GP Case No. 19577/09 dated 24 June 2016 at para 25, by the Full Court in ***Fair Trade Independent Tobacco Association v President of the Republic of South Africa*** (Unreported), GP Case No. 21688/2020 dated 24 July 2020 at para 4 by the Full Court in ***Magashule v Ramaphosa*** (Unreported), GJ Case No. 2021/2379 dated 13 September 2021 at para 6; ***Industrius D.O.O. v IDS Industry Services and Plant Construction South Africa (Pty) Ltd*** (Unreported), GJ Case No. 15862/2020 dated 13 October 2021 at para 6 and a host of other cases

[8] ***Matoto v Free State Gambling and Liquor Authority*** (Unreported), FB Case No. 4629/2015 dated 8 June 2017 at para 5

[10] The principles that emerge from ***Four Wheel Drive Accessory Distributions CC v Rattan NO***[10] and ***Independent Examinations Board v Umalusi***[11] require that the Court tests the grounds on which leave to appeal is sought against the facts of the case and the applicable legal principles to ascertain whether an Appeal Court *"would"* interfere in the decision against which leave to appeal is sought.[12]

**THE RESPONDENTS' INITIAL GROUNDS FOR LEAVE TO APPEAL**

[11] The respondents contend that at the time of the hearing of the contempt application, the respondents had complied with the rectification order and had presented evidence thereof to the Court and in turn had I had regard to this evidence I would have found that the respondents were not in contempt of Court.

[12] The respondents conceded in Court on the date of the hearing and also at the hearing of the application for leave to appeal that there was *"not full compliance"* with the Court order of Vorster AJ. It was further argued by the respondents in Court at the hearing of the matter and in the application for leave to appeal that the respondents had taken *"some steps"*[13]and therefore the respondents cannot be found to be in contempt of the order of Vorster AJ.[14] The respondents contend that *"steps were taken"* as opposed to *"no steps taken"* as the respondents alleges the

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[9] ***MEC for Health, Eastern Cape v Mkhita*** (*supra*); ***Four Wheel Drive Accessory Distributions CC v Rattan NO*** 2019 (3) SA 451 (SCA) at para 34; ***Van den Heever v RC Christie Inc.*** (Unreported), GJ Case No. 21746/2019 dated 5 March 2023 at para 3

[10] *Ibid*

[11] ***Independent Examinations Board v Umalusi*** (Unreported), GP Case No. 83440/2019 dated 7 January 2021 at para 224

[12] ***Van den Heever v RC Christie Inc.*** (Unreported), GJ Case No. 21746/2019 dated 5 March 2023 at para 3

[13] As opposed to full compliance with the Court order of Vorster AJ after more than a year.

[14] I have fully dealt with these contentions in my reasons for judgment

applicant contended.[15]

[13] At the hearing of the application I refused a request from Mr Sithole for the matter to be removed from the roll. It was argued on behalf of the respondents that the respondents *"will comply"* in due course. I also refused Mr Sithole's application that the matter be postponed (in the alternative) for the respondents to show that there had been compliance with the Court order (or steps taken to comply with the Court order).

[14] I found that the document under the heading *"first respondent's notice of compliance"*[16] which reads *"Billing account adjustment"* clearly does not constitute *"an accurate and rectified municipal statement"* in terms of paragraph 1.6 of Vorster AJ's order."[17]

[15] I further found that having regard to my findings as set out in paragraph 7 of my judgment a further postponement for the respondents to attempt to show compliance with the order of Vorster AJ would not assist the respondents. Furthermore, Wanless AJ (as he then was) has by agreement between the parties ordered that *"there shall be no further postponements regarding the contempt application"*.[18]

[16] In terms of the rectification order the first to third respondents were ordered to rectify the Municipal account and to furnish the applicant with a re-billed statement within twenty days of service of that order.[19] The *"compliance notice"* does not evidence that this was done.[20] Furthermore e-mail correspondence addressed by the respondents'

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[15] In its heads of argument the respondents however state that *"The applicant in the present case, accepted that the respondents have taken steps and also delivered a notice of compliance, it was not for the Court on its own to make up facts which were not provided in an affidavit and find the respondents in contempt of Court"*

[16] Dated 17th May 2023 but uploaded to CaseLines on the 18th of May 2023, CaseLines 053-1

[17] Para 37 of Judgment, CaseLines, 061-17

[18] Para 38 of Judgment, CaseLines, 061-17

[19] The order of Vorster AJ dated 14 June 2022

attorney of record to the applicant's attorney of record on the 17th of May 2023, being the day preceding the hearing of the contempt application and uploaded to CaseLines on behalf of the applicant as proof of its denial that the rectification order was complied with, evidences that the rectification had not as at date prior to the hearing or on the day of the hearing been complied with.[21] The e-mail further evidences that the first to third respondents had not complied with the rectification order.[22]

[17] On the respondents' own version the credits on the account had not been passed as at the date of the hearing of the application and neither had paragraph 1.6 of Vorster AJ's order been complied with. [23]

[18] The contempt order as sought by the applicant and granted by me provided the first to third respondents yet a further ten days to comply with the rectification order. The first to third respondents were therefore provided a further opportunity in terms of the contempt order sought and granted until the 28th of May 2023 to comply with the rectification order. This was after Wanless AJ afforded the respondents a final indulgence until the 6th of April 2023.[24]

[19] Mr Sithole at the hearing argued that I must find that the parties are in the process of compliance and that they will comply, but a gun cannot be held to his client(s) head(s) to say that they are in contempt and that they have to comply with Vorster AJ's order within ten days of granting of my order. The aforesaid further evidences the respondents'

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[20] The compliance notice that was presented to me at the hearing of the application at CaseLines 053

[21] CaseLines, pp 054-1 and 054-2

[22] *"We are advised that the journals have been approved and pending for capturing.*

*Our client instructed that we request that parties prepare an order by agreement confirming that the respondents are afforded until 24 May 2023 to pass credits on the account …"*

[23] The respondents conceded part-compliance in their argument at the hearing of the application and the application for leave to appeal

[24] Court order of Wanless AJ, CaseLines 047-2

contemptuous disregard for Court orders, notwithstanding the respondents' attorney of record requesting until the 24th of May 2023 to comply with the rectification order.

[20] On the day of the hearing of the contempt application counsel for the respondents submitted that the first to third respondents would not as a matter of course comply with the rectification order within ten days. The aforesaid furthermore illustrates the respondents' *mala fide* and deliberate contemptuous disregard for Court orders.

[21] At the application for leave to appeal Mr Sithole argued that the Municipality has indicated during the hearing of the matter *"that a proper invoice will be delivered on the 31st of May 2023 as the journals had been approved, evidence which was rejected by the Court"*. It was further argued by Mr Sithole that the tax invoice was indeed produced.[25] This Court notes that the tax invoice was uploaded *ex post facto* to CaseLines on the 31st May 2023 (and dated the 30th of May 2023).[26] As the document headed *"rebilled invoice"* dated 30 May 2023[27] together with the respondents' compliance (the respondents' second compliance notice)[28] and the compliance certificate[29] was not before me at the time of the hearing of the application, I cannot take cognisance of this.[30]

[22] The respondents' contentions in this regard furthermore illustrates the respondents' blatant disregard for orders of this Court. The respondents suggested that they shall impose their own time limits and not adhere to time limits imposed by this Court.

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[25] CaseLines, 066-4, respondents' heads of argument, para 12

[26] Tax invoice (re-billed invoice) dated 30 May 2023; CaseLines, 057-3 (the respondents' *"compliance notice"* – the *"second compliance notice"*)

[27] CaseLines, 057-2

[28] CaseLines, 057-1

[29] CaseLines, 057-3

[30] At the time of the hearing of the application there was non-compliance with the order of Vorster AJ

[23] In paragraph 10 of the respondents' heads of argument in the application for leave to appeal the respondents furthermore contend as follows:

> *"On the 18th of May 2023, the respondents were represented and the Court was presented with evidence which was convey* (sic) *to the applicant in the form of a signed and approved journal which had to be translated into a tax invoice which shows that the applicant has partially complied* (emphasis added) *with the Court order of Vorster AJ Court order and it was indicated that the journal will be translated into a tax invoice by the end of the month."*

[24] In arguing the application for leave to appeal Mr Sithole referred me to a document headed *"rebilled invoice"* dated 30 May 2023 under the heading *"respondents' compliance notice"*.[31] From the respondents' contentions in their heads of argument this had been done after the date of hearing and accordingly this Court cannot take cognisance of these submissions as I was called upon to adjudicate the matter as it stood before me on the 18th of May 2023.[32] It appears that the proposed appeal may have become moot.[33]

**SUPPLEMENTARY GROUNDS OF APPEAL**

**First Ground**

[25] The respondents contend that I misdirected myself in joining the fifth respondent, in his personal capacity, to the contempt application without affording the fifth respondent the opportunity to answer to the contempt

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[31] CaseLines, 057

[32] I am not obliged to take cognisance of acts and/or steps taken by the Municipality *ex post facto*. This was not the evidence before me at the date of the hearing.

[33] The initial application for leave to appeal having been delivered/uploaded on the 7th of June 2023 and whereas the rebilled invoice is dated 30 May 2023. ***John Walker Pools v Consolidated Aone Trade & Investment 6 (Pty) Ltd (In Liquidation)*** 2018 (4) SA 433 (SCA)

application and, in turn, making an adverse costs order against him. No adverse or any costs order was made against the fifth respondent in the order I granted.[34]

[26] The fifth respondent duly represented on the 22nd of March 2023 consented together with the other respondents to an order:

[26.1] that the first to fifth respondents are afforded a final indulgence until the **6th of April 2023**, to comply with Vorster AJ's order dated 14 June 2022 and granted under the abovementioned case number;

[26.2] no further postponements will be afforded to the first to fifth respondents with regards to the contempt of Court application instituted under the aforementioned case number;

[26.3] ordering the first to fifth respondents to pay the wasted costs occasioned by the postponement on the attorney and client scale, jointly and severally and *in solidum* the one paying, the other to be absolved.[35]

[27] Paragraph 3 of my order (contempt order) provides the first to third respondents with yet a further opportunity to comply with Vorster AJ's order.[36] Paragraph 4 of my order orders the fifth respondent to take all steps necessary to ensure such compliance.[37]

[28] Paragraph 5 of my order furthermore orders that *"in the event of the fifth respondent failing to take these steps he is ordered to appear before*

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[34] The first, second and third respondents were ordered to pay the costs of the application on an attorney and own client scale, jointly and severally; CaseLines 055-1, signed Court order dated 18 May 2023

[35] Paras 3-5, Court Order of Wanless J dated 22 March 2023, CaseLines 047-2

[36] Para 3, Court Order dated 18 May 2023, CaseLines, 055-2

[37] Para 4, CaseLines 055-2

*Court to explain why he should not be found to be in contempt of Court"*.[38]

[29] I agree with the applicant's counsel's contention that no finding of contempt was sought or made in respect of the fifth respondent and he was at no stage deprived of an opportunity to be heard. My order in fact provides for the fifth respondent to be provided with that very opportunity.

**Second Ground**

[30] The respondents for the first time in the application for leave to appeal raised a new *"issue/defence"* namely that at the time I granted the order against the fifth respondent, the fourth respondent was the Municipal Manager (as opposed to the fifth respondent). According to the respondents I erroneously granted an order against the fifth respondent, whereas I should have granted an order against the fourth respondent. The respondents contend that the fifth respondent was not the Municipal Manager at the time I granted my order, but the fourth respondent.

[31] As stated, these are new allegations and were not raised at the time when I granted my order on the 18th of May 2023 and neither were they raised at the time of the hearing before Wanless AJ. In fact not only were they not raised before Wanless AJ but the fifth respondent consented to an order granted by Wanless AJ on the 22nd of March 2023[39] and to orders against himself.

[32] The only issue that was raised by the respondents at the time of the hearing on the 18th of May 2023 was that there *"was compliance"* of Vorster AJ's order in that *"steps had been taken"* and that the respondents sought a postponement for an opportunity to place

[38] CaseLines, 055-3

[39] CaseLines, 047-2

evidence before Court to show that there had been compliance with the order of Vorster AJ. The only version before me was the applicant's version that the fifth respondent was the Municipal Manager at the time. There was no allegation before me denying the aforesaid and far less has any evidence been placed before me refuting the aforesaid by the respondents. Again I was called upon to determine the matter on the evidence before me at the time of the hearing of the application. A postponement was also not sought by the respondents on the 18th of May 2023 to place evidence before Court that the fourth respondent was the Municipal Manager at the time (and not the fifth respondent).

[33] Mr Sithole argued that resolutions taken by the Municipality are tantamount to legislation and that judicial cognisance ought to have been taken thereof. In support of this contention he referred me to the matter of ***DA v City of Johannesburg Metropolitan Municipality and Others***,[40] which judgment allegedly *"proves"* that the fourth respondent and not the fifth respondent was the Municipal Manager at the time when my order was granted and that judicial cognisance ought to have been taken thereof at the time of the hearing of the application. I disagree with the contention that resolutions taken by a Municipality are tantamount to legislation and that judicial cognisance ought to have been taken thereof.

[34] In an application for leave to appeal (or appeal) a party is bound by factual concessions and may not present argument in conflict with facts which were common cause in the Court *a quo* or in conflict with the parties' common understanding as to what exactly the issues were in the Court *a quo*.[41] Although it may be open to a party to raise a point of law

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[40] An Unreported Judgment of the Gauteng Local Division, Johannesburg dated **27 November 2023** under case number 2023/041913, CaseLines, 063-3

[41] ***AJ Shepherd (Edms) Bpk v Santam Versekeringsmaatskappy Bpk*** 1985 (1) SA 399 (A) at 413D-415G. Also see ***Jurgens Eiendomsagente v Share*** 1990 (4) SA 664 (A); ***Kerksay Investments (Pty) Ltd v Randburg Town Council*** 1997 (1) SA 511 (T); ***Filta-Matrix (Pty) Ltd v Freudenberg*** 1998 (1) SA 606 (SCA); ***F&I Advisors (Edms) Bpk v Eerste Nasionale Bank van Suidelike Afrika Bpk*** 1999 (1) SA 515 (SCA) and ***National Union of Metal Workers of South Africa v Driveline*** 2000 (4) SA 645 (LAC)

which involves no unfairness to the other party and raise new factual issues, a point raised for the first time on appeal on factual considerations not fully explored in a Court below, should not be allowed.[42] In other words, when a party seeks to build a case on a foundation not laid in the Court *a quo*, he should be precluded from doing so.[43]

**Third Ground**

[35] The orders that I granted in sub-paragraph 2.5 (sic)[44] amount to an anticipatory contempt of the first to third respondents in circumstances where there was no evidence in support of the aforesaid orders.

[36] Insofar as the respondents contend that the order granted against the first to third respondents (no reference in this ground) amounts to an anticipatory order, I do not agree.

[37] Paragraph 2 of my order provides for the first to third respondents to be found to be in contempt and paragraph 3 thereof furnishes them with yet a further opportunity to remedy their contempt.[45]

[38] Insofar as the respondents contend that the order granted against the fifth respondent amounts to anticipatory contempt, this is also not the position.[46]

**Fourth Ground**

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[42] ***Naude v Fraser*** 1998 (4) SA 539 (SCA) at 558A-E; ***Ras and Others NNO v Van der Meulen*** 2011 (4) SA 17 (SCA) at 22C

[43] ***Administrator, Transvaal v Theletsane*** 1991 (2) SA 192 (A) at 195F to 196E and 200G; ***Ras and Others NNO v Van der Meulen*** *supra* 2011 (4) SA 17 (SCA) at 22B-C

[44] There is no such paragraph

[45] CaseLines, 055-2

[46] For the reasons I have already dealt with

[39] The respondents contend that I misdirected myself in finding the respondents to be in contempt of Court in circumstances where I had been placed in possession of a *"compliance notice"*.[47]

[40] This ground is a repetition of the initial grounds of appeal and I have already dealt with this ground.

**Fifth Ground**

[41] The respondents assert that I erred in my application of the law more so when it comes to wilful and *mala fide* conduct on the part of the respondents. In so doing the respondents placed reliance on the decisions of ***Le Hanie and Others v Glasson and Others***[48] and ***MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others.***[49] I have dealt with the respondents' wilful and *mala fide* contempt in my reasons for judgment and hereinabove. In the ***Le Hanie*** matter[50] the SCA again set out the requirements necessary to hold a party in contempt of Court with reference to the ***Fakie***[51], ***Pheko***[52], ***Matjhabeng***[53] and ***Zuma***[54] matters.

[42] In ***Secretariate, Judicial Commission of Enquiry into Allegations of State Capture v Zuma***,[55] the Constitutional Court held that:

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47 Referring to the first compliance notice, CaseLines, 055-3

48 ***Le Hanie and Others v Glasson and Others*** 214/2121 (2022) ZASCA 59 (22 April 2022)

49 ***MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others*** 2013 (6) SA 582 (CC)

50 *Supra*

51 ***Fakie NO v CCII Systems (Pty) Ltd*** 2006 ZASCA 52 2006 (4) SA 326 (SCA) and ***Ph***

52 ***Pheko and Others v Ekurhuleni City*** 2015 ZACC 10 10 2015 (5) SA 600 (CC)

53 ***Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*** 2017 ZACC 35 2018 (1) SA 1 (CC)

54 ***Secretary Judicial Commission of Enquiry into Allegations of State Capture v Zuma and Others*** 2021 ZACC 18 (2) 2021 (5) SA 327 (CC), para 37

*"[37] 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."*[56]

[43] Regarding the requirements of contempt of Court the burden of proof is further dealt with in the ***Le Hanie*** matter[57]

*"[26] In Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma, the Constitutional Court held that:*

*'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.'*

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[55] *Supra*

[56] Para 26 ***Le Hanie*** judgment *supra*

[57] Paras 26-32, ***Le Hanie*** judgment *supra*

*[27]* *This Court, in Fakie NO v CCII Systems (Pty) Ltd, set out the requirements necessary to hold a party in contempt of court. Fakie was cited with approval in Pheko v Ekurhuleni City, Matjhabeng Local Municipality v Eskom Holdings Ltd, and in Zuma.*

*[28]* *In Fakie, Cameron JA held that it is a crime to intentionally and unlawfully disobey a court order. It amounts to violation of the dignity, repute or authority of a court or judicial officer. He dealt with the standard of proof to be applied where committal of the contemnor was sought solely to enforce compliance with the court order. He held that the civil standard (a preponderance of probabilities) for a finding of contempt where committal is the sanction (whether in its own right or as a coercive mechanism to enforce compliance with the court order) is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt.*

*[29]* *In Fakie, Cameron JA summarised the law on contempt of court as follows:*

> *'(a)* *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
>
> *(b)* *The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.*
>
> *(c)* *In particular, the applicant must prove the requisites*

*of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*

*(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*

*(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'*

*[30] In Matjhabeng, the Constitutional Court summed up the position in regard to the standard of proof required, as follows:*

*'Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand,*

*there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.'*

*[31] In dealing with the requirement of a deliberate and mala fide non-compliance with an order, to found a contempt order, Cameron JA, in Fakie, stated that:*

*'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).'*

*[32] The Constitutional Court in Zuma, cited with approval the dictum in Consolidated Fish Distributors (Pty) Ltd v Zive, which defined contempt of court as 'the deliberate, intentional (ie wilful), disobedience of an order granted by a court of competent jurisdiction'."*

[44] The ***Le Hanie*** decision is distinguishable from the facts *in casu inter alia* insofar as the respondents in that decision (directors of an HOA who were not cited in terms of the initial compelling order) demonstrated, under oath, substantial steps taken by them to comply with the compelling order granted in that matter[58] in circumstances where it was

[58] In that matter the Court order was against the HLA and not the directors individually, para 38, ***Le Hanie*** judgment

not apparent from the order what steps had to be taken. *In casu* the order granted by Vorster AJ clearly stipulated the steps to have been taken by the respondents and the time period.

[45] A further distinguishable feature of this matter from the ***Le Hanie*** judgment is that in the ***Le Hanie*** matter it was also relevant that no time period was specified by the respondents in the main application and no time limit was set by the Judge for compliance with the order. Thus, as the appellants contended, the period from the date the Court order was granted until the contempt application was launched on 18 September 2019, was not an unreasonable period of time for the HOA to have taken in its attempts to comply with the Court order.[59]

**REASONABLE PROSPECT OF SUCCESS**

[46] Having regard to the aforementioned, I am of the opinion that the appeal would not have a reasonable prospect of success.[60] I am not persuaded that another Court would come to a different conclusion.

[47] It follows therefore that the application for leave to appeal must fail.

**COSTS**

[48] An attorney and own client costs order is sought against the respondents. I agree with the applicant's contention that same is justified in circumstances where the applicant has attempted to achieve rectification for many years as can be seen from the plethora of correspondence before the Court. The respondents have throughout

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[59] Para 39, ***Le Hanie*** judgment. The Court in the ***Le Hanie*** matter furthermore found that *"The HOA was at all times advised by the attorney how it should deal with Mr Da Silva, so as to ensure compliance with the Court order. Thus, even if there was non-compliance with the Court order, it was not wilful and mala fide. There is thus no factual or legal basis to hold the appellants in contempt of the Court order."*, para 33 of the ***Le Hanie*** matter which is also distinguishable on this basis from the matter *in casu*

[60] ***MEC for Health, Eastern Cape v Mkhita*** *supra* at para 17

shown a contemptuous disregard and lackadaisical approach to orders this Court. The respondents have been found to be in *mala fide* and deliberate contempt of the order of Vorster AJ.

**ORDER**

[49] The following order is made:

[49.1] The application for leave to appeal is dismissed.

[49.2] The first to third respondents (in the main application) are ordered to pay the costs on an attorney client scale.

**M VAN NIEUWENHUIZEN**
*Acting Judge of the High Court of South Africa*
*Gauteng Division, Johannesburg*

**Delivered**: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 28 February 2024.

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|---|---|
| HEARD ON: | 4 December 2023 |
| DATE OF JUDGMENT: | 28 February 2024 |
| FOR APPLICANTS (IN THE APPLICATION FOR LEAVE TO APPEAL – THE RESPONDENTS IN THE MAIN APPLICATION): | Advocate E Sithole<br>E-mail: |
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