



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

**DELETE WHICHEVER IS NOT APPLICABLE**

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**
- (4) Date: 17 January 2024

Signature: \_\_\_\_\_

**CASE NO. 2023-077633**

In the matter between:

**MARIANA HATTINGH**

First Applicant

**JOHANNES PHILLIPUS BOTHA N.O.**

Second Applicant

and

**JOHANNES HENDRIK HATTINGH**

Respondent

First

**CENTURION REAL ESTATE CC**

Respondent

Second

## JUDGMENT

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**NYATHI J**

### **A. INTRODUCTION**

- [1] The matter is brought before this court on an urgent basis. The first applicant is a co-member of the second respondent. The second respondent is hereinafter referred to as the “corporation”. The second applicant is the administrator of the corporation. The first respondent is also a co-member of the corporation.
- [2] This is an application to declare the first respondent in contempt of two court orders dated 29 June 2023 and 26 July 2023 respectively, with an order to commit the respondent to prison with conditions attached.
- [3] The first court order was handed down by Acting Judge Ally on 29 June 2023 under case number 2023-60418, and the second order of 26 July 2023 was handed down under case number 2023-070399 by Acting Judge Lenyai (as she then was).
- [4] The respondent opposes this application.

## **B. APPLICANT'S SUBMISSIONS**

- [5] The applicants aver that the first respondent has made the corporation's operations hostile, volatile and unbearable due to his delinquent and erratic behaviour.
- [6] The first respondent has blatantly disregarded two court orders and has shown no desire to abide with the orders. He has attempted, on multiple occasions, to disrupt the operations of the corporation by making false and baseless accusation against the applicants.
- [7] The first respondent makes business decisions on his own without any prior consultation with, and/or consent of the first and second applicants. Despite the order granted on 29 June 2023, the first respondent does not acknowledge the appointment of the second applicant as administrator of the corporation and has made it expressly clear that it is his desire for the appointment of the second respondent to be terminated.
- [8] The first respondent has made it quite impossible for the second applicant to perform any of his functions since his appointment. The first respondent has unduly dispossessed the applicants of control and access to the operations of the corporation. Moreover, there has been a plethora of events stemming from the financial transactions of the corporation, one of which should be noted being the first respondent acting *mala fide*, reporting an authorised transaction

as one which is unauthorised, from the business account of the corporation, with the intention to have the account suspended from any further transactions.

[9] Furthermore, the respondent has made unauthorised transactions in the name of the corporation. The applicants aver that the first respondent has prohibited them from accessing the corporation's **Afrihost** domain, claiming that it belongs to him personally, and not the corporation.

[10] The applicants have been to court on two occasions seeking to have the first respondent to conduct himself within lawful bounds, all in vain. The applicants now seek an order holding the first respondent to be in contempt of court.

[11] The respondent denies being in contempt of the court orders against him. He contends that he has been fully compliant with the first and the second court orders.

[12] The respondent instead challenges the locus *standi* of the second applicant in this application and alleges that there is no urgency in this application. The respondent avers that the second applicant has no standing to bring this application and the urgency is self-created.

[13] The respondent states that the second applicant's powers and functions are confined to him resolving disputes and/or disagreements between the respondent and the first applicant. He argues that the second respondent has no further powers beyond that.

[14] It is important to note that at the time this application was brought, a notice for request for written reasons had been delivered to the Honourable Madam Justice Lenyai's chambers. The respondent submits that it is his intention to bring an application for leave to appeal (against the two court orders referred to above) once he is in possession of the reasons.

## C. LEGAL PRINCIPLES

### Contempt of court

[15] The question before the court is whether it has been established that the non-compliance with the court orders was wilful, deliberate and *mala fide*. The applicants bear the onus of proving that the respondent has acted *mala fide* in not complying with the court order.<sup>1</sup>

[16] In the matter of *Municipal Manager OR Tambo District Municipality and Another v Ndabeni* [2022] ZACC, the court held that a order of court is legally

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<sup>1</sup> *Snyders and Others v De Jager* [2016] JOL 37134 (CC) at para 7.

binding and enforceable until such time it is set aside by competent court.<sup>2</sup> The respondent is expected to have complied with orders against him. If the respondent is disgruntled with the outcomes of the court proceedings, there are measures put in place to aid him in challenging the outcomes. In the words of Cameron JA:

*“It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.”*<sup>3</sup>

[17] In *Fakie NO v CCII Systems (Pty) Ltd*<sup>4</sup> the Constitutional Court held that the non-compliance must be wilful, deliberate and *mala fide*. Mere disregard of the order is insufficient to make out a case. In the matter of *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*<sup>5</sup> the Supreme Court of Appeal made the following remarks:

*“The question which then arises is whether the appellant proved that the Commissioner’s failure to comply with the [consent order] amounted to civil contempt of court, beyond a reasonable doubt to secure his committal*

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<sup>2</sup> Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni [2022] ZACC at 3 para 24.

<sup>3</sup> *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52 at para 6.

<sup>4</sup> *Supra* note 3.

<sup>5</sup> 2018 (1) SA 1 (CC).

*to prison. An applicant for this type of relief must prove (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. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide. Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him.”<sup>6</sup>*

[18] It should come as no surprise that civil proceedings in contempt of court matters have some elements of criminal law. The full court in the matter of *Burchell v Burchell*<sup>7</sup> made it abundantly clear that contempt of court applications feature in both criminal and civil proceedings and are thus interlinked in matters of such nature. The court held:

*“Civil contempt proceedings have always had a dual nature and the discussion thus far has focused only on its criminal aspect. In my judgment the perceived difficulties associated with its continued treatment as a criminal offence should not prevent attention being given also to its purely civil character and the possible development of the common law in that regard. In addition to its retention as a criminal offence, albeit with a stricter standard of proof, the potential effectiveness of issuing a (civil) declaratory order that an offending litigant is in contempt of a court order should not be underestimated. Such a*

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<sup>6</sup> 2018 (1) SA 1 (CC) at para 34.

<sup>7</sup> [2005] ZAECHC 35.

*declaration would have as its purpose to uphold the rule of law too, but even if shorn of its criminal sanction or punishment there is, in my view, no reason why other civil sanctions may not attach to such an order.”*<sup>8</sup>

## **Urgency**

[19] Notshe AJ in the matter of *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*<sup>9</sup> reminds us that urgency is not for the taking<sup>10</sup>. The applicant should make out a case for urgency so that there is no doubt in the court’s mind that the matter at hand deserves to be heard urgently, because were this application to be heard under normal time frames in terms of the Uniform Rules of Court, the applicants would be severely prejudiced. The applicants would also not derive adequate recourse in due course.

[20] In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*,<sup>11</sup> Coetzee J bemoaned the frequency (even then, in the Seventies) with which Rule 6 (12) was prone to abuse by applicants and practitioners in setting matters down as urgent while seeking to gain priority ahead of more deserving matters.

## **Are contempt of court matters urgent?**

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<sup>8</sup> [2005] ZAECHC 35 at para 27.

<sup>9</sup> [2011] ZAGPJHC 196.

<sup>10</sup> *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* at para 6.

<sup>11</sup> *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W).



[21] Counsel for the applicant submitted that contempt of court matters are inherently urgent because they go to the dignity of the court.

[22] In the matter of *Siyakhulisa Trading Enterprise (Pty) Ltd v Glencore Operations South Africa (Pty) Ltd and Another*<sup>12</sup> Ford AJ states the following:

*“It is sometimes said that contempt of court proceedings are inherently urgent. I do not think that can be true as a general proposition. I accept that the enforcement of a court order may well qualify as urgent, in situations where time is of the essence, but it seems to me that contempt proceedings entail the exercise of powers which often demand the kind of careful and lengthy consideration which is generally incompatible with urgent proceedings. For example, it cannot be sound judicial policy to commit someone to prison, even where the committal is suspended, or to impose a fine, on an urgent basis, simply because that might be the only way to enforce a court order. There must, in addition, be some other feature of the case that renders it essential that the court order be instantly enforced, such that the penalties associated with contempt require immediate imposition.”*<sup>13</sup>

### **Section 49 of the Close Corporations Act 69 of 1984**

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<sup>12</sup> [2023] ZAGPJHC 1099.

<sup>13</sup> *Siyakhulisa Trading Enterprise (Pty) Ltd v Glencore Operations South Africa (Pty) Ltd and Another* [2023] ZAGPJHC 1099 at para 7.

[23] Section 49 of the CC Act empowers any member of a CC to apply for a court order against any other member of the CC in the event of any such member engaging in unfairly prejudicial, unjust or inequitable conduct against the interests or affairs of the corporation.<sup>14</sup>

[24] In the instant case the applicant alleges that the first respondent is the sole cause of the court applications, because he does not accept the authority of the administrator. The applicants want the first respondent to be restrained pending the liquidation application that is pending in this court.

#### **D. RESPONDENT'S CONTENTIONS.**

[25] The respondent contends that he is unhappy with the administrator, yet he has not applied to remove him. His steps to appeal the two orders that are subject of this application are tardy to say the least.

[26] The respondent merely denies that his conduct is harming the corporation without providing any tangible facts to the contrary.

[27] Nothing is disclosed by the respondent to refute the allegation that his actions are motivated by *mala fides*.

[28] The respondent opposes the urgency alleged by the applicants, suggests that they could be able to obtain relief in due course.

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<sup>14</sup> Gatenby v Gatenby and Others 1996 (3) SA 118 (E).

[29] The respondent contends that the applicants do not have *locus standi* to make this application to hold him in contempt of court.

[30] The respondent asserts that the first court order does not give the administrator the power to make payments on behalf of the corporation. The powers of the administrator are limited. the administrator was appointed to resolve disputes between the members of the corporation but has gone beyond that.

[31] The respondent alleges that he is appealing the two court orders, therefore the application to find him in contempt is inappropriate at this time since the effect of the orders are suspended pending the finalization of the appeals.

#### **E. ANALYSIS AND FINDINGS**

[32] It is apparent that the respondent has taken steps to apply for leave to appeal at least one or both orders, which indicates awareness on his part that the orders stand unless and up until they are set aside by a competent court. Non-compliance with the orders has thus far not been justified.

[33] From the legal authorities referred to above, it is also clear that the application satisfies the requirements of urgency and has appropriately been dealt with as such.

[34] The first applicant is a member of the corporation together with the first respondent. Her interest in the matter cannot be gainsaid. The second applicant was appointed as administrator, his standing arises from that capacity.

[35] The obstructive, uncooperative attitude adopted and displayed by the first respondent is borne of *mala fides* against the first respondent for undisclosed personal reasons.

[36] I find that the applicants in this matter must succeed, with the respondent being liable for their costs.

## **F. ORDER**

[37] The following order is made:

(a) The rules relating to forms, service and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court;

(b) It is declared that the first respondent, Johannes Hendrik Hattingh, is in contempt and breach of the order handed down by Acting Judge Ally on 29 June 2023 under case number 2023-60418, and the second order of 26 July 2023 handed down under case number 2023-070399 by Acting Judge Lenyai (as she then was).

(c) The first respondent is committed to prison for 30 (thirty) days;

(d) The sentence referred to in prayer 3 above be suspended for a period of 1 year, from the date of this order, on condition that the first respondent, within the 24 hours, implements the Court Orders under Case number 2023-60418 and case number 2023-070399, and by restoring the Second Applicants access and authorisation to the Second Responders banking accounts within the 24 hours.

[38] In terms of Section 49 of the Close Corporation Act 69 of 1984 on the grounds that the First Respondent's conduct, is unfairly prejudicial, unjust or inequitable to the Applicants,

- 38.1 The Conduct of the First Respondent unfairly prejudices the First Applicant, the affairs of the Second Respondent are being conducted in a manner unfairly prejudicial, unjust or inequitable to the Applicants, the First Respondent is ordered to do the following;
- 38.2 First Respondent take all steps as may be necessary to provide the Second Applicant with access to the Second Respondent's banking accounts and
- 38.3 First Respondent take all steps as may be necessary to provide the Second Applicant with main administration rights in respect of the Afrihost hosting service of the Second Respondent, including domain administration, email addresses and web hosting;
- 38.4 The First Respondent's decision-making powers in relation to the business management and administration of the Second Respondent are suspended, pending the hearing of the liquidation application instituted under case number 2023-055249 ("the Liquidation Application").

38.5 The First Respondent executive power in relation to the Second Respondent is removed pending the hearing of the liquidation application instituted under case number 2023-055249 ("the Liquidation Application").

38.6 Without derogating from the generality of the aforesaid:

38.6.1 The first respondent is removed and prohibited from accessing the second respondent's banking account;

38.6.2 The first respondent is ordered not to engage with any clients, service providers or employees of the second respondent whatsoever;

38.6.3 the first respondent is prohibited from accessing or transacting on the Afrihost hosting service for the second respondent; and

[39] The Applicants are ordered to manage the second respondent's business affairs jointly pending the finalization of the liquidation application.

[40] The first respondent is ordered to pay the costs of this application.

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**J.S. NYATHI**

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 17 August 2023

Date of Judgment: 17 January 2024

On behalf of the Applicants: Adv. E. Coleman.

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**Delivery:** This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-



down is deemed to be 17 January 2024.