Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: **1521/2020**
Heard: **25/11/2022**
Delivered: **17/02/2023**

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA Applicant

and

HENDRIK ALBERTUS RETIEF N.O. 1st Respondent

KAREN RETIEF N.O. 2nd Respondent

CORNELIUS JOHANNES JANSE VAN RENSBURG N.O. 3rd Respondent
[Cited in their capacities as trustees of the
Karee-Aar Trust Masters Reference: IT82/2013]

HENDRIK ALBERTUS RETIEF N.O. 4th Respondent

KAREN RETIEF N.O. 5th Respondent

CORNELIUS JOHANNES JANSE VAN RENSBURG N.O. 6th Respondent
[Cited in their capacities as trustees of the Beginselsvlei
Family Trust Master's Reference: IT 47/2009]

HENDRIK ALBERTUS RETIEF 7th Respondent

JUDGMENT

Mamosebo J

[1] The applicant, the Standard Bank of South Africa Ltd, brought the application in terms of Rule 6(11) based on the respondents' contempt of a Court Order and is seeking the following relief:

1.1 An order finding the respondents guilty of contempt of a Court Order and such sentence to be imposed in the Court's discretion;

1.2 That the sentence be suspended on condition that the respondents comply with the Court Order, alternatively, that the Registrar of this Court be authorised to enter into the contract which the respondents were ordered to do; and

1.3 Costs of the application on the scale of attorney and client, jointly and severally, the one to pay the other to be absolved.

[2] The issue for determination in this application is crisp: whether the respondents are in wilful contempt of the Court Order by Stanton AJ granted on 14 May 2021 in the conditional counter-application by the Standard Bank.

[3] This is how Stanton AJ's order reads:

"1. The application for rescission of the judgment dated 27 July 2018 is dismissed.

2. The applicant is to pay respondent's costs in respect of the application for the rescission of the judgment on an attorney and client scale.

3. The counter application is granted.

4. The applicant is to pay the respondent's costs in respect of the counter application on a party and party scale."

[4] In order to comprehend the alleged contempt, the facts are necessary for context. On 27 July 2018 Standard Bank of South Africa (the Bank) obtained judgments by default against the respondents, jointly and severally, under Case Numbers 1805/2017 and 1806/2017, declaring the properties specially executable.

[5] Notwithstanding the aforementioned order, the parties entered into a settlement agreement on 13 November 2019 quoted in relevant part:

> *"3.1 The respondents are afforded the opportunity until 28 February 2020, to market the properties set forth in paragraphs 2.1 and 2.2 (hereinafter "the farms).*
>
> *3.2 Should any offers be received for the purchase of the farms directly by the respondents until 28 February 2020, the applicant will have the right to consider the offers and will have the right to decline such offers in the appropriate circumstances. The respondents agree however that any offers received for the purchase of the farms shall be presented to the applicant for its consideration.*
>
> *3.3 Should the respondents be unable to conclude a private sale for any or all of the farms by 28 February 2020, by appending their signature hereto the respondents provide In2Assets (ref: Mr Hein Hattingh) (hereinafter "the auctioneer") with the unfettered mandate (although regulated in a separate agreement to be concluded between the auctioneer and the respondents) to market and sell the properties set forth in paragraphs 2.1 and 2.2 by public auction or private treaty, whichever in the sole discretion of the In2Assets will yield the highest proceeds.*
>
> *3.4 The auctioneer will be entitled to commence the marketing of the property as from 01 March 2020."*

[6] These are the properties forming the subject of these applications: Portion 2 (Karee-Aar) of farm number 80, district Barkly West, Northern Cape Province, 569 5938 hectares in extent, held under title deed number T0455/2014; Portion 2 (Fransch Hoek), a portion of portion 1 of the farm Droogpan number 46, district of Barkly West, Northern Cape Province, 257 2051 hectares in extent, held

under title deed number T4885/2000; the remainder of portion 1 (Uitkyk) of the farm Droogpan number 46, district of Barkly West, Northern Cape Province, 427 7064 hectares in extent, held under title deed number T4885/2000; Portion 4 (Vreesniet) of the farm Droogfontein number 933, situated within the North West registry area, 462,7458 hectares in extent, held under title deed number T1541/2004; the remaining extent of portion 1 (Vondeling) of farm number 42 district of Barkly West, Northern Cape Province, 856,5349 hectares in extent, held under title deed number T2019/2008. In the event that the properties are not sold by 28 February 2020 the respondents would provide a company by the name of In2Assets, represented by Mr Hein Hattingh, the auctioneer, an unfettered mandate to market and sell the said properties by way of public auction or private treaty.

[7] The agreed upon date arrived but the respondents had neither marketed nor sold the properties. They further failed or refused to grant In2Assets the requisite mandate but rather, launched an application for the rescission of the two judgments under case numbers 1805/2017 and 1806/2017 which had declared the property specially executable. The Bank opposed the rescission application while it simultaneously launched a counter-application. The rescission application together with the counter-application were heard by Stanton AJ who dismissed the rescission application and granted Standard Bank the counter-application.

[8] In the counter-application, the relief sought by Standard Bank, considered favourably by Stanton AJ, was that the first to seventh respondents be ordered and compelled to enter into a regulatory agreement with In2Assets Properties (Pty) Ltd as Auctioneer, to regulate In2Assets' unfettered mandate to market and sell the properties in para 6 (above) set forth in paragraphs 2.1 and 2.2 of the Settlement Agreement entered into between the applicant and

first to seventh respondents, in accordance with clauses 3.3 and 3.8 of the Settlement Agreement which was attached to the founding affidavit in the counter-application, as Annexure “B”. The first to seventh respondents were directed to pay the costs of this application, jointly and severally, the one to pay the other to be absolved.

[9] On 21 June 2021 the respondents yet again brought a rescission application for the rescission of the two default judgments which had declared the properties specially executable under Case No 1246 of 2021. It served before Erasmus AJ on 12 November 2021 who dismissed the application on 03 December 2021. The respondents sought leave to appeal Erasmus AJ’s judgment which was heard on 01 March 2022 but suffered the same fate. There was apparently an attempt to petition the Supreme Court of Appeal (the SCA) but as at date of this hearing nothing was forthcoming, as submitted by Adv Zietsman SC. In addition the applicant’s attorneys established and received confirmation from the Registrar of the SCA that no application was submitted.

[10] In the answering affidavit, filed in his personal and representative capacity as trustee of the Karee-Aar Trust and Beginselsvlei Family Trust, Mr Hendrik Albertus Retief, the seventh respondent, claimed that they were not in wilful default. But for the struggle to obtain Erasmus AJ’s stamped order and judgment timeously, they would have instituted the application for leave to appeal to the SCA timeously and would have enjoyed the protection of s 18 of the Superior Courts Act, 10 of 2013 as the order the applicant is intent on enforcing would have been suspended, so the argument went. It is for this reason that they urge the court not to grant the relief sought by the applicant.

[11] The respondents have neither filed a rescission application against the judgment or order granted in the counter-application nor sought leave to appeal against the judgment or order of Stanton AJ. The only defence raised by the respondents pertains to their inability to obtain the stamped Erasmus AJ's court order and seem to lay the blame solely at the door of the Registrar of this Court and the Acting Judge's registrar. Assuming this to be the case, it begs the question why the petition was not filed immediately after the attorneys were favoured with a stamped copy of the judgment by the applicant's attorneys on 29 April 2022?

[12] Of significance is that after counsel for Standard Bank, Mr Zietsman, served and filed his heads of argument on 17 November 2022 only then did the respondents file an application for leave to appeal with the SCA seeking condonation for their non-compliance with the periods envisaged in Rule 6. Patent in the application to the SCA is that the respondents failed to deal with the period between 29 April 2022, when they were placed in possession of a stamped copy of the judgment and order, and 17 November 2022 when the application was filed (a delay of seven months).

[13] The respondents tried to close the gap by serving a supplementary affidavit on Standard Bank's Attorneys on 21 November 2022. The number and sequence of affidavits to be filed in motion proceedings are trite. Circumstances that warrant the filing of an additional affidavit must be preceded by seeking permission from Court to do so. In *Hano trading CC v J R 209 Investments (Pty) Ltd and Another*[1] the SCA said the following:

> *"...It is accepted that the affidavits are limited to three sets. It follows thus, that great care must be taken to fully set out the case of the party on whose behalf an affidavit is filed. It is therefore not surprising that the Rule 6 (5) (e) provides that further affidavits may only be allowed at the discretion of the court."*

[1] 2013 (1) All SA 142 (SCA) at para 10

[14] The Court in *Standard Bank of SA Ltd v Sewpersadh and Another*[2] held:

> "*[13] Clearly, a litigant who wished to file a further affidavit must make a formal application for leave to do so. It cannot simply sign the affidavit into the court file (as appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as pro non scripto.*"

[15] The aforegoing, notwithstanding, the deponent to the supplementary affidavit, Mr Hendrik Albertus Retief, contends in this affidavit that the respondents have now filed their petition to the SCA together with a condonation application. Further to their explanation pertaining to the stamped copy of Erasmus AJ's judgment and order, they (the second and fifth respondents and himself) had the following to say relating to their health and finances:

15.1 They had unrelated litigation involving the Swaardlaagte Family Trust where Retief and his wife are trustees and had brought an urgent application under Case No 873/2022 which, according to him, drained their resources;

15.2 His wife underwent heel surgery during February 2022 and required a wheelchair for about six weeks followed by intensive rehabilitation of learning to walk again; and

15.3 They learned through the media during March 2022 that there was a foot and mouth disease outbreak in the North West, Limpopo and Kwa-Zulu Natal Provinces which prevented movement of cattle. Because of the co-dependence on each other when one is indisposed the other cannot function as a trustee.

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[2] 2005 (4) SA 148 (C) at para 13

15.4 He contracted bronchitis in May 2022 and was placed on substantial medication and admitted to hospital thus preventing him from working and deriving an income;

15.5 During August 2022 while tending to the cattle he bumped his head against a gate which affected his ability to work;

15.6 He underwent two heart operations and had three stents placed in his heart during August and November 2022 followed by a six-week rehabilitation period;

[16] Evidently, the aforementioned explanation for the delay was not addressed in the condonation application filed with the SCA on 17 November 2022 but is belatedly mentioned in this application. The respondents do not explain why there was non-compliance with the settlement agreement of putting the property on the market and selling it. It would also have been prudent for the respondents to substantiate the allegations in para 15 (above) by way of confirmatory affidavits, medical records, and certificates or prescriptions for their medical conditions yet this was not done. As things stand, it is just the say so of the deponent which the Court must weigh up in determining whether they are wilful or not.

[17] Adv Zazeraj, for the respondents, submitted that the versions submitted by the parties pertaining to whether the respondents had wilfully disobeyed the court order are mutually destructive and in the light thereof that the applicants are seeking final relief the version of the applicant must be preferred following the Plascon-Evans Rule[3]. The crux of the matter is that the court order is common cause and the fact that it has not been complied with is also common cause. The other differences are consequently

[3] Plascon -Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H – 634I

peripheral. I cannot therefore fathom any real, genuine or *bona fide* dispute of fact not soluble on these papers.

[18] The leading case on this subject matter is *Fakie NO v CCII Systems (Pty) Ltd*[4] where the SCA dealt with the principle and requirements of contempt of court and summarised the issue in this manner:

"*To sum up*

(a) *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional security in the form of a motion court, 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 requirements 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 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."*

[19] The Constitutional Court in *Eke v Parsons*[5] made the following pronouncements relating to settlement agreements:

"[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for

[4] 2006 (4) SA 326 (SCA) at para 42

[5] 2016 (3) SA 37 (CC) at para 31

> *litigation that may be consequent upon the nature of the particular order, the order brings finality to the lis between the parties; the lis becomes res judicata (literally, 'a matter judged'). It changes the terms of a settlement agreement to an enforceable court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a mandamus."*

[20] Mr Zazeraj's contention is that a deliberate failure to comply with a court order is not enough if good faith is established as it avoids the infraction. Counsel added that what has transpired is unfortunate but not wilful and left it to the discretion of the Court. In his explanation of the supplementary affidavit without any application, counsel submitted that they were placed in possession of the facts recently without specifying which facts and dates, and urged the Court to accept the supplementary affidavit as the reasons contained in it are substantial. The respondents remain intent on prosecuting the appeal, so the argument went. Counsel conceded, correctly, that the deponent deposed to the answering and supplementary affidavits without any confirmatory affidavits from other trustees.

[21] The respondents' properties are already declared specially executable. The arrangement entered into by way of a Settlement Agreement was in my view accommodating the respondents but in no way changed the substance of the legal position. There are no reasons furnished as to why the respondents did not carry their end of the bargain by marketing and selling the properties through the assigned auctioneers or at least seek an extension of time from the bank. It is only when the bank sought enforcement that they woke up from their slumber. When assessing wilfulness, one does not look at one aspect of the events to arrive at the appropriate conclusion but rather at the totality of the facts and circumstances presented. The contention by the respondents is that but for the

stamped copy of the judgment they would have prosecuted the appeal timeously. They are silent about the terms of the settlement agreement which is the genesis and litmus test of the litigation that followed.

[22] In condonation applications a party seeking condonation must explain the entire period of the delay. Where the delay is time-related, the entire period must be explained. See *SA Express Ltd v Bagport (Pty) Ltd*[6] and *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as amicus curiae)*[7]. More importantly relating to the respondents' explanation as deposed to in the answering affidavit it is insufficient to file generalised causes of the delay without a convincing attempt to account fully for the delay and underpinned by dates. The Court still has a discretion to be exercised judicially, upon being convinced by the applicant in the condonation application, why the discretion must be in their favour. A mere filing of the petition to the SCA is not the panacea.

[23] Unquestionably, Standard Bank has met the three requirements, namely, the existence of the court order by Stanton AJ; service or notice thereof; and the non-compliance with that order by the respondents. The respondents bore the evidential burden in relation to lack of wilfulness and *mala fides* which, in my view, they have failed to discharge. Their explanation that it has always been their intention to prosecute the appeal, the unavailability of a stamped court order and their deafening silence in respect of why they did not honour their end of the bargain to comply with the terms in the settlement agreement and their failure to account for the period between 29 April 2022 and 17 November 2022 are telling. I have also considered the inordinate inaction by the respondents after the applicant's attorneys availed the stamped

[6] [2020] ZASCA 13; 2020 (5) SA 404 (SCA) para 34

[7] [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22

copy of the judgment to their attorneys. Moreover, the Bank's attorneys sounded three warnings to the respondents through their attorneys that they are in contempt of a court order: on 17 March 2022; 21 April 2022 and on 29 April 2022. All these factors cumulatively taken show wilfulness and *mala fides* on the part of the respondents.

[24] I am therefore satisfied that the applicant has proven beyond reasonable doubt the requisite higher criminal threshold, that the respondents are guilty of contempt of Court. Sentencing remains in the discretion of the Court. It is a sound principle and legal convention that a court would suspend the sentence on condition that a respondent comply with a court order within a period to be determined by the Court within a reasonable period from the date of the order, alternatively that the Registrar of this Court be authorised to enter into a regulatory agreement contingent upon a respondent's failure or refusal to carry out the court order.

[25] I have hereinbefore, addressed the aspect of the permissible number of affidavits but still allowed the respondents' additional affidavit. Having taken its contents into consideration for purposes of an appropriate sanction, the main relief sought of R100,000.00 (One Hundred Thousand Rand) or six (6) months imprisonment wholly suspended for a period of three (3) years on condition that the respondents comply with the order was not considered favourably to avoid future imprisonment of the respondents pertaining to this matter. The alternative relief sought, in my view, is adequate to purge the respondents' contempt.

[26] In as far as costs are concerned, the general principle is trite, that costs will ordinarily follow the result. There is no reason to deviate therefrom.

[27] Resultantly, and for the aforegoing reasons, I make the following order:

1. The first to seventh respondents are found guilty of contempt of a court order granted by Stanton AJ on 14 May 2021.

2. The first to seventh respondents are to comply with Stanton AJ's order within ten (10) days from the date of this order.

3. Should the first to seventh respondents fail to comply with the order in 2 (above) within ten (10) days, the Registrar of this Court is authorised to sign the regulatory agreement with In2Assets Properties (Pty) Ltd on their behalf.

4. The first to seventh respondents to pay the costs of this application, jointly and severally, the one to pay the other to be absolved on the scale of attorney and client.

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MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the Applicant:	Adv Paul Zietsman SC
Instructed by:	Honey Attorneys c/o PGMO Attorneys Inc
For the 1st – 7th Respondents:	Adv Luke Zazeraj
Instructed by:	Van de Wall Inc