IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D8029/2021

In the matter between:

ANDRE GRUNDLER N.O.	**FIRST APPLICANT**
BODY CORPORATE OF ELWYN COURT	**SECOND APPLICANT**

and

LEE ZULU	**FIRST RESPONDENT**
LEGAL PRACTICE COUNCIL, KWAZULU-NATAL PROVINCIAL OFFICE	**SECOND RESPONDENT**

J U D G M E N T

SHAPIRO AJ

[1] The first applicant is the court appointed administrator of the second applicant,

having been appointed by this Court in August 2010.

[2] There are two applications that serve before me: first is an application compelling the first respondent, who is an advocate of this Court, to provide copies of the application papers issued under case number D3896/2021 that served before my brother Nkosi J on 8 July 2021 and in terms of which His Lordship granted an order that the second applicant would henceforth be under the administration of a Board of Trustees.

[3] The second application is an application for the committal of the first respondent to prison, alternatively, that he would be directed to pay a fine, arising out of his contempt of an interim order granted by my sister, Masipa J on 13 September 2021 in terms of which the first respondent was directed to provide the applicants' attorneys with the application papers to which I have already referred.

[4] The first respondent did not provide the application papers despite personal service upon him of Masipa J's order and instead delivered an opposing affidavit which appears to be in respect of both the main application and the contempt application. I will revert to this in due course.

[5] Up to a point, I can understand why the members of the second applicant are frustrated with the ongoing administration of the body corporate. The body corporate has been under administration for almost 13 years - a period that no court could have contemplated, and which seems to me to be unduly long.

[6] Applications have been launched and remain pending in the Regional Civil Court in terms of which the first applicant sought the provisional extension of his appointment until a Special General Meeting of the second applicant could be convened and the members could resolve whether they wished to exit administration and be governed internally.

[7] The last Order granted by that court on 2 March 2020 directed that a Special General Meeting be convened within 60 days. Whilst that order was granted just before the country went into a hard lockdown that was then followed by slowly reducing restrictions on meetings imposed under the various iterations of the disaster regulations promulgated by the government, there is no reason that I can fathom why that meeting has not yet been convened.

[8] Even if there was a delay caused by the Covid regulations, those restrictions were lifted quite some time ago, and the meeting could have been convened at the very latest during 2022.

[9] However, this issue is not directly before me, and the views that I express are both to place the matter in context and to indicate a level of understanding of the actions of the members of the body corporate.

[10] It may well be that the frustrations of the members of the second applicant led to the application being launched that served before my brother Nkosi J on 8 July 2021, under case number D3896/2021[1].

[11] It is that application that has caused matters to go somewhat awry.

[12] There is no doubt that the application papers existed or that there was a court file opened by the Registrar of the Court, as the matter was on the Motion Court Roll for 8 July 2021 and His Lordship obviously had a basis upon which he decided to grant the Order.

[13] The first respondent appeared on that day and quite obviously was in possession of a copy of the application papers.

[14] Despite this, the first respondent refused at the time to supply a copy of the

[1] The allocated case number according to the copy of the Order annexed to the founding papers and the Notice of Motion annexed to the first respondent's answering affidavit.

papers to the applicants' attorneys when they requested them and then failed some months later to supply a copy despite being ordered to do so.

[15] The first respondent appeared before me, robed, at the opposed hearing on 9 February 2023. When I asked him where the application papers were, he stated from the bar that he "thought" that they were at his office at Commercial City, Durban.

[16] When I asked the first respondent why the papers had not been supplied as ordered, his only response was to refer to the answering affidavit filed of record. He did not appear to distinguish between his alleged clients' position as litigants (assuming for the purposes of argument that they were in fact *bona fide* litigants) and his own – not only as an advocate but as the subject of a court order that compelled him personally to act.

[17] What was clear to me was that the first respondent expected to find a copy of the papers at his offices - something to which I will return presently.

[18] I stood the matter down and directed the first respondent to return in the afternoon with a copy of the papers or, at the very least, a set of the draft, unsigned papers.

[19] However, when the matter was recalled, the first respondent stated that he had been unable to find a copy of the papers in any form and that he now assumed that a copy of the application papers was with his clients.

[20] In a final attempt to bring the application to a sensible conclusion, I postponed the application to 16 February 2023 and gave the first respondent one last opportunity to comply with the provisions of Masipa J's order by 12h00 on 14 February 2023.

[21] On 16 February 2023, the first respondent submitted that he had been unable to find a copy of the papers and could not provide them.

[22] The first respondent is an officer of this Court. He refused to cooperate with the applicants' attorneys and to take the obvious and reasonable step of providing them with a copy of the issued application papers upon which he had submitted that the Court could grant the order which was then granted.

[23] His entirely dismissive view that the first applicant's attorney should have communicated directly with the members of the body corporate and requested the papers from them lacks any merit. The first respondent was the sole legal representative of those members[2], and it was proper that the first applicant's attorney communicate with him and not with his "clients".

[24] This behaviour was unprofessional, obstructive, and dilatory and certainly is not the behaviour one would expect from a legal practitioner.

[25] Regardless of the view that the first respondent may have taken of the order granted by Nkosi J, what cannot be disputed is that this Order was suspended by Masipa J, who also ordered the first respondent either to provide the relevant application papers or to advise the applicants of who was in possession of the papers.

[26] Madam Justice Masipa's Order was served on the first respondent personally on 17 September 2021.

[27] The first respondent's answer is contained in his affidavit that was delivered on 15 October 2021.

[28] Apart from accusing the first applicant of substituting the court file contents (a reckless, inflammatory and spurious allegation), the first respondent admitted that he presented the case as counsel for the body corporate.

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[2] Something he confirmed in his submissions on 16 February 2023

[29] The first respondent's argument was that the first applicant should have requested the application papers from the second applicant, and he then attempted to be coy and to defend his refusal or failure to provide a copy of the papers by saying that he had a duty to uphold "confidentiality" with the body corporate.

[30] This, with due respect to the first respondent, is nonsense. The applicants were not asking for the disclosure of privileged communications but simply for a copy of issued application papers which, by definition, are public documents.

[31] In the same dilatory vein, the first respondent claimed the need to consult with the body corporate and its members before releasing the application papers.

[32] To make matters worse for the first respondent, he then alleged that it was the first applicant who was acting in breach of Nkosi J's Order by continuing to present and conduct himself as the administrator of the body corporate and was therefore acting in contempt of that Order, justifying "a punishment incorporating imprisonment".

[33] All this while the first respondent was already in breach of Masipa J's Order – an "amazingly brazen attitude to adopt"[3].

[34] It is revealing that the first respondent did not say anywhere in his answering affidavit that he was not in possession of the application papers, or at least a copy of them. He could not honestly have said so because he annexed a copy of the Notice of Motion issued on 30 April 2021 to that affidavit. He represented the body corporate and signed that Notice of Motion as the body corporate's counsel.

[35] Similarly, the first respondent anticipated returning to court on 9 February 2023 with the papers when I gave him the opportunity to do so – he must then, at the very least, have had a good idea where those papers were filed.

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[3] *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 228F

[36] Whatever strategy the first respondent thought he was following, there is no excuse for his refusal to comply with an order of this Court and there is no explanation from him why he did not comply after personal service of the order upon him.

[37] There is a rising trend in the legal profession of practitioners demonstrating disrespect (if not outright contempt) for courts and the judiciary. One does not need to look far to find examples of this sort of behaviour, from the ranks of senior counsel to the most junior of candidate attorneys. It manifests not only in how practitioners interact with opponents and judges in and out of court but also in the launching of *prima facie* spurious applications, lacking in factual or legal foundation, that are designed to "snatch bargains", achieve ulterior objectives, delay and/or obstruct. It is a "win at all costs" attitude that does a disservice to the profession and to the country and sets an appalling example to the public at large. It ignores not only the oath that all lawyers take upon their admission but also the distinction between the duty that practitioners owe to their clients and the separate duty that they owe to the Court.

[38] The first respondent failed in this most basic duty. He did not distinguish between his clients' interests and his own professional and ethical obligations. Had he acted appropriately, neither the main application nor the application for contempt would have been necessary. Time and significant expense would have been saved.

[39] It is therefore appropriate that the first respondent be referred to the second respondent, so that his conduct as a legal practitioner can be investigated and, if required, sanctioned.

[40] I turn to consider whether the applicants have established that the first respondent acted in contempt of court.

[41] I accept that courts must be slow to impute *mala fides* to a legal practitioner, who will not "be guilty of negligence merely because he committed an error of judgment, whether on matters of discretion or law. It is a question of degree and there is a

borderline within which it is difficult to say whether a breach of duty has or has not been committed… An attorney is not responsible for any wrongful act committed by him qua attorney within the scope of his authority: *qui facit per alium facit per se*. There is, however, a duty of care owed by an attorney conducting litigation on behalf of a client, to the court, and a duty of care owed towards his opponent."[4]

[42] Masipa J's order was served personally on the first respondent.

[43] He did not comply with it, and there is no evidence that he advised his clients of the order either.

[44] The first respondent bears the evidential burden of showing that his conduct was neither wilful nor mala fide.

[45] The requirements for contempt of court were restated by His Lordship Mr Justice Cameron (as he then was) in **Fakie NO v CCII Systems (Pty) Ltd**[5].

[46] The applicants must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt. But, once the applicants have proved the order, service or notice, and non-compliance, the first respondent bears the evidential burden referred to above. If the first respondent fails to advance evidence that establishes beyond a reasonable doubt as to whether his non-compliance was wilful or mala fide, contempt would have been established beyond reasonable doubt.

[47] The first respondent did not advance any of the requisite evidence, at any level.

[48] Having been required personally to deliver the papers or identify the persons in whose possession the papers were, the inference is irresistible that first respondent

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[4] *Jonker and Another v Stoffels* (1222/2008) [2010] ZANCHC 46 (25 May 2010) at para [28]

[5] 2006 (4) SA 326 (SCA) at para [42]

must have foreseen that his actions could result in the breach of Masipa J's Order. He therefore foresaw the possibility of that consequence and he reconciled himself to it[6].

[49] As was held in *Jonker*, the evaluation of whether the first respondent is in contempt is a matter of degree and it may be that in some cases, there is a borderline where a legal practitioner's conduct (even if negligent) does not breach their professional duty or their duty to the court.

[50] There is no borderline here: the first respondent is not being held responsible for the misconduct of his clients, and their contempt is not being imputed to him. The first respondent, himself, was directed by court order to perform. Instead of complying, and after service of that Order, he then elected to advance a defence to the main application whilst ignoring his separate obligation to comply with the Order and seeking orders that the first applicant be held in contempt.

[51] I therefore have no difficulty in concluding that the first respondent was in contempt of this Court's order of 13 September 2021.

[52] Officers of this Court must be held to a higher standard of conduct then lay people[7]. If attorneys or advocates ignore court orders, there would be little to stave off the ultimate collapse of the rule of law.

[53] As Cameron JA reminded us[8], contempt of court is

> 'not merely a mechanism for the enforcement of court orders. The jurisdiction of the Superior Courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the legal system… That, in turn, means that the Court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.'

[6] *HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others* 2000 (1) SA 507 (C) at 521J to 522B
[7] *HEG Consulting*, above, at 520J to 521A
[8] *Fakie NO*, above, at para [38]

[54] This court will not tolerate the conduct of a legal practitioner who treats it with contempt and who ignores binding court orders.

[55] There must be a serious consequence for this kind of behaviour.

[56] The first respondent neither delivered nor secured the delivery of the 2021 application papers. He has now submitted that they cannot be found.

[57] One cannot get blood from a stone, and I must accept that it is now no longer possible for the first respondent to comply with Masipa J's Order. Similarly, it would be an exercise in futility now to grant the directory relief sought in the main application or in the contempt application.

[58] However, that is not the end of the matter. I accept without reservation that the first respondent was in possession of a copy of the application papers as late as 15 October 2021 when he delivered the answering affidavit in the main application. This must be so because he annexed a copy of the Notice of Motion in that application, that he signed, to the affidavit.

[59] Therefore, almost one month after he was served personally with an order directing him to deliver the application papers forthwith, he was in possession of them and chose not to deliver them.

[60] It is noteworthy that the first respondent has not even put up a copy of the draft application papers.

[61] That the first respondent can no longer purge his contempt by deliver delivering the application papers, does not change the fact that he was in contempt of Masipa J's Order, and must suffer the consequences.

[62] Whilst I was inclined to impose a sentence of direct imprisonment without the option of a fine upon the first respondent, justice must be tempered with a modicum of mercy. I would like to think that, given the chance, the first respondent would now react quite differently, and would understand where his obligations lie and the seriousness of failing to comply with orders of court.

[63] A serious sanction, however, remains appropriate, and will be reflected in the orders that are granted.

[64] The first respondent has submitted that he should not pay the costs personally and should not have been joined in the proceedings. He argued that he was only the legal representative and that it was his clients who should have been the respondents.

[65] I do not agree: the applications were launched in the very specific circumstances described above. It was comfortably within the first respondent's professional and ethical ability to cooperate with the applicant's attorneys or, at the very least, to comply with the Order of 13 September 2021. There is no evidence on the papers that he tried to comply, or that he advised his clients to comply on his behalf.

[66] Before the opposing affidavit was delivered, Masipa J's Order had been served. Neither application should have gone a step further – the first respondent should have realised what was required, and ameliorated his conduct. He did not do so – he did the opposite and then sought to cast the applicants as the contemnors.

[67] Given the view that I have taken of the first respondent's conduct and ultimately how unnecessary the main and interlocutory applications should have been, there is no reason why the applicants should pay any of the costs of these applications. A punitive costs order is warranted.

[68] The final issue to be determined is the fate of the Order granted by Nkosi J on 8 July 2021.

[69] That Order was suspended pending the final determination of the applications, no doubt on the basis that the delivery of the application papers would enable the applicants then to launch an application for the rescission of that Order.

[70] This is now not possible and would lead to a situation where any application for rescission would be based on speculation as to the contents of the application papers and of the reasons why His Lordship granted the initial order. The applicants would not be able to demonstrate prospects of success in the absence of the grounds upon which the original Order was granted.

[71] Mr Broster SC, who appeared for the applicants together with Mr Stewart, advised me from the Bar that the first respondent had consented to an order rescinding Nkosi J's Order because the application papers could not be found.

[72] Whilst this is undoubtedly the most practical solution, I cannot rely on the first respondent's apparent consent to that order. The body corporate remains under administration and I am not convinced that the first respondent has any authority to consent to this order, or any other, on behalf of the body corporate.

[73] There is also no application for rescission before me.

[74] Any rescission therefore would have to be granted *mero motu* if sufficient grounds for this existed.

[75] It is undisputed that the first respondent had represented members of the body corporate in the lower courts in various proceedings brought by the first applicant and his attorneys. The first respondent knew that the body corporate was under administration and, if nothing else, knew that the first applicant would contend that the body corporate remained under administration.

[76] The effect of the Order sought by the first respondent and granted by Nkosi J was to reimpose governance over the body corporate by an elected Board of Trustees to the exclusion of the first applicant.

[77] It is obvious that the first applicant would have a direct and substantial interest in those proceedings, and he should have been cited as a respondent.

[78] There are simply no reasons that I can fathom how or why the first respondent legitimately could have launched the application *ex parte* and, in the same vein, there is no way that Nkosi J would have granted such an order had full disclosure of all the material facts been made to him. In those circumstances, His Lordship would no doubt have required service of the application on the first applicant and his attorneys.

[79] In terms of Rule 42(1)(a) of this Court's Rules, a court may *mero motu* rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party affected by it.

[80] Our courts have found that a judgment was erroneously granted, if at the time of its issue, there existed a fact or facts of which the court was unaware and which would have precluded the granting of the judgment or would have induced the Court, if aware of these facts, not to grant to the judgment. Similarly, if material facts were not disclosed in an *ex parte* application, or if a fraud was committed (by facts being deliberately misrepresented to the court) or if an order was granted in an *ex parte* application without notice to a party who had a direct and substantial interest in the matter, any such order was erroneously granted[9].

[81] It is, in my view, clear that the order granted by Nkosi J on 8 July 2021 was granted erroneously in the absence of the first applicant and that it should be set aside.

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[9] *Naidoo and Another v Matlala NO and Others* 2012 (1) SA 143 (GP at paras [6] and [7]

[82] Given the express wording of Rule 42(1)(a), it was not necessary that the applicants first launch an application for rescission before such an order can be granted and, for all of the reasons set out in this judgment, it is manifestly in the interests of justice and expedition that I grant such an order *mero motu*.

I grant the following orders:

1. **The first respondent is declared to be in contempt of the order of Her Ladyship, the Honourable Madame Justice Masipa granted under case number D8029/2021 on 13 September 2021.**

2. **The first respondent is directed to pay a fine of R30,000.00 (thirty thousand rand) alternatively is directed to serve a period of imprisonment of 30 (thirty) days.**

3. **The sentence contemplated in paragraph 2 of this Order is suspended for five years on condition that the first respondent is not again declared to be in contempt of court.**

4. **The applicant's attorneys are directed to deliver a copy of the application papers in both the main application and the application for contempt (if they have not already done so) together with a copy of this judgment to the second respondent within 15 (fifteen) days of the date of this Order in order that the first respondent's conduct as a legal practitioner be investigated.**

5. **The Order of this Court granted on 8 July 2021 under case number D3896/2021 is rescinded *mero motu* in terms of Rule 42(1)(a) on the basis that it was erroneously granted in the absence of the first applicant.**

6. **The first respondent is directed in his personal capacity to pay the costs of**

both the main application and the application for contempt and all reserved costs on the scale as between attorney and client.

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SHAPIRO AJ

APPEARANCES

Date of Hearing:	Thursday, 09 February 2023; and Thursday, 16 February 2023
Date of Judgment :	Monday, 20 February 2023
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