THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 006/2011

GAUTENG PROVINCE DRIVING SCHOOL ASSOCIATION First Appellant
GODFREY MTHAISA MASINGA Second Appellant
ALBERT MATHINA Third Appellant

and

AMARYLLIS INVESTMENTS (PTY) LTD First Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Second Respondent

Neutral citation: ***Gauteng Province Driving School Assocation & others v Amaryllis Investments (Pty) Ltd & another*** **(006/11) [2011] ZASCA 237 (1 December 2011)**

BENCH: **PONNAN, MALAN and WALLIS JJA**

HEARD: **18 NOVEMBER 2011**

DELIVERED: **1 DECEMBER 2011**

SUMMARY: **Mandament van spolie – rule 49(11) of the Uniform Rules – leave to execute judgment pending appeal – contempt of order of court**

ORDER

On appeal from: North Gauteng High Court (Pretoria)
(Mabuse J sitting as court of first instance).

(1) The appeal by the first appellant is dismissed with costs.

(2) The appeal by the second and third appellants against paragraphs 1, 3 and 4 of the order of the court below is allowed and the order is amended by the deletion of paragraphs 3 and 4 and the substitution of paragraph 1 with the following:

'The rule nisi granted by the court on 28 July 2010 is discharged.'

JUDGMENT

PONNAN JA (Malan and Wallis JJA concurring):

[1] On 12 September 2007 and pursuant to an agreement between them, the second respondent, the City of Johannesburg Metropolitan Municipality (the City), granted use of a parking area on property owned by it (being erven 849, 851 and a portion of 847 Ferndale, Randburg) (the parking area) to the first respondent, Amaryllis Investments (Pty) Ltd (Amaryllis). From that date Amaryllis was in undisturbed occupation of the parking area until 23 May 2009 when certain individuals purporting to act on behalf the first appellant, the Gauteng Province Driving School Association (GPDSA), a section 21 company, allegedly cut the lock and chain that was utilised by

Amaryllis to secure the gate to the parking area. Amaryllis countered with an application to the North Gauteng High Court for urgent relief and on 2 September 2009 the following order issued (per Phatudi J):

'[16.1] [Amaryllis's] possession of the parking area on Erven 849, 851 and portion of 847 Ferndale, Randburg be restored immediately.

[16.2] [GDPSA] is ordered to remove all chains and locks on gates leading to [the parking area].

[16.3] [GDPSA] is ordered to pay [Amaryllis'] costs on party and party scale.'

[2] That order was a simple *mandament van spolie*. In *Nino Bonino v De Lange* 1906 TS 120 at 122 Innes CJ described spoliation as 'any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right'. The learned Chief Justice explained:

'It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.'

The accepted principle is that the *mandament van spolie* envisages 'not only the restitution of possession but also the performance of acts, such as repairs and rebuilding, which are necessary for the restoration of the *status quo ante'* (*Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 717E-F).

[3] On 7 September 2009 GPDSA served and filed an application for leave to appeal against the spoliation order. On 15 September 2009 that application was struck off the roll. It was re-enrolled on 1 October 2009 but thereafter dismissed by Phatudi J on 7 October 2009. An application, by way of petition to the President in terms of 21(3)*(a)* of the Supreme Court Act 59 of 1959, was then lodged by GPDSA on 1 February 2010 with the Registrar of this court. After the filing of answering and replying affidavits, the petition was considered by a panel of two Judges designated by the President in terms of s 21(3)*(b)*. They evidently formed the view that there were reasonable prospects of the appeal against the spoliation order succeeding and on 7 April 2010 granted leave to appeal to the full court. I pause to record that although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated

were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and is therefore appealable (*Nienaber v Stuckey* 1946 AD 1049 at 1053).

[4] On 5 May 2010 and pursuant to the grant of leave to appeal by this court, GPDSA served and filed with the Registrar of the high court a notice of appeal. The noting of the appeal had the effect of suspending execution of the spoliation order (see *Reid & another v Godart & another* 1938 AD 511 at 513). Amaryllis thereupon made application two days later to Phatudi J for leave to execute the order in terms of rule 49(11) of the Uniform Rules. Notwithstanding opposition to that application by GPDSA, the learned Judge issued the following order (the execution order) on 11 May 2010:

'[13.1] That it is directed that paragraph 16.1 and 16.2 of the order made by this Court on 2 September 2009 in case No 41787/2009 shall not be suspended pending the decision [in the] Full Bench appeal against such order;

[13.2] That the Sheriff, in whose area of jurisdiction the premises at Erven 849, 851 and 847 Ferndale is situated, is directed and ordered to take all necessary steps to give effect to 1;

[13.3] That [Amaryllis] shall not be required to furnish security as contemplated in Rule 49(11);

[13.4] That [Amaryllis] is ordered to pay [GDPSA's] costs of this application on party and party scale.'

[5] Both parties were aggrieved – each by different aspects of the execution order. Each accordingly sought leave to appeal. Amaryllis' application, which was dated 28 May 2010 and filed with the Registrar of the high court on 18 June 2010, was restricted solely to the adverse costs order granted against it. Whilst GDPSA's application dated 8 June 2010, which was served on Amaryllis' attorney a day later, was directed against 'the whole of the judgment and order' of Phatudi J. Those applications were heard on 29 July 2010. GPDSA's application was dismissed with costs. Amaryllis' application on the other hand succeeded - Phatudi J directing that it be heard by the full court together with the appeal against the grant of the spoliation order.

[6] In the meanwhile on 3 June 2010 a copy of the order of Phatudi J of 11 May 2010 was served by the Sheriff by affixing it to the gate of the principal place of business of GPDSA. That notwithstanding, according to Amaryllis, GPDSA refused to

vacate those premises. On 2 July 2010 the Sheriff executed the spoliation order and removed from the parking area all of those persons occupying it through GDPSA. Three days later GPDSA re-took occupation of the parking area after once again cutting the chain and lock. The attitude of GPDSA as initially communicated in the correspondence exchanged between the parties and later re-iterated in its affidavits was: First,

' . . . it is [GPDSA's] contention that the two applications for leave to appeal lodged by each of the parties . . . have effectively suspended the operation of Phatudi J's order of 11 May 2010 until same would have been adjudicated upon and disposed of by Phatudi J.'

And, second,

'Phatudi J's approach and conduct in expressly or impliedly over-ruling or re-visiting or purporting to over-rule or re-visit the issue of prospects of success of our client, after having been disposed of by the SCA in terms of the order of 7 April 2010 is unheard of and a clear breach of the stare decisis rule or principle, and certainly requires the attention and consideration of an Appeal Court as it no doubt sets **a very bad precedent**. Like any other Lower Court, the Honourable Phatudi J is bound by decisions of the SCA.'

[7] According to Amaryllis: '[it] found it very difficult to comprehend GPDSA's interpretation of the matter and events'. It thus on 13 July 2010 lodged yet a further application with the high court, in which it sought an order:

'2. That [GDPSA] be declared in contempt of court;

3. That [GDPSA] be imprisoned for a period of the 30 (thirty) days;

4. That prayer 3 is suspended, on condition that [GDPSA] complies with the order of the above Honourable Court dated the 11th May 2010 under case number 41787/2009 granted by the Honourable Justice Phatudi, within 7 (seven) days from date hereof;

5. That a further declarator be issued in terms whereof it is confirmed that the court order granted by the Honourable Justice Phatudi under case number 41787/2009 on the 11th May 2010 shall not be suspended pending the decision of the Full Bench Appeal in the main application against such order;

6. That [GDPSA] be ordered to pay the costs hereof on a scale as between attorney-and-own-client.'

[8] GPDSA objected to Amaryllis's contempt application and moreover, counter-applied seeking a declarator that it constituted an irregular or improper step. Both of those applications came before Fabricius J, who, on 28 July 2010, issued the following order (the contempt order):

'1. That [GDPSA] be declared in contempt of court;

2. That [GDPSA's] directors, Godfrey Mthaisa Masinga and Albert Mathina, are called upon to show cause, on 17 August 2010 why an order should not be granted against them, in their capacities as directors of [GDPSA], that they are in contempt of Court.

3. That Godfrey Mthaisa Masinga and Albert Mathina, in their capacities as directors of [GDPSA], be imprisoned for a period of the 30 (thirty) days;

4. That 3 is suspended, on condition that Godfrey Mthaisa Masinga and Albert Mathina, in their capacities as directors of [GDPSA], complies with the order of the above Honourable Court dated the 11th May 2010 under case number 41787/2009 granted by the Honourable Justice Phatudi, within 7 (seven) days from date hereof;

5. That a further declarator be issued in terms whereof it is confirmed that the court order granted by the Honourable Justice Phatudi under case number 41787/2009 on the 11th May 2010 shall not be suspended pending the decision of the Full Bench Appeal in the main application against such order.

6. That [GDPSA] be ordered to pay the costs hereof on a sale as between attorney and own client.'

[9] On 26 August 2010 Fabricius J furnished brief reasons for having made the contempt order. He stated:

'4. At the time I was satisfied (subject to the amendment to par. 2 of the Court order) that a prima facie case had been made out for the relief sought.

5. It seems clear to me (at least as a prima facie basis) that the order with a return date was called for and that in any event the Court order referred to in par. 5 should be enforced. There was no justification for any argument to the contrary.

6. First Respondent's conduct seemed to me to be vexatious, and in the exercise of my discretion I deemed an appropriate court order to be justified.'

[10] The matter eventually came before Mabuse J, who, on 12 November 2010, confirmed the rule nisi envisaged in paragraph 2 and in all other respects issued an order in identical terms to that issued previously by Fabricius J. On 10 December 2010 Mabuse J granted leave to GPDSA to appeal to this court. Although cited as a party, the City took no part in the proceedings either in this court or the one below. Mr Godfrey Mthaisa Masinga and Mr Albert Mathina are respectively the second and third appellants before us.

[11] I deem it convenient to first dispose of the appeal of the second and third appellants, Messrs Masinga and Mathina. In *Twentieth Century Fox Film Corporation & others v Playboy Films (Pty) Ltd & another* 1978 (3) SA 202 (W) at 203 King AJ stated:

'A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company. If it were not so a court would have difficulty in ensuring that an order *ad factum praestandum* against a company is enforced by a punitive order, *Vide Halsbury* 4th ed vol 9 at 75. Consequently Jagger who had knowledge of the order of Court is guilty of a contempt of an order of this Court. An order *ad factum praestandum* against a company should also be served on its directors if a punitive order is to be sought against the directors in order to establish knowledge of the order of Court.'

No doubt those considerations weighed with Fabricius J. But, it seems to me, that there was simply no factual foundation for the joinder of Messrs Masinga and Mathina as parties to the proceedings, much less for a rule nisi to have issued against them. For, as Mr Masinga, makes plain in his affidavit:

'I have been authorised by Mr Albert Mathina ("Mathina") to also depose to this affidavit on his behalf, and I annex hereto his confirmatory affidavit marked "GM1".

On Tuesday, 27 July 2010, an application for contempt of Court by the Applicant, Amaryllis against the First Respondent, the Gauteng Province Driving School Association came for hearing on an urgent basis before the Honourable Mr Justice Fabricius ("Fabricius J"). Immediately after being addressed by Counsel for the Applicant, and before hearing our Counsel, Fabricious J expressed the view and conclusion that the First Respondent was in contempt of Court.

However, Fabricius J pointed out to the Applicant's Counsel that the difficulty which the Applicant faced is that the allegation and case of contempt as contained in the Applicant's Notice of Motion and Founding Affidavit were not directed at any specific person other than the First Respondent and therefore that it would be difficult and impractical for the Court to grant the relief sought by the Applicant.

It was then *meru moto* suggested by Fabricius J that the Applicant's legal representatives should go and prepare a draft order in which an order for contempt of Court is sought to be made as against specific persons and the matter was stood down until Wednesday, 28 July 2010 for this purpose. I was present in Court at the time.'

. . .

Mathina and I were not joined as parties and no specific allegations or at all were made in the Applicant's Founding Affidavit as to the facts and conduct on our part alleged to have constituted contempt of Court

until when the draft Court Order which was presented by the Applicant's legal representatives on 28 July 2010 when it was first intimated that we may be in contempt of Court.

I am advised that it is trite law that in motion proceedings the Notice of Motion and Affidavits filed before the Court constitute, both the pleadings and evidence. I am advised that no amended Notice of Motion nor supplementary founding affidavit directed against Mathina and I were filed at all by the Applicant providing and setting out specific basis and grounds upon which we are required to be held in contempt of Court.

Mathina and I deny that we, in our capacities as general secretary and director, disobeyed or failed to comply with the Court Order or that there was wilfulness and *mala fides* on our part in that regard. This has not been proven by the Applicant beyond reasonable doubt or at all.'

Amaryllis not having filed a replying affidavit in answer to those allegations, they went undisputed. There was thus no evidence that either Mr Masinga or Mr Mathina with knowledge of the order of court had caused GPDSA to disobey it. Mabuse J ought therefore to have discharged the rule nisi that Fabricius J had issued against them. It follows that their appeal must succeed. That leaves the appeal of GPDSA.

[12] Rule 49(11) and (12) of the Uniform Rules of Court provide that:

'(11) Where an appeal has been noted or application for leave to appeal against or to rescind, correct, review or vary an order of a court has been made, the operation and execution of the order in question shall be suspended, pending the decision of such appeal or application, unless the court which gave such order, on the application of a party, otherwise directs.

(12) If the order referred to in subrule (11) is carried into execution by order of the court the party requesting such execution shall, unless the court otherwise orders, before such execution enter into such security as the parties may agree or the registrar may decide for the restitution of any sum obtained upon such execution. The registrar's decision shall be final.'

This restates the accepted common-law rule that the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make a special application in terms of Rule 49(11).

[13] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545B-G Corbett JA set out the following general principles to be applied in the consideration of applications under Rule 49(11):

'The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised . . . This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments . . . In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;

(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;

(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and

(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

[14] The thrust of GPDSA's case before this court (as indeed it had been before the high court) was: first, that an application for leave to appeal had been lodged, which had the effect of suspending Phatudi J's execution order; second, in the light of the Supreme Court of Appeal (SCA) order of 7 April 2010, which granted leave to GPDSA to appeal against the spoliation order: 'Phatudi J would in terms of the principle of the hierarchy of the courts and/or the *stare decisis* principle not have been competent nor empowered to revisit the issue of prospects of success'; and, third, that Amaryllis had in any event failed to discharge the onus resting upon it. Each of those contentions will be considered in turn.

As to the first:

[15] In *South Cape Corporation,* Corbett JA held that an order granting leave to execute a judgment or order pending an appeal must be classified as purely interlocutory and consequently not appealable. In *Minister of Health & others v*

Treatment Action Campaign & others (No 1) 2002 (5) 703 (CC) paras 10-12 the Constitutional Court stated:

'Before making an order to execute pending appeal, therefore, a Court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the Judge clearly did in this case. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would "stultify the very order . . . made".

Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the Court which granted it in the light of changed circumstances. To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the Court's decision to order execution pending appeal, the litigant may approach that Court once again to seek a variation or, where appropriate, clarification of the order.

All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted — a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.'

But even were one to assume in GPDSA's favour that the implementation order was indeed appealable on the basis of irreparable harm, no such allegation was made, and its application for leave to appeal the execution order was dismissed by Phatudi J on 29 July 2010. And yet even from that date onwards there is no indication that GPDSA complied with the order of the high court. Thus on its own version, it, at the very least, acted from then on in disregard of the court order.

As to the second:

[16] In my view counsel's reliance on the doctrine of *stare decisis* is misplaced. In *Ex Parte Minister of Safety and Security: In Re S v Walters* 2002 (4) SA 613 (CC) para 57 Kriegler J explained:

'The words are an abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points. It is widely recognised in developed legal systems. *Hahlo and Kahn* [Hahlo and Kahn *The South African Legal System and its Background* (1968)] describe this deference of the law for precedent as a manifestation of the general human tendency to have respect for experience. They explain why the doctrine of *stare decisis* is so important, saying:
"In the legal system the calls of justice are paramount. The maintenance of the certainty of the law and of equality before it, the satisfaction of legitimate expectations, entails a general duty of Judges to follow the legal rulings in previous judicial decisions. The individual litigant would feel himself unjustly treated if a past ruling applicable to his case were not followed where the material facts were the same. This authority given to past judgments is called the doctrine of precedent.'"

More recently in *Camps Bay Ratepayers Association v Harrison* 2011 (4) 42 (CC) paras 28-30 (footnotes omitted) Brand AJ stated:

'This argument raises issues concerning the principle that finds application in the Latin maxim of *stare decisis* (to stand by decisions previously taken) or the doctrine of precedent. ... What it boils down to ... is: "certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*." Observance of the doctrine has been insisted upon, both by this Court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'

[17] In this case GPDSA was held to have acted in contempt of the execution order of the high court of 11 May 2010. The order by the SCA granting leave to appeal against the spoliation order predated that order. Rule 49(11) expressly empowers the high court in the exercise of its discretion to direct that its order be carried into effect pending the appeal. If the high court had itself granted leave to appeal it would nonetheless have been free to direct that its order be carried into effect pending the appeal. That leave had been granted by the SCA was thus irrelevant. And, that two judges of the SCA had formed the view that there were prospects of the appeal succeeding was but one factor. But that, in and of itself, could hardly fetter the high court in the exercise of its discretion. Nor did it. In considering the application the learned judge stated:

'In evaluating the submissions made by both counsel, I am of the view that prospects of success meant that the Respondent(s) may, on the face of it, succeed on appeal. It does not mean that the

Respondent(s) will succeed. Rule 49(11) grant[s], in my view, the Court with t he discretion to direct that the suspended order be carried into effect pending the decision of the appeal court.

The suspension of my order creates the status quo to prevail. The status quo is the locking of the gate of an area enclosed by the Applicant. In the event the status quo prevails, the dispute between the parties will remain and may lead to unrests. This is evident from correspondence exchanged between parties subsequent to the Supreme Court of Appeal's order dated 7 April 2010.

I find it in the best interest of Justice to direct that the "Status" created by my order prevail pending the outcome of the appeal court.'

[18] In *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC), the Constitutional Court had to decide whether different outcomes in two cases which were materially identical, was unconstitutional. The facts, which were described (at para 25) as 'highly unusual if not unique' were these: on successive days this court made contrary orders in two cases that were materially identical. They were made by two separate panels of Judges of this Court in response to petitions addressed to the Chief Justice for leave to appeal against orders of the High Court. Goldstone J, writing for the majority, had this to say (paras 12 and 13):

'There is nothing to suggest that they [the petitions] were not conscientiously considered or that each panel did not act in good faith in considering whether there were reasonable prospects of success on appeal. Such a test permits of a reasonable difference of opinion on the same facts, as do all discretionary tests. There is no suggestion that this test is unconstitutional.

As O'Regan J pointed out in *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*:

"Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner."

It would seriously diminish the efficacy of this role of discretion if a decision made pursuant to its exercise bound other judicial officers in a court at the same level in the later exercise of their discretion in subsequent cases.'

It thus appears to me that there can be no room for the application of the *stare decisis* rule in a situation such as this. (See *Fellner v Minister of the Interior* 1954 (4) SA 523 (A); Prof E Khan 'Ratio decidendi and divided courts – the passport case reagitatus'

1955 *SALJ* 6.) I should perhaps add that the learned judge also weighed, as against the prospects of the appeal succeeding, the prejudice to Amaryllis and the public interest, namely that there should be obedience to orders of court and that people should not be allowed to take the law into their own hands (*Kotze v Kotze* 1953 (2) SA 184 at 187F). There thus appears to me to be no warrant for this court to interfere with the exercise of the high court's discretion on this score.

As to the third:

[19] Respect for the authority of the courts is foundational to the rule of law. Civil contempt is not solely an issue *inter partes*, but also an issue between the court and the party who has failed to comply with its order. It is thus as much about vindicating judicial authority as it is about vindicating individual rights. In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) 326 (SCA) para 41, Cameron JA stated:

'Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and *mala fide*, the requisite contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt.'

Here, the three requisites – order, service and non-compliance – had been established by Amaryllis. GPDSA thus bore an evidential burden in relation to wilfulness and mala fides. It sought to discharge that burden by suggesting:

'Our understanding in terms of the legal advice we obtained was that an application for leave to appeal suspends the operation of the order against which leave to appeal is sought, and particularly the order of 11 May 2010. We believed the advice was reasonable and correct.'

But that explanation does not avail GPDSA. For, as Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend BPK* 2001 (2) SA 224 (E) at 229:

'An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714).'

It follows in my view that the contempt was thus established beyond a reasonable doubt.

[20] In the result and for the reasons given GPDSA's appeal must fail. It remains to consider costs. The high court ordered GPDSA to pay the costs of the proceedings in that court on the scale as between attorney and own client. No order for costs issued against Messrs Masinga and Mathina. There is no basis for interfering in the exercise of the high court's discretion in that regard. It follows that that order must stand. As to the costs of the appeal: all three appellants were represented in this court and the one below by the same counsel and attorney. Accordingly, no additional costs distinct from that of GPDSA have in truth, been occasioned on appeal in respect of Messrs Masinga and Mathina. Thus notwithstanding their success on appeal no warrant exists for an order of costs in their favour on appeal.

[21] One final aspect requires comment. In his judgment granting leave to appeal to this court Mabuse J stated:

'I always adopt the attitude that no one may be a Judge in his own case. If the court were to believe that the order that it made is correct, in my view, the application that come before such a Judge would be refused on the basis that the Judge would always think that the judgment that he has given is right and can therefore not be challenged. I also believe in the principle that doors should not be closed if parties want to litigate to challenge the decision of the court, let them do so and it should not be taken personally that if a Judge gives leave to appeal then it meant that his judgment was wrong or that the parties who want to challenge the judgment undermine his reasoning.

I should therefore think that we should always open the doors for litigants in order to pursue their rights. In instances like this one in particular the court should be inclined to grant leave to appeal until the issues are fully exhausted. There is no prejudice that the other party will suffer or there is before this court no indication or no argument that if this court were to grant leave to appeal the respondent will one way or the other suffer any prejudice. On that basis I am therefore of the opinion that the applicant should be granted leave to appeal ... '

That with respect to the learned judge is not the test. In *R v Muller* 1957 (4) SA 642 (A) at 645E-G, Ogilivie Thompson AJA said:

'From the very nature of things it is always somewhat invidious for a Judge to have to determine whether a judgment which he has himself given may be considered by a higher Court to be wrong; but that is a duty imposed by the Legislature upon Judges in both civil and criminal matters. As regards the latter, difficult though it may be for a trial Judge to disabuse his mind of the fact that he has himself found the Crown case to be proved beyond reasonable doubt, he must, both in relation to questions of fact and of

law, direct himself specifically to the enquiry of "whether there is a reasonable prospect that the Judges of Appeal will take a different view" (per CENTLIVRES, J.A., in *Rex v Kuzwayo*, 1949 (3) SA 761 (AD) at p. 765).'

[22] In the result:

(1) The appeal by the first appellant is dismissed with costs.

(2) The appeal by the second and third appellants against paragraphs 1, 3 and 4 of the order of the court below is allowed and the order is amended by the deletion of paragraphs 3 and 4 and the substitution of paragraph 1 with the following:
‘The rule nisi granted by the court on 28 July 2010 is discharged.'

_____

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	G Shakoane V D Mtsweni Instructed by: Dolf Mosoma Attorneys Pretoria Naudes Attorneys Bloemfontein
For Respondent:	M P van der Merwe H C Janse van Rensburg Instructed by: Tim du Toit Attorneys Pretoria Honey Attorneys Bloemfontein