

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2021/22981

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED NO

17 May 2021


Judge Dippenaar

In the matter between:

CHERYL ANN BENJAMIN (nee GOVENDER)

1ST APPLICANT

RYAN MARK RABEY

2ND APPLICANT

And

COLIN PREMLAN GOVENDER

1ST RESPONDENT

COLIN PREMLAN GOVENDER NO

2ND RESPONDENT

(In his capacity as Trustee of the

ABISHAI TRUST, (No 4270/2012)

NICOLE ODELL BALKARAN NO

3RD RESPONDENT

(In her capacity as Trustee of the
ABISHAI TRUST, (No 4270/2012)

SPIDERWEBB ALTITUDE SYSTEMS (PTY) LTD

4TH RESPONDENT

MASTER OF THE HIGH COURT

5TH RESPONDENT

**COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

6TH RESPONDENT

THE STANDARD BANK OF SOUTH AFRICA LIMITED

7TH RESPONDENT

ABISHAI CAPITAL (PTY) LTD

8TH RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 17th of May 2021.

DIPPENAAR J:

[1] The applicants sought, in an urgent application launched on Monday 10 May 2021, enrolled for hearing on 11 May 2021, variation of an order granted in the urgent court by Victor J on 20 April 2021 under case number 14808/2021, enforcement of that order by way of further interdicts and contempt relief, together with a punitive costs order. In the

applicants' heads of argument, the purpose of the application was stated to be *“for variation/amplification and the handing over of the fourth respondents financial and other records and banking accounts and assets to enable the applicants to administer the fourth respondent as required under the Companies act (sections 66 et seq)”*. The application was opposed by the first to fourth and eighth respondents (“the respondents”). The respondents launched a counter application, conditional upon the granting of the interdictory relief sought by the applicants, in which a variation to the Victor J order was sought, attaching a number of conditions to be attached to applicants' access to the fourth respondent.

[2] When the matter was called on 11 May 2021, the applicants requested the matter to stand down until 13 May 2021. The founding papers had afforded the respondents some 4 hours to deliver their answering papers. A partial answering affidavit was delivered under protest at 09h45 on the morning of 11 May 2021. On the evening of 12 May 2021, at 20h49 a supplementary answering affidavit was delivered. The applicants had delivered a replying affidavit, dealing only with the partial answering affidavit during the afternoon of 12 May 2021. In their heads of argument, the applicants objected to the supplementary affidavit and sought the dismissal of the counter application. They did not however deliver any supplementary replying affidavit. When the matter was argued on 13 May 2021, the applicants did not seek a postponement of the application, nor an opportunity to supplement their replying papers. The applicants must be held to their election not to respond to the supplementary answering affidavit.

[3] The respondents further launched a condonation application for the late delivery of their answering affidavits. No opposing papers were delivered by the applicants. I am satisfied that good cause has been shown and that condonation should be granted.

[4] According to the applicants, the basis of their case is “to enable the applicants to perform their fiduciary duties under the Companies Act” ¹(“the Act”). Reliance was placed

¹ 71 of 2008

on paragraph 2.5 of the order of Victor J which provides: “*The Applicants are to be placed in the position to exercise their duties under the Companies Act and its regulations and the fiduciary duties for the fourth respondent*”.

[5] The respondents’ grounds of opposition were: (i) the application was not urgent; (ii) the court is functus officio and the issues are *res iudicata*. The court has no power to vary the Victor J order either under r 42 or the common law; (iii) the order of Victor J is currently suspended under s18(1) of the Superior Courts Act as it is final in effect; and (iv) the applicants have failed to make out a case on the facts that the respondents are not complying with the order of Victor J.

[6] The present application is predicated on the alleged non-compliance by the respondents with the Victor J order in terms of which interdictory relief was granted in favour of the applicants, directing the first to fourth respondents *inter alia*, not to deny the applicants access to the premises and records of the fourth respondents. The order was granted “*pending the final enquiry into the directorships of the fourth respondent by the sixth respondent and any litigation arising therefrom*”. The respondents launched an application for leave to appeal against the Victor J order on 21 April 2021.

[7] The proceedings before Victor J were preceded by an earlier urgent application before Windell J on 10 March 2021. The present proceedings are also related to four other legal proceedings and certain investigations by the South African Police Services and others. The issues between the parties traverse a wide ambit in respect of which there are multiple factual disputes between the parties. Various of those disputes are again raised in the present proceedings.

[8] I agree with the respondents that the present application was brought with undue haste and without the requisite urgency, resulting in a haphazard delivery of papers at the last minute. The respondents argued that the matter should be dismissed on the basis

that it constituted an abuse². The matter could have been struck from the urgent roll for the lack of urgency illustrated in the founding papers. I have however elected to consider the application on its merits in order to consider whether it constitutes an abuse of process.

[9] It is undisputed that the nub of the applicants' complaints underpinning the contempt application before Makume J and their present complaints are the same. There is merit in the respondents' contention that the present application constitutes the proverbial "second bite at the cherry". The judgment of Makume J is not presently available. In dismissing the application after hearing full argument on its merits, Makume J already determined that the respondents' conduct in refusing to allow the applicants to collect and make copies of the fourth respondents' documents, did not constitute contempt of the Victor J order. That issue is *res iudicata*.

[10] The contempt relief sought by the applicants is in any event doomed to failure as the applicants fail to meet the requirements for contempt³ in their founding papers. The interpretation of the order is in dispute between the parties. It is undisputed that the respondents are acting on legal advice received from their attorneys and senior counsel, pertaining to the interpretation of the Victor J order. In such circumstances it can hardly be concluded that the applicants have illustrated beyond a reasonable doubt that the respondents are in willful and mala fide contempt of the Victor J order.

[11] Moreover, the wording of the relief sought is in peculiar terms and based on what can best be described as a pre-emptive arrest for contempt. Such relief cannot succeed and in my view constitutes an abuse.

² Relying on *Vena v Vena* 2010 (2) SA 248 (ECP)

³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA);; *Pheko & Others v Ekurhuleni City* 2015 (5) SA 600 (CC); *Matjhabeng Municipality v Eskom Holdings Ltd & Others*; *Mkhonto & Others v Compensation Solutions (Pty) Ltd* 2018 (1) SA 1 (CC)

[12] The application for leave to appeal the Victor J order remains pending. It is in dispute between the parties whether that order is appealable. The applicants contended that the order is interim and thus not appealable whereas the respondents contended that the order is final in its effect, absent any pending proceedings or enquiry into the directorships of the fourth respondent and that its operation is suspended under s18(1) of the Superior Courts Act⁴. The applicants did not in their founding papers establish that in relation to the fourth respondent, a complaint had been made under s 168 of the Companies Act⁵ or that it has been instituted by the delivery of form CoR 135.1 or that there was any pending proceedings or enquiry into the directorships of the fourth respondent at the time of the granting of the Victor J order. There is thus merit in the respondents' argument.

[13] In addition to an interpretational dispute between the parties regarding the meaning of the Victor J order, disputes have arisen pertaining to what access the applicants were to enjoy under that order. There is a myriad of factual disputes on the papers. The applicants' case is that the respondents are "in wanton disregard" of the Victor J order. I agree with the respondents that in the present application, the applicants are attempting to substantially expand on the relief sought and granted to them in terms of the Victor J order. The application had been crafted by the applicants and had been fully argued before Victor J granted the order in its terms. The applicants did not refer me to any authority entitling this court to vary that order and no case for such variation was made out, either under r 42 or the common law. They contended that they were entitled to seek an amendment to the order on good cause shown.

[14] It is well established that once a court has finally pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it, except in limited circumstances⁶. Such limited circumstances do not arise in the present application. Some

⁴ 10 of 2013

⁵ 71 of 2008

⁶ Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306F-307G

three weeks after the granting of the original order before Victor J, the applicants sought to tailor the relief sought and obtained in that application.

[15] Even if it were open to the applicants to seek to vary the Victor J order on an interim basis, I am not persuaded that the applicants have shown good cause or have made out a proper case in their founding papers to do so. No attempt was made to address the requisites of the additional interdictory relief in their founding papers. The applicants' founding papers are replete with vague references to "*the applicants being obliged to exercise their fiduciary duties*" to the fourth respondent. No attempt is made to give content to those duties other than vague references to the Act and no factual information has been provided by the applicants in relation to those issues. In those circumstances, I am not persuaded that the applicants have made out a proper case or have shown any good for the proposed variations to the Victor J order.

[16] I am further not persuaded that it would be appropriate at this juncture, to grant additional urgent interdictory relief aimed at extending the ambit of the order of Victor J, whilst the very existence of the order is subject to an application for leave to appeal.

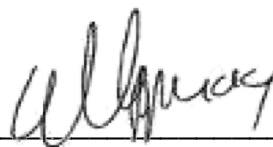
[17] It follows that the application must fail. In light of the conclusions reached, it is not necessary to consider the respondents' conditional counter application.

[18] The normal principle is that costs follow the result. There is no basis to deviate from this principle. The respondents sought a punitive costs order based on their contention that the application constituted an abusive. Considering the applicants' conduct in relation to the application, which can be characterised as an abuse, I am persuaded that such an order is warranted.

[19] I grant the following order:

[1] Condonation is granted to the respondents for the late delivery of their answering and supplementary answering affidavits.

[2] The application is dismissed with costs on the scale as between attorney and client.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING : 13 May 2021

DATE OF JUDGMENT : 17 May 2021

APPLICANT'S COUNSEL : Adv. JTH. Berdou

APPLICANT'S ATTORNEYS : Annie Van Der Merwe Inc.

1st to 4th & 8th RESPONDENTS' COUNSEL : Adv R. Moultrie SC

1st to 4th & 8th RESPONDENTS' ATTORNEYS : Schoonees Belling & Georgiev