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

Case Number: 388/2024

Heard: 22/03/2024

Delivered on: 24/05/2024

In the matter between:

S[...] H[...] D[...] P[...]

Applicant

and

P[...] S[...]

First Respondent

JEBEKO FARMING CC

Second Respondent

BECKER BERGH & MORE INC

Third Respondent

***Coram:* Tyuthuza AJ**

JUDGMENT

***Per* Tyuthuza AJ**

INTRODUCTION

1. This is a contempt of court application against the respondents for failing to comply with my interim order granted on 23 February 2024 under the above case number. In the alternative, the applicant seeks an order that the interdict granted on 23 February 2024 be put into immediate effect pending any appeal proceedings in respect of the said order.
2. On 23 February 2024, the applicant approached the Court on an urgent basis, wherein I granted the following order:

“1. The Applicant’s non-compliance with the Uniform Rules of Court regarding time limits and service be and is hereby condoned and the application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court.

2. *Pending finalisation of the divorce action between the Applicant and the First Respondent, under case no: GC11/2023 instituted in the Gariep Circuit Local Division, the First and Second Respondents are:*

2.1 interdicted and restrained from utilizing an amount equal to 50% of the nett proceeds of the sale of the immovable property, namely the farm Jebeko, no. 375, situate in the Dawid Kruiper Local Municipality, Gordonia district, Northern Cape Province, which was held under Title Deed No. T[...] (“Jebeko”); and

2.2 directed to forthwith pay, or cause to be paid, 50% of the nett proceeds of the sale of Jebeko into the trust account of Cluver Markotter Inc., alternatively CJ Willemse & Babinszky Attorneys.

3. *In the event that the First and/or Second Respondent having already utilized any part of the nett proceeds of the said sale, he/it be ordered to forthwith pay 50% of the amount so utilized into the trust account of Cluver Markotter Inc; alternatively CJ Willemse & Babinszky Attorneys,*

where it shall remain together with the amount referred to in paragraph 2.2 above pending the finalization of the above mentioned action.

4. *The Third Respondent is directed to account to the Applicant's attorneys, Cluver Markotter Inc; within 3 days from date of service of this order , by providing them with:*

- 4.1 *The final statement of account in respect of the sale and transfer of Jebeko;*

- 4.2 *All documents confirming any payments made in terms of the final statement of account; and*

- 4.3 *Full details of any part of the nett proceeds of the said transaction remaining in any trust banking account of the Third Respondent.*

5. *The First Respondent, together with and separate from any other party electing to oppose this application, the one paying the other to be absolved pro tanto, are hereby ordered to pay the costs of this application."*

3. The first and second respondents opposed the grant of the interim interdict on 23 February 2024.

BACKGROUND TO THE MAIN APPLICATION

4. The applicant, S[...] H[...] D[...] P[...] and the first respondent, P[...] S[...], were married in community of property on 2 November 2011. They have since separated. The first respondent instituted divorce proceedings in April 2023, which proceedings are yet to be finalised. The first respondent claims therein for the division of the parties' joint estate.

5. The applicant sought urgent interdictory relief pending the finalisation of the divorce proceedings to interdict and restrain the respondents from utilizing an amount equal to 50% of the nett proceeds of the sale of Farm Jebeko and to pay the amount equal to 50 % of the nett proceeds into the applicant or the first respondent's attorneys' trust account.
6. The applicant contended that the first respondent is intent on frustrating her claim or diminishing the value of her claim in the divorce action. She further submitted that his refusal to account to her regarding the sale of livestock; his spending of the joint funds and his failure to disclose details regarding the sale of the farms Jebeko and Gamuip, is indicative of his intent to frustrate her claim or at the very least, to significantly diminish the value of her claim. It is the applicant's case that the first respondent will alienate and dissipate her share of the joint estate. It is also her case that if the proceeds of the sale are not preserved, the court awarding her rightful share of the joint estate might prove to be an exercise in futility.
7. The first respondent avers that the applicant has failed to provide evidence to the effect of him either selling or squandering the communal assets or having the intention to do so. He further contended that farm Jebeko is an asset belonging to the second respondent and that the second respondent is at liberty to deal with its assets as it deems fit. It is the first respondent's case that the proceeds from the sale of the Jebeko Farm will be utilised to increase the value of the estate and therefore the applicant cannot suffer any prejudice if the relief is not granted.
8. The first respondent further contended that if the relief sought is granted, it will prejudice the communal estate in that the entities will be unable to fulfil their respective contractual obligations. He further contended that the applicant has approached the Court to effectively stay the divorce proceedings. That the relief sought (interim interdict) has a final effect and is not interim in nature because the first respondent has lent and advanced the proceeds of the sale of the farm to entities owned by the first respondent to purchase other valuable properties, so ran the argument.

9. I granted the order in favour of the applicant and provided my reasons thereafter. On 28 February 2024, the first and second respondents lodged an application for leave to appeal the order which I granted on 23 February 2024.

CONTEMPT APPLICATION

10. This application was launched on 15 March 2024. The first and second respondents have opposed this application. The third respondent has withdrawn its opposition to the application and has complied with the order granted on 23 February 2024 in so far as it is concerned, thus the applicant no longer seeks any relief against it.

Applicant's Arguments

11. It is the applicant's submission that the first and second respondents have wilfully and negligently failed to comply with the Court order by failing to comply with paragraph 2.2 of the order i.e., they have failed to pay, or cause to be paid, 50% of the nett proceeds of the sale of Jebeko into the trust account of Cluver Markotter Inc., alternatively CJ Willemse & Babinszky Attorneys and neither have they accounted for any funds that have been utilised from the nett proceeds.
12. The applicant avers that the first and second respondents have deliberately brought the application for leave to appeal to avoid or delay compliance with the order granted on 23 February 2024 and to deal with the proceeds of the sale as they see fit. The order granted on 23 February 2024 is an interlocutory order with interim effect and the application was launched by the applicant merely to safeguard her interests in regards to her half of the joint estate which will be decided in due course. Therefore, the applicant seeks that the first and second respondents be held in contempt of the court, be directed to comply with the order alternatively the interdict granted on 23 February 2024 be put into immediate effect pending any appeal proceedings in respect of the said order.

Respondents' Arguments

13. The main contention of the respondents' opposition is that the order granted on 23 February 2024 has final effect, as a result, the respondents have filed an application for leave to appeal the order. The respondents submit that the material issue to be decided herein is '*whether a party can be in contempt of court order that has been suspended in terms of section 18(1) of the Act¹, pending the finalisation of the appeal process*'.
14. The respondents argue that the order is not immediately executable as it is the subject of an application for leave to appeal. They further contend that they are not bound by the order and that the second respondent is thus entitled to carry on as if the order does not exist. The respondents submit that they hold a *bona fide* view that the order has a final effect and that this view is demonstrated and substantiated by the alternative relief sought by the applicant.
15. The respondents further aver that the current application for them to be held in contempt of the court and *inter alia* be directed to comply with the impugned order cannot succeed as the applicant has failed to demonstrate any exceptional circumstances for the Court to grant such an order and irreparable harm that the applicant may suffer if the Court does not order same. The second respondent has made a formal tender to the applicant, by way of security which is secured by the registration of a covering mortgage bond in favour of the applicant. The respondents allege that the proceeds of the sale have been utilised in a commercial endeavour intended to increase the value of the first respondent's estate, which would in return also have a positive financial benefit for the applicant. Therefore, the respondents submit that its non-compliance with the order is not wilful or contemptuous and that the application for contempt is *mala fide*, thus the court should dismiss the application with costs on an attorney and client scale.

¹ Superior Courts Act 10 of 2013.

16. The issues I had to determine were:
- 16.1 Whether the application is urgent;
 - 16.2 whether the applicant had made out a case for the contempt; and
 - 16.3 whether the order is susceptible to the provisions of section 18(1), read with section 18(3) of the Superior Courts Act?

URGENCY

17. The applicant avers that the application is urgent, in that the applicant must take expeditious steps to secure her half share of the nett proceeds of the sale of Jebeko, otherwise the respondents will continue to utilise the funds as they deem fit.
18. The respondents submit that the application is not urgent, the application is an abuse of process and in the absence of valid grounds to justify urgency, the court strike the matter of the roll with an appropriate punitive costs order; and or alternatively, dismiss the application.
19. It is trite that an ongoing contempt of a court order, by its very nature, is urgent. In *Protea Holdings Ltd v Wriwt and Another*², Nestadt J held that as *'one of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element of urgency would be satisfied if in fact it was shown that respondents were continuing to disregard the order of 3 August 1977. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed'*.

² 1978 (3) SA 865 (W), 868H

20. In the matter *Victoria Park Ratepayers' Association v Greyvenouw CC and Others*³ it was held that *"it is not only the object of punishing a respondent to compel him or her to obey an order that renders contempt proceedings urgent: the public interest in the administration of justice and the vindication of the Constitution also render the ongoing failure or refusal to obey an order a matter of urgency."*
21. The applicant avers that on 27 February 2024, her attorneys addressed correspondence to the conveyors Thorpe & Hands Inc. to advise that in terms of the Court order, 50% of the funds held by it was to be paid into their trust account, the conveyors were also advised that the respondents have launched an application for leave to appeal the order and that such application does not suspend the operation of the order in that it is interim. A similar letter was addressed to Arajulo Attorneys. The first respondents' attorneys were aware of the letters sent to the parties and in response to the letters, they addressed a letter to the applicant's attorneys, wherein they advised, that the application for leave to appeal does suspend the operation of the order and that the impugned order had the effect of a final judgment. The Respondents further made an interim proposal to the applicant and tendered to register a mortgage bond in favour of the applicant.
22. On 1 March 2024, the applicant's attorneys advised the respondents' attorney that its actions are circumventing the order and reiterated that the relief granted is not final in nature but interim. Further, the respondents were advised to comply with the order or confirm the steps taken to comply with the order failing which the applicant would institute contempt proceedings. According to the applicant, the first and second respondent's attorneys advised that it would revert to the applicant on 11 March 2024 and requested that the matter stand over until then, but no response was received on 11 March 2024. The applicant alleges that it had no option but to approach the Court on the shortened time periods to enforce compliance with the order,

³ [2004] 3 All SA 623 (SE) (11 April 2003) at para 27.

and that in the interim, the applicant has no control over how the first and second respondents deal with her half share of the nett proceeds.

23. It is evident that the applicant sought compliance with the order from the respondents in that it was of the view that the order was interim and thus not appealable, upon the respondents having failed to comply with the order or advise upon the steps it would take to comply with the order, the applicant launched this application. I take the view that the respondents' contempt in the circumstances is ongoing and thus the applicant was entitled to launch these proceedings on an urgent basis.

CONTEMPT

24. In the matter *Fakie NO v CCII Systems (Pty) Ltd*⁴, the Supreme Court of Appeal dealt with the test and requirements to be met for a committal in respect of contempt of court, at paragraph 9 it held: *"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."*
25. To succeed in establishing that the respondents are guilty of contempt of a court order, the applicant must establish the following: (a) that the order was made against the respondents; (b) the order was served on the respondents or that the respondents had knowledge or information about the order; and that (c) the respondents failed to comply with the order.⁵ It is further trite that once the above requirements have been satisfied, wilfulness and *malafide* on the part of the respondent is presumed. The evidentiary burden is then on the respondent to establish reasonable doubt. Failure to

⁴*Fakie NO v CCII Systems (Pty) Ltd* (653/04) 2006 (4) SA 326 (SCA).

⁵ *Ibid* at para 22

discharge this burden by the respondent will result in him or her being found guilty of contempt of court.⁶

26. It is common cause that the court order exists; the first and second respondents have knowledge of the court order; and that the first and second respondents have not complied with the express terms of the order. The respondents' dispute that their conduct is wilful and *malafide*. The respondents submit that it is impossible to be in contempt of an order which has been suspended and which is inoperative in that the order granted falls within the purview of section 18 (1) of the Superior Courts Act. The respondents aver that they hold a strong and *bona fide* view that the order has the effect of a final judgment, therefore, they cannot be in wilful disobedience. The respondents further submits that there are very good prospects of success in appealing the order and that the prospects of being unsuccessful on appeal are therefore slim. I am unpersuaded that this defence excuses the respondents from complying with the order.
27. It is trite that all orders of court, whether correctly or incorrectly granted, have to be obeyed unless they are properly set aside.⁷
28. The correspondence sent by the respondents' attorney wherein it made an interim proposal to the applicant and tendered to register a mortgage bond in favour of the applicant failed to assist in resolving the respondents' non-compliance with the order. This does not demonstrate a *bona fide* attempt by the respondents to secure 50% profit of the net proceeds of the sale of Jebeko. The respondents conduct is indicative of the fact that the respondents are intent on subverting the order granted on 23 February 2024 and frustrating the applicant's claim.
29. It has been said authoritatively that: "*Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her*

⁶ *Ibid* at para 41-42

⁷ *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* 2021 (5) SA 327 (CC) at para 59.

*opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. 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.”*⁸ If a coercive order will be fruitless, a punitive order aimed at punishing the contemnor by imposing a sentence which is unavoidable will be the only appropriate remedy.

30. The Supreme Court of Appeal in *Fakie* held that: *‘[i]n the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law’*⁹.
31. In *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*¹⁰ it has held, *“...[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders. It is indeed the accepted practice in contempt matters to seek compliance, using punishment as a means of coercing same.*
32. I am of the view that the only way to ensure that the respondents comply with the order and to stop their contemptuous behaviour is to coerce the respondents.
33. The respondents have failed to advance evidence that established a reasonable doubt that their non-compliance with the order was wilful and *mala fide*.

⁸ *Victoria Park Ratepayers’ Association*, above n 3, at para 23.

⁹ *Ibid* at para 8

¹⁰ [2014] ZASCA 209; 2015 (2) SA 413 (SCA) at para 16

SECTION 18 OF THE SUPERIOR COURTS ACT 10 OF 2013.

34. Section 18 of the Superior Courts Act provides as follows:

18. Suspension of decision pending appeal-

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

35. It is an established rule of practice in our Courts that generally, 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. 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 section 18 of the Superior Courts Act.

36. In the main judgment, the nature of the interim anti-dissipatory interdict *pendente lite* was comprehensively discussed. I concluded then, and reiterate that conclusion here, that the interdict granted is interim and

interlocutory, and does not have final effect. This conclusion brings into operation, section 18(2) of the Act for purposes of the present case. The effect thereof will be that, the Superior Courts Act does not suspend the operation of an interlocutory order, not having the effect of a final judgment, pending the outcome of the application for leave or the appeal itself. Thus if the impugned order falls squarely within the ambit of s18(2) of the Act, then the Court may not have to trigger s18(1) and 18(3) of the Act. The nature of the order itself is such that it cannot be subverted or suspended by a pending appeal or application for leave to appeal.

37. In *Ntlemenza v Helen Suzman Foundation and another* [2017] JOL 38075 (SCA), it was held that: *“Where a judgment is final in effect, as contemplated in section 18(1), the default position is that the operation and execution of the principal order is suspended pending the decision of the application for leave to appeal or appeal. In terms of section 18(2), the default position in respect of an interlocutory order that does not have the effect of a final judgment is that the principal order is not suspended pending the decision of the application for leave to appeal or appeal. Both sections empower a court, assuming the presence of certain jurisdictional facts, to depart from the default position.”*
38. The grant of an interdict *pendente lite*, though it may cause great, and indeed irreparable prejudice to the respondent, it clearly does not dispose of any issue or any portion of an issue in the main action, thus an order is held to be interlocutory in effect as well as in form¹¹.
39. The order granted on 23 February 2024 does not dispose of the applicant’s claims and is clearly interim in nature and thus not appealable, be that as it may, to settle this point between the parties, I intend to make an order to the effect that the order is not suspended. The applicant will be severely prejudiced by the respondents using the application for leave to appeal as a shield to justify its non-compliance with the order.

¹¹ Herbstein and Van Winsen, *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* 5 ed (Juta & Co Ltd, Cape Town 2009) at 1209.

40. The order granted on 23 February 2024 falls squarely within the purview of Section 18(2) of the Superior Courts Act, thus its operation and execution is not suspended pending the decision on the application for leave to appeal or the appeal itself.

COSTS

41. The respondents' conduct in this matter justifies a punitive costs order against them as a mark of this Court's displeasure at their conduct and resolute refusal to abide by the order. In the circumstances, I am inclined to grant costs in favour of the applicant on an attorney and client scale.

I make the following order:

1. The first and second respondents are declared in contempt of the order granted by this Court on 23 February 2024.
2. The first respondent, due to his contempt be committed to prison for a period of 30 days.
3. The second respondent due to its contempt is sentenced to pay a fine in an amount of R100 000.00.
4. Orders 2 and 3 above are suspended for a period of 2 years on condition that the first and second respondent comply in every respect with their obligations in terms of the order granted by this Court on 23 February 2024 and that they do so within five days from the date of this order and more specifically that:

4.1. the first and second respondent pay or cause to be paid, 50% of the nett proceeds of the sale of Jebeko into the trust account of Cluver Markotter Inc;

4.2. In the event that the First and/or Second Respondents have already utilized any part of the nett proceeds of the said sale, he/it forthwith pay 50% of the amount so utilized into the trust account of Cluver Markotter Inc;

5. The operation and execution of the order granted by this Court on 23 February 2024 shall not be suspended pending the finalisation of the application for leave to appeal and subsequent applications/petitions for leave to appeal of that order.
6. The first and second respondents are ordered to pay the costs jointly and severally from each other, the one paying the other to be absolved *pro tanto* on an attorney and client scale.

T TYUTHUZA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Applicant:	Adv A.G. Van Tonder
On the instruction of:	Cluver Markotter Inc. c/o Engelsman Magabane Inc.
On behalf of the 1 st and 2 nd Respondents:	Adv MMW Van Zyl SC
On the instruction of:	CJ Willemse & Babinszky Attorneys c/o Roux Welgemoed Du Plooy Att.