



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **083030/2023**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: YES
(3) REVISED

[REDACTED]

24 OCTOBER 2024

SIGNATURE

DATE

In the matter between:

MARTIN KYLE JOUBERT

Applicant

and

BLACK RHINO GAME LODGE (PTY) LTD

First Respondent

MIKHAIL JOUBERT

Second Respondent

ODETTE OCTAVIA JOUBERT

Third Respondent

ODETTE OCTAVIA JOUBERT N.O.

Fourth Respondent

(In her capacity as the executrix in the estate late
Hendrik Petrus Joubert)

BIG NAME INVESTMENTS 1025

Fifth Respondent

CIPC

Sixth Respondent

MASTER OF THE HIGH COURT

Seventh Respondent

MARMICO FAMILY TRUST

Eighth Respondent

(IT 12757/96)

ODETTE OCTAVIA JOUBERT N.O.

Ninth Respondent

(Trustee of the Marmico Trust)

HENDRIK PETRUS JOUBERT N.O.

Tenth Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 24 October 2024.

JUDGMENT

RELIEF J

INTRODUCTION

[1] On the 29 August 2023 Hassim AJ, as she then was, granted an order sought by agreement [the mandatory order]. Emanating from such mandatory order are two applications which have, by consent and for the sake of good order to be heard together. One being a contempt application brought by the applicant which, has been struck and removed several times in the urgent court [contempt relief] and the other application is brought by the respondents to stay the execution of alternatively, to rescind the mandatory order [stay and rescission relief]. 'For the sake of good order' soon called for this Court to make a determination on the ranking order in which these two applications were to be adjudicated. An important determination considering the effect of each. This aspect is dealt with below.

[2] The mandatory order emanates from an application which was initially brought by the applicant in July 2023 in which he, in his capacity as the director of the first respondent, Black Rhino Lodge (Pty) Ltd [Black Rhino], the fifth respondent, Big Name Investments 1025 [Big Name] and as a beneficiary of the eighth respondent, the Marmico Family Trust, IT12757/96 [Family Trust] sought to declare his mother, the third respondent [Odette] and his brother, the second respondent [Mike] delinquent directors in terms the Companies Act¹ [delinquency relief]. The delinquency relief was met with a counter-application in which Odette and Mike, *inter alia*, attack the applicant's *locus standi* as the cited director. The applicant then in August 2023, launched a separate Part A with the delinquency relief, now referred to as Part B in the consolidated form. Part A served before Hassim J, the mandatory order, the delinquency relief was postponed and has been referred to Part B in the main application.

[3] The contempt relief was launched in October 2023 and the applicant, before the respondents filed their answer thereto, filed two further supplementary affidavits. The respondents filed their answering affidavit in September 2023 and their stay and recession relief in February 2024. The respondents too, filed a further supplementary affidavit. The further affidavits were, with leave tendered into evidence.

[4] The applicant too, moved for an amendment at the date of hearing of the application. The amendment has not been filed on caselines. The notice too, is incorrectly dated as October 2023 and save for setting out the intended amendment as required in sub-rule 1, the notice does not accord with rule 28. None the less, it was unopposed and the amendment was granted to ensure that the correct parties were before Court. The fourth respondent as cited, Hendrik Petrus Joubert, the applicant's father, passed away [the deceased]. The deceased was substituted with Odette, the duly appointed executrix of the deceased's estate. The applicant also sought to amend the amounts claimed in respect of the respective monetary claims against Odette, Martin and the deceased estate.

¹ Section 162 of Act 71 of 2008.

[5] The applications proceeded on the amended papers, and for clarity the parties will be referred to as cited in the contempt relief application.

Ranking order of the applications

[6] Counsel for the applicant invited the Court to consider the matter of Clipsal Australia (Pty) Ltd and Others vs Gap Distributors and Others² [Clipsal matter]. In this way the Court was reminded that court orders are to be obeyed, even if they are wrong, until set aside. If not, warned by Goldstein J, chaos would result if people defied orders with impunity. Counsel submitted further that to adjudicate the stay and rescission relief before the contempt relief would be the wrong way round because the respondents had to purge their contempt first. The reliance on the Clipsal matter too, was to dilute an anticipated point to be taken by the respondents. A similar point which was successfully argued before Joffe J in the Court *a quo*, but which, the SCA rejected in Clipsal. In principle, an issue to be decided in the main application has nothing to do with whether a party is in contempt of a court order and is not relevant to the enquiry. *In casu*, the challenge to applicant's *locus standi* as a director in the counter-application in the main action, the anticipated point was submitted not to be relevant and not to be taken into account.

[7] Counsel for the respondents not arguing the anticipated point, rather urged this Court to dispense with the stay and rescission relief first arguing that the contempt relief before this Court was purely a monetary claim and that to purge the contempt, if any, was a mere accounting exercise which could be resolved at a later stage. Counsel further urged this Court to consider the human element in this matter as it concerned personal contempt within a family unit.

[8] The argument raised by the respondents' Counsel that the contempt relief was simply a monetary exercise, is an aspect which required closer scrutiny to ensure that the principle objective of the contempt relief is realised if it should

² 2010 (2) SA 289 (SCA) at [22] referring to what Goldstein J said in the **Culverwell v Beira** 1992 (4) SA 490 (W) at 494 A-E.

succeed.³ This aspect it dealt with in more detail below. However, for present purposes, the mandatory order consists of 29 prayers. The prayers deal with both final and interim relief and include procedural issues in respect of Part B. It is common cause that some of the prayers **have been complied with** but not, *inter alia*, prayers 7 and 8. Counsel for the applicant in argument conceded that the thrust of the contempt relief related to prayers 7 and 8 of the mandatory order. Prayer 7 is interim relief. In the absence of further authority for the respondents' propositions advanced in argument, and applying the approach by the SCA in the Clipsal matter, this Court deals with the contempt relief first.

[9] Before doing so, and to give context to the applications before this Court, relevant facts are set out to give perspective to the relief sought, the relationship between the parties and what is meant with reference to 'the Joubert group of companies'.

RELEVANT FACTS

[10] The Family Trust was registered by the late Willie Martin Joubert [the founder] in 1996. The founder was the applicant's grandfather and Odette's father-in law. The first duly appointed trustees of the Family trust were the founder, the deceased and Odette. They have administered the Family trust and its assets together for almost two decades. The Family trust is a discretionary trust with its main object being to administer trust assets for the benefit of the beneficiaries. The uncontentious beneficiaries are the applicant, Mike and their younger minor brother William Joubert [William]. William is still a minor. Odette in terms of an amendment to the trust deed was named a beneficiary. The amendment and Odette's appointment as a beneficiary are contentious issues raised by the applicant but, are not serving before this Court.

[11] Both the deceased and the founder have subsequently passed away. The present trustees of the Family trust are Odette, the deceased and Chris

³ Minority judgment, **Eke v Parsons** at para 65.

Anagnostellis. The appointment of Chris Anagnostellis too, is a contentious issue raised by the applicant but, is not serving before this Court.

[12] Black Rhino and the Big Name are Family trust assets. Black Rhino the flagship of such assets. The Family trust owns 100% in Black Rhino and 67% in Big Name. Odette, Mike and the applicant are the directors of Black Rhino and the Big Name. The applicant was appointed as a director on the 17 November 2022 having been estranged from the Joubert family for a number of years. It is common cause that the applicant has received substantial benefits from the trust over time. The capacity of Odette and Mike to remain directors, the subject matter of Part B brought by the applicant in the delinquency relief.

[13] According to an uncontentious organogram of the Joubert group of companies, the correctness thereof admitted, Mike, Odette, the deceased and the founder possess/ed their own company portfolios within the Joubert group of companies. No portfolio however is depicted on the organogram for the applicant. The three Trusts, namely the Joubert, the Family and the Petmar Trust form part of the organogram.

[14] Of further significance is that Odette is indicated as a director of approximately 23 companies within the Joubert group of companies and is a trustee administering 2 out of the 3 trusts. The deceased, Odette's late husband was a director of only 4 of the companies of which, Odette was a co-director with him. The deceased a trustee in all 3 of the trusts. Odette according to the depiction of the organogram, is and has been a significant figure head and manager of companies and administrator of trusts within the Joubert group of companies.

[15] Part B, nor the contempt relief is specifically aimed at Odette's capacity as a trustee of the Family trust nor her statutory and administrative function as the executrix of the deceased's estate. This is not to say that the consequences of Part B, if successful will not have, but for present purposes it is important to note that it does not. Against this backdrop the contempt relief.

CONTEMPT RELIEF

[16] To commence it is prudent to highlight and to reinforce that the object of a contempt order is not an issue *inter partes* but concerns the dignity of the Court, to vindicate the rule of law. It is therefore not punishment but compels a contemnor to comply with a mandatory court order. In other words, no matter the objectives of an applicant and presence of personal interest “*Contempt of court is not an issue inter partes; it is an issue between the court and the party who has not complied with a mandatory order of court.*”⁴ This point elaborated by Plasket J in the Victoria Park Ratepayers⁵ matter when he expressed the following view in a constitutional context: “*It is clear that 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 judicial 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 (own emphasis) but also, as importantly, acting as guardian of the public interest.*”.

[17] In argument as previously mentioned, Counsel for the applicant indicated that he would focus on prayers 7 and 8 of the mandatory order because that really goes to the heart of the matter, being the personal expenses and the repayment of what has been paid. Having regard to the heart of the contempt relief and the necessity expressed in argument that Odette and Mike must purge their contempt, this Court considers the amended relief. In the amended relief, the applicant seeks an order declaring Odette and Mike to be in contempt of Court, he seeks a determination of monetary claims, on motion from Odette, Mike and from his father's deceased estate, and the committal of Odette and Mike as a sanction should they fail to pay the monetary claim within 48 Hours of an award. Therefore, at the time the applicant launched the urgent contempt relief in October 2023, the applicant in respect of the heart of the contempt, prayers 7 and 8, albeit frustrated, could not have been a “-

⁴ **Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng** 2002 (1) SA 660 (T) at 673D-E (Southwood and Basson JJ concurring).

⁵ **Victoria Park Ratepayers' Association** [2004] 3 All SA 633.

successful litigant-“ as referred to by Plasket J in the Victoria Park Ratepayers matter.⁶ This is because the monetary claim still had to be established and awarded. The applicant’s entitlement to repayment was to be established by the determination of a contempt finding of prayer 7 and the amount, a claim still to be determined. His success was not immediately evident. Prayer 8 stated that:

“If it is established (own emphasis) that the payment was not a liability of the first, fifth or eighth respondent and made to or on behalf of the applicant, second, third or fourth respondent, (with reference to the interim interdictory relief in prayer 7-own emphasis) the party receiving the monies shall make repayment to the first respondent, fifth respondent or eighth respondent as applicable.”

[18] To expand the reasoning, because the repayment of money had not been established nor awarded against Odette and Mike, the applicant at the time the application was launched had no reason to call for contempt as there was none to purge, as was submitted. There too was no reason to call for their committal yet. The cart is before the horse. The mere notion of a possible repayment without an award in your favour can never be seen as purging your contempt. In consequence, the repayment triggered by prayer 7 yet to be awarded, is not the sanction for disobedience. Committal for non-compliance to repay an award is. The applicant knew this, yet persisted. This is why the applicant had to try and remedy his position, to do that, the applicant introduced prayer 9 in the contempt relief. Prayer 9 states:

“9. In the event that the Second and/or the Third Respondents fail to repay the said funds within 48 hours of the granting of this order (contempt relief-own emphasis) then the Second and the Third Respondents are to be sentenced to 60 days imprisonment which sentence is wholly suspended pending compliance with the court order” (own emphasis)

[19] Reference to ‘the order’ and ‘this order’ in prayer 9 can only be the contempt relief. The committal to 60 days imprisonment is the sanction sought, such sanction

⁶ Ibid.

is only coupled to the respondents' failure to pay the monetary claim, within 48 hours once awarded. The applicant does not seek a sanction for the respondents' non-compliance to do something/perform (*ad factum praestandum*), not even with regard to any of the other prayers of the mandatory order mentioned in the founding papers. In other words, to desist from their actions in prayers 5 and 6 of the mandatory order. In contrast, the applicant seeks compliance with the payment of a monetary claim only, and a criminal sanction to follow such disobedience if not paid within 48 hours of payment (*ad pecuniuam solvendam*). It is trite that the common law draws a sharp distinction between these two types of orders and that failure to comply with an order to pay money as requested by the applicant is not regarded as a contempt of court, whereas disobedience of a person to perform, as Jafta J (as he then was) in the Mjeni matter⁷ endorsing a long line of authority that, an order must be *ad factum praestandum* before the Court can enforce it by means of committal. The Constitutional Court agreed with the court's findings in the Mjeni matter confirming both the common law distinction and the comments of Jafta J.

[20] The applicant's Counsel is correct that prayers 7 and 8 lie at the heart of the applicant's contempt relief, this too is borne out from the applicant's evidence and his concern that Odette and Mike's personal expenses are paid by the Family trust and Black Rhino lodge. However, with the contempt relief the applicant is not moving for an order to vindicate the court's dignity but to establish and seek repayment of those expenses which are personal of nature, relying only on the contemptuous failure by Odette and Mike to repay it once determined. This is further bolstered by the applicant's inability to forgo the monetary claim against his father's deceased estate in the contempt application in circumstances where no declarator of contempt sought. Of significance then, the prospect that Odette and Mikes will be indebted and fail to pay, is the only reason relied by the applicant in his amended relief warranting the contempt relief and the call for this Court to commit his mother and brother. Committal the only sanction the applicant seeks.

[21] The contempt relief has not been brought to vindicate the Court's dignity but an attempt to vindicate the applicant who seeks to enforce a monetary claim to be

⁷ **Mjeni v Minister of Health and Welfare, Eastern Cape** 2000 (4) SA 446 (Tk) at 451D-E.

awarded, on motion and adjudicated in contempt proceedings. This is not the object of contempt proceedings. No alternative relief was advanced nor did Counsel only move for a declarator. The basis and thrust of the contempt relief is clear on the papers and bolstered in argument: the repayment of personal expenses back to the Family Trust and Black Rhino or face the consequences, committal.

[22] The contempt relief must fail. The Court now deals with the rescission and stay relief.

RESCISSION, ALTERNATIVELY STAY RELIEF

[23] The respondents in their notice of motion seek to rescind, not vary the mandatory order alternatively, that the mandatory order be stayed pending the determination of the delinquency relief and counter application. The basis and facts are now dealt with.

What are the grounds relied on to rescind the order?

[24] The respondents' founding papers rely on a change of circumstances and ambiguity of phrases in the mandatory order as the grounds for rescission. No authority for the change in circumstances as a basis for the rescission of a judgment was provided. However, as to ambiguity and on the basis that the interpretation of the order is ineffective and leaves doubt as to what the order requires, leaving a discretion by the person who applies it, the respondents relied on the Constitutional matter of Eva v Parsons.⁸ This Court, in the heads of argument, was specifically referred to paragraph 65 E-G, in the minority judgment by Jafta J. This paragraph deals with a Court's powers and the exercise its discretion to ensure that effective orders are granted in circumstances when parties wish to make a settlement agreement an order of Court. The respondents in their founding papers do not rely on the manner in which Hassim J exercised her discretion on the 29 August 2023 to ensure that an effective order was granted which was not ambiguous. The papers are silent. The papers speak more to what occurred after the mandatory order was

⁸ 2016 (3) SA 37 (CC).

granted. The basis for such relief with reference to the Eva v Parsons matter misplaced and on this basis for want of another competent basis must fail.

[25] Notwithstanding, in the papers, reference to ambiguity is made with reference to the mandatory order itself. Such being prayers 4-8 and 12. Reliance was placed on the use of phrases of “*fiduciary duties*”, “*major decisions*”, “*personal expenses*”, “*human resources function*” and “*integral in decision-making functions*”.

[26] Applying rule 42, although not specifically raised, as it caters for the rescission of an order where there is an ambiguity, but only to the extent of such ambiguity. In other words, the sub-rule caters for where the judgment or order does not reflect the intention of the judicial officer pronouncing it.⁹ This is not the case, nor the reasons relied on. The mandatory order was granted by agreement and in the content agreed to by them. In circumstances when all the parties were legally represented. The rescission relief on this ground must fail.

Should the mandatory order be stayed?

[27] The respondents rely on rule 45A and the common law in their founding papers. Rule 45A directs that a Court may suspend any order. This is besides a Court’s inherent jurisdiction to do so should an injustice be done if the order should not be stayed for a period of time.

[28] Returning to the Clipsal matter the SCA stated that the Court possessed an equitable discretion to be exercised sparingly and in exceptional circumstances. The exceptional circumstances in this matter raised by the respondent’s Counsel were the human and family factor in this application. A Court when exercising its discretion is not only bound by the facts relied in argument but must consider all the facts and circumstances of the matter before it. This Court too considers the

⁹ **Zondi v MEC, Traditional and Local Government Affairs** 2006 (3) SA (CC) at 12 G-H.

evidence relied on and the guidance of the factors set out in Gois t/a Shakespeare's Pub vs Van Zyl ¹⁰[Gois matter].

[29] Of importance too, is that all the parties committed themselves to motion proceedings. In considering the choice and the acrimonious Part B, loomed the fact that the parties are in a family dispute about the Family trust and trust assets. A dispute which has escalated into 'family warfare'. The disputes not only appear to relate to the applicant being a director of Black Rhino and Big Name, but whether Odette Mike stand to be declared are delinquent directors and the consequences which follow such a declaration. Such foreshadowed in the relief of Part B, damages and Odette's ability to hold other *ex officio* positions. The ripple effect according to the organogram will send a shock wave. Central to this appreciation must surely have been the foreseeable reactions between the family members who on these papers have, been referred to as idiots. Each party in the papers asserting their own reasons for the justification and in certain cases, on their admission in non-compliance of the mandatory order themselves. This surely is an illustration the ineffectiveness of the mandatory order, a reason quiet apart from the alleged ambiguities therein.

Why is the mandatory order ineffective?

[30] The answer to this question is actually rather simple and has already been answered by the parties themselves by their assertion of their own justifications. The crux appears to be the lens through which each party views the mandatory order itself. The lens through which it is viewed, appears to be dictated by the reason, the intent each party had when the mandatory order was entertained and agreed to. Odette records in her papers that it was means for a truce and as her Counsel put it in argument, a ceasefire until Part B was determined. Conversely, applicant's intent according to his Counsel was not a truce. This too is borne out from the papers and it incapsulated from the premise through which he views Odette and Mike and a possible 'truce'. The applicant states under oath that: "- *the third respondent*

¹⁰ 2011 (1) SA 148 (LC)AT 155 H-156B. a court will stay the execution of an order where real and substantial justice requires it or where injustice would otherwise result. Guided by factors usually applicable in interim interdicts.

(Odette – own emphasis) is an idiot who can take no responsibility for her own conduct – and the problem in the matter rests in the delusions and naïve mannerism of the respondents (Odette and Mike) who lack insight or intelligence to understand how a company or a Trust is supposed to operate -". The possibility of a ceasefire or truce not capable, intent polar opposite and the ability to have a meeting of minds under these circumstances not possible. The comfort that further or retaliative actions won't be taken by either party based on the mandatory order, pending the finalisation of the delinquent relief is not apparent.

[31] As raised, the mandatory order does not bind Odette in her capacity as a trustee of the Family trust nor as an executrix but, in her capacity personal and capacity as a director. As a trustee she too exercises a discretion over the benefits of Mike, the applicant and William. William is a minor and his best interests have not even been considered nor featured in these papers. A best interest right this Court must consider as the benefits flowing from the Family trust to him *via* his mother Odette in her capacity as trustee of the Family trust and requested by her, in her capacity as is legal guardian, will only entail benefits of a personal nature. In consequence, personal expenses, a possible contempt alert for the applicant as Odette would have authorised the transaction. Bolstered is the fact that Odette views the trust assets working for the trust to benefit the beneficiaries. This view is denied by the applicant. William is not to be prejudiced by the lens through which these parties view each other and apply the mandatory order.

[32] Returning to the application of the mandatory order to illustrate a point. Both Odette and the applicant hold their own views of how prayer 6, for example should be actioned. Odette contends that the applicant, interprets the mandatory order according to his own intentions. To illustrate the point, prayer 6 states that: *"Pending the final determination of the matter all payments to be made by the first respondent (Black Rhino), fifth respondent (Big Five) and eighth respondent (Family Trust) shall be circulated first to the applicant and thereafter to the second and third respondents (Mike and Odette) and subsequently authorised by the third respondent (Odette) alone".*

[33] A logical interpretation is a ranking notice order in terms of which notice of all payments made by Black Rhino, Big Name and the Family trust, must come to the attention of the applicant and thereafter Mike and Odette. Odette alone is authorised to make such payments. No authorisation, meaning consent, of all payments is given to the applicant. The applicant in support of the contempt relief contends that personal payments are made without his consent.

[34] Odette contends that the applicant misinterprets the clause by insisting that he must be given express consent before personal payments can be made. When this was raised in answer, in reply the applicant then agrees with Odette stating that *“I don’t think my consent is necessary but the order is explicit that NO personal expenses may be paid and I object on the group to the payment of personal expenses because this is theft in my respectful opinion and a contravention of the court order”*.

[35] Personal opinions mask the effectiveness of the order. The mandatory order is not effective, the position and actions and attitudes by all the parties prior to the mandatory order has remained much the same. Prejudice and harm to all established and foreseeable, including harm and prejudice to William. The ripple effect of repetitive litigation exhausting, including financial. The circumstances and the family dynamics of the Joubert’s are exceptional. This Court has carefully considered all the facts and factors considered in the Gois matter and considers that it is just and equitable that the mandatory order be stayed pending the outcome of the delinquent relief.

COSTS

[36] There is no reason why the costs should not follow the result. Both Counsel did not move for another cost order and both argued for scale C.

[37] The following order:

1. The Applicant’s application is dismissed.

2. The execution of the order handed down by Hassim AJ on the 29 August 2023 is stayed pending the finalisation of Part B, in the main application.
3. The Applicant is to pay the Respondents' costs, costs to include the cost of two Counsel, taxed on scale C.



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