



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

Reportable

Case no: CA & R: 44/2024

In the matter between:

FRANKEL ENGELBRECHT N.O

In his capacity as executor of the estate
Simangele Agnes Mabotsa

First Appellant

MMABATHO LUCIA MAKOBO

Second Appellant

and

LOUISE MMAPHUTI MOKITIMI

First Respondent

**THE MASTER OF THE HIGH COURT,
KIMBERLEY**

Second Respondent

FIRST NATIONAL BANK TRUST

Third Respondent

TEBOGO CLIFFORD LOUW

Fourth Respondent

SHANE MATHEBULA

Fifth Respondent

ITUMELENG NKOPANE

Sixth Respondent

QING ZHANG

Seventh Respondent

CHAOQIANG HUANG

Eighth Respondent

CHARISMA FUNERAL DIRECTORS CC

Ninth Respondent

In re:

FRANKEL ENGELBRECHT N.O

In his capacity as executor of the estate
Simangele Agnes Mabotsa

First Applicant

MMABATHO LUCIA MAKOBO

Second Applicant

CHARISMA FUNERAL DIRECTORS CC

Third Applicant

and

LOUISE MMAPHUTI MOKITIMI

First Respondent

**THE MASTER OF THE HIGH COURT,
(KIMBERLEY)**

Second Respondent

FIRST NATIONAL BANK TRUST

Third Respondent

TEBOGO CLIFFORD LOUW

Fourth Respondent

SHANE MATHEBULA

Fifth Respondent

ITUMELENG NKOPANE

Sixth Respondent

QING ZHANG

Seventh Respondent

CHAOQIANG HUANG

Eighth Respondent

Neutral citation: *Frankel Engelbrecht N.O and Another v Mokitimi and Others* (Case no CA & R: 44/2024) (19 March 2025)

Coram: Tlaetsi JP et Phatshoane DJP et Mamosebo J

Heard: 19 November 2024.

Delivered: 19 March 2025.

Summary: Rule nisi issued on 09 September 2022 returnable on 14 April 2023. First respondent failed to adhere to the terms of the interim order. Appellants sought a contempt of court order set down for 10 March 2023. Court a quo *mero motu* rescinding the interim order invoking Rule 42(1)(a) of the Uniform Rules of Court. No *Audi Alteram Partem* observed and no notice to the affected parties of intended order as contemplated in Rule 42. Court a quo erred in considering the main application which was not before it and rescinding the interim order.

ORDER

1. The appeal is upheld and the order of the Court *a quo* dated 10 March 2023 is set aside and substituted with the following order:

“1. The first to the eight respondents are called upon to show cause on 11 April 2025 why the rule nisi issued by Lever J, on 09 September 2022 under case number 1424/2022, which is hereby extended to that date, should not be confirmed.

2. The first respondent is further called upon to show cause, if any, on the date referred to in para 1 above why the following order ought not to issue:

- 2.1. The first respondent is found to be in contempt of the court order issued by Lever J on 09 September 2022.

- 2.2. The first respondent is sentenced to 60 days imprisonment which sentence is suspended on condition that the first respondent complies fully with the terms of the order referred to in para 2.1 above and until the administration of the deceased estates of MDA and SA Mabotsa have been finalised.

- 2.3 The first respondent is ordered to pay the costs of the application.”

2. The parties are to bear their own costs of the appeal, including the costs in respect of the applications for leave to appeal

JUDGMENT

THE COURT

- [1] This appeal raises matters of great importance as it explores the functions of a judicial officer and adherence to basic tenets. The appeal is with leave of the Supreme Court of Appeal against the order of

Nxumalo J dated 10 March 2023 and the whole of the judgment handed down on 28 July 2023.¹

[2] The appeal is premised on the following grounds set out in the Notice of Appeal dated 08 August 2024, paraphrased, that the court erred:

1. By adjudicating the main application which had been postponed to the opposed roll for argument on 14 April 2023 and issuing an order when the main application did not serve before the court on 10 March 2023, but only the contempt of court application.
2. In finding, by clear implication, that a court of equal standing erroneously failed to consider and apply the relevant provisions of the Administration of Estates Act 66 of 1965 ('the Act') and/or the other relevant legal principles, and as such took up the role of a court of appeal, whereas and in fact it had no authority, constitutionally, statutorily or otherwise, to do so.
3. In considering the rescission of the rule nisi granted in the main application and handing down the judgment without affording the parties to the main application the opportunity to state their case, or to properly and fully state their case, regarding the consideration of the main application and as such failing to afford the applicants a fair hearing and thereby comply with its duty to observe the letter and spirit of the *Audi alteram partem* rule.
4. In finding that the order in the main application was erroneously sought and granted based on the secondary erroneous findings that the first appellant was guilty of a misrepresentation to the Court as to whether the appellants had an adequate remedy; whereas there was indeed an alternative remedy at their disposal in terms of section 13(1) read with 102(1)(g)(iii), of the Act; and a

¹ *Engelbrecht N.O and Another v Mokitimi and Others* (1424/2022) [2023] ZANHC 56 (28 July 2023).

further adequate alternative to safeguard the funds of the deceased estate under the uncontroverted circumstances as stated in the affidavits filed in the main application.

- [3] This seminal exposition of the functions of a judicial officer by Harms DP in *National Director of Public Prosecutions v Zuma*² is apposite:

'It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that, in exercising the judicial function, judges are themselves constrained by the law. The underlying theme of the court's judgment was that the Judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the Executive (paras 161 – 162). This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.'

- [4] A further instructive reminder on the powers entrusted upon judicial officers were echoed by Cachalia JA in *Motswai v Road Accident Fund*³ in this fashion:

'Through the authority vested in the courts by s 165(1) of the Constitution judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a

² 2009 (2) SA 277 (SCA) para 15.

³ 2014 (6) SA 360 (SCA) para 59. See also *Molusi v Voges* NO 2016 (7) BCLR 839 (CC) paras 27 and 28

public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process did serious harm to several parties.'

It is against the aforementioned fundamental principles that we are enjoined to examine the role played by Judge a quo in the proceedings before him and to consider whether the court observed the parameters within which it had to adjudicate the matters serving before it.

- [5] On 09 September 2022, Lever J issued a *rule nisi* (interim interdict) out of this court interdicting and prohibiting the first respondent (Ms Mokitimi) from receiving and/or utilising the rental income due to the estates of the late Mr and Mrs Mabotsa, and the third applicant, (Charisma Funeral Directors CC), and interdicting and prohibiting the said first respondent from dealing with the assets of the estate. The first to sixth respondents were ordered to effect the monthly rental income due to the estates into the estate account as reflected in the order. The funds were to be deposited into the trust account of Engelsman Magabane Inc, a local firm of attorneys representing the first appellant. The sheriff of Randburg West personally served the first respondent with this interim order on 28 September 2022. The same order was also served on all the other respondents personally by the sheriff of Kimberley on 05 October 2022.
- [6] The first respondent ignored the aforementioned order and continued to collect the monthly rental from the fourth to the eighth respondents and failed to pay the money over to the estate account or the trust account as ordered. The fourth to the eighth respondents also continued to pay the first respondent. Only one payment of R10 000 was deposited by one of the respondents into the trust account of Engelsman Magabane on 26 October 2022. On the return date, 18 November 2022, the respondents were present in court. Before the

matter was called Mrs Shaneal Andrea Feltman, an attorney at Engelsman Magabane as well as Johané van der Merwe, also from the same firm, explained to the respondents the significance of the order and that their failure to comply therewith would attract a contempt of court sanction. Adv Johan Harmse, for the appellants, repeated the explanation pertaining to the effect of the order to the respondents before Sieberhagen AJ, who postponed the matter and had the rule extended. Their confirmatory affidavits form part of the papers.

[7] On 06 January 2023, the matter came before Lever J who explained the consequences of not adhering to the court order to the first respondent and postponed the case to 17 February 2023 for the opposing papers to be filed. The first respondent was warned not to disobey the court order. No further payments were made into the estate account or the trust account of Engelsman Magabane.

[8] The first appellant, Frankel Engelbrecht N.O, in his capacity as executor of the estate of Simangele Agnes Mabotsa, filed a contempt of court application which was set down for 10 March 2023, seeking the following relief:

1. That the first to sixth respondents be found to be in contempt of the court order issued out by this court on 09 September 2022 (the Lever J order);
2. That a sentence of imprisonment be imposed on the first to sixth respondents for such period as the court may deem fit; and
3. Costs of suit.

[9] The contempt of court application served before Nxumalo J on 10 March 2023. The court was made aware that the return date for the *rule nisi* was 14 April 2023. It was made plain that what was before

court was only the non-adherence by the respondents to the Lever J order of 09 September 2022. The following digression then transpired:

Court: ... There are a few concerns that have arisen in the course of studying your papers and I want you to address me on them, and if you are not able to do so, immediately reflect on them and revert. The first one is, is it not so that the applicant in these proceedings Frankel Engelbrecht is the executor of the estate of the late Mrs Mabotsa? Which firm of attorneys is he... under which firm does he practice?

Female speaker: Engelsman Magabane Attorneys.

Court: And you are therefrom as well?

Female speaker: Correct M'Lord

Court: So here is an applicant essentially for all intents and purposes appearing for itself against another applicant in person, is it so? Both of you are self-represented for all intents and purposes effectively.

Female speaker: My Lord could it be said that the applicant is self-represented if they use an attorney from the law firm.

Court: Yes.

Female speaker: The applicant himself is not in court.

Court: No I'm just saying to the extent that what I'm going to engage with you now essentially would be a reflection on your firm. So, I must take your submissions with a pinch of salt.

Female speaker: Never My Lord.

Court: We'll use my discretion, but it gets even trickier. The rule nisi was granted on the 9th September 2022 right?

Female speaker: Yes M'Lord.

Court: As an interdictory order and one of the mantras that we aver in interdictory relief, correct me if I'm wrong, is that there is no other alternative relief other than the one sought in terms of the interdict, is it not so?

Female speaker: That's correct, M'Lord.

Court: In other words, there is no effective satisfactory relief which the applicant might avail itself other than the one sought there. Now you must remember that the whole issue here is about the incarceration of an individual and you know you are flying very close to the sun with wings of wax. Now I'm enjoined to interpret the law and any other order subject to the Bill of Rights and to promote the rights and [indistinct] value. In other words, I should look and scrape the pot to find whether there is no other way I can enforce and all.

Court: Now you and I know that if a statute penalises its contravention and provides for the penalty therein, it is not our business to go outside the four corners of that act to enforce it. So, in light before what I read what I'm reading... or let me read in order to give you a chance. Any person who [indistinct] subsection (g) "contravenes or fails to comply with the provisions of section 1(1) of section 13 [indistinct] section 13, section 27(1)." And so forth and so on. "Or with any notice under section 9(2) and (iii) "In the case of an offence referred to in paragraph (f) or (g), to a fine or to imprisonment for a period not exceeding twelve months."

And then the generic...ja. Now in light of that you still aver that there is no alternative relief other than the one you obtained on the 09 September 2022.

Female speaker: M'Lord I would like an opportunity to reflect on that and address M'Lord on that because the question would be who would enforce the imposition of that penalty set out in that Act.

Court: But it's a criminal... it's a criminal offence. The Act says that much and we will not... I will not stand there without a volunteer. It's an offence. In the case of an offence referred to in paragraph f and g (f) and (g) is to a fine or an imprisonment for a period not exceeding 12 months. And then you read it and there's a background of section 35, which is arrest detained and accused person. It has a rubric of rights that go to a person accused of committing an offence and the bulwark of this is equal protection and enjoyment of the law in section 9. And remember I approach the encroachment of the Bill of Rights with trepidation, and you are saying, or you said, there is no alternative relief. And I found a relief in the four corners of the very administration act which you are the agent of and all the facts you alleging turn around 13 and 13 has a relief therein. And once you accuse a person of an offence you trigger section 35(3) of the Constitution. Every accused person has a right to a fair trial, which include the rights to be informed of the charge with sufficient detail to answer it, to have adequate time and facilities to prepare a defence. **Now with the greatest respect I'm not going to tell you what the Constitutional Court did to Zuma. I'm not gonna do that. I might be a [indistinct] judge but I know something about fundamental rights. I'm not going to convict somebody of contempt of court in circumstances when there is an alternative relief right within the four corners of the very Act that is being enforced. It would be egregious and very career limiting.'**⁴

⁴ Reference to "Female Speaker" is to the attorney who appeared on behalf of the applicants in the court *a quo*.

The law contemplates the enforcement or compliance without necessarily trammelling into the fundamental rights. So, your first port of call was in order for the right thing to be done an incarceration application ... or the contempt of court application should be lodged. Now you have the and your... this whole ... this whole averments are predicated against the Administration of Estates Act of 1966. I beg your pardon 1960... I mean Act 66 of 1965. Isn't it. No wonder I can't read it properly I wasn't born then. Now do you have a copy thereof that?

Female speaker: Of what My Lord?

Court: Of the Administration of Estates Act.

Female Speaker: I do not have it [with] me M'Lord but I can access it.

Court: Please do so. If you have an Android you can ask people who have a faster phone. Okay. Are you there ma'am?

Female speaker: Thank you M'Lord.

Court: Let's go to page... let's go to section 13. Are you at section 13?

Female speaker: I'm at section 13 M'Lord.

Court: One three ma'am.

Female speaker: Yes M'Lord.

Court: Are you there? Section 13(1), do you want to read that?

Female speaker: "No person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted or signed and sealed under this Act, or under an endorsement made under section 15, or in pursuance of a direction by a Master."

Court: Now that is the nub of this application is it not so?

Female speaker: That is so M'Lord.

Court: That is what you are ... the... [intervenes]

Female speaker: [Indistinct]

Court: ...facts and the circumstances fly in the face of section 13.

Female speaker: Correct M'Lord.

Court: Right. Let's read section 102(g). Just read it contemporaneously with section... with (iv). In other words, read the section following from section.... Subsection (1)(g)(iv) contemporaneously.

Female speaker: "Contravenes or fails to comply with the provisions and then it mentions certain." [intervenes]

Court: Or let me read it this time around. The heading is "Penalties" aptly so, is it not so?

Female speaker: Correct M'Lord.

- [10] Lest it be suggested that the remarks captured in bold are condoned. They are egregious, uncalled for and unprincipled. Their import is plainly that “what the Constitutional Court did to Zuma” was a misdirection. They fly in the face of the doctrine of precedent or the stare decisis system. In *Ex Parte Minister of Safety and Security and Others: In Re S v Walters*⁵ the Constitutional Court per Kriegler J said the following regarding precedent:

‘The first ancillary question relates to the application of the principle of the binding authority of judicial precedent where constitutional issues are involved. The High Court, in finding the section constitutionally invalid to the extent stated, consciously departed from a decision delivered shortly before in the Supreme Court of Appeal (the SCA) in the case of *Govender v Minister of Safety and Security*. In this latter judgment the SCA, putting a particular construction on ss (1) of s 49, held it to be constitutionally valid. The High Court rejected both the interpretation and the resultant finding of the SCA, saying that these were constitutional questions on which the decisions of this Court and not those of the SCA were binding on other courts. Decisions of the SCA on constitutional questions, so the trial Court reasoned, should not be followed by High Courts when they find them to be wrong. This line of reasoning and conclusion have serious implications for established interrelationships in our hierarchy of courts and consequently for the administration of justice in general. It also has implications for the rule of law.’

- [11] There was further extensive engagement between the court and the appellant’s representative which pertained to whether the first appellant was correct when he alleged in the papers that there was no alternative remedy. The court’s remarks continued in this fashion:

‘Court: I’m sitting here with Rule 42 *ex mero motu* on my own backing gives me the authority to look at an order that is patently wrong and set it aside, and my inclination is to say you received and you obtained a rule nisi genuinely

⁵ 2002 (2) SACR 105 (CC) para 12.

and in good faith, which is bad in law because it doesn't meet the one fundamental *sine qua non*, i.e, that you don't have an alternative in law. And I have pointed out to you where you should have hung your jacket. All you should have done is... otherwise if somebody breaks into my house, I must get an interdict because that is the essence of what you're saying. Somebody is breaking our penal law. That person must be tried and must be charged and be brought before the court and I should do so summarily today until sunset I'm not going to do that.'

- [12] The court was referred to an unreported judgment of *Cilibia v Cilibia* Case No 3460/2021 delivered by Snellenburg AJ on 17 May 2022 in the Free State High Court on a violation of a maintenance order where the Judge granted the order having made the distinction between a coercive order where an applicant is entitled to the enforcement of that order and a punitive order where a coercive order might serve no purpose. The Court considered the requirements to be met. In response to those submissions, the court *a quo* remarked:

'What madam doesn't want to appreciate is that you have made an allegation at a prima facie level and this court has now had a chance because you brought the matter before this court and you're saying I want to enforce it. And the court now looks at it with four eyes and say why should I willy nilly enforce an order, which is [indistinct]. It is not legally sound. ...'

- [13] What the appellants were essentially seeking was a simple declarator in respect of their contempt of court application. That did not materialise because, very bizarrely, the court *a quo*, per Nxumalo J, rescinded the *rule nisi* issued by Lever J on 09 September 2022 and made no order as to costs. The applicants then sought leave to appeal against the order issued by Nxumalo J but it was refused. The applicants thereafter petitioned the SCA which granted them leave to the Full Court of this Division.

- [14] Mr van Niekerk SC was assisted by Ms Erasmus to argue the appeal before the Full Court. There was no appearance by the respondents

despite them having knowledge that the appeal had been set down for that day. The sheriff served a copy of the Notice of Motion, founding affidavit and annexures in the contempt of court application on the first respondent personally on 17 February 2023. She was also served with the Notice of Appeal. We were satisfied that proper service had been effected and therefore allowed counsel for the appellants to argue the appeal.

- [15] It is for the parties, either in the pleadings or affidavits to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues alone. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case provided that no prejudice will be caused to any party by its being decided. Beyond that, it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone. It is certainly not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them.⁶

- [16] Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.⁷ Yacoob J, writing for a unanimous court in *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)*⁸ said:

‘This s 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order

⁶ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA) paras 13-14.

⁷ See s 34 of the Constitution of the Republic of South Africa, 1996.

⁸ 2002 (1) SA 429 (CC) para 11.

being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this. They are not, however, an exclusive standard of reasonableness. There is no reason why legislation should not provide for other reasonable ways of giving notice to an affected party. If it does, it meets the notice requirements of s 34.'

- [17] The above constitutional principle was unquestionably not adhered to by the Court at first base when it adjudicated the main application which not only did not serve before it but more significantly, did so in the absence of the affected parties. Unlike the respondents who were served with all the necessary papers and elected not to participate in the proceedings, the appellants were neither served nor made aware that the main application would be adjudicated on 10 March 2023.
- [18] We have had the benefit of reading the entire transcript of the proceedings of 10 March 2023⁹ before Nxumalo J. Nowhere in the entire record does it appear that the parties were informed beforehand that the court would adjudicate all the issues traversed at the instance of Nxumalo J. It is not surprising that the appellant's representative seemed unprepared when questioned on aspects which did not form part of the contempt of court application and the relief sought. The court only stood the application down for the applicant's legal representative to consider the applicant's position having subjected her to intense questioning on, among other things, the provisions of the

⁹ The practice in this Court is that transcripts of the deliberations and arguments in court do not necessarily form part of the record for the appeal. However, the appellant obtained leave of this Court for the transcript to form part of the record to place the issues in the appeal in the proper context.

Administration of Estates Act which were irrelevant to the application that served before him.

- [19] Even more disconcerting are the adverse findings made against the first appellant who was not afforded an opportunity by the court to clarify his 'purported' misrepresentation. The first appellant is not only an attorney and therefore an officer of the court, but he is also wearing the hat of an executor of the estate of the late Ms Mabotsa. It was understood that the averments levelled against the respondents were to be dealt with on the return date of 14 April 2023 as ordered by Lever J. It was further of no consequence that the first appellant and the attorney seeking the contempt of court remedy were attorneys from the same firm, provided there was no conflict or prejudice. None was alleged or shown to exist. The court claimed to have relied on the Constitution and protecting the constitutional rights of the respondents, particularly, the first respondent. However, the court failed to afford the appellants the same protection or courtesy.

- [20] Was the court *a quo* correct to invoke the provisions of Rule 42 of the Uniform Rules of Court *mero motu* in rescinding the interim interdict granted by another court? Rule 42 stipulates that:

'42 Variation and rescission of orders

- (1) The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
 - (a). An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
 - (b). an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c). an order or judgment granted as the result of a mistake common to the parties.

(2) Any party desiring any relief under this rule *shall make application* therefor upon notice to all parties whose interests may be affected by any variation sought.

(3) *The court shall not make any order rescinding or varying any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.*' (emphasis added)

[21] In *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*¹⁰ Jones AJA held:

'Rule 42 is confined by its wording and context to the rescission or variation of an ambiguous order or an order containing a patent error or omission (Rule 42(1)(b)); or an order resulting from a mistake common to the parties (Rule 42(1)(c)); or 'an order erroneously sought or erroneously granted in the absence of a party affected thereby' (Rule 42(1)(a)). In the present case the application was, as far as the Rule is concerned, only based on Rule 42(1)(a) and the crisp question is whether the judgment was erroneously granted.'

[22] There is no evidence which shows that the interim order granted by Lever J on 09 September 2022 was erroneously sought or erroneously granted. Neither the appellants nor the respondents filed an application for its variation or rescission. What the court needed to do was to consider whether the applicant had satisfied all the requirements pertaining to the relief sought in the contempt application. When the court found an 'error' upon which it relied, it supposedly entertained a possible defence that the first respondent may raise in a different forum and did not confine itself to the procedural error that Rule 42 aims to correct. It therefore follows that the invocation of the rule by the court defeated the purpose of Rule 42 and is not encouraged.

¹⁰ 2003 (6) SA 1 (SCA); [2003] 2 All SA 113 (SCA) para 7.

- [23] The Lever J order of 09 September 2022 was for all intents and purposes a valid order. It did not deserve the following gratuitous attack in a busy open unopposed motion court proceeding: "...the order is not worth the ink it has been typed with. It's just a nuisance because you are going to come again on 14th and pester the applicant again and threaten [her] freedom which is [indistinct]". It was further mentioned "...Why should the respondent come again here on an order that was... to put as low and I don't want to go any lower. Things have been going very low recently in South Africa."
- [24] The insistence by the court of first instance of the existence of an alternative remedy, referring to s 13(1) read with 102(1)(g)(iii) of the Administration of Estates Act, to safeguard the funds of the estate should not have even featured. We accept that when the application was first considered by Lever J the appropriate considerations were made before the interim relief was granted. It is also apparent from the papers that the first appellant bears the responsibility to protect the assets of the estate and immediate interim relief was warranted. Regard being had to the papers before us, we are of the view that no other remedy would have offered the appellants immediate relief than the interdictory relief granted by Lever J. The upshot of the foregoing is that the court *a quo* erred in rescinding the Level J order and in finding that there was an appropriate alternative relief.
- [25] On the question of costs. The appellants were entitled to bring contempt of court proceedings before Nxumalo J. The application was unopposed. There is no reason why costs should not follow the result in that regard. The first respondent is to pay costs of the contempt of court proceedings. In as far as the appeal costs are concerned, including the costs for leave to appeal, the parties are to bear their own costs.

An order is therefore made:

1. The appeal is upheld and the order of the Court *a quo* dated 10 March 2023 is set aside and in its place is substituted the following:

“1. The first to the eight respondents are called upon to show cause on 11 April 2025 why the rule nisi issued by Lever J, on 09 September 2022 under case number 1424/2022, which is hereby extended to that date, should not be confirmed.

2. The first respondent is further called upon to show cause, if any, on the date referred to in para 1 above why the following order ought not to issue:

2.1. The first respondent is found to be in contempt of the court order issued by Lever J on 09 September 2022.

2.2 The first respondent is sentenced to 60 days imprisonment which sentence is suspended on condition that the first respondent complies fully with the terms of the order referred to in para 2.1 above and until the administration of the deceased estates of MDA and SA Mabotsa have been finalised.

2.3 The first respondent is ordered to pay the costs of the application.”

2. The parties are to bear their own costs of the appeal, including the costs in respect of the applications for leave to appeal.

On behalf of the Court



TLALETSI JP
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

Appearances

For the appellants

Adv. J van Niekerk SC

Adv S Erasmus

Instructed by:

Engelsman Magabane Attorneys

For the respondent:

No appearance