

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

Case Number: 098393/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE

SIGNATURE

In the matter between:

NOMCEBO NOTHULE NKWANYANA

First Applicant

EMAZULWINI PRODUCTION AND PROJECTS (PTY) LTD

Second Applicant

and

OPEN MIC PRODUCTIONS (PTY) LTD

First Respondent

AFRICORI SA (PTY) LTD

Second Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 9 May 2025.*

Summary: A declaratory relief is not there for a mere taking. It is not the duty of a Court to give litigants legal advice. Where parties conclude a written agreement and also agree that the agreement be made an order of Court, it is inappropriate for one party to the agreement to seek an order effectively freeing it from the agreed obligations by way of a declaratory relief. Where a legal position is clear, a declaratory relief is unavailable. Where a party seeks

to be relieved from the contractual obligations for legally valid reasons, that party must approach a Court to seek a cancellation; rectification or variation of the term of the agreement. In an instance where, as it is the case herein, the agreement has been made an order of Court, a party may approach a Court for a rescission or variation of the Court order. The settlement agreement that had been turned into a Court order is enforceable in law. The belated argument by the applicants that the agreement lacks force in law because it is dubbed an agreement to agree is one that is bad in law.

Generally, Court orders are enforced by way of contempt proceedings. Where a party seeks a *mandamus* as a relief, a party must allege and prove a statutory or public duty to be enforced. It is trite law that a party makes his or her case in the notice of motion as well as the founding affidavit. Prayer 2 of the notice of motion effectively calls upon the other party to comply with the accounting obligations. Regard being had to the founding papers of the applicants, no case for *mandamus* has been pleaded. Thus a Court cannot grant a party a relief that it did not seek. Prayers seeking to enforce a Court order or agreement must be predicated on the clauses in the agreement or the terms of a Court order.

Duties of counsel in Court are to assist the Court. When faced with what may appear to be a difficult case, it remains the duty of counsel to courteously seek to persuade the Court to the best of his or her ability. It is inappropriate and probably an unprofessional conduct for counsel to utter statements like, “the Court has already decided” and “submissions are made for what it is worth”. Since it is not the duty of this Court to enquire into the professional conduct of a legal practitioner at this stage, the matter must be referred to the South African Legal Practice Council for investigations and appropriate action. Held: (1) The application is dismissed. Held: (2) The applicants are ordered to pay the costs on a scale of party and party taxable or to be settled on scale B, which costs include the costs of employing two counsel, the one party paying absolving the other.

JUDGMENT

MOSHOANA, J

Introduction

[1] From the year 2019 to date, the hit song, *Jerusalema*, performed by Nomcebo Zikode (Zikode) and Khaogelo Moagi (better known as “Master KG”), threw the world into a frenzy, which saw idiosyncratic and esoteric dance moves being developed the world over in response to the lyrics and sounds of the song. Little did the dancers know that, in a no distant future, a fight shall be fermented over the ownership of the song that threw them into a frenzy.

[2] The irony that belies the present application is that, the parties before me, who were embroiled in a fierce litigation that they managed to resolve by way of a settlement agreement, which they agreed should be made an order of Court, are back in Court, where the one party contends that a particular clause of the agreement already made an order should be declared to be unenforceable in law.¹ Before this Court is an application in terms of which the applicants seek a declaratory and an enforcement order (limited to the accounting obligations), to be later dubbed, in the heads of argument submitted on behalf of the applicants, a *mandamus*. The prayer 2 in the notice of motion is arduously longer than the settlement agreement itself and in particular, the clauses it purportedly seeks to enforce. Therefore, for the purposes of this judgment, the prayers shall be recorded in a rather truncated form in order to give context to this judgment.

[3] The applicants seek reliefs in the following terms:

“1 Declaring that the first and second applicants **do not have any obligation to conclude the “Joint Venture agreement” as envisaged in the clause entitled “Future Recordings” in the agreement** between the first applicant, second applicant and first respondent which was made an order of Court on 15 December 2022 (“the settlement agreement”).

¹ This appears to be a reinvention of the wheel. It is more like a spin of a picker wheel with a hope of a different random choice.

2 Ordering the first respondent to **comply with its accounting obligations in terms of the settlement agreement** by taking the following steps:”

[4] It must be stated upfront that the steps suggested by the applicants in prayer 2 are overly creative and expansive more than what the settlement agreement provided for.

[5] The applicants cited Africori SA (Pty) Ltd (Africori) as a party, yet no relief was sought against it. The applicant was understandably opposed by Open Mic Productions (Pty) Ltd only since the elaborative order sought in prayer two was sought against it. Properly understood, prayer 1, if granted, affects the rights of Africori.

Pertinent background facts and evidence

[6] The applicants confidently chose motion proceedings over action proceedings. Impliedly, the applicants did not anticipate a genuine dispute of facts, and if they did, probably they chose to live with the attendant risk. The dispute between the parties before me is one that is chequered. For the purposes of the present application, it shall be obsolete to chronicle that chequered past. It suffices to acknowledge, as this Court already did at the dawn of this judgment, that *Jerusalema* was a hit song. It had almost 158 million views on the platform YouTube.

[7] In September 2018, the first applicant, Ms Nomcebo Nothule Nkwanyana (Zikode), an artist, concluded agreements with the first respondent, Open Mic (Pty) Ltd (Open Mic), a record label company. The relationship between Zikode and Open Mic has been unsteady for a considerable while. As already indicated, in 2019, the song *Jerusalema* was released by Open Mic. There is a dispute as to whether Zikode and Master KG co-authored the song or whether Master KG alone did that. This dispute would require no resolution by this Court in the present application.

[8] Around September 2022, a song, *Bayethe*, was released and Zikode was nominated for a Grammy Award for it. It was this song that proverbially broke the camel’s back and sent the limping relationship between Zikode and Open Mic into a

state of chagrin. This saw Zikode instituting interdictory proceedings against Open Mic. The application emerged before the High Court Pretoria on 15 December 2022, before my sister Madam Justice Tolmay. On this day, the parties concluded a settlement agreement. The terms of the settlement agreement were reduced to writing and was signed by the parties thereto. It was a tripartite agreement, involving Open Mic; Zikode and Emazulwini Production and Projects (Emazulwini). The settlement agreement was headed: "settlement agreement between Nomcebo Nkwanyana and Open Mic Productions (Pty) Ltd". One of the terms of the agreement was that it shall be made an order of Court on 15 December 2022 for it to have legal effect.

[9] Indeed, this Court, per Tolmay J, issued an order in the following terms:

1 The ordinary forms and service provided for in the Rules of the High Court are dispensed with and the application is heard on an urgent basis in terms of the provisions of Rule 6(12)(a) of the Uniforms Rules of Court.

2 The Settlement Agreement dated, 15 December 2022 attached as annexure "A" to this Court Order is hereby made an order of court.

[10] It is apposite at this stage to refer to a clause which, following the agreement being made an order of Court, is now also an order of Court. The clause reads:

"This agreement constitutes a binding agreement and is the sole agreement between the parties in relation to the subject matter hereof, save as expressly set out herein. This agreement reflects all the terms as agreed to between the parties. **No variation, amendment or consensual cancellation of this agreement shall be of any force or effect unless it is reduced to writing and signed by both parties.**"

[11] It is apparent that after the Court order was achieved, from January 2023 up to and including 18 August 2023, the parties engaged with a view of implementing the terms of the Court order. The parties give different accounts of the events during this period. Given the view this Court takes at the end, it is unnecessary to regurgitate each party's stance over the mentioned period. I pause to mention that there is serious dispute of facts over certain of the events in an attempt to implement

the terms of the Court order. Regard being had to the order sought in prayer 2, the facts to be tabulated below are of significance.

[12] On the version of Zikode, after imploring Open Mic to comply with its accounting obligations in terms of the settlement agreement for months, Open Mic finally provided inadequate accounting. The highlighted defects in the accounting obligations may be summarised as follows:

- 1 Income arising from synchronisation of the sound recordings set out in a spreadsheet was not included;
- 2 Income arising from the bookings income, brands or endorsement deals was not included;
- 3 The spreadsheet does not include any income from physical sales of *Jerusalema*;
- 4 Spreadsheet does not include royalty base that was applied, nor does it indicate what royalty Master KG receives.

[13] The version of Open Mic on the accounting obligation may be summarised as follows:

- 1 The applicants claim that Open Mic has made partial and inadequate performance. This claim is not only malicious, but it is entirely not truthful because Open Mic has, in fact, performed fully in terms of the agreement.
- 2 Open Mic provided to the applicants, in respect of what it has received concerning the song *Jerusalema*.
- 3 The Honourable Court can accept that everything else that Open Mic ought to have provided to the applicants has been provided.
- 4 A link to access Open Mic's accounting records was sent to the applicants.
- 5 The information pertaining to the synchronisation of the sound recordings was appended to the answering affidavit.

[14] It must be stated that the replying affidavit of Zikode created a further dispute around the alleged compliance by Open Mic. After the exchange of correspondences alluded to above, on 28 September 2023, the present application was launched to be heard on 26 March 2024. The present application could not be heard, and

subsequent interlocutory orders were issued by Mnyovu AJ and Lenyai J, respectively. The application came before me as a special motion.

Evaluation

[15] Before this Court engages with the two prayers sought in the present application, it is apposite to deal with some of the relevant legal principles appertaining this application.

Suitability of motion proceedings

[16] Motion proceedings are mainly concerned with resolution of legal questions with little to no dispute of facts. Motion proceedings are not designed to deal with dispute of facts. Rule 6(5)(g) of the Uniform Rules provides that when an application cannot be properly decided based on affidavits, such application may be dismissed. With regard to compliance with the accounting obligations, there is clearly a dispute of fact. On the one hand, Zikode alleges that Open Mic has not complied, and on the other hand, Open Mic alleges that it has complied. This is a genuine dispute of fact if this Court is minded to grant prayer 2. On application of the *Plascon Evans* rule, the applicants are entitled to a final order if the facts justify such an order. The order of compelling sought by Zikode is final in nature and can only be issued in motion proceedings once the requirements in *Plascon Evans* are met. The version of Open Mic is incapable of being rejected as being far-fetched. On the applicants' own version, there was compliance but the compliance was defective. This claim of compliance being defective is rejected by Open Mic as being malicious and untrue. On application of rule 6(5)(g), this Court is unable to resolve the dispute around full or defective compliance on affidavit. On this basis alone, prayer 2 is bound to fail. Accordingly, it is the view of this Court that motion proceedings were not suitable for prayer 2.

The remedy for non-compliance with a Court order

[17] As spelled out above, prayer 2 is all about compliance. All the applicants do is to dictate, as it were, how compliance should happen. It is common cause that that which the applicants seek an order of compliance for, is a Court order. It is indeed so that before being made an order of Court, that which was made an order of Court was a settlement agreement. Counsel for Open Mic forcefully submitted that

contempt of court order is the only remedy to compel compliance. Counsel for the applicants, strenuously argued that a *mandamus* is also a remedy available to compel compliance. For that proposition, reliance was placed on the judgment of *Eke v Parsons (Eke)*.² In particular, he placed reliance on paragraphs 24, 31-35 of the judgment. Similar to the facts of this matter, Mr Parsons and Mr Eke were embroiled in litigation where they were suing each other an amount of about R5 million. At the doorsteps of Court, they settled the litigation by concluding a settlement agreement, which agreement was made an order of Court. Mr Eke failed to comply with the terms of the Court order.

[18] What Mr Parsons did was to enrol the summary judgment again as per a clause in the settlement agreement. Mr Eke raised technical defences which were rejected by the Court. Mr Eke then appealed to the Constitutional Court. On the issue of the status of the settlement agreement, the Constitutional Court expressed itself in the following terms:

“[29] Once settlement agreement has been made an order of court, it is an order like any order. It will be interpreted like all court orders”.

[19] In paragraph 24, the learned Madlanga J, as he then was, in *obiter*, this Court must remark and accept the submission from Open Mic’s counsel that it was stated in clear terms, the following:

“**Depending on the nature of the order**, it may for an example – first issue a *mandamus* for compliance. Failing compliance, it may then consider committal for contempt.

[20] When the learned judge made that *obiter* statement, he referenced what was said by the erudite Van Zyl ADJP in *Ex Parte Le Grange and Another v Le Grange (Le Grange)*.³ The learned ADJP felicitously expressed himself thus:

“[39] While it must be acknowledged that the primary purpose of the parties seeking, and the court granting a judgment by consent in s 7(1), is to enable the parties to the underlying agreement to enforce their rights, there is no

² 2016 (3) SA 37 (CC).

³ 2013 (6) SA 28 (ECG).

reason to restrict the inherent power of the court to enforce its own orders in this manner. It does not account for the fact that the inherent power of the court in this regard, like its power in terms of s 7(1) of the Divorce Act, is discretionary and is exercised in a manner as dictated by the facts of any particular case. The court is as result not compelled to commit a party for contempt. It may not only refuse to grant an order for committal, it may choose to grant such other relief as it may find to be appropriate in the circumstances. By reason of the quasi-criminal nature, and the emphasis on the penal nature, of contempt proceedings, the court may choose a less coercive method to enforce the order, such as instructing some other person nominated by it to make performance to judgment debtor. **It may, for example, order the registrar of deeds to sign the necessary documents for the transfer of immovable property, or instruct an officer of the court to seize moveable property and deliver it to the judgment debtor.**⁴

[40] The ability of the court to grant orders other than committal for contempt, or the levying of execution leaves it the scope to be innovative in the manner in which it compels compliance with its own orders. It is therefore not uncommon for the court to first make an order compelling the judgment debtor to comply with the terms of the consent judgment on which order the judgment creditor may then subsequently base proceedings for contempt in the event of non-compliance. **This may be necessary where the obligation in the settlement agreement was conditional upon some further event.**" (footnotes omitted)

[21] Counsel for Open Mic was correct when he submitted that options like *mandamus* may arise as an innovative means to avoid a coercive order in a contempt application. A *mandamus* is a legal remedy available to compel performance of a public or statutory duty.⁵ Accordingly, a submission by Zikode's counsel that *mandamus* is available to compel private individuals is rejected.

⁴ It is worth emphasising that these examples are those of *mandamus*. Hence the learned Madlanga J chose not to relist those orders but collectively referred to them by their legal name.

⁵ See *Thusi v Minister of Home Affairs and Another* 2011 (2) SA 561 (KZP).

[22] Therefore, the remedy available for non-compliance with court orders is contempt proceedings. It is indeed so, that a Court seized with an application for contempt may choose to refuse committal and grant any other innovative order, depending on the nature of the order breached.

Did Zikode plead mandamus in any event?

[23] A *mandamus* is a form of an interdict. Where a party seeks a final relief of *mandamus*, such a party must allege and prove, (i) clear right; (ii) an injury actually committed or reasonably apprehended; (iii) the absence of similar protection by any other ordinary remedy. In motion proceedings, a party sets out the relief it seeks in the notice of motion, supported by a founding affidavit. In motion proceedings, affidavits serve two purposes; as pleadings and evidence.

[24] In *Director of Hospital Services v Mistry*,⁶ the Appellate Division stated the law as follows:

“When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as has been said in many other cases:

‘... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’”

[Own emphasis]

[25] When regard is had to the founding affidavit, no case for any form of interdict has been pleaded. To buttress this point, the obligation in the settlement order with regard to accounting obligations reads:

“Open Mic Productions will provide full accounting of any artist royalties **or** bookings income, sync income and brand endorsement deals concluded for

⁶ 1979 (1) SA 626 (A) at 635H-636A.

the song “Jerusalema” and all other Existing Recordings and other amounts due in terms of this agreement.”

[26] This clause, in itself, is not a model of clarity. Both parties are *ad idem* that the settlement agreement was poorly drafted and not a model of clarity. It must be so, that it will be difficult to emerge with a clear right in a clause like this. The full accounting, on another interpretation, may mean any of the aspects mentioned in respect of an artist. Where the word ‘or’ is used, it typically means a choice between two or more options, where only one of the options is selected. During argument, counsel for the applicants suggested that, contrary to a submission that some of the information sought Open Mic does not have, it has been specifically pleaded that Open Mic is in possession and it is simply refusing to comply with an obligation to account. Such an allegation would support the requirement of injury committed or apprehended. The founding affidavit is bereft of such an allegation. The conclusion this Court makes is that a case for *mandamus* has not been pleaded at all.

Prayer 1: declaratory relief

[27] Where the legal position is clear, a declaratory relief is unwarranted. Where a party holds a view that a contractual provision is not binding on him or her, the available legal remedy for that party is to seek a cancellation of that contract. If the contract is already made an order of Court, apply to set aside or vary the order. A declaratory relief is a discretionary relief and it is not there for the mere taking. Where the contract in question lays down a procedure for cancellation, that procedure must be followed, otherwise the cancellation is ineffective.⁷ In the absence of laid down procedure, all a party needs to provide is a clear and unequivocal notice of cancellation. Nienaber JA in *Datacolor International (Pty) Ltd v Intamarket (Datacolor)*,⁸ expressed himself in the following terms:

“It is settled law that the innocent party, having purported to cancel on inadequate grounds, may afterwards rely on any adequate ground which existed at, but was discovered after, the time.” (references omitted)

⁷ See *Bekker v Schmidt Bou Ontwikkelings CC and Others* [2007] 4 All SA 1231 (C).

⁸ 2001 (2) SA 284 (SCA) at para 28.

[28] A perplexing feature about this relief is that it is sought almost a year after the conclusion of the settlement agreement. According to Zikode, the clause set out below constitutes an agreement to agree and it is unenforceable in law. As it shall be demonstrated later in this judgment, there is no merit in this assertion. The alleged offending clause reads:

“Future Recordings

The Parties have **agreed** that Nomcebo Nkwanyana through her company Emazulwini Productions **will enter into** a 50/50 **Joint Venture agreement** within 60(sixty) days of the Effective Date of this agreement in relation to the Future Recordings. The Future Recordings, will be released by the Joint Venture via Africori. The parties **agree** that Africori will act as a conduit facilitating the interaction between the two parties.”

[29] The dictionary meaning of the word ‘agree’ is to concur in opinion or purpose; to come into harmony; to give mutual assent; to unite in mental action; to exchange promises; to make an agreement.⁹ Regard being had to the meaning of the word, Zikode has made an agreement to enter into a 50/50 Joint Venture agreement. This Court cannot declare that Zikode is not bound by the obligation she agreed to. Such a declaration will be at odds with the constitutionally valid common law principle of *pacta sunt servanda* (agreements must be kept). It is apparent that the argument that the clause amounts to an unenforceable agreement to agree is a recent legal machination. The pleaded case reveals a different position. In late November 2022, in a meeting convened by one Mr Sipho Dlamini, whereat the husband of Zikode was present, a settlement framework in the following terms, was discussed:

“I (through Emazulwini Production) would enter into a “50/50” joint venture with Open Mic. The **joint venture would fund and co-own my next two albums**. At that stage, the understanding was that the albums would be released by Universal Music.”¹⁰

[30] Further, the pleaded case reveals the following:

⁹ Black’s Law Dictionary.

¹⁰ See Paragraph 35.1 Founding Affidavit (FA) of Zikode.

“The result of this contractual war of attrition, was a draft agreement that included all the essential framework terms of the settlement (as described above), but which was by no means perfect.”¹¹

“On 13 April 2023, Feinberg, wrote to the attorneys acting for Open Mic. His email is attached as “FA5”. Annexed to his email was a draft JV agreement as envisaged in the settlement agreement...”¹²

“Our position regarding the draft JV agreement is recorded in paragraph 1 of the email...”¹³

[31] The email dated 31 May 2023, alluded to in paragraph 48.1 of the founding affidavit of Zikode, reads:

“1. On the JV – the agreement we prepared is in line with the terms of the settlement. **The settlement agreement sets out that Emazulwini and Open Mic will constitute a “50/50” JV, for the next two albums of Nomcebo, to be exploited by Africori.** This is what is reflected in our draft agreement, along with the ordinary terms relating to a joint venture. **Considering how far behind the parties are in implementing the settlement agreement,** can we suggest we set up a call this week to get a sense from you what is in issue. We are hopeful the current agreement can be tailored and **executed**, rather than waiting another few months to negotiate and conclude an entirely new draft.”

[32] If there was no agreement, regard being had to the above evidence, what was Zikode busy implementing? An agreement to agree is unimplementable. It is unenforceable because an absolute discretion is conferred on the contracting parties.¹⁴ On any benign reading of the alleged offending clause, an absolute discretion is not apparent. The reason why Zikode began the process of exchanging the draft JVs is simply that she knew that in order for her to release her two albums

¹¹ Para 38 of the FA.

¹² Para 43 FA.

¹³ Para 48.1.

¹⁴ See *Premier of the Free State Provincial Government and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) at para 35.

as agreed, a JV ought to be concluded as a vehicle for the release of the two albums.

[33] The learned Cromwell JA, writing for the majority in *Mitsui & Co. (Point Aconi) Ltd v Jones Power Co Ltd et al (Mitsui)*,¹⁵ with sufficient sagacity, expressly stated that:

“[64] To be enforceable, an agreement must contain all essential terms. The determination of what are essential, however, varies with the nature of the transaction and the context in which the agreement is made. As Morden JA said in **Canada Square Corp. et al v VS Services Ltd. Et al (1981)**... where the parties intended to create a binding relationship and were represented by experienced businessmen, “... a court should not be too astute to hold that there is not that degree of certainty in any of its essential terms which is the requirement of a binding contract.”

[66] Jones submits that the MOU is not a contract because its terms require the parties to reach agreement in the three areas; suitable modifications; review and revision of the contract to take account of the MOU generally and the development and signing of the suitable change order. **In essence, the submission is that the operation of the MOU is conditional on agreement being reached on contract modifications to reflect the MOU and embodiment of those modifications in a change order.**

[67] **An agreement is not incomplete simply because it calls for some further agreement between the parties... The question is whether the further agreement or documentation is a condition of the bargain, or whether it is simply an indication of the manner in which the contract already made will be implemented. This is a matter of the proper construction of the agreement...**”

[34] This Court is in full agreement with the sentiments expressed with such perspicacity by the erudite Cromwell JA. On proper construction of the clause, the parties agreed to record two albums, and the JV was simply the manner and or vehicle to execute the contract and was not the condition of the bargain. In

¹⁵ 2000 NSCA 95 (CanLII).

interpreting any document, be it legislation or Court order, the entire document must be read by having regard to the text, context and purpose symbiotically. In the definitions section of the settlement agreement, the following was recorded by the parties:

“Future Recordings” shall mean the next two albums only, to be delivered by Nomcebo, which **will be recorded by Nomcebo through her record label Emazulwini Productions in a joint venture partnership with Open Mic Productions** and released by Africori and shall include any recordings that Nomcebo elects to feature on up until the date of first release of the second album delivered by Nomcebo.

[35] When the above clause is taken into account, it is beyond perspicuous that what the parties were looking for is a vehicle they will use to execute their agreement to record the two albums together. Hence the interchangeably used agreement and partnership. As confirmed in *Mitsui*, the interpretative exercise must take account of the document as a whole as well as the genesis and aim of the transaction of which it forms part.

[36] In summary, since the legal position is clear, a declaratory relief is inappropriate. It can only serve as a legal opinion by this Court, something this Court is not enjoined to do. The clause impugned does not amount to an agreement to agree. It is a valid, enforceable agreement to jointly deliver two albums using the JV only as a vehicle. Accordingly, Zikode is bound by the agreed terms. Prayer 1 must fail.

Prayer 2: Breach of agreement/Court order

[37] Even if this Court were to consider that Open Mic breached the accounting obligations, this is part of a case which, with respect, was badly pleaded. When regard is had to the notice of motion, it is expansive and innovative in nature. In contractual parlance, if the terms of the contract are not performed at all or performed late or performed in a wrong manner, the party upon whom the duty of

performance lay is said to have committed a breach of contract.¹⁶ In a contract regime, once a breach occurs, the aggrieved party has an election to make. Either to accept the repudiation and cancel the agreement and sue for damages or insist on specific performance. The remedy of specific performance is granted at the discretion of a Court.

[38] The contractual regime has since vacated in this matter. The settlement agreement has been made an order of Court and has to be enforced like any other Court order. An order *ad factum praestandum* (for the performance of an act) is enforceable by means of a contempt of Court order.¹⁷ In *Numsa and Others v Hendor Mining Supplies (a division of Marschalk Beleggings (Pty) Ltd) (Hendor)*,¹⁸ Madlanga J had the following to say with regard to a reinstatement order, an order *ad factum praestandum*:

“[23] If the employee presents her- or himself for work, but the employer refuses to accept her or him back, **her or his remedy is not contractual**. It is to bring the employer before **court for contempt of court**. What contempt? For not **complying with the judgment debt embodied in the order** to accept her or him back into employment. The order of reinstatement cannot be a contractual debt.”

[39] What Zikode seeks to enforce is compliance with the accounting obligations. In other words, the Court has ordered Open Mic to provide full accounting of either of the records specified in the clause. The undue expansion requiring Open Mic to go under oath on certain information is not what the Court ordered on 15 December 2022. In contempt proceedings, a party is behoved to allege and prove that (i) a valid court order does exist; (ii) the alleged contemnor was aware of the order; (iii) there was non-compliance with the order; and (4) the non-compliance was wilful or *mala fide*. Had contempt proceedings been instituted, on the facts of this case, Zikode would have failed to prove non-compliance and disprove lack of wilfulness or *mala fide* on the part of Open Mic. Clearly, in whatever form Zikode chose to approach this

¹⁶ See *Ally and Others NNO v Courtesy Wholesalers (Pty) Ltd and Others* 1996 (3) SA 134 (N) at 149H-150A.

¹⁷ See *Kubeka and Others v Ni-Da Transport (Pty) Ltd* [2021] 4 BLLR 352 (LAC) at para 31.

¹⁸ (2017) 38 ILJ 1560 (CC).

Court, be it *mandamus*, or any other form of mandatory interdict, Zikode fails on a simple elementary basis of breach or non-compliance.

[40] In summary, Zikode must fail with regard to prayer 2, widely expanded and casted as it is. As indicated earlier, there is a serious genuine dispute of fact on the non-compliance issue, and such a dispute is incapable of being resolved on affidavit. Even when *Plascon-Evans* is to be brought into aid, a final relief sought in prayer 2 is not justifiable on the disputed and admitted facts of this case.

Duties of counsel.

[41] In any proceedings before a Court, counsel functions as an officer of a Court. It is not the duty of a Court to, at every turn, remind counsel of his or her professional duties. Even where counsel is faced with a tough and challenging case before a Court, he must remain focused to his or her duties towards a Court. No musical chairs and vacillation of duties would be countenanced by a Court. Counsel, in as much as he or she owes a duty towards his or her client, robust and forceful persuasion should not be conflated with conduct dithering on contempt of Court.

[42] Counsel makes submissions to a Court with an honest intention to (a) persuade a Court to find in favour of his or her client and (b) assist the Court to arrive at a just decision. Statements like “judge has made up his or her mind” and “submissions are made for what it is worth” are in direct contradiction with the duties of counsel. This Court cannot put it any better than it was put by Ponnann JA in *Public Protector of South Africa v Chairperson of the Section 194(1) Committee and Others (Public Protector)*,¹⁹ when he quoted the former Chief Justice of the Supreme Court of Victoria, who said:

“The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short,

¹⁹ [2024] 4 All SA 693 (SCA) at para 47.

lawyers **“must do what they can to ensure that the law is applied correctly to the case”**.

[43] When a Court engages counsel and probes the legal correctness of some of the submissions counsel makes, a Court does not “make up its mind” but a Court seeks to apply the law correctly to the case. It is only when a Court delivers its judgment that a Court makes up its mind. Before then, it is unprofessional and inappropriate for counsel to cast an aspersion that a judge has made up his or her mind. This Court is not responsible for the professional behaviour of legal practitioners. There exists a body better qualified to probe into the professional conduct of legal practitioners. This Court implores the professional body to which Mr Friedman belongs, to obtain a transcript of the proceedings in order to consider the conduct of their member. A copy of this judgment must be placed before the secretary of the South African Legal Practitioners Council (SALPC) for consideration, investigation and where necessary, proper action. It will be remiss of this Court not to reveal the submissions of Mr Maphuta, counsel for Open Mic on this issue. In short, he reverberated that his colleague had overstepped the mark. Even though Mr Friedman withdrew the “for what it is worth” statement, it is not the duty of this Court to censure Mr Friedman at this stage.

[44] On account of all the above reasons, I make the following order:

Order

1. The application is dismissed.
2. The applicants are to jointly but severally pay the costs of this application, the one paying absolving the other, on a scale as between party and party to be settled or taxed at scale B, which costs include the costs of employing two counsel.
3. A copy of this judgment, together with the transcript of the proceedings of this Court on the day of the hearing, be placed before the secretary of the SALPC for consideration.

G N MOSHOANA

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the applicants:

Mr A Friedman.

Instructed by:

Rosengarten & Feinberg, JHB.

For the Respondent:

Mr M R Maphutha

Instructed by:

M Ramalivha Attorneys, Sandton

Date of the hearing:

2 May 2025

Date of judgment:

9 May 2025