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REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE DIVISION, CAPE TOWN)

Case No A178/2022

In the matters between:

SOYISILE MOKWENI First Appellant

MICHAEL MGAJO Second Appellant

LANGEBERG MUNICIPALITY Third Appellant

v

KOOS PLAATJIES First
Respondent

MAGRIETA DE JAGER Second Respondent

JEREMY DE JAGER Third Respondent

JUDGMENT DELIVERED ELECTRONICALLY 26 OCTOBER 2023

NZIWENI, J

Introduction

[1] This appeal relates to an order of contempt of court made against the appellants [respondents in the court *a quo*] by De Villiers AJ. The learned judge *a quo* held the appellants in contempt of court for disobeying a court order by Sievers

AJ, dated 07 May 2020. The appeal to this Court is, with the leave of the court a *quo*, against the order for contempt.

[2] The developments in this case justified the late filing of the heads of arguments. Both parties did not object to the non-compliance with the rules of court. Consequently, the non-compliance with the rules is condoned.

Background

[3] It is necessary to sketch the events forming the background to this appeal. The background facts can be stated quite briefly. The respondents launched an *ex parte* application on an urgent basis, before Sievers AJ. The *ex parte* application was brought by Mr Plaatjies (first respondent) together with Ms De Jager (second respondent) and Mr De Jager (third respondent).

[4] The urgent application was for *mandement van spolie*. Amongst others, in terms of the notice of motion in the *ex parte* application, the respondents [applicants in the court a *quo*] sought relief for the restoration of peaceful and undisturbed possession of house [...] L[...] street, Draaihill Robertson (“the property”) and all building material. In paragraph four of the founding affidavit [of the spoliation application] the first respondent states that he and the other respondents stayed at the property.

[5] In the same vein, the respondents' founding affidavit [applicants in the court a *quo*] reveals the following:

"I, together with the Second and Third Applicants, reside at [...] L[...] Street, Draaihill, Robertson, Western Cape Province, herein referred to as "the house, home and /or property" ...

This is an application for urgent restoration for my dwelling pending the outcome of the Appeal process. . .

On or about 30th April 2020 I emotionally contacted my legal representative, Mr Brown. . . and informed him that that two structures (mine and my neighbour's) were demolished in the Robertson Municipal area. . .

An urgent application became imminent, and Brown contacted the Honourable Magistrate in the Robertson district. . . (t)he Honourable Magistrate directed Brown to provide a Supplementary Affidavit by me, which set out, that I was in undisturbed and peaceful occupation / possession of my house. . . The Honourable Magistrate was of the view that if this application was under ESTA the Magistrate would have granted same. . .

I instructed my Attorneys of record to file a Notice of Appeal against the findings of the Honourable Magistrate."

[6] There is no dispute that in the replying affidavit, the first respondent mentioned for the first time that the appellants actually spoliated his informal structure situated at an area known as "Die Koppies". The replying affidavit which affidavit formed part of the materials before this Court, the first respondent [first applicant in the court a *quo*] stated the following:

“ . . . CIRCUMSTANCES RELATING TO THE URGENT APPLICATIONS

13. On or about 29 April 2020 the Respondent demolished my informal structure situated at a place known as “Die Koppie”, Robertson.

14. This demolition eventually gave rise to the urgent applications launched in the Robertson Magistrate’s Court as well as the numerous applications which was (*sic*) heard in the Western Cape Division.

15. I have to make it clear that at the time of the Robertson application as well as the urgent application herein I stated to Mr Brown that I was still resident at [...] L[...] Street, Draaihill, Robertson [the property]. This is the primary reason why my address appeared as [...] L[...] Street, Draaihill, Robertson [the property] . . .

16. Unfortunately, I had failed to adequately explain to Mr Brown that the address where my informal structure was demolished and where I had stayed are two different addresses. . .”

Grounds of appeal

[7] The issues in this appeal are two - fold. Firstly, whether the appellants acted wilfully and *mala fides* when they failed to comply with paragraphs 3 (a) and (b) of the order of Sievers AJ. Secondly, whether the finding of contempt by De Villiers, dated 14 May 2020, should prevail where the entire order was premised on misrepresented facts. I shall deal first with the issue pertaining to whether the *ex parte* application was based on misrepresented facts, because it might be dispositive of the entire appeal, if determined in the appellants’ favour.

[8] The plain fact in this matter is that the issue of misrepresentation of facts has only been raised for the first time on appeal.

[9] Before this Court, the essentials of Mr Steyn's [on behalf of the appellants] argument, as set out in his heads of argument and developed orally, proceeded on the footing that the *ex parte* motion before the court *a quo* was based on misrepresented facts. Mr Steyn argues that the misrepresented facts constituted fraud upon the court *a quo*, as such this court has powers to set aside the order of De Villiers AJ, based on fraud upon the court. Similarly, it was asserted on behalf of the appellants that it is a general principle that no party should have any form of advantage based on misrepresented facts. According to the appellants, the respondents benefitted from misrepresented facts, by obtaining a contempt of court order against them [appellants].

[10] In the course of argument, a question was posed by this Court to Mr Steyn, as to whether an application in terms of section 19(b) of the Superior Courts Act 10 of 2013 ("the Act"), should not have been brought to lead further evidence in this appeal. According to Mr Steyn, the application in terms of section 19 of the Act was not necessary in the context of this case. Mr Steyn submitted that the application to lead evidence can be determined on the basis of the material before this Court.

[11] As noted earlier, Sievers AJ, granted the motion for spoliation and issued a rule *nisi*. Notably, the court *a quo* in its judgment for leave to appeal indicates that it was of the view that the application that was brought before it and Sievers AJ, may

have been brought on wrong and/ or false information, which, if they had known of the correct facts could have influenced the outcome of the court a *quo* decision and that of Sivers AJ.

[12] From the grounds of appeal, it is clear that the appellants wish to introduce in these appeal proceedings, a new issue about respondents' misrepresented facts during the *ex parte* application.

[13] It is of some significance that in this case the appellants do not seek rehearing of the findings made during the *ex parte* application. Instead, by seeking to introduce a new issue to be argued, the appellants intend to show that the misrepresentation of facts had an impact on the fairness as far as the contempt of court application is concerned. By necessary implication this means that the new argument goes to the core of the issue that was raised during the *ex parte* application. Thus, [the new argument] does not require the leading of new evidence.

Analysis

[14] The appellants allege fraud. As noted previously, the question of misrepresentation was never an issue before the courts of first instance. It is well established that an appellate court cannot usurp the functions exclusively vested to the court of first instance. Moreover, and importantly, the findings of facts or factual issues are matters solely within the prerogative of the court a *quo*. Therefore, a party

that seeks to raise a new issue on appeal has an almost insurmountable obstacle to overcome.

Common cause issue in this appeal

[15] It is important at the outset to set out the issues that are common cause between the parties. It is not in dispute in this matter that the *ex parte* application was granted on misrepresented facts. It is further common cause that the first respondent did not live at the address he claimed to have lived at when he brought the spoliation application. It is also common cause that the respondents have never been actually dispossessed of the property [house number [...] L[...] Street, Draaihill].

[16] The above-mentioned common cause factors were not presented before De Villiers AJ, when he heard the contempt of court application. Similarly, they were not presented before Sievers AJ, when he considered the *ex parte* application.

Can this Court hear the new issue raised?

[17] Undoubtedly, raising an entirely new issue for the first time on appeal is something to be frowned on. This is because, it is well settled that appellate courts do not decide any issue that was not raised in the court *a quo*. The upshot of this is that a party cannot raise an issue on appeal that was not raised in the court *a quo* unless it is a pure question of law. Hence, a party must seek leave of the appellate court to introduce a new issue on appeal.

[18] Accordingly, the individual facts of each case must be considered, and the decision taken whether the appeal court is going to allow the hearing of the new issue. In *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) (19 September 2017), the Constitutional Court stated:

“The distinction between a question of fact and a question of law is not always easy to make. How difficult it is will vary from case to case”.

[19] Against this background, it is clear that the issue which the appellants seek to raise in this appeal is whether a party can benefit from an order obtained from misrepresented facts or secured fraudulently. It is my firm view that it is discernable that the issue which the appellants seek to raise relates to a question of law.

[20] Of course, the appellants need to meet threshold requirements before this Court can consider the new issue.

The threshold criteria

[21] In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) (4 April 2007) Zondo J stated the following:

“The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party

been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.” Footnotes omitted and emphasis added.

[22] In *Barkhuizen*, Zondo CJ, points towards two relevant metrics which are whether the issue is covered by the pleadings and whether the consideration of the issue by the appeal court would involve unfairness to the other party.

[23] In *Naude and Another v Fraser* 1998 (4) SA 539 at 558 B-C, the Supreme Court of Appeal stated the following:

“ . . . Different considerations arise where a party, whether on review or on appeal, raises a point for the first time which is dependent upon factual considerations that were not fully explored in the court of first instance. . . (d)oes not detract from the principle that the court may take cognizance of the point raised for the first time on appeal provided that it results in no unfairness and causes no prejudice.”

[24] It is thus important to keep in mind in this case that, as stated in *Barkhuizen supra*, that because the hearing of a new issue is not the same as a hearing of new evidence; the party who seeks to present a new issue must also show that all facts essential to such an issue are already contained in the appeal record as if they were raised in the court *a quo*. Put differently, a party that seeks to argue a new issue on appeal, cannot raise new allegations which were never averred or placed before the court *a quo*. It follows from that that it may be so that in the court *a quo* the allegations were not argued or traversed as an issue, but they should have been presented to the court of first instance.

[25] It is further important to be mindful that for most purposes, the concept of fairness raises principles of justice. Fairness also speaks to the administration of justice. To this end, the two-steps test developed by *Barkhuizen* and *Naude* connotes more than fairness; it implies that the court of appeal should determine whether it would be in the interests of justice to allow the hearing of the new issue.

[26] In keeping with the abovementioned authorities [*Barkhuizen* and *Naude*] this Court before it allows a new issue, it should also decide as to whether the exclusion of the new issue would bring the administration of justice into disrepute; and moreover, before the new issue is allowed, this Court should also consider whether that would not prejudice the respondent.

[27] As noted earlier, Mr Steyn, on behalf of the appellants submitted that it was not necessary to bring an application as envisaged in section 19 (b) of the Act, as all the information required about the misrepresented facts, is already before this Court.

The appeal record

[28] It was emphatically contended on the respondents' behalf that an appellate court is a court of record. It is quite clear in my view that, the assertion on behalf of the respondents is quite correct. However, in the present case, this Court has a proper record of the court a *quo* before it. Additionally, a full conspectus of the relevant material was placed before the court of first instance. As noted earlier, the issue which the appellants seek to raise in this Court was spelt out in the papers of

the respondents in the court a *quo*. This is because the new issue which the appellants seek to argue is contained already in the notice of motion, founding affidavit and the replying affidavit. Thus, this Court has sufficient evidential material on record to resolve the new issue that the appellants seek to raise.

[29] I venture to say that in this appeal it is common ground between the parties that, while the relevant material was placed before the court a *quo*, they [relevant material] were not explored at the *ex parte* and contempt of court hearings and thus remain a fundamental live controversy. As such, as alluded to before, the appellants do not want to introduce new evidence, but simply want an issue that is already pre-existing on papers to be adjudicated by this Court.

[30] To be clear, in this appeal, there is already sufficient evidentiary record to resolve the new issue, which the appellant seeks to argue in this appeal. Consequently, as the appeal currently stands, there is an already existing factual foundation to support the new issue that the appellant wants to be adjudicated. To put it bluntly, there is no need for this Court to go further to look beyond the record to find new evidence.

[31] More importantly, it is common ground between the parties that the fashion in which the respondents presented their *ex parte* application led to the misrepresentation.

Fairness

[32] The apt question which arises is whether an injustice will occur should this Court allow now issue to be raised at this juncture. As is clear from the case-law, when a party raises a new issue on appeal, it should not involve unfairness. In this matter the fairness aspect is two pronged. The first leg is whether the respondents would be prejudiced, and the second leg is whether it would be in the interests of justice to hear the matter.

[33] As noted earlier, in this matter, there is common ground between the parties regarding the nature of the issue that the appellants seek to raise. The respondents were forewarned that the new issue would be argued before this Court.

[34] Moreover, I also consider that, in this case, it was never argued on behalf of the respondents that they would be prejudiced if this Court entertains the new issue that the appellants seek to raise. Instead, it was argued that the appellants should have brought an application for rescission of the order of De Villiers AJ.

Is it in the interests of justice that this Court should hear the new issue?

[35] In *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* 2016 (1) SA 621 (CC) (19 November 2015) at 639 A-B, Van Der Westhuizen J, stated:

“In Lagoonbay this Court stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument for the first time”. Footnote omitted.

[36] It is as well to remind oneself at this stage that Sievers AJ presided over an *ex parte* application. *Ex parte* applications invariably involve restricted rights to make contribution by those affected by them; since the court is not properly constituted. Hence, an applicant in an *ex parte* application has an onus to disclose fully and frankly all the material facts. What is more, it is important to remember that the all-important requisite for *ex parte* applications is that an applicant should always make a full and accurate disclosure of all relevant facts. Put differently, an application brought on *ex parte* basis imposes upon an applicant a duty to speak.

[37] The courts are tasked with truth-seeking function, which should never be impaired. To give misrepresentations and false information to court is grave and it can effectively undermine the integrity of court proceedings. Importantly, a party that approaches a court on an *ex parte* basis must show and use the utmost good faith. The founding affidavit in an *ex parte* application must be clear and concise. A party cannot seek to present a new case or explain material facts on a replying affidavit.

[38] The principles mentioned above were reaffirmed many times by the courts. For instance, *National Director of Public Prosecutions v Basson* 2002 (1) SA 419 at para 21, the following is stated:

“Where an order is sought *ex parte* it is well established that the utmost good faith must be observed. All material facts must be disclosed which might influenced a court in coming to its decision, and the withholding or suppression of material facts, by itself, entitles a court to set aside an order, even if the non- disclosure or suppression was not wilful or *mala fide*.”

[39] These principles are too well grounded in our jurisprudence to require more reference to authorities. But, notwithstanding the well-established principles applicable in *ex parte* applications, it is a striking feature of this case that there is little, if any disagreement, about the wrong information which was contained in the *ex parte* application.

[40] Furthermore, a careful consideration of the record in this matter, leads to an inescapable conclusion that the founding affidavit and the notice of motion in the *ex parte* application do contain material misrepresentation of facts of significance to both the *ex parte* application and the contempt of court applications. It is axiomatic that the respondents were guilty of wrongdoing in the court a *quo*. This is so because, the validity of the *ex parte* application [original proceedings] constituted the essential prerequisite for the legal force of the contempt of court order that followed it. Put differently, the later order [contempt of court order] could not have been granted were it not for the order granted in the *ex parte* hearing. Thus, the respondents attained the adjudication of the *ex parte* through misinformation.

[41] I therefore accept that there is no sound reason why the appellants should not raise the new issue. In my view, fairness dictates that the new factual issue should be heard by this Court.

In the circumstances, should this Court refuse to hear the factual issue, in essence, it would be upholding a wrong order. Plainly, that would not be in the interest of justice. In conclusion I have no doubt that this final criterion has been proved to the requisite standard.

[42] From the foregoing, I am satisfied therefore that this threshold criterion has been established. I have thus come to the conclusion that this Court should adjudicate the new issue.

Proceedings before Sievers AJ

[43] I have already adverted to the number of instances that the notice of motion together with the founding affidavit created an overall impression that the spoliation had occurred at the property [...] L[...] Street, Draaihill, Robertson] and that the respondents were residing there at the time of the spoliation. Indeed, the record in this matter clearly demonstrates that there is substantial evidence on record to indicate that the first respondent did not place correct facts before Sievers AJ when he heard the *ex parte* application.

[44] It is important to record that, the address of the property [...] L[...] Street, Draaihill, Robertson], is the only one that appears in the founding affidavit and the ex

parte application. It also appears from the founding affidavit that an application *for mandament van spolie* was firstly brought before a magistrate and was refused by the magistrate. It also appears that the property address related to the application before the magistrate was not revealed in the founding affidavit presented before Sievers AJ.

[45] Additionally, as I understand the position, the application for *mandament van spolie* in the magistrate court was refused. They then launched an application before the court *a quo* for the same reason. Although the founding affidavit describes where the respondents lived, nowhere does it [founding affidavit] categorically disclose the address where the demolished structure was situated. However, as mentioned previously, the spoliated address is only mentioned in the notice of motion.

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[46] Despite the fact that the date upon which the structures of the respondents were demolished is mentioned, there is no mention in the founding affidavit that the demolished structures were situated at “*Die Koppies*”. Nor was it disclosed that the address where the first respondent stayed and the structure which was demolished, were two separate addresses. In my view, these aspects which were not disclosed during the consideration of the *ex parte* application, ought to have been disclosed when the relief was sought.

[47] In his attempt to explain the inconsistency between the founding and the replying affidavit, the first respondent stated in the replying affidavit that he failed to

adequately inform his attorney that the place where his informal structure was demolished and where he stayed are two different addresses.

[48] Over and above that, the evidence reveals that Sievers AJ also considered the affected property to be the property [...] L[...] Street Draaihil Robertson. The order of Sievers AJ reads as follows:

“1. ...

2. ...

3. That a rule *nisi* is issued calling upon the Respondent to appear in this Honourable Court to show cause, if any, on the 11th of June 2020 at 10h00 as to why the following order should not be made final:

(a) The Respondent be ordered to restore the Applicants peaceful and undisturbed possession of house at [...] L[...] street, Draaihill, Robertson to the Applicants and all the building material before the illegal demolition pending the institution of appeal proceedings against the decision of the Learned Magistrate Swanepoel in the Robertson Magistrate Court in dismissing Applicants Application to restore possession;

(b) That the Respondent be ordered to, replace the roof sheeting and/or put back the roof sheeting that was removed and all the other building material pending the institution of appeal proceedings against the decision of the Learned Magistrate Swanepoel in the Robertson Magistrate Court in dismissing the Applicants Application to restore possession;

(c) The Respondent should pay cost of this application.

4. That pending the return date hereof, paragraph 3 (2), (b) above shall operate as an interim order”.

[49] It is evident from the record that the respondents in their *ex parte* application failed to make full and frank disclosure to Sievers AJ, regarding the address which was affected. The address which was affected was the most relevant fact during the

launch of the *ex parte* application. In my view, the omission by the respondents involved a material fact that might have influenced the decision of Sievers AJ, as far as it concerned the decision to grant or not to grant the relief sought.

[50] It is, of course, the case that, if an applicant in *an ex parte* application fails to make full disclosure of all material facts, the non-disclosure can have an effect of a misrepresentation. As I have said there was little, if any disagreement, about the fact that the order in the *ex parte* application was obtained through misrepresentation. Thus, the appellants in this matter cannot be faulted for stating that the respondents misrepresented their case before Sievers AJ. In my view, in this case, the conduct of the respondents is appropriately characterized as such as it had the result of misleading the court. The undisclosed evidence had an impact on the overall fairness of the *ex parte* application because it affected the results of those proceedings. Hence, I entirely agree with the submissions made on behalf of the appellants that, in the context of this case, the respondents obtained an *ex parte* application on material misrepresented facts.

[51] Naturally, where there has been a material misrepresentation on *ex parte* application the order should be set aside. Equally, it is settled that judgment obtained by fraud is void. It is also established principle of our law that a void order is no order at all.

The authors in *Herbstein & Van Winsen* 'The Civil Practice of the High Courts in South Africa' 5th Ed, 2009 at 939, state that:

“A judgment procured by fraud of one of the parties, whether by forgery, perjury, or any other way such as the fraudulent withholding of documents, cannot stand.”

[52] In *Makoma Mohali v Phetole Victor Mohali and seven others*, (unreported case number 39683/2019, ZAGP JHC (24 January 2023)), para 19-22, the following was stated:

“[19] It has been said that “fraud unravels all subsequent transactions even..... a subsequent sale to a bona fide purchaser. In *Firststrand Bank Ltd t/a Rand Merchant Bank and Another v The Master of the High Court, Cape Town*, the Court after considering the fraudulent misrepresentation made by the attorney to the Master of the High Court said:

“[20] It is trite that the effect of fraud is far-reaching. In *Farley (Aust) Pty Ltd v JR Alexander & Sons (Qld) Pty Ltd* [1946] HCA 29; (1946) 75 CLR 487 the High Court of Australia, per Williams J, said this:

'Fraud is conduct which vitiates every transaction known to the law. It even vitiates a judgment of the Court. It is an insidious disease, and if clearly proved spreads to and infects the whole transaction.'

[21] And in *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) at 712 one finds Lord Denning's well-known remarks:

'No court on this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is

careful not to find fraud unless it is distinctly pleaded and proved, but once it is proved, it vitiates judgments, contracts and all transactions whatsoever.

[22] In South Africa, the 'insidious effect of fraud permeates the entire legal system'. It renders contracts voidable. It is one of the elements of delictual liability. It constitutes a crime. Fraud excludes the effect of an ouster clause in the legislation. See *Narainsamy v Principal Immigration Officer* 1923 AD 673 at 675. It also nullifies a contractual exemption clause which purports to exclude a party from the consequences of fraudulent conduct. See *Wells v SA Alumnite* 1927 AD 69 at 72." Footnotes excluded, and emphasis added.

The proceedings before De Villiers AJ

[53] Given the circumstances in the present matter, we are not dealing with independent or isolated matters. The contempt of court order is a consequence that was produced by the *ex parte* application. Thus, the contempt of court application was inextricably linked to the *ex parte* application. Hence, the attack on the contempt of court order amounts to a collateral attack of the initial *ex parte* application. This is so because, the validity of the *ex parte* application [original proceedings] constituted the essential prerequisite for the legal force of the contempt of court order that followed it. Put differently, the later order [contempt of court order] could not have been granted were it not for the order granted in the *ex parte* hearing. Thus, the respondents attained the adjudication of the *ex parte* through misinformation. Accordingly, the new issue of misrepresentation completely alters the dynamics of the *ex parte* application.

[54] In the appellants' head of argument, it is submitted that the appellants are not seeking an order setting aside the order of Sievers AJ. At the end of the day the question that then begs to be asked is: can it be said that the order granted by Sievers AJ still stands. It is trite that a *rule nisi* lapses if it not extended. The appellants are of the view that the order of Sievers AJ was extinguished by the proceeding of 21 May 2020. There is no evidence in this matter that the rule *nisi* granted by Sievers AJ was ever extended, or confirmed or discharged and thus, it had lapsed on 21 May 2020.

[55] The *ex parte* application order, being the initiating order cannot be used against the appellants as it was obtained based on misrepresented facts. That being so, it seems to me an impossibility that the respondents can benefit from such a situation. Thus, the respondents cannot keep the outcome of their application for contempt of court, that flowed from tainted proceedings. It is fundamental rule that a court order is valid and binding until set aside on appeal or lawfully quashed. This is also clear from the case-law. See *Oudekraal Estate (PTY) Ltd v City of Cape Town and Others* [2004] 3 All SA 1 (SCA) (28 May 2004). Under the circumstances, the appellants have thus done the proper thing to come to this Court to have the contempt of court order set aside instead of it being ignored.

[56] Even if I were to err regarding the above findings. The threshold to satisfy the contempt of court has not been met for the following reasons.

Contempt of court

[57] One of the issues to determine under this heading is whether the failure to comply with the order of Sievers AJ (“the order”) was wilful or *mala fide*. Although the appellants admit that they failed to comply with the order of Sievers AJ, they [appellants] deny that the failure was wilful or *mala fide*. Accordingly, it is asserted on behalf of the appellants that the element of *mala fide* had not been satisfied. It was further contended by the appellants’ counsel that if the facts relating to the contempt of court proceedings are objectively assessed they do not point to *mala fides* but point to a party that had made a mistake.

[58] It is not in dispute in this matter that the appellants anticipated the order of Sievers AJ. According to the appellants the order in question did not determine a date by when they had to perform. So, the argument continues that the *ex parte* order also did not direct that it should be complied with, forthwith. Thus, they acted under honest belief that the anticipation of the order meant that the matter would be adjudicated before they were required to perform in terms of the order.

[59] Undoubtedly, wilful non-compliance with an order of a court is a contemptuous behaviour. Hence, it is settled that intent or wilfulness is required to hold a party in contempt for disobeying a court order. Thus, there should be a deliberate intentional act to disregard the court order. When one considers the fact that the appellants anticipated the return date of the order [Sievers AJ’s order], it is difficult to conclude that they wilfully disobeyed the order of Sievers AJ.

[60] Mr Filton argued on behalf of the respondents that the appellants did not anticipate the matter for its immediate hearing and in so doing he intended to punish the respondents.

[61] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA), at paragraph 9, the following was stated:

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed “deliberately and mala fide”. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith).” Footnote omitted.

[62] In this matter, it is common cause that the appellants anticipated the order granted by Sievers AJ. The mere fact that the appellants anticipated the order evinces that they did not intend to manifestly disregard the court order in question. Thus, in the context of this case, it cannot be said that the appellants inexcusably failed to comply with the order. It is evident that the appellants acted on a mistaken belief that they did not have to comply with the order. This construction is buttressed by the fact that they anticipated the return date. The anticipation of the date further demonstrates that the appellants genuinely believed that they could act in the manner in which they did.

[63] When one considers the fact that the appellants anticipated the return date of the order, it is difficult to conclude that there was obstinacy and mala fides to disobey the order of Sievers AJ. In my mind, the mere fact that the appellants were showing willingness to go to court before the return date, shows that the parties were willing to subject themselves to court. Consequently, it cannot be said that the appellants did nothing, and exhibited wanton disregard of the court order. I am thus not satisfied that the requisite that for contempt of court, that the non-compliance must be wilful and mala fide was satisfied.

Costs

[64] It is trite that the costs ordinarily follow the results. Though the respondents conduct is objectionable, I am however mindful to the fact that the first respondent issued an apology to the appellants and did not persist in the misrepresented facts. I also take cognisance of the fact that there is a high probability that the respondents won't be in position to pay a cost order. There is thus a huge possibility that even if this court grants a cost order, the appellants would not be able to recoup their costs from the respondent.

[65] In the circumstances, a costs award would merely be an academic exercise. Consequently, each party should pay its own costs.

[66] For all the foregoing reasons, I propose the following order:

1. Appeal is upheld.
2. The contempt of court order by De Villiers AJ, is hereby set aside.
3. Each party to pay its costs.

C. N. Nziweni
Judge of the High Court

I agree, and it is so ordered.

T. C. Ndita
Judge of the High Court

I agree.

R. C. A. Henney
Judge of the High Court

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