



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: CA206/2021

Matter heard on: 21 October 2022

Judgment delivered on: 22 November 2022

In the matter between:

ROPAX INVESTMENTS 10 (PTY) LTD

First Appellant

RIO RIDGE 1387 (PTY) LTD

Second Appellant

GRANT COTTERELL

Third Appellant

ADRIAN PRICE

Fourth Appellant

and

EXPRESS PETROLEUM (PTY) LTD

Respondent

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

.....
Signature

.....
Date

JUDGMENT

Smith J:

Introduction

[1] This appeal is against the judgment of Kruger AJ, delivered on 20 May 2021, *inter alia*, finding the appellants in contempt of the order granted by Nhlangulela DJP on 4 December 2020. In terms of Nhlangulela DJP's judgment, the appellants were ordered, pending final determination of the trial, exclusively to source fuel from the respondent (Express). The order does not mention the price at which the fuel had to be procured. Kruger AJ nevertheless found that the order, properly construed, re-instated the *status quo ante* and thus enjoined the appellants not only to procure their fuel exclusively from Express, but also to pay the same price they have paid before. She also found that the appellants were in contempt of that order because they paid short on the invoices delivered to them by Express, 'by only paying market-related prices for fuel delivered'. She consequently ordered the appellants to purge their contempt by paying in accordance with the invoices delivered by Express.

[2] The appellants contend that Kruger AJ erred in having regard to the reasons provided by Nhlangulela DJP in his judgment when construing the order. They contend that the order is unambiguous and it was therefore not permissible for Kruger AJ to go outside the scope of the wording of the order. She also erred by going beyond merely interpreting the order and extending it outside the perimeters intended by Nhlangulela DJP, namely by determining the price they had to pay for the fuel. According to them, the order, properly construed, does not enjoin them to pay the above market-related prices unilaterally determined by Express. The appeal is with the leave of the court *a quo*.

Condonation application

[3] Before I consider the merits of the appeal, I must first deal with the appellants' application for condonation of their failure to comply with the Uniform Rules of Court in the prosecution of the appeal. In order to do so, I briefly narrate the history of the various applications filed or abandoned, so as to provide proper context.

[4] After Kruger AJ granted the appellants leave to appeal, Express successfully applied for an order in terms of section 18(4) of the Superior Courts Act 10 of 2013 for

her order to become effective immediately. The order was granted by Pakati J on 10 November 2021. The appellants thereafter unsuccessfully attempted to appeal Pakati J's order. Lowe J, writing for the Full Court, dismissed the appeal and found that it had effectively lapsed.

[5] The appellants have subsequently filed no less than three condonation applications in an attempt to rectify numerous procedural difficulties. On 19 October 2021 they purported to file the record, but omitted to file security as required by Uniform rule 49(13). They also failed to file powers of attorney, as required in terms of Uniform rule 49(6)(a), read with rule 7(2).

[6] On 16 November 2021, Express's attorneys wrote to the appellants' attorneys alerting them to those procedural shortcomings. The appellants' attempt to rectify the irregularities were also not good enough. The security they purported to provide was wholly inadequate and the powers of attorney did not comply with the requirements of section 74 of the Companies Act 71 of 2008. Once again it was Express's attorneys who pointed out those difficulties to the appellants' attorneys. They also explained what the law required and the extent of the appellants' non-compliance.

[7] The appellants instituted their first application for condonation on 29 November 2021, but brought it in the wrong court. On 30 November 2021, Express's attorneys delivered a notice in terms of Uniform rule 30A, notifying the appellants of that procedural irregularity and calling upon them to remove their application from the urgent court roll. The appellants duly removed the application from the urgent roll on 9 December 2021 and thereafter re-enrolled the same application in the correct court.

[8] On 10 May 2022, the appellants purported to re-enrol their section 18(4) appeal, despite the fact that the Full Court had pronounced that the appeal had lapsed. Express's attorneys again wrote to the appellants' attorneys reminding them of their failure to remedy the procedural irregularities in respect of the security and powers of attorney, and pointed out to them that their section 18(4) application was incompetent because the main appeal had lapsed. Express thereafter filed its answering affidavit

in the appellants' third application for condonation, again drawing attention to the mentioned procedural irregularities.

[9] The section 18(4) appeal was argued on 18 July 2022 and Express's counsel, *inter alia*, argued that the condonation application should be dismissed because of the clear failure to remedy the procedural irregularities. On 2 August 2022 Lowe J delivered the judgment on behalf of the Full Court, holding, *inter alia*, that the appeal had lapsed on 19 October 2021 on account of the appellants' non-compliance with Uniform rule 49(6)(a), read with rule 7(2).

[10] The appellants have, on the third attempt, finally rectified the procedural irregularities. They contend that they have timeously complied with Uniform rule 49(6)(a) when they filed the appeal record on 19 October 2021 and requested a date for the hearing of the appeal.

[11] Mr *De La Harpe* SC, who together with Ms *Watt* appeared on their behalf, relying on an unreported judgment of the Western Cape High Court in *Daniel Welman Janse Van Rensburg v Theodorim Nguema Obiang* (case no: A338/2018; delivered on 10 May 2019) argued that the appeal could not have lapsed in circumstances where the responsible functionary has accepted the timeously lodged application for it to be set down and had allocated a date for the hearing.

[12] In respect of the contended deficient power of attorney, he argued that it was for the Registrar and not Express to be satisfied as to the authenticity of that document when deciding whether to accept or reject an application for the set down of the appeal. Since there has not been an application to impugn the Registrar's decision to accept the power of attorney, there can be no question of the appeal having lapsed.

[13] In any event, so Mr *De La Harpe* argued, there is no challenge to the validity of the powers of attorney filed on behalf of the third and fourth appellants, namely Mr Price and Mr Cotterell. He submitted that Express's contention is that there was non-compliance with the requirements of section 74 of the Companies Act, because the resolution was not referred to all of the directors, in particular Mr Wells, even though the majority of the directors, namely Mr Cotterell and Mr Price had signed it.

[14] He argued furthermore that since Mr Wells deposed to the opposing affidavit on behalf of Express, and had been behind litigation instituted by Express against the appellants, it was inconceivable that he would have signed a resolution supporting the appeal. In addition, the conflict of interests which arose from Mr Wells' stance resulted in him being removed as a director of the first and second appellants, namely Ropax and Rio Ridge. The position is therefore that the current directors of Ropax and Rio Ridge have authorised the prosecution of the appeal, or so Mr *De La Harpe SC* argued.

[15] Mr *De La Harpe* submitted that the appellants' previous attorney, Mr Sharp, has explained the circumstances in which certain irregularities arose. After he had withdrawn as attorney of record, the new attorney, namely Mr Allanson of DTS Attorneys, advised the applicants to convene another directors' meeting where a unanimous resolution was passed to proceed with the appeal. In the event, the appellants have filed a supplementary application for condonation and reinstatement of the appeal, which must be considered if the court should find that it had lapsed.

[16] Regarding the issue of security, Mr *De La Harpe* argued that the appellants had filed sufficient and proper security. If Express were of the view that the security was insufficient, it should have approached the Registrar in terms of Uniform rule 49(14)(b) to set a higher sum. The appellants have in any event since addressed that complaint by providing security in the sum of R100 000. He argued that the effect of not filing security is not that the appeal lapses, because the Uniform rules do not provide for such an eventuality.

[17] I agree with Mr *Epstein SC*, who together with Mr *Hopkins* appeared for Express, that it was incumbent on the appellants to show good cause for condonation and reinstatement of the lapsed appeal, since Lowe J's pronouncement that the appeal had lapsed remains unchallenged.

[18] The application for condonation and reinstatement of the appeal must be considered in the light of the following factors: (a) the standard for considering an application for condonation is the interests of justice. This will depend on the facts and circumstances of each case; (b) the nature of the relief sought; (c) the extent and

course of the delay; (d) the effect of the delay on the administration of justice and other litigants; (e) the reasonableness of the explanation for the delay; (f) the importance of the issues to be raised in the intended appeal; and (g) the prospects of success. (*Van Wyk v Unitas Hospital and Another* 2008 (4) BCLR 442 (CC), para 20).

[19] I now turn to consider those factors in the context of the circumstances of this case.

(a) Nature of the relief:

Express sought urgent relief before Nhlangulela DJP and subsequently also before Kruger AJ. The appellants' notice of appeal had caused it to bring another application for relief in terms of section 18(3). The appeal in terms of section 18(4) was also heard on an urgent basis by the Full Court, resulting in a unanimous judgment. Mr *Epstein*, submitted that despite those four urgent applications, Express still does not have effective relief.

I am also constrained to have regard to the fact that these are essentially contempt of court proceedings and that a pronouncement against any litigant is a serious matter. In my view courts should be inclined to leniency and to adopt an approach that would ensure that a litigant has a fair opportunity to challenge allegations of contumacious non-compliance with court orders. There are, however, limits to the leniency. Mr *Epstein* submitted this court should not come to their assistance given the extent of the appellants' remissness and obstinate refusal to heed the advices of Express's attorneys.

(b) The extent of the delay:

It had taken the appellants nearly nine and a half months to file powers of attorney that complied with section 74 of the Company's Act. This was after their attorneys were alerted on numerous occasions about the procedural deficiencies of the filed powers of attorney.

(c) The reasonableness of the explanation for the delay:

Mr *Epstein* has submitted that there has effectively been no explanation for the four-month period that preceded Mr Allanson's involvement in the matter. The appellants were required to provide an explanation that covers the entire period and they have failed to do so. He argued that this long and serious delay militates against the granting of condonation.

(d) The reasonableness of the explanation for the delay:

Mr *Epstein* has correctly submitted that all the blame has been put on the previous attorney, Mr Sharp, and no attempt was made to explain the four-month period before the new attorney took over. Indeed, the conduct of the appellants' attorneys, in particular Mr Sharp, leaves much to be desired. Despite the numerous warnings by Express's attorneys regarding the procedural irregularities, it appears that Mr Sharp has arrogantly ignored them and allowed a period of more than four months to lapse before they were rectified. In the end, the delay of nine and half months is extensive and the explanation tendered by the appellants falls far short of reasonably clarifying the delay.

[20] All of the abovementioned factors militate strongly against the granting of condonation. However, I am also constrained to consider the prospects of success and must therefore consider the merits of the appeal before pronouncing on the application for condonation.

Contempt of court

[21] In the application before Kruger AJ, Express initially sought an order declaring the appellants to be in contempt of Nhlangulela DJP's order and for the imposition of such period of imprisonment or fine as the court may deem meet. It, however, subsequently amended its notice of motion, in effect abandoning the prayer for the imposition of a sentence and instead asking for an order compelling the appellants to purge their contempt by enjoining them to source the fuel at the price determined by Express.

[22] The effect of that amendment was to bring into play the standard of proof applicable to contempt of court proceedings where a civil remedy is sought, as opposed to criminal contempt of court where a criminal conviction and consequential committal of the contemnor is sought. The Constitutional Court held in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* 2018 (1) SA 1 (CC), at para 67, that in civil contempt proceedings, where the committal of the contemnor is not sought, the standard of proof is the balance of probabilities. In order to succeed, Express was required to prove: (a) a valid court order; (b) that the appellants were notified of the order; (c) that they have failed to comply with the order; and (d) that their non-compliance was wilful and *mala fide*. It is trite that once (a), (b) and (c) have been established, the appellants bore an evidentiary burden to prove that the non-compliance was not *mala fide*. (*Fakie N.O v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)).

[23] It was common cause that the requirements of a valid court order and the appellants' knowledge of it had been established. The only questions which Kruger AJ was therefore required to decide were whether the appellants had failed to comply with the order and, if so, whether their non-compliance was wilful or *mala fide*.

[24] The appellants contend that Nhlangulela DJP's order only compelled them to source their fuel from the respondent without telling them how much they must pay. They contend that they did comply with the order because they sourced their fuel exclusively from Express, but had refused to pay the invoiced price as they were entitled to do.

[25] The appellants' stance was premised on the judgment in *Firestones South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (AD) at 304D-E (*Firestones*). In that case it was held that the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasoning for it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify or supplement it. In such a

case not even the court that gave the judgment or order can be asked to state what its objective intention was in giving it.

[26] In *Rail Commuters Action Group & Others v Transnet Ltd t/a Metrorail and Others* 2007 (1) All SA 279 (C), at 286F, Thring J endorsed this approach and held that the order is the executive part of the judgment. It defines what the court requires to be done or not done, and although it must undoubtedly be read as part of the entire judgment, and not as a separate document, ‘if its meaning is clear and unambiguous, it is decisive, and cannot be restricted or extended by anything else stated in the judgment’.

[27] However, insofar as *Firestones* must be read as holding that the reasons in the judgment can only be resorted to when there is ambiguity in the order, it has been superseded by the judgment in *HLB International (South Africa) v MWRK Accountants and Consultants* (113/2017) [2022] ZA(12 April 2022), at para 26. The Supreme Court of Appeal held in that case that orders must be interpreted together with the reasons provided in the judgment and that both the reasons and the order must be read as a whole in order to ascertain the court’s intention. (See also *Eke v Parsons* 2016 (3) SA 37, at para 29 (CC))

[28] Nhlangulela DJP’s order must therefore be construed in the context of the reasons provided in his judgment. Express’s attempt to introduce into this exercise averments made in their founding or replying affidavits must, however, be resisted. The dangers of such an approach are obvious. A judgment is the judicial officer’s recordal of his or her factual findings, conclusions of law and the consequential relief granted. In interpreting the executive part of the judgment, namely the order, regard can only be had to the reasons as they appear from the judgment. Averments contained in the parties’ affidavits can only be relevant insofar as they form part of the judicial officer’s factual findings. Otherwise, parties will effectively be allowed to re-argue the case in order to give meaning to the order.

[29] What then did Nhlangulela DJP say about the relief sought by Express? There is only one reference to this issue in the judgment where he recognises that Express was seeking to maintain the *status quo ante*, namely to continue sourcing the fuel

exclusively from Express. It consequently sought to reinstate the business arrangement that was in place immediately before the launching of the application. I agree with Mr *Epstein* that it is therefore only logical to assume that in ordering the appellants to source their fuel exclusively from Express, Nhlangulela DJP, intending to reinstate that *status ante quo*, must have had a price in mind. Certainly he could not have intended for the appellants to get it for free. And in the context of the reasons provided in his judgment that price could only have been the usual price paid by the appellants for the fuel before the institution of the application.

[30] Nhlangulela DJP's order was framed in exactly the language prayed for by Express. So, in a manner of speaking, Express was the author of its own problems by not being more specific about the form of the relief it sought. The issue of the price which the appellants had to pay for the exclusively sourced fuel was a fundamental part of the relief sought by Express. It should therefore have been spelled out in clear and unambiguous terms and not left for complicated exercises of construction.

[31] Nevertheless, in the context of this case, it matters not how one arrives at the conclusion that the order sought to reinstate the *status ante quo*, both in respect of the exclusive sourcing of the fuel and the price which the appellants were required to pay. The result is the same, namely that the appellants were compelled to buy their fuel exclusively from Express at the usual price.

[32] As mentioned, the appellants contend that Express did not address the issue of price in its main application before Nhlangulela DJP. Hence in his judgment the only reference to price was that it was an above-market price and that Express sought to restore the *status ante quo*. The judgment nowhere spells out what that price was or what the terms of the tacit agreement were, or so the appellants contended.

[33] Mr *De La Harpe* argued that there was a clear dispute on the papers regarding the price of fuel and the cost of transporting it, as well as the manner in which those prices and costs were to be calculated with reference to past practices and the conduct of the parties. Those disputes, if they were to be determined by Nhlangulela DJP, should have been resolved on the appellants' version, or so the argument went.

[34] Even though the amendment of the notice of motion changed the nature of the proceedings into an application for civil contempt, Express was still required to establish, amongst others, that the appellants had wilfully disregarded the order, albeit that the latter carried the evidentiary burden of establishing the contrary.

[35] It is manifest that the appellants adopted the position – at least from 30 December 2020 – that Nhlangulela DJP's order only compelled them to source their fuel exclusively from Express. According to them the fact that the learned judge did not mention the price at which they have to procure the fuel meant that they were entitled to pay what they regarded to be a market-related price. This much was clear from the letter which their attorneys addressed to Express's attorneys on 30 December 2020. They accordingly did not pay the price which Nhlangulela DJP's order intended them to pay. Their conduct consequently constitutes non-compliance with the order. This, however, is not the end of the enquiry. These being contempt of court proceedings, I must still consider the appellants' explanation for their non-compliance in order to determine whether it has been wilful.

[36] The question as to whether their conduct was wilful must be answered with due regard to their explanation as to why they believed they were entitled to adjust the prices stated on Express's invoices and to pay a price that they regarded as market-related.

[37] In their answering affidavit, the appellants explained that Express had priced its fuel according to a formula based on prices that it was able to obtain from various bulk suppliers, using 'a weighted average price'. Express had, however, in the months preceding the launch of the urgent application before Nhlangulela DJP, adopted a new formula which is equivalent to the most expensive price that Shell charges. The appellants thus contended that in determining the *status quo ante* price, the court must have regard to the price which had historically been charged over a number of years, using the formula previously applied by Express and not based on Shell's most expensive price.

[38] However, Express, in its replying affidavit, was able to demonstrate conclusively, with the assistance of chartered accountants, that it has been using the

same pricing formula in respect of Ropax for the past 16 months and in respect of Rio Ridge, for the past 24 months.

[39] Mr *Epstein* has described the appellant's version as 'stitched together with fabricated facts', and he stopped short of calling it deliberately dishonest. While this depiction may seem a trifle harsh, I am of the view that, at the very least, the appellants had been opportunistic in latching onto the fact that Nhlangulela DJP's order was silent on the price at which the fuel have to be procured.

[40] The most compelling substantiation of this assertion is the fact that from 4 December 2020 until 30 December 2020, the appellants had fully complied with the court order. They had bought fuel exclusively from Express at the *status quo ante* price, namely the price that they had consistently been paying – in the case of Ropax, for the preceding 16 years and in the case Rio Ridge, for the past 24 months. This much was evident from the letter their previous attorney, Mr Sharp, had written to Express's attorneys on 11 December 2020, confirming that Ropax and Rio Ridge will pay the invoices issued by Express for the supply of fuel 'provided that the fuel is charged for at the same rate it has been charged for most recently'. This, in my view, is incontrovertible evidence that the appellants had, at least at that point, understood at what price Nhlangulela DJP's order has compelled them to procure the fuel.

[41] The letter of 30 December 2020 was thus an opportunistic about-turn on the part of the appellants. Their attorneys stated in that letter that they, together with the appellants, had an opportunity to reconsider the judgment and the order and were of 'the considered view that the judgment obliges our clients to do no more than source fuel from your client. No terms are stipulated regulating such sourcing, supply and pricing'.

[42] It is thus clear that while their initial stance – as set out in the letter of 11 December 2020 – was based on a reasonable construction of Nhlangulela DJP's order, they have subsequently – and in my view opportunistically – latched onto the fact that the order did not specifically mention price, and have contrived to construct a version to justify their refusal to pay the above market-related price.

[43] I accordingly agree with Mr *Epstein* that in those circumstances the appellants could not have held a genuine and bona fide belief that they were entitled to pay short on the invoices issued by Express. Their conduct consequently constitutes contumacious non-compliance with the order. The inexorable consequence of this finding is that the appellants' application for condonation must also be refused. The appeal must accordingly fail and, these being contempt of court proceedings, costs must be awarded on a punitive tariff, namely on the attorney and client scale.

The order

[44] In the result the following order issues:

- 1) The appeal is dismissed with costs, including the costs of two counsel, on the attorney and client scale.
- 2) Paragraphs (a) and (c) of the order granted by Kruger AJ on 20 May 2022 are confirmed.
- 3) Paragraph (b) of the order made by Kruger AJ on 20 May 2022 is replaced with the following paragraph:

‘(b). The first and second respondents are hereby granted ten days from the date of this judgment to purge their contempt as set out in paragraph (a) above. This must be done through payment in accordance with the invoices delivered by the applicant to the date of the Full Court’s judgment and order, failing which the applicant may set the matter down upon notice as a matter of urgency, with or without further amplification of the papers, calling upon the first to fourth respondents to show cause why:

 - (i) A further order should not issue in terms of which the first and second respondents would be prohibited from proceeding in any other litigation in any other matters that they may be

involved with in the High Court until they have purged the said contempt;

- (ii) They should not pay the costs of any further proceedings on an attorney and client scale;
- (iii) Further sanctions to ensure purging of the contempt should not be imposed against them;
- (iv) Criminal sanctions should not be imposed on the third and fourth respondents.'

JE SMITH
JUDGE OF THE HIGH COURT

I agree

BESHE
JUDGE OF THE HIGH COURT

I agree

NTLAMA-MAKHANYA
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellants	:	Adv. D H De La Harpe SC Adv K L Watt
	:	Netteltons Attorneys 118A High Street MAKHANDA (Ref: Ms. Pienaar)
Counsel for the Respondent	:	Adv H Epstein SC Adv K Hopkins
	:	Neville Borman & Botha 22 Hill Street MAKHANDA (Ref: Mr Powers)