IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

16/9/15

CASE NUMBER: 8105/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: (YES)/NO

(2) OF INTEREST TO OTHER JUDGES: (YES)/NO

(3) REVISED

DATE: 16 September 2015

SIGNATURE: .....

In the matters between: -

MBONISENI YSTER DLADLA Applicant

And

TSHWANE UNIVERSITY OF TECHNOLOGY First Respondent

NTHABISENG AUDREY OGUDE Second Respondent

MATOANE STEWARD MOTHATA Third Respondent

VUSI NICHOLA MGWENYA Fourth Respondent

In re

MBONISENI YSTER DLADLA Applicant

TSHWANE UNIVERSITY OF TECHNOLOGY Respondent

JUDGMENT

JANSEN J

Nature of the application:

[1] This application is for the joinder of the second, third and fourth respondents as well as a concomitant amendment to the existing notice of motion in a contempt of court application.

Background:

[2] This matter has a long, tortuous history. During January 2014 student protests resulting in violence and damage to the TUT's property and protests were rife. This ended on the 31st of January 2014 when the Tshwane University of Technology (**the "TUT"**) obtained urgent interdicts *ex parte* against the applicant, various individuals and student organisations prohibiting them from threatening, intimidating and/or harassing the staff of the Tshwane University of Technology coupled with a rule *nisi*.[1] It is important to note that the service of this court order was to be effected via the sheriff by affixing it to the main gate as appears from the court order.

[3] On 30 January 2014 (a fact which, curiously, was omitted to be mentioned by the TUT in the urgent application referred to above) a notice was issued to all the students on the TUT's campuses calling upon all residential students to

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[1] What happened to this rule *nisi* is unclear. It appears as though the students elected to comply with the order.

vacate residences by 7h30 on the 31st of January 2014. The only statement made in the urgent application by the TUT touching on this issue was to the effect that it stated that its Pretoria West campus had been closed indefinitely. The TUT had therefore evicted its students summarily, without prior notice, thus breaching their basic constitutional rights to accommodation. It is important to emphasise that the mass evictions took place, as stated, without a court order, allowing the TUT to act accordingly. It had ample opportunity to request such an order from the court but failed to do so.

[4] On 1 February 2014, a Saturday, the court, also on an urgent basis, granted a final interdict in favour of the current applicant ("the anti-eviction or spoliation application") in the following terms: —

"***ORDER***

Having heard counsel on behalf of the applicant and after perusal of the papers the following order is made: —

1. ***That the matter be heard on an urgent basis and that non-compliance with the Rules of this Court relating to time periods and form of service as provided for in the Rule 6(12)(a) of the Rules of Court be condoned.***

2. ***Declaring the evictions that were effected at the respondent's residences on 31 January 2014 by the respondent to have been unlawful.***

3. ***Ordering the respondent to <u>immediately</u> allow all students who were evicted from the respondent's residences back into such residences.*** [emphasis added]

4. ***That the respondent pay the costs of this application, on the scale as between attorney and own client.***

BY ORDER

THE REGISTRAR"[2]

[5] An endeavour to rescind the order of the 1st of February 2014 which was brought by the TUT on 29 January 2015, was dismissed by Kollapen J. (No appeal was lodged against Kollapen J' s order.)

[6] The TUT adopted an extremely cavalier approach to the anti-eviction order of which it had full knowledge. This is demonstrated later in this judgment which issue, to a large extent, has been dealt with in the judgment of Kollapen J. The attitude adopted by the executive members of the TUT was that no proper service of the urgent application had been effected on them. However, the turbulence present on campus by necessity caused everybody to be on high alert and given the drastic measures taken by both students and the TUT, it is impossible to accept that the TUT was not highly vigilant over the

[2] Apparently an appeal was launched against the anti-eviction order, but not prosecuted.

weekend. Had this not been the case, it would have resulted in a grave dereliction of its duties.

[7] During the afternoon of the 1st of February 2014, the applicant personally handed a copy of the anti-eviction court order to the security staff of the TUT, and in particular to the TUT's Director of Campus Security who informed the fourth respondent thereof. However, the TUT refused to comply with the anti-eviction order. The TUT even published its knowledge of the anti-eviction order on its website on the 2nd of February 2014 but failed to comply with it. Similarly it published a news report referred to below.

[8] During the early afternoon of 1 February 2014 the applicant's attorneys of record indicated to the TUT's attorneys of record that the applicant intended to launch an urgent contempt application to enforce compliance with the anti-eviction order. The application was heard on the 3rd of February 2014, and was adjourned to the next morning, the 4th of February 2014 when it was granted.

[9] Although the TUT states that it decided to comply with the anti-eviction order on 3 February 2014 it only fully implemented the anti-eviction order on 4 February 2014.

[10] The interim order obtained against the TUT by the applicant based on contempt of court reads as follows: —

"***That a rule nisi do hereby issue in terms of which the respondent is to show cause on 31 march 2014 at 10:00 why the following order should not be made final:***

a) That the respondent be declared to be in contempt of the court order dated 1 February 2014;

b) That he be sentenced in the discretion of the court accordingly;

c) Directing the respondent to pay the cost of this application;

Further and/or alternative relief."

[11] The rule *nisi* issued by the court against the TUT obliged it to provide the court with reasons as to why the contempt of court order should not be made final.

[12] The rule *nisi* was extended on various occasions.

[13] On the 26th of March 2014 the TUT filed its answering affidavit in the contempt application. This affidavit by the TUT constitutes the main evidentiary basis for the current joinder application. In an attempt to explain the TUT's non-compliance with the anti-eviction order, the affidavit by the TUT pinpoints the officials of the TUT who caused the TUT's non-compliance.

[14] It is necessary to describe the positions held by the respondents sought to be joined. The second respondent, a certain Nthabiseng Audrey Ogude is the vice-chancellor and principal of the TUT, the third respondent Motoane Steward Mothata, the registrar of the TUT, working at its main campus and the fourth respondent, Vusi Nichola Mgwenya as stated above, the Deputy Registrar: Secretariat and Legal Service of the TUT.

[15] The applicant argued that on the TUT's own version, its vice-chancellor and principal as well as its registrar (the second and third respondents) recklessly avoided being contacted by the applicant's attorney. This was the case despite the fact that each of them clearly foresaw that a court order of the nature of the anti-eviction order would be granted against the TUT.

[16] On the TUT's own version, its deputy registrar responsible for legal services (the fourth respondent) was informed of the anti-eviction order by the security staff on the 31st of January 2014, but specifically instructed the TUT's security staff not to comply with it.

[17] It was argued on behalf of the applicant that based on the facts which are common cause, together with the facts alleged in the TUT's answering affidavit in the contempt application, that a case of contempt of court has been made out against each of the second to fourth respondents.

[18] It was further argued by the applicant that in order to obviate the necessity for separate applications, a multiplicity of applications, time and costs being

wasted in respect of the same cause of action, it was justifiable to join the second to fourth respondents in the application of contempt of court against the TUT.[3]

[19] The argument by the respondents was that the initial notice of motion in the contempt application, in terms of which the rule *nisi* was granted, was the operative instrument, and that one cannot, when a rule *nisi* has already been issued, thereafter join parties to an application. This argument is fallacious for various reasons. Often when an application has been launched and all the affidavits have been filed, the point in *limine* is taken that a necessary party should be joined. Nothing disallows a party from seeking the joinder of such a party or a court ordering such joinder *mero motu.* A rule *nisi* in its very nature calls on parties on the return day to show cause why the rule should not be made final. Nothing prohibits necessary parties to be joined before the rule is made final,[4] as was held in the matter of ***Apostolic Faith Mission of South Africa and Another v Moloi and Others* (4702/2013) [2014] ZAFSHC 151 (11 September 2014)**

[3] It is trite that convenience is a consideration when granting an application for joinder.

[4] This principle has been has been espoused in various cases such as ***Morgan and Ramsay v Cornelius and Hollis* 1910 NPD 262** at 285; ***Berg v Gossyn (1)* 1965 (3) SA 702 (O)**; **and *Rishton v Rishton* 1912 TPD 718** at 719.

Analysis of the evidence:

[20] In analysing the history of the matter it should be kept in mind that both the applicant, representing the students *qua* the President of the Central Student Council, and the TUT, had important constitutional rights to protect – the TUT its right to property, peace on the campus and the right to avert bodily harm – and the students their right to accommodation. It is trite that all constitutional rights are equal and one cannot elevate one above the other.

[21] It is also important to keep in mind that the TUT took drastic measures to mitigate the damage to its property and the safety of its staff and students during violent and chaotic circumstances. The mistake it made was not to approach the court for an order to evict the students. (Whether it would have been granted is, of course, open to question.)

[22] If one were to use an analogy, the TUT was acting in self-defence and the students were the aggressors. However, the TUT went a step too far in evicting students, many of whom had no alternative accommodation and who suffered severe hardship, without first obtaining a court order. Hindsight is, however, always a precise science. For all one knows, matters could have erupted in complete mayhem and chaos and students and staff members could have been injured or killed. In such circumstances, the TUT would have been vehemently criticised for not being pro-active. The mistake it made was to take matters into its own hands. It is unclear why the TUT did not play open cards with the court when it obtained the urgent interdicts on 31 January 2014

as it was obtained on the self-same day when mass evictions was taking place. The TUT contends that the students left the residences voluntarily. Clearly they did not. They were ordered to do so.

[23] What the applicant is seeking to do in the contempt of court application against the TUT, is to rely on its officials' explanations proffered in the TUT's answering affidavit in the contempt application. That this cannot ordinarily be done was set out in express terms in the case of ***Administrator, Transvaal v Theletsane*** **1991 (2) SA 192 (A).**[5]

[24] However, the applicant took these facts and incorporated them in his founding affidavit in this application for joinder of the officials in the contempt application to which the respondents are given the full right to file an answering affidavit. Given that these facts were taken directly from the answering affidavit of the respondents who are sought to be joined in the contempt application, the respondents are in no position to deny the facts set out by the applicant in his founding affidavit in the application for their joinder.

[25] On the respondents' own versions the situation on the TUT's campuses was dangerous and desperate.

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[5] ***Hassen and Another v Amod and Others*** **(1036/2004) [2004] ZAFSHC 47 (27 May 2004)** at par [4] *et seq*..

[26] It is alleged by the applicant that both the second and third respondents had the authority to implement the anti-eviction order.

[27] The applicant also recounted how, during the Saturday afternoon of the 1st of February 2014, the anti-eviction order was served by him on the security guard of the TUT.

[28] During the said Saturday afternoon, the applicant's attorney also attempted to contact the second and third respondents via e-mail and telephonically to inform them of the anti-eviction order. The telephone calls to both the second and third respondents went unanswered.

[29] The respondents allege that the second and third respondents – despite the alleged desperate, life-threatening situation on campus, and despite the mass unlawful eviction of thousands of students – did not look at their emails during the weekend, and that the second respondent cannot conceivably be expected to answer phone calls on a Saturday evening.

[30] These excuses ring hollow given the fact that the officials knew that they had to be on full alert throughout the weekend.

[31] It was submitted on behalf of the applicant that the second and third respondents can, *qua* officials of the TUT who had the authority to implement the anti-eviction order, and who were personally involved in the events

surrounding the anti-eviction order, in principle be held liable as accomplices for the TUT's non-compliance with the anti-eviction order.

[32] It was submitted on behalf of the applicant that the respondents, on purpose, adopted an incommunicado attitude, foreseeing that an anti-spoliation/eviction court order would be granted against the TUT and thus conspired to evade the consequences of such a court order. It was argued that such conspiracy was wilful and constitutes intentional contempt of a court order.

[33] The fourth respondent's situation is different in that he had personal knowledge of the eviction order at about 17h00 on Saturday the 1st of February 2014, and, as stated, decided not to comply with it and instructed the TUT's security staff to ignore the order.

[34] It was argued on behalf of the applicant that the fourth respondent, *qua* official of the TUT, had the authority to implement the anti-eviction order and was involved with the anti-eviction order due to the fact that he was personally informed of the anti-eviction order.

[35] It was argued that the fourth respondent had *dolus directus* due to the facts stated. On this basis it was argued that the fourth respondent was also an accomplice to (and a co-perpetrator of) the TUT's alleged contempt of the anti-eviction order.

[36] It was further emphasised that the objective of the joinder application was not to prove that the second to fourth respondents are guilty of contempt of court,

but to demonstrate, *prima facie*, that there is a basis for a case of contempt of court against each of the second to fourth respondents, qualifying them to be joined in the contempt application.

[37] It bears mention that the anti-eviction order obtained by the applicant against the TUT ordered it immediately to allow the students to return to their residences. The officials of the TUT, who were fully aware of the court order, did not obey it as they adopted the stance that it had not been served by the sheriff or the deputy sheriff. Adopting such a stance in an extremely urgent matter is, of course, questionable.

[38] As stated on Monday, 3 February 2014, the applicant launched a contempt of court application against the TUT. The application was prompted by the fact that the TUT did not give effect to the anti-eviction order dated 1 February 2014. At that point there was a single applicant Mr Mboniseni Yster Dladla, the current applicant, and the only respondent was the TUT. In this joinder application, consequential amendments to the notice of motion in the contempt proceedings were sought. These amendments were opposed. Although the first amendment sought was that the matter be heard on an urgent basis, this prayer was abandoned and the matter was placed on the ordinary opposed roll, due to the various extensions of the *rule nisi*. An amendment was further sought to allow the applicant to execute the court order of 1 February 2014 pending the appeal lodged against the order of 1 February 2014, under case number 8104/2014. This prayer was subsequently

abandoned. The further amendments of the notice of motion in the contempt application which were sought read as follows: —

> "*3. That until at least 4pm on Monday, 3 February 2014, the first to fourth respondents were in contempt of the court order granted against it by this Honourable Court on 1 February 2014 under case number 8104/2014.*
>
> *4. That the first respondent be sentenced to pay a fine of R30 000.00.*
>
> *5. That the second to fourth respondents are each sentenced to a fine of R30 000.00 failing payment of which the respondent that so fails is to be committed to prison for a period of 6 months.*
>
> *6. The first to fourth respondents are to pay, jointly and severally, the one paying the other to be absolved, the applicant's costs, on a scale as between attorney and client.*"

[39] The order of the 4th of February 2014 was obtained on a Tuesday morning after the TUT's attorneys had already been warned over the weekend by the applicant's attorney that it would be launched. The application was brought on the 3rd of February 2014 at 16h00 and postponed until the next day, the 4th of February 2014.

[40] It is emphasised in the applicant's practice note that the application deals with *res nova*, in that contempt proceedings are sought against specific officials (respondents 2 to 4) of a legal person who caused it to ignore the anti-eviction order. It was argued that the rule of law dictates that those in positions of power cannot abuse their power by violating the basic human rights of others and cannot hide behind a legal *persona* in order to avoid accountability.

The respondents' new contentions at the hearing of the joinder application:

[41] At the hearing of the matter the respondents' counsel raised various issues not addressed in his "concise heads of argument" which were the only heads of argument filed on behalf of the respondents. The short heads of argument are sparse, and cite no case law.

[42] The first point which was raised in oral argument was that the applicant never had the requisite *locus standi* to launch the anti-eviction application. This argument was based on yet a further application in this long saga – namely an eviction order obtained by the TUT on 12 September 2014 on an *ex parte* basis in the urgent court. This eviction order pertained to only two of the applicant's six campuses. The eviction order further required the TUT to give the students an opportunity to sign an undertaking that they would not participate in protest action.

[43] It was pointed out by counsel for the applicant, Mr Donrich Jordaan, that the applicant, acting on behalf of a class of students, namely the residents, approached the court on an urgent basis, *inter alia*, (a) to anticipate the TUT's eviction order (a rule *nisi*) and (b) to apply for the evictions which took place on four campuses not covered by the eviction order, to be declared unlawful.

[44] Due to certain undertakings by the TUT the court, per Jordaan J, struck the September eviction order from the roll citing three reasons: —

[44.1] The violent and destructive nature of the protests and the feeling that the TUT's actions must be seen in such light.

[44.2] Lack of urgency.

[44.3] Lack of *locus standi.*

[45] In the initial anti-eviction application of 1 February 2014, the applicant stated in his founding affidavit that he deposed thereto on behalf of himself and the other students who are residents of the TUT's residences. At all relevant times he was the duly elected President of the Central Student Representative Council. The applicant's *locus standi* was accepted in that application and also in the rescission application of the said order brought by the TUT, which was dismissed by Kollapen J. Given this fact, Jordaan J's finding of alleged lack of *locus standi* of the applicant in an application brought seven months later is

wholly irrelevant and an analysis of whether the applicant represented a class and whether the class had to be registered is irrelevant.[6]

[46] Even if it were, in the particular circumstances of this case, the applicant clearly had the requisite *locus standi*, as set out in ***Mukaddam v Pioneer Foods (Pty) Ltd and Others*** **2013 (5) SA 89 (CC): —**

> "***It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice ....***
>
> ***These requirements*** [as stipulated by the SCA in Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others 2013 (2) SA 213 (SCA)] ***must serve as factors to be taken into account in determining where the interests of justice lie in a particular case. They must not be treated as conditions precedent or jurisdictional facts which must be present before an application for certification may succeed. The absence of one or another requirement must not oblige a court to refuse certification where the interests of justice demand otherwise.***"

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[6] See: ***Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*** **1996 (1) SA 984 (CC)** para 165.

[47] Given the extremely urgent nature of the application and the drastic breach of the TUT residents' constitutional right to housing, prior certification of the class represented by the applicant could also not be regarded as a requirement. This question was in any event left open in Constitutional Court matter of ***Mukaddam v Pioneer Foods (Pty) Ltd and Others*** *supra.*

[48] In the case of ***KwaZulu-Natal Joint Liaison Committee v The MEC, Department of Education, KwaZulu-Natal*** **2013 (4) SA 262 (CC)** the Constitutional Court took a lenient approach towards procedural requirements, focusing on the merits of the case.

[49] Professor Hoexter[7] describes the Constitutional Court's approach in ***KwaZulu-Natal Joint Liaison Committee v The MEC, Department of Education, KwaZulu-Natal*** *supra* as "anti-formalistic" and perceives such an approach as "transformative adjudication", prescribed by the Constitution.

[50] Other issues raised by the TUT was the alleged lack of proper service (notwithstanding the fact that the application was properly served on the TUT's attorneys, JJR Attorneys, which firm of attorneys filed an opposing affidavit on behalf of all four respondents on 16 May 2014 in this joinder application).

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[7] Hoexter, C. "**The Enforcement of an Official Promise: Form, Substance and the Constitutional Court**", to be submitted to the SALJ; the paper was originally presented at a conference on "**Process and Substance in Public Law**" held at the University of Cambridge on 15–17 September 2014, and was subsequently the subject of a seminar hosted by the South African Institute for Advanced Constitutional, Human Rights, Public and International Law (SAIFAC), University of Johannesburg, on 17 October 2014.

There was thus proper compliance with Rule 4(1)(aA). Given the fact that the application to rescind the order of the 4th of February 2014 was dismissed, these further issues are all irrelevant. Even if an appeal against the rescission application were to be successful that has no bearing on whether the respondents were in contempt of a court order as even an erroneous court order has to be obeyed until set aside by a court.[8]

[51] It was further argued by counsel for the respondents at the hearing of this matter that the evictions were the "easiest decision" and necessary. Once again, it is unnecessary to deal with this argument as the court order had not been set aside when the TUT allegedly committed contempt of court.

[52] The further argument advanced by counsel for the TUT that the eviction was an administrative order and should have been dealt with as such, is rejected. Our courts do not approach evictions as administrative actions which should be taken on review due to the drastic and unlawful nature of most eviction orders and the breach of the principle of legality.

[53] Furthermore, proper notice of the launch of the anti-eviction order was given to the TUT. As pointed out by counsel for the applicant, Mr Jordaan: —

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[8] ***Clipsal Australia (Pty) Ltd and Others v Gap Distributors (Pty) Ltd and Others*** **(657/08) [2009] ZASCA 49; 2010 (2) SA 289 (SCA); [2009] 3 All SA 491 (SCA) (25 May 2009).**

"***The third respondent was notified technically on the evening of 31 January 2014 that an urgent application was planned in the event that the matter of the eviction is not settled amicably. No settlement proposal was forthcoming from the first respondent. These facts are common cause. Given these facts, the first respondent (and the third respondent) should have been at high alert, knowing than an urgent application would be launched at any minute.***"

[54] Furthermore, Mr Jordaan emphasised the following facts: —

[54.1] At 01h23 AM on the 1st of February 2014, an email was sent to three members of the TUT's executive management committee, including *inter alia* the second and third respondents, to notify the TUT of the urgent anti-eviction application. The notification e-mail states: —

"***To whom it may concern,***

Please find attached an urgent application for attention.

The Court is yet to confirm the time for the hearing today but has suggested 13:00. Kindly call me on 017 [sic] 608 6658 to confirm should you wish to oppose the application.

Nathaniah Jacobs

71 608 6658"

[54.2] Both the notice of motion and the founding affidavit of the anti-eviction application were attached to the notification e-mail.

[54.3] The notification email was successfully delivered to the email accounts of all the said three recipients.

[54.4] A read receipt email for the notification email was received from the second respondent at 8h10 AM on 1 February 2014, which constitutes *prima facie* proof that he did have sight thereof.

[54.5] Between 11h00 AM and 12h00 PM, Ms Jacobs made phone calls to the following officials of the TUT: —

[54.5.1] The second respondent. (There was no answer; Ms Jacobs left a voice message.)

[54.5.2] Professor Moraka, the Deputy Vice Chancellor for Student Affairs of the TUT. (There was no answer but a voice message was left.)

[54.5.3] Mr Tlhabadira, Deputy Vice Chancellor for Institutional Support of the TUT. (He answered and was notified that the urgent anti-eviction application would be moved at 13h00 PM; however, he tried to avoid responsibility by referring Ms Jacobs to the third respondent.)

[54.5.4] The third respondent. (He answered and, similar to Mr Tlhabadira, Ms Jacobs notified the third respondent that the

urgent anti-eviction application has been set down for 13h00 PM.)

[55] None of the arguments raised by the respondents' counsel at the hearing were relevant or added anything to the enquiry.

[56] In short there is/was a valid court order – the anti-eviction order – that declares the eviction unlawful and orders the TUT immediately to allow all students to return to their residences.

[57] On its own version, the TUT had knowledge of the anti-eviction order by 5 PM on Saturday, 1 February 2014.

[58] The TUT even advertised its knowledge of the anti-eviction order through its website and through a press statement.

[59] Furthermore, none of these points were mentioned or even alluded to in the TUT's concise heads of heads of argument – filed seven weeks late. Not a single case was even cited in the heads of argument.

[60] The haphazard way in which counsel for the respondents presented his arguments to the court warrants a punitive costs order. No less than eight points were raised in oral argument which were not even alluded to in his heads of argument which were clearly a perfunctory attempt to comply with the rule that heads of argument should be filed.

Legal principles applicable to contempt of court:

[61] It was argued by counsel for the applicant that contempt of court proceedings are directed not only to forcing a party or parties to comply with a court order, but is also in the public interest, in that court orders should be obeyed. Reference was made by the applicant's counsel to the case of ***Victoria Park Ratepayers' Association v Greyvenouw CC and others*** **[2004] 3 All SA 623 (SE)** wherein the following was held: —

> "*... It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. In this sense, contempt of court must be viewed in a particularly serious light in a constitutional State such as ours that is based on the democratic values listed in section 1 of the Constitution, particularly those of constitutional supremacy and the rule of law. Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the*

frustrated successful litigant but also, as importantly, acting as guardian of the public interest."

[62] This dictum was eloquently put by Cameron JA in ***Fakie NO v CCII Systems (Pty) Ltd*** **2006 (4) SA 326 (SCA): —**

"***The offence*** [contempt of court] ***has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.***"

[63] Cameron JA emphasised that contempt of court proceedings may be brought to punish the perpetrator of contempt of a court order.

[64] It was strenuously argued on behalf of the TUT that it already commenced complying with the court order on the 3rd of February 2014 and had fully complied therewith on the 3rd of February 2014. Hence, it argued that it had cured its contempt.

[65] However, as was pointed out by counsel for the applicant, even when an act of contempt of court has been cured, a court can still punish the party who was in contempt of court. Counsel for the applicant relied on the case of ***Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions, and Another*** **2011 (3) SA 641 (GNP): —**

"*However, the question arises whether a court can simply ignore the fact that a person, for a specific period of time, acted in contempt of a court order, and then, thereafter, through much force and persuasion, changed his mind to then comply with the court order. Should such a person be regarded as not having committed the offence, should a court order be sought against him in that regard? I do not think so. Once the requirements of the offence have been established to have existed at a certain period in time, and once it is found that no valid defence has been raised in that regard, a positive finding should follow.*

It must be kept in mind that contempt of court proceedings are not only directed towards the perpetrator, but are directed towards the protection of the courts, respect towards the courts and court orders, and the protection of the integrity of the court system. Non-compliance at a specific period in time cannot therefore simply be ignored because compliance did in fact occur at a later stage."

[66] In the ***Fakie*** case *supra* the Supreme Court of Appeal confirmed that there are four elements of contempt of court, as pointed out by counsel for the applicant: —

1. The existence of a court order;
2. Service or knowledge of the court order;

3. Non-compliance; and

4. Wilfulness and *mala fides*.

[67] The Supreme Court of Appeal further held in ***Fakie*** that the applicant must prove the first three elements beyond reasonable doubt. On when these points have been established does the respondent bear the evidentiary burden regarding wilfulness and *mala fides*.

[68] Before turning to the case law on which Mr Jordaan for the applicant relied, and which deal with instances of contempt of court by officials of a legal *persona*, the court wishes to turn to the common law remedy of contributory delictual action. Another epithet attached to such contributory delictual action is "aiding and abetting". This common law remedy was applied even to matters governed by statutes such as the Patents Act 57 of 1998. In summarising this approach adopted in patent matters Adams and Adams,[9] gives the following summary: —

> "***Contributory infringement occurs when an infringer supplies a method and/or a means to infringe a patent, but does not directly infringe the patent himself. In other words, contributory infringement allows a person to gain an advantage from a patented invention***

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[9] **Contributory Negligence 6/09/2012** –www.adamsadams.com/index.php/media. The cases mentioned in this article are also relevant. See also "**Inducing Patent Infringement**" Mark A. Lemley Stanford Law School **UC Davis Law Review**, Vol. 39, No 1.

without personally having committed an act of infringement. For example, someone could sell a known substance with instructions on how to use that substance in a method that has been patented. Alternatively, a kit containing the components of a patented invention could be made available for sale, with the effect that the components are assembled by a buyer or a user, thereby to form an infringing article. Therefore the buyer or the user infringes, but only as a result of receiving instructions from the seller."

[69] The Court of the Commissioner of Patents judgment of ***Grande Paroisse Société Anonyme and Sasol Limited together with Kaltenbach Thuring Société Anonyme*** **2003 BIP 11 (CP)** is highly instructive. At page 12 of his judgment, Van der Westhuizen J stated: —

"***According to the second defendant, a person may be held responsible for acts not performed by himself but by others in different fields of law. In the field of criminal law the doctrine of common purpose operates, in regard to offences requiring intention, to attach criminal liability to all those acting in concert to accomplish a common object, it being necessary to prove that each participant committed the act which constituted the offence. In the field of delict not only the person who perpetrated the delictual act (or omission) attracts delictual***

liability, but also those who caused the commission of the delict by command, instigation, assistance, abetting, advice, etc."

[70] It is clear that if a person does not actually perpetrate the unlawful act, then he must have actively caused it.[10]

[71] In that matter Van der Westhuizen J emphasised that "***the Act does not confer rights upon the patentee of a process patent in respect of acts which do not constitute acts of 'using, exercising'. In particular, the Act confers no remedy against the inducing, aiding and abetting, advising, inciting, or assisting the 'using, exercising' of an invention. (All the aforesaid conduct is, for the sake of brevity, often hereafter referred to as 'induce', 'inducing', 'inducement')***."

[72] Van der Westhuizen J emphasised that for the concept of "inducement" to find application, all the requirements for delictual conduct has to be satisfied (*op. cit.* at page 9). Furthermore, the party who induces another to commit a wrongful act becomes a "joint wrongdoer" as was explained by Nicholas AJA in the ***Esquire Electronics Ltd v Executive Video*** **1986 (2) SA 576 (AD)** case.

[73] In ***Nedcor Bank Ltd v Lloyd-Gray Lithographers (Pty) Ltd*** **2000 (4) SA 915** at 922E, joint wrongdoers were stated to be wrongdoers acting "*in concert or in*

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[10] ***Esquire Electronics Ltd v Executive Video*** **1986 (2) SA 576 (AD).**

furtherance of a common design". In other words, such parties are both party to the commission of a delict.

[74] In ***McKenzie v Van der Merwe* 1917 AD 41** at 51 Solomon JA held as follows: —

> "***Under the Lex Aquilia not only the person who unduly took part in the commission of a delict were held liable for the damaged caused, but also those who assisted them in any way, as well as those by whose command or instigation or advice the delict was committed. To a similar effect is the passage which was quoted from Grotius 3.32.12.13 that everyone is liable for a delict 'even though he has not done the deed himself, who has by act or omission in some way or other caused the deed or its consequence: by act, that is by command, consent, harbouring, abetting, advising or instigating.***"

[75] In the trade mark case of ***Esquire Electronics*** *supra* it was accepted that not only infringement of a trade mark by a perpetrator is actionable, but also infringement by the perpetrator's servants or agents (at 589F to 590G). In this matter the respondent clearly knew and actually intended that a visual representation by the customer of the trade mark should take place – as an inevitable consequence.

[76] Counsel for the applicant, Mr Jordaan, in well-reasoned heads of argument went to great lengths to analyse courts' various approaches to the liability of directors or officials of entities for contempt of court.

[77] Mr Jordaan referred to the following cases: —

[77.1] ***Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another*** **1978 (3) SA 202 (W)** where a director of a company who caused the company to commit contempt of court was held liable based on complicity; hence the legal *persona* was the perpetrator and the director an accomplice.

[77.2] ***Höltz v Douglas and Associates (OFS) CC en Andere*** **1991 (2) SA 797 (O)** wherein it was held that the terms of the court order will determine the identity of the persons liable for non-compliance with the court order. However, the principle of ***Twentieth Century Fox*** *supra* was quoted with approval in the said case, namely that officials can be held liable for contempt of court based on complicity. ***Höltz***, contrary to ***Twentieth Century Fox***, held that a legal *persona* can only be held liable for contempt of court when its officials perpetrate contempt of court.

[77.3] ***East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health and Others*** **2001 (3) SA 1133** (Ck) where the Bisho Local Division dealt with non-

compliance by organs of state. Although the court expressed reliance on the approaches of both ***Twentieth Century Fox*** and ***Höltz***, the judgment in ***East London Transitional Local Council*** although closely linked with the existing approaches, essentially constitutes a distinct approach that determines the identity of persons who are liable for non-compliance with a court order with reference to the official(s) who carry the ultimate responsibility for the legal *persona*'s non-compliance and not lesser officials.

[77.4] ***Metlika Trading and Others v Commissioner for the South African Revenue Service*** **[2004] 4 All SA 410 (SCA)** confirmed the principle that the directors of a company can be held liable for a company's non-compliance with a court order but did not embroider on the issue.

[77.5] ***Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited and Others*** **2006 (5) SA 333 (W)** wherein the Witwatersrand Local Division held that all the directors of a company are (together with the company) liable for the company's non-compliance with a court order. ***Stilfontein Gold Mining Company Limited*** emphasised that the board of directors is saddled with the ultimate responsibility but did not exclude the possibility of lesser officials being held liable for causing a company to commit contempt of a court order. This dictum is in conflict with the ***East London Transitional Local Council*** *supra*.

[77.6] ***Lan v OR Tambo International Airport***, where three officials who had been specifically requested to see to it that a court order was complied with, neglected to do so and was held guilty of contempt of court, notwithstanding the fact that they were not mentioned in the court order which referred only to the legal *persona*. It is unclear why these three officials (an immigration officer, a director and a deputy Director General) were singled out and contacted to ensure compliance with the court order and none of them was the official who decided to deport the applicant. What is clear, however, is that as the facts evolved, these officials became involved in the course of events. Nonetheless only the Deputy Director General was convicted of contempt of court.

[77.7] ***Mchunu and Others v executive Mayor, Ethekwini Municipality and Others*** **2013 (1) SA 555 (KZD)** wherein the Durban Local Division at paragraph [5] dealt with non-compliance with a court order by the eThekwini Municipality. This case applied the principle (as per ***Höltz***) that the terms of a court order determine the identity of the officials liable for the legal *persona*'s non-compliance: —

> "***The nature of these proceedings is to hold the Executive Mayor, the Municipal Manager and the Director of Housing of the 6th respondent, (hereinafter referred to as the 1st, 2nd and 3rd respondents respectively in their official capacities) accountable for compliance with the terms of the Court order. The reason***

for this is that they are the functionaries of the 6th respondent and have the power and duty to ensure that the 6th respondent complies with the Court order."

[78] From the above it is clear that officials of a legal *persona*, due to the positions they hold, or their involvement in a legal *persona*'s non-compliance with a court order, may be held liable either as a main perpetrator or an accessory to contempt of court.

Does "wilfulness" as a requirement for contempt of court include all forms of *dolus*, including *dolus evenatualis*?:

[79] Clearly aware that, on the facts, the second and third respondents will argue that they did not know of the existence of the court order but simply suspected that it might exist, counsel for the applicant included the concept of *dolus eventualis* in his argument as sufficient to establish contempt of court.

[80] I agree with his approach. In circumstances where the TUT was alleging that circumstances were dangerous, desperate and even life-threatening a supine approach was wholly inappropriate. The second and third respondents knew full well that there would be massive repercussions and were constrained to be vigilant and to monitor the situation. The court order was sent to the TUT via email. Neither opening emails nor answering phone calls appears to be actionable *omissiones*. The fourth respondent, in his own words, knew of the

existence of the court order at about 17h00 on Saturday 1 February 2014. Intentionally seeking to disregard the consequences of unlawful action, which are foreseeable, cannot, *prima facie* be excused.

Complicity:

[81] Regarding perpetrators and accessories to a crime, the *locus classicus* is ***S v Williams en 'n Ander* 1980 (1) SA 60 (A)** wherein the Appellate Division held as follows: —

> "***'n Dader*** [perpetrator] ***voldoen aan al die vereistes van die betrokke misdaadomskrywing. Waar mededaders saam die misdaad pleeg, voldoen elke mededader aan al die vereistes van die betrokke misdaadomskrywing. Daarenteen is 'n medepligting nie 'n dader of mededader nie aangesien die dader se actus reus by hom ontbreek. 'n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of die inligting verskaf wat die pleging van die misdaad bevorder.***"

[82] Where an official wilfully assists a legal person to commit contempt of court, such an official is complicit in the crime. The court agrees that officials may

be complicit in the perpetration of contempt of court depending on the facts of the matter.[11]

Joinder:

[83] It should be borne in mind that this application is only one of joinder and that the ultimate liability of the officials will be determined by the court hearing the contempt application. It is emphasised that no opinion is expressed in this judgment regarding the liability of the second to fourth respondents. The only exercise that has been undertaken is to seek to establish, *prima facie*, whether a cause of action might possibly exist against the officials justifying their joinder. It is emphasised that their liability or otherwise has not been decided in the adjudication of this application for their joinder and no dictum of the court should be construed as such.[12]

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[11] ***S v Williams*** *supra*:—

"***Die medepligtige*** [accomplice] ***se bewustelike hulpverlening by die pleging van die misdaad kan uit 'n doen of 'n late bestaan. Laasgenoemde is bv die geval waar 'n nagwag versuim om alarm te maak omdat hy hom bewustelik met die pleging van 'n inbraak by die gebou wat hy oppas, vereenselwing***."

[12] The test for joinder is a direct and substantial interest in the proceedings.

The application to amend the current notice of motion in the contempt application:

[84] There can be no prejudice to the second, third and fourth respondents should the initial notice of motion in the contempt application be amended as requested, save for prayer 1 which finds no application and prayer 2 which has been abandoned, as set out above.

[85] In the event, the following order is made in the joinder application: —

Order

1. The second respondent (**Nthabiseng Audrey Ogude**) is joined as the second respondent in the application under case number 8105/2014;

2. The third respondent (**Matoane Steward Mothata**) is joined as the third respondent in the application under case number 8105/2014;

3. The fourth respondent (**Vusi Nicholas Mgwenya**) is joined as the fourth respondent in the application under case number 8105/2014;

4. The applicant is afforded five (5) days from the date of this order to file a supplementary founding affidavit in the application under case number 8105/2014, which supplementary founding affidavit must incorporate paragraphs 26 to 54 of the applicant's founding affidavit in the joinder application;

5. The second, third and fourth respondents are afforded ten (10) days from the date of the applicant's filing of his supplementary founding affidavit to each file their respective answering affidavits in the application under case number 8105/2014, if any;

6. The applicant be afforded ten (10) days from the date of filing of whichever one of the answering affidavits referred to above filed last, to file in the application under case number 8105/2014:

    6.1 a combined replying affidavit, if any; and

    6.2 a combined notice in terms of Rule 23, if any

7. The late filing of a replying affidavit and a notice in terms of Rule 23 in the application under case number 8105/2014 relative to the TUT's answering affidavit is condoned.

8. The Notice of Motion in the contempt application is amended as set out in prayer 8 of the Notice of Motion of the joinder application.

9. The costs of the application are to be borne by respondents on an attorney and client basis, the one party to pay, the others to be absolved.

MM JANSEN

JUDGE OF THE HIGH COURT

For the Applicant: **Advocate DW Jordaan** (083 306 9099)
Instructed by Lawyers for Human Rights (Ref: LHR/NEJ/TUT)
(012-3202943/071 6086658))

For the Respondent: **Advocate MP van der Merwe** (082 920 4228)
Instructed by Jarvis Jacobs Raubenheimer Inc. (Ref: Mr Raubenheimer/LT/MAT2059 (Tech/0041)) (012 362 5787)