



NOT REPORTABLE

CASE NO: SA 87/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

SERVE INVESTMENTS EIGHT FOUR (PTY) LTD

Appellant

and

**AGRICULTURAL PROFESSIONAL SERVICES
(PTY) LTD**

First Respondent

GILROY LEONARD KASPER

Second Respondent

ENRICO GONTEB

Third Respondent

SAREL VAN DER MERWE

Fourth Respondent

**CHIEF REGISTRAR OF THE HIGH COURT
(IN HER CAPACITY AS SHERIFF)**

Fifth Respondent

**ACTING DEPUTY SHERIFF FOR THE DISTRICT OF
RUNDU**

Sixth Respondent

COMMANDING OFFICER, NDIYONA POLICE STATION

Seventh Respondent

Coram: Frank AJA, Makarau AJA and Prinsloo AJA

Heard: 20 March 2025

Delivered: 4 June 2025

Summary: This is an appeal against the whole judgment and costs order of the High Court delivered on 9 September 2022. On 14 February 2018, the appellant and the first respondent entered into a written agency and sale agreement in terms of which the appellant would render certain specified specialist agricultural services to the first respondent and also purchase the crops produced on the farm. The said agreement was substituted by a new agreement which became the final and sole agreement binding between the parties. On the strength of that agreement and to execute its mandate, the appellant brought onto the farm various assets and farming equipment.

After some time, the agreement between the parties was terminated and as a result, the appellant had to remove its assets and equipment from the farm. Upon the termination of the appellant's agency, the control and possession of the farm was taken over by the third respondent while the daily management of the farm was transferred to the fourth respondent. The appellant alleged that the third respondent advised its representative that he, third respondent, was taking control of all keys and locks to the storerooms and warehouses where the stock, farming implements and other assets of the appellant were stored, to prohibit the appellant from removing its assets from the farm. Efforts to get assistance from the local police were in vain. This prompted the appellant to approach the court *a quo* on an urgent basis. On the date of the hearing, the parties entered into a settlement agreement which was subsequently made an order of court. Therein, the parties agreed amongst others, to prepare a joint inventory list of all movable assets on the farm reflecting ownership and to grant the appellant and/or its agents access to the farm and remove its assets thereafter. This order was dated 19 February 2021.

After the joint inventory list had been prepared, the appellant commenced the process of removing its assets. The appellant specifically alleged that it managed to remove its agrochemicals without incident. Later on the same day, the farm manager locked the farm gate to prevent the appellant and its agents from removing any further assets. Appellant engaged the services of both the Deputy-Sheriff and the local police

which yielded no results. Consequently, the appellant approached the court *a quo* again, this time seeking an order holding the respondents in contempt of court. The application was opposed, with the respondents in the main arguing that there was no willful and/or *mala fide* disregard of the court order, that the removal of the farming implements would lead to the collapsing of the farming operations and that there were difficulties in compiling the joint inventory list. After hearing arguments from the parties, the court *a quo* dismissed the application with an appropriate order as to costs. It was the view of the court *a quo* that there were substantial disputes of fact concerning the attempt to comply with the court order of 19 February 2021. This was the basis of the appeal before this Court.

Held that, the court erred in dismissing the application on the basis that there were disputes of facts on whether or not there was an order requiring the respondents to allow the appellant access to the farm to collect its assets and equipment as jointly identified by the parties.

Held that, it is a fact that the court order was not complied with and once the non-compliance was not disputed, *mala fides* and willfulness had to be inferred. The evidence adduced by the respondents was insufficient to rebut the inference of *mala fides* and willfulness which had to be found to have been proved against the respondents.

Held further that, the facts deposed to by the respondents in both its answering affidavit did not rebut the averment by the appellant that after the joint inventory list was compiled, it was denied access to the farm to remove its assets.

Held that, in view of the fact that the appellant was pursuing only the civil remedies of the contempt proceedings, the burden of proof applicable was on a balance of probabilities and not beyond reasonable doubt as found by the court *a quo*.

In the result, the appeal succeeded with costs.

APPEAL JUDGMENT

MAKARAU AJA (FRANK AJA and PRINSLOO AJA concurring):

Introduction

[1] This is an appeal against the whole judgment and costs order of the High Court, (the court *a quo*), delivered on 9 September 2022. In the judgment, the court *a quo* dismissed the appellant's application with costs which costs would include the costs of one instructing and one instructed counsel.

[2] *A quo*, the appellant had approached the court on an urgent basis, seeking an order in the final instance, declaring the respondents to be in contempt of an order of the court, issued earlier by the court on 19 February 2021. The application sought the issuance of a rule *nisi* in which a host of other relief of a spoliation nature was also prayed for as both interlocutory and final relief. For the sake of brevity, I will not set out in full the order that was sought in the urgent application.

[3] The appeal was opposed.

Background

[4] As its name implies, the first respondent is in the farming business. It leased a certain farm at Shitemo in the Kavango East Region that forms part of the Government's Agricultural Green Scheme Project. Its sole shareholder, one Aaron

Mushimba, passed on in 2014 and his estate is duly represented by the second respondent who incidentally, in this appeal and the proceedings *a quo* acted as the legal practitioner of the respondents. He also acted as the legal practitioner of the first, third and fourth respondents in the events leading to the litigation *a quo*.

[5] On 14 February 2018, but with an effective date of 1 October 2017, the appellant and the first respondent entered into a written agency and sale agreement in terms of which the appellant would render certain specified specialist agricultural services to the first respondent and also purchase the crops produced on the farm.

[6] In December 2019, the first agreement was substituted by a new agreement which completely novated the duties and obligations of the parties. It was specifically agreed between the parties that the new agreement would become the sole and whole agreement binding between them.

[7] To execute its mandate, the appellant brought onto the farm numerous assets and farming equipment. Whilst this is not apparent from the papers, it would appear that no inventory list of such assets was commonly kept and periodically updated by the parties.

[8] Differences arose between the parties. The genesis and scope of such differences is not material to the determination of this appeal. Suffice it to say that the agency of the appellant to render specialist services and act as the point of sale of the first respondent's crops was terminated and the need for the appellant to remove its

assets and equipment from the farm arose. Upon the termination of the appellant's agency agreement, the control and possession of the farm was taken over by the third respondent while the daily management of the farm was transferred to the fourth respondent.

[9] The situation quickly deteriorated after the contractual relationship between the parties was terminated. The appellant alleges that the third respondent advised its representative that he, third respondent, was taking control of all keys and locks to the storerooms and warehouses where the stock, farming implements and other assets of the appellant were stored, to prohibit the appellant from removing its assets from the farm. Efforts to get assistance from the local police were in vain. So were efforts by the parties themselves to resolve the matter amicably.

[10] The appellant then approached the court *a quo* on an urgent basis in February 2021. It may be pertinent at this stage to note that in the urgent application, the fourth respondent was not cited as a respondent. The respondents therein were the first, second and third respondents. I shall return to this point in due course.

[11] At the hearing of the urgent application, the parties settled literally on the doorstep of the court room and entered into a draft consent order which the court *a quo* issued as an order of court. The order was granted on 19 February 2021. I reproduce the operative part of the order below. It reads:

'2. Until 31 March 2021, the parties are directed to conduct themselves in the manner set out below:

- 2.1 That the first, second and third respondents are hereby and directed to forthwith to grant the applicant's access and use of the Green Scheme Project known as Shitemo Irrigation Project situated on the banks of the Kavango River . . . subject to and as per the clocking system so introduced by applicant in respect of all agents and/or employees gaining access to the farm and for all vehicles gaining access to the farm through the main gate subject to a register system being operated by a security guard at the main gate.
- 2.2 That the parties are hereby directed to prepare a joint inventory list of all movable assets reflecting the ownership in and to same currently being held and/or found to be on the farm which list shall be compiled by an appointed representative of the applicant in the person of Mr. WT Spyron and Mr. Enrico Gonteb, by no later than 28 February 2021.
- 2.3 That the first, second and third respondents are hereby directed to forthwith grant the applicant's agents and/or employees free, undisturbed possession and use of all its farming equipment and assets as more fully depicted and described in appendix "X1" as well as the agricultural input assets and equipment more fully depicted and described in appendix "X2" attached hereto and held at the farm provided further that no movables would be removed from the farm prior to 28 February 2021;
- 2.4'

[12] Alleging breach of the above court order, the appellant once again approached the court *a quo* on urgent basis. It is the determination of this application that has given rise to this appeal. I now proceed to set out the details of the application.

The application *a quo*

[13] In the founding affidavit filed on behalf of the appellant, it was alleged that after the issuance of the court order of 19 February 2021, a list of all the appellant's assets was duly prepared. This list also separately included assets belonging to a Mr Venter who was an agent and employee of the appellant. The third respondent allegedly joined in the exercise and together with the deponent to the appellant's founding affidavit, the two planned on how to prepare a joint inventory list. Eventually, the inventory list, which had seven parts, was jointly signed.

[14] After the joint inventory list had been prepared, the appellant commenced the process of removing its assets. The appellant specifically alleged that it managed to remove its agrochemicals without incident. Later on in the day, the farm manager locked the farm gate to prevent the appellant and its agents from removing any further assets or equipment. Upon being approached to allow the appellant access to the farm, the security guard refused to unlock and open the gate. When contacted for clarification, the fourth respondent is alleged to have confirmed the third respondent's position that no further assets were to be removed from the farm.

[15] Upon this advice being given, the appellant enlisted the service of the Deputy-Sheriff to serve the court order in terms of which the removal of assets was effected. The fourth respondent refused to accept service and service of the court order was ultimately effected by dropping it onto the floor. The appellant alleges that it then became apparent that the respondents did not intend to obey the court order of 19 February 2021.

[16] Acting on the advice of the Deputy-Sheriff, the appellant broke the gate and fence and collected a few more items. The locks were changed again by the respondents. Offers to settle the matter out of court were in vain. The police did not assist. The appellant was left with no immediate redress but to approach the court once again seeking an order whose main thrust was to have the respondents held in contempt, to allow the appellant access to the farm to collect its assets and equipment and to enlist the assistance of the police and the Deputy-Sheriff in the exercise. The order also prayed for certain interdicts against the respondents whose details are not material.

[17] The application was opposed. The answering affidavit on behalf of the respondents was deposed to by the second respondent. In the affidavit sworn to on 27 March 2021 and in answer to the allegations by the appellant, the respondents made the following points:

- (a) That the matter was not urgent. It was further contended that due to the far reaching nature of the declaratory order for contempt sought and the undesirability of engaging such a matter on an urgent basis, the matters arising from the application had to be fully dealt with on another basis and in the fullness of time.
- (b) That it was necessary given the punitive nature of the relief sought, that the court had the full facts before it. The respondents argued that they required more time to respond to the allegations made by the appellant.

- (c) That the founding affidavit filed with the application was burdensome.
- (d) In the main, and in direct reference to the order of contempt that the appellant sought, it was contended that there was no willful and/or *mala fide* disregard of the court order. Further, and still in direct reference to the order sought, it was contended that the spoliation order sought should not be granted because if it was granted, it would be final in nature. In this regard, the argument advanced by the respondents was that if the spoliatory relief was granted, the farm implements would be removed from the farm before the return day of the rule *nisi*.

[18] It was further argued on behalf of the respondents that the removal of the farming implements would lead to the collapsing of the farming operations.

[19] I pause at this stage to note that where the affidavit of the second respondent referred to above appears to have been the main answering affidavit filed in response to the application, another answering affidavit was filed for and on behalf of the respondents. This was deposed to by the third respondent and gave some detail as to what, according to the respondents, occurred after the order of 19 February 2021 was issued. This affidavit was filed after the court *a quo* had granted an amended court order on 31 March 2021 and pending the return day which was in July 2021. This affidavit was extensively referred to by counsel for the respondents during the hearing of the appeal.

[20] In the further answering affidavit, the respondents made points that there were too many disputes of facts which were incapable of resolution on the papers before court and that the conduct of the respondents was far from being willful and *mala fide*.

[21] While conceding that a joint inventory list as ordered by the court in the order of 19 February 2021 was finally compiled, the respondents detailed the difficulties that they encountered at the hands of the appellant in compiling the joint inventory list. Much detail was gone into about how the appellant's agent was insistent on compiling his own separate list which he wanted the third respondent to sign off and how he had spray painted assets marking them as belonging to the appellant without having conducted a proper verification exercise. The details also included how a discrepancy list was compiled in which all the assets and equipment whose ownership was disputed were listed.

[22] It was finally argued that the court order of 19 February 2021 had since been executed. No further details as to how the order had been fully effected were however given.

[23] The additional answering affidavit was sworn to on 30 June 2021.

The decision *a quo*

[24] As indicated above, the court *a quo* handed down a varied court order on 31 March 2021. The circumstances under which the varied order was issued were not

readily ascertainable from the papers but the order is not disputed. It was a rule *nisi* and had the following terms in part:

'1 the rule nisi is issued calling upon the first to fourth respondents to show cause if any on a date as the honourable court may determine why an order in the following terms should not be made:

1.1 Declaring the 1st, 2nd, 3rd and 4th respondents to be in contempt of the order of this Honourable court dated 19 February 2021, so given by Honourable Justice Parker under case number HC-MD-CIV-MOT-GEN-2021/0032;

2. The following final relief is granted with immediate effect:

2.1 Directing and ordering the first, second, third and fourth respondents to forthwith and *ante omnia* restore the applicant's free and undisturbed access and occupation to the farm, as well as to remove all obstacles including locks etc. Whereby the applicant and/or its employees' access become restricted, to the aforementioned farm immediately, failing which the Deputy Sheriff for the District of Rundu, be authorized and directed to take such steps necessary in order to restore the applicant's possession of the farm as aforesaid;

2.2 Further and directing the first, second, third and fourth respondents to forthwith and *ante omnia* restore the applicant's free and undisturbed possession of all its farming equipment and as is more fully depicted and described in "SP2" to the founding affidavit under the headings "Serve Investments" and "Johan" failing which the Deputy Sheriff be authorized and directed to take such steps necessary in order to restore the applicant's possession of those items and assets;

2.3 Interdicting and restraining the first, second, third and fourth respondents from in any way interfering or /or hampering and /or

preventing and/or intimidating the applicant and/or its employees and/or agents:

2.3.1 from accessing the farm;

2.3.2 taking possession of and removing the farming to remove all its farming equipment and assets as more fully depicted and described in “SP2” to the founding affidavit under the headings “Serve Investments” and “Johan”;

2.3.3 Directing and authorising the applicant to remove all its farming equipment and assets as more fully depicted and described in “SP2” to the founding affidavit under the headings: “Serve Investments” and “Johan”, from the farm and further thereto, that;

2.3.3.1 Notwithstanding the termination of the contract between the parties on 31 March 2021, the applicant may continue to access the farm for a period of 14 days after the termination date, for the sole purposes of removing its farming equipment and assets as more fully depicted and described in “SP2” to the founding affidavit under the headings: “Serve Investments” and “Johan”;

2.4’

[25] The rest of the order relates to costs, authorises the Deputy-Sheriff and the Police to assist the appellant and interdicts the respondents from being physically on the farm until such a time as the appellant has collected its assets and equipment and further restrains the first to fourth respondents from threatening, verbally assaulting or intimidating the appellant’s employees.

[26] After hearing arguments from the parties on the return day, the court *a quo* dismissed the application with an appropriate order as to costs. It was the view of the court *a quo* that there were substantial disputes of fact concerning the attempt to comply with the court order. Relying on the principle that has been established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*¹, the court *a quo* in its judgment at para 7 reasoned thus:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether be it an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances, the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.'

[27] The court *a quo* then concluded that once the approach in *Plascon-Evans Paints Ltd (supra)* was followed, it was not possible to resolve the factual disputes that were before it on the papers. It was its further view that, on the papers, the applicant had not been able to prove to the required degree of proof, that there was any willful or intentional disobedience of the order.

[28] In disposing of the matter in this manner, the trial court was clear that it had to determine the contempt of court allegations only as the remainder of the relief granted in the order of 19 February 2021 had been given effect to. This is the relief that

¹ *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) para 9.

related to the collection and removal of the appellant's assets and equipment from the farm. The basis upon which the court entertained this belief is not disclosed.

[29] In relation to the contempt of court allegations, the court *a quo* found that the appellant bore the onus to prove beyond reasonable doubt that the order existed; that the order came to the notice of the respondents; that the order was not complied with; and that such non-compliance was occasioned by willfulness.

[30] It was the further view of the court *a quo* that the parties had failed to produce the joint inventory list as ordered by Parker JA on 19 February 2021. In its own words, the court *a quo* found at para 4:

‘ . . . Given the disputes concerning ownership at that stage the parties were unable to complete a list. Several lists were compiled in the end.’

The appeal

[31] Aggrieved by the decision *a quo*, the appellant noted this appeal. It raised not less than seventeen grounds of appeal. From a judgment that was fairly terse and turned on one point only, it was not a mean feat for counsel to tease out these seventeen grounds of appeal from the judgment *a quo*. This led counsel for the respondents to submit that the appellant attacked the judgment and reasoning of the court *a quo* ‘on everything under the sun’, a most cautious approach I dare say, but one that resulted in some degree of prolixity. It is not necessary that I reproduce the seventeen grounds of appeal herein.

[32] Distilled, the grounds attack the main finding by the court *a quo* that there were material disputes of facts that could not be resolved on the papers and that as a consequence, the court *a quo* erred in failing to find that the appellant had established, to the requisite degree of proof, that the respondents were in contempt of the order of court.

Appellant's written arguments

[33] Citing *Sikunda v Government of the Republic of Namibia & another*², the appellant started off by recognising the public considerations that underlie the need to respect and comply with orders of court. In this regard, the appellant argued that all orders of court, whether correctly or incorrectly granted must be obeyed until set aside.

[34] Regarding the applicable burden of proof in contempt proceedings, the appellant submitted that the burden of proof in such matters is as set out in *Teachers Union of Namibia v Namibia National Teachers Union & others*³ wherein it was held that constitutional values do not permit a person to be put in prison to enforce compliance with a civil order when the elements of the crime are established on a balance of probabilities. However, a declarator and other remedies in relation to the contempt are still available to a civil applicant on a balance of probabilities.

[35] The appellant further submitted that civil contempt is the willful and *mala fide* refusal or failure to comply with an order of court other than an order to pay money.

² *Sikunda v Government of the Republic of Namibia & another* 2001 (1) NR 86 (HC).

³ *Teachers Union of Namibia v Namibia National Teachers Union & others* 2020 (2) NR 516 (SC).

The appellant must show that the order was granted against the respondent and that the respondent was either served with the order or informed of its contents and that he/she either disobeyed or neglected to comply. Once this is shown, willfulness is inferred.

[36] It was the appellant's final submission that the order of 19 February 2021 was not complied with and that the respondents have not fully explained their conduct in disobeying or disregarding the order.

[37] On the basis of the above submissions, it was prayed that the appeal be allowed with costs consequent upon the employment of one instructed and one instructing counsel and that the decision *a quo* be reversed and be substituted with an order finding the respondents in contempt of court, with costs.

Respondents' written submissions

[38] In the main, the respondents supported the judgment *a quo*, calling it 'unassailable'. In this regard it was submitted that the court *a quo* considered the correct facts and correctly applied the law in disposing of the application.

[39] It was further submitted that the court *a quo* did not misdirect itself as it had a discretion in the matter and in the circumstances, was a reasonable decision. The court *a quo* had not exercised its discretion capriciously or upon a wrong principle.

[40] On the considerations underlying the remedy afforded by contempt proceedings, the respondents referred to *Bock v Bock*⁴, a case in which the *Sikunda* judgment was cited with approval. Regarding the onus of proof applicable in such proceedings, the respondents cited the decision of the Supreme Court of Appeal of South Africa in *Fakie NO v CCII Systems (Pty) Ltd*.⁵

[41] Finally, the respondents submitted that before the court *a quo*, there were material disputes of facts that were raised by the respondents in their answering papers. As a result of their failure to apply that the dispute be referred to oral evidence, the appellant failed to prove the non-compliance with the order of court.

Oral submissions

[42] Mr Strydom for the appellant submitted that the contempt proceedings were brought *a quo* for purposes of seeking a declarator against the respondents and thereby enforce the order. The appellant was not seeking criminal sanctions against the respondents.

[43] In an engagement with the court, Mr Strydom conceded the legal point that if the fourth respondent was not a party to the suit in which the order allegedly disobeyed by the respondents was issued and was acting merely as the agent and or employee of the first respondent, then an order declaring him to be in contempt of the order would be incompetent.

⁴ *Bock v Bock* (SA 12/2013) [2016] NASC (8 November 2016).

⁵ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

[44] He emphasised that no direct answer was given by the respondents in their answering affidavits to the material allegation and therefore there was no dispute of fact that was created by the papers filed of record. In particular, the identity of the assets that formed the dispute of fact were not specifically identified in the answering papers. Instead, he submitted that a joint inventory list as envisioned by the order of Parker JA of 19 February 2021 was duly compiled and was adduced into evidence as SW2. The items listed therein were never disputed. This was also reflected in para 2.6 of the varied order of the rule *nisi* issued on 31 March 2021. It was therefore surprising that the same court that had issued the rule *nisi* then found on the return day, that there was a dispute of fact in respect of the items that were to be collected in terms of the order of February 2021.

[45] Regarding the applicable law, it was his submission that the test as laid down in *Fakie NO (supra)* was applicable.

[46] For the respondents, Mr Phatela submitted that the factual background as given in the appellant's heads of argument was incorrect and misleading. The starting point was that the order that was not complied with was the order of 19 February 2021 and not that of 31 March 2021.

[47] It was his further submission that the order of 19 February 2021 required that there be a joint inventory list and once that exercise failed, the parties ought to have gone back to the court *a quo* for directions.

[48] Following engagement with the court *a quo*, he conceded that a list as contemplated in para 2.2 of the order of 19 February 2021 was eventually prepared including another list where ownership of the assets or items was not agreed upon. This was referred to in the papers as the discrepancy list.

[49] It was his final submission that there was compliance with the order of 19 February 2021 although the respondents faced innumerable difficulties posed by the appellant. Some of these difficulties were placed before the court *a quo* in the form of the answering affidavit by the second respondent in the contempt proceedings and dated 30 June 2021.

[50] In summary, it was his argument that the court *a quo* correctly found that there were disputes of fact in the application and in the absence of a referral to oral evidence, the court *a quo* correctly dismissed the application as it did. As the respondents genuinely believed that they had a right to act as they did, *mala fides* on their part had not been established and the appellant was not entitled to the relief that it was seeking.

[51] It is on the basis of the foregoing competing arguments that this Court now has to determine the appeal.

The Issues

[52] It is common cause that both counsel were agreed as to the legal principles applicable in this appeal. At adjectival law, it was common cause that the rule in

Plascon-Evans applied. The essence of the applicable principle was correctly captured by the court *a quo* fully and I need not repeat it herein.

[53] Regarding the substantive issues of the relief that the appellant sought, again, it was common cause that the law as set out in *Fakie NO (supra)* was applicable. This consensus on the applicable law both procedurally and substantively considerably narrowed the issues arising in this appeal. They appear to me to revolve around the sole issue of whether or not there were material disputes of facts *a quo*. If there were no such disputes of fact, the consecutive issue becomes whether or not the appellant established its case for the civil remedy of contempt of court proceedings on a balance of probabilities.

[54] I now proceed to consider the merits of the appeal on the basis of these issues.

Discussion

[55] To establish whether or not there were material disputes of facts on the papers filed *a quo*, it is necessary in my view to reiterate the four requirements that the appellant had to meet to succeed in its application. As found by the court *a quo* at para 6 these are set out in *Teachers Union of Namibia*⁶ (*supra*) as follows:

- (a) That the order existed;
- (b) That the order came to the notice of the respondents;
- (c) That the order was not complied with; and

⁶ Paras 9 and 11.

(d) That the non-compliance with the order was occasioned by willfulness.

[56] In *casu*, it is necessary that I traverse each and every one of the four requirements. This is so because the court *a quo* was not specific in relation to which requirement it found the disputes of fact to exist. It merely made one sweeping and general statement to the effect that:

‘On the papers there are substantial disputes of facts concerning the attempt to comply with the order of the court.’

[57] That the order existed is common cause. This was the order of 19 February 2021. Mr Phatela for the respondents was quite clear that notwithstanding the order of 31 March 2021, the order giving rise to the contempt of court proceedings was the order of 19 February 2021.

[58] I therefore pause momentarily to record that whilst the order of 31 March 2021 remained extant and was equally binding between the parties at the time of the hearing of the application *a quo*, I proceed on the basis that the judgment *a quo* was a discussion of the order of 19 February 2021. Put differently, the alleged disputes of fact found by the court *a quo* related to the parties’ conduct in relation to the order of 19 February 2021 and not to the terms of the rule *nisi* of 31 March 2021.

[59] I am comfortable in adopting this approach as there is no material difference between the two orders in respect of the obligations that were imposed on the first, second, and third respondents. It is in respect of the fourth respondent that I need to

stress that he was not a party to the first order and therefore an order declaring him in contempt of that order was and remains incompetent. That he was however a party to the second order becomes of no import as the common position adopted in this appeal is that the operative order is the order of 19 February 2021. In the result, the order sought against the fourth respondent was not warranted.

[60] I return to the order of 19 February 2021 to further observe that its gist or main operative term was not only the compilation of the joint inventory list as ordered by para 2.2 of that order. The compilation of the joint inventory list was not an end in itself. After the joint inventory list was compiled, the first to third respondents had to allow the appellant access to the farm for purposes of removing from the farm those assets and farming equipment that appeared on the joint inventory list as belonging to the appellant.

[61] The appellant's application *a quo* was based on the allegation that after the joint inventory list was compiled in accordance with para 2.2 of the order, the first to the third respondents denied it access to remove the assets and equipment that had been identified on the joint inventory list as belonging to it. This specific allegation was not answered directly or indirectly by the respondents. Put differently, it was not rebutted. Nowhere in their answering papers do the respondents aver and assert that they did allow the appellant to remove those assets and farming equipment that had been jointly identified as belonging to it.

[62] In the absence of any specific averment that the respondents did allow the appellant access to the farm to collect the assets and farming equipment that had been identified in the joint inventory list as belonging to it, the averments by the appellant that it had been denied such access had to be accepted. More importantly, as the averments by the appellant had to be accepted because they had not been controverted, there was no room for the court *a quo* to find that a dispute did exist on this issue and further that such a dispute could not be resolved.

[63] It would appear to me that the court *a quo* fell into one or more grave errors in respect of the order of 19 February 2021. Firstly, it held at para 4 that:

‘It soon became apparent that paragraph 2.2 of the order was troublesome. Given the disputes concerning ownership at that stage, the parties were unable to compile a list and several lists were compiled in the end.’

[64] The above finding was not a correct finding of fact as it is common cause between the parties that a joint inventory list was indeed compiled albeit after some difficulties had been encountered.

[65] Secondly and in any event, para 2.2 of the order of 19 February 2021 did not impose a duty on the respondents only. It imposed a duty on all the parties to compile a joint inventory list. Any failure to compile a joint inventory list would have been failure by both parties to comply with the court order and would not have been a basis for one of the parties to apply to have the other held in contempt.

[66] It was therefore an error on the part of the court *a quo* to dismiss the application on the basis that there were disputes of fact on whether or not there was an order requiring the respondents to allow the appellant access to the farm to collect its assets and equipment as jointly identified by the parties.

[67] That the order came to the notice of the parties is an issue that need not detain me. This is so because the order of 19 February 2021 was a consent order by the parties. The appellant and the respondent were the joint authors of the order and knew precisely what they wanted to see incorporated in the order.

[68] In a similar fashion, the third requirement will not detain me for long. This is fact that the order was not complied with. The appellant made the specific averment that the respondents had denied it access to the farm to remove its assets and equipment after a joint inventory list had been compiled and agreed upon. As indicated above, this specific averment was not met. Instead, the affidavit by the third respondent on which reliance was placed was detailed in the difficulties that the third respondent encountered at the hands of the appellant's representatives in coming up with a joint inventory list. The affidavit does not aver and assert that the respondents thereafter allowed the appellant access to the farm to remove its assets and equipment.

[69] It was also argued at some stage that the first respondent had a lien over the appellant's assets in terms of the first agreement of agency. In light of the second agreement which completely novated the first and did not include the lien provision,

this argument lost traction. At another stage, it was argued that the appellant had brought the application for contempt proceedings because the first respondent had refused to renew the agency agreement. Again, this is not the rebuttal of the specific averment of non-compliance with a court order that the law envisions.

[70] Again, it is my finding that the facts deposed to by the respondents in their answering affidavits did not rebut the averment by the appellant that after the joint inventory list was compiled, it was denied access to the farm to remove its assets. There was therefore no basis for the court *a quo* to find that there were disputes of fact in relation to the second and third requirements set out above.

[71] Once the non-compliance was not disputed, *mala fides* and willfulness had to be inferred. The evidence adduced by the respondents was once again insufficient to rebut the inference of *mala fides* and willfulness which had to be found to have been proved against the respondents.

[72] Finally, in view of the fact that the appellant was pursuing only the civil remedies of the contempt proceedings, the burden of proof applicable was on a balance of probabilities and not beyond reasonable doubt as found by the court *a quo*.

[73] In the result, the appeal must succeed. The decision *a quo* must be set aside and be substituted with one declaring the first, second and third respondents to be in

contempt of the order of the court dated 19 February 2021 and given under the hand of Parker AJ under case number: HC-MD-CIV-MOT-GEN-2021/00032.

Application for condonation

[74] The appellant failed to file its heads of argument in accordance with rule 17(1) of the rules of this Court as per the directive issued in the notice of set down. It applied for condonation for the delay and for the appeal to be reinstated.

[75] To explain the non-compliance, the appellant's legal practitioner deposed to an affidavit in which he detailed how the non-compliance was occasioned by mal-administration in his office following his relocation to a satellite office. He explained that at the time when the notice of set down was sent to their office in Windhoek, he was already stationed at the satellite office in Otjiwarongo. The notice of set down was then received by a candidate legal practitioner at the Windhoek office who had assumed the duties of the receptionist in the absence of the office receptionist. Due to the candidate legal practitioner's inexperience, she failed to circulate and/or send the notice of set down to counsel at the Otjiwarongo office and in the process the document got misplaced.

[76] Due to that administrative oversight, the notice of set down never reached Counsel until on or about 7 March 2025 when counsel was informed by the respondents' counsel that their appeal has lapsed since no heads of argument were filed.

[77] Soon thereafter, counsel engaged the instructed counsel who commenced on working and finalising the heads of argument which were subsequently filed on 10 March 2025.

[78] Respondents deposed to an affidavit in opposition to the granting of the condonation and reinstatement application, submitting that the notice was indeed received by the appellant's office and even in the absence of the notice, the appellant ought to know that they had to prepare heads of argument.

[79] Regarding the mal-administration in the office of the appellant's legal practitioner, the respondents were of the view that the explanation given was hollow and sketchy. There is a duty on the legal practitioner to meticulously, properly and timeously diarise matters. The court was urged to dismiss the application for condonation without having regard to the prospects of success.

[80] Lastly, counsel also submitted that appellant enjoys no prospects of success on appeal. To this end, respondents prayed for the appeal to be dismissed with costs.

[81] To the contrary, I find that the appeal is meritorious as discussed above and whilst there was some mal-administration in the office of the appellant's legal practitioners, I am inclined to treat the explanation given as being reasonable. Accordingly, the late filing of the heads of argument is condoned and the appeal is reinstated and is disposed of on the merits.

[82] In the result, I make the following order:

- (a) The appeal is upheld with costs, such costs to include the costs of one instructing and one instructed legal practitioner.
- (b) The judgment of the court *a quo* is set aside and is substituted with the following:
 - ‘(i) The application is granted with costs, such costs to be paid by first, second and third respondents and to include the costs of one instructed and one instructing legal practitioner.
 - (ii) It is hereby declared that the first, second and third respondents are in contempt of the court order dated 19 February 2021, given under the hand of Parker AJ under case number HC-MD- CIV-MOT-GEN-2021/00032.

- (iii) The application against the fourth respondent is declined with costs.'

MAKARAU AJA

FRANK AJA

PRINSLOO AJA

APPEARANCES

APPELLANT:

J A N Strydom

Instructed by Veiko Alexander & Co. Inc.

FIRST TO THIRD RESPONDENTS:

C Phatela (with him G L Kasper)

Instructed by Murorua Kurtz Kasper Inc.