THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 214/2021

In the matter between:

LE HANIE, DEIDRE VANESSA	**FIRST APPELLANT**
VAN DER MERWE, LIEBENBERG DAWID RYK	**SECOND APPELLANT**
VERMEULEN, MARIUS	**THIRD APPELLANT**
KENNEDY, KEITH NOEL	**FOURTH APPELLANT**
MUSHET, STEVEN JAMES	**FIFTH APPELLANT**
LANGE, LESLIE WILLIAM	**SIXTH APPELLANT**
VLOK, JAMES ADRIAN	**SEVENTH APPELLANT**
CARNEIRO, AMERICO	**EIGHTH APPELLANT**

and

GLASSON, ROY EDWARD	**FIRST RESPONDENT**
GLASSON, CYNTHIA ARLENE	**SECOND RESPONDENT**
HEATH, MICHAEL BRUCE	**THIRD RESPONDENT**
LEWIS, LINDA	**FOURTH RESPONDENT**
EAGLE CANYON GOLF ESTATE HOMEOWNERS ASSOCIATION NPC	**FIFTH RESPONDENT**

(Registration Number 2003/012328/08)

Neutral citation: *Le Hanie and Others v Glasson and Others* (214/2021) [2022] ZASCA 59 (22 APRIL 2022)

Coram: DAMBUZA, MBATHA JJA AND TSOKA, WEINER AND MOLEFE AJJA

Heard: 22 FEBRUARY 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 22 April 2022.

Summary: Contempt of court – interpretation of court order – non-compliance not proven – absence of wilfulness and *mala fides* – court order not directed at respondents.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Bezuidenhout AJ, as court of first instance):

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel. Such costs are to be paid by the first to fourth respondents, jointly and severally, the one paying, the others to be absolved.

2. The order of the high court is set aside and replaced with the following:

   '1. The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

   2. The applicants are to pay the respondents' costs jointly and severally, the one paying, the others to be absolved.'

JUDGMENT

Weiner AJA (Dambuza and Mbatha JJA and Tsoka and Molefe AJJA concurring)

Introduction

[1] The issue in this appeal is whether the appellants were correctly held to be in contempt of a court order granted by the Gauteng Division of the High Court, Johannesburg (the 'High Court'). The appeal is with the leave of this Court.

Background

[2] On 20 October 2017, the first to fourth respondents ('the respondents') as owners of immovable properties in the Eagle Canyon Golf Estate ('the Estate'), launched an application in the High Court under case number 2017/40103 ('the main

application'). The main application was brought against the fifth respondent, the Eagle Canyon Golf Estate Home Owners Association NPC (the 'HOA'). The respondents sought relief in relation to the alleged contravention of the Rules of the HOA by one Gerard Manuel Pereira Da Silva (Mr Da Silva), the owner of stand 667 on the Estate. The application was opposed by the HOA, as it was then constituted.

[3] The respondents considered that Mr Da Silva's building works on his stand, within the estate, did not comply with the Rules of the HOA. The allegations were that the building constructed on Mr Da Silva's stand was built in breach of the HOA building Rules in that: its plans had not been approved by the HOA; the roof exceeded the 8.5m prescribed maximum height; the first floor exceeded the maximum prescribed percentage of the ground floor; the building lines exceeded the permitted distance from the boundary walls; and wood panels were used on the street side of the swimming pool deck.

[4] On 11 December 2018, Cambanis AJ, granted an order (the 'court order') in favour of the respondents against the HOA in the following terms:

'1. The respondent [HOA] is ordered and directed to comply with its contractual obligations as a diligent Home Owners association as described in the Homeowner and resident Charter of the Eagle Canyon gold and Lifestyle estate ("the estate"), as read with its rules and regulations, incorporating the Architectural, Building & Landscape Requirements ("the Rules") and its Memorandum of Incorporation ("MOI"), in relation to Stand 667 of the estate, more fully described as Erf 667 Honeydew Manor Extension 9 township, 4 Registration Division IQ, Province Gauteng ("the property"), more in particular:

1.1 to take all steps necessary, including but not limited to the procurement of a partial demolition order, to enforce compliance by Gerard Manuel Pereira da Silva ("Da Silva"), the owner of the property or anyone occupying through or under him, with Rules of the Respondent in relation to:

1.1.1 the 8.5 m roof height restriction measured from the natural ground level;

1.1.2 the first floor to ground floor coverage ratio;

1.1.3 the building line relaxation guidelines in respect to the side boundary building lines;

1.1.4 the raised patio and pool deck to conform with the requirement of high quality aesthetics and maximum privacy; and

1.1.5 any other violation of the Estate's Rules.

2. To take all steps necessary to enforce compliance with Clauses A (a) and (b) as well as B (a) and (c) of the Title Deed Number T000029179/2011 issued in relation to the property.'

[5] On 18 September 2019, the respondents applied to the high court for the appellants to be held in contempt of the court order granted in the main application ('the contempt application'). They sought the imprisonment of the appellants, *alternatively,* the imposition of a fine. On 9 June 2020, the high court granted an order holding the appellants in contempt of court (the 'contempt order'). A fine in the amount of R10 000 was imposed on each of the appellants. The fine was suspended for a period of two years, on condition that the appellants complied with the court order within 30 days. The appellants were ordered to pay the costs of the contempt application on the attorney and client scale.

[6] In this Court, the appellants submitted that the high court erred in finding that, because the HOA had not yet instituted legal proceedings against Mr Da Silva, at the time the contempt application was launched, the appellants were in contempt of the court order. They argued that it was evident, even on the respondents' version, that the HOA had consistently, since the date of the court order, taken steps to comply with the court order. Further, even if the HOA had not given full effect to all the steps set out in the court order, the high court had failed to deal with the absence of wilfulness and *mala fides* on the part of the appellants, an essential element in finding a party in contempt of court. Therefore, they contended that they could not be held personally liable for contempt of court.

Chronology of events subsequent to the court order

[7] In order to decide whether or not the appellants were in contempt of the court order, it is necessary to examine the chronology of events that took place subsequent to the court order being granted. In their founding affidavit, the respondents set out the

history of the matter. Most of the factual allegations relating to the history of the matter, contained in the founding and answering affidavits, are common cause.

[8] After the judgment was handed down in the main application, the HOA delivered an application for leave to appeal on 7 January 2019. However, that application was withdrawn on 4 March 2019, as the HOA was advised to seek expert guidance from an independent architect on the breach of the Rules by Mr Da Silva. Mr Stanley Segal (Mr Segal), an architect, was appointed by the South African Institute of Architects.

[9] On 7 March 2019, the HOA's attorney, addressed a letter to the respondents' attorney confirming that the HOA had agreed with Mr Da Silva to secure the services of an architect to investigate and report on the dwelling erected on stand 667.

[10] The HOA assigned Mr Segal to peruse the plans and attend at the property to investigate and advise on:

(a) whether there was a breach of the 8.5 meter roof height restriction measured from natural ground level;

(b) whether there was an infringement of the first floor to ground floor coverage ratio;

(c) the effect of the building line relaxation guidelines in relation to the side boundary building lines; and

(d) Mr Segal's general comments in respect of the raised patio and pool deck to conform to the requirement of high quality aesthetic and maximum privacy.

[11] The four issues identified in the letter of instruction to Mr Segal, are the four breaches referred to in the court order. On 9 April 2019, Mr Segal's brief was extended, and he was requested to investigate any other non-compliance with the Rules by Mr Da Silva. For that purpose, he was provided with the affidavit and annexures that the respondents had delivered in the main application, in order to deal with the 'catch-all' sub-paragraph in the court order.

[12] Mr Segal provided his first report on 3 April 2019. The HOA's attorney informed the respondents' attorney that Mr Segal required 'a copy of the approved building plans for the house originally built on Stand 667 to verify that the existing external walls were retained in their original positions by the current owner when the existing dwelling was erected'. Mr Segal had also requested 'clarification in respect of any special dispensation granted to the developer of the original house more specifically, relaxation in respect of the side boundary lines'.

[13] Mr Segal recommended the employment of a land surveyor to assist him in the preparation of his report, and to confirm the square meterage of all of the 'as built' areas – prior to any further decision being made in respect of infringement of the first floor to ground floor coverage ratio of Mr Da Silva's property.

[14] On 9 April 2019, the respondents' attorney was provided with a copy of Mr Segal's interim report. The respondents were not happy with his report. A 'without prejudice' meeting was held between the parties to resolve the respondents' discontent. This meeting did not lead to a resolution of the disputes.

[15] On 21 May 2019, the HOA's attorney informed the respondents' attorney that he had been advised that the land surveyor would attend Mr Da Silva's property on that day, and that he would produce his report and findings by close of business on that day. The report would be sent to Mr Segal for his consideration. The HOA had also employed the services of a 'plan runner' to find the building plans of the initial building erected on Mr Da Silva's property, which Mr Segal required.

[16] The plan runner was having difficulty retrieving the plans from the City of Johannesburg Metropolitan Municipality, which had approved the original plans. As a result, enquiries were being made at the offices of the Western Region of the City of Johannesburg situated at Roodepoort. The HOA's attorney advised the respondents' attorney that he would inform Mr Segal that if they could not obtain the approved plans, he should produce his report without them. The HOA's attorney noted the delay which the respondents were complaining of and undertook 'to take all such steps necessary to bring the independent architect report forward as soon as possible'. On 27 May 2019, The HOA's attorney addressed a further letter to the respondents' attorney

assuring him that the HOA, via its Board, remained fully committed to adhere to the court order.

[17] Mr Segal had informed the HOA's attorney that he would conclude and transmit his report to the HOA's attorney by 29 May 2019. The HOA's attorney undertook to inform the respondents' attorney of the HOA's recommendations within 10 days of receipt of the report.

[18] Mr Segal's report was received, a few days late, on 3 June 2019. On 5 June 2019, the HOA's attorney informed the respondents' attorney that Mr Segal had provided his report, and that the HOA was considering the report. Ms Le Hanie, the first appellant, who had only been appointed to the HOA in April 2019 (about four months after the court order in the main application had been granted), had certain queries relating to the report and was in the process of discussing them with Mr Segal.

[19] Having considered Mr Segal's report, the HOA, on 20 June 2019, through its attorney, provided the respondents' attorney with a copy of Mr Segal's final report. The HOA's attorney requested a meeting with the respondents and Mr Da Silva to discuss the report and ways in which to comply with the court order. The respondents were unhappy with the contents of Mr Segal's report and refused to attend the proposed meeting. The meeting went ahead with Mr Da Silva's attorneys on 23 July 2019. On 25 July 2019, the respondents' attorney was advised that the HOA and Mr Da Silva had discussed the steps that Mr Da Silva would need to take so that his property would conform with the court order and with the Rules of the HOA.

[20] On 5 August 2019, the HOA's attorney addressed a further letter to the respondents' attorney, advising that Mr Da Silva's attorney wished to transmit a draft set of plans to the HOA for consideration and possible approval, prior to executing the building alterations introduced in terms of those plans. The HOA was asked to approve the plans 'in principle'. Mr Da Silva's architect stated that 'once these plans were approved, the building would conform with the rules and court order'. The HOA's attorney responded to Mr Da Silva's attorney by stating that the approval of the plans would be left to the HOA, as per the Rules regulating the conduct of building activities within the estate.

[21] On request from the HOA, Mr da Silva submitted drawings to it on 23 August 2019. The respondents' attorney was informed that the plans would be sent to Mr Segal for his review, taking into account the requisites set out in the court order. The drawings were provided to Mr Segal for review. When Mr Da Silva submitted the drawings to the HOA, his attorney advised that Mr Pieters, the previous Operations and Compliance Manager, had approved plans with a 60% coverage ratio. Mr Da Silva therefore contended that the HOA would be estopped from denying Mr Pieter's and/or the erstwhile Board's authority for approving the plans. There were some recordings of conversations between Mr Da Silva and the erstwhile directors of the HOA, in which Mr Da Silva was making requests regarding this approval. None of the appellants were in office at the time when this alleged approval was given, and neither Mr Payne nor Mr Pieters was still employed by the HOA at the time the court order was granted. This contention cast a 'spanner in the works' and had to be investigated. Advice was sought on the matter.

The contempt application

[22] The respondents did not dispute that when the contempt application was launched on 19 September 2019, the HOA was in the throes of investigating whether Mr Da Silva was entitled to the recordings requested; whether Mr Pieters had approved the 60% coverage ratio; and whether he was authorised to do so. If he did, and he was not authorised, the question was whether the HOA would be estopped from denying his authority. In addition, the HOA was exploring whether the drawings submitted by Mr Da Silva on 23 August 2019 would comply with the Rules and court order. The HOA was waiting for Mr Segal's view in this regard.

[23] In the replying affidavit, the respondents sought to show that the appellants had not dealt with the events of 2015. Mr Da Silva had purchased stand 667 (the 'property') on 4 April 2011 and commenced building works during May 2015. The respondents, being the neighbours on either side, noticed that the building works appeared to contravene the Homeowner and Resident Charter of Eagle Canyon, as read with the rules and regulations of the Estate. The respondents had informed Trevor Payne ('Mr Payne'), the erstwhile Estate Manager, and Mr Pieters, of various contraventions. According to the respondents, the HOA (as it was then constituted) failed to monitor

and implement compliance with the Rules. The appellants submitted that none of them were directors of the HOA at that time, and could not be expected to have knowledge of these issues.

[24] The appellants contended that the respondents bore the onus to prove non-compliance with the court order. The appellants submitted that, in view of all of the reasonable steps they had taken, and the trouble and expense of appointing an independent architect and a land surveyor, they had facilitated compliance with the court order. The appellants contended that not only did the undisputed facts not demonstrate non-compliance with the court order, but they also did not demonstrate that the non-compliance (if found) was in any way wilful or *mala fides*.

[25] The respondents, on the other hand, maintained that the court order was clear. They submitted that the phrase 'to take all steps necessary, including but not limited to the procurement of a partial demolition order, to enforce compliance. . .' meant that the HOA was compelled to procure a partial demolition order in order to comply with the court order. The respondents contended that the steps taken by the HOA demonstrated a lack of intention to comply with the court order. The high court found the respondent's arguments on these issues persuasive and relied upon them in finding the appellants in contempt of the court order.

Requirements for contempt of court – burden of proof

[26] In *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma,* the Constitutional Court held that:

'As set out by the Supreme Court of Appeal in *Fakie*, and approved by this court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that *(a)* an order was granted against the alleged contemnor; *(b)* the alleged contemnor was served with the order or had knowledge of it; and *(c)* the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.'[1]

[1] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC) para 37.

[27] This Court, in *Fakie NO v CCII Systems (Pty) Ltd*,[2] set out the requirements necessary to hold a party in contempt of court. *Fakie* was cited with approval in *Pheko v Ekurhuleni City,*[3] *Matjhabeng Local Municipality v Eskom Holdings Ltd*,[4] and in *Zum*a.

[28] In *Fakie*, Cameron JA held that it is a crime to intentionally and unlawfully disobey a court order. It amounts to violation of the dignity, repute or authority of a court or judicial officer.[5] He dealt with the standard of proof to be applied where committal of the contemnor was sought solely to enforce compliance with the court order. He held that the civil standard (a preponderance of probabilities) for a finding of contempt where committal is the sanction (whether in its own right or as a coercive mechanism to enforce compliance with the court order) is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt.

[29] In *Fakie*, Cameron JA summarised the law on contempt of court as follows:

'(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.

(d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

[2] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).
[3] *Pheko and Others v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC).
[4] *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* [2017] ZACC 35; 2018 (1) SA 1 (CC).
[5] *Fakie* (note 2 above) paras 19- 20.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'[6]

[30] In *Matjhabeng*, the Constitutional Court summed up the position in regard to the standard of proof required, as follows:

'Summing up, on a reading of *Fakie, Pheko II, and Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies – for example, declaratory relief, *mandamus*, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is *Burchell*. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.'[7]

[31] In dealing with the requirement of a deliberate and *mala fide* non-compliance with an order, to found a contempt order, Cameron JA, in *Fakie*, stated that:

'The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and *mala fide*". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).'[8]

[32] The Constitutional Court in *Zuma*,[9] cited with approval the *dictum* in *Consolidated Fish Distributors (Pty) Ltd v Zive,* which defined contempt of court as

[6] *Fakie* (note 2 above) para 42.
[7] *Matjhabeng* (note 4 above) para 67.
[8] *Fakie* (note 2 above) para 9.
[9] *Zuma* (note 1 above) para 2.

'the deliberate, intentional (ie wilful), disobedience of an order granted by a court of competent jurisdiction'.[10]

[33] The high court, in finding wilfulness and *mala fides*, concluded, by inference, that the appellants, as directors of the HOA, had taken a decision not to comply with the court order. This flies in the face of the steps which were taken by the HOA (at some expense) to incur the costs of an architect, land surveyor, and attorney for the sole purpose of 'evading' the court order. The HOA was at all times advised by its attorney how it should deal with Mr Da Silva, so as to ensure compliance with the court order. Thus, even if there was non-compliance with the court order, it was not wilful and *mala fides*. There is thus no factual or legal basis to hold the appellants in contempt of the court order.

[34] It bears repeating that the court order was granted against the HOA and not the appellants herein, who are the individual directors of the HOA. None of the appellants were cited in the main application. The respondents erroneously assumed that, as directors of the HOA, against whom the court order had been granted, they could simply visit contempt upon the appellants.

[35] The high court failed to appreciate the distinction between the appellants and the HOA, as it was constituted in 2015. By conflating the HOA with the individual directors in seeking the contempt order, the respondents and the high court failed to consider the position of the appellants who were not in office in 2015. or at the time the court order was granted.

[36] Other than Ms Le Hanie, who, like the other directors, was not in office at the time the court order was granted, the other appellants are not employed by the HOA and are not involved in the day-to-day activities of the Estate. As was held in *City of Tshwane Metropolitan Municipality v Beukes*, a court will not hold a party responsible for the execution of a court order where that party was not cited in the proceedings, or against whom the order was not granted, unless there is a factual or legal basis to do so.[11] There was no such basis in the present case.

[10] *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 (2) SA 517 (C) at 522B.
[11] *City of Tshwane Metropolitan Municipality v Beukes* 2009 JDR 0951 (GNP) paras 16-19.

[37] In *Meadow Glen Home Owners Association v City of Tshwane City Metropolitan Municipality,* this Court held that:

'…there is no basis in our law for orders for contempt of court to be made against officials of public bodies, nominated or deployed for that purpose, who are not themselves personally responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings.'

. . .

However, it must be clear beyond reasonable doubt that the official in question is the person who has wilfully and with knowledge of the court order failed to comply with its terms. Contempt of court is too serious a matter for it to be visited on officials, particularly lesser officials, for breaches of court orders by public bodies for which they are not personally responsible'.[12]

[38] This principle must apply equally to directors of an HOA, more particularly where the court order was against the HOA and not the directors individually.

[39] It is also relevant that no time period was specified by the respondents in the main application, and no time-limit was set by the judge for compliance with the court order. Thus, as the appellants contended, the period from the date the court order was granted until the contempt application was launched on 18 September 2019, was not an unreasonable period of time for the HOA to have taken in its attempts to comply with the court order.

[40] Mr Da Silva was not cited as an interested party in the main application or the contempt application. The relationship between a HOA and a member is regulated by contract.[13] Accordingly, the HOA had to act in accordance with its Memorandum of Incorporation, and its Rules, in dealing with Mr Da Silva. It was thus necessary to obtain clarity whether Mr Da Silva had obtained approval for his plans from the previous directors of the HOA. Obviously, it would have been reckless to proceed with litigation based solely on the terms of the court order, without investigating this issue first.

[12] *Meadow Glen Home Owners Association v City of Tshwane City Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) paras 20 & 22.
[13] *Mount Edgecombe Country Club Estate Management Association II RF NPC v Singh* [2019] ZASCA 30; 2019 (4) SA 471 (SCA) paras 23-24.

[41] The high court's finding that the appellants acted deliberately and *mala fide* appeared to also have been partially based on the HOA's decision to file an application for leave to appeal the court order. The high court found that this was a dilatory tactic (as it was later withdrawn), which demonstrated a deliberate intention to evade compliance with the court order. However, this was not raised by the respondents, and the high court erred in taking it into consideration. The high court, in any event, disregarded the undisputed explanation for withdrawing the application for leave to appeal.

Conclusion

[42] Having regard to the chronology of events set out above (which are in essence common cause and/or not disputed), and the authorities in both this Court and the Constitutional Court, I am of the view that the high court erred in the following ways:

(a) First, in finding that the appointment of the architect was to mediate and afford Mr Da Silva an opportunity to 'fix' his non-compliances;

(b) Second, in requiring the appellants to produce a resolution evidencing a decision taken by the HOA to prepare themselves towards obtaining a partial demolition order or to put Mr Da Silva on terms to comply with the court order;

(c) Third, in finding that the steps taken by the HOA, including the obtaining of an architect's report were not essential to enforcing compliance with the court order. On the contrary, these steps would have been necessary steps, whether Mr Da Silva had voluntarily agreed to rectify the breaches on his dwelling or litigation had been commenced against him. At a bare minimum, the 'catch-all phrase' in paragraph 1.1.5 of the court order required investigation; and

(d) Lastly, in finding that the seeking of a partial demolition order was the only way in which to 'comply' with the court order.

[43] The high court did not deal with the question as to what constitutes compliance with the court order. It did not consider what 'steps' as contemplated in the court order would satisfy compliance with the court order, other than assuming that compliance with the court order could only be achieved by commencing litigation against Mr Da

Silva and securing a partial demolition order. Second, the conduct of the appellants or the HOA shows an absence of *mala fides* or wilful disregard of the court order and lastly, there is no basis in law or fact to hold the appellants personally liable for contempt of a court order to which they were not a party.

[44] **Accordingly, the following order is made:**

1. The appeal is upheld with costs, including the costs consequent upon the employment of two counsel. Such costs are to be paid by the first to fourth respondents, jointly and severally, the one paying, the others to be absolved.

2. The order of the high court is set aside and replaced with the following:

    ‘1. The application is dismissed with costs, including the costs consequent upon the employment of two counsel.

    2. The applicants are to pay the respondents’ costs jointly and severally, the one paying, the others to be absolved.’

_____

S E WEINER

ACTING JUDGE OF APPEAL

Appearances:

For the appellants:	W Lüderitz SC (appearing with R Ismail)
Instructed by:	Webber Wentzel Attorneys, Johannesburg McIntyre Van Der Post, Bloemfontein
For the first to fourth respondents:	FH Terblanche SC (appearing with JW Steyn)
Instructed by:	Brand Potgieter Inc, Johannesburg L&V Attorneys, Bloemfontein.