

# IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT337/21  
Court *a quo* Case No: 37229/2015

In the matter between:

**DAVID JOHN RILEY**

Applicant  
(Respondent in the Court *a quo*)

and

**ROCHELLE TRACY RILEY**

Respondent  
(Applicant in the Court *a quo*)

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## APPLICANT'S HEADS OF ARGUMENT IN ANSWER TO THE RESPONDENT'S HEADS OF ARGUMENT

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As permitted by Rule 20(4) of the Rules of this Honourable Court, the applicant delivers his heads of argument in response to the respondent's heads of argument.

1. **AD PARAGRAPHS 15 AND 16:**

1.1 The respondent's Caselines note did not constitute admissible evidence before the Court *a quo*. The reasons for the applicant not providing a response in reply to the request by Justice Davis were furnished to Justice Davis during the course of argument.

1.2 Furthermore, the lack of evidential value of the Caselines note was pertinently raised as a ground of appeal in the applicant's application for leave to appeal brought before Justice Davis.<sup>1</sup> That issue was specifically dealt with by Justice Davis in his judgment dismissing the application for leave to appeal.<sup>2</sup>

2. **AD PARAGRAPHS 21 TO 28:**

2.1 The basis of the variation sought by the applicant in his counter-application was the common law ground of fraud.<sup>3</sup> It was the applicant's contention that, in the course of her evidence at the divorce hearing, Mrs Riley had presented the Court *a quo* with false evidence, alternatively had failed to present material and relevant evidence. Her evidence diverged from the truth to such an extent that, so the applicant argued, had Justice Davis known the true state of affairs in the divorce proceedings, a different judgment would have issued.<sup>4</sup>

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<sup>1</sup> V6: p 492 paras 9 and 10

<sup>2</sup> V6: p 511, lines 11 and further

<sup>3</sup> V2: p 153 para 138 (incorrectly numbered)

<sup>4</sup> **Rowe v Rowe** 1997 (4) SA 160 (SCA); **Moraitis Investment (Pty) Ltd and Others v Montic Dairy (Pty) Ltd** 2017 (5) SA 508 (SCA) at paras [12] and [13]

2.2 The facts and circumstances presented in support of the variation sought on the basis of fraud are detailed in the applicant’s affidavit in support of the counter-application.

3. **AD PARAGRAPHS 32 TO 46 AND 50:**

3.1 Neither Mr nor Mrs Riley applied for or sought to make out any case in the motion proceedings for an amended court order on the terms granted by Justice Davis.

3.2 The absence of any common mistake as a ground for variation is dealt with at length in the applicant’s primary heads of argument.<sup>5</sup>

3.3 In the divorce proceedings Mrs Riley testified<sup>6</sup> that there were several companies throughout Mozambique. In response Mr Riley testified<sup>7</sup> that: “... *I do not own the entire Company*”. In addition, senior counsel who represented Mrs Riley in the divorce proceedings specifically referred to the fact that Mr Riley was “*part*” of the multi-national company and a 45% shareholder in the

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<sup>5</sup> p 18 para 31

<sup>6</sup> V3: p 229 line 20

<sup>7</sup> V3: p 273 line 21

Engco group of companies.<sup>8</sup> That submission carries with it the obvious implication that the balance of 55% was owned by other persons or entities.

3.4 The contention on behalf of Mrs Riley<sup>9</sup> that, in the divorce proceedings, it was not contemplated that there may have been other parties who were shareholders in the relevant companies or who might object to the transfer of their shares, or that a monetary judgment would have issued had Justice Davis known of the impediments attached to the transfer of shares, is incorrect.<sup>10</sup>

3.5 There remains no legal or factual justification for Justice Davis, unilaterally and without any evidence to support his conclusion, directing Mr Riley to pay Mrs Riley the amount of USD 450 000 making up the ostensible value of the shares to which Mrs Riley was entitled.

#### 4. **AD PARAGRAPHS 53 TO 57:**

4.1 In the proceedings which served before Justice Davis

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<sup>8</sup> V5: p 436 lines 17-21

<sup>9</sup> Respondent's heads of argument p 12 paras 36 to 38

<sup>10</sup> Justice Davis could and should have dealt with this issue *mero motu* – **Cusa v Tao Ying Metal Industries and Others** 2009 (2) SA 204 (CC) at para [68]

there were no facts or circumstances from which it could be contended that it was in the interests of justice or that there was a need to adapt the common law to changing circumstances and/or modern exigencies which justified the *mero motu* amendments effected by Justice Davis to the original order.

4.2 A perusal of Justice Davis’s judgment makes it clear that the circumstances which justify a court altering its own judgment or order were not considered by Justice Davis. The only relevant consideration expressed by his Lordship was that the order required variation in order to render it capable of implementation.<sup>11</sup>

4.3 In **Zondi**<sup>12</sup> this Court emphasised that the doctrine of *res judicata* remains unimpaired and is of full force. The Court expressed the view: “... *for the court is merely doing justice between the same parties on the pleadings in the same suit, on a claim which it has inadvertently overlooked*”.

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<sup>11</sup> Vol 6: p 480 para 4.6

<sup>12</sup> **Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others** 2006 (3) SA 1 (CC) at para [34]

4.4 A court's inherent power to regulate its own procedure remains limited and circumscribed by the principles expressed in the applicant's primary heads of argument.

4.5 In the event that the variations effected *mero motu* by Justice Davis are set aside, the divorce order in its original form will be reinstated. In that event Mrs Riley will have at her disposal the remedies available to any litigant to enforce payment to her of whatever net rental may be found to be due to her in respect of the Masala property.

5. **AD PARAGRAPHS 73 TO 84:**

5.1 Mrs Riley never presented the version, either in her affidavits or the numerous letters addressed by her attorneys to Mr Riley, that she was content to receive the rental income from the Masala property into her South African bank account, less any tax deductions.

5.2 Mrs Riley testified no more than that<sup>13</sup> the only requirement to which a non-Mozambican citizen was required to adhere would be for her to declare her share of the rental

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<sup>13</sup> V1: p 8 para 6.5

income to the Mozambican tax authorities (which Mrs Riley did not tender to do).

5.3 In the circumstances, the argument that Mrs Riley had tendered to meet all of her tax liabilities is incorrect.<sup>14</sup>

5.4 Mr Riley was not requested at any time in the process of the contempt proceedings to advise Justice Davis in what manner the Masala rent that he had received had been utilised by him. Mr Riley volunteered the information that, to Mrs Riley's knowledge, that rental was utilised for the tertiary education of their daughter in the United Kingdom.<sup>15</sup> That evidence was not disputed by Mrs Riley whose only response thereto was that she was unaware thereof and that Mr Riley did not have her permission to so utilise those funds.<sup>16</sup>

5.5 In these circumstances it is submitted that Justice Davis clearly erred by making a finding against Mr Riley in circumstances in which he had not had an opportunity to

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<sup>14</sup> V6: p 474 lines 8 to 10

<sup>15</sup> V2: p 95 para 13

<sup>16</sup> V4: p 325 paras 22.3 and 22.4

respond thereto.<sup>17</sup>

6. **AD PARAGRAPH 89:**

- 6.1 There is no merit in the submission that the declaratory nature of the order relating to the Masala rental (which cannot be the subject matter of an order for contempt) was not raised before Justice Davis. In fact, it has always been Mr Riley's case<sup>18</sup> that he had not been directed to make any payments of the Masala rentals but that he and Mrs Riley were equally entitled to whatever net rental income the Masala property generated.
- 6.2 This issue was addressed at some length at the hearing of the contempt application before Justice Davis and it was pertinently raised as a ground of appeal in Mr Riley's application for leave to appeal.<sup>19</sup>
- 6.3 It is readily available to Mrs Riley to institute proceedings against Mr Riley for payment of whatever portion Mrs Riley contends is her share of the net rental income.

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<sup>17</sup> V6: p 474 lines 20 to 27 and V2: p 95 para 13; **National Director of Public Prosecutions v Zuma** 2009 (2) SA 177 (SCA) at p 186I to 188D

<sup>18</sup> V2: p 95 para 12

<sup>19</sup> V6: p 491 para 5.4

Any such relief could be accompanied by a prayer for the rendering of an account in respect of such income and a subsequent debatement thereof.

6.4 It is reiterated that there is no merit in the submission that Mr Riley deliberately withheld from Justice Davis relevant information regarding the Masala rentals. The reality is that the information contained in Mrs Riley's Caselines note (including the amount of R489 136.50) was not evidence which required an answer from Mr Riley and, with respect, given the terms of the divorce order and the nature of the contempt proceedings, it was improper of Justice Davis to ask for that information and, secondly, to have regard to the Caselines note. Once again, this is an issue that was squarely addressed before Justice Davis in the contempt application.

7. **AD PARAGRAPH 113:**

7.1 Mrs Riley did not raise in the contempt proceedings Mr Riley's alleged "*history*" of refusing to disclose the companies' financial documents during the trial and subsequent to the divorce order. As appears from the

judgment in the divorce order, nothing at all was said by Justice Davis regarding this alleged failure to furnish financial information.

7.2 Furthermore, in the divorce proceedings, and despite the fact that reference had been made to the numerous Mozambican companies, Mr Riley was not cross-examined at all on his alleged failure or refusal to disclose the companies' financial statements. In point of fact, when Mr Riley was asked about the value of the group of companies, he referred to the relevant balance sheets which had been presented by him in the Rule 43 application.<sup>20</sup>

7.3 In the circumstances, the conclusion by Justice Davis<sup>21</sup> that Mr Riley “*hid*” behind the shareholders' rights to company statements (in circumstances in which Mrs Riley was not a shareholder) and the conclusion that Mr Riley “*in similar fashion as during the trial more than three years ago*” refused to put either Mrs Riley or the Court *a quo* in possession of the relevant information is incorrect. Once

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<sup>20</sup> V 3: p 273 line 25 to p 274 lines 1 and 2

<sup>21</sup> V 6: p 475 para 3.3.4

again, Mr Riley was not afforded the basic opportunity of responding to these criticisms.<sup>22</sup>

7.4 It is submitted that, subsequent to the divorce, there was a clear appreciation by Mrs Riley, on a factual level, that the transfer of the shareholding as directed by Justice Davis in the divorce order could not be effected. On 15 May 2018, shortly prior to the expiry of the sixty-day period referred to in paragraph 2.4 of the divorce order<sup>23</sup> Mrs Riley’s attorneys, for the first time, sought financial information from Mr Riley, the expressed reason being “*to enable [Mrs Riley] to make an educated decision regarding her shareholding*”.

8. **AD PARAGRAPHS 114 AND 115:**

It is respectfully submitted that Justice Davis made adverse findings against Mr Riley in the context of the transfer of the shares out of the context of his evidence and without taking into consideration the reasons<sup>24</sup> Mr Riley had put forward regarding the impossibility of giving effect to the relevant order.

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<sup>22</sup> **Zuma** *supra* at footnote 15

<sup>23</sup> V1: p 40 para 2.4

<sup>24</sup> V2: p 105, pars 39 and 40

9. **AD PARAGRAPH 120:**

It cannot permit of any reasonable doubt that any entitlement that Mrs Riley may have had to a prospective shareholding in the Mozambican companies was always to be subject to the provisions of the relevant Mozambican legislation and the articles of association for each of the Mozambican companies. Mr Riley's version in respect of both the factual and legal impediments to the transfer of shares was not contradicted by Mrs Riley or seriously disputed by her.

10. **AD PARAGRAPH 124:**

10.1 Prior to the delivery of Justice Davis's judgment in the contempt application, which included the impugned variation orders, neither of the parties were informed by his Lordship of the nature or extent of the envisaged variation. In those circumstances, Justice Davis did not give either of the parties an opportunity to make submissions to him in the context of any proposed variation.

10.2 It is, with respect, clear from Justice Davis's judgments

and orders<sup>25</sup> that he does not propose that either Mr or Mrs Riley was given an opportunity to make submissions regarding the variations his Lordship *mero motu* effected.

11. It is submitted that the respondent's heads of argument do not derogate from the relief which the applicant seeks.

**A R G MUNDELL SC**  
**H F GEYER**  
COUNSEL FOR THE APPLICANT

21 June 2022

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<sup>25</sup> V6: p 467 (court *a quo*'s judgment dismissing the contempt application and counter application); V6: p 507 (court *a quo*'s judgment dismissing Mr Riley's application for leave to appeal)