

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

**Constitutional Court Case No: CCT337/2021
(Gauteng Division, Pretoria Case No: 37229/2015)**

In the matter between:

DAVID JOHN RILEY

Applicant

(Respondent/Defendant in the court *a quo*)

and

ROCHELLE TRACY RILEY

Respondent

(Applicant/Plaintiff in the court *a quo*)

FILING NOTICE

DOCUMENT: RESPONDENT'S INDEXED AND PAGINATED OPPOSING AFFIDAVIT

DATED AT PRETORIA THIS THE 8th DAY OF NOVEMBER 2021.

FILED BY:

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TO: THE REGISTRAR OF THE CONSTITUTIONAL COURT
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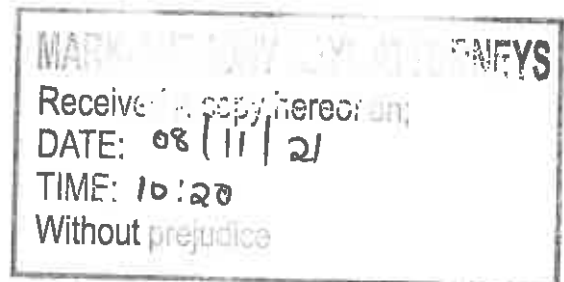
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**RECEIVED A COPY HEREOF ON THIS
THE _____ DAY OF NOVEMBER 2021**

A handwritten signature in black ink, enclosed in a hand-drawn oval.

ATTORNEYS FOR THE APPLICANT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Constitutional Court Case No: **CCT 331/2015**
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In the matter between:

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(Respondent/Defendant in the court *a quo*)

And

ROCHELLE TRACY RILEY

Respondent
(Applicant/Plaintiff in the court *a quo*)

OPPOSING AFFIDAVIT

I, the undersigned

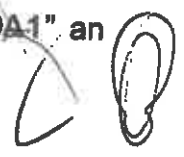
CHARL FRANCOIS ERASMUS

State under oath as follows:

1.

1.1. I am a major male attorney, practicing as a partner of the firm Macintosh Cross & Farquharson of 834 Pretorius Street, Arcadia, Pretoria.

1.2. The facts contained herein fall within my personal knowledge, unless otherwise stated and are both true and correct. I attach hereto as Annexure "OA1" an



affidavit by Jonathan Peter Keus ("Mr Keus"), an attorney from my offices who was present in court at all relevant times.

- 1.3. I am the attorney of record for the Respondent in this matter and am as such duly authorised to depose to this affidavit.

2.

CONSTITUTIONAL RIGHTS:

- 2.1. It is noted that the Applicant's application to this court is based on Section 34 of the Constitution and specifically his right to a fair hearing.
- 2.2. The Applicant argues that his right to a fair hearing was infringed due to the fact that the Judge *a quo, mero motu* varied the divorce order where the court was *functus officio*. Furthermore, he argues that his right was infringed as the court *a quo* found him to be in contempt of an order which was declaratory in nature without applying the law or assessing the evidence presented to it.
- 2.3. From a reading of the application, it is clear that the appeal is limited to Section 34 of the Constitution and no argument has been made regarding any of the Applicant's other constitutional rights.
- 2.4. The Applicant states that he seeks leave to appeal paragraphs 3 to 7 of the judgment handed down by the court *a quo* on the 10th of February 2021, in that the threatened imposition of imprisonment in the contempt order is

unconstitutional and the unilateral variation of the divorce order is judicially unsustainable and infringes on his right to a fair hearing.

- 2.5. I will as such deal with the following aspects in opposing the application, the *mero motu* variation of the court order; the variation in circumstances where the court is *functus officio*; *audi alteram partem* and the variation, the contemptuous behaviour of the Respondent together with the nature of the divorce order; the constitutionality of the contempt order and lastly, the order relating to payment of the arrear rental.
- 2.6. It is noted that the Applicant states in paragraph 14 of his affidavit that one of the Justices of the Supreme Court of Appeal who considered his application for leave to appeal, dissented, and that a third Justice had to be appointed to consider the application, which application was ultimately dismissed. The Applicant believes that as one of the Justices dissented, he should be warranted leave to appeal. He however fails to mention that his application in terms of Section 17(2)(f) of the Superior Courts Act, 10 of 2013 was premised on this argument, which application was dismissed. The argument as such does not carry any weight and should not be taken into account.
- 2.7. It is further noted that the grounds for leave to appeal the contempt of court order has changed from those before the High Court as well as that before the Supreme Court of Appeal.



3.

MERO MOTU VARIATION OF THE DIVORCE ORDER:

- 3.1. When the Respondent launched her contempt application, the Applicant opposed the application by filing an application for leave to appeal the divorce order, together with an application to vary the divorce order.
- 3.2. The Applicant argued that should the court not grant him leave to appeal the divorce order, the court should vary the divorce order by removing the redistribution order and effectively grant sole ownership of all the assets to him. As stated by the Judge *a quo*, the variation application "flies in the face of the whole judgment, the redistribution order contained therein and all various grounds relating to Section 7 of the aforementioned Matrimonial Causes Act contained therein."¹
- 3.3. In opposing the application for contempt of court and seeking a variation of the order, the Applicant for the first time, raised the issue that there may be third parties affected by the divorce order, which were never joined to the proceedings. These parties would be the other shareholders of the companies of which the Applicant was a shareholder, and which shares were subject to the divorce order.

¹ Paragraph 4.3 of Annexure "B" on page 70 of the Application



- 3.4. The court *a quo* considered the issue posed by the Applicant as well as his variation application and varied the divorce order to provide that the value of the shares be paid by the Applicant instead.
- 3.5. On appeal, the Applicant raised the argument that there was no variation application before court, which argument he persists with. This argument has no basis in light of the fact that the Applicant himself approached the court *a quo* with a variation application which provided for further and/or alternative relief.
- 3.6. The court *a quo* rightfully dismissed this argument and referred to Uniform Rule 42(1)(c) as well as the common law, which provides that a court may *mero motu* vary an order where there is a mistake common to the parties. The mistake which was common to both parties, was the issue of the other shareholders which was not known at the time the divorce trial took place.²
- 3.7. In the circumstances, the court was correct in its finding that it could vary the court order in order to give effect thereto. The only issue was what amount to attribute to the shares.
- 3.8. The judge *a quo* stated that the initial order whereby the shares were to be transferred, was made as there was very little evidence presented during trial as to the value of the shares. The only evidence of the value of the shares was the oral testimony of the Applicant himself which evidence was tested in court.³

² Paragraphs 4.3 to 4.7 of Annexure "C" on pages 85 and 86 of the Application

³ Paragraph 4.7.4 of Annexure "B" on pages 72 and 73 of the Application



3.9. No other or further evidence was ever forthcoming from the Applicant regarding the value of the shares⁴ despite the Applicant's legal representative being asked in court whether he intended to bring an application to lead further evidence, the answer to which was non-committal. As such the court had no other option but to vary the divorce order to provide for payment of the value of the shares as presented at trial.⁵

4.

VARIATION WHERE THE COURT IS *FUNCTUS OFFICIO*:

- 4.1. The Applicant wishes to argue that the court *a quo* was not able to vary its own order as it was *functus officio*.
- 4.2. Even though the statement is correct in that a court is not ordinarily able to vary its own orders, Uniform Rule 42(1)(c) as well as the common law provides for certain exceptions to this rule.
- 4.3. The court in this instance relied on the fact that the issue relating to the shareholders which were not joined to the divorce proceedings, was a common mistake between the parties.⁶
- 4.4. Apart from relying on the common mistake between the parties, the court was further able to vary its own order on the basis that exceptional circumstances

⁴ Paragraph 3.3.4 of Annexure "B" on page 66 of the Application

⁵ Paragraph 4.7.4 of Annexure "B" on pages 72 and 72 of the Application

⁶ Paragraph 4.5 and 4.6 of Annexure "C" on pages 85 and 86 of the Application



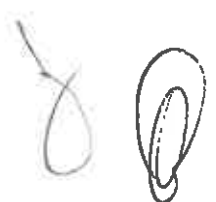
existed which would justify the variation of the order to provide the true intention of the court and ensure that the order can be implemented.⁷

5.

VARIATION AND AUDI ALTERAM PARTEM:

- 5.1. The Applicant wishes to argue that the court could not grant an order of contempt where it did not allow the Applicant to address the court on his ability to pay.⁸
- 5.2. With respect, the Applicant is confusing the contempt order with the variation order as well as the question of liability and affordability.
- 5.3. The order of contempt was granted on the basis that the Applicant purposely frustrated the divorce order relating to the rental income from the Masala Property⁹, and further that the Applicant unilaterally decided not to transfer the shares to the Respondent, as he did not believe it to be a good financial decision. The issue of the other shareholders was not the reason why he did not transfer the shares and the court found his behaviour to undermine the authority of the court and to be contemptuous in nature.¹⁰

⁷ Firestone SA (Pty) Limited v Genticuro AG1977 (4) SA 298 (A) which was referred to in Zondi v MEC, Traditional and Local Government Affairs and others 2006 (3) SA 1 (CC) [also reported at [2006] JOL 16174 (CC) – Ed at [29].
⁸ Paragraph 37 and 38 on pages 22 and 23 of the Application
⁹ Paragraph 3.2.3 of Annexure "B" on page 65 of the Application
¹⁰ Paragraphs 3.3.4 to 3.3.7 of Annexure "B" on pages 66 to 68 of the Application



- 5.4. The contempt was therefore not related to the payment of the shares, but his wilfulness not to transfer the shares. The Applicant now wishes to state that he was not granted the opportunity to address the court on his financial ability to pay the value of the shares, which aspect would respectfully only have been relevant had the initial order been one of payment.
- 5.5. The fact that the Applicant now alleges that he does not have the financial ability to comply with the varied order, does not have an impact on the value of the shares owed to the Respondent. The Applicant very conveniently ignores paragraph 2.4 of the amended order whereby he is ordered to pay the value of the shares within 60 days of date of this order, or within such extension of time as the court may on good cause grant.¹¹ (own emphasis)
- 5.6. If the Applicant does not currently have the financial means to pay the value of the shares, he has the remedy to approach the court to seek that payment be made over an extended period of time. His affordability does not however change the value of the shares owed to the Respondent or the fact that he was in contempt of the court order.

6.

CONTEMPT OF THE DIVORCE ORDER:

- 6.1. The Applicant's main argument relating to the contempt order is that a party cannot be found to be in contempt of an order that is declaratory in nature.

¹¹ Annexure "B2" on page 78 of the Application



- 6.2. He argues that the order providing that both parties will remain joint owners of the property in Masala, did not provide what the Applicant needs to do in order to comply with the order, and he could therefore not be found in contempt of such an order.
- 6.3. In the contempt proceedings the Applicant however stated that the reason why he did not pay the Respondent her share of the rental income, was due to the fact that she did not provide him with a Mozambique bank account and that there would be tax implications should the monies be paid into a South African bank account. When the Respondent however stated in her application that she would accept payment of the rental monies after the tax was deducted, and that the Applicant has assets and bank accounts in South Africa which would easily enable him to make payment to her in South Africa, the Applicant did not provide a further reason as to why he could not make payment to her.¹²
- 6.4. It was common cause that the Applicant at all times administered and received the rental payments, and the court found that the Applicant was actively trying to frustrate the court order in not even considering to pay the monies into the Respondent's South African bank account. His behaviour in this regard was considered contemptuous as he was actively disregarding the order instead of seeking alternative ways to comply with the order.¹³

¹² Paragraph 3.2.3 of Annexure "B" on page 65 of the Application

¹³ Ibid



6.5. What is strange to say the least is that the Applicant states that the order of contempt is unconstitutional as Section 12(1) of the Constitution does not entitle imprisonment of a judgment debtor against whom an order is made *ad solvendam pecuniam*.¹⁴ However, earlier in his application, he specifically states that the divorce order is not *ad solvendam pecuniam*.¹⁵

7.

THE ORDER FOR PAYMENT OF THE OUTSTANDING RENTAL:

7.1. The order whereby the Applicant was ordered to pay the Respondent an amount of R489 136,59, was not part of the variation of the divorce order, but was the amount owed to the Respondent for her share of the rental income since the date of the divorce order. The court *a quo* did not vary the portion of the order relating to the rental income and the order relating to the payment of the amount of R489 136,59 was not the basis for the contempt of court application as the order was made after the application was launched.

7.2. Prior to the application being ventilated in open court, the Judge *a quo* loaded a question on the CaseLines System, which all parties had access to prior to the application being heard, whereby he requested the value of the outstanding rental. Mr Keus, on the instructions and information provided to our firm by the

¹⁴ Paragraph 28 on page 18 of the Application
¹⁵ Paragraph 30 on page 19 of the Application



Respondent, replied to the question on the CaseLines System and provided the amount of R489 136,59.

- 7.3. When the application was ventilated in court, the Judge *a quo* asked the legal representative of the Applicant why he had not responded to the question on the CaseLines System. He could not provide a proper answer and could further not provide the court with an alternative figure. To date the Applicant has still not provided an alternate amount to what was posed by the Respondent.
- 7.4. In his judgment, the Judge *a quo* stated that the Applicant not only failed to disclose particulars of the rental income received and expended, but he raised feeble arguments as to why he could not pay the Respondent's share to her.¹⁶
- 7.5. With regards to the CaseLines question, the Judge *a quo* stated that where the number of rental monies owed is relevant to a contempt of court application, a court is certainly entitled to enquire the value from the parties. Such a question could have been posed in open court, however the CaseLines System provided the parties with advanced warning.¹⁷
- 7.6. To date, no evidence has been forthcoming from the Applicant as to the value of the outstanding rent owed to the Respondent and the amount offered by the Respondent remains uncontested.

¹⁶ Paragraph 3.4 of Annexure "C" on page 81 of the Application

¹⁷ Paragraph 3.7 of Annexure "C" on pages 83 and 84 of the Application

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8.

SPECIFIC ALLEGATIONS NOT ADRESSED ABOVE:

I have addressed the Applicant's main arguments above and for the sake of completeness, I will answer to the allegations *ad seriatim* by referring to the specific paragraphs above.

9.

AD PARAGRAPHS 1 TO 3 THEREOF:

Save to state that the facts contained in the affidavit are not correct, the remainder of the paragraphs are admitted.

10.

AD PARAGRAPHS 4 TO 8 THEREOF:

Save to state that the Applicant also launched a variation application together with his application for leave to appeal in the court a *quo*, the remainder of the paragraphs are noted.

11.

AD PARAGRAPHS 9 TO 14 THEREOF:

The paragraphs are denied and I wish to refer to paragraphs 2.1 to 2.7 above.



12.

AD PARAGRAPH 15 THEREOF:

The paragraph and sub-paragraphs are noted.

13.

AD PARAGRAPHS 16 TO 18 THEREOF:

Save to state that the paragraphs are irrelevant to the application, the contents are noted.

14.

AD PARAGRAPH 19 THEREOF:

The paragraph is admitted.

15.

AD PARAGRAPH 20 THEREOF:

Save to deny that the contempt order is unconstitutional and the variation of the court order is judicially unsustainable and infringes the Applicant's right to a fair hearing for the reasons as set out in paragraphs 4 and 6 above, the remainder of the paragraph is noted.



16.

AD PARAGRAPHS 21 AND 22 THEREOF:

Save to state that the paragraphs are irrelevant to the application, the paragraphs are noted.

17.

AD PARAGRAPH 23 THEREOF:

The paragraph is denied. As stated above and in both judgements of the court *a quo*, the Applicant consistently tried to evade the divorce order by providing poor excuses for not paying the Respondent's portion of the rent, or not transferring the Respondent's shares to her.

18.

AD PARAGRAPHS 24 AND 25 THEREOF:

The paragraphs are noted.

19.

AD PARAGRAPHS 26 TO 32 THEREOF:

The paragraphs are denied and I refer to paragraphs 6 and 7 above.

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20.

AD PARAGRAPHS 33 TO 48 THEREOF:

The paragraphs are denied and I refer to paragraphs 3, 4 and 5 above.

21.

AD PARAGRAPHS 49 TO 54 THEREOF:

The paragraphs are denied for all the reasons already traversed in paragraphs 3 to 7 above. The Applicant has had every opportunity to provide the court *a quo* with the value of the shares as well as the value of the rental income owed to the Respondent and he has actively withheld this information from the court in a further attempt to evade the redistribution order contained in the divorce order. The Respondent has been denied her share of the estate for a period of 5 years and has been severely prejudiced by the Applicant's conduct in these proceedings.

22.


CONCLUSION:

The Applicant's application carries no weight as he has consistently received a fair hearing by the High Court as well as the Supreme Court of Appeal. This application for



leave to appeal is another attempt to frustrate the Respondent's rights and should be dismissed together with an appropriate order for costs.

SIGNED AT PRETORIA ON THIS 5th DAY OF NOVEMBER 2021.



DEPONENT

SIGNED AND SWORN TO BEFORE ME AT PRETORIA ON THIS 5th DAY OF NOVEMBER 2021, BY THE DEPONENT WHO ACKNOWLEDGES THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF THIS AFFIDAVIT AND THAT IT IS TRUE AND CORRECT, THAT HE DOES NOT HAVE ANY OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS IT BINDING ON HIS CONSCIENCE.

BEFORE ME



COMMISSIONER OF OATHS

ALBRE JACO HOPKINS

Commissioner of Oaths

317 Cross Street, Rosebank, Pta

Tel: 082 941 0114

Appointed: 23 August 1998 / Ref.: 9/1/8/2

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And

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Respondent

(Applicant/Plaintiff in the court *a quo*)

CONFIRMATORY AFFIDAVIT

I, the undersigned

JONATHAN PETER KEUS

State under oath as follows:

1.

I am a major male attorney, practicing as an associate of the firm Macintosh Cross & Farquharson of 834 Pretorius Street, Arcadia, Pretoria.



2.

The facts contained herein fall within my personal knowledge, unless otherwise stated and are both true and correct.

3.

I have read the Opposing Affidavit deposed to by Charl Francois Erasmus and confirm that the content thereof is true and correct insofar as it relates to me.

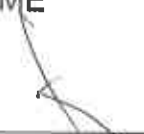
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DEPONENT

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BEFORE ME



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ALBRE JACOB HOPKINS

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317 Civic Street, Rosebank, Pta
Tel: 082 941 0114
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