REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE.
(2) OF INTEREST TO OTHER JUDGES.
(3) REVISED.

SIGNATURE 28/10/2021 DATE

Case number: 21609/2021

In the matter between:

JR Applicant

and

AL Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 28 October 2021.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application brought urgently to hold the respondent in contempt of an order granted *ex parte* by Matojane J on 13 June 2021 ('*the court order*').

[2] The court order is couched in the form of a rule *nisi* and the following orders relevant to this application, which were ordered to have immediate effect, interdict and restrain the respondent from:

> '2.1.1. Without lawful cause, making unsolicited contact, in person, telephonically or in writing, including electronically or on social media platforms, with the applicant.
>
> 2.1.2. Publishing any communications, including electronically or on social media platforms, about the applicant which contain allegations and/or insinuations regarding any alleged impropriety, be it personal, professional or fiscal.
>
> 2.1.3. Making any communication, whether in writing, telephonically or in person that threatens, insults and/or seeks to undermine or harm the applicant's reputation and dignity;
>
> 2.1.4. Making attempts to have the applicant arrested without good cause, or threatening to do so;
>
> 2.1.5. Harassing, threatening, intimidating, or verbally or physically abusing the applicant.'

[3] It is common cause that that the respondent has knowledge of the court order[1] and that after the granting of the court order, the respondent dispatched 21 emails to the applicant's former attorney of record ('*Ms B*')

[4] The respondent contends that the court order does not direct him not to send correspondence to Ms B.

Facts

[5] On 15 June 2021 the applicant again approached the Court in terms of Rule 6(12) for an order holding the respondent in contempt of Court ('*the first contempt application*'). The respondent opposed the first contempt application, and raised as his defence his belief that the court order had no force and effect absent signature by the judge and proper issue thereof by the registrar. He said that his attorney had advised him on 14 June 2021 at 11:30 that he should refrain from directing further correspondence to the applicant and his attorneys. Matojane J dismissed the first contempt application but made no order as to costs.

[6] For a limited period the respondent complied with the court order. Towards the end of August 2021, the respondent again started sending emails – not to the applicant, but to Ms B, copying in his own attorneys, the applicants' estranged wife ('*Ms R*') as well as her attorneys.

[7] Over the period 27 August to 13 September 2021, the respondent sent no less than 18 emails. Even after service of this application ('*the second contempt application*'), the respondent continued, dispatching further communications regarding

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[1] The court order was served on the respondent, as directed in paragraph 4 and 5 thereof on 13 June 2021.

the applicant. These further communications are detailed in the applicant's supplementary affidavit.

Contempt of court

[8] Based on *Fakie,*[2] the dictum of the Supreme Court of Appeal which was confirmed in *Pheko II*,[3] an applicant who alleges contempt of court must establish that an order was granted against the respondent, that the respondent was served with the order or had knowledge of it and that the respondent failed to comply with the order. Once these three elements have been established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish reasonable doubt. If the respondent fails to do so, contempt will be established.

[9] A deliberate failure to comply with a court order is not enough if good faith is established, e.g. a genuine (albeit mistaken) belief that the conduct constituting non-compliance does not breach the order, for good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be shown to be *bona fide*, although unreasonableness could evidence lack of good faith.[4] Clearly, the more unreasonable the so called 'belief' that the conduct did not contrave the order, the more difficult it will be to prove that the 'belief' was genuinely held, and hence *bona fide*.

The order and knowledge of the order

[10] The respondent admits that Matojane J granted the court order against him and he admits the content of the court order.

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[2] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)
[3] *Pheko v Ekurhuleni City*, 2015 (5) SA 600 (CC)
[4] *Fakie* at para [9]

[11] The terms of the court order are clear and unambiguous.

The respondent's non-compliance with the order: publication and making of communication

[12] In response to the applicant's exposition of the numerous emails that the respondent sent to Ms B, Ms R and her attorney, the respondent contends that it '*is important to note that the applicant does not deny the correctness of the content of my emails.*' In doing so, the respondent admits sending the emails.

[13] To establish whether the respondent's emails constitute a breach of the court order, one must have regard to the contents of these emails.

The respondent's non-compliance with the court order

[14] Without dissecting each of the emails, it is self-evident that the respondent continues to refer to the applicant in an insulting manner accusing him of being a bully and financially and otherwise being abusive towards Ms R and her mother. He also insinuates impropriety.

[15] It matters not that the emails were not addressed to the applicant himself, or that Ms B ought to have blocked the respondent's emails, for the court order does not only prohibit communications made or published to the applicant. The making of, and publishing of these emails are in direct contravention of paragraphs 2.1.2 and 2.1.3 of the court order which prohibit any communications having the deleterious content referred to in the order. Accordingly, there can be no reasonable doubt that the respondent contravened the terms of the court order.

[16] '*Harassment*' is defined as behaviour towards a person that causes mental or emotional suffering, which includes repeated unwarranted contacts without

reasonable purpose, insults, threat, touching and offensive language.[5] In terms of the *Protection from Harassment Act,*[6] harassment includes sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person [7] - a '*related person'* being a person in a close relationship with the complainant.

[17] The emails sent and/or addressed to Ms B by the respondent were so sent as it would of necessity have been brought to the attention of the applicant. An attorney can hardly be expected not to bring such correspondence to her client's attention. The contents of 'related person' includes an attorney of record who, as a consequence of a professional and ethical duty to a client, is obliged to transmit to the client all communications received from third parties and or other litigants.

[18] It follows that the incessant emails that the respondent sent to Ms B, constitutes harassment, in contravention of paragraph 2.1.5 of the court order. In addition, numerous of these emails contain direct threats directed at the applicant.[8]

[19] In the result, the applicant has proven the first three elements of contempt of court, and the evidentiary burden shifts to the respondent to raise reasonable doubt of his wilfulness and *mala fides.*

The respondent's evidentiary burden

[20] The respondent's answering affidavit does not disclose creditworthy evidence to support his allegations that it was not his intention to harass the applicant or to act

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[5] https://dictionary.cambridge.org/dictionary/english/harassment.

[6] Act 17 of 2011

[7] Section 1

[8] Founding affidavit annexures "FA4" at 022-35, "FA5" at 022-36, "FA10 at 022-41, "FA11" at 022-42, "FA13" at 022-44, "FA15" at 022-46, "SA4" on 025-13

in breach of the court order. Rather, the content of the very answering affidavit demonstrates the respondent's bad faith, and his continued contemptuous breach of the terms of the court order.

[21] Accusing the applicant of attempting to paint a picture that the respondent would, without cause, send emails, without providing '*the relevant context*', the respondent fails to give '*the relevant context*' to the numerous emails he sent. In the absence of such '*context*', on which the respondent relies and must therefore disclose, the Court cannot find that the respondent has acquitted himself of the evidentiary burden resting on him.

[22] On the 29th of September 2021 the respondent was cautioned against using these proceedings as a platform to injure the applicant's reputation and dignity. The answering affidavit, to which the respondent deposed to on 5 October 2021 contains even more publications of allegations and/or insinuations of the applicant's alleged impropriety, including that the applicant is a parsimonious bully who intimidates and harasses women physically and emotionally; that the applicant financially abuses Ms R's mother; that the applicant does not qualify as a good person:

> '... if "one" can bully, intimidate, harass, physically abuse, emotionally abuse and financially abuse women to a point where they have to get protection orders against you and where they have to employ bodyguards for their own safety, "one" does not qualify as being a good person.'

[23] Additionally, the respondent contravened the prohibition in paragraph 2.1.3 of the court order that he may not make communications that threatens, insults and/or seeks to undermine or harm the applicant's reputation and dignity, by stating that because the applicant obtained insight into Ms R's bank statements, this act '*questions the applicant's integrity and honorability* (sic)' ; the applicant is acting in bad faith as he is abusing the Court processes, together with his professional capacity as an

attorney, for his bullying tactics; the applicant (and Ms B) is guilty of unethical behaviour and therefore the respondent reported them to the Legal Practice Council.

Discussion

[24] There can be no reasonable doubt that the respondent intentionally seeks to undermine and harm the reputation and dignity of the applicant, an attorney, who has spent over 40 years building his professional reputation – one he contends is of excellence and unimpeachable integrity.

[25] While everyone has inherent dignity and the constitutional right to have their dignity respected and protected[9], a legal practitioner's most valuable assets are repute and integrity, and once either is lost it is seldom recovered.[10]

[26] It has been held that:

> '... it is a grave and ugly thing falsely to say of an attorney that he deliberately deceived the Court, and to that end was party to the leading of perjured testimony. It is worse when it is said of an attorney who, according to the evidence, was trained in the strict observance of professional ethics, and for thirty years has jealously guarded his good name.'[11]

[27] The respondent's continued publication and communications are plainly intentionally aimed at undermining and harming the applicant's reputation and dignity – in contravention of the court order.

[28] The respondent's contention that the court order does not direct him not to direct correspondence to the applicant's attorneys is not correct and this belief cannot legitimately be held.

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[9] Section 10 of the Constitution

[10] *Chetty v Perumaul* (AR 313/2020) [2021] ZAKZPHC 66; [2021] JOL 51115 (KZN) (21 September 2021) at para [46]

[11] *Gelb v Hawkins* 1960 (3) SA 687 (A) at 693F-G

[29] Although the unreasonableness of a non-complier's behaviour does not *per se* equate to the absence of *bona fides,*[12] in the absence of an alternative explanation for doing so, the respondent's behaviour is so blatantly unreasonable and his attacks on the applicant's reputation and dignity are so scurrilous that this Court can and does reject his bald denial of wilfulness and *mala fides* out of hand.

[30] The inherent implausibility of his version is borne out by the following emails: On 8 September 2021 at 21:55, the undermentioned email was addressed to Ms B and published to Ms R's attorney, Mr Steyn, the respondent's attorney, Mr Ben Esterhuyse and the applicant's first wife:

> 'Ms B .... Your client is a sad piece of shit .... Now sue me ....'

[31] On 20 September 2021 at 19:57, after service of this second contempt application, the following email was addressed to Ms B and published to Mr Steyn, Mr Ben Esterhuyse and Ms Cheydene de Ru:

> 'Ms B.... I received your next attempt .... Pathetic, boring and madness to say the least ... Your client tries desperately to make himself out to be the victim and present himself as the most honest person, but now let me share something with you, [the applicant] has not had a passing relationship with honesty in his entire life ...'

[32] On 21 September 2021 at 13:19, the following email was addressed to Ms B and also published to Mr Ben Esterhuyse:

> '... With this application your client has left himself wide open for a knockout shot .... Clearly I'm defending this .... But I'm going to give your client one chance to repent and withdraw this .... Failing, I'll prove in court that he is a Serial Woman Abuser ...
>
> ...

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[12] *Noel Lancaster Sands (Edms) Bpk v Theron en andere* 1974 (3) SA 688 (T) at 693E-G

> The picture he tries so deviously to colour in for the court will be left in tatters, as his reputation .... [Applicant's] call now, but let it never be said he wasn't warned .... '

[33] Manifestly, the respondent at all material times was and remains fully aware of the terms of the court order and challenged the applicant to take legal action against him.

[34] The respondent's conduct goes beyond a mere disregard of the court order and constitutes a deliberate and intentional violation of this Court's dignity, repute and authority.

[35] In view of the evidence of the respondent's transgressions and the nature thereof, the failure of the respondent to place any evidence before this Court that establishes a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, I find that the applicant has proved beyond a reasonable doubt that the respondent is in contempt of the court order.

Appropriate Sentence

Further evidence

[36] On 20 October 2021 after hearing argument in the matter, I stood it down to Friday, 22 October 2021 for argument on the appropriate sentence to be imposed should I find the respondent to be in contempt of court. I afforded the respondent the opportunity to file a supplementary affidavit in mitigation of sentence should he choose to do so. The applicant was also afforded an opportunity to file a response if he was so advised and to bring an application to strike out irrelevant matter. The costs of 20 October 2021 were reserved.

[37] The respondent took up this opportunity and summarised his personal circumstances in his supplementary affidavit as follows:

5.1 I am a 63 year old divorcee with one son, but do not have any dependents;

5.2 My highest qualification is a Senior Certificate and I have no tertiary education;

5.3 I have been involved in the construction industry and mainly the painting industry for the past 40 years.

5.4 I am the managing director of AJL Contractors (Pty) Ltd, but due to Covid, I have not been remunerated for the past nearly two years, due to the slump in the construction industry and mainly the painting industry, where AJL Contractors are involved;

5.5 I am not involved in overseeing projects since semi-retiring some 6 years ago, but manage the administrative side of the business.

5.6 I stay on the farm Hoek van die Berg in the Montagu District, which is the property of Hoek van die Berg Trust, who also owns the neighbouring Farm Puts.

5.7 The Trust farms cattle on a limited scale and employs two labourers.

5.8 I am a Trustee of the Trust and oversee the day- to- day farming operations.

5.9 In return for managing the farms, I get free use of the dwelling, use of the vehicles and payment of my living expenses.

5.10 The single shareholder of AJL Contractors (Pty)Ltd is Last Lap Trust of which I am a Trustee.

5.11 I personally have no assets, apart from a loan account in AJL Contractors and all assets are settled in the two Trusts.

5.12 In the event that the above Honorable Court finds me guilty of contempt of court and imposes a reasonable fine, I should be able to access funds to pay same.

5.13 I confirm that I have no previous convictions for any other transgression.

[38] The applicant's current attorney of record, Mr Roux, filed an affidavit in which he explained that on the instructions of his client, the applicant, he had caused a

subpoena *duces tecum* to be issued against Ms R's Bank and that the bank statements, which were attached to the affidavit, revealed transfers from AJL Contractors (Pty) Ltd ('*the company*') in which the respondent is the managing director and in which he holds a loan account. The sole shareholder of the company is the Last Lap Trust of which the respondent is a trustee. The funds were transferred to Ms R and from her to her attorneys. Mr Roux contended that it is clear that the respondent financially supports Ms R in the litigation between her and the applicant. Mr Roux concluded that '*the respondent has access to substantial amounts of funds from the company which he may use at his discretion.*'

[39] In my view this conclusion is fair as the bank statements reveal transfers in excess of R200 000 to Ms R and transfers shortly thereafter to her attorney.

Punitive and coercive nature of contempt orders and sanction sought by applicant

[40] The object of contempt proceedings is not only to punish the guilty party but also to compel compliance with the court order.[13]

[41] In his minority judgment in *Fakie*,[14] Heher JA explained the marked and important distinction between coercive and punitive orders as follows:

> '[74] The following are, I would suggest, the identifying characteristics of a coercive order:
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> 1. The sentence may be avoided by the respondent after its imposition by appropriate compliance with the terms of the original (breached) order *ad factum praestandum* together with any other terms of the committal order which call for compliance. Such avoidance may require purging a default, an apology or an undertaking to desist from future offensive conduct.
>
> 2. Such an order is made for the benefit of the applicant in order to bring about

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[13] *Protea Holdings Ltd v Wriwt and another* 1978 (3) SA 865 (W) at 868H

[14] *Fakie* at paras [74] – [75], referred to with approval in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* 2021 (5) SA 327 (CC) at para [47]

compliance with the breached order previously made in his favour.

3. Such an order bears no relationship to the respondent's degree of fault in breaching the original order or to the contumacy of the respondent thereafter or to the amount involved in the dispute between the parties.

4. Such an order is made primarily to ensure the effectiveness of the original order and only incidentally vindicates the authority of the court.

[75] By contrast, a punitive order has the following distinguishing features:

1. The sentence may not be avoided by any action of the respondent after its imposition.

2. The sentence is related both to the seriousness of the default and the contumacy of the respondent.

3. The order is influenced by the need to assert the authority and dignity of the court and as an example for others.

4. The applicant gains nothing from the carrying out of the sentence.'

[42] In *the State Capture* decision, Acting Deputy Chief Justice Khampepe remarked that although she preferred the aforegoing delineation, the majority in *Fakie*:

'....rejected the idea that there is a bright line between the two, maintaining that the binary between seeking enforcement through a contempt order and vindicating the authority of the court may be a false one. It held that the enforcement of an order in contempt proceedings has a public dimension, and that it is almost impossible to disentangle the punitive from the coercive purposes of contempt order.'[15]

[43] I was urged to follow the approach formulated as follows in *the State Capture* matter:

'[62] Notwithstanding this, I might have been persuaded to compel compliance had I been given a single reason to believe doing so would be a fruitful exercise. As it will not be fruitful, I defer to what was said in *Victoria Park Ratepayers' Association*:

"Contempt of court is not merely a means by which a frustrated successful litigant is able to force his or her opponent to obey a court order. Whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit

[15] at par [53]

> such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest."
>
> Indeed, at the core of these contempt proceedings lies not only the integrity of this Court and the Judiciary, but the vindication of the Constitution itself.'[16]

[44] Generally, in cases of contempt of court, a court is loath to restrict the personal liberty of an individual and if a period of imprisonment is imposed, it is generally suspended. As such, at its core, coercive committal, through a suspended sentence, uses the threat of imprisonment to compel compliance with a court order. This is what the applicant contends he sought when launching this application. This is indeed born out by the notice of motion as originally crafted.

[45] However, in light of the respondent's continued contemptuous non-compliance after service of the second contempt application, the applicant amended his notice of motion on 12 October 2021 to seek a punitive order of 30 days direct imprisonment alternatively a punitive order in the form of a fine together with a suspended sentence of direct imprisonment subject to certain conditions.

Aggravating factors

[46] Ms de Wet SC, who represented the applicant, submitted that the following aggravating factors are relevant to the consideration of an appropriate sentence:

46.1. This is the second application for contempt of court against the respondent, based on similar conduct which breaches the same court order. Since August 2021, the respondent's conduct was exacerbated and even more scurrilous.

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[16] at para [62]

46.2. Already in his opposing affidavit to the first application for contempt of court, the respondent admitted that on 14 June 2021 he received advice from his attorney not to send any emails to the applicant or his attorneys. This advice he heeded until end-August 2021 whereafter he, in brazen disregard for the court order set upon his unlawful conduct in breach of the court order.

46.3. Despite numerous cautions and calls for the respondent to cease his unlawful conduct, he continues to breach the terms of the court order.

46.4. The answering affidavit itself is littered with further gratuitous breaches of the court order, notwithstanding the letter dated 29 September 2021, addressed by Ms B to the respondent's attorneys cautioning him against such conduct.

46.5. The respondent's previous undertakings to cease communicating with the applicant's attorneys came to naught. The respondent's professed lack of further interest in the applicant, must be marked as hollow, in light of his correspondence to the applicant's previous attorney, even after he deposed to his answering affidavit on 5 October 2021.

46.6. There is no undertaking in the respondent's answering affidavit that he will desist from the unlawful conduct.

46.7. It is abundantly clear that the respondent does not only fail to acknowledge that his conduct is unlawful but seeks to deflect accountability for such conduct to Ms B, accusing her of harassing the applicant by forwarding the respondent's emails to him '*knowing that my communications would upset the applicant.*'

46.8. Notwithstanding the applicant having informed the respondent on 29 September 2021 that the former will seek a sentence of direct imprisonment, the amendment of the notice of motion on 12 October 2021 and further, despite being granted an opportunity to file a supplementary affidavit, on 20 October 2021, the respondent has failed to place facts before the Court on which he can rely for mitigation.

46.9. Notwithstanding having been granted yet another opportunity to admit the unlawful nature of his conduct, and to show remorse, it is sorely absent from the respondent's supplementary affidavit, dated 21 October 2021.

46.10. Absent any explanation for the respondent's conduct or his motive for such conduct, the motive must be gleaned from the plain wording of each of his emails: these speak to his malice, vindictiveness, vexatiousness, and unbridled intention to do as much harm to the reputation and dignity of the applicant, and to cause him as much distress as possible despite the existence of the court order known to him.

[47] Mr van der Merwe who represented the respondent, placed much reliance on the fact that the respondent had said that:

> 'In any event, now that [Ms R] is **no longer living with the applicant** and now that the applicant cannot subject [Ms R] to his constant abuse, [Ms R] is in a better frame of mind. I find this comforting and as a result I have no further interest in the applicant whatsoever.' (emphasis provided)

[48] Ms de Wet pointed out that the statement does not bear scrutiny. The court order expressly provides that Ms R is interdicted and restrained from entering the

former matrimonial home in Westcliff where the applicant resides and that she is authorised to occupy a home known as Hollyberry where she has been resident since the granting of the court order on 13 June 2021. Thus, on the 5th of October 2021, when the respondent deposed to the affidavit Ms R had not been resident with the applicant since 13 June 2021. The emails started on 26 August 2021 at a time when the applicant was not living with Ms R and thus his professed loss of interest in pursuing the applicant with the harassing emails emerged from the same set of facts that he now claims denude him of all motive to send such emails. But if they weren't living together then when he sent the emails, there can be no credence attached to his recent reliance on their not living together as a '*change of circumstance'* that will now give him cause to stop sending such emails. They weren't living before and he sent the emails. The fact that they are not living together now does not change anything, and gives no comfort as to his intentions.

[49] This respondent has shown time and again that he struggles to heed sound advice. On 14 May 2021, Ms B addressed a mail to Mr Esterhuyse, the respondent's attorney of record in which she recorded the following:

> 6. Furthermore, our client is a very senior and highly respected attorney, and should your client make any attempt to contact his clients, colleagues, friends or business associates about him — as threatened in his emails — our client will not hesitate to seek the appropriate interdictory relief and substantial damages from your client. Although our client's reputation and record are unimpeachable, he is not prepared to allow your client to seek to embarrass him or to make a spectacle of his personal life.

[50] On 17 May 2021, the following:

> '1. Despite our letter of 14 May 2021, your client has continued incessantly to send our client abusive and threatening emails, the content, tone and frequency of which say a great deal more about your client than they do about ours. This

behaviour can only be described as unstable, and your client continues with it at his peril.'

[51] On 25 May 2021, Ms B recorded:

'3. Given that our client is a highly respected attorney, we trust you have guided your client appropriately as to how he should behave. His conduct is both unbecoming and tiresome, and is certainly not assisting the very person whose interests he claims to be protecting.'

[52] On 13 June 2021[17] the court order was obtained and served and on 14 June 2021 the first contempt application was served. In paragraph 11 of the respondent's answering affidavit in the first contempt application, he stated the following:

'11. On Monday morning the 14th of June 2021 at 11h30, after being served with the signed order, I contacted Mr Esterhuyse, who advised that I should refrain from directing any further correspondence to the applicant **or his attorneys, which advice I heeded.**' (emphasis provided)

[53] On 6 September 2021, Ms B wrote to the respondent's attorneys in the following terms:

'Kindly tell your client NOT to email me. He; 1. Has no business interfering in matters between my client and [Ms R]; 2. Is represented by an attorney- I will communicate with you and not with him; 3. Is interdicted by court order from communicating with my client, and simply transferring his harassment to agents of my client's is unacceptable, 4. Told me little more than a week ago that I would never hear from him again.'

[54] On the 16th of September 2021, the second application for contempt was served.

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[17] The order was obtained *ex parte*. I express no views on this. The court order, however it was procured, must be obeyed until set aside. It is not insignificant that the respondent did not apply for a reconsideration of the order in terms of Rule 6(12)(c) but decided to oppose the confirmation of the rule instead. I was informed from the Bar that the rule has been extended a number of times, that all the affidavits have been filed and that the matter will be ripe for hearing once both parties have filed heads of argument. From the sounds of it the matter will be heard during the first term of 2022.

[55] On 29 September 2021, Ms B called on the respondent to desist from breaching the court order. It is appropriate to quote extensively from this mail:

1. We refer to the recent emails sent to us by your client, Andre Loots, dated 17, 20 and 22 September 2021.
2. It would appear that your client has no regard whatsoever for the rule of law, apparently believing that an order of the High Court means nothing and he is entitled to breach it as and when and how he pleases. Even the pending contempt application appears not to concern him in the slightest (indeed, he labels it "pathetic, boring and madness'), causing him only to escalate his threats and intimidation, as he has done in particular in his most recent email dated 22 September 2021.
3. Your client, who has on several occasions boasted that he is something of a legal expert, exhibits a fundamental misconception of the process in which he is presently involved. This proceeding is a contempt of court application brought because of your client's arrogant (and still on-going) disregard for an order of the High Court. The question before the court is whether or not he has breached the order, and if so, whether he did so wilfully and mala fide. The answers to all three enquiries are self-evidently in the affirmative. Before the court is whether or not he has breached the order, and if so, whether he did so wilfully and mala fide. The answers to all three enquiries are self- evidently in the affirmative,
4. There is no basis whatsoever for him to use the motion proceedings instituted against him as an opportunity to make further defamatory allegations against our client. The process obviously does not allow him to bring any witnesses to attempt to demonstrate the truth of the false and defamatory narrative that he is trying to fabricate (about which, more below). You will no doubt advise your client that he is not entitled to use these proceedings as a platform to further besmirch our client's reputation by putting inadmissible allegations before the court, purely in order to get the said allegations into the public domain.
5. Your client is required only to answer the allegations made in the founding affidavit, and any attempt to use his answering affidavit to make further scurrilous (and baseless) public allegations against our client will be met with an amended application that he be sentenced to an immediate thirty day period of incarceration. In addition, in that this will be a wilful abuse of the process of the court, our client will unfortunately have to seek a costs order against you *de bonis propiis*. He does not relish having to do this to a colleague, but will be left with no option should you not heed this caution.

6. You have presumably advised your client that contempt of a High Court order is no small thing, and that our client's application would best be met with humility and not the kind of arrogance which your client presently displays……'

[56] Despite this clearly articulated caution, approximately 1 week later and on 5 October 2021, the respondent filed an answering affidavit in the second contempt application in which he again made allegations which breach the court order. He did so under a heading in bold and capital letters which reads: '***APPLICANT'S BULLYING AND ABUSIVE NATURE'***. It is hard to imagine more defiant drafting.

[57] On 12 October 2021 the applicant, faced with the respondent's brazen and repeated breaches, amended his notice of motion to seek direct committal without the option of a fine.

Consideration of all factors

[58] Although the facts in this case were likened to *the State Capture* case and I was urged to make an exclusively punitive order, I am not persuaded that the degree of the contempt in this matter meets that demonstrated in *the State Capture* matter. I agree with Mr van der Merwe's submissions that this is not an exceptional case and certainly does not warrant comparison to *the State Capture* matter where ADJP Khampepe was driven to find:

> [128] Quantifying Mr Zuma's egregious conduct is an impossible task. So, I am compelled to ask the question: what will it take for the punishment imposed on Mr Zuma to vindicate this Court's authority and the rule of law? In other words, the focus must be on what kind of sentence will demonstrate that orders made by a court must be obeyed and, to Mr Zuma, that his contempt and contumacy is rebukeable in the strongest sense. With this in mind then, I order an unsuspended sentence of imprisonment of 15 months. **I do so in the knowledge that this cannot properly capture the damage that Mr Zuma has done to the dignity and integrity of the judicial system of a democratic and constitutional**

> **nation. He owes this sentence in respect of violating not only this Court, nor even just the sanctity of the Judiciary, but to the nation he once promised to lead and to the Constitution he once vowed to uphold.** (emphasis provided)

[59] She concluded that never before had the judicial process nor the administration of justice been so threatened. It was the first time that an exclusively punitive order had been granted. The Constituional Court found itself in '*unchartered water*'.

[60] There are a host of distinguishing features between this case and *the State Capture* matter not least of which being that in such case, a former President of the Republic disobeyed an order of the Constitutional Court and had launched sacrilegious attacks on the Constitutional Court.

[61] Mr van der Merwe, quite correctly in my view, drew attention to the fact that in this case the communications were made to a handful of people. He argued that despite the respondent's say-so this fact evidences that they were not intended to destroy the applicant's career. Unfortunately I can draw no inference from the extent of the publication/s other than that such communications were made to a handful of people. I do not know what the respondent's intention was as he does not tell the court. I do not know what his motive was. What I do know is that he was fully aware of the consequences of his actions being that it would upset the applicant because he accused Ms B of harassing the applicant by forwarding his emails to the applicant '*knowing that my communications would upset the applicant.*'

[62] Mr van der Merwe suggested that this was a 'tit for tat' situation. I do not agree. The applicant has met the respondent once in his life. There is thus no question of direct provocation as between the applicant and the respondent. The context is one of intimate relationships where passions do run high, this is not a case of a national leader defying a subpoena from a commission of enquiry into a matter of national importance.

[63] I do not think that direct imprisonment without the option of a fine is warranted but here too, the respondent is very economical with the facts he places before the court. I have been given no assistance by the respondent in determining what a '*reasonable fine*' is.

[64] Ms De Wet has sought to assist the court by providing an analysis of evidence regarding the respondent's professed wealth. In this analysis reference was made to the content of emails attached to the papers in the first contempt application. Mr van der Merwe argued that this court should not accept the truth of the content of such mails as it was not presented for purposes of establishing the wealth of the respondent whereas, the supplementary affidavit dated 21 October 2021, was presented for that purpose. In the one mail the respondent says that he was picked up on his farm by private jet and attached photos of his runway. I will accept for current purposes that he does not have a jet or a runway. However, I will also accept that the respondent is able, despite not having been remunerated for the past 2 years due to Covid, to access R200 000 during the month of June 2021 to assist Ms R with the litigation.

[65] Although he tells this court that he is one of the trustees of the Trusts, he does not tell the court how many trustees there are or who the beneficiaries are. Mr Roux told this court that the respondent is a director of the company and that the one trust is the sole shareholder. I infer, which inference under the circumstances I consider to be reasonable and the only plausible one to make, that he can access considerable amounts of money from the disclosed sources.

[66] From the emails authored by the respondent and attached to the papers in the second contempt application, the respondent has said the following from which I infer that he is a man of some wealth:

66.1. 27 August 2021: 'if [the applicant] withdraws his side-shows, so will Ms R and I, if not, **we'll both go the distance**, at [the applicant's] peril.'

66.2. 28 August 2021: '...Now we'll go the distance**.....trust your client has enough money for this....I have....**'

66.3. 1 September 2021: '[Ms B].... I'll write what I like to whoever I want to....If you are not happy with it....**Bring another interdict....I'm good to go**....'

66.4. 20 September 2021: '.....**Let's go the distance**..'

[67] The respondent elected not to take this court into his confidence by disclosing his obligations. I have no idea what they entail.

[68] At 63, I know that the respondent is financially secure enough to have taken early semi-retirement.

[69] The applicant submitted that were I to consider imposing a fine, a reasonable fine would be R100 000 whereas Mr van der Merwe, with reference to certain authorities[18] submitted that a fine of R10 000 would be more appropriate coupled with, or as an alternative to, imprisonment of 48 Hours or 5 days suspended for a period.

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[18] *Kenton-on-Sea Ratepayers Association and others v Ndlambe Local Municipality and others* 2017 (2) SA 86 (ECG) where prior to the contempt hearing the breach had been purged and a warning had been given; *AG v DG*, 2017 (2) SA 409 (GJ) where repeated breach of maintenance court order and frustrating the process of execution of such order including the hiding of assets was met with an order to pay arrear maintenance and a suspended sentence of 5 days imprisonment if maintenance was not paid; *Readam SA (pty) ltd v BSB international link CC and others* 2017 (5) SA 184 (GJ) where there was non-compliance of a court order over an extended period and the contemnor was sentenced to 30 days imprisonment in the event of non-compliance with the court order which was suspended; *Laubscher v Laubscher* 2004 (4) SA 350 (T), interim custody order was breached and 30 days imprisonment was imposed suspended for 1 year; *Victoria Park Ratepayers Association v Greyvenouw CC* [2004] ALL SA 3 623 (SE) for ongoing contempt a fine of R10 000 alternatively 3 months imprisonment suspended was imposed.

[70] In my view, a coercive order alone will not attain the respondent's obedience of the court order. Despite numerous calls and cautions for the respondent to cease his unlawful conduct, he continues to breach the terms of the court order. There is no acknowledgment of any wrongdoing nor an undertaking to refrain from doing so in future. The respondent's previous undertakings to cease communicating with Ms B came to naught.

[71] With reference to the dual purpose of contempt proceedings, the sentence to be imposed on the respondent should contain both a punitive and coercive element. I should exercise my discretion and issue a sentence that I deem to be just and equitable in the circumstances. In doing so I am mindful of why I am doing so:

> '[137] The right, and privilege, of access to court, and to an effective judicial process, is foundational to the stability of an orderly society. Indeed, respect for the Judiciary and its processes alone ensures that peaceful, regulated and institutionalised mechanisms to resolve disputes prevail as the bulwark against vigilantism, chaos and anarchy. If, with impunity, litigants are allowed to decide which orders they wish to obey and those they wish to ignore, our Constitution is not worth the paper upon which it is written.'[19]

[72] I therefore intend imposing a fine of R70 000 plus a period of imprisonment of 30 days which I intend suspending for a period of 1 year on certain conditions. The order underpinning this application (Matojane J's order and herein previously referred to and defined herein as the court order) will be revisited in the not too distant future and I therefore consider it appropriate that the suspension be of short duration.

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[19] *The State Capture* matter at [137]

Costs

[73] It was not suggested that any order other than a punitive costs order would be appropriate were I to find the respondent in contempt of court. In my view it is the appropriate order under the circumstances of this case. Punitive costs orders are reserved for instances where a litigant conducts himself in a manner worthy of the court's reproach and I exercise my discretion in favour of such an order. The respondent has conducted himself in a vexatious and reprehensible manner and his conduct is worthy of rebuke.

Order

[74] I accordingly make the following order:

74.1. The application is enrolled as an urgent application and the applicant's non-compliance with the rules of this Court in regard to service and time limits is condoned and this application is heard as one of urgency in terms of the provisions of Uniform Rule 6(12)(a).

74.2. The respondent is found guilty of being in contempt of the court order granted on 13 June 2021 by Matojane J (*'the 13 June 2021 court order'*) under case number 21609/2021.

74.3. A warrant of arrest is authorised committing the respondent to imprisonment for contempt of court for a period of 30 days, which warrant is suspended for a period of 1 year on condition that the respondent during the period of suspension:

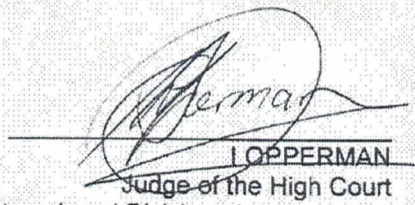
74.3.1. not be in contempt of the 13 June 2021 court order; and

74.3.2. not be in contempt of this court order; and

74.3.3. not be found guilty of contempt of court.

74.4. The respondent is fined R70 000 (Seventy thousand rands) which shall be paid to the Registrar of this Court within 10 (ten) days from date of service of this order by way of electronic mail on the respondent and his attorney.

74.5. The respondent is ordered to pay the costs of this application, including the costs reserved on 20 October 2021, as between attorney and client, which costs shall include the costs of two counsel where so employed.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

For the Applicants: Adv Adelé de Wet SC and Adv Sarita Liebenberg
Instructed by: Ulrich Roux & Associates
For the Respondent: Adv B van der Merwe
Instructed by: Van Zyl & Hofmeyr Attorneys
Date of hearing: 20 and 22 October 2021
Date of Judgment: 28 October 2021