

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22982/2021

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
17-12-2021

In the matter between:

ABSA BANK LIMITED

Applicant

and

FLUSK CHANTAL
MINISTER OF POLICE
NATIONAL COMMISSIONER OF SOUTH
AFRICAN POLICE SERVICE

First Respondent
Second Respondent
Third Respondent

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 17 December 2021*

SENYATSI J:

[1] This is an application for contempt of a court order issued by Moosa AJ on 11 March 2021¹ against the respondent, and erstwhile employee of the applicant. The order issued by Moosa AJ was both mandatory and prohibitory.

[2] The applicant ABSA Bank Limited, a publicly listed company with limited liability according to the company law of South Africa and is duly registered in terms of the Bank Act 94 of 1990 and a registered Financial services provider, carrying on business as inter-alia as a commercial bank from its head office situated at Absa Towers West, 15 Troye Street Johannesburg.

[3] The first respondent is Ms Chantelle Flusk (Ms Flusk), an adult female former employee of ABSA who resides at [....] G[....] Street, Eldorado Park Johannesburg.

[4] The second respondent is the Minister of Police, cited in his official capacity, who receives the court process through the State Attorney located at Pretoria at 756, 7th floor Wachthuis Building 231 Pretoria Street, Pretoria. The second respondent is cited in terms of section 207 of the Constitution, as the National Minister of the Police Service exercises control over the police service.

[5] The third respondent is the National Commissioner for the South African Police Service, cited in his official capacity, care of the State Attorney at 756 7th floor Watchhuis Building 231, Pretoria Street, Pretoria, and SALU Building, 316 Thabo Sehume Street, Pretoria. The third respondent is cited as he is in control and manages the Police Service in accordance with the directions of the second respondent.

[6] No relief or court order is sought against either the second or third respondents. They are cited in this application because the South African Police Service is required to implement the order that ABSA seeks in this application.

¹ Annexure FA1 of Founding Affidavit

[7] The court order forming the subject of this application was both mandatory and prohibitory interdict preventing the first respondent from making baseless, untrue and defamatory statements on social media platforms, that ABSA had bribed her previous attorney in the trial under case number 14/02678 which resulted in her losing the case. In that case, the first respondent had claimed payment of 12 million from ABSA and the case was dismissed with costs.

APPLICANTS CASE

[8] The interdict application was based on two videos identified in the interdict proceedings which had been uploaded onto YouTube during October 2020 allegedly by the first respondent. It was in those videos that Ms Flusk made the claims of bribery against ABSA. She alleged that her former attorney was bribed by ABSA which resulted in her losing her case against ABSA.

[9] After she received the interdict application papers, Ms Flusk did not file the opposing papers. She instead sent an email to ABSA's representatives advising them that *"I am not going to court on my own, as I have overwhelming support from family and friends all the way from the Free State and Eastern Cape"*.

[10] Ms Flusk sent another email to ABSA's legal representatives on 4 March 2021, in which she expressed that *"we are living in a democratic country, protesting is one of the ways to let your voice be heard. I love my family and friends."*

[11] On 10 March 2021, the day before the interdict application was due to be heard and having not delivered any opposing papers, she again sent an email to ABSA's legal representatives stating that she should not be held responsible for her friends and family would be uploading on social media at *"tomorrow's protest and sit down"*. Ms Flusk's choice of words was a clear indication that she was not going to comply with the anticipated court order.

[12] It is clear from her statements contained in the emails, so contends ABSA, that by reference to friends and family, Ms Flusk was extending what she had earlier written to ABSA's legal representatives when she intimated that she would have the support of family and friends from the Eastern Cape and Free State. She also

informed them that she and her husband were researching how they could make the video viral on social media through the assistance of friends who have 500 plus followers who had agreed to upload the video. This, she said, was a way of getting Justice.

[13] Although she had filed no opposing papers in the interdict application, she nevertheless appeared in person through video conference and the presiding Judge explained to her what the matter entailed. Ms Flusk told the Court that she was not going to oppose the application and was going to comply and remove the defaming videos.

[14] The order was accordingly granted by Moosa AJ and read out to Ms Flusk. The order was also served on her by the Sheriff. In terms of the court order, Ms Flusk was given 24 hours to remove the offending video. The two videos were removed from YouTube within the 24 hours. However, within a few minutes of granting the court order on 11 March 2021 at around 12h00, Ms Flusk again allegedly uploaded the same two videos to her Facebook page as confirmed by the screenshots provided to the Court. Based on the evidence averred, ABSA prays that she be held in contempt of court and that she be committed to 3 months' imprisonment.

RESPONDENTS CASE

[15] In her opposition to the contempt of court application, Ms Flusk states that the allegations of contempt emanate from social media posts that were uploaded on her Facebook page, by her son Mickyl Flusk ("Mickyle"). The same posts were also uploaded to his Tik-Tok and Instagram account, Lekesha Storm's (Micklye Flusk's girlfriend) Tik-Tok account and videos posted on a Facebook group called "Coloured Girls Rock".

[16] Ms Flusk states that after the order was granted against her, she was in an emotional state and that as soon as she got home from attending court, she instructed Mickyle to upload the videos on YouTube and but later instructed him to delete all forms of the social media apps that were installed in her phone. She admitted that she omitted to tell him the reasons why she now wanted the videos

deleted. She contends that she was at that time under the impression that the videos were deleted from her Facebook account and uninstalled from her phone. At that stage, she was under the impression that she had complied with the court order.

[19] As far as she was concerned, to her knowledge and belief, the court order had been complied with and the issues between ABSA and herself were behind her. She contends that she even stopped sending emails to Ms Wright, the legal representative of ABSA.

[20] Ms Flusk states that there was a misunderstanding between herself and her son in that he deleted the uploaded videos from YouTube within 24 hours but instead of deleting them from all forms of social media, proceeded to upload them on the Facebook page. When she became aware of that fact, she immediately ensured that he deleted the videos. She states that she did not see the need to further tell him that family and friends were also prohibited from posting the videos as well. She says she did not think that her son would decide to take matters upon himself as he previously never showed any interest in her case, though he had been aware of why she was always emotional over the years.

[21] The uploading of the defaming videos by her son on Tik-Tok and Instagram, so contends Ms Flusk, was done without her consent or influence. Her son had uploaded the videos out of his own volition with the belief that he was helping her in the situation. Upon becoming aware of the uploads, she confronted her son where after he informed her that he had downloaded them from YouTube before they were deleted and that he obtained information about the case from the family computer. Mickyle further stated that he had sought assistance from an EFF member. Ms Flusk attached a confirmatory affidavit by Mickyle to her affidavit as annexure "CR1" which confirms her facts in so far as they relate to Mickyle.

[22] Mickyle also confessed that he was behind the video uploads that were found on Lekesha Storm's social media platforms. He expressed that his main intention was to ensure that the videos accumulated a lot of views hence he used Lekesha Storm's account. He took sole responsibility and confirmed that the latter has no involvement in the matter.

[23] Mickyle further sent an email to EFF informing the political party about the litigation between Ms Flusk and ABSA. It is his version that he did this without her consent and knowledge. Insofar as the Facebook group “Coloured Girls Rock”, Mickyle states that he has no knowledge of how the video was uploaded onto that group page.

[24] The court enquired whether Ms Flusk fully understood the contents of the order as was granted against her on 11 March 2021, to which she replied she did. In reply to ABSA’s allegations that she “used” the young adults to further her own cause, she submits that she has no reason to use her own son to achieve a personal agenda which was otherwise criminal conduct. In addition, she did not have any reason to hide behind her son to achieve what would clearly amount to criminal conduct. She further contends that she has no reason to involve Lekesha Storm in the matter.

[25] Ms Flusk contends that ABSA relied on an email that was sent in 2018 stating her intentions to make the video go viral. However, no videos were posted until October 2020 and these were posted only on YouTube and nowhere else. Ms Flusk stated that she took no further steps to make the videos viral as there were no other videos posted between October 2020 and 11 March 2021 on the other social media platforms.

[26] She contends furthermore that she did not personally and deliberately defy the court order. Her version was that she was not aware that her son had been uploading the videos to other social media platforms post the granting of the interdict and did not condone his actions. She is not active on social media and was not aware what her son was up to although he stays with her in the same house. She further states that after she instructed him to delete the defaming videos from all social media platforms, she had no reason to suspect that he would defy her instructions and upload the videos to Tik-Tok and Instagram. She states that she only became aware this was done after she was served with contempt of court notice. It was only after she confronted Mickyle that he confessed that he did upload the videos and was only trying to help.

[27] She stated that in order to salvage the situation she instructed Mickyle to upload the court order on Lesheka Storm's TikTok so as to give effect to what the court had ordered. She did this so that she could exonerate herself from any criminal conduct/ liability that may ensue as she was not in control of who may have or not seen the videos.

[28] In addition, Ms Flusk opposes the committal sanction of 3 months' imprisonment and submitted that it is severe punishment and is disproportionate to the crime allegedly committed. She contends that her conduct was neither intentional, wilful nor *mala fide* as she was unaware of the uploaded videos post the granting of the court order on 11 March 2021.

[29] In her defence, Ms Flusk pointed out that ABSA's allegations are based on irrelevant emails that had been sent before the court order was granted. Firstly, ABSA failed to take into account that she had stopped sending Ms Wright emails and that she had deleted the videos on YouTube showing full compliance with the court order. Secondly, ABSA also failed to take into account that the videos might have been uploaded without her consent and knowledge. Thirdly, ABSA failed to take into account that had she intended for the videos to go viral, she would have done so from the 27th October 2020- when she uploaded the videos on YouTube. Fourthly, ABSA failed to take into account that the defaming videos have since been removed from all social media platforms, including posts that were on Lesheka Storm's social media accounts.

ISSUE FOR DETERMINATION

[30] The issue for determination is whether or not, based on the evidence before this court, ABSA has succeeded in proving that Ms Flusk was in wilful defiance of the court order. Furthermore, whether Ms Flusk has caused (influenced) her son Mickyle to upload the defaming videos post the granting of the order and finally whether reliance on Mickyle's evidence is hearsay.

LEGAL PRINCIPLES AND REASONS FOR THE JUDGMENT

HEARSAY EVIDENCE AND CONFIRMATORY AFFIDAVIT

[31] In its argument ABSA contends that Ms Flusk relies on hearsay evidence in relation to claims that Mickyle told her that he was responsible for the video uploads. This contention is not supported by facts. Mickyle confirmed the version of Ms Flusk through a confirmatory affidavit and our law is trite that once this is so, the evidence is no longer hearsay but real evidence. In the *National Education Health and Allied Workers Union v The Minister of Health and Another* it was held thus:

“Where the averments are supported by confirmatory affidavits, they do not constitute hearsay evidence.”² In the instant case, Mickyle confirmed that he read Ms Flusk answering affidavit and duly confirmed its contents insofar as they relate to him by deposing a confirmatory affidavit.”

This is also supported by section 3(1)(a) The Law of Evidence Amendment Act (Act 45 of 1988), which provides as follows:

“Hearsay evidence

- (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-
- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings”

I am therefore satisfied that Mickyle had read the contents of Ms Flusk’s affidavit in so far as it says he is the one who confessed to uploading the defamatory videos post the court order and confirmed Ms Flusk’s affidavit through his confirmatory affidavit. ABSA’s contention that Ms Flusk had consented or knew about such uploads cannot be supported by any direct evidence and is therefore rejected.

[32] ABSA further contends in paragraph 32 of its replying affidavit that the confirmatory affidavit by Mickyle is ‘bare and lacking evidence’. There is nothing irregular about the confirmatory affidavit provided because the very purpose of a confirmatory affidavit is to confirm that what has been already deposed to in the main affidavit is true and correct insofar as it relates to the person deposing the confirmatory affidavit. The confirmatory affidavit does not intend to repeat in verbatim

² (J33321/2018) [2018] ZALCJHB 349 (18 October 2018)

what is stated in the main affidavit insofar as it relates to the person deposing to the confirmatory affidavit.

[33] Mickley has furthermore confirmed that he is the one who persuaded Lesheka Storm to upload the videos on her social media account for the purpose of getting more views and accepts liability in that regard as well. It cannot be suggested as ABSA is trying to persuade this court otherwise, that Ms Flusk was aware and put to use her threat, based on a 2018 email that she had the support of friends from the Eastern Cape and Free State to ensure that Lesheka Storms social media account was used with Ms Flusk's consent and knowledge. This argument has no factual basis and must on account of what has been admitted by Mickyle, be rejected out of hand.

WHETHER MS FLUSK HAD CAUSED MICKYLE TO UPLOAD THE DEFAMING VIDEOS AND IN DEFIANCE OF THE COURT ORDER

[34] Ms Flusk contends that she has not caused her son Mickyle to upload the videos on the social media platforms post to the court order and that his son has done so without her consent and knowledge. ABSA in its replying affidavit paragraph 17 contends that "if Mickyle's independent conduct cannot be established on the standard of proof for contempt of court, then Ms Flusk on her own version is guilty of contempt of court." This argument by ABSA fails to take into account that Mickyle had thoroughly read Ms Flusk's answering affidavit and signed a confirmatory affidavit in relation to what she had said. Based on what Mickyle has confirmed, no wilful defiance of the court order can be imputed on Ms Flusk. It is therefore illogical for the proposition that based on her version Ms Flusk is guilty of contempt of court.

WHETHER THE DEFIANCE WAS WILFUL AND MALA FIDE

[35] The common law test for when disobedience of a civil order constitutes contempt is that an: (a) an order must exist; (b) the order must have been duly served on the contemtor; (c) there must have been non-compliance must have

been deliberate and mala fide; (d) the non-compliance must have been deliberate and mala fide;³

Another new element is the aggravation element⁴

[36] The Constitutional Court in the *Zuma* case held that “*the obligation to obey Court orders has at its heart the very effectiveness and legitimacy of the judicial system*”. The court held furthermore that “*an act of defiance in respect of a direct judicial order has the potential to precipitate the constitutional crisis: when a public office bearer or government official or indeed any citizen of the Republic, announces that he or she will not play by the rules of the Constitution, then surely our Constitution and the infrastructure built around it has failed us all.*”

[37] In *Clement v Clement* ⁵ It was held that there is authority for the proposition that, in contempt of court cases, the party alleged to be in contempt because he or she has failed or refused to obey an order is not automatically entitled to be heard while he or she remains in effect in default. The court will, however, be loath to refuse to hear at parties defence and it will only be in exceptional circumstances that a party may be barred in this way from defending himself or herself.⁶

[38] In *SA Fakie NO v CCII Systems (Pty) Ltd* ⁷; the court held that it is a crime to unlawfully and intentionally disobey a court order.⁸ The crime in essence lies in violating the dignity, repute or authority of the courts.

[39] The office has in general terms received a constitutional stamp of approval in *S v Mamabolo*⁹ since the rule of law requires that the dignity and authority of the

³ See Secretary of the Judicial Commission of Inquiry into Allegations off State Capture Corruption and Fraud in the Public Sector including Organs of State v Jacob Gedleyihlekisa Zuma [2021] ZACC 2 (CTT 295)

⁴ Zuma Supra

⁵ (1961) 3 SA 861 (T) 867A-C

⁶ See Victoria Park Ratepayers Association v Greyvennouw CC and Others [2004] 3 All SA 623 (SE)

⁷ [2006] SCA 54

⁸ See S v Beyers 1968 (3) SA 70 (A)

⁹ 2001 (3) SA 409 (CC) para 14

courts, as well as their capacity to carry out their functions should always be maintained.¹⁰

[40] As already stated, in the present case it has not been shown that Ms Flusk deliberately disobeyed the court order and was in so doing *mala fides*. In fact and on the contrary, ABSA confirms that save for the uploads done by Mickyle, Ms Flusk complied and removed the defaming videos from YouTube within 24 hours as required by the court order. This is confirmed by ABSA in paragraph 41 of its founding affidavit.

[41] In all the averments on the alleged violation of the court order, ABSA has referred to the contempt of court order on the defaming videos that appeared on Mickyle and Lesheka Storms' social media accounts. I need not repeat my findings as they are clearly stated, it could not factually be established on a balance of probabilities that the uploads were done with the consent and knowledge of Ms Flusk.

[42] It is not necessary for me to deal with the aspect of sanctions to be imposed as I am satisfied that ABSA has not been able to persuade me that Ms Flusk deliberately and with *mala fides* uploaded the defaming videos with the intention to violate the court order dated 11 March 2021.

[43] It follows that the application to hold Ms Flusk in contempt must, for reasons provided above, fail.

ORDER

[44] The following order is made:

- (a) The application to hold the first respondent in contempt of court order issued by Moosa AJ on 11 March 2021 is dismissed with costs.

¹⁰ See Coetze v Government of the Republic of South Africa 1995 (4) 631 (CC) para 61.

SENYATSI ML
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 04 October 2021

Date of Judgment: 17 December 2021

Applicants Counsel: Adv L M Grenfell SC

Instructed by: Lowndes Dlamini Attorneys

First Respondent's Counsel: Adv LZ Msiza

Instructed by: TH Attorneys