

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

CASE NO: 2023-0001343

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REPORTABLE

In the matter between:

**HARMONY GOLD MINING
COMPANY LIMITED**

[Registration Number:[...]]

FIRST APPLICANT

RANDFONTEIN ESTATES LIMITED

[Registration Number:[...]]

SECOND APPLICANT

and

BONGUMUSA CYPRIAN MBATHA

[Identity Number:[...]]

FIRST RESPONDENT

**THUTHUKANI COMMUNITY
DEVELOPMENT NPC**

[Registration Number:[...]]

SECOND RESPONDENT

In re:

**HARMONY GOLD MINING
COMPANY LIMITED**

[Registration Number:[...]]

FIRST APPLICANT

**RANDFONTEIN ESTATES
LIMITED**

[Registration Number:[...]]

SECOND APPLICANT

and

**THUTHUKANI COMMUNITY
DEVELOPMENT NPC**

[Registration Number:[...]]

FIRST RESPONDENT

BONGUMUSA CYPRIAN MBATHA

[Identity Number:[...]]

SECOND RESPONDENT

MPHO PAKKIES

THIRD RESPONDENT

KEDIBONE GLADYS MOLEFE

FOURTH RESPONDENT

ABERT TSOTSI MOLEFE

FIFTH RESPONDENT

SONTO AYABONGA BIYELA

SIXTH RESPONDENT

**THE RESIDENTS OF WARD 53
OF SLOVOVILLE TOWNSHIP AND
SURROUNGS INVOLVED AND/OR
PARTAKING IN THE INTERDICTED**

SEVENTH RESPONDENT

ACTIVITIES

JUDGMENT

SENYATSI J:

[1] This is an opposed urgent application to hold the first and second respondents in contempt of a court order granted on the 12th of April 2023 and to order the first respondents imprisonment for a period of 90 days or such time period as the Court deems appropriate, alternatively that the respondents be ordered to purge their contempt within seven days of the order. The respondents contend that the service of the Court was not explained in the language he understands and that in any event, he has the constitutional right to protest. Mr Mbatha contended during his oral submissions that the protest as interdicted was authorized by the Johannesburg Metropolitan Police and he would do it again if need be as the demands of the community have not been satisfied by the applicants.

[2] I need to deal with a concerning preliminary issue about Mr. Madikane and his African Black Lawyers Foundation NPC. When the matter before me was called on the 20th of June 2023, it could not proceed due to the unavailability of the first respondent. A certain Mr. Zuko Madikane appeared before Court and claimed that he represented the respondents. He

was not dressed appropriately and when asked why he was not robbed, he claimed that he was not an admitted attorney in terms of the law. The court enquired from him on what basis he could claim to be representing the respondents when he was not an admitted legal practitioner, his answer was that his non-profit company uses attorneys who appear for his clients. He informed Court that he had been involved in various matters concerning the evictions some of which were before me and that he did not see anything untoward by addressing the Court as he did. He claimed that the counsel briefed on the matter was not available to deal with the application that day and required the application to stand down until the 23rd of June 2023 when counsel would be available to represent the respondents. The court demanded that Mr Mbatha, the first respondent in the matter should avail himself to make representations or secure the services of counsel. The matter was adjourned to 21 June 2023 and Mr Mbatha was required to be present himself to address me on this matter.

- [3] On 21 June 2023, Mr Mbatha appeared before me and stated that it came as a shock to him that Mr Madikane was not a legal practitioner because he claimed to be one to him. He informed the court that he was present in court the previous day when the Court challenged Mr. Madikane about his status as a legal practitioner. He claimed that Mr Madikane never told him that he was not an admitted attorney and in fact he knew that he had

represented several communities involved in evictions. Mr. Mbatha told the Court that he had not yet made any payment to Mr. Madikane as he had agreed to be paid at a later stage. He was requested to secure the services of a legal representative to argue his papers. He confirmed that his papers were all drafted by Mr. Madikane.

- [4] It is puzzling that the notice to oppose the application and the subsequent pleadings which were filed on behalf of the respondents shows Sithi and Thabela Attorneys as representing the respondents but the notices on their face state that the attorneys are instructed by African Black Lawyers Foundation (NPC) SA t/a Lawyers For Black People . If this is true, it can only be inferred that Mr Madikane through African Black Lawyers Foundation NPC facilitates the commission of the offence in contravention of the Legal Practice Act as he consults with members of public for reward and instructs attorneys or advocates to appear in Court in circumvention of section 33 of the Legal Practice Act. This view is fortified by the fact that the attorneys that appear to be on record withdrew at about 11h00 on the day of hearing. I believe that it is highly likely that the notice of withdrawal did not even emanate from the said attorneys but was probably drafted by Mr. Madikane after becoming aware of the concerns from the Court of his authority to represent the respondents. This is a judgment which should be referred to the Director of Public Prosecutions for

investigation of Mr. Zuko Madikane and the African Black Lawyers Foundation NPC for the possible contravention of the law.

- [5] On 23 June 2023, Mr Mbatha appeared unrepresented at the hearing. He told the Court that he was able to argue his case as he could not secure the services of an attorney. As the matter was being argued, a notice of withdrawal as attorneys of record was filed purportedly by Sithi and Thabela Attorneys instructed by African Black Lawyers Foundation NPC. The email contact details mentioned in the notice are those of the attorneys and Mr. Madikane.
- [5] The controversy for determination is whether or not the respondents are in contempt of the court order granted on 12 April 2023 as contended by the applicants.
- [6] The essential object of contempt proceedings is to obtain the imposition of a penalty to vindicate the Court's honour consequent upon the disregard of its order as well as to compel the performance in accordance with the order. The proceedings may also be brought for the sole purpose of punishing the contemnor.¹

¹ Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA (SCA) at paras 6-8; 333B; Protea Holdings Ltd v Wriwt and Another 1978(3) SA (W) at 868B; Sparks v Sparks 1998 (4) SA 714 (W) at 725H-I; Bruckner v Bruckner and Another [1999] 3 All SA 544(C) at 549I-J and 550A ; East London Transitional Council v MEC for Health, Eastern Cape and Others 2001 (3) SA 1133(CkH)at para 28;p1140J; S v Bresler and Another 2002(4) SA 524 (C)at 531H-532B

[7] The approach of Courts has been that civil contempt can be committed only in the case of orders to do or not to do something (*factum praestandum*).²

[8] The test to be applied to determine whether a party in contempt was spelled out in Fakie NO v CCII Systems (Pty) Ltd³ by Cameron JA (as he then was) in the following terms:⁴

“[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and *mala fide*’.⁵ A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.⁶ Even a refusal to comply that is objectively unreasonable may be *bona fide* though unreasonableness could evidence lack of good faith.⁷

² Metropolitan Industrial Corporation (Pty) Ltd v Hughes 1969 (1) SA224(T) at 226F-230D; East London Local Transitional Council, supra at para 17, p138A; BJBS Contractors (Pty) Ltd v Lategan 1975(2) SA 590 (C) at 592E; Jayiya v MEC for Welfare, Eastern Cape and Another 2004(2) SA 611(SCA) at 15 and 16, p 619E-G; Kate v MEC for Welfare, Eastern Cape and Another 2005 (1) SA141 (E) p157; HEG Consulting Enterprises (Pty) Ltd and Others v Siegwart and Others 200(1) SA 507 (C) at 517D; E-F

³ (653/04) [2006] ZASCA 52

⁴ See para a

⁵ See Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355 (A) 367 H-I.

⁶ See Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 (C) 524 D

⁷ S v Beyers 1968 (3) SA 70 (A) at 76E and 76F-G and the definitions in Jonathan Burchell *Principles of Criminal Law* (3ed, 2005) page 945 (‘Contempt of court consists in unlawfully and intentionally

These requirements – that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evidences. Honest belief that non-compliance is justified or proper is incompatible with that intent.”

- [9] The applicant bears the onus to prove contempt and the following requirements must be met:
- (a) the existence of the order;
 - (b) its service on the respondent;
 - (c) non-compliance in order to succeed with the civil disobedience of the court order. The respondents must furnish evidence raising a reasonable doubt whether non-compliance was willful and *mala fide*, to rebut the offence.⁸
- [10] The constitutional imperatives of contempt of court have also been dealt with by our courts. In Fakie NO v CII Systems (Pty) Ltd⁹, Cameron JA (as he then was) stated as follows in dealing with the constitutional

violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it’) and CR Snyman *Strafreg* (4ed, 1999) page 329 (‘Minagting van die hof is die wederregtelike en opsetlike (a) aantasting van die waardigheid, aansien of gesag van ‘n regterlike amptenaar in sy regterlike hoedanigheid, of van ‘n regsprekende liggaam, of (b) publikasie van inligting of kommentaar aangaande ‘n aanhangige regsgeding wat die strekking het om die uitslag van die regsgeding te beïnvloed of om in te meng met die regsadministrasie in daardie regsgeding’).

⁸ Fakie NO v CII Systems (Pty) Ltd (Supra) at para 22

⁹ Supra at paras 23 and 24

imperatives on contempt of court:

“[23] It should be noted that developing the common law does not require the prosecution to lead evidence as to the accused’s state of mind or motive: once the three requisites mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted willfully and *mala fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disapprove willfulness and *mala fides* on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.

[24] There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor’s committal to prison as punishment for non-compliance. This is not because the respondent in such an application must inevitably be regarded as an accused person for the purposes of s35 of the Bill of Rights. On the contrary, with respect to the careful reasoning in the Eastern Cape decisions, it does not seem to me to insist that such a respondent falls or fits within s35. Section 12 of the Bill of Rights grants those who are not accused of any offence the right to freedom and security of the person, which includes the right not only to be detained without trial,¹⁰ but not to be deprived of freedom

¹⁰ Bill of Rights s12 (1)(b)

arbitrarily or without cause.¹¹ This provision affords both substantive and procedural protection,¹² and an application for committal for contempt must avoid, infringing it.”

[11] The Constitutional Court has previously also considered the constitutional imperative of the disobedience of the civil court order. In Matjhabeng Local Municipal v Eskom Holdings Limited and Others¹³ the Court described the nature of contempt proceedings in the following terms:

“[52] Although contempt is part of a broader offence, it can take many forms, even though its essence ‘lies in violating the dignity, repute, or authority of the Court’. Traditionally, contempt of Court has been divided into two categories according to whether the contempt is criminal or civil in nature. These types of contempt are distinguished on the basis of the conduct of contemnor. Criminal contempt brings the moral authority of the judicial process into disrepute and as such covers multiplicity of conduct interfering in matters of justice pending before a Court. It thereby creates serious risk of prejudice to the fair trial of particular proceedings.

[54] Not every court order warrants committal for contempt of

¹¹ Bill of Rights s12(1)(a)

¹² *Bernstein v Bester* NO [1996] ZACC 2; 1996 (2) SA 751 (CC) para 145 -146

¹³ 2018 (1) SA 1 (CC)

court in the civil proceedings. The relief in the civil proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamus, and structural interdicts . All of these remedies play an important part in the enforcement of Court orders in civil contempt proceedings. Their objective is to compel parties to comply with a Court order. In some instances, the disregard of a Court order may justify committal, is this sanction for past non-compliance. This is necessary because breaching a Court order, wilfully and with *mala fides*, undermines the authority of the Courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron J (as he then was) for the majority in Fakie:

‘While the litigants seeking enforcement has a manifest private interest in securing compliance, the Court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the Courts and detracts from the rule of law.’”

[12] In SS v VV-S¹⁴ the Court held as follows on compliance with court orders:

¹⁴ 2018 (6) BCLR 671 (CC)

“[18] The judicial authority vested in all Courts , obliges Courts to ensure that there is compliance with Court orders to safeguard and enhance their integrity, efficiency, and effective functioning.

...

[21] A Court's role is more than that of a mere umpire of technical rules, it is ‘an administrator of justice’...[it] has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done.”

[13] In Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others¹⁵ the Court held that:

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

¹⁵ 2021 (5) SA 327 (CC)

...

[47] I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in *Fakie*, there is a distinction between coercive and punitive orders, which differences are “marked and important”.¹⁶ A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed.¹⁷ Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.¹⁸”

[14] In the instant case, the order was granted on 12 April 2023 and the protest happened on 13 April 2023. Mr Mbatha argued that he had not

¹⁶ See *Fakie* above n 8 at para 76.

¹⁷ *Id* at para 74.

¹⁸ *Id* at para 75.

violated any court order because he had obtained a permit for the march. He submitted that it was his constitutional right to demonstrate together with the community and maintains that the demands that were sent to the applicants were not met. He maintained that the court order meant nothing to him and that he would do it again so as to ensure that the applicants meet the demands he sent.

[16] Unfortunately for Mr. Mbatha he does not appreciate the seriousness of contempt of court. I say so because despite his claim that the demonstration was authorized by Johannesburg Metropolitan Police, this is not supported by any evidence. On the contrary, the only available so-called permit authorized the demonstration on 12 April 2023 which is the date of the court order. However, the demonstration which sought to disrupt the operations of the applicants took place on 13 April 2023 in direct violation of the court order granted the previous day. Accordingly, the applicants have, in my view, discharged the *onus* of meeting the three requirements as set out above.

[15] Mr Mbatha, also claims that the order which is the subject of litigation in these proceedings, was not explained to him by the Sheriff of this Court in the language he understood. This defence is not supported by any evidence. On the contrary, a series of emails authored by Mr. Mbatha are in English and there is no doubt that not only can he communicate in the

language, he writes fairly well. His oral submissions in Court were in English and he was impressive in his arguments. Accordingly, the defence has no basis.

- [16] Having considered the papers before me, I am of the view that the respondents deliberately violated the court order by Mudau J issued on 12 April 2023.

ORDER

- [17] The following order is issued:

(a) the Rules relating to forms, notice and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court;

(b) The first and or/second respondents are declared not to have complied with the Mudau J order and are directed to comply with Mudau J order within seven days of this Court order being granted;

(c) The Registrar of this Court is directed to make a copy of this judgment to the Director of Public Prosecutions, Gauteng, to investigate if any offence has been committed by Mr Madikane and/or the African Black Lawyers Foundation NPC in contravention of section 33 of the Legal Practice Act No; 23 of 2014.

(d) The first and second respondents are directed to pay the costs of this application on the scale as between attorney and client, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 05 July 2023.

DATE URGENT APPLICATION HEARD: 23 June 2023

DATE JUDGMENT HANDED DOWN: 05 July 2023

APPEARANCES

Counsel for the Applicant: Adv AG South SC

Adv JHF le Roux

Instructed by: Edward Nathan Sonnenberg Inc

First Respondent (in person): Mr B Mbatha