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**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number.: 5254/2013**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

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**E.M. KUBUSHI**

**DATE: 02-03- 2021**

In the matter between:

**GAYAAT SALIE-HLOPHE**

**Applicant**

and

**ADRIAN JOHN SAMUELS**

**Respondent**

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**JUDGMENT**

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## **KUBUSHI J**

*This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.*

[1] Pursuant to an urgent application launched by the applicant, Justice Mudau granted an urgent order against the respondent on 4 December 2020. In the said order it was ordered that:

- 1.1. The matter is heard as a matter of urgency.
- 1.2. The respondent shall comply with the order of Justice Samela of 29 July 2013 by making payment to the applicant, by depositing same into her attorneys trust account, Standard Bank (Rosebank), Account name: Thomson Wilks Inc, account number [...], branch code 004305, of the sum of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), by no later than 17h00 on Friday 18 December 2020.
- 1.3. Failing compliance with the provisions of paragraph 2 hereinabove the applicant is granted leave to set the matter down again, on no less than 48 hours' notice to the respondent, for an order that the respondent be held to be in contempt of the above Honourable Court and a warrant be issued for the

arrest of respondent and he be committed to imprisonment for a period to be determined by the above Honourable Court.

1.4. The respondent shall pay the applicant's costs on a party and party scale.

[2] I am informed that Justice Mudau provided reasons for the urgent order on 14 December 2020 transmitting same to the parties electronically.

[3] The applicant's submission is that the respondent failed to make payment in the amount of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), or any payment at all by 17h00 on Friday 18 December 2020 as ordered by Justice Mudau in the order as set out in paragraph [1] of this judgment. No reasons were provided for the respondent's failure to adhere to the court order.

[4] The respondent having failed to comply with the order of Justice Mudau, and by implication that of Justice Samela, it is contended that he is in contempt of the said court order. In pursuance of paragraph 3 of the order of Justice Mudau, the applicant has filed a supplementary affidavit seeking this

court to make an order that the respondent be held to be in contempt of the court order of Justice Samela and a warrant be issued for the arrest of respondent and he be committed to imprisonment for a period to be determined by this court.

[5] In terms of paragraph 3 of Justice Mudau's order on failure of the respondent to comply with the provisions of paragraph 2 of that order, the applicant was granted leave to approach the court for relief and to set the matter down again, on no less than 48 hours' notice to the respondent.

[6] The parties agreed on 27 November 2020 that service of all processes will take place via email. Accordingly, the supplementary affidavit pertaining to this hearing was served on the respondent's attorneys of record on Wednesday, 24 February 2021 at 13h05, via email as agreed between the parties. The respondent's attorneys of record confirmed receipt on the same date at 14h04.

[7] The matter appears before me unopposed as the respondent has not filed any answering affidavit to the applicant's supplementary affidavit.

[8] The respondent did not file an answering affidavit because on 22 February 2021 he received sudden and unexpected news of his sister's terminal illness and imminent death which made him not able to concentrate on the application. When he received the message from his attorneys of record that the supplementary affidavit has been served, he immediately instructed them to request a postponement of the matter which was flatly refused by the applicant.

[9] The respondent has, as a result, filed a substantial application for the postponement of the matter hopelessly out of time on the morning of the hearing of the matter. The respondent does not state why it is that the application was filed only on the morning of the hearing when he had been aware as early as 24 February 2021 that the applicant was going to oppose the postponement. There is, also, no application for condonation for such late filing.

[10] The respondent has always been aware that these proceedings will be brought on short notice as the applicant was in the order granted on

4 December 2020 granted leave to approach the court on not less than 48 hours' notice to him.

[11] The respondent seeks the postponement on the ground that the application brought by the applicant is ill conceived on the basis which includes, amongst others, that:

11.1 a substantial amount of the monies claimed are not due and payable to the applicant, in terms of the order relied on by the applicant;

11.2 following on from the above, the applicant lacks *locus standi* to bring this application; and

11.3 the application is an abuse of legal process as the monies owed are far less than the amount claimed. The admitted small arrears were, according to the respondent, occasioned by the adverse effects of the COVID pandemic which severely affected his practice.

[14] The grounds raised by the respondent simply misses the point of the application. In accordance with the court order of Justice Mudau granted on 4 December 2020 the respondent was ordered to pay to the applicant an amount of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), by no later than 17h00 on Friday 18 December 2020. The respondent concedes in his papers that not all the amount has been paid.

[15] What the respondent does not understand is that in failing to pay the full amount of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), by no later than 17h00 on Friday 18 December 2020, he contravened the court order and is, in that sense, in contempt of the court order.

[16] The respondent's proposition that the small arrears that are outstanding were occasioned by the adverse effects of the COVID pandemic which severely affected his practice, does not assist his case. At the time when the COVID pandemic was declared a national disaster which occasioned the lockdown in the country, he was already in contravention of the court

order having not paid the full amount he was ordered by the court to pay to the applicant.

[17] The respondent, having not paid the full amount as ordered, remains in contempt of the court order. The application for postponement will, as such, not succeed as the grounds raised by the respondent will not avail him in the main application.

[18] The court in *Tasima (Pty) Ltd and Others v Department of Transport and Others*,<sup>1</sup> the court held that:

"(18) Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCll Systems (Pty) Ltd* 2008 (4) SA 326 (SCA) para 9. *Fakie* also held that whenever committal to prison is sought, the criminal standard of proof applies (para 19). A declarator of contempt (without imprisonment) and a mandatory order can however be made on the civil standard (see *Fakie* para 42). The applicant for a committal order must establish (a) the order, (b) service or notice of the order; (c) non- compliance

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<sup>1</sup> [2016] 1 All SA 465 (SCA).



with the terms of the order and (d) wilfulness and *mala fides*, beyond a reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears the evidentiary burden in relation to (d) (*Fakie* para 42). Should the respondent therefore fail to advance evidence that establishes reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt (*Fakie* paras 22-24)".

[19] It is the applicant's submission that the respondent should be held in contempt of Justice Samela's order of 29 July 2013, in that: he was aware of the order; he failed to comply with the order in that he did not pay the applicant the sum of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), as he was directed to pay, which failure was done wilfully and *mala fide*.

[20] The applicant submits that in an attempt to avoid having to proceed with the contempt application, she instructed the sheriff of the High Court to

execute the re-issued writ for the same arrears as stipulated in the urgent order, as a matter of urgency.

[21] The sheriff, I am told, experienced serious difficulties in gaining access to the respondent's property and was thus not able to execute the writ until 20 January 2021. The sheriff's return of service includes an inventory listing the movables that were eventually attached, in the amount of R19 000 (Nineteen Thousand Rand), but the movables are said to be the subject of an interpleader application.

[22] The sheriff was instructed to return to the respondent's premises to locate and attach the respondent's motor vehicle which the applicant had ascertained that it belonged to the respondent. The sheriff provided a return of service on 11 February 2021 indicating that his further attendances at the premises in an effort to locate the motor vehicle were unsuccessful as the motor vehicle could not be found. The sheriff further noted that the respondent, in an affidavit provided to him, indicated that the motor vehicle had been sold. Despite such a sale, no payment was made to the applicant.

[23] It is said that in an affidavit the respondent, without attaching the sale agreement, states under oath that while he remains the registered owner of the motor vehicle, he is no longer the legal owner thereof as it has been sold. No further details of the sale are provided, save to state that the respondent has not been in possession of the motor vehicle since 17 December 2020. It is the applicant's contention that the respondent is, in this regard, wilfully and in complete disregard of this court's order, evaded service by the sheriff in order to ensure that his asset could be dissipated prior to the expiry of the period within which he was due to make payment to the applicant for arrear maintenance.

[14] The applicant contends further that the respondent sold an immovable property which he held as an investment to his cousin for an amount of R550 000 (Five Hundred and Fifty Thousand Rand). According to the applicant, the respondent did this as a flagrant attempt to ensure that the property could not be attached to satisfy his legal obligations to his children in terms of the court order. The children in no way benefited from the proceeds of this sale.

[25] The applicant submits that the respondent's actions can only be seen as a wilful and *mala fide* attempt to escape the consequences of the court order and further to hamstring the applicant's attempts to enforce the court order against him.

[26] I am satisfied that the applicant has made out a case for the relief she seeks in this matter. The respondent is well aware of the order of court granted on 29 July 2013 directing him to pay a sum of R138 413, 90 (One Hundred and Thirty-Eight Thousand Four Hundred and Thirteen Rand and Ninety Cents), to the applicant. He failed to comply with this order and another court order was granted against him on 4 December 2020. The respondent's disobedience, as set out in this judgment, is clearly wilful and *mala fide*. An order should be made out directing that the respondent be held in contempt of court and a warrant be issued for his arrest and he be committed to imprisonment for a period of three (3) months.

[17] Consequently, the following order is made:

1. The application for postponement is dismissed.
2. The respondent, Mr Adrian John Samuels, is declared to be in contempt of Justice Samela's order of 29 July 2013.
3. The respondent is committed to a period of three (3) month's imprisonment.
4. The Registrar of this court is directed to issue a warrant of arrest in respect of the respondent, which warrant shall be effective 15 days from date of this order.

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**E.M KUBUSHI**  
**JUDGE OF THE HIGH COURT,**  
**GAUTENG DIVISION, PRETORIA**

Appearance:

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|------------------------|-------------------------------------|
| Applicant's Counsel    | : Adv. B. Hack                      |
| Appellant's Attorneys  | : <b>Thomson Wilks Incorporated</b> |
| Respondent's Counsel   | : Adv. J. Van Der Schyff            |
| Respondent's Attorneys | : <b>NSW Inc. Attorneys</b>         |

Date of hearing : 02 March 2021

Date of judgment : 02 March 2021