

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

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

Case Number: 64045/2020

THE STANDARD BANK OF SOUTH AFRICA LIMITED

(Registration number: 19[....])

Applicant

AND

SHAMASE, BUSISIWE BLESSED ELIZABETH

(Identity Number: 63[....])

First Respondent

SHAMASE, SIKHUMBUZO ARMSTRONG

(Identity Number: 67[....])

Second Respondent

JUDGMENT

H G A SNYMAN AJ

INTRODUCTION

[1] This is an application to have the second respondent (“*Dr Shamase*”)

found guilty of contempt of court for his alleged wilful and *mala fide* disregard of certain paragraphs of a court order granted by the Honourable Mr Justice Barit AJ on 25 October 2021 (*“the order”*). The terms of the order are quoted later herein. No relief is sought against the first respondent (*“Ms Shamase”*). The applicant (*“the bank”*) cited her in these proceedings by virtue of her being cited as the first respondent in the main application, which resulted in the order being granted. Ms Shamase is cited for any direct and substantial interest that she may have in the application. Dr Shamase and Ms Shamase will, where applicable, jointly be referred to herein as *“the respondents”*.

[2] The respondents brought a counter-application for relief that the late filing of their answering affidavit and a counter-application be condoned. In terms of the counter-application, they move for relief that paragraphs 4.1 and 4.2, 5 and 6 of the order be deleted *in toto*. Dr Shamase’s alleged contempt is founded on paragraphs 5 and 6 of the order.

BACKGROUND

[3] On 3 May 2017 the bank obtained summary judgment against the respondents in respect of themselves and their erstwhile company, Sham-Mock (Pty) Ltd (*“Sham-Mock”*). A copy of this order is annexed to the founding affidavit. That order does not refer to Sham-Mock, but this court accepts that this is the context in which it was granted. This order related to outstanding payments in respect of a vehicle asset finance (*“VAF”*) facility (for a different vehicle than the vehicles relevant to this application), a home loan agreement in respect of the respondents’ Zimbali property (*“the Zimbali property”*), as well as overdraft facilities and credit cards.

[4] The summary judgment directed the respondents and their erstwhile company to jointly and severally make payment of R2,631,547.56 in terms of the current account with their erstwhile company; R237,459.64 in respect of the credit card held with their company; and R945,973.96 in respect of the

vehicle asset finance account.

[5] In addition, the respondents' holiday home, i.e. the Zimbali property situated in the Zimbali estate in KwaZulu Natal, was declared specifically executable. It was directed that their Mercedes-Benz GL350 BlueTEC with registration number SZ[...] be returned to the bank within 10 days of granting of the summary judgment.

[6] In the latter part of 2017, the bank and the attorneys on behalf of the respondents ("*Hartzenberg*") negotiated a settlement in terms of which the respondents would sell the Zimbali property privately, and the proceeds would be used to settle the outstanding summary judgment, as well as other outstanding accounts held with the bank. The bank's attorneys of record were at all relevant stages Bowman Gilfillan Inc ("*Bowmans*"), and still are.

[7] In terms of the 2017 repayment agreement, the sale proceeds of the Zimbali property (R7,100,000.00) were deposited into Bowmans' trust account. It would be allocated to the Sham-Mock overdraft current account, the Sham-Mock credit card, the Sham-Mock VAF facility, Dr Shamase's credit card, the first VAF account, the second VAF account, Dr Shamase's overdraft, Ms Shamase's overdraft, the home loan account, and legal fees. This totalled the amount of R6,350,756.10. The proceeds of the Zimbali property were used to pay R3,401,710.29 of this, namely: the Sham-Mock overdraft; Dr Shamase's overdraft; and Ms Shamase's overdraft. The balance of the outstanding amount was R2,949,025.81.

[8] On 18 January 2018, Bowmans transferred a portion of R2,949,025.81 of the remaining proceeds of the sale of the Zimbali property from its trust account into the current account held by Dr Shamase (to be utilised to repay the remaining agreed outstanding amounts in respect of the various finance agreements). On the same day, the respondents' erstwhile private banker, Ms Thompson, sent a letter to the respondents notifying them that they could

collect the eNatis documents in respect of the vehicles from the bank, which the respondents did.

[9] On 19 January 2018, the bank received an email from an authorised officer of the South African Reserve Bank (“SARB”) advising that the R2,949,025.81 (the amount which was transferred to Dr Shamase’s current account for purposes of settling the outstanding amounts on the finance agreements), had been attached by SARB in terms of regulations 22A and/or 22C of the Exchange Control Regulations.

[10] In light of the SARB attaching the funds, Ms Thompson telephonically contacted Dr Shamase to ask him to hand back the eNatis documents in respect of the vehicles because the VAF agreements had not been settled (as the funds that were supposed to have been used also to settle the VAF agreements, had in the meantime been attached by SARB).

[11] Two days later, namely on 25 January 2018, Ms Thompson collected the eNatis documents from Dr Shamase’s son at their Glenvista property. It does not appear that Dr Shamase resisted this at that time.

[12] On 25 January 2018, Bowmans directed an email to Hartzenberg, attaching a letter which was sent to the SARB. In this letter Bowmans set out the history of the legal action taken in 2017 against the respondents and the chronology of events. In addition, Bowmans set out the payments which were made to it in respect of the private sale of the Zimbali property, and that as of 18 January 2018, R519,997.96 and R519,731.83 were still outstanding in respect of the vehicles. Bowmans advised that it made payment of the total amount in respect of the VAF account, credit card and home loan R2,949,025.18 into Dr Shamase’s current account and that the balance remaining in their trust account (i.e. R749,263.91) was earmarked for transfer to Hartzenberg.

[13] On 26 January 2018, Bowmans received an email from Hartzenberg requesting that R374,631.95, i.e. half of the remaining proceeds on the sale of the Zimbali property still held in Bowmans' trust account, be transferred into his trust account, as his clients intended to challenge the SARB decision to attach his clients' funds. Bowmans duly transferred the R374,631.95 to Hartzenberg. The respondents then eventually never challenged SARB's actions.

[14] On 2 February 2018 the SARB issued a second notice in terms of the Exchange Control Regulations 22A and 22C in respect of the remaining amount of R374,631.95 held in Bowmans' trust account.

[15] On 26 May 2020 Bowmans sent a comprehensive letter to Hartzenberg wherein it set out the issue of the attachment by SARB, recording and confirming which accounts have been fully paid; and listing those accounts which remained outstanding as a result of the attachment of the funds by SARB. This included the two VAF accounts relevant for purposes of the present application.

[16] The bank contends that this letter, which was attached by the respondents to their answering affidavit, shows that they were completely aware of which accounts had been settled by the Zimbali property proceeds and which had not.

[17] On 17 August 2021, Bowmans sent an email to Hartzenberg where it attached a letter of demand and request in terms of section 129(5) and 129(6) of the National Credit Act. The letter of demand requested payment, *inter alia*, for the outstanding amounts under the VAF agreements. It set out the exact outstanding balances in respect of the VAF agreements. Hartzenberg emailed Bowmans on 26 August 2020, acknowledging receipt of the section 129(5) and 129(6) demand and electing their offices as the *domicilium citandi et executandi* for his clients.

[18] Bowmans then sent Hartzenberg a demand in terms of section 129(1)(a) of the National Credit Act on 15 September 2021. The letter of demand requested payment for the outstanding amounts under the two VAF agreements and set out exactly the outstanding balances in respect thereof, namely at that stage being R639,428.37 and R639,235.84.

[19] Still there was no payment in respect of the outstanding VAF agreements, the home loan agreement in respect of the Glenvista property as well as the credit card facility of Dr Shamase. On 8 December 2020 the main application was served on Hartzenberg's offices per Sheriff. The main application was also served at the Glenvista property, the respondents' residential address, situated at 19 Cunningham Road, Glenvista, Extension 3. It was this application which eventually resulted in Barit AJ granting the order.

[20] As part of the main application the bank *inter alia* sought orders for: payment in respect of home loan facilities and to declare the respondents' immovable property in Glenvista specifically executable; payment by Dr Shamase in terms of a credit card facility; payment in respect of certain vehicle asset finance agreements, and a claim for the return of the vehicles subject to those vehicle asset finance agreements from Dr Shamase.

[21] On 15 January 2021, SARB made a final decision on the attached funds held in Dr Shamase's current account (R2,949,025.81) and in Bowmans' trust account (R374,631.95), and these amounts were forfeited.

[22] On 22 January 2021, Bowmans sent a letter to Hartzenberg requesting that the respondents surrender the vehicles for them to be kept in storage by the bank until there is an outcome to the main application, alternatively that the respondents provide proof of insurance of the vehicles as well as a written undertaking that they will be kept in safe custody.

[23] Hartzenberg emailed Bowmans on 26 January 2021 confirming that the vehicles are insured and stating that he will address the other items in a separate letter once he has consulted with his clients.

[24] On 5 February 2021, Hartzenberg emailed Bowmans advising that his clients will hold on to the vehicles and that if the respondents decided to sell the vehicles, they will duly inform the bank prior thereto.

[25] The respondents served a notice of intention to oppose the main application on 8 February 2021.

[26] On 1 March 2021, Hartzenberg emailed Bowmans stating that the vehicles are insured and that trackers were installed on the vehicles. Hartzenberg advised that if the vehicles were sold, his clients will immediately inform Bowmans' offices and will ensure that the bank's rights are protected at all times.

[27] The respondents delivered no answering affidavit in the main application, and Bowmans set the application down on the unopposed motion roll. The notice of set down was served on Hartzenberg on 12 October 2021 and uploaded onto CaseLines, to which Hartzenberg had access. On the day of the hearing, i.e. 25 October 2021, the matter came before the Barit AJ. Barit AJ directed Bowmans to contact Hartzenberg to ascertain whether his clients will be attending court. The bank's attorney, Bowmans' Ms Ashley Graham (*"Ms Graham"*), telephonically contacted Hartzenberg c/o Mr Hartzenberg. Mr Hartzenberg advised that he was aware that the hearing of the main application was to take place that day; that he had communicated the set down to the respondents; and that he would not be attending the hearing. The respondents were therefore clearly in wilful default. The bank's counsel advised Barit AJ of this telephonic exchange between the parties' attorneys. Barit AJ proceeded to grant the order the bank sought. In terms of the order the following orders were granted:

“1. The first and second respondents are ordered pay (jointly and severally the one paying the other to be absolved) R3,445,898.94 with interest thereon at the rate of 6% per annum from 8 October 2021 to date of final payment together with monthly insurance premiums of R2,894.13.

2. An order declaring the following the Property specially executable and authorising a writ in execution in respect of:

ERF [...] GLENVISTA EXTENSION 3, TOWNSHIP;

REGISTRATION DIVISION I.R.

IN THE EXTENT 319 SQUARE METRES,

HELD BY DEED OF TRANSFER NO. T6[...]6

3. A reserve price of R2,450,000 is set in respect of the abovementioned immovable property.

4. The second respondent is ordered to pay the applicant:

*4.1 **R681,285.73** with interest thereon at the rate of 6.00% per annum, which interest is calculated daily and compounded monthly in arrears from 24 July 2020 to date of final payment, both days inclusive.*

*4.2 **R681,075.60** with interest thereon at the rate of 6.00% per annum, which interest is calculated daily and compounded monthly in arrears from 24 July 2020 to date of final payment, both days inclusive.*

*4.3 **R88,526.09** with interest thereon at the rate of 07.00% per annum, which interest is calculated daily and compounded monthly in arrears, from 7 October 2021 to date of final payment, both days inclusive.*

5. The second respondent is ordered to return and deliver the following motor vehicles to the applicant within 10 (ten) days of the granting of the Order:

5.1 Mercedes-Benz C200 (chassis number WDD[...] and engine number 27[...]); and

*5.2 Mercedes-Benz C180 (with chassis number WDD[...] and engine number 27[...]). (**‘the Vehicles’**)*

6. The Sheriff of the above Honourable Court is authorised to take possession of the Vehicles and return the Vehicles to the applicant in the

event of the second respondent failing to return the Vehicles within 10 (ten) days of granting of this order.

7. The application for an order in respect of any shortfall from the sale of the Vehicles is postponed sine die and the applicant is granted leave to duly supplement the founding affidavit in this regard.

8. The first and second respondents are ordered to jointly and severally pay the costs of the application on an attorney and own client scale.”

[28] This application for contempt pertains to Dr Shamase’s non-compliance with paragraphs 5 and 6 of the order. The application for contempt therefore specifically relates to Dr Shamase’s failure to return and deliver the vehicles and/or his failure to allow the Sheriff to take possession thereof. In this regard the bank contends that the vehicle finance agreements concluded between the bank and Dr Shamase terminated due to the effluxion of time. Moreover, that the bank is the owner of the vehicles, that Dr Shamase has no entitlement to retain the vehicles in his possession; and that the court has already ordered that the vehicles must be returned to the bank.

[29] Pursuant to the order being granted, namely on 4 November 2021, Bowmans sent a letter to Hartzenberg confirming that the order was granted. Bowmans confirmed the following:

“2. Thank you for confirming telephonically on Monday 25 October 2021 that you and your clients were aware that the above application was enrolled for hearing and that you will not be attending court.

*3. We write to you as a matter of courtesy to advise the Draft Order sought by our client was made an Order of Court (‘the **Order**’). A copy of the Order is attached. We will attend to serving same upon your clients.*

4. We are instructed by our client to write to you as a matter of courtesy to request that:

4.1 ...

4.2 Your client, Dr Shamase, is to return the vehicles described in

*paragraph 5.1 and 5.2 of the Order ('the **Vehicles**') to our client **by no later than 9 November 2021**, being within 10 days from the date of the granting of the Order (which period is contemplated by paragraph 6 of the Order). To this end, please revert with the time and proposed date (being before 9 November) and proposed address at which our client's agent can attend to collect the vehicles, which will then be sold and the proceeds utilised towards the amount set out in paragraph 4.1 and 4.2 of the Order to the extent that these are not satisfied in full in accordance with the aforementioned demand. Failing which we hold instructions to proceed with writs for (i) the attachment and delivery of the Vehicles; (ii) execution where the amount ordered in paragraph 4.3 of the Order is concerned; (iii) the execution of the immovable property."*

[30] Hartzenberg did not respond to the above letter.

[31] On 5 November 2021, the Sheriff, Johannesburg South, attended at the Glenvista property, being the respondents' primary residence at the time and served the order on both respondents by affixing a copy thereof to the principal door. Dr Shamase did not voluntarily surrender the vehicles by 9 November 2021, being 10 days from date of the order. The bank therefore contends that Dr Shamase is in default of paragraph 5 of the order. The bank contends that the wilful nature of Dr Shamase's default is *inter alia* demonstrated by virtue of the events that subsequently transpired described below.

[32] On 14 December 2021, the Registrar issued a writ of delivery in respect of the vehicles contemplated by paragraph 6 of the order. In terms of the writ of delivery, the sheriff was authorised to take the vehicles from Dr Shamase at his chosen *domicilium citandi et executandi* address and place the vehicles in possession of the bank.

[33] On 21 January 2022, the Deputy Sheriff, together with the bank's

authorised representative, attended the property of the respondents in order to serve the writ of delivery and its annexure. The writ was served on Ms Shamase who refused to disclose the whereabouts of the vehicles and the vehicles were not located at the immovable property.

[34] On 9 February 2022, Bowmans sent a letter to Hartzenberg in response to a without prejudice email Bowmans received on 1 February 2022. In this letter Bowmans advised Hartzenberg that Dr Shamase is in contempt of paragraphs 5 and 6 of the order and that Bowmans holds instructions to instruct the sheriff to again attempt to locate and uplift the vehicles. Failing which, the bank will have no option but to pursue a contempt application against Dr Shamase, in the event that payment of the amounts ordered in respect of the vehicles was not made.

[35] On 16 February 2022, Hartzenberg sent an email to Bowmans advising that Dr Shamase undertook to make payment in respect of the vehicles on or before 25 February 2022. Bowmans responded to this correspondence on 22 February 2022. In this letter Bowmans advised Hartzenberg that the bank instructed them that should the bank not receive payment of the amounts ordered by the court together with interest thereon as set out in paragraphs 4.1, 4.2 and 4.3 of the order, into the accounts designated in their letter dated 9 February 2022 in respect of the credit card, and the motor vehicles, and proofs of payment thereof by 17:00 on Friday, 25 February 2022, the bank would immediately resume with its instructions to the Sheriff to resume execution in respect of these paragraphs of the order. It was also stated that as previously advised, this will include instructions to the Sheriff to attend on a last occasion at the respondents' property in Glenvista in an attempt to uplift the vehicles in accordance with paragraph 6 of the order. It was stated that the bank reserves its rights to pursue the contempt application against Dr Shamase in the event that the Sheriff renders a second *nulla bona* return. It was recorded that as the respondents have indicated that they are in possession of the motor vehicles, the respondents may of course voluntarily

surrender them to the Sheriff or furnish the Sheriff with particulars of where the vehicles can be located when the Sheriff attends at the property.

[36] On 24 February 2022, Hartzenberg sent an email to Bowmans asking them to provide the full amounts owing to the bank by 15 March 2022. In reaction, Bowmans provided Hartzenberg with certificates of balance in respect of the vehicles indicating the outstanding amounts owing as of 22 February 2022.

[37] However, the respondents did not make any payments by the stated date and Dr Shamase did not return the vehicles.

[38] The Sheriff's further attempts to uplift the vehicles were that on 5 March 2022, the Sheriff attended the movable property in order to uplift the vehicles. The return of service demonstrates that the address was found to be locked and unattended and the vehicles were not visible on the premises. On 7 March 2022 the Sheriff attended the immovable property a third time to uplift the vehicles in terms of paragraph 6 of the order. Once again, the return of service indicated that the address was found to be locked and unattended and the vehicles were not visible on the premises. On 11 March 2022, the Sheriff attended the immovable property a fourth time to uplift the vehicles. Once again, the return of service indicates that the address was found to be locked and it was impossible to ascertain whether the respondents were still residing at the given address. The neighbours were also unable to confirm occupancy of the property and the vehicles were not visible at the premises. The bank also attempted, on various occasions, to track the location of the vehicles, but has been unable to do so successfully.

[39] On 4 April 2022, Bowmans wrote to Hartzenberg in which it recorded that Bowmans held instructions, as previously advised, to proceed with the contempt of court application against Dr Shamase in respect of his failure to comply with paragraphs 5 and 6 of the order.

[40] Hartzenberg responded by stating that the respondents acknowledge receipt of the letter of 4 April 2022 and advised that if the bank proceeded with the contempt of court application, such application must be served on his offices.

[41] The contempt application was issued on 24 June 2022 and was served by hand on Hartzenberg's offices on the same day. On 30 June 2022 the respondents served a notice of intention to oppose.

[42] On 4 July 2022 the sale of the Glenvista property was registered in the deeds office. The proceeds of the Glenvista property were received in the amount of R2,850,000.00 on 5 July 2022. This was in respect of the amounts owed by the respondents in terms of prayer 1 of the order. However, the amount which was ordered to be paid in respect of the home loan agreement was R3,445,898.94. There therefore still remained a shortfall. The respondents' contention raised for the first time in their reply to the condonation application that the proceeds of the Glenvista property were used to pay for the vehicles, is therefore not correct. In any event, it goes against the respondents' contention that the outstanding amounts of the vehicle finance agreements were already settled in 2018.

[43] The answering affidavit in the contempt application was due on 21 July 2022. It is common cause that the respondents did not file an answering affidavit by this date.

[44] On 17 October 2022, Bowmans served a notice of set down on Hartzenberg for the hearing of the contempt application on the opposed roll of 2 November 2022.

[45] On 31 October 2022, i.e. two days before the hearing of the matter and three months out of time, the respondents served their answering affidavit in

the contempt application, together with a counter-application and application for condonation. As part of the counter-application, the respondents seek condonation for the late filing of their answering affidavit and the counter-application; a rescission of the order, alternatively varying the order by deleting prayers 4.1, 4.2, 5 and 6 *in toto*; and costs in the event of opposition. I agree with the submission on behalf of the bank that properly construed, what the respondents seek is actually not a rescission of the entire Barit AJ order. They merely seek the paragraphs identified to be deleted.

[46] On 2 November 2022, the contempt application was removed from the unopposed roll with Dr Shamase tendering the wasted costs occasioned by the removal. The bank's replying affidavit was filed out of time on 20 January 2023 (it was meant to be filed on 12 December 2022). As I see it, nothing turns on this.

THE PARTIES' CONTENTIONS

[47] The bank *inter alia* contends that the wilful default and *mala fides* of Dr Shamase are demonstrated by the fact that shortly after the main application was issued, the bank called for an undertaking that the respondents would retain possession and custody of the vehicles pending the determination of the main application. The undertaking ultimately furnished came about following various exchanges of correspondence in which the bank, as the owner of the vehicles, requested that Dr Shamase return the vehicles. This was for the vehicles to be retained in storage by the bank pending the granting of the relief sought in the main application, alternatively requesting that the respondents confirm that they have proof of insurance of the vehicles. They also had to provide a written undertaking that the respondents will in the meantime retain possession of the vehicles and preserve the safe custody and condition of the vehicles.

[48] In reaction, Hartzenberg confirmed that the vehicles were indeed insured

and confirmed that the respondents would retain possession of the vehicles. Moreover, Hartzenberg advised that if the matter was not resolved, which the bank understood to mean by virtue of a without prejudice settlement, the respondents would inform the bank of the “*unlikely event of sale*” in order to “*ensure that the applicant’s rights are protected qua owner*”. This was reiterated by Hartzenberg later on, who recorded that if the respondents sought to sell the vehicles, Hartzenberg would immediately inform Bowmans of such intention and that he would “*ensure that [the bank] are protected at all times*”.

[49] As part of the condonation application, the respondents contend that purely from a financial perspective, they were unable to secure the funds to allow Hartzenberg to secure the services of counsel to draft the answering affidavit earlier.

[50] Taking into account that the respondents’ notice of opposition was filed on 28 June 2022, and that the answering affidavit was only filed on or approximately 31 October 2002, the answering affidavit was filed more than three months late. As this court sees it, the delay is left largely unexplained.

[51] The respondents contend that the conduct of the bank has financially crippled them and has effectively removed their income generating streams “*until very recently*”. This allegedly made it impossible for them to timeously place their attorney in the financial position to proceed with the opposition of the litigation. Their position is further that SARB had seized a large amount of the proceeds from the sale of their Zimbali property, whereafter the bank refused or failed to fully account to them for the balance paid to its attorneys, which amount has fully, according to them, settled their indebtedness. It was stated that the present application, and the preceding main application, were thus fraudulently sought and obtained. They accordingly instructed Hartzenberg to proceed simultaneously with an application to set aside the order granted in the main application, or at least to vary it to bring it in line with

“the true facts”. It was stated that had their position been different, they would not have been in default in respect of same, for which they apologise. Furthermore, they contend that they have reasonable prospects in opposing the application as they are not in wilful contempt of the order.

[52] It was stated that in as much as this court may feel that their explanation for the default to timeously oppose the matter is lacking, Dr Shamase will ask, on this basis, that they late filing be condoned.

[53] The respondents raise as a point *in limine* that the fact that Ms Shamase was joined as a respondent in the application, constitutes a misjoinder. Dr Shamase also raised points *in limine* regarding an alleged lack of authority of the bank's deponent, and the fact that the bank attached emails of Hartzenberg to the application, which allegedly infringed their right to legal professional privilege. The latter two points were, however, correctly in my view, not pursued before this court.

[54] The respondents argued in respect of the first point *in limine* that since Ms Shamase has been cited in as much as she may have a direct and substantial interest in the matter, and that no relief is sought against her in the application in which only a contempt of court order is sought against Dr Shamase, this constitutes such misjoinder. As I see it, this point lacks merit. Ms Shamase clearly has a direct and substantial interest in the matter and the point *in limine* ought therefore to fail.

[55] Regarding his financial predicament, Dr Shamase contends that he is a medical doctor by profession, but a few years back he and his wife became involved in international business transactions, which led to SARB seizing funds from their bank account, for alleged contraventions of the foreign exchange regulations. He explains that this was in lieu of SARB's investigation into the conduct of Mr K Zuma, a son of former president Jacob Zuma. He also complains that the bank called up basically all of their facilities, which

were substantive at the time. As part of his opposition Dr Shamase gives an account of his dealings with the bank. As appears from the heads of argument filed on behalf of the respondents the position of the respondents can be summarised as set out below.

[56] The outstanding balances on the vehicles in question were settled in January 2018. Thereafter ownership passed to Dr Shamase. He argues that if the opposite was true, then why did Bowmans pay over the amount of almost R400,000 to his attorneys; and why would the bank have allowed the respondents to give the vehicles up as security to SARB in an attempt to avoid forfeiture, also that the bank handed over the eNatis documents to the respondents. As appear from what is stated earlier herein, the bank fully explained the transfer to Hartzenberg.

[57] It is, however, common cause that after handing the eNatis documents over to Dr Shamase, the bank again collected it from the respondents. Dr Shamase argues that the moment that the eNatis documents were handed over to him, the process of ownership was finalised and finally passed to the respondents and that the unlawful removal of the documents could not serve to reverse the process. I agree with the submission on behalf of the bank that the mere handing over of the eNatis certificates to Dr Shamase did not result in a transfer of ownership. Particularly not, as the outstanding amounts in terms of the vehicle finance agreements had at that stage not been settled because of the intervention of SARB. Dr Shamase alleges that he is unable to practice in the field of his expertise as a medical doctor, since the insurance premiums in that field have become unaffordable. He does not say exactly what his field of expertise is, or why he could not practice in other medical fields where there are lesser insurance requirements. The only support he provides for his predicament is a lease agreement his son entered into with his landlord. He says that is proof that he cannot afford his own accommodation and therefore stays with his son. The only other fact in support of his contentions is an outstanding bill from Hartzenberg. As I see it,

this does not suffice.

[58] I agree with the submission on behalf of the bank, with reference to **Du Plessis v Wits Health Consortium (Pty) Ltd [2013] JOL 30060 (LC), paragraph 16 and 17** (which authority is also quoted in the heads of argument on behalf of the respondents), that the respondents do not need the threshold for the defence of a lack of funds. An applicant needs to provide more than a mere claim that the reason for the delay is lack of funds. The applicant has to take the court into his or her confidence in seeking its indulgence by explaining “*when*”, not only that, he or she finally raised funds to conduct a case. Also how and when did he or she raise the funds. The “*when*” aspect of the explanation is important as it provides the court with the information as to whether there was any further delay after raising the funds and whether an explanation has been provided for such a delay. As I see it, Dr Shamase has failed in this regard.

[59] In support of the counter-application Dr Shamase summarises that his failure to attend to the main application timeously was precipitated by the fact that for literally several years he was left without any sustainable form of income when the application was launched. For this reason, his attorney was unable to timeously brief counsel and properly represent the respondents in the application, which led to the granting of the order. Dr Shamase argues that the order was *de facto* granted in the respondents’ absence. He was very much cognisant of the fact that the application was launched at a very late stage for the same reason (the absolute absence of any financial backing), but applies based on this fact that the late filing be condoned. He states that he has a *bona fide* defence since having been in the financial position to timeously oppose the matter, the respondents would have been in a position to explain to the court the basis of their opposition. This was that they were the lawful owners of the vehicles as of January 2018, as their indebtedness to the bank has become settled and the eNatis documents had been delivered. He contends that the moving around of the funds paid to the bank that had

already been allocated, do not serve to erase the fact. As I see it this is clearly not what transpired.

[60] In its reply the bank stated that the respondents are seeming to rescind an order to which they have already acted on in respect of the prayers and orders that are not in dispute. The bank states that no good cause has been shown to allow this court to grant condonation for the late filing of the respondents' answering affidavit. In this regard the bank says that the allegation by Dr Shamase that he did not have money to pay the legal representatives and draft papers is disingenuous.

[61] As appears from the heads of argument filed on behalf of the respondents it is accepted that the order was granted and the terms thereof are not in dispute. It is also accepted that the order is partly *ad pecunium solvendum* and partly *ad factum praestandum*. It is also accepted that Dr Shamase bore knowledge of the existence of the order, but chose not to fully comply with the disputed prayers. It is therefore common cause that the bank has established *prima facie* its entitlement to an order for contempt.

[62] The argument on behalf of the respondents therefore centres around whether Dr Shamase has placed sufficient evidence before this court to dispel the inference of *mala fide* contempt, and whether a case has been made out for the relief in the counter-application.

THE LAW IN RELATION TO CONTEMPT OF COURT PROCEEDINGS

[63] As Cameron JA held in **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** at paragraph [6]:

"It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute

or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'."

[64] The essential object of contempt proceedings is to obtain the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order as well as to compel performance in accordance with the order. The proceedings may also be brought for the sole purpose of punishing the respondent.¹

[65] It is trite that the approach of our courts has been that civil contempt can (only) be committed in the case of orders *ad factum praestandum* (i.e. orders to do, or abstain from doing, a particular act or delivering a thing). This is as opposed to orders *ad pecuniam solvendam* (i.e. orders to pay a sum of money). Moreover, it is trite that formerly the onus that an applicant had to satisfy was the same as in civil matters, namely on a balance of probabilities, but has more recently been held to be normal criminal onus, namely beyond reasonable doubt, particularly where the incarceration of the respondent is sought.²

[66] Cameron JA summarised the position as follows in paragraph [42] of **Fakie** *supra*:

"[42] To sum up:

(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional

¹ **Fakie**, *supra*, [6] – [8], pp.332A–333B.

² **Fakie**, *supra*, [19] – [20].

scrutiny in the form of a motion court application adapted to constitutional requirements.

(b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.

(c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

(e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities."

[67] In the result, once a failure to comply with a court order has been established, wilfulness will normally be inferred, and the onus will rest upon the person who failed to comply with such order to rebut the inference of wilfulness on a balance of probabilities. This can for instance be done by such person establishing that he did not intentionally disobey the court's order. Once the applicant proves the three requirements as aforesaid, unless the respondent provides evidence raising reasonable doubt (where imprisonment is sought), or on the balance of probabilities (for relief other than committal) as to whether noncompliance was wilful and *mala fide*, the requisites of contempt will be established.

[68] Where the respondent is aware of the order and had disobeyed it or had neglected to comply with it, the onus is on him to rebut the inference that he wilfully disobeyed or had neglected to comply with the order.

[69] The court will not entertain an application for committal if no wilful or

reckless disregard of the court's order has been proved. Before the respondent will be found guilty of contempt of court, it will have to be shown that the disobedience of the order was not only wilful but also *mala fide*.

[70] In **Pheko II**³ the Constitutional Court dealt with the presumption in contempt applications and held as follows:

"[t]he object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

...

The presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create a reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established." [Emphasis supplied]

[71] This was reaffirmed in **Secretary, Judicial Commission of Inquiry Into Allegations of State Capture v Zuma and others 2021 (5) SA 327 (CC)**, where the court held as follows at paragraph 37:

"As set out by the Supreme Court of Appeal in Fakie, and 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 and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge

³ **Pheko v Ekurhuleni City** 2015 (5) SA 600 (CC) at [28] and [36].

this burden, contempt will have been established.”

DISCUSSION

[72] The bank initially sought an order for the imprisonment to be suspended for an indefinite period. During argument, following certain concerns raised by this court, the bank asked that any such order should rather be suspended for a period of three years.

[73] It is common cause in this matter that the order was granted against Dr Shamase; that the order was served on him or that he had knowledge of it, and that Dr Shamase failed to comply with the order. Wilfulness and *mala fides* are therefore presumed. Dr Shamase therefore has the evidentiary burden to establish reasonable doubt since the bank seeks his imprisonment, albeit a suspended “*sentence*”.

[74] Dr Shamase therefore had to show reasonable doubt, i.e. that his version is reasonably probably true. Based on the history of the matter, including that immediately after the order was granted Dr Shamase attempted to enter into arrangements to avoid the vehicles being handed over by making offers through his attorneys for the amount to be settled, there is no doubt that Dr Shamase was indeed in wilful default.

[75] The extent of his failure to comply for an extended period since 25 October 2021 to 31 October 2022, i.e. nearly a year later when he filed his answering affidavit, is significant. As I see it, the fact that Dr Shamase for the first time on this occasion more than four years after he had already returned the eNatis documents to the bank, is support for the bank’s contention that Dr Shamase’s version cannot be reasonably possibly true. He throughout this period avoided the bank from attaching the vehicles through the Sheriff. The bank after four failed attempts and putting Dr Shamase on terms, proceeded to launch the application for contempt.

[76] I therefore find that Dr Shamase's failure to comply with the order is not only wilful, but also *mala fide*.

[77] Based on the bank's careful analysis of the cashflows it is also clear that Dr Shamase's defence that he is in fact the owner of the vehicles and has paid the outstanding amounts lack merit. Although it is true that but for the intervention of SARB he would have been able to settle his indebtedness and would have retained the vehicles, that is not what happened. SARB seemingly on an unopposed basis seized the balance of the proceeds of the Zimbali property, which was earmarked for payment of his indebtedness, in the accounts of Dr Shamase and Bowmans. The amounts were later forfeited.

[78] As I see it, the fact that the bank returned the vehicles' eNatis certificates to Dr Shamase when it was under the impression that the transfer amount would be paid towards the outstanding indebtedness, prior to becoming aware of the SARB forfeiture, is of no moment. Immediately, when the bank realised this, they asked for the return of the eNatis certificates and these were collected from Dr Shamase. Dr Shamase's version that this was done unlawfully is not borne out by the correspondence and I also reject his version in this regard.

[79] In so far as the application for condonation is concerned, Dr Shamase's version that he was unable to resist the bank's attempts to recover the outstanding amounts and the vehicles from him is equally unpersuasive. Instead of instructing Hartzenberg in an attempt to make arrangements with the bank for payment of the outstanding balances, he could just as well have instructed Hartzenberg to record his opposition and at least record his version, namely that he is the owner of the vehicles and that the outstanding amounts have been settled. That he did not do. He only disclosed that on the eve of the first due date of the hearing of the contempt application in his answering affidavit. His version that he was not properly informed regarding the balances

due to the bank must equally fail. The bank through Bowmans at all relevant times painstakingly informed Dr Shamase exactly what the position was.

[80] As I see it, Dr Shamase's version is not raised as a real, genuine or *bona fide* dispute of fact, or are so farfetched, or clearly untenable that this court is justified rejecting it merely on the papers (**Wightman t/a JW Construction v Head Four (Pty) Ltd and another** 2008 (3) SA 371 (SCA) at [12] and [13]).

[81] Further, Dr Shamase's version that he has a lack of funds, which caused him not to timeously oppose the application, is highly speculative and unfounded. In support of this version one would have expected a detailed account of his financial position with supporting evidence and documentation. Instead he makes general remarks with reference to his predicament regarding the actions by SARB, the bank, and his inability to work. This, however, is wholly unsupported by any objective facts. Under the circumstances his version is also rejected. In any event, he fails to dispel the case made out against him for failure to comply with the court order and hand over the vehicles. That would not have had any impact on his finances. Significantly, he rather clung onto the vehicles under circumstances where he confirmed to Bowmans that these vehicles were properly insured and that trackers were installed on the vehicles, which obviously he was in a position to afford. This court agrees with the submission on behalf of the bank that it is significant that the respondents did not at that stage already dispute that the amounts remained outstanding and did not contend then that they were in fact now the owners of the vehicles in question.

[82] In so far as the application for rescission is concerned, even if condonation is granted, which this court is not prepared to do, I agree with the bank that Dr Shamase cannot rely on either rule 31(2)(b) or rule 42 of the Uniform Rules of Court (*"the rules"*). The application was not brought within 20 days after Dr Shamase had obtained knowledge of the order, but more than a year after the order was granted and admittedly came to his knowledge. Rule

42 caters for a mistake. This is not an instance where it can be said that the order was erroneously sought and granted.

[83] In so far as the common law is concerned, there must be a reasonable explanation for the default (which in this instance was approximately one year); the applicant must show that the application was made *bona fide*; and that he has a *bona fide* defence, which *prima facie* has some prospects of success. In view of my findings in respect of contempt it follows that Dr Shamase has not satisfied the requirements and should also not be successful in his application for rescission or variation. Dr Shamase has failed entirely to make out a case for his contention that the bank fraudulently obtained the order.

[84] In so far as costs are concerned, the applicant asks a punitive cost order, namely for a cost order as between attorney and own client as opposed to an order as between attorney and client. As the court held in the Zuma matter, *supra*, at paragraph 129, I do not consider it necessary to enter the debate as to the distinctions between costs on attorney and client scale as opposed to costs on an attorney and own client scale. If punitive costs are warranted, and I find that they are, there is no reason why they should not be on an attorney and client scale.

[85] In the result, the following order is made:

ORDER

1. The respondents' application for condonation is dismissed.
2. The respondents' counter-application is dismissed.
3. The second respondent is declared to be in wilful contempt of prayers 5 and 6 of the order of this court granted on 25 October 2021, under the

above case number by the Honourable Mr Justice Barit AJ.

4. The second respondent is sentenced and committed to imprisonment for a period of 90 (ninety) days, suspended for three years, on condition that the second respondent does not again breach the said terms of the court order.

5. The second respondent is ordered to pay the costs of the contempt application, the condonation application and the counter-application, on an attorney and client scale.

H G A SNYMAN

Heard in open court: 7 June 2023

Delivered and uploaded to CaseLines: 3 August 2023

Appearances:

For the applicant: Adv C van der Linde

Instructed by Bowman Gilfillan Inc

For the respondents: Adv ZF Kriel

Instructed by Hartzenberg Inc Attorneys