

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Case Number: 215/2023

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
23/05/2023	
DATE	SIGNATURE

In the matter between:

TSUNDZUKA KEVIN MALULEKE

APPLICANT

AND

THE HONOURABLE MR JUSTICE N RANCHOD

FIRST RESPONDENT

THE HONOURABLE MR JUSTICE B MASHILE

SECOND RESPONDENT

THE HONOURABLE MR JUSTICE EM MAKGOBA

THIRD RESPONDENT

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

FOURTH RESPONDENT

CHIEF REGISTRAR OF THE LIMPOPO DIVISION OF THE HIGH COURT: POLOKWANE

FIFTH RESPONDENT

LIMPOPO PROVINCIAL COUNCIL

SIXTH RESPONDENT

JUDGMENT

MTHIMKULU SS AJ:*Introduction*

- [1] On 17 January 2023 the honourable AJP Semanya granted an order (“the order”) against the respondents in the following terms;
- (i) That the matter is to be heard in camera due to the parties involved and the nature of the application.
 - (ii) The application is postponed sine die.
 - (iii) The applicant is ordered to serve the papers on the respondents on or before 17 February 2023.
 - (iv) The respondents are to file their opposing papers on or before 8 March 2023.
 - (v) The application for postponement is to be heard by the judges ceased with the matter as set down today the 17 January 2023.
 - (vi) Costs are to be costs in the application.
- [2] Pursuant to the order of 17 January 2023 the applicant brought an urgent application for an order in the following terms;
- (i) Declaring that the respondents are in contempt of paragraph 4 of the order by Semanya AJP;
 - (ii) Imposing a fine, such as is deemed appropriate by the court, on the respondents;
 - (iii) Imposing a period of imprisonment, such as is deemed appropriate by this court, on the respondents, suspended on conditions deemed appropriate by this court;
 - (iv) Directing the respondents to bear the costs of this application on an attorney and client scale, including any respondent who may elect to oppose this application.
- [3] The primary issue for determination in this application is whether the respondents are in contempt of the court order granted on 17 January 2023.

Contempt of court – the legal framework:

[4] Committal due to civil contempt or non-compliance with a court order in our law is not a foreign concept and it is well developed. For one to be guilty of contempt of court, one needs not only to disobey a court order, but should do so deliberately and with *mala fides*. In **Waterston v Waterston**¹, Clayden J held thus:

“It has to be remembered that proceedings to commit a person for contempt of court are proceedings of a criminal nature, and it is contrary to the criminal law to require the person charged, merely by reason of the charge, to satisfy the Court that he did not do what he was charged with. The proper approach is illustrated by sec. 110 of the General Law Amendment Act, No. 46 of 1935, which makes it an offence to fail to comply with an Order of Court for the payment of maintenance. Sub-sec. (1) creates the offence subject to sub-sec (3), and as it is an offence the Crown would have to prove the failure. But if the failure is proved, then sub-sec. (3) provides that proof of lack of means shall be a good defence. This corresponds to the law as laid down in *O’Reilly v O’Reilly* (*supra*). I cannot, therefore, accept the proposition that, if the respondent fails to satisfy the Court on the balance of probabilities that he has complied with the order of Court in this case, the applicant is entitled to the relief prayed, namely, committal for contempt.”

[5] The Supreme Court of Appeal in **Fakie NO v Systems (PTY) LTD**², dealt with the prerequisite for the committal in respect of contempt of court and held,

“[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*’. 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. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] 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

¹ 1946 WLD 334 at page 337.

² 2006 (4) SA 326 (SCA).

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 evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.”

- [6] In **Pheko and Others v Ekurhuleni City**³ the Constitutional Court developed this further when it remarked that where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance, such as declaratory relief, a *mandamus* demanding the contemnor to behave in a particular manner, a fine and any further order that would have effect of coercing compliance. The Apex Court held,
- “While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority. On whether this court should make a civil contempt order against the Municipality, it is necessary to consider whether, on a balance of probabilities, the Municipality's non-compliance was born of wilfulness and *mala fides*.”
- [7] The Constitutional Court in dealing with the required proof for contempt where committal is imposed as a remedy, held that the required proof for contempt should be proof beyond a reasonable doubt. In **Matjhabeng Local Municipality v Eskom Holdings LTD and Others**⁴ the Constitutional Court held that the standard of proof to be applied in contempt cases varied in accordance with the consequences of the remedy. If the sanction involved committal, the standard of proof (beyond reasonable doubt) was always required. But if it involved civil remedies, the civil standard of proof (on a balance of probabilities) sufficed.

³ 2015 (5) SA 600 (CC) at para 37 and 42.

⁴ 2018 (1) SA 1 (CC) at para 61.

Background facts:

- [8] Against the legal framework stated above, this court now turns to consider the facts that led to the launching of this urgent application by the applicant, which facts are mainly undisputed. The applicant launched an urgent ex-parte application in terms of section 47(1) of the Superior Courts Act ⁵ seeking to institute civil proceedings against the respondents. In his application he sought to institute an urgent interdict and review proceedings against the first, second and third respondents in relation to their acting appointments and the process that that was adopted in their acting appointments to deal with the matter with case number 7113/2017 (the main application). The said ex-parte application was granted on 17 January 2023 by the honourable AJP Semenya.
- [9] Pursuant to the granting of the ex-parte application of 17 January 2023, the main application was proceeded with by the acting judges that were appointed to deal with the matter. The main application that the applicant sought to prevent was proceeded with and was finalized.
- [10] The respondents opted not to file opposing papers on or before 8 March 2023 as was ordered by the Acting Judge President on 17 January 2023. The order by the honourable AJP Semenya on a proper reading thereof, should be understood in the context of this matter and its surrounding circumstances as a whole. The order provides for an event that would take place if the main application did not proceed on 17 January 2023, and in the event that the respondents elected to oppose the application by the applicant.
- [11] The respondents if they elected to oppose the application, they would then be required to file their opposing papers on or before the date stipulated. The respondents (the first and second respondents in particular), proceeded with the main application and therefore did not deem it necessary to oppose the application of 17 January 2023.
- [12] In his address the applicant argued that when the order was granted on 17 January 2023, the intention was to place the respondents on terms to file opposing papers on or before 8 March 2023. This argument by the applicant is problematic in that no court order can force or compel a party to oppose an application. It could never have been AJP Semenya's intention to order the respondents to oppose the application.

⁵ Act 10 of 2013.

The intention was to order the respondents to file the opposing papers by no later than 8 March 2023 should they decide to oppose the application.

- [13] The respondents finalized the main application on 17 January 2023. There was no need therefore to oppose the interlocutory application brought by the applicant. The relief sought by the in the interlocutory application became moot as the main application was finalized on 17 January 2023.
- [14] The Supreme Court of Appeal in **Fakie NO v CCH Systems (PTY) LTD**⁶, held that a deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the manner claimed to constitute the contempt. The respondents finalised the main application on 17 January 2023. Thus concluded that it was not necessary to oppose this application. As I have already alluded to earlier in this judgment, I do not think it was the AJP's intention to compel the respondents to oppose the application. The respondents therefore cannot be said to have been deliberate, wilful and *mala fide* in not complying with the order of 17 January 2023. There is therefore no merit in the allegation of contempt against the respondents.
- [15] It is for these reasons that the application is dismissed with costs, including costs of counsel.



SS MTHIMKULU
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 16h00 on 24 May 2023.

⁶ See fn 2 supra.

DATE OF HEARING: 21 March 2023

DATE JUDGMENT DELIVERED: 24 May 2023

APPEARANCES:

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