



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: **1852/2023**

In the matter between:

THE AFRICAN NATIONAL CONGRESS

Applicant

and

LEHLOHONOLO MOQOLO

First Respondent

PATRICK MONYAKOANA

Second Respondent

MAPASEKA MOTHIBI-NKONE

Third Respondent

CHABELI FRANK RAMPAI

Fourth Respondent

PUSELETSO LETICIA SELEKE

Fifth Respondent

MPHO MOKOAKOA

Sixth Respondent

MARYKE DAVIES

Seventh Respondent

CORAM: **CRONJÉ, AJ**

HEARD ON: **26 MAY 2023**

DELIVERED ON: **1 AUGUST 2023**

JUDGMENT BY: **P R CRONJé, AJ**

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 1 August 2023.

I INTRODUCTION

- [1] The African National Congress ("the ANC") brought an application against the Respondents wherein it sought that the Respondents be found guilty of contempt of the interim interdict issued in this Division on 14 April 2023 under case number 1852/2023. It seeks that the First to Sixth Respondents ("the Councillors") be incarcerated for a period of fifteen (15) months, alternatively such a period as the Court finds just, and the Seventh Respondent ("Ms Davies") to be fined R100 000.00, alternatively three (3) months' imprisonment.
- [2] The application was issued on 18 April 2023 and gave the Respondents opportunity to inform the ANC in writing on or before 19 April 2023 at 15h00 if they intend to oppose the application and furthermore to file opposing affidavits, if any, by 24 April 2023 at 10h00. The matter would be set down for 26 April 2023.

II THE VERSION OF THE ANC

- [3] The Councillors were members of the ANC in the Mangaung Metro Municipal Council ("MMM"), and Ms Davies the appointed Speaker of the MMM, cited in her personal capacity.
- [4] The Court order interdicting the Councillors from attending the Council meeting on 14 April 2023 "*has been violated individually and collectively by all the Respondents*" and this Court's honour has to be vindicated. Ms Davies is drawn into the fray as Speaker who allegedly knew of the order against the

Councillors yet allowed them to be present. She was not cited as a party in the interdict.

- [5] All the Respondents made themselves guilty in attending and performing any functions at a Council meeting of the MMM. There is no doubt that all the Respondents had known of the Court order and decided to ignore it entirely.
- [6] The Councillors were expelled as members of the ANC in March 2023 after a disciplinary process was conducted and the outcome ratified by the Provincial Executive Committee ("PEC"). They were expelled after they, in violation of their agreement with the ANC, voted with opposition parties when Ms Davies was elected as Speaker.
- [7] In fear that the Councillors would again vote on resolutions with the opposition parties, the ANC's attorney directed letters to the Councillors on 13 April 2023, wherein they were instructed not to attend the Council meeting and should they persist in their unlawful conduct, the ANC will have no option to take steps to safeguard its interest, including approaching Court on urgent basis for an interdict. As no response was received, the ANC launched the urgent application and states that service of the order was authorised via WhatsApp, SMS and e-mail.
- [8] Its attorney typed the order immediately as he realized that it was anticipated that it would be difficult to solicit the services of the Sheriff to timeously serve the order in accordance with the Uniform Rules of Court. The order was granted at approximately 12h30 and the meeting would commence at 14h00.
- [9] The attorney took it upon himself to, from his cellphone, send copies of the order via WhatsApp to the Councillors on the cellphone numbers that the ANC provided. He alleges that he sent the order at approximately 13h00 or shortly thereafter, which is allegedly supported by a screenshot of the attorney's

WhatsApp messages. The time on the screenshot shows 20h42 and that a document was sent to the Respondents.

- [10] There can be no doubt that all the Councillors and Ms Davies knew about the order and its effect prior to the commencement of the meeting. The attorney allegedly attended the office of Ms Davies where he was met by her secretary and he handed to her a copy of the order. The attorney was requested to wait outside when the secretary entered Ms Davies' office and she informed him that she handed a copy of the order to Ms Davies. The Sheriff could not serve the order and only served same on the Councillors at 15h00, shortly after the meeting adjourned.

- [11] The Chief of Staff in the office of the Executive Mayor confirms that after the meeting was called to order, Ms Davies informed Council of the Court order. The order was allegedly treated as an addendum to the existing agenda.

- [12] It is stated that the Councillors clearly acted wilfully, with *mala fides* and in blatant contempt of the order. They knew about the order and its effect and decided to attend nonetheless.

- [13] It was incumbent on Ms Davies to make sure that the Council meeting is not only properly constituted, but also not to proceed in the presence of the order. She allowed the Councillors to attend. It was incumbent on her to insist that the Councillors voluntarily leave the meeting, failing which they should have been removed. She therefore violated the order. Save to state that applications for contempt is by nature urgent, not much is said about why it could not have been brought on a semi-urgent basis or in normal course.

III THE COUNCILLORS' VERSION

- [14] They are entitled to the rights contained in the ANC's constitution. The essence of their defence to the disciplinary proceedings is that it is

constitutionally flawed. The ANC's attorney was informed by way of a letter from their attorney that the averment that they were expelled was rejected. The ANC's attorney was informed that they intend to oppose an interdict application and they only learned that an interdict was applied for and granted after the Council meeting had adjourned.

[15] They deny that they were aware that the ANC approached the Court for the interdict or that they were aware that it was granted before attending the meeting. They dispute that the WhatsApp messages were sent to them at approximately 13h00 or shortly thereafter. They refer to the WhatsApp screenshot of the ANC's attorney that shows that it was sent at 13h42. They deny that the Speaker informed Council of the order. The order was therefore only scanned within twenty (20) minutes before the Council meeting commenced. They do not know when the message was sent. The only legal proceeding that the Speaker informed the Council of was unrelated to the interdict.¹

[16] In terms of the MMM's Rules, Councillors are required to be seated 15 minutes before the Council meeting and they are required to mute their cell phones when they take their seats. They were all present 15 minutes before the meeting.

VERSION OF THE INDIVIDUAL RESPONDENTS

[17] The First Respondent states that he left his cell phone concealed in his laptop bag in his car before proceeding to the meeting because of threats during a riot at the preceding meeting. The number that he used was not known to the ANC and he did therefore not receive the message.

¹ Pleadings, p. 302, para 30; p. 182, para 26.2

- [18] The Second Respondent left his cell phone in his car as a safety precaution as a result of the riots at the previous meeting. He did not receive the message before or during the meeting.
- [19] The Third Respondent left her cell phone with her tea lady before she went to attend the meeting. She normally leaves it with her secretary, who was not well and did not come to work.
- [20] The Fourth Respondent uses a different number from the one that the ANC avers he had on that date. The ANC has no record of the cell number that he then used. He did not receive the message from the ANC's attorney before the meeting commenced.
- [21] The Fifth Respondent had her cell phone with her but muted it when she entered the meeting. The messages on the phone were also muted. She became aware of the ANC attorney's message after the Council meeting adjourned.
- [22] The Sixth Respondent was not aware of the order until a consultation with legal representatives.
- [23] The ANC was invited and challenged to provide the WhatsApp sent and read reports. The Councillors gave detailed steps on how this can be done.² There is no reply to this challenge, averment or invitation. The version is thus uncontested.³

² Pleadings, p. 187, para 27.4.7

³ Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

IV THE VERSION OF MS DAVIES

[24] The order was not granted against her and she was neither served with the order nor had any knowledge of it. Non-compliance with the order was neither wilful nor *mala fide*. She seeks an order on a punitive scale against the ANC. After the interdict was granted, the application for contempt was launched on 18 April 2023 leaving her with three (3) Court days to respond. Rule 6(12)(b) require from the ANC to set forth explicitly the circumstances in terms of which it avers the matter is urgent.

[25] I do not deal with the balance of Ms Davies' answer as I directed that oral evidence be presented in respect of her knowledge of the order.

V THE ANC'S REPLY

[26] The order was served on the Respondents by SMS⁴ and WhatsApp shortly before commencement of the meeting. The order was served on the Third Respondent at approximately 15h49, at which time the meeting had not yet adjourned. The Councillors observed each other in the Council chamber, 15 minutes before the meeting commenced and after the meeting adjourned. Save to state that it is "*astonishing*" that all the Respondents are in unison about not receiving the WhatsApp messages and that the "*probabilities*" do not favour such a version nothing more concrete is said.

[27] The Respondents "*ought to have received the orders*". It is not disputed that the mobile devices had to be muted 15 minutes before the meeting commences, but to state that the devices were left in their vehicles and with their "*tea girls*" is "*opportunistic*" and at best to insult this Court's intelligence.

⁴

No proof of the SMS messages was appended to the papers

- [28] It is “*highly improbable*” that the Councillors did not have sight of the order until after the Council meeting. The “*probabilities*” support that they received the order, were aware of it and wilfully elected to ignore it.
- [29] It deals with the respective applications (interdict and contempt application) “*thematically*”.⁵
- [30] I asked Mr Grobler SC, who appeared for the ANC, whether the Councillors should be treated individually or as a collective. He stated that they had to be treated individually. This accords with our law as impeding freedom would affect the Councillors individually.

VII THE TEST FOR CONTEMPT

- [31] The test laid down by the Constitutional Court in *Fakie v CCII Systems (Pty) Ltd*⁶ has not changed:

“[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 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.”*

⁵ Pleadings, p. 341, para 5

⁶ [2006] SCA 54 (RSA)

[19] ... Differently put, do constitutional values permit a person to be put in prison to enforce compliance with a civil order when the requisites are established only preponderantly, and not conclusively? In my view they do not, and the Eastern Cape decisions that the criminal standard of proof applies whenever committal to prison for contempt is sought are correct

[21] A long series of Constitutional Court (CC) decisions has established that it is generally impermissible to find an accused guilty of a criminal offence in the absence of conclusive proof of its essential elements. These decisions provide one of the leitmotifs of our democratic jurisprudence, and have led to the invalidation of a number of 'reverse onus' provisions, which placed on an accused the legal burden of disproving an essential element of the offence. The CC has held however that it is permissible in certain circumstances for an accused to bear the lesser evidential burden of having to advance evidence that raises a reasonable doubt about an element of a crime – absent which the offence is established beyond reasonable doubt.

[22] The decisions deal with statutory presumptions and reverse onuses. But they undoubtedly entail that where the state prosecutes an alleged contemnor at common law for noncompliance with a civil order, the requisite elements must be established beyond reasonable doubt. In such a prosecution the contemnor is plainly an 'accused person' in terms of s 35(3) of the Bill of Rights, and enjoys the inter-related rights that s 35(3)(h) confers: to be presumed innocent, to remain silent in the face of the charges and not to testify during the proceedings. By developing the common law in conformity with the Constitution, the reverse onus the accused bore in prosecutions such as Beyers must now be reduced to an evidential burden (as Mbenenge AJ rightly envisaged in the second *Uncedo*⁷ decision). Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent, but does not exercise the choice without consequence.

⁷

Uncedo Taxi Service Association v Maninjwa 1998 (3) SA

[23] ... What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt."

[29] ... Pickering J pointed out in *Uncedo* that the application of two different standards of proof, depending on whether the initiator chooses to lay a criminal charge, or proceed civilly, is unwarrantable, because it introduces 'a certain degree of arbitrariness'. This applies the more if the standard of proof were to depend on the objective with which the initiator proceeds, and would run counter to this court's analysis in *Beyers*, which pointed to the ineluctably criminal dimension of the remedy granted even in proceedings aimed at coercion." [My emphasis]

[32] In *Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd*⁸ it was affirmed that the test remains beyond reasonable doubt:

"[67] Summing up, on a reading of *Fakie*, *Pheko II*, and *Burchell*, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is *Fakie*. On the other hand, there are civil contempt remedies – for example, declaratory relief, mandamus, or a structural interdict – that do not have the consequence of depriving an individual of their right to freedom and security of the person." [My emphasis]

[34] It is important to note that whilst the ANC at least twice made the averment that there can be no doubt that the Councillors received the order via SMS and Whatsapp it stated, after having read the answering affidavit of the

⁸ 2017 (11) BCLR 1408 (CC)

Councillors, that “*the probabilities do not favour such a version*”,⁹ that they “*ought to have received the orders*”, that it is “*opportunistic*” to state that they left their cell phones in their cars and with ‘*tea girls*’¹⁰, and “*that the probabilities*” support that the Councillors received the order.¹¹

[35] When the ANC did not accept the challenge of the Councillors to produce the “*receive and read*” reports on the Whatsapp messages, it failed not only the test to prove beyond reasonable doubt but also failed to place the Councillors on defence. Probabilities, as *Fakie supra* makes clear, is not the test.

[36] The second hurdle that the ANC created for itself was to deal with the answering affidavit of the Councillors “*thematically*”¹². This may have been the result of the rules of the game it created for dealing with this matter on tight timeframes, or due to the lack of sufficient knowledge to challenge the facts presented by the Councillors. It does not matter which it is, the result remains the same.

VIII URGENCY

[37] Notwithstanding that contempt proceedings are by nature urgent, the extent of urgency should be carefully weighed. This is especially so as the interdict was only granted *pendente lite*. It may have been discharged on the return day.

[38] In my view this raises one of two approaches in matters of this nature where the return day is pending. The one is a principled approach and the other an outcome approach.

[39] The principled approach consists of the principle that Court orders must, notwithstanding whatever happened afterwards, at all times be obeyed. The

⁹ Pleadings, para 32

¹⁰ Pleadings, p. 347, para 33

¹¹ Pleadings, p. 348, para 34

¹² Pleadings, p. 348, para 39

risk to the alleged contemnor is rather high as the Rule *nisi* may be discharged on the return day. This means that there was no merit in the interdict¹³ application but the alleged contemnor was found guilty and “sentenced”. It may be manifestly unfair in those circumstances.

- [40] When an outcome based approach is preferred, the Court has the advantage of knowing whether there was merit in the interdict¹⁴ proceedings. This would avoid a person being “sentenced” for something that was eventually found to have been without merit.
- [41] It is not necessary for me to decide this as no arguments were presented on it.
- [42] I do not take issue with Mr Grobler’s excerpt¹⁵ from *Victoria Park Ratepayers’ Association v Greyvenouw CC and others*.¹⁶ The case also makes it clear that even though contempt of court proceedings are by their nature urgent, an applicant may nonetheless misconceive the extent of the urgency or may act with undue haste and in this way abuse the provisions of the Rules of court that permit urgent applications to be brought.¹⁷ The basis for the urgency in the matter before me was rather thin and mostly based on the averments that proceedings of this nature are by their nature urgent and of public importance.¹⁸ The replying affidavit did not take it much further.¹⁹

¹³ Or similar proceedings

¹⁴ Ibid

¹⁵ It is quoted at para [5]

¹⁶ (511/03) [2003] ZAECHC 19 (11 April 2003)

¹⁷ At para [28]

¹⁸ Pleadings, p. 64, para 18

¹⁹ Pleadings, p. 198, par 13 – 16

- [43] In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*²⁰ it was held:

“[31] It is not insignificant that his assaults and his alleged contempt are ongoing and relentless, as this underscores the urgency. In Protea Holdings, the Court said that “if there was no continuing contempt of court ... then the hearing of this application as a matter of urgency in the Court vacation would not be justified”. It held that—

“the element of urgency would be satisfied if in fact it was shown that [the] respondents were continuing to disregard the order If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.” [my emphasis]

- [44] There was nothing in the papers to show that the Councillors intended to continue with their duties or conduct if they obtained knowledge of the order.
- [45] It is trite that the test to be applied at contempt proceedings is whether the Respondents are guilty beyond reasonable doubt. In dealing with the Councillors’ version “*thematically*”, the ANC opened itself up for reasonable doubt as no effort was made, even on invitation by the Respondents, to show when the messages were received and read. No effort was made to doubt the versions of the respective Councillors. If probabilities play a role at all, they still do not assist the ANC.
- [46] One of the peculiar circumstances of this case is the failure of the whip of the ANC in the Council or any other ANC Councillor, to inform the Council of the order before the meeting commenced.
- [47] The ANC did not pass the test to prove beyond reasonable doubt that the Councillors received the messages before the meeting or that if it was sent at

²⁰ (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021)

the time that the attorney allege, that the Councillors obtained knowledge of the order.

THE CASE OF MS DAVIES

- [48] I decided to refer the question whether Ms Davies was guilty of contempt for hearing of oral evidence and not for trial. The reasons are as follows.
- [49] When I prepared to hear the application, I discovered a supplementary affidavit of Ms Davies. I accepted that there was an agreement between the parties that it forms part of the pleadings.
- [50] When the representatives approached me in chambers, I discovered that there was not such agreement. I informed Mr Benade, who appeared for Ms Davies, that I did not receive an application to have it admitted. I was subsequently provided with a copy.
- [51] When the matter was called, I enquired from Mr Benade whether I can hear Ms Davies' case without affording the ANC an opportunity to answer to the supplementary affidavit. He confirmed that I may but Mr Grobler advanced argument that they want the matter as a whole, inclusive of the Councillors, be referred for evidence, alternatively to file an answer.
- [52] The challenge I had with the supplementary affidavit was that it created a number of disputes about the identity of persons who were involved, what their roles were, what they saw and what they heard. This only applied to Ms Davies.
- [53] To afford the ANC an opportunity to reply to the supplementary affidavit would have caused further disputes and I exercised my discretion to refer the matter for oral evidence and not for trial.

[54] It would be inappropriate to express any views on these disputes. I made an order that Counsel for the Applicant and Ms Davies prepare a draft order in respect of the evidence to be heard during oral evidence and provide same to the Registrar in the week of 29 May – 2 June 2023 for my consideration. I have not received same and I implore the respective parties to provide me with such a draft order on or before 10 August 2023 failing which I will consider making further orders.

[55] I grant the following orders:

1. The application against the First to Sixth Respondents for contempt is dismissed.
2. The Applicant pays the costs of the dismissal of the application against the First to Sixth Respondents.
3. The Applicant and Seventh Respondent shall comply with paragraph 4 of the order granted on 26 May 2023 on or before 10 August 2023.

P R CRONJÉ, AJ

On behalf of the Applicant:

Adv S Grobler et Adv T Ngubeni

Instructed by:

S.M.O Seobe Attorney

BLOEMFONTEIN

On behalf of the First to Sixth Respondents:

Adv. JG Gilliland

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On behalf of the Seventh Respondent:

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