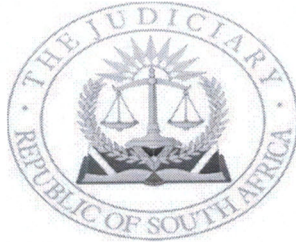


THE REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 47954/2018

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

[Signature]
20/07/2019

In the matter between:

CRS TECHNOLOGIES (PTY) LTD

APPLICANT

and

JAMES MCKERRELL

FIRST RESPONDENT

FRANCESCO ARICO

SECOND RESPONDENT

MARK ANDREW SCHORN

THIRD RESPONDENT

FLASH CLOUD (PTY) LTD T/A

THE PEOPLE SOLUTIONS COMPANY

FOURTH RESPONDENT

JUDGEMENT

CORAM : RAMAPUPUTLA AJ

INTRODUCTION

[1] This is an application which seeks an order that the first and fourth respondents be committed to prison for a period of six months as a result of the breach of the Court Order dated 18 April 2017.

FACTS OF THE APPLICATION

[2] The Order, which was made an order of Court by agreement between the parties provides that the respondents may not reproduce the applicant's computer programmes; perform or broadcast the applicant's computer programmes in public; cause the applicant's computer programmes to be transmitted in a diffusion service; and let or hire the applicant's computer programmes. The order also provides that the respondents may not entice the applicant's customers to breach the terms of their contracts and the respondents may not copy or reproduce the systems manual.

[3] On 17 August 2018, the Court granted additional orders to the effect that the first and fourth respondent are interdicted from directly or indirectly using, copying, distributing, performing, broadcasting or adapting the applicant's proprietary software. The software comprises the following modules: Human Resources Administration, Human Capital Management, Talent Management, Employee Relations including Disciplinary and Grievance, Occupational Health, Payroll Administration, Leave Management, Loan Management and Employee and Manager Self Service.

APPLICANT'S SUBMISSION

[4] The applicant submits that the respondents are using its software programmes and that they are also enticing its customers away from it in violation of a court order. This violation amounts to a contempt of court which is punishable by committal to civil imprisonment of six months or a fine. In support of the above assertions, the applicant claims that a Skype conversation with one De Richelieu (who is the applicant's prospective business partner) revealed similarities with its software programmes. It is asserted that the respondents could not have developed their own programmes in the limited time available to them, given their shoestring budget and accordingly must be

using the applicant's programmes. The applicant contends that its system is unique and that the respondents' system shares these unique features.

[5] The applicant's second complaint is that by providing tech support to the applicant's customers, the respondents are enticing them to breach their contracts with the applicant, which in turn is a breach of the Court Order.

RESPONDENTS' SUBMISSIONS

[6] The respondents contend that the applicant failed to establish which part or parts of the Order have been breached by the respondents and have failed to prove beyond reasonable doubt, that the respondents have acted in contempt of the Order. The evaluation copy is not included in the Court Order. Therefore, it is contended that the Court Order was not wilfully disobeyed or not complied with.

[7] Notwithstanding that this Honourable Court, sits in the civil motion court in civil robes, it sits as a criminal court and applies that standard of proof as required by a criminal court, i.e. beyond a reasonable doubt.

COMMON CAUSE

[8] The application is for contempt of court *ex facie curiae*; the orders were granted; the orders were served on the respondents.

LEGAL POSITION

[9] The applicant needs to prove five elements namely: an order was granted; the order was served on the respondents; that this order was wilfully disobeyed or not complied with; that the actions of the respondents were wilful; and that the actions of the respondents were *mala fide*.

The applicant is aided by a presumption that once the first three elements are proven, that the action is wilful and *mala fide*.

LEGAL ARGUMENTS

[10] The applicant submits that 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 or *mala fide*, contempt will have been established beyond reasonable doubt.

[11] The first respondent denies having acted with intention to breach any court order. The respondent further argues that the applicant is unable to prove beyond reasonable doubt that there was any *mala fide* in his actions.

REASONS FOR JUDGMENT

[12] On 18 June 2018, Mr De Richelieu ("**De Richelieu**") contacted the first respondent to request that the first respondent provide a demo of the fourth respondent's software.

According to the respondents:-

1. the programme shown to De Richelieu was not the applicant's main programme but the latter's evaluation copy;
2. though an evaluation copy is not the same as the main programme, it was used to demonstrate the capabilities of the applicant's software to potential clients;
3. it is a partial version of the software which was given to employees of the applicant, including the first respondent who worked as an employee at some point in time.

[13] The first respondent asserts that he was not comfortable showing De Richelieu the fourth respondent's software and he had resolved not to have any further business dealings with De Richelieu. In other words, he submits that he shown De Richelieu the applicant's software in order to protect the fourth respondent's software.

[14] The aforesaid assertions compel this Court to subjectively consider the first respondent's state of mind at the time of the Skype call. Such inquiry is purely factual. The following facts were clearly put forward by the first respondent:-

1. he was uncomfortable with the tone of De Richelieu's email and unsure of his *bona fides* and resolved to speak to him to gauge for himself whether he could trust him and if so, whether he wished to go into business with him;
2. he did not know that De Richelieu was not acting independently;
3. he did not know De Richelieu is the applicant's prospective business partner;
4. he was fully aware of the Court Order that prohibited him from publicly broadcasting applicant's software;
5. he was gauging De Richelieu's *bona fides* by misleading him with the applicant's software.

[15] The first respondent is not denying the contents of the transcript of the Skype call but submits that it is important for the purposes of issuing a contempt of Court Order that De Richelieu was acting on behalf of the first respondent.

[16] From the onset, the first respondent has never disguised his desire to own the applicant's business in its totality. He asserts that "I had considered at the time that were the company to be liquidated, I would consider purchasing the rights to the software out of the liquidated company." It is this covetousness that does not auger well for him.

[17] The respondents fail to explain why they chose to use the applicant's evaluation copy. If the evaluation copy is used to demonstrate the applicant's programme, why would the respondents use it to for it's prospective clients? This defies logic. The first respondent states that other than the Skype call with De Richelieu, the applicant is unable to refer the Honourable Court to any other person or company to which the first respondent has allegedly passed off the applicant's programme and that this is because the first and fourth respondents have not done so.

[17] Presumably the applicant seeks only to have the first respondent imprisoned as it is not possible to imprison the fourth respondent which is a company. The first respondent's Counsel submits that this application is an abuse of court process.

It is opportune to state that the crime of contempt of court, as it exists in South Africa today, is directly derived from English law.¹

It has been held that:

"The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained. In respect of contempt of court, the common law drew a sharp distinction between orders ad solvendam pecuniam, which related to the payment of money, and orders ad factum praestandum, which called upon a person to perform a certain act or refrain from specified action. Failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was²".

[18] The Constitutional Court held that if the sanction sought involves committal to prison, "the criminal standard of proof, i.e. beyond reasonable doubt, was always required".³

[19] In the case of *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*⁴ the Constitutional Court cautioned that:-

"Frequently, the resultant committal to prison violates the right to freedom and security of the person — which includes the right not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial — in terms of s 12(1) and the fair trial rights in terms of s 35(3) of the Constitution."⁵

¹ Jordaan 'The 'gagging writ' and contempt of court – the correct means to the correct end? A comparative analysis of South African and English law' 1990 CILSA 220

² Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC) para 60.

³ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) at [67].

⁴ *Supra* at [1].

⁵ *Supra* at [1].

[20] In **S v Beyers**⁶ the court held that “it is a crime unlawfully and intentionally to disobey a court order.”

[21] According to **Pheko & others v Ekurhuleni City**,⁷ which held the following:

“The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (ad factum praestandum), the following elements need to be established on a balance of probabilities:

(a) the order must exist;

(b) the order must have been duly served on, or brought to the notice of, the alleged

contemnor;

© there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or mala fide.”

[22] In **Fakie NO v CCII Systems (Pty) Ltd**⁸ Cameron JA stated;

“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 had, in general terms, received a constitution’l ‘stamp of appro’al’, 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.”

When a litigant has obtained a court order requiring an opponent to do or not to do something (*ad factum praestandum*) and there is non-compliance, he can approach the court again for a further order declaring the non-compliant party in contempt of

⁶ 1968 (3) SA 70 (A).

⁷ 2015 (5) SA 600 (CC) at para 32.

⁸ 2006 (4) SA 326 (SCA) at 332. See also *S v Mamabolo* (ETV and Others Intervening) 2001 (3) SA 409 (CC) para 14.

court and for the imposition of a sanction which usually, but not invariably, has the object of inducing the non-complier to fulfil the terms of the previous order.

[23] The court in *ABSA Bank Ltd v Transcon Plant and Civil CC and Another*⁹ (**ABSA Bank**) held the following

“Despite the fact that wilful disobedience of a court order in civil proceedings constitutes a criminal offence, a practice exists in the high court in which proceedings are instituted by way of an application on notice of motion for committal of a respondent for contempt of court. In D E Van Loggerenberg Erasmus Superior Court Practice 2 ed vol 1 at A2-170-171, the authors summarise the position as follows:

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

Contempt of court, in the present context, has been defined as “the deliberate, intentional (i.e. wilful), disobedience of an order granted by a court of competent jurisdiction”.

[24] The respondents’ Counsel argument that notwithstanding that this Honourable Court sits in the civil motion court in civil robes, it sits as a criminal court, is flawed up to this extent. The court in **Fakie** further stated the following, *“I follow this path because the civil process for a contempt committal is an oddity that is distinctive in its combination of civil and criminal elements, and it seems undesirable to strait-jacket it into the protections expressly designed for a criminal accused under s 35.¹⁰ Certainly, not all of the rights under that provision will be appropriate to or could easily be grafted*

⁹ (3954/17P) [2019] ZAKZPHC 48 at para 5 and 6.

¹⁰ In re Dormer (1891) 4 SAR 64 at 85 per Kotzé CJ (‘Contempts of court are certainly in some respects analogous to criminal offences, but they are a distinct species of offence, to which a special mode of summary procedure is applicable, and do not admit of the ordinary and usual forms and modes of criminal procedure’), applied in *Afrikaanse Pers-Publikasies (Edms) Bpk v Mbeki* 1964 (4) SA 618 (A) 626.

onto the hybrid process. For similar reasons, the High Court of Australia has observed, in the context of the English-derived process for contempt, that 'to say that [civilly-initiated] proceedings for contempt are essentially criminal in nature is not to equate them with the trial of a criminal charge'.¹¹ That this court applies the standard of proof as required by a criminal court, i.e. beyond a reasonable doubt, is beyond dispute.

[25] The Court Order prohibiting the respondent from using the applicant's software is couched in such a way that the respondents are prohibited from using the applicant's specified software programmes. The evaluation copy is not specifically mentioned as one of the prohibited software. The evidence of use of the evaluation copy means the respondents have discharged their evidentiary burden of disproving any required wilfulness and *mala fides*.

[26] In addition to the above, the reading of the affidavits of the applicant and the supporting affidavit of its employee, one is met by egregious contradictions. In paragraphs 67.4, 67.11, 67.13, 67.15, 68, and 69 of the founding affidavit of Mr Ian McAllister, it is clearly asserted that the first respondent made mere cosmetic changes.

[27] On the other hand, in his supporting affidavit, Luther Aubrey Arendse who is employed as a Software Developer/Programmer with the applicant, who has been involved and is responsible for using, modifying and developing the applicant's software, states "the modifications that were made by the first respondent to the Evaluation copy are substantial and not cosmetic."

[28] Now the court is at loss as to whether the applicant is complaining about cosmetic or substantial changes. These contradictions are of such a serious nature that it cannot be said that the applicant has proven that the court order has been violated and such violation amounted to a contempt of court. This obviously brings the "Plascon-Evans rule"¹² in mind. This rule is to the effect that when factual disputes

¹¹ *Witham v Holloway* (1995) 131 ALR 401 (HC of A) 408, per Brennan, Deane, Toohey and Gaudron JJ.

¹² *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51.

arise, relief should be granted only if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. The above contradictions do not justify an order in favour of the applicant.

[26] As regards applicant's second complaint that by providing technical support to the applicant's customers, the respondents are enticing them to breach their contracts with the applicant, which in turn is a breach of the Court Order, I am not persuaded that there was any wilful and *mala fide* disobedience. In the case of *Clement v Clement*¹³ the Full Court held that disobeying Court Order only amounts to contempt, if the applicant is able to show that such disobedience was both wilful and *mala fide*. The respondents' response is to the effect that the clients approached him because they were not satisfied with the service they received from the applicant. This surely cannot be seen as wilful and *mala fides*. In any event the respondent has offered to repay the applicant, if he is found to be at fault.

[27] The court in ***Absa Bank***¹⁴ further held that;

"The locus classicus in respect of civil contempt is the decision of Fakie NO v CCII Systems (Pty) Ltd. In Fakie the court, per Cameron JA indicated as follows: (a) The essence of contempt of court 'lies in violating the dignity, repute or authority of the court.'¹⁵ The offence has been approved by the constitutional court as the rule of law requires the dignity and authority of the courts to be maintained.¹⁶

(b) '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).'¹⁷

¹³1961 (3) SA 861 (T).

¹⁴ *Id* at para 6.

¹⁵ *Fakie* para 6.

¹⁶ *S v Mamabolo* (E TV & others intervening) 2001 (3) SA 409 (CC) para 14; *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631(CC) para 61.

¹⁷ *Fakie* para 9.

(c) *'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.'*¹⁸

(d) *The onus is that of the criminal standard of proof being proof beyond reasonable doubt.*¹⁹

(e) *Once an applicant shows an order in existence and that it came to the notice or attention of a respondent and that the respondent had disobeyed or neglected to comply with the order, wilfulness and mala fides will be inferred and the applicant will then be entitled to a committal order. An evidentiary burden then rests upon a respondent in relation to the aspect of wilfulness and mala fides. A respondent must advance evidence that establishes a reasonable doubt as to whether non-compliance with such order was wilful and mala fides. A respondent does not bear a legal burden to disprove wilfulness and mala fides. If the respondent fails in discharging such evidentiary burden, contempt of the court order will be established beyond reasonable doubt.'*²⁰

*"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'."*²¹

[28] Another factor is that the applicant has not seen the respondents' full programme. The evidence of use of the evaluation copy, also proves that the applicant

¹⁸ *Fakie* para 10.

¹⁹ *Fakie* para 33; at 342B and 344D.

²⁰ *Fakie* at 344J-345A; para 41.

²¹ In *D E Van Loggerenberg* Erasmus Superior Court Practice 2 ed vol 1 at A2-170.

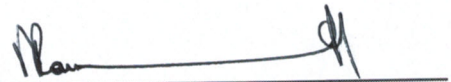
has failed to prove that there is any contempt of any court order. I therefore conclude that the applicant has failed to meet the required standard of beyond a reasonable doubt in order to have the first respondent imprisoned.

[29] The finding of this application does not mean that the applicant has failed in the civil claim he has instituted against the respondents but only signifies that the applicant does not meet the required standard of proof for the court to conclude that there is contempt which justifies committal to civil imprisonment.

[30] I am not satisfied that the applicant has proven all the requirements which will enable this Court to convict the respondent of contempt of Court for using the applicant's software programme and enticing the applicant's clients to breach their contracts with the applicant, which in turn is a breach of the Court Order.

ORDER

This application is dismissed costs including costs of Part A.



NE RAMAPUTLA
Acting Judge, Gauteng Division of
the High Court of South Africa,
Pretoria

Heard On:
Date of Judgment :

26 April 2019
26 July 2019

APPEARANCES

For the Applicant: Adv. M. Louw

For the first respondent: Adv. A.G Campbell

For the second respondent: No appearance

For the third respondent: No appearance

For the fourth respondent: Adv. A.G Campbell