



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 28869/2019

(1) REPORTABLE: YES/NO	✓
(2) OF INTEREST TO OTHER JUDGES: YES/NO	✓
(3) REVISED.	
3/7/2019	
DATE	SIGNATURE

In the matter between:

MERCEDEZ-BENZ FINANCIAL SERVICES

First Applicant

and

XILUMANI HOLDINGS & PROJECTS CC T/A

First Respondent

ZILUMANI HOLDINGS AND PROJECTS

HOWARD ALEX MASHABA

Second Respondent

JUDGEMENT

SARDIWALLA J:

Introduction

- [1] On 9 May 2019, an application was before me in the urgent court brought by the applicant against the first respondent and second respondents in terms of Rule 6(12) Of the Uniform Rules of Court declaring them to be in contempt of various court orders.
- [2] On 9 May 2019 I handed down an order granting the relief that the applicant had sought.

Background to the Application:

- [3] The parties entered into various instalment agreements during the period of October and November 2017 in respect of the purchase of eleven vehicles. The first respondent failed to pay the instalments as agreed which resulted in the applicant cancelling the agreements and issuing summons against the respondents.
- [4] Default judgment was granted under case numbers 45886/2018 and 90088/2018. The matters proceeded under various case numbers of which 9 matters were defended and upon summary judgment stages the parties entered into a settlement agreement in respect of each matter which were made order of court on 10 and 18 December 2018 respectively. The relevant parts of the agreements are as follows:-

"5. Paragraphs 2 and 3 of the order are temporarily suspended pending compliance by the defendant with the following, and pending compliance, the defendant will be allowed to retain temporary possession of the vehicle:

5.1 The defendant will make immediate payment of the amount of R600 000.00, which amount will be apportioned to the arrears on the contracts 950024, 98444, 942534, 942533, 949728, 950023, 942530, 949876, 942515 and 942531;

5.2 The defendant will thereafter, insofar as it has not made payment of the normal instalments for October 2018, immediately pay such instalment.

5.3 The defendant will then resume its monthly instalments on the due dates as

they were prior to the cancellation from November 2018 up and to the final payment date of 20 October 2022.

5.4 In addition to the normal monthly instalments the defendant shall, for each of the months of November 2018, December 2018 and January 2019, make an additional payment of R200 000.00, which amount will be apportioned to the arrears of the contracts 950024, 98444, 942534, 942533, 949728, 950023, 942530, 949876, 942515 and 942531;

5.5 Thereafter, and still whilst maintaining the normal monthly instalments, the defendant shall make additional monthly payments in the amount of R150 000.00, commencing February 2019 and monthly thereafter until the arrears on all the contracts referred to above has been settled in full.

6. In the event that the defendant fails to make payment on the due date and/or in the due amounts as contemplated in paragraphs 5.1. To 5.6 above, the suspension of paragraphs 2 and 3 will immediately cease, and the defendant will be in unlawful possession of the vehicle with immediate effect.”

[5] In February 2019 warrants of executions were obtained against the first respondent failure to make payments as stipulated in the agreements. On 18 February 2019 the first respondent launched 9 rescission applications which were subsequently struck off role for failure to show urgency and merit.

[6] After several attempts to attach the vehicles a case of vehicle theft was opened at the SAPS Weirabrug under case number 411/2019. On 21 April 2019 three of the vehicles were impounded as a result by the police. The first respondent together with three of its drivers approached the Polokwane High Court for urgent relief alleging spoliation. An interim order was granted ex parte to the first respondent for the return of three of the vehicles to the first respondent on 22 April 2019.

Applicant's Argument

- [7] It is the applicant's submission that the respondents have failed to comply with the Court orders by failing to make payments as stipulated. The applicant indicated that since the warrants of execution were obtained the applicant's agents have made several attempts to attach the vehicles and deliver to the applicant without success. It avers that the first respondent, through the deliberate actions of the second respondent has frustrated those attempts. It further submits that it intends illustrating on the return day of the ex parte matter that there can be no issue of spoliation in light of the various valid court orders and warrants of execution which it avers the first respondent deliberately withheld from the Polokwane High Court misleading the court to the true nature of the matter and is an obstruction to justice which is a criminal offence. It indicated that the respondent is aware of the court orders as it made reference to the court orders in its urgent application on 12 March 2018 which were struck from the roll. That the applicant has exhausted all available remedies and that the respondent's actions are clearly mala fide in attempting to retain possession of the vehicles after failing to comply with the above court orders.
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First Respondent's Argument

- [8] The first respondent opposes this application on the basis that the application lacks urgency and is without merit. He argues that the matter is premature as there is pending litigation regarding the rescission applications and that until such times as those are finalised the court orders are suspended and therefore it cannot be held to be in contempt. It lastly alleges that the second respondent was not properly served in terms of Rule 4 and R6 (5) (a) of the Uniform Rules of Court and was therefore not a party to the proceedings relating to the court orders.
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Contempt proceedings

- [9] It is trite that compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. What is required in civil contempt matters is that sufficient care should be taken in the proceedings to ensure a fair procedure as far as possible with the provisions of section 35(3) of the Constitution - (*JSO v HWO (24384/2009) (2014) ZAGPPHC 133 (19 February 2014)*). *Fakie NO v CCH Systems (Pty) Ltd 2006 (4) SA 326 (SCA)* is the leading authority on contempt of court proceedings. In this decision the Supreme Court of Appeal describes the application for committal for contempt by a private party as a '*peculiar amalgam*' because

'it is a civil proceeding that invokes a criminal sanction or its threat.' (para [8]).

The Court continues in paragraph [9]

'The test for when the 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...'

However, in paragraph [41] the Court holds

'... this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites..., unless the respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide the requisites of contempt would have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but, but only need evidence that establishes a reasonable doubt.'

- [10] The Supreme Court of Appeal summarised its findings in paragraph [42]:

- 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 requirement.*
- 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.*

[11] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015]ZACC 10 in a unanimous decision delivered by Nkabinde J, the Constitutional Court subsequently explained that:

"[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour....

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the role of law.

[32] 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; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or mala fide'.

- [12] The Constitutional Court confirmed the decision by the Supreme Court of Appeal in *Fakie* (supra) and held in paragraph [36] that the decision creates a presumption in favour of the Applicant –

‘Therefore 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 reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.’

- [13] Nkabinde J continued in paragraph

“[37] - - However, 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 the effect of coercing compliance.’

The current application

- [14] It is common cause between the parties before the Court that the first three elements of the test for contempt have been established. However the second respondent denies being in contemptuous default in that he was not cited as a party to the agreements that were made an order of court and therefore cannot be bound by that order.
- [15] Since the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the respondents are able to lead evidence sufficient to create reasonable doubt as to their existence. The respondents thus need to rebut the presumption of *mala fides* and wilfulness.
- [16] The meaning of the terms *mala fides* and wilfulness need to be determined. It was held in *Fakie* (supra paragraph [9]) that a deliberate (wilful!) disregard is not enough.

‘since the non-complier may genuinely, albeit mistakenly, believe him of herself entitled to act in a way claimed to constitute 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] In light of the facts of this application the question would be whether (i) the respondents indicated in their affidavit a factual inability to comply with the court order; (ii) and, if such a factual inability is evident from the documents before the Court, whether the Respondent honestly believed that non-compliance with the court order due to a factual inability to comply is justified.
- [18] The applicant avers in the founding affidavit that the respondents are *mala fide* and in wilful contempt of the Court order. It is evident from the papers that the parties have been embroiled in extended litigation and that the relationship between the parties is acrimonious. The applicants aver that the second respondent who is the only member of the first respondent is aware of the court orders and has failed to comply. However, in addressing the first question, namely, whether the respondents have indicated any factual inability to comply with the court order, it is imperative to take cognisance of the fact that the Court is not called now to adjudicate a grievance dispute between the parties. Kirk-Cohen J stated unequivocally in *Federation of Governing Bodies of South Africa African Schools (Gauteng) v MEC for Education, Gauteng 2002 (1) SA 660 (T)* at 6730-E-

'Contempt of court is not an issue inter parties; it is an issue between the court and the party who has not complied with a mandatory order of court.'

- [19] I am not convinced that the respondents have discharged the evidentiary burden in creating reasonable doubt as to the wilfulness and *mala fides* of their default to perform in terms of the court orders. Although there is no *onus* on the respondents, but merely an evidentiary burden to create a reasonable doubt as to the existence of wilfulness and *mala fides*. The reliance on the rescission applications automatically suspending the operation of the orders is incorrect. Counsel for the applicant correctly stated that such a rule only applies automatically to appeals and not rescission applications. If the respondents required the operation and execution of the orders to be suspended pending the finalisation of the rescission applications the respondents were required to bring a formal application to suspend in terms of section 18(3) of the Act, which the respondents have provided no reason why it has not done so. The

Court is also cognisant of the fact that these court orders were as a result of agreements entered into by the parties, to which despite the fact that the second respondent was not cited as a party to the proceedings, as the sole member of the first respondent these agreements could not have been concluded without his express knowledge and consent. Therefore the respondents did not succeed in rebutting the presumption of wilfulness and *mala fides*. The respondents also did not succeed in creating a reasonable doubt as to their non-compliance with the court order being wilful and *mala fide*. Therefore there cannot be said to be reason or even a possibility of the respondent's inability to comply with the order.

[20] The final question then is whether there are any alternative means through which the court can ensure compliance with the court orders. I am of the view that the applicant has exhausted all its remedies. In light of the absence of an adequate explanation for the respondent's conduct, I am satisfied that the balance of convenience favours the applicants and that a failure to declare the respondents in contempt and ordering the second respondents committal to prison would result in irreparable harm being done to the applicant to which there is no alternate remedy.

[21] Accordingly, the following order is made:

1. The non-compliance with the rules of the Honourable Court in respect of dies, form and service, be condoned in terms of 6(12) of the Rules of Honourable Court and that this application be heard as an urgent application.

2. The respondents be declared in contempt of the following Court order(s) under case number(s):

2.1	90088/2018
2.2	45886/2018
2.3	45893/2018
2.4	45885/2018
2.5	45888/2018
2.6	45982/2018
2.7	45889/2018
2.8	45840/2018
2.9	45887/2018
2.10	45894/2018
2.11	45891/2018

3. The second respondent be committed in prison for 30 (thirty) days.
4. The respondents are to pay the costs of the application, jointly and severally on the scale as between attorney and client.



SARDIWALLA J

APPEARANCES

Date of hearing	:	9 May 2019
Date of judgment (reasons)	:	31 July 2019
Applicant's Counsel	:	Adv.: C.J Welgemoed
Applicant's Attorneys	:	Straus Daly Attorneys
First and Second Respondent's Counsel	:	ADV.:T K MALULEKA
First and Second Respondent's Attorneys	:	BM Mudzuli Attorneys
