



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

- (1) REPORTABLE: Yes ☐ / No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 29 August 2024

WJ du Plessis

Case 123899/2023

In the matter between:

MUTUMWA DZIVA MAWERE

Applicant

and

**MASTER OF THE HIGH COURT OF SOUTH AFRICA
SMM HOLDINGS (PRIVATE) LIMITED**

First Respondent
Second Respondent

In re:

Case no: 040602/2016

In the matter between:

SMM HOLDINGS (PRIVATE) LIMITED

Applicant

and

MUTWAMWA DZIVA MAWERE

Respondent

Coram: Du Plessis AJ
Heard on: 14 August 2024
Decided on: 29 August 2024

This judgment has been delivered by uploading it to the CaseLines digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by e-mail to the attorneys of record of the parties. The deemed date and time of the delivery is 10H00 on 29 August 2024.

ORDER

The following order is made:

1. The applicant, Mutumwa Dziva Mawere, acting in contempt of the order granted by his Lordship Acting Justice van Nieuwenhuizen under case number 16114/2022 on 11 May 2022.
2. The applicant, Mutumwa Dziva Mawere, is sentenced to imprisonment for a period of 6 (six) months.
3. The applicant, Mutumwa Dziva Mawere, is directed to submit himself to the South African Police Service at the Sandton Police Station within 5 calendar days from the date of this order, for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in 2 above.
4. The applicant, Mutumwa Dziva Mawere, is ordered to pay the costs of the second respondent, on scale C, including the costs of two counsel.

JUDGMENT

DU PLESSIS AJ

[1] The rule of law is a foundational value of our Constitution. It includes the dignity of the courts being upheld. If this is not done, the court will lose its authority and ability to perform its functions. The Constitution commands that orders and decisions issued by a court bind all persons to whom they apply. This is an important command, as courts will be ineffective without such a command, and orders from a court will be empty words. Parties who choose not to abide by court orders thus risk being held in contempt of court. When courts are called to decide whether to hold a person in contempt of court, they do so to ensure that the rights of the successful litigant are protected and that the Constitution is upheld.

[2] The history of the matter spanning over 20 years is shortly as follows. The litigation between the parties started two decades ago when Mr Mawere caused an urgent application to be brought by Petter Trading (Pty) Ltd (hereafter “Petter”) against SMM and Southern Asbestos Sales (Pty) Ltd (hereafter “SAS”), for payment of about R74 million. It was based on a cession agreement purportedly dated 2003. This agreement, however, was a fraudulent document, only signed a week before the urgent application was brought.

[3] SMM did not oppose the application, as the papers were not served on them. Van Oosten J granted an order against SAS in terms of the application. When SMM heard about the fraudulent proceedings, they launched an urgent rescission application against Petter, initially opposed but eventually granted by Joubert AJ.

[4] SMM then delivered an answering affidavit to the main application. No replying affidavit was filed, and the matter was not pursued.

[5] In 2005, SMM launched an application for the final winding up of SAS, based on its indebtedness to SMM for products delivered to SAS and sold through to customers. SAS opposed this application on the basis that the legislation underpinning SMM's authority to prosecute the application was unconstitutional and therefore unenforceable in the Republic of South Africa, and that the winding-up application is an abuse of process. The matter was argued in full before Epstein AJ on 1 June 2005, who granted an order for final winding-up. Epstein AJ dismissed all the defences raised by SAS, dealing specifically with the allegation that SMM was not authorised to bring the application.¹

[6] A year after the final winding-up order was granted, Mr Mawere and Mr Mariemuthu instituted a rescission action on behalf of SAS to set aside the final liquidation and the appointment of the liquidators. SMM defended the action. After two days of trial with Mr Mariemuthu giving evidence, the action was withdrawn.

[7] Liquidators were appointed for the estate of SAS, and after the first meeting of creditors held on 4 November 2005, no claims were proven. The second meeting was held a year later, and Mr Mawere and Mr Mariemuthu proved claims in the estate on behalf of various companies. The following day, SMM brought an urgent application for an order to review and set aside the decision of the Master to admit the claims brought by Mr Mawere and Mr Mariemuthu. Wepener AJ set aside the decision of the Master after hearing the parties. They applied for leave to appeal to this judgment, which was dismissed.

[8] In September 2006, SMM brought an action against SAS to prove its claim and obtained a default judgment in 2007 against SAS for rectification of the agreement and payment of large sums of money constituting the main claim against SAS. The default judgment was granted after the liquidators of SAS withdrew a bare denial plea they entered in defence of the claim.

¹ *SMM Holdings (Private) Limited v Southern Asbestos Sales (Pty) Limited* 2005 (4) All SA 584 (W).

[9] In September 2006, SMM also issued a summons against Mr Mawere for payment of monies, based on s 424 of the Companies Act relating to the purported session agreement and the urgent application launched. Trial dates were requested, but Mr Mawere had the trial postponed on several occasions until it was placed before Willis J, but the trial proceeded. Willis J gave judgment in favour of SMM, with unfavourable words to Mr Mawere's conduct. Leave to appeal against this judgment was unsuccessful. A rescission application against the judgment was also unsuccessful. Mr Wawere did not comply with Willis J's judgment. He stated that

This has been one of the most unpleasant civil cases in which I have presided... The case reeks of contempt not only for those who have lost employment as a result of the alleged fraud but also the court including individual person who have been judges in this saga, and the court's rules and processes.

[10] In 2016 SMM brought an application for sequestration of Mr Mawere's estate under this case number. It clarified that the sequestration application resulted from the unpaid judgment debt in the s 424 action. Mr Mawere filed an answering affidavit that does not deal with the merits of the sequestration application. SMM proceeded with the application by filing heads of argument and a practice note. Mr Mawere refused to do the same, despite being requested.

[11] In January 2023, Vally J granted an order compelling Mr Mawere to file heads of argument, failing which his defence in the sequestration application would be struck out. Mr Mawere failed to file heads of argument, and his defence was struck. In March 2023, Fischer J granted a provision order sequestrating Mr Mawere's estate. Leave to appeal against that order was dismissed. The final order was granted in May 2023. The Master appointed two trustees for his estate. After that, at least eight applications were instituted to avoid his sequestration, including the urgent application before Pearse AJ discussed below.

[12] On 11 May 2022, Van Nieuwenhuizen AJ granted an order² declaring Mr Mawere a vexatious litigant in terms of s 2(1)(b) of the Vexatious Proceedings Act.³ He was prohibited from instituting proceedings in his own name against various persons⁴ without obtaining leave from the court.

[13] Despite this order, on 24 November 2023, Mr Mawere instituted an urgent legal application against The Master of the High Court. This contravened the Van Nieuwenhuizen J order, under case number 164114/2022, in which he sought an order declaring his sequestration a legal nullity and other far-reaching declaratory, interdictory and ancillary relief. He confirmed that he did not have leave from the court to institute the application. He persisted with the application despite warnings from Pears AJ that this *prima facie* constitutes contempt of court.

[14] After this hearing and before judgment, Mr Mawere instituted at least seven applications in which he has cited the Master of the High Court, without seeking leave to institute those applications.

[15] On 5 December 2023, Pearse AJ delivered a judgment, where Mr Mawere's urgent application was struck from the roll due to a lack of urgency, and an order was granted directing Mr Mawere to show cause why the following order should not be made final:

24.3.1 convicting [Mawere] of contempt of court on the account of any wilful contravention of the order of Van Nieuwenhuizen AJ, granted on 11 May 2022 under case number 16114/2022; and

² Case no 16114/2002.

³ 3 of 1956.

⁴ The Master of the High Court; the Trustees and ABSA bank Ltd.

24.3.2 in the event of such conviction, committing [Mawere] to imprisonment for such period as the court may deem appropriate, alternatively imposing on [Mawere] such fine as the court may deem appropriate.

[16] Pearce AJ allowed Mr Mawere to file further papers and directed him to set 15 April 2024 as the hearing date, which he never did. On that date, Windell J extended the rule nisi to 12 August 2024, which is how this matter was enrolled on my roll.

The law

[17] The Constitution declares its supremacy and the fact that it is binding on all laws in s 1(c) of our Constitution. This is a founding value of our Constitution, emphasising the importance of it. S 165 of the Constitution deals with judicial authority – it vests the judicial authority in courts, and no person or organ of state may interfere with the functioning of the courts. For the courts to be effective, s 165(5) states that an order of court is binding on “all person to whom and organs of state to which it applies”. Continual non-compliance with court orders and decisions would thus lead to a constitutional crisis.⁵

[18] Contempt of court is the commission of an act or statement that shows disrespect to the authority of the court or its officers acting in an official capacity. This can be either wilful disobedience or resistance to lawful court orders.⁶ Contempt orders are there to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of its previous order, and hopefully compel performance in accordance with the previous order.⁷

[19] Committal for civil contempt is possible in civil proceedings for punitive or coercive reasons. Coercive contempt requires that a person comply with an original order that has been breached and set out terms in a contempt order. If a contemnor

⁵ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10 par 26.

⁶ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10 par 28.

⁷ *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10 par 28.

complies with the coercive order, they may avoid imprisonment. Compared with coercive contempt orders, punitive orders aim to punish the contemnor by imposing an unavoidable sentence.

[20] The requirements for contempt of court were recently confirmed 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*⁸ namely:

- a. An order was granted against the alleged contemnor;
- b. The alleged contemnor was served with the order or had knowledge of it;
- c. The alleged contemnor failed to comply with the order.

[21] If these three elements are established, then wilfulness and mala fides are presumed, and the respondent bears an evidentiary burden to establish reasonable doubt, failing which contempt would have been established.

[22] On the evidence that was provided, there can be no doubt that Mr Mawele is in contempt of court for the following reasons:

- a. Mr Mawere is clearly in contempt of Van Nieuwenhuizen AJ's order granted, preventing Mr Mawere from instituting proceedings in his own name against the Master and Van den Heever NO.
- b. He was not only aware of the order because it was emailed to him, but he was also warned by Pearse AJ's that him instituting the urgent application *prima facie* shows that he is in contempt;
- c. despite him acknowledging the existence of the order and being made aware of the fact that he is *prima facie* in contempt, he persisted in the application;

⁸ [2021] ZACC 18.

[23] His *mala fides* is thus presumed. Even in the absence of such a presumption, his *mala fides* is evident from his actions. He continues to cite and serve the Master of the High Court.

[24] I am persuaded by the argument that a fine would not be effective, seeing that Mr Mawere's estate has been sequestrated. I agree that the only effective punishment in this case is committal.

[25] The second respondent asked for a punitive cost order. I do not think that is warranted in this case, as the punishment for Mr Mawere's contemptuous behaviour is committal.

Order

[28] The following order is made:

1. The applicant, Mutumwa Dziva Mawere, acting in contempt of the order granted by his Lordship Acting Justice van Nieuwenhuizen under case number 16114/2022 on 11 May 2022.
2. The applicant, Mutumwa Dziva Mawere, is sentenced to imprisonment for a period of 6 (six) months.
3. The applicant, Mutumwa Dziva Mawere, is directed to submit himself to the South African Police Service at the Sandton Police Station within 5 (five) calendar days from the date of this order for the Station Commander or other officer in charge of that police station to ensure that he is immediately delivered to a correctional centre to commence serving the sentence imposed in 2 above.
4. The applicant, Mutumwa Dziva Mawere, is ordered to pay the costs of the second respondent, on scale C, including the costs of two counsel.



WJ du Plessis
Acting Judge of the High Court

For the Applicants:

Mr Mawere (self-represented) and
attorney AG Mulaudzi Attorneys (no
appearance on the day)

For the Second Respondent:

Mr HC Bothma SC with him Ms
Lingenfelder instructed by DLA Piper
South Africa (RF) Inc