

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

Case No. 14562/2018

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

31/10/2024

DATE

SIGNATURE

In the matter between:

THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA

Applicant

and

FREDDIE NYATHELA

First Respondent

SOUTH AFRICAN ROADIES ASSOCIATION

Second Respondent

In re:

THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA

First Applicant

ROSEMARY MANGOPE

Second Applicant

and

FREDDIE NYATHELA

First Respondent

SOUTH AFRICAN ROADIES ASSOCIATION

Second Respondent

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to Court Online and by release to SAFLII. The date for hand- down is deemed to be 1 November 2024.

JUDGMENT

BEYERS, AJ:

[1] This is an opposed application, brought on an urgent basis, wherein the Applicant seeks an order in the following terms against the First Respondent:

- "1. Dispensing with the forms and service provided for in the Uniform Rules of Court, and that the matter be regarded and dealt with as an urgent in terms of Uniform Rule 6(12)(a).*
- 2. That the first respondent, Mr Freddie Nyathela, be incarcerated for a period of 90 (ninety) days and that a warrant of arrest be issued by the Registrar of the Gauteng Division of the High Court (Johannesburg) to this effect.*
- 3. That the first respondent be ordered to pay the costs of this application on a scale as between attorney and client."*

[2] The Applicant alleges that the First Respondent is in contempt of Court by virtue of his alleged continued disregard of an Order ("*the Order*") granted by the Honourable Judge Mdalana-Mayisela on 20 September 2018, which provides as follows:

- "1. The First and Second Respondents are directed to remove or cause the removal, within 24 hours of this Order, from the First Respondent's Twitter page: @[...], as well as the Second Respondent's Facebook page: South*

African Roadies Association (SARA) and/or any other social media accounts under the control of either the First or Second Respondent, the statements referred to in this application, including any retweets thereof and/or responses received thereto;

2. *The First and Second Respondents are interdicted from making, publishing, causing to be published, retweeting, commenting on Facebook or Twitter or disseminating any defamatory statements concerning the any of the Applicants hereto, including the same or similar statements as those forming the subject matter of this application;*

3. *The First and Second Respondents bear the costs of this application jointly and severally.”¹*

[3] The Order was granted pursuant to an application (“*the initial application*”) brought by the Applicant together with a Second Applicant, Rosemary Mangope, against the First and Second Respondents in the instant application.

[4] The Applicant’s complaint in the instant application is that the First Respondent is in contempt of the Order in that it has, after the Order was granted, and in contravention of the Order, continued to publish statements which are the same or similar as those forming the subject-matter of the initial application.

[5] In addition to opposing the instant application on the merits, the First Respondent took a number of points *in limine*, including that:

- a. The application is not urgent and should be struck from the roll;²
- b. The deponent to the Applicant’s founding affidavit, Ms Diphofa, is not authorised to institute and prosecute the instant proceedings;³
- c. The Applicant has failed to establish a factual and legal foundation for contempt of Court;⁴ and
- d. The Applicant’s application constitutes an abuse of process.⁵

¹ The Order appears at Caselines pp 51-26/27.

² First Respondent’s Answering Affidavit, paras 6-18, Caselines pp 52-5 to 52-9.

³ First Respondent’s Answering Affidavit, para 19, Caselines p 52-9.

⁴ First Respondent’s Answering Affidavit, paras 20-50, Caselines pp 52-10 to 52-17.

⁵ First Respondent’s Answering Affidavit, paras 51-71, Caselines pp 52-17 to 52-23.

[6] Prior to addressing these points *in limine*, I address prior Orders granted by this Court in the context of the disputes between the parties in this application:

- a. On 20 September 2018 the Order referred to above was granted in favour of the Applicant against the Respondents.
- b. On 14 November 2018 the Respondents delivered an application seeking a rescission of the Order, which application was dismissed with costs on 29 April 2022 by the Honourable Judge Manoim.⁶
- c. The Respondents hereafter applied for leave to appeal against the dismissal of the rescission application. The application for leave to appeal was dismissed by the Honourable Judge Manoim on 30 August 2022.⁷
- d. The Applicant, together with Ms Mangope, who had been the second applicant in the original application that resulted in the Order, thereafter launched an application to have the Respondents declared to be in contempt of the Order and for the First Respondent to be committed to prison on account thereof. The Honourable Judge Senyatsi handed down judgment in that application on 4 July 2023, and granted an Order in the following terms:

“[16] An order is therefore granted in the following terms: ...

(a) The First and Second Respondents are declared to be in contempt of the order made by the Honourable MDALANA-MAYISELA J on 20 September 2018 under the above case number.

(b) The First Respondent, Mr. Freddie Nyathela, is sentenced to be committed to prison for a period of 30 (thirty) days, which committal is suspended on condition that the First Respondent complies with the order granted on 20 September 2018 within a period of 10 (ten) days from date of this order.

(c) Should the First Respondent fail to comply with this order the Applicant will be entitled to approach this Honourable Court, on the same papers duly amplified as may be necessary, for an order for the immediate committal of the First Respondent to prison for a period of 30 (thirty) days, alternatively such period as this Honourable Court deems fit.

⁶ Caselines, pp 26-1 to 26-7.

⁷ Caselines, pp 26-8 to 26-9.

(d) *That the First and Second Respondents be ordered to pay the costs of this application on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved."*

e. A further contempt of Court application was brought by the Applicant against the Respondents, which resulted in a Court Order granted by the Honourable Judge Moosa on 19 September 2023 in the following terms:

"HAVING READ THE DOCUMENTS FILED OF RECORD, HEARD COUNSEL, AND HAVING CONSIDERED THIS MATTER, THE FOLLOWING ORDER IS MADE BY AGREEMENT:

IT IS ORDERED THAT:

1. *The First Respondent is ordered to pay the Applicant a fine, in an agreed amount of R75,000.00 (SEVENTY-FIVE THOUSAND RAND), payable in two installments of R37,500.00 (THIRTY-SEVEN THOUSAND FIVE HUNDRED RAND), payable on or before the 19th of October 2023, and on or before the 19th of November 2023;*
2. *The First Respondent is ordered to pay the cost of the application on a scale as between attorney and client."*

[7] The instant application is yet a further application by the Applicant wherein it seeks the committal of the First Respondent for contempt of the Order granted by the Honourable Judge Mdalana-Mayisela.

[8] I turn to address the *in limine* points raised by the First Respondent.

Urgency:

[9] In its papers the Applicant addressed the issue of urgency on the basis, inter alia, that a party's continued disregard of an Order of Court is inherently urgent and that the Applicant acted with promptness and alacrity as soon as the First Respondent's alleged contemptuous conduct become known to it on 17 May 2024.⁸

⁸ Founding Affidavit, paras 9-14, Caselines, pp 51-7 to 51-8.

[10] The First Respondent contends that the application is not urgent on the basis that:

- a. The timeframes dictated by the Applicant were longer than the timeframes provided for in the Rules of Court on the Practice Directive;⁹
- b. The Applicant had allegedly failed to place sufficient and explicit reasons before the Court in the founding affidavit to establish urgency;¹⁰ and
- c. The Applicant's conduct evidences an unexplained delay in that the relevant statements were published during the period between 12 March 2024 and 16 May 2024, but the application was only launched on 3 June 2024.¹¹

[11] Applications for contempt of court are inherently urgent. This has been confirmed on a number of occasions, for example Secretary, Judicial Commission Enquiry into allegations of State Capture v Zuma & Others 2021 (5) SA 327 (CC) at 344; Victoria Ratepayers Association v Greyvenouw CC [2004] All SA 623 (SE); Protea Holdings Ltd v Wriwt 1978 (3) SA 865 (W); Department of Environmental Affairs, Forestry and Fisheries v Xulu and Partners Incorporated and Others; In re: Department of Agriculture, Forestry and Fisheries and Others [2021] 3 All SA 166 (WCC) and Gauteng Boxing Promoters Association and Another v Wysoke [2022] JOL 54009 (GJ).

[12] In the circumstances I consider that this application is inherently urgent and the First Respondent's objection to urgency is dismissed.

Alleged lack of authority

[13] The First Respondent contests the authority of Ms Diphofa, the Applicant's deponent and interim CEO, to institute and prosecute the instant proceedings.¹²

[14] A similar point was raised by the First Respondent in the earlier contempt of Court application before the Honourable Judge Senyatsi. In his judgment he addresses the applicable legal principles as follows:¹³

⁹ Answering Affidavit, para 7, Caselines, pp 52-5 to 52-6.

¹⁰ Answering Affidavit, paras 11 and 12, Caselines, p 52-7.

¹¹ Answering Affidavit, paras 13-18, Caselines pp 52-7 to 52-9.

¹² Answering Affidavit, par 19, Caselines p 52-9.

“[10] I now consider the principles on authority to depose to an affidavit. The lack of authority to either institute action or depose to an affidavit is a common feature that is raised as a defence in the motion proceedings.

[11] In Ganes and Another v Telecom Namibia Limited¹⁴, Streicher JA said the following in regard to the defence of lack of authority:

‘[19] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent ... It must, therefore, be accepted that the institution of the proceedings were duly authorised.’

[12] The Court in Eskom v Soweto City Council¹⁵ had an opportunity to consider a defence that a person lacked authority to bring an application to court and Flemming DJP stated as follows on the approach to be adopted:

‘The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to the litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare Viljoen v Federated Trust Ltd 1971 (1) SA750 (O) 752D-F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

¹³ Caselines pp 26-15 to 26-16.

¹⁴ [2004] 2 All SA 609 (sca); (608/202) [2003] zasca 123 (25 November 2003)

¹⁵ 1992(2) SA 703 at 705E-I.

As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with accept only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.”

[15] In the instant case the First Respondent did not challenge the authority of the Applicant's attorneys to bring the instant application.

[16] Ms Diphofa did not need to be authorised by the Applicant to depose to the founding affidavit.

[17] The objection to Ms Diphofa's authority is thus misdirected.

[18] Although a resolution was uploaded to Caselines on 18 July 2024¹⁶ which evidences Ms Diphofa's authority, this was unnecessary for the reasons set out above.

[19] This point *in limine* is accordingly dismissed.

The factual and legal foundation for contempt of Court:

[20] The First Respondent contends that the Applicant has failed to make out a case against him for contempt of Court in the instant proceedings on the basis, inter alia, that:

- a. The events relied upon by the Applicant in the instant proceedings are “*totally different from the previous events*” which were the subject-matter of the applications before Justices Madalana-Mayisela, Senyatsi and Moosa.¹⁷

¹⁶ Caselines, p 53-89.

¹⁷ Answering Affidavit, paras 21-23, Caselines pp 52-10 to 52-11.

b. The Respondent alleges that the tweets posted from 12 March 2024 had not been the subject-matter of a previous contempt of Court application.¹⁸

c. The First Respondent goes on to allege that the tweets that form the subject-matter of the instant application are neither defamatory of the Applicant (on the basis that the Applicant as organ of state cannot sue for defamation) nor unlawful, as it represented the exercise by the First Respondent of a right to free expression.¹⁹

[21] These contentions have to be considered against the provisions of the Order which the Applicant contends were contravened:

a. Paragraph 2 of the Order prohibits the First Respondent from making, publishing, causing to be published, retweeting, communicating on Facebook or Twitter or disseminating any defamatory statements concerning any of the Applicants including the same or similar statements as these forming the subject-matter of the application that led to the Order.²⁰

b. The issue in the present context concerns whether the First Respondent published statements concerning the Applicant which are the same or similar as those that formed the subject-matter of the initial application.

c. In paragraph 17 of the Founding Affidavit the Applicant sets out a number of statements that formed the subject-matter of the initial application:²¹

“17. It is important to appreciate from the outset that the Court Order specifically directed the removal of the ‘statements referred to in the application’ and also interdicted the dissemination and publication of defamatory statements ‘including the same or similar statements as those forming the subject matter of the application.’ These specific referenced statements included in the initial application were inter alia the following: -

DATE	PUBLICATION/STATEMENT	REF
21 August 2016	‘following the procedures? Truth ...	CL 18-

¹⁸ Answering Affidavit, paras 24-29, Caselines, p 52-11.

¹⁹ Answering Affidavit, paras 30-50, Caselines, pp 52-11 to 52-17.

²⁰ Caselines, p 51-27.

²¹ Founding Affidavit, para 17, Caselines pp 51-10 to 51-11

	<i>the NAC is currently suspending innocent staff members, to protect Maladministration and Corruption.</i>	26
21 August 2016	<i>'Independent forensic investigation ... as advised by the Portfolio Committee on Arts & Culture? Stop the rot ... for the interest of the youth'</i>	CL 18-26
13 September 2016	<i>High level of maladministration and Arrogance must Cease.</i>	CL 18-27
12 October 2016	<i>Dept official & NAC Chairperson recently presented lies ... to parliament</i>	CL 18-27
5 December 2016	<i>SA Roadies (SARA) challenging the findings of the fake forensic re maladministration & corruption at the National Arts Council (NAC)</i>	CL 18-28
14 January 2017	<i>Dept of Arts & Culture covering Rot at the NAC, with fake forensic report</i>	CL 18-28
15 January 2017	<i>Cabals operating between the DAC and NAC, choking development with impunity</i>	CL 18-29
15 April 2018	<i>Roadies won't be intimidated with a High Court action ... By a corrupt National Arts Council and its CEO, abusing the public purse and protected by Minister Nathi Mthethwa.</i>	CL 28-45
17 April 2018	<i>The board members of the national arts council and its chairperson should stop being complicit to corruption ... at the expense of youth empowerment.</i>	CL 28-46
19 April 2018	<i>Did the incompetent Minister Nathi Mthethwa advise his cabal ... at the</i>	CL 28-47

	<i>National Arts Council to file a court action against the roadies ... to shield maladministration??</i>	
20 April 2018	<i>The Department of Arts and Culture and the National Arts Council, had become feeding troughs for connected cronyism ... at the expense of the African child.</i>	CL 28-47
25 April 2018	<i>For the sake of youth empowerment ... please could the 'new dawn' stop the madness and arrogance of Minister Nathi Mthethwa and his cabal at the National Arts Council.</i>	CL 28-48
26 April 2018	<i>Minister Nathi Mthethwa and his cabal ... at the National Arts Council are abusing the 'public purse' to deprive the African children technical skills and opportunities ... with impunity.</i>	CL 28-49"

d. In paragraph 19 of the Founding affidavit, the Applicant sets out the statements of the First Respondent which form the subject-matter of its complaint in the instant application:²²

"19. However, and despite being interdicted from further publication and dissemination of same and similar statements, the First Respondent continued unabated with his unlawful conduct. A table of a limited number of these statements made after the above Court Order was granted, included: -

DATE	PUBLICATION/STATEMENT	REF
4 February 2020	<i>Fact: Minister Nathi Mthethwa and DG Vusumuzi Mkhize have deliberately ignored and suppressed documentation evidence confirming rampant</i>	CL 28-53

²² Founding Affidavit, par 19, Caselines pp 51-11 to 51-14.

	maladministration and corruption at the National Arts Council and the Department.	
17 June 2020	It is a fact; the National Arts Council (NAC) is Rotten and protected by Minister Nathi Mthethwa, who also signed off a fake report to protect maladministration, corruption and abuse of power by CEO Rosemary Mangope, at the expense of empowerment and development.	CL 28-54
21 June 2020	Minister Nathi Mthethwa should finally stop 'turning a blind eye' to the unlawful and criminal conduct at the National Arts Council of South Africa.	CL 28-55
24 June 2020	The Council/Board of the National Arts Council (NAC) is complicit to maladministration and abuse of power... They even signed a resolution for the CEO to litigate against SARA and Freddie Nyathela, to protect maladministration, including an unlawful policy 'looting scheme' titled 'Expired Projects and Surplus Policy'.	CL 28-56
25 June 2020	The Council/Board of the National Arts Council (NAC) should now stop supporting and protecting maladministration and corruption ... at the expense of empowerment and development.	CL 28-57
29 June 2020	Corruption in Motion at the National Arts Council (NAC) – The anatomy of State Capture cover-up by the NAC	CL 28-58

	<i>board members and Minister Nathi Mthethwa.</i>	
1 July 2020	<i>Minister Nathi Mthethwa and the board members of the National Arts Council (NAC) are deliberately failing to act against widespread maladministration and corruption at the National Arts Council. Are they benefiting from the illegal policy 'looting scheme' titled 'Expired Projects and Surplus Policy'???</i>	CL 28-59
July 2020	<i>The Chairperson of the Portfolio Committee on Sports, Arts and Culture, Ms B Dlulane, should urgently stop protecting maladministration and corruption at the NAC and DSAC.</i>	CL 28-60
4 July 2020	<i>Minister Nathi Mthethwa and his cabal at the DSAC and the NAC cannot be allowed to continue to perpetuate a pre-1994 agenda... Sabotaging youth empowerment and transformation with impunity.</i>	CL 28-61
15 July 2020	<i>Minister Nathi Mthethwa is deliberately allowing the looting of public funds at the National Arts Council and protected by Parliament Portfolio Committee on Sports, Arts and Culture.</i>	CL 28-62
6 August 2020	<i>A rogue Minister Nathi Mthethwa is also continuing to protect an unlawful policy operating at the National Arts Council titled 'Expired Projects and Surplus Policy' which gives thieves a licence to 'commit fraud' and loot the public funds with impunity.</i>	CL 28-63

4 April 2021	@n[...] @s[: The National Arts Council should not be allowed to continue to abuse the public funds to protect rampant fraud and corruption.	CL 28-64
6 April 2021	@n[...] 2SportArtsCulture: The NAC Council is continuing to abuse the public funds with court applications ... to protect rampant fraud and corruption.	CL 28-65
13 April 2021	@N[...] @n[...] @S[...] @D[...]e: The minister should deal with the thieves looting the public funds at the NAC, and stop bullying the Artists and Roadies...	CL 28-66
14 April 2021	@N[...] @n[...] @S[...] @D[: The minister should stop aiding and abetting rampant fraud and corruption at the rotten NAC.	CL 28-67
15 April 2021	@N[...] @n[...] @S[...] @D[: DSAC and NAC – bad faith, dishonesty, aiding and abetting corruption... filthy and dirty hands.	CL 28-68
25 April 2021	@N[...] @n[...] @S[...] @D[: Blatant fraud and corruption at the NAC, under the watch of the minister should stop.	CL 28-69
3 June 2021	Thieves at the National Arts Council , shielded by @N[...] cannot continue to loot ... the public funds with impunity... and get away with it.	CL 28-70
4 June 2021	@N[...] @n[: 'When artists staged a sit-in at the NAC, they were telling the greedy and visionless clowns that predatory behaviour can no longer be allowed to continue.'	CL 28-71

19 July 2021	<i>It seems like the new Council members of the National Arts Council are also continuing to protect rampant fraud and corruption ...at the expense of empowerment and development.</i>	CL 28-72
25 Nov 2021	<i>@n[...] @N[...]: The suspend CEO Ms Mangope and the National Arts Council committed perjury .. whilst rying (sic) to legitimise a looting scheme titled 'Expired Project and Surplus Policy'.</i>	CL 28-73
10 May 2022	<i>Could the law enforcement agencies finally stop this fraud and corruption @n[...] for the sake of the African child.</i>	CL 28-74
30 May 2022	<i>This criminality 'looting scheme' operating at the corrupt NAC should be abolished ... for the sake of the child and those not yet born.</i>	CL 28-75"

e. The First Respondent addresses paragraphs 17 and 19 of the Founding Affidavit in paragraph 79 of his Answering Affidavit. In this paragraph the approach adopted by the First Respondent is to the effect that the statements are not defamatory as "... *it is inconsistent with established authority on the proper approach to an application for an interdict to prevent the publication of future defamatory statements.*"²³ The First Respondent does not deny that it made the statements complained of by the Applicant.

f. It is clear from a comparison of the statements that formed the subject-matter of the initial application, and those that form the subject-matter of the instant application, that the statements in the instant application are the same or similar to those that formed the subject-matter of the initial application.

g. The statements complained of by the Applicant in the instant application thus clearly contravene the express provisions of paragraph 2 of the Order.

²³ Answering Affidavit, par 79.1, Caselines p 52-26.

[22] The relevant principles concerning contempt of Court were addressed by the Honourable Judge Senyatsi in his judgment of 4 July 2023 as follows:²⁴

“[5] The principles of disobedience of court orders are trite in our law. It is a crime unlawfully and intentionally to disobey a court order.²⁵ 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.²⁶ The offence has in general terms received a constitutional stamp of approval,²⁷ 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.²⁸

[6] The contempt of civil court proceedings permits a private litigant who has obtained a court order to require an opponent to do or not to do something and to approach the court again, in the event of non-compliance, for a further order declaring the non-complaint party in contempt of court and ask the court to impose a sanction.²⁹ The sanction usually, does not invariably,³⁰ has the object of inducing the non-complier to fulfil the terms of the previous order. This involves a criminal sanction in order to force the non-complier to comply with the court order.

[7] The test for when disobedience of a civil order constitutes contempt has come to be stated as to whether the breach was committed deliberately and mala fide.³¹ 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

²⁴ Caselines pp 26-13 to 26-15.

²⁵ S v Beyers 1968(2) SA 70 (A).

²⁶ Attorney-General v Crockett 1911 TPD 893.

²⁷ S v Mamabolo [2001] ZACC; 2001(3) SA 409 (CC) para 14.

²⁸ Coetzee v Government of the Republic of Sout Africa [1995] ZACC 7; 1995 (4) SA 631 (CC) para 61.

²⁹ Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) para 7.

³⁰ Cape Times v Union Trades Directories (Pty) Ltd 1956 (1) SA 105 (N) 120D-E.

³¹ Fakie NO (supra) at para 9.

infraction.³² Even a refusal to comply that is objectively unreasonable may be bona fide (the unreasonableness could evidence lack of good faith).³³

[8] In LAN v OR Tambo International Airport Department of Home Affairs Immigration Admissions and Another³⁴ Du Plessis AJ said the following regarding the alleged compliance with the court order after the fact:

‘[75] I am, however, of the view that non-compliance with a court order, at specific, given period in time, constituting an offence that has been committed at that time, cannot or should not be ignored by a court simply because of the fact that there was at later stage compliance with the court order. That renders the remedy only applicable to a situation where a person has refused to obey a court order, and the court is requested to strengthen its court order by way of a threat of guilty finding of contempt, and a suitable order ensuring compliance.’

[9] In order to succeed with the relief of contempt, the applicant must prove the following requirements:

- (a) The existence of the court order;
- (b) Service thereof to the respondent³⁵; and
- (c) Failure to comply with the terms of the order.

Once these requirements are met, the respondent bears the onus to prove that non-compliance was not wilful.”³⁶

[23] The Applicant has clearly established that there is a Court Order, which was served upon the First Respondent and/or of which the First Respondent had knowledge, and that the First Respondent has failed to comply with the terms of such Order.

³² Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 © 524D; Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 691C.

³³ Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (2) SA 355 (A) 368C-D.

³⁴ [2010] ZAGPPHC 165; 2011 (3) SA 641 (GNP) at para 75.

³⁵ Or knowledge of the Order – see Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra), par [37], p 345.

³⁶ Also see Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra), par [37], p 345.

[24] As such, the Applicant has laid a factual and legal foundation in its papers for contempt of Court, and the First Respondent's *in limine* objection in this regard is accordingly dismissed.

Abuse of process

[25] The First Respondent contends that the Applicant's application is "*part of a pattern of conduct whereby the Applicant seeks to intimidate and silence public criticism of it*".³⁷

[26] I disagree. The Applicant has, as indicated above, made out a substantive case to the effect that the First Respondent has contravened the provisions of the Order.

[27] The Applicant's application does not constitute an abuse of process.

Was the First Respondent's contravention wilful

[28] Once an applicant has established the three requirements for contempt of Court referred to above, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.³⁸

[29] The instant proceedings represents the third application in which this Court has been approached to address a contravention by the First Respondent of the terms of the Order. In the two previous contempt of Court applications, this Court imposed a suspended prison sentence and a fine, respectively.

[30] The First Respondent has not in his response to the instant application presented evidence which supports any inference that his failure to comply with the Order was *bona fide* or inadvertent. The contrary is quite evident, particularly given

³⁷ Answering Affidavit, paras 51-71, Caselines pp 52-17 to 52-23, and specifically par 55 at p 52-18.

³⁸ Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra), par [37], p 345.

the fact that this is the third occasion where this Court is confronted with a disregard by the First Respondent of the relevant Order.

[31] Despite the Orders of the Honourable Justices Senyatsi and Moosa, the First Respondent has, once again, contravened the provisions of the Order.

[32] The inescapable inference from these facts is that the First Respondent wilfully contravened the terms of the Order.

The appropriate sanction

[33] The purpose of contempt orders was set out as follows in Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra) at paragraph [47] thereof:³⁹

“I should start by explaining how the purposes of contempt of court proceedings should be understood. As helpfully set out by the minority in Fakie, there is a distinction between coercive and punitive orders, which differences are 'marked and important'. A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct. Such an order is made primarily to ensure the effectiveness of the original order by bringing about compliance. A final characteristic is that it only incidentally vindicates the authority of the court that has been disobeyed. Conversely, the following are the characteristics of a punitive order: a sentence of imprisonment cannot be avoided by any action on the part of the respondent to comply with the original order; the sentence is unsuspended; it is related both to the seriousness of the default and the contumacy of the respondent; and the order is influenced by the need to assert the authority and dignity of the court, to set an example for others.”

[34] Neither the suspended sentence nor the fine have been effective in achieving continued compliance by the First Respondent with the Order.

³⁹ At p 347.

[35] Court orders must be obeyed. If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the Judiciary, and the rule of law, would be bleak.⁴⁰

[36] The order granted must vindicate this Court's honour, and protect and maintain public confidence in the legitimacy of the Judiciary.⁴¹

[37] Given the brazen manner in which the First Respondent has flouted the provisions of the Order and the absence of any remorse, the only appropriate sanction is a direct, unsuspended order of imprisonment.

[38] The Applicant seeks direct imprisonment for a period of 90 (ninety) days. In my view a period of 60 (sixty) days would be more appropriate.

Costs

[39] The Applicant seeks costs on an attorney and client scale. Given the First Respondent's conduct, a punitive costs order is appropriate.

ORDER:

[40] I accordingly issue an Order:

- a. Dispensing with the forms and service provided for in the Uniform Rules of Court, and that the matter be regarded and dealt with as urgent in terms of Uniform Rule 6(12)(a);
- b. That the First Respondent, Mr Freddie Nyathela, be incarcerated for a period of 60 (sixty) days and that a warrant of arrest be issued by the Registrar of the Gauteng Division of the High Court (Johannesburg) to this effect; and

⁴⁰ See Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra), par [87], p 365.

⁴¹ Secretary, Judicial Commission of Enquiry into allegations of State Capture v Zuma and Others (supra), par [103], p368.

- c. That the First Respondent be ordered to pay the costs of this application on a scale as between attorney and client.

J BEYERS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 23 July 2024

Date of Judgment: 31 October 2024

APPEARANCES:

For the Applicants: Adv WJ Bezuidenhout
Instructed by: Moodie Robertson Attorneys

For the Respondent: Adv B Shabalala
Instructed by: Morakile Tibane Attorneys Inc