

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES

CASE NO: 2025-013976

DATE: 17 February 2025

In the matter between:

NTSIKELELO KWEZI N O

First Applicant

BULELWA JEANIE MKANGISA N O

Second Applicant

SIBUSISO PETER-PAUL NGWENYA N O

Third Applicant

and

ODWA BONGILE KUPISO

Respondent

Neutral Citation: *Kwezi N O and Others v Kupiso (2025-013976) [2025]*

ZAGPJHC --- (17 February 2025)

Coram: Adams J

Heard: 12 February 2025

Delivered: 17 February 2025 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 17 February 2025.

Summary: Civil procedure – urgent application – for contempt of court order – the applicant in civil contempt of court proceedings required to prove beyond a reasonable doubt (a) the Court Order, service thereof and / or actual knowledge thereof; (b) non-compliance with the order; and (c) wilfulness or *mala fides* – once knowledge of and non-compliance with the order is established, the respondent then bears an evidential burden to rebut wilfulness and *mala fides* – *In casu* – applicants met all the requirements – respondent found to have been in contempt –
Urgent application granted.

ORDER

- (1) The applicants' non-compliance with the Uniform Rules of Court relating to form, service and prescribed time periods, is condoned and this matter is allowed to be heard as one of urgency in terms of Uniform Court Rule 6(12).
- (2) The respondent is held to be in contempt of the order of this Court granted under case number: 2024-130701, by agreement between the parties, on 19 November 2024 by Dlamini J, in that he (the respondent) dispatched the letters dated 15 and 30 January 2025 respectively to the founder of the Peaker Trust, First National Bank, ABSA Bank and the Master of the High Court.
- (3) For his contempt of court, the respondent is fined R50 000, suspended on condition that he desists and refrains forthwith from any further conduct which amounts to contempt of the 19 November 2024 court order and on condition that the respondent does not, directly or indirectly, or in any other manner further breach the said order.
- (4) The respondent shall pay the applicants' cost of this opposed urgent application, including Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

JUDGMENT

Adams J:

[1]. On 19 November 2024 this court (per Dlamini J), by agreement between the parties, granted an order under case number: 2024-130701, which reads in the relevant part as follows: -

- '(1) The applicants, the first and the second respondents, as trustees of the Peaker Trust ("the Trust"), agree and undertake to pay an *ex-gratia* amount of R3 million to each of the first and the second respondents.
- (2) The parties referred to in paragraph 1 agree to sign a resolution of the Trust authorising the payment contemplated in the paragraph above.
- (3) The first and second respondents shall forthwith resign as Trustees of the Trust and from all its investee companies and shall cooperate and take all action necessary to effect their resignation from the Trust and the investee companies, including being removed as bank signatories of the said entities.
- (4) Within five court days from the date of this order, the first and second respondents shall deliver to the applicants all the requisite resignation letters, resolutions, accompanied by an irrevocable power of attorney authorising the applicants as the remaining trustees to sign all necessary forms and documents to effect the resignation of the first and second respondent.
- (5) Upon receipt of the resignation letters, resolutions and the power of attorney referred to in paragraph 4 or any necessary document required to effect their resignation from the Trust and the investee companies contemplated herein, the applicants shall cause the Trust to effect the payment to the first and second respondents as stated in paragraph 1.
- (6) *The first and second respondents undertake not to cooperate with any third party whatsoever to the detriment of the Trust and any of its investee companies and shall not divulge any information that they obtained during their term as trustees of the Trust and the directors of its investee companies.*
- (7) This settlement is in full and final settlement of all claims, whether civil or criminal, that may be pending between the parties.
- (8) The Parties agree that each party shall bear its own costs.' (Emphasis added)

[2]. The applicants in that case were the first and the second applicants in this matter and the first respondent in that case is the respondent *in casu*. All of the foregoing parties were trustees of the Peaker Trust as and at the time the 19 November 2025 order was granted.

[3]. In issue in this opposed urgent application is whether the respondent, in addressing communiqués to various institutions and entities during January 2025, has acted in contempt of the foregoing order. The relevant portion of the

court order, which, according to the applicants, the respondent is in breach of is paragraph 6. Therefore, the question to be considered by me is whether the respondent intentionally cooperated with a third party ‘to the detriment of the Trust and any of its investee companies’ and whether he has divulged any information that he obtained during his term as trustees of the Trust and the director of its investee companies. These issues are to be decided against the factual backdrop as set out in the paragraphs which follow.

[4]. However, before dealing with the facts in the matter it may be apposite at this point to have a brief overview of the applicable legal principles relating to contempt of court to place in context the issues which require adjudication. And in that regard, the leading authority remains *Fakie v CCII Systems (Pty) Ltd*¹, in which the Supreme Court of Appeal (SCA) held as follows: -

‘The essence of contempt of court *ex facie curiae* is a violation of the dignity, repute or authority of the court. ... Deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe that he is entitled to act in the way he claimed to constitute the contempt. ... Even a refusal to comply that is objectively unreasonable, may be *bona fide*.’

[5]. It is trite that the applicants are required to prove three requirements, that being a valid and extant court order; knowledge on the part of the respondent of the existence of the order and thirdly wilful, *mala fide* and unreasonable non-compliance with the court order, before it can be said that the conduct of the respondent constitutes contempt of court. As regards the question of the unreasonableness of the non-compliance, *Consolidated Fish Distributors (Pty) Ltd v Zive and Others*² held that ‘even though a respondent may be wilful, and admittedly so, he may yet escape liability if he can show that he was *bona fide* in his disobedience, that is, that he genuinely, though mistakenly, believed that he was entitled to commit the act, or the omission, alleged to be a contempt of Court’.

¹ *Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

² *Consolidated Fish Distributors (Pty) Ltd v Zive and Others* 1968 (2) SA 517 (CPD) at 524 D.

[6]. In *Fakie* (supra) Cameron JA held that the applicant in civil contempt of court proceedings is required to prove beyond a reasonable doubt the following requirements: (a) the Court Order, service thereof and / or actual knowledge thereof; and (b) non-compliance with the order. Once these are established, so Cameron JA held, the respondent then bears an evidential burden to rebut wilfulness and *mala fides*, by raising only a reasonable doubt, which is the test applicable in criminal matters.

[7]. That brings me back to the facts in the matter. In that regard, the existence and the wording of the court order and the fact that the respondent has knowledge of same, are common cause. The respondent does however take issue with the contention by the applicants that he is in contempt of paragraph 6 of Dlamini J's order. The case on behalf of the respondent is that the applicants have not proven beyond a reasonable doubt his (the respondent's) non-compliance with the court order. From this it follows that the respondent denies wilfulness and *male fides*.

[8]. On 11 December 2025 – about four weeks after the Dlamini J Order – T Mpumlwana and Associates, the present attorneys of record of the respondent, wrote to the trustees of the Peaker Trust, ostensibly on behalf of an entity by the name of Masintinge Investments CC ('Masintinge'), requesting certain information relating to the Trust. Masintinge is named as a possible beneficiary of the Peaker Trust in the Deed of Trust of the Peaker Trust. The communiqué was addressed to the Trustees at the instance of the respondent – about this there can be no doubt.

[9]. This letter alleges *inter alia* that the trustees of the Peaker Trust misled Masintinge about the nature of the investments the investee companies are involved in. The letter also insinuates other irregularities in the running and the administration of the Trust, and the contents of the demand are clearly based on information obtained by the respondent whilst he was a Trustee of the Peaker Trust from about June 2024 to November 2024, when he resigned his post as a Trustee in accordance with the Dlamini J order. In my view, this

missive is the first violation of paragraph 6 of the said order in that the respondent had clearly cooperated with a third party, being Masintinge, *may* he instigated the said company, to the detriment of the Trust. The prejudice to the Trust as a result of the respondent's aforesaid conduct is self-evident. Moreover, it is as clear as day that the respondent had divulged information to Masintinge which he obtained during his term as trustees of the Trust.

[10]. It did, however, not end there. On 15 January 2025, the applicants received an electronic mail from the respondent, copying in third parties, confirming in as many words that he is the force behind Masintinge and threatening to address a communication to Engie Southern Africa (Pty) Ltd and its attorneys, the Development Bank of Southern Africa, Absa Bank Limited, First National Bank Limited and the Master of the High Court, Johannesburg, in which he would presumably bring to the attention of these entities alleged irregularities in the running of the Trust. The applicants were given an ultimatum to 'find a solution to all the issues raised in the [15 December 2024] letter', failing which the respondent intended '... [issuing] the letter on Monday, 20 January 2025 and proceed with the intended Court application ...'. The respondent also threatened to instruct First National Bank and Absa Bank Limited to proceed to in effect freeze the business bank accounts of the Trust.

[11]. On the same day, that being 15 November 2025, T Mpumlwana & Associates, also addressed a missive to the applicants, ostensibly on behalf of Masintinge, demanding *inter alia* 'a written undertaking from the Trustees for the time being of the Peaker Trust, no later than Friday, 24 January 2025, that they will not adopt any resolution for payment of distributions, awards, grants and/or any payment (administration fees or not) to the Named Beneficiaries and any Beneficiary for that matter (including [Masintinge]), pending the outcome of an application to be brought on a semi-urgent basis by [Masintinge] for the reconstitution of the board of trustees of the Peaker Trust in a manner set out in the Broad-Based Black Economic Empowerment Act, No 53 of 2003 and Codes of Good Practice alternatively, for the appointment of an Independent Trust Administrator that will manage and run the affairs of the Peaker Trust so

as to achieve the objectives set out in clause 5 of the Deed of Trust of the Peaker Trust’.

[12]. Other demands were also made in the said letter in relation to a stop on the further transacting of the business bank accounts of the Trust.

[13]. A copy of the foregoing letter was send by T Mpumlwana & Associates to Engie Southern Africa, the Master of the High Court, Johannesburg, First National Bank and ABSA Bank Limited. It goes without saying and it is self-evident that the conduct by the respondent, disguised as actions by Masintinge, has the potential to severely prejudice the Trust and, if he is allowed to persist with those actions, the Trust and its further administration will be severely prejudiced. It is, as contended by the applicants, that the respondent is using Masintinge to disrupt the efficient running of the Peaker Trust. And he does that utilising the knowledge he gained as a trustee of the said Trust and as a director in the investee companies to undermine the Trust.

[14]. In my view, it cannot be gainsaid that the respondent, by his aforementioned conduct, did precisely what he undertook not to do as per the Dlamini J order. By writing to the founder of the Peaker Trust, Engie, knowing that the trustees are having a difficult engagement with the founder, the respondent is deliberately in contempt of the court order. In that regard, there is currently, to the knowledge of the respondent, an ongoing High Court case between the trustees and Engie. He played a crucial role in assisting the trustees in their defend against the lawsuit filed by Engle.

[15]. Moreover, the letter from the T Mpumlwana & Associates is disparaging of the trustees, and by sending a copy of the said communication to the business bankers of the Trust, the respondent undoubtedly breached the terms of the court order by Dlamini J. The respondent, through his attorneys, also urged the Master of the High Court not to issue any further letters of authority. How prejudicial and detrimental will such advices to these institutions be, I ask rhetorically. The respondent acted as the secretary of the Peaker Trust, a role

akin to that of a Company Secretary. He is fully aware of the governance requirements of the trust deed, and he is abusing his knowledge and acting to the detriment of the Trust.

[16]. The final straw for the applicants came on 30 January 2025, when the respondent's attorneys wrote to the Master of the High Court, requesting the Master to remove the trustees of the Peaker Trust. In the communication to the Master's office, further disparaging remarks are made of and about the applicants. There is, to my mind, no doubt that the allegations made by and on behalf of the respondent are damaging and detrimental to the interest of the Trust and its beneficiaries. I reiterate that this conduct violates the letter and the spirit of the Dlamini J order.

[17]. For all of these reasons, I conclude that the respondent, in sending out these foregoing communications to the entities mentioned, is in contempt of the order of this Court dated 19 November 2024. The applicants have, in my view, proven all of the elements necessary to have the respondent declared to be in contempt. I reject the convoluted defences and legal points raised by the respondent in opposition to this application. There is no merit in any of these defences and it is not necessary for me to deal with those defences in any detail. The simple point is that factually the respondent has wilfully and *mala fide* breached the court order, underpinned by an undertaking he gave to the applicants, in that he initiated and instigated processes which are detrimental to the Trust. Moreover, the undisputed fact of the matter is that the respondent divulged and used information – again to the detriment of the Trust – which information he had obtained during his term as a trustee of the Trust and as a director of the investee companies of the Trust.

[18]. Wilfulness and *mala fides* can and should, in my view, be inferred from the fact that the respondent knew that his conduct amounted to contempt of court. This is why he disguised his unlawful contemptuous actions as those of Masintinge and not of himself.

[19]. The respondent also opposed the application on the basis that it lacks urgency. I disagree. Whilst the contemptuous conduct on the part of the respondent started during December 2024, the applicants only became aware of his involvement in the unlawful contemptuous communications addressed to the Trustees and other entities during January 2025. By all accounts, the applicants have approached this court not with undue delay and at the first available opportunity. There is no self-created urgency, as contended by the respondent. I am satisfied, all things considered, that the applicants' application is urgent.

[20]. The application should therefore be granted and the costs should follow the suit.

Order

[21]. In the result, I make the following order:

- (1) The applicants' non-compliance with the Uniform Rules of Court relating to form, service and prescribed time periods, is condoned and this matter is allowed to be heard as one of urgency in terms of Uniform Court Rule 6(12).
- (2) The respondent is held to be in contempt of the order of this Court granted under case number: 2024-130701, by agreement between the parties, on 19 November 2024 by Dlamini J, in that he (the respondent) dispatched the letters dated 15 and 30 January 2025 respectively to the founder of the Peaker Trust, First National Bank, ABSA Bank and the Master of the High Court.
- (3) For his contempt of court, the respondent is fined R50 000, suspended on condition that he desists and refrains forthwith from any further conduct which amounts to contempt of the 19 November 2024 court order and on condition that the respondent does not, directly or indirectly, or in any other manner further breach the said order.

- (4) The respondent shall pay the applicants' cost of this opposed urgent application, including Counsel's charges on scale 'C' of the tariff applicable in terms of the Uniform Rules of Court.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	12 February 2025
JUDGMENT DATE:	17 February 2025 – Judgment handed down electronically
FOR THE APPLICANTS:	S Mahlangu
INSTRUCTED BY:	Mdyesha Ndema Attorneys Inc, Fourways, Randburg
FOR THE RESPONDENT:	N Zwane
INSTRUCTED BY:	T Mpumlwana & Associates, Morningside, Durban