



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 532/2024

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
	
<u>11 August 2025</u>	
DATE	SIGNATURE

In the matter between:

CARNABY WAY INVESTMENTS (PTY) LTD

APPLICANT

and

DESIRE KOCH

FIRST RESPONDENT

NONOSI TRADING CC

SECOND RESPONDENT

TERSIA MASHALL ATTORNEYS

THIRD RESPONDENT

**THE REGIONAL LEGAL PRACTICE COUNCIL
MPUMALANGA**

FOURTH RESPONDENT

JUDGMENT

Msibi AJ

[1] The applicant requests that the first respondent be found in contempt of this Court's order dated 16 November 2023, specifically paragraph 2, which requires payment of R615 988.78 into the third respondent's Trust Account. The applicant also seeks an immediate arrest warrant for the first respondent, with a minimum of one-month imprisonment if they do not comply.

Background Facts

[2] On 16 November 2023, the applicant filed an application with this court under case number 297/23 against the first respondent for an interdictory order in respect of funds held by her, which were placed into her Trust Account by her client, the second defendant.

[3] The application was opposed by the second respondent, who was represented by the first respondent at that time. It transpired during the hearing of the matter before Pick AJ that the first respondent did not have a valid Fidelity Fund Certificate. The first respondent conceded to this fact. As a result, the court found that the first respondent was unlawfully holding money in her Trust Account on behalf of the second respondent and granted the following order:

“1 The first respondent is hereby interdicted from disposing of, paying out or in any way dealing with the remaining portion of the funds that the second respondent has paid into her attorney's trust account being an amount of R615 988,78 pending the finalization of the action instituted by the applicant against the second respondent in this Honourable Court under case number 269/2023

2 The amount of R615 988,78 should be paid over into the trust account of Tersia Marshall Attorneys for purposes thereof.

3 The aforementioned sum should be invested by Tersia Marshall Attorneys, and interest should accrue to the successful party under case number 269/2023.

4 The first and second respondents are ordered to pay the applicants' costs in this application."

[4] On 10 June 2024, the first respondent sought leave to appeal, claiming she could not pay as the funds had covered the legal fees for the second respondent. The applicant opposed, stating the money was allocated post-court order. The application was dismissed with costs.

[5] In this application before me, the applicant argues that the first respondent is in wilful default of the court order granted by Acting Judge Pick on 24 November 2023. Further, that on 4 December 2023 and 9 January 2024, correspondence was addressed by the applicant to the first respondent inquiring if the money was paid to the third respondent's Trust Account.

[6] In her first response, dated 10 January 2024, the first respondent stated that she has received instructions to bring an application for leave to appeal as soon as she is in receipt of the Judge's reasons. She also made an undertaking that no further fees had been taken since the hearing in November 2023 and that she would keep the funds in abeyance, pending her application for leave to appeal. The applicant is relying on the contents of the correspondence exchanged between the parties to confirm that the first respondent was aware of the court order and is wilfully not complying with same.

[7] The first respondent conceded to the fact that she was present during the court proceedings wherein Pick AJ reserved the judgment. She could deduce from the remarks made by the presiding judge that the judgment would not be in her favour; as a result, she started preparing for an application for leave to appeal. She was never, prior to the service of this application, provided with a copy of the court order. While exchanging

correspondence with the respondents, the applicant never included a copy of the court order.

[8] The first respondent vehemently denied that the order was handed down in court in her presence. Neither the court nor the Registrar had forwarded her a copy of the court order, even though the presiding Judge had made an undertaking to forward the order and reasons therefor to the individual parties. She only became aware of the order when this application was served on her by the applicant.

Issues

[9] Based on these facts, the court must determine the following issues:

9.1 Whether the first respondent was aware of the court order.

9.2 Whether the applicant has discharged the onus of proof beyond reasonable doubt that the respondent is in wilful contempt of the court order, and thus entitled to the orders as sought against the respondent.

Legal Framework

[10] An application for contempt of court is a remedy available to parties whose rights have been frustrated despite legal intervention and sanctions by our courts. All South Africans have a duty to respect and abide by the law. In *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others*,¹ Jafta J in his dissenting judgment stated as follows:

“Ordinarily therefore, a decision of this Court brings about finality in litigation. And this finality in turn engenders legal certainty which produces legitimacy and public confidence

¹ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State and Others* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 136.

in our legal system. Both finality and certainty are components of the rule of law, a founding value of our Constitution.”

[11] An attempt to evade any legal sanctions by the courts, especially court orders, carries serious consequences as it also undermines the best interests of society at large. If court orders are habitually evaded with relative impunity, not only is the justice system discredited, but the general interests of society are also not adequately protected. Disregard of court orders is an attack on the very fabric of the rule of law.

[12] In *Fakie NO v CCII Systems (Pty) Ltd*,² it was stated that the requirements for contempt of court are now trite and they are: the existence of a court order; the contemnor must have been served with the order or have knowledge of the court order; there must be non-compliance with the court order; and the non-compliance must have been wilful or *mala fides*. Once the first three elements have been shown, wilfulness and *mala fides* will be presumed, and the evidentiary burden switches to the contemnor.

[13] It has been recognised by our courts that where a committal is ordered, the standard of proof in civil contempt matters must be the criminal standard. In those circumstances, wilfulness and *mala fides* must be shown beyond reasonable doubt. See *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited*.³

[14] Put differently, the contemnor has an evidential burden to create a reasonable doubt as to whether his conduct was wilful and mala fide. There is a different standard of proof where no criminal sanction is sought; then, the standard of proof is that of a balance of probabilities. While all wilful disobedience of a court order made in civil proceedings is a criminal offence, civil mechanisms that are designed to induce compliance without resorting to committal are competent when proved on a balance of probabilities.⁴ The

² *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA).

³ *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2017(11) BCLR 1408 (CC) para 61.

⁴ *S v S.H* [2023] ZASCA 49 para 20.

hybrid nature of contempt proceedings, which results in committal, combines civil and criminal elements. But this does not mean that contemnors are not afforded the substantive and procedural protections which apply to any individual facing the loss of their freedom.

[15] It is in light of the above that the issuing of a conditional warrant of arrest or refusal thereof should be considered. Whether or not the conduct of the applicant was merely a delaying tactic or resistance to the court order, this court should be alive to the potential of an individual's loss of liberty. It is therefore incumbent on this court to establish that the appellant's conduct was mala fide and wilful beyond a reasonable doubt.

[16] It was argued on behalf of the applicant that the first respondent is not a lay person but an officer of the court. She was present as a litigant during previous court proceedings. She would not refer to the Judge's reasons and appeal proceedings in her correspondence if she were not aware of the court order. The court was called upon to consider the credibility of the first respondent's version. If she were willing to comply with the court order, she would have done so any time after being served with notice of this application.

[17] Counsel for the first respondent argued that the applicant wants the court to infer from the correspondence exchanged that the first respondent was indeed aware of the order granted, although the applicant never caused the order to be served on the first respondent. The fact that she is an officer of the court does not override the requirement that she should be served with notice of the order.

[18] It is not in dispute that a court order was granted against the first respondent on 24 November 2023. Secondly, the first respondent has not complied with the court order. The first respondent's argument that the order was not served on her could not be disputed by the applicant during the proceedings before me. The applicant is indeed calling upon this court to infer from the abovementioned objective facts that the first respondent was aware of the court order.

[19] As stated in *Fakie and Others (supra)*, the applicant carries the evidential burden of proof beyond reasonable doubt that the first respondent was aware of the court order. The applicant argued that the application for leave to appeal was issued after service of this application, but it was dismissed as condonation for the late filing of the leave to appeal was not granted. The admitted knowledge of the order in their correspondence is denied by the first respondent. As such, the first respondent could not comply with an order that she had no knowledge of.

[20] As it was held in *Matjhabeng Local Municipality (supra)*, the court must be satisfied that failing to comply with the court order was wilful and mala fide. Before the court can investigate the applicant's step of lodging an application for leave to appeal in order to establish if it was indeed a delaying tactic aimed at frustrating the court order, the background facts, service, or knowledge of the court order play an equally important role. The fact that the first respondent has not paid the funds to the third respondent's Trust Account was argued to be an undeniable fact that indicated malice.

[21] It is accepted that the order was not served on the first respondent. This represents an initial procedural requirement for the applicant. Consideration of mala fides cannot proceed without establishing knowledge of the contents of the court order.

[22] This court was not provided with records of previous court proceedings of 16 November 2023, but was, however, referred to the court order dated 24 November 2023, which was handed down a week after the hearing. However, as already demonstrated, the applicant has not disputed the first respondent's version that the order was not served on the applicant nor brought to her attention.

[23] Consequently, the court finds that the applicant has failed to discharge the criminal evidential burden of proof that the first respondent was aware of the court order and that her failure to comply with the order was mala fides.

[24] Both parties applied for punitive costs against each other. I am mindful of the fact that the applicant had to approach this Court to seek compliance with the order, thereby incurring costs. I am equally mindful of the respondent's reasons in opposing same. I am therefore of the view that the circumstances are such that there should be no costs order in this application.

[25] In the result, I make the following order:

1 The application is dismissed, with no order as to costs.



MSIBI AJ

ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

For the applicant: Adv M.M Boonzaaier

Instructed by: Doyer and Doyer Attorneys, Mbombela.

For the respondent: Adv N. Nortje

Instructed by: Sekgala and Njau Attorneys

Reserved on: 24 July 2025

Delivered on: 11 August 2025