

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11854/2023

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 03 October 2025 SIGNATURE.....

In the matter between:

DICKIEL KUSAINDA

APPLICANT

And

THE UNIVERSITY OF LIMPOPO

FIRST RESPONDENT

NEHEMIA MAHLO MOKGALONG

SECOND RESPONDENT

KWENA MASHA

THIRD RESPONDENT

JUDGMENT

DU PLESSIS AJ:**Introduction:**

[1] The Applicant applies for the following relief against the Respondents:

- 1.1 Declaring the First Respondent, alternatively the First, Second and Third Respondents to be in contempt of the court order granted by this Court on 7 June 2024; and
- 1.2 Directing the First Respondent to comply with the court order granted by this Court on 7 June 2024.

[2] The First Respondent opposed this application, whilst the Second and Third Respondents are abiding the decision of this Court.

[3] The First Respondent also instituted application proceedings in terms of Rule 30(1), which has now become academic, except for the issue of costs.

Background:

[4] The First Respondent applied for leave to appeal the Order dated 7 June 2024, which was denied by the Court *a quo*.

[5] The First Respondent then applied to the Supreme Court of Appeal for leave to appeal, which suspended the implementation of the Court Order.

[6] The First Respondent thereafter withdrew its application for leave to appeal, which had the effect that the Court Order was no longer suspended. It must be noted that the Respondents admit that following the First Respondent's withdrawal of the application for leave to appeal to the Supreme Court of Appeal, the Order became operative again.¹

[7] The Applicant then proceeded to demand that the First Respondent comply with the Court Order by:

- 7.1 Reinstating his registration as a student pending the finalisation of the evaluation and examination of his doctoral thesis and by providing proof of such registration by 7 February 2025; and
- 7.2 By appointing a panel of external assessors to evaluate his doctoral thesis and providing proof of such appointment by 21 February 2025.²

Issues to be determined:

[8] The issues requiring determination are the following:

- 8.1 Whether the First Respondent and its functionaries, the Second and Third Respondents, are in contempt of court for failure to comply with and to implement the Court Order dated 7 June 2024; and
- 8.2 Whether the Applicant should be awarded punitive costs due to the conduct of the Respondents.

¹ AA, page 80, para 26.

² FA, page 17, para 36 read with annexure DKCC5, page 52; and AA, page 80, para 26 (no denial).

Legal Framework:

Contempt of Court:

The Constitutional Court confirmed that the rule of law is a foundational value of the Constitution when it was considering the issue of contempt of court in the matter of **Pheko and Others v Ekurhuleni City**. It stated the following:

“The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Consitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our court impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.”³

[9] The Constitutional Court further held in the matter of **Pheko and Others v Ekurhuleni City** that:

“Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court’s honour, consequent upon the disregard of

³ Pheko and Others v Ekurhuleni City 2015 (5) SA 600 CC (“Pheko II”) at [1].

its previous order, as well as to compel performance in accordance with the previous order.”⁴

[10] In the matter of **Matjhabeng Local Municipality v. Eskom Holdings Ltd**, the Constitutional Court further explained the purpose of a finding of contempt as follows:

“The purpose of a finding of contempt is to protect the found of justice by preventing unlawful disdain for judicial authority. Discernibly, continual non-compliance with court orders imperils judicial authority.”⁵

The elements of contempt:

[11] There are four elements that must be present in order for the Court to find that a person or entity is in contempt. These four elements are the following:

- 12.1 the existence of a court order;
- 12.2 the contemnor must be aware of the order;
- 12.3 there must have been non-compliance with the order; and
- 12.4 the non-compliance must have been wilful or *mala fide*.⁶

[12] When a declaration of contempt is sought (not committal), these elements must be proved on a balance of probabilities.⁷ The onus is initially on the Applicant,

⁴ Pheko II, Ibid, at [28].

⁵ Matjhabeng Local Municipality v. Eskom Holdings Ltd 2018 (1) SA 1 (CC) para 48.

⁶ Pheko II, Ibid, at [32]; Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at [12], [41] and [42(d)] (“Fakie”).

⁷ Pheko II, Ibid, at [37]; Fakie, Ibid, at [16], [19], [41] and [42(e)].

who needs to prove the existence of the order, that the Respondent had notice of the order and also non-compliance with the Court order.

- [13] Thereafter the onus shifts to the Respondent who must prove, on a balance of probabilities that non-compliance with the order was not wilful or *mala fide*.⁸

The Existence of the Order:

- [14] It is common cause that the Court handed down a judgment on 7 June 2024 which contained the Order.

The Respondents must be aware of the order:

- [15] The University (First Respondent), Vice Chancellor (Second Respondent) and the Registrar (Third Respondent) were all made aware of the Order and its contents. The Respondents admitted thereto.

- [16] It is also evident from the fact that the Respondents applied to the Supreme Court of Appeal against the Order.

Non-compliance with the order:

⁸ Secretary of the Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma and Others 2021 (5) SA 327 (CC) at [41] and [42]; Fakie, Ibid, at [41] and [42]; MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA478 (SCA) at [30]; Kenton-on-sea Ratepayers Association and others v Ndlambe Local Municipality and Others 2017 (2) SA 86 (ECG) at [47].

- [17] Paragraph 3 of the Order directs the First Respondent to take a decision on the Applicant's review application. The First Respondent argued that it has not failed to comply because it has "*started the process of obeying*" the Order.⁹ It must be noted that the Order is very clear and it does not make any provision for a "process".
- [18] The Order provides a 30-day period within which the so-called "process" needed to be completed. The time for compliance with the Order lapsed more than a year ago, yet the First Respondent is still "*in the process of obeying*" the Order, but there has been no actual compliance by the First Respondent.
- [19] Paragraph 4 of the Order directs the First Respondent as follows: "*The Respondent is herewith directed to re-instate the Applicant's registration as a student with the First Respondent pending the finalisation of the evaluation and examination of his doctoral thesis.*"
- [20] The Order is quite clear in that the re-instatement of the Applicant's registration as a student and the evaluation and examination of his doctoral thesis had to be complied with immediately.
- [21] The First Respondent argued before this Court that it had to comply with paragraph 3 of the Order first and only after it has finalised its compliance, would it be possible for the First Respondent to comply with paragraph 4 of the Order.
- [22] This Court does not agree with that argument. Parties do not get to pick and choose which part of court orders they want to comply with.

⁹ AA, page 75, para 4; RA, page 92, paras 15-17.

Non-compliance and Contempt of the Second and Third Respondents:

- [23] An institution such as the First Respondent can only perform its administrative and legal acts through the agency of its human officials. The Applicant has argued that the contemptuous conduct should be attributed not only to the First Respondent, but also to the Second and Third Respondents in their capacities as the most senior functionaries tasked with and responsible for the administration of the University (First Respondent).
- [24] It has been admitted that the Second Respondent, as Vice-Chancellor, is as contemplated in the University's governing statute, the University's (First Respondent's) chief executive and accounting officer who bears ultimate responsibility for all acts performed in the name of the First Respondent.¹⁰
- [25] It has also been admitted that the Third Respondent, as the Registrar, and as contemplated in the University's governing statute, is the First Respondent's chief compliance officer whose duties include ensuring that the First Respondent complies with orders of the courts.¹¹
- [26] It has further also been admitted that the Second and Third Respondents hold the responsibility to see to it that the Order is implemented.¹²
- [27] It is on this basis that the Applicant argued that the non-compliance and contempt of the Court Order must not only be attributed to the First Respondent but also to the Second and Third Respondents.

The non-compliance must have been wilful or mala fide:

¹⁰ FA, page 9, para 11; AA, page 77, para 12.

¹¹ FA, page 9, para 12; AA, page 77, para 12.

¹² FA, page 9, para 12; AA, page 77, para 12.

[28] As set out above, where a declaration of contempt is sought (and not committal), an applicant must prove, on a balance of probabilities, the existence of the order, notice of the order and non-compliance.¹³

[29] In other words, the standard of proof for the declarator sought in prayer 1 of the notice of motion and for the directives sought in prayers 2 to 4.1 and 4.2, requires the Applicant to establish that the Respondents are in contempt of court on a balance of probabilities,¹⁴ including the prayer for the imposition of a fine on the First Respondent.¹⁵

[30] It is only in respect of the committal of the Second and Third Respondents sought in prayer 4.3 of the Notice of Motion that the standard of proof required is beyond a reasonable doubt.¹⁶

[31] Thereafter the onus shifts to the respondents to prove, on a balance of probabilities, that the non-compliance was not wilful or *mala fide*.¹⁷

[32] In the matter of **Fakie N.O v CCII Systems (Pty) Ltd**, the Supreme Court of Appeal explained this evidential burden as follows:

“Once the applicant proves the three requisites (order, service and non-compliance), unless the respondent provides evidence raising a reasonable

¹³ Fakie, Ibid, at [16], [19], [41] and [42(d)]; Phoko II, Ibid, at [37].

¹⁴ Matjhabeng, Ibid, at [65] and [67].

¹⁵ Matjhabeng, Ibid, at [65].

¹⁶ Matjhabeng, Ibid, at [67].

¹⁷ Fakie, Ibid, at [41 and [42].

doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established.

...

Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fides, contempt will have been established beyond reasonable doubt.”¹⁸

- [33] The Respondents attempt to show a lack of *mala fides* by stating that it acted on the advice of its legal representatives.
- [34] Unfortunately for the Respondents, legal advice given and relied on does not constitute a defence to a charge of contempt of court, unless they can demonstrate the absence of wilfulness or *mala fides*.¹⁹
- [35] In the matter of **Moyo v Old Mutual** the Court explained as follows: “... *the enquiry is not whether the advice was correct or incorrect, but whether the reliance on it was sufficient to negative an inference of mala fides.*”²⁰
- [36] The Respondents simply alleged that legal advice was given to them. No explanation is offered of what the factual basis was for such advice; what exactly the legal advice was; why it was accepted as reasonable and why it was followed despite the Order being very clear.

¹⁸ Fakie, Ibid, at [41 and [42(d)].

¹⁹ Municipal Manager, O.R. Tambo Municipality and Another v Ndabeni 2023 (4) SA 421 (CC) at [21] – (“Ndabeni”).

²⁰ Moyo v Old Mutual Ltd and Others [2022] 3 All SA 795 (GJ) (“Moyo”).

- [37] There is insufficient evidence before this Court to determine the nature of the advice received and whether it was reasonable to accept that advice and to refuse to comply with the Court Order.
- [38] The Respondents have further failed to provide sufficient evidence to establish a reasonable doubt, even on a balance of probabilities, as to whether the non-compliance was not wilful and *mala fide* and have failed to demonstrate that their reliance on legal advice was *bona fide* such to negate their duty to comply with a clear and binding court order.
- [39] On the other hand, the Applicant successfully proved contempt beyond a reasonable doubt and claiming the relief as set out in the Notice of Motion.

Costs:

- [40] The default practice in awarding costs is that costs ordinarily follow the result but that the issue of costs is in the discretion of the court.²¹
- [41] The Court finds that there is no reason for the Applicant to be deprived of his costs.
- [42] Despite the fact that the Court Order of 7 June 2024 declared that the First Respondent was violating the Applicants rights, the Respondents deliberately refused to comply with the said Order.

²¹ Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at [224], [227] and [228]; Limpopo Legal Solutions v Eskom Holdings (Soc) Limited 2017 (12) BCLR 1497 (CC) at [20] ("Eskom").

- [43] The Respondents' contemptuous conduct has resulted in the Applicant's rights continuing to be violated and has caused him further serious prejudice.
- [44] In addition to being in contempt of the Court Order dated 7 June 2024, the Respondents' conduct in applying to the Supreme Court of Appeal for leave to appeal only to withdraw the application after the *dies* for filing its replying affidavit had expired, was not in good faith and seems to have been done purely to obtain a delay in the implementation of the Order.
- [45] The First Respondent further indicated to this Court that its Senate held a meeting on 25 March 2025 in respect of the Applicant's matter, however the Respondents have failed to keep the Applicant and his Attorneys apprised of the situation. It has also not provided the Court with the outcome of the meeting.
- [46] The Respondents argued that they invited the Applicant to submit further documents in anticipation of the meeting of 25 March 2025, which the Applicant never did. That is not an excuse for non-compliance with the Court Order.
- [47] This Court does not approve of the conduct of the Respondents and is of the view that a punitive cost order is appropriate.
- [48] In the matter of **Biowatch Trust v. Registrar, Genetic Resources and Others**²² it was stated that the State should bear the costs if the challenge to the constitutionality of a law or of State conduct was 'genuine' and 'non-frivolous'.
- [49] The Constitutional Court has unanimously held that where a claim involves administrative action that conflicts with a requirement imposed by the

²² *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at [22] ("Biowatch").

Constitution, that constitutes a constitutional matter.²³ The matter before Court involves such a claim and is thus a constitutional matter.

[50] The Applicant's counsel recorded that they are acting on a *pro bono* basis. **Section 92 of the Legal Practice Act, Act 28 of 2014** provides for the recovery of legal costs by practitioners who render free legal services. This Court is thus empowered to make a costs order in favour of the Respondent.

[51] Taking all of the above into consideration as well as the scale of fees to counsel as contemplated in Uniform Rule 67A(3)(a), this Court is satisfied that, having regard to the complexity of the matter, the extent of the record, the importance that the matter has to the Applicant, that costs to counsel on Scale C is warranted, such costs to include the costs of two counsel.

Order:

[52] **In the result the following order is made:**

1. The first respondent's application in terms of Rule 30; of the Uniform Rules of Court is dismissed.
2. The The first respondent is declared to be in contempt of the court order granted by this Honourable Court on 7 June 2024.
3. The first respondent is ordered to comply with the court order granted by this Honourable Court on 7 June 2024 within 5 (five) days of the date of this order by:

²³ *Fraser v Absa Bank Ltd* (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 (CC) at [37] – [38].

- 3.1 reinstating the applicant's registration as a student with the first respondent with immediate effect pending the finalisation of the evaluation and examination of his doctoral thesis; and
 - 3.2 appointing a panel of external assessors to examine the applicant's doctoral thesis.
4. Second and third respondents are directed to provide first respondent such assistance as may be required to achieve compliance with the order in paragraph 3 above.
5. The second and third respondents are ordered to report back to this Honourable Court and to the applicant by serving on the applicant and filing with this Honourable Court within 3 (three) days of the expiry of the 5 (five) day time period contemplated in paragraph 3 above, an affidavit under oath setting out the steps which each of them has taken on behalf of the first respondent to comply with the order in paragraph 3 above.
6. The applicant is authorised in the event of non-compliance with the directive in paragraph 3 of this order to approach this Honourable Court as a matter of urgency on these papers duly supplemented for such further order as this Court deems meet, including:
 - 6.1 requiring the attendance of the second and / or third respondent before this Court in person to explain the failure to comply with paragraph 3 above;

- 6.2 directing the first respondent to pay a fine in an amount deemed appropriate by this Honourable Court;

Alternatively to paragraphs 6.1 and 6.2 above,

- 6.3 Declaring the second and / or third respondents in contempt of court and committing the second and / or third respondents to gaol for a period not exceeding 3 (three) months for contempt of court.

7. Directing the first respondent to pay the costs of this application on an attorney and client scale, including the costs of two counsel, such costs to be paid on scale C of the tariff under rule 69.



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ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

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DATE OF HEARING : **17 September 2025**

DATE OF JUDGMENT : **03 October 2025**