**IN THE HIGH COURT OF SOUTH AFRICA**
**EASTERN CAPE DIVISION, MAKHANDA**

**CASE NO. 3486/2022**

In the matter between:

**THE DEPARTMENT OF HUMAN SETTLEMENTS, EASTERN CAPE PROVINCE** **FIRST APPLICANT**

**THE HEAD OF DEPARTMENT AND ACCOUNTING OFFICER OF THE DEPARTMENT OF HUMAN SETTLEMENTS, EASTERN CAPE PROVINCE** **SECOND APPLICANT**

and

**OUMA GAEHUMELWE DIUTWILENG** **RESPONDENT**

## JUDGMENT

**Rugunanan J**

[1] The respondent was formerly employed by the applicant as its chief financial officer. During or about 2021 she was suspended from her employment due to allegations of misconduct. The suspension notice to her directed her to forthwith return to the applicant a laptop allocated to her for the discharge of her duties. The laptop in question is an HP Convertible X360 with serial number 5CD95232F9 and barcode number RSA6000 0403 (the laptop).

[2] On 21 October 2021 and in proceedings instituted in this Court under case number 3261/2021, Roberson J granted a rule nisi in favour of the applicants. The rule directed the respondent to show cause why she should not return the laptop to the applicants. Pending the return day, *inter alia*, the sheriff was to take possession of the laptop and, in the event of it no longer being in the respondent's possession, the respondent was directed to inform the sheriff of the whereabouts of the laptop.

[3] The respondent did not return the laptop.

[4] Contending that it was among items stolen from her home during a housebreaking that occurred on 25 April 2021, the respondent's attempt to discharge the rule nisi met with no success.

[5] The rule was confirmed by order of Malusi J on 3 February 2022.

[6] In a notice of motion issued on 3 October 2022 in case number 3486/2022 the applicants approach this Court seeking an order essentially in the following terms:

(a) That the respondent be declared to be in contempt of this court's orders dated 21 October 2021 and 3 February 2022.

(b) That in the event the respondent returns the laptop within two weeks of any order granted by this court, she is to be sentenced to a period of imprisonment to be determined by this court – which sentence shall be suspended.

(c) That in the event that the respondent does not return the laptop within the aforesaid period, she is to be sentenced to a period of imprisonment to be determined by this court without any suspension of the operation of such order.

(d) That the respondent be directed to pay the costs of the application.

(e) Further and/or alternative relief as may be deemed fit.

[7] Following confirmation of the rule nisi, and in a subsequently handed down judgment, Malusi J made several findings against the respondent. These are recapped only to the extent considered relevant for present purposes.

[8] Referring to the judgment and picking up from the suspension notice directing the respondent to forthwith return the laptop the following succinct extracts articulated by the learned judge are quoted:

[9] They read:

'[4] Six (6) days later the respondent informed the applicants by email that the laptop had been stolen three (3) days after the suspension letter was dispatched to her.

[5] The applicants' attorneys commissioned a digital forensic investigation as part of the disciplinary proceedings against the respondent. The forensic expert was instructed to locate

the laptop in the course of the investigation. He filed an affidavit at the conclusion of his investigation.

[6] The forensic expert asserted in his affidavit that the laptop was utilised three (3) months after it had been reported stolen within a 150 metres radius that included the respondent's residence. When so utilised it was connected to a wi-fi network whose identifying name was *'duitwileng home wi-fi'*. The expert expressed the opinion that the laptop had probably been located at the respondent's residence when so utilised. He drew the conclusion that the respondent had retained the laptop and continued using it after the alleged theft.

[7] In her answering affidavit the respondent averred that the laptop was stolen from her home three (3) days after she had been suspended. She gave details of the alleged theft which occurred in her absence. She stated that at the time the application was launched she was no longer in possession of the laptop.

…

[10] The issue for decision [is] whether the respondent was in possession of the laptop at the time it was demanded.

[10] Applying the established legal principles for resolving disputes of fact on affidavit, Malusi J rejected the respondent's version. and in doing so he found that:

'[13] The respondent has not provided any reason whatsoever why she failed to return the laptop when lawfully instructed to do so in her suspension letter. The lack of explanation lends credence to the contention by the applicants' counsel that the respondent decided to retain the laptop in an effort to frustrate the investigation against her.

[14] The applicant has presented compelling and persuasive evidence from a forensic expert that the laptop was used in the vicinity of the respondent's private home and accessing her home wi-fi well after the purported theft. She has not explained how the fictitious thief would be able to access her home wi-fi when using the laptop in the vicinity of her home. The respondent's version was rendered more implausible by the applicants' uncontested evidence that passwords are used to gain access to its electronic devices/equipment. It

beggars belief that the fictitious thief would have known the applicants' password to be able to use the laptop.

[15 It [is] my strong view that the respondent had not dealt at all with the evidence which disproved her allegation of a permanent loss of the laptop. The court was bound to accept the applicants' evidence that the respondent was in possession of the laptop after the date of the alleged theft. Since there had not been any further alleged theft, it stands to reason that she was in possession of the laptop when the application was launched.'

[11] No appeal lies against the judgment and for that reason the approach adopted by this Court is that the findings by the learned judge are presumed to be correct. In argument this much was conceded by respondent's counsel. In distancing herself from the judgment and laying emphasis rather on the applicants' founding affidavit, the respondent argued that the affidavit does not identify the nature and parameters of their case. The argument misconceives the approach adopted which accords with the settled precept that an order of a court of law stands until set aside by a court of competent jurisdiction[1]. This is consistent with the Constitutional injunction that an order or decision by a court binds all persons to whom it applies[2].

**The requisites for contempt**

[12] The judgment in *Fakie NO v CII Systems (Pty) Ltd*[3] sets out the law on contempt of court committed by a person who disobeys a court order and is referenced more extensively herein. The authoritative statements dealing with the nature of the offence and the consequences of invoking application proceedings to obtain an order declaring a respondent to be in contempt of court and the imposition of a sanction are summarised below.

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[1] *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-C; *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) at 439G-H.
[2] Section 165 (5) of the Constitution of the Republic of South Africa, 1996.
[3] *Fakie NO v CII Systems (Pty) Ltd* 2006 (4) SA 326 paras 6, 24 and 25.

[13] Contempt of court '*is a crime unlawfully and intentionally to disobey a court order.'* [4] A litigant who has obtained a court order that requires an opponent to do or refrain from doing something (*ad factum praestandum*) is permitted, where there is non-compliance with the order, to approach the court for a further order declaring the party in default to be in contempt of court and to have a sanction imposed against them.[5]

[14] The yardstick for determining whether disobedience of a civil order constitutes contempt is '*whether the breach was committed deliberately and mala fide'*. A deliberate disregard on its own is not sufficient since the defaulter may genuinely, although mistakenly, believe themselves entitled to act in the way they did to constitute the contempt. Acting in good faith avoids the infraction even if the conduct is objectively unreasonable (though unreasonableness could, depending on the circumstances, evidence a lack of good faith).[6]

[15] In motion proceedings an application for committal for contempt that is brought at the instance of a party is a civil proceeding intended to invoke a criminal sanction or threat of that sanction against a respondent.[7] Although in motion proceedings a respondent is not strictly regarded as an accused person, the respondent is entitled to analogous protections, suitably adapted to the constitutional imperative that a person's freedom and security must be protected.[8] Accordingly, an applicant that seeks a sanction of committal must prove the requisites of contempt (i.e. (i) the order; (ii) service or notice; and (iii) wilfulness and *mala fides*) beyond reasonable doubt. (Parenthetically, I add that the standard of proof on a balance of probabilities only applies if a declarator or

[4] *Fakie* id at 332A
[5] *Fakie* ibid at 332D
[6] *Fakie* id at 333B-C.
[7] *Fakie* ibid at 333A.
[8] *Fakie* id at 344A; and see generally *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) at 23D.

other civil remedies short of committal are sought (see *Fakie*[9] and *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others*.[10])).

[16] Once an applicant has proven the order, service or notice, and wilfulness and *mala fides*, the respondent bears an evidential burden in relation to wilfulness and *mala fides*. This only requires of the respondent to adduce evidence that establishes a reasonable doubt that non-compliance was wilful and *mala fide*, failing which contempt will have been established beyond reasonable doubt.[11]

[17] Before addressing the question whether contempt has been established with reference to the test laid down in *Fakie* it is useful to highlight the version advanced by the respondent in opposing these proceedings. Essentially, it is the same as that advanced by her in the main application that served before Malusi J.

[18] In summary, she avers that the laptop was stolen on 25 April 2021 during a housebreaking at her home. Her domestic worker deposed to an affidavit for the police and indicated that three laptops were stolen, among them the laptop in question. The police investigation docket as also the report from the neighbourhood security company details the stolen property *inter alia* the laptop.

[19] It is considered prudent to underscore certain principles relevant to the manner in which courts approach disputes of fact in motion proceedings insofar as they relate to the presentation of the respondent's case.

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[9] At 345A.
[10] 2018 (1) SA 1 (CC) para 64.
[11] *Fakie* ibid para 23.

[20] Generally, any dispute of fact must be decided on the respondent's version in terms of the well-known *Plascon-Evans* approach.[12] Where that version, however, is so far-fetched, clearly untenable or palpably implausible as to warrant its rejection merely on the papers, the version of the respondent will not prevail.[13] It is also required of a respondent who seeks to have its version accepted that it deals with facts in the applicant's founding papers seriously and unambiguously, failing which the respondent's version must be rejected. [14] It is apparent – as was the case in the main application – that the respondent has persisted in her failure to deal seriously and unambiguously with the facts advanced by the applicants.

[21] Having considered the evidence before him in the main application Malusi J was driven to 'the ineluctable conclusion' that the respondent's version of the laptop having been stolen was false.

[22] As was correctly contended by the applicants, in determining whether contempt beyond a reasonable doubt has been established it is the abovementioned considerations that should be borne in mind by this Court when applying the accepted test in motion proceedings.

[23] In what follows hereafter the respondent's version, on the appropriate test, does not prevail.

[24] That said, and against the above background, I turn to consider the merits of the application having regard to the requisites laid down in *Fakie*.

**The order and service**

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[12] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C.
[13] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 290D-F.
[14] *Wightman t/a JW Construction Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13.

[25] The rule nisi was served on the respondent on 10 February 2022 together with an unsigned copy of the final order of 3 February 2022. On 24 May 2022 service of the final order duly signed by the registrar was effected. It is not in dispute that personal service was effected on the respondent on both occasions. The respondent, however, attempts to suggest that notwithstanding service on 24 May 2022 she did not have full knowledge of the confirmation of the rule nisi – and although not advancing a clear reason, it appears that she queried the authenticity of the order with the registrar on 27 May 2022. This was due to the fact that she was previously served with an unsigned order and queried it with the registrar on 15 February 2022. The respondent's complaints about service of an unsigned order on a prior occasion do not assist her at all. That she was served with a signed order on 24 May 2022 is not disputed. Her protestations were correctly condemned by the applicants as opportunistic and makeweight.

[26] In the period 27 May 2022 until the launching of this application on 3 October 2022, it is significant that the respondent did not react to the court order other than directing enquiries at the registrar variously on 11 October, 13 October and 18 October 2022 for the purpose of retrieving the court file and obtaining copies of the court papers (presumably of the main application). As at the date of signature of her opposing affidavit the respondent complains that the court file had not been retrieved 'and there is no clarity in regard to the order or judgment'.

[27] What clearly emerges from the timeframe sketched by the above is that as at 24 May 2022 the respondent had knowledge of the final order and that in the period that followed she remained entirely supine in the face thereof.[15]

**Non-compliance**

[15] Compare these facts with those in *Matjhabeng* where the respondent faced with impossibility nonetheless acted proactively.

[28] It is manifestly patent on the respondent's own version that the laptop has not been returned to the first applicant. Her version that it was stolen was rejected in the main application as false and gains no traction in these proceedings.

[29] For reasons to follow her defence of impossibility fails.

**Wilfulness and *mala fides***

[30] Where the applicants have proven the order, service and non-compliance, the respondent bears the evidential burden in relation to wilfulness and *mala fides*.[16]

[31] It was correctly submitted by the applicants, that the respondent has not discharged this evidential burden for the following reasons.

[32] Following service of the final order (as well as the rule nisi), the applicants' attorneys directed a letter to the respondent on 10 June 2022 admonishing her to comply with the court orders. The letter at the same time invited her to contact their offices should she have any queries. Despite having received the letter, which is not disputed, both the terms of the court order and the invitation to make contact were inexplicably ignored by her. It is telling that:

(a) She did not appeal the final order nor did she approach the Court for any form of directions despite the circumstances (impossibility due to theft) supposedly confronting her;

(b) She did not seek to engage the applicants or their attorneys with her alleged concerns or difficulties supposedly confronting her;

[16] *Fakie* ibid para 42.

(c) She did not engage with her own legal representatives to address the applicants about her alleged difficulties in a meaningful manner;

(d) She did not make the slightest suggestion that the findings by Malusi J were erroneous or perhaps tainted by misdirection; and

(e) Save for the few desultory or random enquiries made with registrar without any form of satisfactory response, the respondent has remained entirely supine in the face of the two court orders.

[33] The respondent's conduct – manifest of a deliberate disregard of the terms of the court order/s – must be evaluated in the light of what Malusi J found to be the 'compelling and persuasive evidence from a forensic expert' that the laptop was utilised, while employing the respondent's home wifi and accessing it with a password in the vicinity of her residence after the theft had allegedly taken place.

[34] It bears mentioning that the respondent did not, neither in the main application, nor in the present application, seek to rebut, by way of contrary expert evidence, the compelling and persuasive evidence from the applicants' own expert. In argument no explanation was put up for this omission on her part.

[35] Furthermore the respondent has not, either in these proceedings or in the main application, presented an affidavit from her domestic helper (who was apparently at the scene immediately after the housebreaking) confirming that the affidavit presented to the police and allegedly deposed to by the domestic helper was indeed the latter's affidavit and that the facts contained therein are true and correct. Yet again, no explanation is tendered for this further omission on the part of the respondent.

[36] Commenting on the video footage, presented for the first time by the respondent as evidence of the alleged housebreaking, the applicants maintain that the evidence is simply meaningless. It is not supported by any confirmatory affidavits from neighbours whose CCTV allegedly recorded the incident – and yet again, no explanation for this further omission is tendered by the respondent. As was submitted by the applicants the video footage does nothing to discharge the evidentiary burden resting on the respondent.

[37] To sum up, the respondent has manifestly failed in all the circumstances to deal with the facts presented by the applicants 'seriously and unambiguously', as was required of her. To quote the submission in the applicant's heads of argument:

'Her version that the laptop was stolen has already been roundly rejected by this Honourable Court, and correctly so, because it is so clearly untenable. Nothing has been presented by the respondent to disturb that finding. It follows that she has not discharged her evidentiary burden to establish a reasonable doubt as to whether non-compliance with the court orders was wilful and *mala fide*.

[38] Unreservedly, I am in agreement therewith.

[39] In the circumstances, the respondent having failed to discharge the evidentiary burden, her contempt has been established beyond a reasonable doubt.

[40] I deem it appropriate to make the following order:

1. It is declared that the respondent *Ouma Gaehumelwe Diutlwileng* also known as *Gaehumelwe Elizabeth Diutlwileng* is guilty of the crime of contempt of court for failure to comply with the orders of this Court dated 21 October 2021 as read with the order dated 3 February 2022 issued under Case Number 3261/2021.

2. In the event that the respondent returns to the applicants the laptop with particulars detailed in the court order of 21 October 2021 within 10 (ten) days of the date hereof, the respondent is sentenced to a period of imprisonment of 4 (four) months which sentence is suspended for 3 (three) years on condition that she is not again found guilty of contempt of court in the form of non-compliance with an order of court which is committed during the period of suspension.

3. In the event that the respondent fails to return the laptop to the applicants within the period mentioned in paragraph 2 of this order, the respondent is committed to imprisonment for contempt of court and sentenced to undergo 9 (nine) months' imprisonment.

4. The respondent is further ordered to pay the costs of this application.

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**M S RUGUNANAN**

**JUDGE OF THE HIGH COURT**

Appearances:

For the Applicants: *S C Rorke SC*, Instructed by Wesley Pretorius & Associates Inc., c/o Netteltons Attorneys, Makhanda (Ref: *I Pienaar*).

For the Respondent: *M Somandi*, Instructed by Wheeldon Rushmere & Cole Inc., Makhanda (Ref: *B Brody*)

Date heard: 3 August 2023

Date delivered: 31 October 2023