

**REPUBLIC OF SOUTH AFRICA**



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

- (1) REPORTABLE:
- (2) OF INTEREST TO OTHER JUDGES:
- (3) REVISED.

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**SIGNATURE**

.....  
**DATE**

**Case number: 21609/2021**

In the matter between:

**JR**

Applicant

and

**AL**

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 28 October 2021.

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## LEGAL SUMMARY

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This is an application brought urgently to hold the respondent in contempt of an order granted *ex parte* on 13 June 2021 (*the Order*). On 15 June 2021 the applicant approached the Court in terms of Rule 6(12) for an order holding the respondent in contempt of the Order. The Court dismissed the application but made no order as to costs. The respondent complied with the Order until end of August 2021 but then started sending emails to the applicant's former attorney, the applicants' estranged wife as well as her attorneys. It is common cause that the respondent had knowledge of the Order and that after the granting of the Order, the respondent dispatched 21 emails to the applicant's former attorney of record. The respondent contended that the Order did not direct him not to send correspondence to the applicant's attorney.

The Court applied the principles formulated in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) which were confirmed in *Pheko v Ekurhuleni City*, 2015 (5) SA 600 (CC), that an applicant who alleges contempt of court must establish that an order was granted against the respondent, that the respondent was served with the order or had knowledge of it and that the respondent failed to comply with the order. Once these three elements have been established, wilfulness and *mala fides* are presumed and the respondent bears an evidentiary burden to establish reasonable doubt. If the respondent fails to do so, contempt will be established. A deliberate failure to comply with a court order is not enough if good faith is established.

The Court found that it mattered not that the emails were not addressed to the applicant himself (an attorney can hardly be expected not to bring such correspondence to her client's attention), or that the applicant's former attorney ought to have blocked the respondent's emails, for the Order did not only prohibit communications made or published to the applicant. The making of, and publishing of the emails was in direct contravention of the Order which prohibits any communications having the deleterious content referred to in the Order. Further, the

incessant emails constituted harassment and numerous of the emails contained threats directed at the applicant. Accordingly, there could be no reasonable doubt that the respondent contravened the terms of the Order. In the result, the applicant had proven the first three elements of contempt of court, and the evidentiary burden shifted to the respondent to raise reasonable doubt of his wilfulness and *mala fides*.

The Court found that the respondent's contention that the Order did not direct him not to send correspondence to the applicant's attorneys was not correct and this belief could not legitimately be held. Although the unreasonableness of a non-complier's behaviour does not *per se* equate to the absence of *bona fides*, in the absence of an alternative explanation for doing so, the respondent's behaviour was so blatantly unreasonable and his attacks on the applicant's reputation and dignity were so scurrilous that the Court could and did reject his bald denial of wilfulness and *mala fides* out of hand. Consequently, in view of the evidence of the respondent's transgressions and the nature thereof, the failure of the respondent to place any evidence before the Court that established a reasonable doubt as to whether his non-compliance was wilful and *mala fide*, led the Court to find that the applicant had proven beyond a reasonable doubt that the respondent was in contempt of the Order.

The matter was argued on 20 October 2021 and the court stood the matter down until 22 October 2021 to afford the respondent an opportunity to file a supplementary affidavit in mitigation of sentence should the court find the respondent to be in contempt of court and afforded the applicant an opportunity to respond thereto. Both affidavits were not obligatory but both parties took up the opportunities to place further relevant evidence before the court. On 22 October 2021 the court heard argument on the appropriate sentence.

The Court was urged to make an exclusively punitive order noting the aggravating factors present in this matter. The Court was not persuaded that the degree of the contempt in this matter met that demonstrated in *the State Capture* matter, in which direct imprisonment without the option of a fine was ordered. The Court affirmed that the object of contempt proceedings is not only to punish the guilty party but also to compel compliance with the Order. Generally, in cases of contempt of court, a court

is loath to restrict the personal liberty of an individual and if a period of imprisonment is imposed, it is generally suspended.

The Court was not convinced a coercive order alone would attain the respondent's obedience with the initial Order. This as the respondent continued to breach the Order despite numerous calls and cautions to cease his unlawful conduct, his failure to acknowledge any wrongdoing and as his previous undertakings to cease communicating with the applicant's former attorney came to naught. The court concluded that the sentence to be imposed on the respondent should contain both a punitive and coercive element and the Court imposed a fine of R70 000 plus a period of imprisonment of 30 days suspended for a period of 1 year on certain conditions.