IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 22/6726

(1)	REPORTABLE: Not/
(2)	OF INTEREST TO OTHER JUDGES: Not/
(3)	REVISED.
28 APRIL 2022	
Date	signature

In the matter between:

GAUTENG BIXING PROMOTORS ASSOCIATION **First Applicant**

TSHEE KOMETSI **Second Applicant**

And

BRIAN WYSOKE **Respondent**

Transmitted by email to the parties' legal representatives. The judgment is deemed to have been delivered on 28 April 2022

JUDGMENT

Molahlehi, J

Introduction

[1] This is an urgent application in which the applicants seek an order declaring the respondent to be in contempt of the court order made by Wright, J on 1 March 2022. The applicants further request that punitive measures be imposed on the respondent for his alleged contempt of the court order.

[2] Initially, the applicants sought interim relief in Part A pending a final determination of Part B. The dispute between the parties arose from the statements that the respondent had posted on the social media platform. It is alleged that the comments posted were defamatory, racist, had sexual undertones and suggested that the applicants were involved in immoral activities.

[3] The applicants were successful in their application, and accordingly, the following order was made against the respondent:

> "2. Pending the final determination of the relief claimed in Part B in the notice of motion on a date to be determined by this court. . . the respondent is hereby:
>
> 2.1. interdicted and restrained from defaming the applicants or either of them or injuring them in their dignity in any manner whatsoever, including but not limited to the publication . . . to any person of any statement, claim or allegation in any medium, including but not limited to Facebook or any other social media platforms or fora;

2.2. interdicted and restrained from intimidating or making any threats that are violent or racial in nature, in any manner whatsoever, including but not limited to the publication . . . to any person of any in whatsoever, including but not limited to the publication . . . to any person of any statement, claim or allegation in any medium, including but not limited to Facebook or any other social media platforms or fora;

2.3. ordered to forthwith remove and delete defamatory, intimidatory, threatening or racial posts or statements alternatively any and all references to the applicants therein, wheresoever and howsoever made and to remove and delete all and any posts and comments in response thereto insofar as it is within his power to do so; and/or

24. to make and publish an appropriate retraction of the relevant statements or utterances above, and to issue an apology to the applicants by name for defaming them and injuring them in their dignity and person, on all the same websites with the same prominence where such posts were published by him."

[4] It is apparent that the hearing of the application in the initial interdict was conducted virtually on the electronic platform in the presence of the respondent's legal representatives. There is some suggestion in the founding affidavit that the respondent was present on the virtual platform when the order was made. This was not pursued in the replying affidavit.

[5] The order was uploaded onto caselines on 14 March 2022. Soon after that, the applicants' attorneys of record addressed a letter to the

respondent's attorneys of record demanding that the respondent complies with the order within 24 hours. They further indicated in the same letter that failure to comply by the respondent would result in an application for contempt of court.

[6] This application is consequent the complaint by the applicants that the respondent has refused to remove, retract and apologies for the published statements in contravention of the court order. This conduct of the respondent, according to the applicants, constitutes a breach of the court order. They further contend that the conduct constitutes:

> “(i) disrespect for the authority of the court and its officers, acting in their official capacity;
>
> (ii) willful disobedience and resistance to a lawful court order; and
>
> (iii) a disregard for the law."

[7] The applicants further contend that the respondent has exhibited both intent and malice in refusing to remove the published statements as directed by the court. According to them, the respondent's conduct has caused them serious and irreparable harm to their dignity.

[8] The respondent opposed the application and contended that although the order was made on 1 March 2021, he only received it on 14 March 2022. After receipt of the order in the late afternoon of that day,

he had to obtain legal advice from his attorneys concerning the issue of compliance with the court order.

[9] Furthermore, the respondent contended that in the alternative, the order was suspended upon his application for leave to appeal of paragraphs 2.4 and 3 of the order filed on 18 March 2022. He does not deny having posted further comments on his Face Book since the issuance of the order but contends that those were not related to what was provided for in the court order.

[10] He further contends in his answering affidavit that he had complied with the court order in that he removed from his personal Facebook and other social media all the posting he had made by 18 March 2022.

[11] In paragraph 19.2 of his answering affidavit, he further states that: "following the hearing, I was advised that the application was granted successfully but was unaware and uncertain in respect of the extent of the Court order itself." The respondent's case is thus not that he did not believe that the order was made in favour of the applicants but rather that he did not appreciate its full extent, having not seen the hard copy thereof.

[12] The respondent further contended that the matter was not urgent because he had removed the posting on Facebook upon receipt of the court order. According, to the respondent he did that after obtaining legal advice as whether or not he should to comply with the order.

[13] The first question to answer in the present matter is whether this matter deserves to be treated as urgent.

[14] In my view, urgency in the present matter arises from the nature of the relief which was sought and granted in favour of the applicants. It is trite that contempt of a court order is inherently urgent. In the context of this matter, this means non-compliance with the court order would result in the applicants suffering ongoing prejudice against their dignity. Thus considering the nature of the relief sought and the circumstances of this matter, I find that the matter deserves to be treated as urgent.

[15] The next question is whether the respondent should be found guilty of contempt of the order made on 1 March 2022.

[16] It is trite that the crime of contempt of court order consists of unlawfully and intentionally disobeying a court order.[1] The crime is

[1] See Fakie N.O. v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) paragraph 6.

established by showing that the respondent's conduct in not complying with the court order was deliberate and *mala fide*.[2]

[17] To succeed in establishing that the respondent is guilty of contempt of a court order, the applicant must establish the following:

(a) That the order was made against the respondent;

(b) The order was served on the respondent or that he or she had knowledge or information about the order;

(c) The respondent failed to comply with the order.[3]

[18] It is further trite that once the above requirements have been satisfied, wilfulness and *malafide* on the part of the respondent is presumed. The evidentiary burden is then on the respondent to establish reasonable doubt.[4] Failure to discharge this burden by the respondent will result in him or her being found guilty of contempt of court.

[19] The defendant's defence is that he did not deliberately and intentionally disobey the order between 1 March 2022 and 14 March 2022, as the order was not yet released. He did not comply with the order between 14 and 18 March 2022 as he was still seeking legal advice to determine the validity or enforceability of the order.

[2] Fakie supra paragraph 9.
[3] Fakie supra at para 22, and Pheko v Ekurhuleni Metrpolitan Municipality [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (Pheko II) at para [32].
[4] Fakie supra at para 41 and 42; Pheko II at 36.

[20] In my view, the respondent in the present matter failed to comply with the court order made by Wright J on 1 March 2022. The contention that he was only able to comply after receiving the stamped order, and after obtaining legal advice, and properly considering the extent of the order has no merits. There is no principle in our law that affords a litigant a discretion whether or not to comply with an order of the court.

[21] It is common cause that the court issued the order on 1 March 2022 in an open virtual court. The respondent was legally represented at the time the order was made. The draft order, which at the time was uploaded onto caselines, was made an order of the court. Although the order was only stamped on 14 March 2022, the respondent knew about the order long before then. This can, therefore, not be an excuse for non-compliance with the order.

[22] For the purposes of this judgment, I will accept that the respondent has filed leave to appeal against paragraphs 2.4 and 3 of the order. There is, however, non-compliance with paragraph 2.3 of the order which required the removal of the posting from Facebook "forthwith." This means that the respondent was obliged to immediately remove the posting after he was informed of the order on 1 March 2022. His duty to

obey the order was immediately after the court pronounced that he draft order was made the order of the court. Thus, the respondent's defence that he became aware of the extent of the order when it was stamped and uploaded onto caselines is unsustainable.

[23] The defence that the posting constitutes fair comment is an issue to be determined at a later stage, in Part B of the proceedings, and is thus not before this court. In other words, this court is enjoined to consider whether there has been compliance with the order and not the merits of the dispute between the parties.

[24] For the above reasons, I find that the respondent acted wilfully and with *mala* in disobeying the order made by this court on 1 March 2022. The respondent is accordingly found guilty of contempt of court.

Order

[25] In the circumstances, the following order is made:

1. This matter is treated as urgent in terms of rule 6 (12) of the Uniform Rules of the High Court and non-compliance with the Rules is condoned;

2. The respondent is declared to be in contempt of the Court order granted by Wight J under case number 6726/2022 on 01 March 2022;
3. The respondent is directed to show cause within a period of 14 days of the date of this order why he should not be committed to a period of thirty days imprisonment, alternatively to pay a fine of R30 000.00.
4. Regarding paragraph 3 above, the following shall apply:

(ii) The respondent shall serve and file his affidavit by the 18 May 2022,

(iii) The applicants shall, if they so wish to file their answer within 7 days of the date of the respondent's affidavit, and

(a) he respondent shall, if he so wishes, serve and file his reply within 5 days of the date.

[26] The respondent shall pay the costs of this application.

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E Molahlehi
Judge of the High Court,
Gauteng Local Division,
Johannesburg.

Representation

For the applicant: Adv T Mathopo

Briefed by: Majavu Attorneys

For the Respondent: Adv JNysschens

Briefed by: Johan Nysschens Attorney.

Hearing date: 29 March 2022

Delivered: 28 April 2022.