

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
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DATE	SIGNATURE

Case No: 12317/2017

In the matter between:

FRANCOIS FRANCK

Applicant

and

DYKE CRAIG

Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and by being uploaded to *CaseLines*. The date for hand-down of the judgment is deemed to be on 16 September 2022.

JUDGMENT

TLHOTLHALEMAJE, AJ:

- [1] The applicant seeks an order that the Respondent be held to be in contempt of a court order issued on 28 May 2018 by Moshidi J under the above case number. The respondent was ordered to deliver a vehicle (A 1990 Mercedes-Benz 560 SEL with registration number HVD 092 GP) to the applicant.
- [2] This application was brought about following the respondent's failure to comply with that order. The applicant further seeks that the respondent be committed to gaol.
- [3] The background to this application is largely undisputed and may be summarised as follows;
- 3.1 Both the applicant and the respondent are businessmen. The applicant is the rightful owner of the vehicle in question, and had surrendered it into the custody of the respondent on 04 February 2016, for the purposes of effecting certain repairs on it.
- 3.2 In accordance with the parties' agreement and the quoted price, the applicant had made payments for the repairs done on the vehicle. Despite a demand through the applicant's attorneys of record in September 2016, the respondent had refused to return the vehicle to the applicant on the grounds that he enjoyed a *lien* over the vehicle for unpaid services rendered to one Mr James Bruce Davidson (the applicant's business partner), in respect of Davidson's vehicle.
- 3.3 The applicant had disputed the respondent's contentions, and had averred that Davidson had in fact paid the respondent any amounts due in respect of repairs to his vehicle hence it was returned to him on 07 June 2016. Despite these payments having been made by Davidson in respect of his vehicle, and who had also disputed that there were any amounts due, the respondent had nonetheless insisted otherwise.
- 3.4 When the respondent persisted with his demands for the payments of Davidson's alleged debts, and further demanded more payments from the applicant related to storage fees in respect of the vehicle, the latter had approached this Court and obtained the order which is the subject of the contempt application.

- 3.5 The Court order having been granted on 28 May 2018, the respondent had then on 07 June 2018, served on the applicant's erstwhile attorneys of record, a copy of what purported to be an answering affidavit in the form of a one-page "urgent appeal" of the Court order. The applicant contends that it is difficult to appreciate the nature and purpose of that 'answering affidavit'.
- 3.6 The Sheriff of this Court had then served a copy of the Order on the respondent on 9 July 2018. The respondent nonetheless refused to disclose the whereabouts of the vehicle. Attempts to lay a charge of theft against the respondent at the Midrand – SAPS under CAS No. 678/07/2018 in August 2018 have since proved to be unsuccessful, as the docket in that regard was subsequently closed on the basis that the respondent had alleged noted an 'appeal'. The SAPS had however advised the applicant that the respondent had refused to disclose the location of the vehicle, necessitating this contempt application.
- 3.7 Following the 'answering affidavit' by the respondent, the applicant had in August 2021, filed a supplementary affidavit confirming that the respondent had on 21 July 2021, ultimately delivered the vehicle at the applicant's attorneys' offices, which was surrendered together with its keys to a receptionist. Even then, the vehicle was only returned after a costs order granted against the respondent on 18 May 2018 was pursued through the applicant's attorneys of record.
- 3.8 The vehicle as returned by the respondent however was not in a roadworthy condition. It was stripped of its engine parts and severely damaged. Its windows were vandalised, and scribbled with '*pay your bills*'.

[4] In these proceedings, the respondent who was self-represented, and without any answering affidavit to back up his oral submissions, sought to rely on the 'appeal' in seeking to extricate himself from being found in contempt. He conceded knowledge of the Court Order and his willingness to return the vehicle. He had however argued that there was no time limit set by the Court as to when he was required to return the vehicle. He had conceded having kept the vehicle but contended that he had only done so since he had stored the vehicle at his own costs on behalf of the applicant, in view of outstanding

amounts due to him. In the end, he saw nothing wrong and untoward with his conduct.

- [5] The approach to contempt applications is trite as restated in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*¹ as follows;

“As set out by the Supreme Court of Appeal in *Fakie*, and approved by this Court in *Pheko II*, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and *mala fides* are presumed, and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.” (Citations omitted)².

- [6] Significantly, and more apposite to the facts of this case, the Constitutional Court in the above matter had also added that;

“The thrust of section 165 of the Constitution³ was expounded by Nkabinde J in *Pheko II*, in which it was stated that—

¹ [2021] ZACC 18; 2021 (9) BCLR 992 (CC); See also *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); 2018 (1) SA 1 (CC). 2017 (11) BCLR 1408 (CC) at para 74 where the Constitutional Court confirmed the requisites for contempt of court as follows:

‘I now determine whether the following requisites of contempt of court were established in Matjhabeng: (a) the existence of the order; (b) the order must be duly served on, or brought to the notice of, the alleged contemnor; (c) there must be non-compliance with the order; and (d) the non-compliance must be wilful and mala fide. It needs to be stressed at the outset that, because the relief sought was committal, the criminal standard of proof – beyond reasonable doubt – was applicable.’

² At para 37.

³ Section 165 of the Constitution provides:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of State may interfere with the functioning of the courts.
- (4) Organs of State, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of State to which it applies.
- (6) The Chief Justice is the head of the Judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.”

“[t]he 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 Constitution 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 courts 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.

Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of State. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest.” (Citations omitted)⁴

[7] Having had regard to the facts and circumstances of this case, inclusive of the respondent’s conduct after the order of 28 May 2018 was granted until he had returned the vehicle on 21 July 2021 in a state as described by the applicant, the invariable conclusion to be reached is that indeed, the applicant has established contempt on the part of the respondent, and that the latter’s conduct was both wilfulness and *mala fide*. My conclusions in this regard are based on the following;

7.1 There is no doubt that an order was granted against the respondent, and he was aware of it after it was served on him by the Sheriff. Of importance is that the order was clear regarding what was required of him, *i.e.*, to return the vehicle to the applicant as the rightful owner.

7.2 Notwithstanding the above, the respondent failed to comply with the order for over a period of three years, despite attempts by the Sheriff of this Court to retrieve the vehicle and demands made by the applicant. The respondent’s wilfulness and *mala fides* are not even a matter of presumption in this case, as it is glaringly obvious that he had not only willingly and deliberately refused to return the vehicle, but had also refused to disclose its location to both the Sheriff and members of the SAPS, based on spurious grounds that either amounts were owing to him, or that he had merely stored the vehicle on behalf of the applicant.

⁴ At para 26.

- 7.3 Even when making oral submissions before this Court, no valid explanation was proffered as to the reason the respondent had kept the applicant's vehicle for over three years despite a court order, and worse still, returned it in the state as described by the applicant.
- 7.4 Other than the above conduct, the respondent's *mala fides* are evinced by his misrepresentation to the members of SAPS after a case of theft was opened against him, that he was prosecuting an 'appeal' when in fact there was no proper appeal before this Court. That misrepresentation had resulted in the police docket being closed.
- 7.5 It is understandable that the respondent is self-represented in these proceedings and had drafted the 'answering affidavit' / 'urgent appeal' on his own. Be that as it may, whichever way one looks at it, that one-page document, does not however qualify as either an appeal, or an answering affidavit.
- 7.6 The respondent's *mala fides* are further evinced by the malicious manner with which he had grudgingly returned the vehicle. The unroadworthy state of the vehicle when returned was not even disputed by the respondent. As to the reason he would deliberately have damaged and vandalised the vehicle is beyond comprehension.

[8] The respondent's conduct as a whole was not only vindictive but also deplorable. It pointed to an individual who considered himself to be above the law; not bound by Court decisions, and bent on rendering the Court impotent, and judicial authority a mere mockery. Ironically, this was the same individual who had in these proceedings referred to his constitutional rights to be protected whilst at the same casting aspersions at the manner with which the Court order in question was obtained, and further being wilfully disobedient of the Court's authority.

[9] In the light of the above conclusions, I agree with the submissions made on behalf of the applicant that this Court should not only make a finding of contempt, but also show its displeasure at the respondent's conduct by mulcting him with a punitive costs order.

[10] Accordingly, the following order is made;

Order:

1. The Respondent is declared to be in contempt of the order of the Honourable Justice Moshidi dated 28 May 2018 under the above case number.
2. The Respondent is to be committed for a period of imprisonment not exceeding three (3) months.
3. The order in paragraph (2) above, and the authorisation of the issue of a warrant for the arrest of the Respondent giving effect to that order, is suspended for a period of two (2) years, on condition that the Respondent during the period of suspension may not be found to be guilty of contempt of court.
4. The respondent is ordered to pay the applicant's costs, on a scale as between attorney and client.

Edwin Tlhotlhalemaje

Acting Judge of the High Court, Johannesburg

Date of hearing: 27 January 2022

Date of judgment: 16 September 2022

APPEARANCES:

For the Applicant:

Adv. L. Franck, instructed by JHS
Attorneys

For the Respondent:

In Person