

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 024692/2022

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

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DATE

In the matter between:

GARY MARK CARLISLE

First Applicant

HONEY FASHION ACCESSORIES (TPY) LTD

Second Applicant

And

JACQUES WIESE

First

Respondent

MIKO & ANNA (PTY) LTD

Second Respondent

JUDGMENT

MAKUME, J:

[1] In this matter the Applicants seek an order that the first Respondent be imprisoned on the basis that he has breached the terms of a Court order granted against him earlier this year.

- [2] In the order granted by this Court on the 28 June 2022 it was specifically ordered that he be incarcerated for 90 days which order was suspended on condition that he desists from being in contempt of an earlier Court order.
- [3] It is common cause that there was a second order granted by Mudau J on the 16th August 2022 which order restrained the Respondent from contacting and poaching the clients of a company called Honey Fashions (the second Applicant).
- [4] The Applicants aver that it has come to their knowledge that the Respondent has placed orders and in fact received stock from one of the Applicant's suppliers which stock is earmarked for sale to the Applicants customers. This the Applicant says it discovered during September 2022 through one of its existing clients.
- [5] As regards the order made on the 28th June 2022 the Respondent maintains firstly that, that order was in favour of the first Applicant only, excluding the second Applicant. Secondly that when the first Respondent sent the impugned emails he did not know that the recipients thereof namely, Wayne Bredenkamp, Valmal Van der Merwe, Taryn Folley, Cheryl Sniders, Chantel Yzelle, Debbie Wilmot, Gail De Wet, Roshni Naidoo and Margaret Levenson, were employees of the second Applicant also that when he published the impugned statements as set out in annexures FA10 – FA 12 he had no malice it was but just a knee-jerk reaction to an earlier statement uttered by one Bredenkamp who is not an employee of the Applicants.
- [6] It is trite law that the object of proceedings relating to failure to observe or comply with an order of Court is the imposition of a penalty in order to vindicate the Court's authority such penalty may at the discretion of the Court take the form of incarceration or a fine.
- [7] The jurisdictional facts required to sustain an order for contempt were set out by Cameron J in **Fakie N.O. v CCH systems (Pty) Ltd 2006 (4) SA 326 (SCA) at 333 and 334** when the learned Judge found that the offence is

committed not by a mere disregard of a Court order but by the deliberate and intentional violation of the Courts dignity repute or authority.

[8] The Court in Consolidated Fish Distributions (Pty) Ltd vs Zive 1968 (2) SA 517 (C) concluded that an Applicant for an order of committal must show the following:

8.1 That an order was granted against the Respondent.

8.2 That the Respondent was either served with the order or informed of the grant of the order and could have no reasonable grounds for disbelieving that information.

8.3 That the Respondent has either disobeyed the order or neglected to comply with it.

[9] It is not disputed that the order was granted on the 28th June 2022 and that it was communicated to the Respondent and his attorneys. It is the third requirement that is the decisive factor whether or not the Respondent should be incarcerated. The guiding principle is that set out by the SCA in Fakie (supra).

BACKGROUND FACTS

[10] It is necessary at this stage to set out a brief narrative of certain facts and circumstances giving rise to this litigation which bear on the question to be decided.

[11] The first Applicant (Gary) and the first Respondent (Wiese) hold shares in the ratio of 60/40 respectively in the second Applicant. They at some stage until year 2021 worked together in the employ of the second Applicant. Wiese left and has opened his own company the second Respondent in direct competition with the second Applicant. It is that fact that led to the restraint order granted by Mudau J on the 16th August 2022.

- [12] Gary and Wiese are not on good terms their relationship has soured and what exacerbates is that they are in commercial competition with each other. They are sworn enemies and clearly do not wish each other success in their businesses.
- [13] The first Respondent does not dispute that on the 28th June 2022 this Court granted an order pursuant to him having failed to comply with the order by Matsemele AJ. Secondly in this application he does not dispute that he penned the disparaging words about first Applicant's and the second Applicant employees as set out in the emails attached as Annexure's FA10 – FA12. It is in fact correct to note that the order granted against him on the 28th June 202 was after he had defended it and eventually he consented to the order. His defence for having flouted that order now is that it was not intentional or done with malice it was a knee-jerk reaction.
- [14] I have no hesitation to conclude that the first Respondent Mr Wiese has demonstrated that he has no respect for Court orders he is a serial transgressor of Court orders three in one year within a space of six months.
- [15] The only issue that now remains is to determine if the first Respondent's non-compliance was wilful and *mala fide* and in this instance the onus lies with the first Respondent to prove that the non-compliance was not wilful and *mala fide*.
- [16] The Respondent initially argued that the application was not urgent. I am persuaded that the application is urgent judging by the ongoing and unabated statements in contempt of Court order. **The Court in Protea Holdings Ltd vs Wriwt and Another 1978 (3) SA 865 (W) at 868 H** said the following:

“as one of the objections of contempt proceedings is by punishing the guilty party to compel compliance of the orders, it seems to me that the element or urgency would be satisfied if in fact it was shown that the Respondents were continuing to disregard the order of 3 August 1977. If this be so, the

Applicant is entitled as a matter of urgency to attempt to get the Respondent to desist by the penalty referred to be imposed.”

[17] The Court in **Victoria Park Rate Payers Association v Greyvenouw CC and 2 Others Case Number (511/03) [2003] ZAECHC 19 (11 April 2003)** emphasised that the public interest in the administration of justice and the vindication of the Constitution also renders the ongoing failure or refusal to obey an order a matter of urgency. All matters in which ongoing contempt of an order is brought to the attention of a Court must be dealt with expeditiously as the circumstances and the dictates of fairness allow.

[19] The second point in *limine* argued by the first Respondent is that the order of contempt only relates to the first Applicant not the company Honey Fashions the second Applicant. The Respondent is wrong and has misinterpreted the order attached to this application as annexure FA3. Paragraph 1.3 and 1.4 of that order reads as follows:

“(1.3) Publishing any statements on any platform whether in print or virtual of any nature in which the Applicant or employees of the Applicant are either directly or indirectly harassed and

(1.4) Harassing the Applicant’s direct or indirect employees.

[20] The first Respondent justifies his non-compliance by stating that the comments were not intentional, that he was lured into the private communications by various social media posts that agitated him and that the wording of the communication is taken out of context with no intention to disregard the orders.

[21] This argument is in my view hopelessly inadequate and falls to be dismissed. The communications were not single or isolated events but multiple, continuous and persistent. That behaviour and actions should be viewed holistically under the existing circumstances of feuding parties who are in competition with each other. Mr Wiese clearly had the necessary men’s area

and wilfulness to disobey an existing Court order which was handed down in his presence barely 3 months ago.

[22] In the result I find that he clearly contravened the terms and conditions of the order FA2 and for that it is now time that he must be punished.

THE SECOND URGENT ORDER

[23] As regards the second urgent order there is a dispute whether the Respondent is trading prior to the expiration of the *dies* in that order. In his Answering Affidavit and in the submission before me the first Respondent admits that the stock has been paid for and has in fact arrived. He says that despite that nothing can be done with the stock until after the 27th October 2022. In the result I have to give the first Respondent the benefit of doubt and cannot find that he has disobeyed the Court order by Mudau J.

SHOULD THE COURT ORDER DATED 28TH JUNE 2022 BE EXECUTED AS IS OR NOT

[24] The Constitutional Court in *Matjabeng Local Municipality v Eskom & Others* as well as in *Shadrack Mkhonto and others vs Compensation Solutions (Pty)Ltd* Case Number CCT217/15 and CCT 99/6 a judgment handed down on the 26 September 2017 at paragraph 54 Nkabinde ADCJ said the following:

“The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions such as declaratory order, mandamus and structural interdicts. All these remedies play an important part in the enforcement of Court order in civil contempt proceedings. Their objective is to compel parties to comply with a Court order. In some instances, the disregard of a Court order may justify committal as a sanction for part non-compliance. This is necessary because breaching a Court order wilfully and mala fide undermines the authority of the Court and thereby adversely affects the broader public interest.”

[25] Once again Nkabinde J in the matter of **Nthabiseng Pheko & Another vs Ekurhuleni Metropolitan Municipality Case Number CCt19/11** a judgment delivered on 7 May 2015 said the following at paragraph 37;

“However where a Court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief a mandamus demanding the contemnor to behave in a particular manner a fine and any further order that would have the effect of coercing compliance.”

[26] I have taken into consideration the fact that this matter arises out of a fierce and tense commercial dispute involving two individuals. As a result, I have decided that there should be no direct imprisonment with the hope that the first Respondent will by now have learnt a lesson and will desist from further unwelcoming conduct which amounts to contempt of Court.

[27] In the result I make the following order:

1. The first Respondent is hereby committed to imprisonment for a period of 90 (Ninety) days.
2. The order of imprisonment is wholly suspended for a period of one year on the following conditions:
 - a. That the first Respondent fully complies with the Court order granted against him dated the 31st May 2022 under case number 22/16990.
 - b. The first Respondent pays an amount of R50 000.00 (Fifty Thousand Rand) as a fine which amounts shall be paid not later than the 31st December 2022. The payment is to be made to the Registrar of this Court and proof of such payment be submitted to the Applicant.

3. The first and second Respondents are ordered jointly and severally the one paying the other to be absolved to pay costs of this application on an attorney and own client scale including costs of two counsel.

Dated at Johannesburg on this 14th day of October 2022

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING	:	10 OCTOBER 2022
DATE OF JUDGMENT	:	14 OCTOBER 2022
FOR APPLICANT	:	ADV RF DE VILLIERS
INSTRUCTED BY	:	MESSRS JAN KEMP NEL ATTORNEYS
FOR RESPONDENT	:	ADV B STEVENS
INSTRUCTED BY	:	MESSERS AYOOB KAKA ATTORNEYS