IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 14562/2018

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
(4)	DATE: 04 JULY 2023
(5)	SIGNATURE: ***ML SENYATSI***

In the matter between:

THE NATIONAL ARTS COUNCIL OF SOUTH AFRICA — **FIRST APPLICANT**

ROSEMARY MANGOPE — **SECOND APPLICANT**

And

FREDDIE NYATHELA — **FIRST RESPONDENT**

SOUTH AFRICAN ROADIES ASSOCIATION — **SECOND RESPONDENT**

JUDGMENT

SENYATSI J

[1] This application concerns a contempt of court order issued on 18 September 2018 by Mdalana-Mayisela J. The order was mandatory in its nature and in in terms thereof, the respondents were required to remove certain defamatory statements published on the first and second respondents Twitter pages concerning the applicant. The respondents were required to comply with the order after the issue thereof.

[2] However, the respondents sought to rescind the order as well as the judgment without success. They also applied for leave to appeal the judgment and this was refused by the court on 30 August 2022. The impugned publications about the applicant had not been removed at the time the contempt application was launched.

[3] The first respondent, Mr. Freddy Nyathela, denies that he is in contempt of the court order on the ground that he has , upon legal advice removed the impugned published defamatory statements. He also raises two *points in limine* in his heads of argument and states that Mrs Marrion Mbina-Mthembu a former CEO of the first applicant lacks the authority to depose the affidavit by virtue of the fact that no resolution has been attached to the papers authorising her to depose to an affidavit. He further contends that the juristic person such as the first applicant cannot be defamed.

[4] The issue for determination is whether the respondents are in contempt of the court order as averred in the papers by the applicant and in addition whether the points raised *in limine* can be sustained by the facts as pleaded by the respondents.

Principles of Contempt of Court

[5] The principles of disobedience of court orders are trite in our law. It is a crime unlawfully and intentionally to disobey a court order.[1] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.[2] The offence has in general terms received a constitutional stamp of approval,[3] since the rule of law a founding value of the Constitution requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.[4]

[6] The contempt of civil court proceedings permits a private litigant who has obtained a court order to require an opponent to do or not to do something and to approach the court again, in the event of non-compliance, for a further order declaring the non-complaint party in contempt of court and ask the court to impose a sanction.[5] The sanction usually, does not invariably,[6] has the object of inducing the non-complier to fulfil the terms of the previous order. This involves a criminal sanction in order to force the non -complier to comply with the court order.

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[1] S v Beyers 1968(3) SA 70 (A).
[2] Attorney -General v Crockett 1911 TPD 893.
[3] S v Mamabolo [2001] ZACC; 2001(3) SA 409 (CC) para 14.
[4] Coetzee v Government of the Republic of South Africa [1995] ZACC 7; 1995 (4) SA 631 (CC) para 61
[5] Fakie NO v CCII Systems (Pty) Ltd (653/04) [2006] ZASCA 52; 2006 (4)SA 326 (SCA) para 7.
[6] Cape Times v Union Trades Directories (Pty) Ltd 1956 (1) SA 105 (N) 120D-E.

[7] The test for when disobedience of a civil order constitutes contempt has come to be stated as to whether the breach was committed deliberately and *mala fide*.[7] a deliberate disregard is not enough, since the non - complier may genuinely, *albeit* mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.[8] Even a refusal to comply that is objectively unreasonable may be *bona fide* (the unreasonableness could evidence lack of good faith).[9]

[8] In LAN v OR Tambo International Airport Department of Home Affairs Immigration Admissions and Another [10] Du Plessis AJ said the following regarding the alleged compliance with the court order after the fact:

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> " [75] I am, however, of the view that non -compliance with a court order, at specific, given period in time, constituting an offence that has been committed at that time, cannot or should not be ignored by a court simply because of the fact that there was at later stage compliance with the court order. That renders the remedy only applicable to a situation where a person has refused to obey a court order, and the court is requested to strengthen its court order by way of a threat of guilty finding of contempt, and a suitable order ensuring compliance."

[9] In order to succeed with the relief of contempt, the applicant must prove the following requirements:

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[7] Fakie NO (supra) at para 9.
[8] Consolidated Fish (Pty) Ltd v Zive 1968 (2) SA 517 © 524D; Noel Lancaster Sands (Edms) Bpk v Theron 1974 (3) SA 688 (T) 691C.
[9] Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc [1996] ZASCA 21; 1996 (3) SA 355(A) 368C-D
[10] [2010] ZAGPPHC 165; 2011 (3) SA 641 (GNP) at para 75

(a) The existence of the court order ;

(b) Service thereof to the respondent; and

(c) Failure to comply with the terms of the order.

Once these requirements are met, the respondent bears the onus to prove that the non-compliance was not wilful.

Lack of authority to depose to an affidavit

[10] I now consider the principles on authority to depose to an affidavit. The lack of authority to either institute action or depose to an affidavit is a common feature that is raised as a defence in the motion proceedings.

[11] In Ganes and Another v Telecom Namibia Limited[11], Streicher JA said the following in regard to the defence of lack of authority:

> "[19] The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent… It must, therefore, be accepted that the institution of the proceedings were duly authorised."

[12] The Court in Eskom v Soweto City Council [12] had an opportunity to consider a defence that a person lacked authority to bring an application to court and Flemming DJP stated as follows on the approach to be adopted:

[11] [2004] 2 All SA 609 (SCA);(608/202) [2003] ZASCA 123 (25 November 2003)
[12] 1992(2) SA 703 at 705E-I

“The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to the litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney. (Compare Viljoen v Federated Trust Ltd 1971(1) SA750 (O) 752D-F and the authorities there quoted.)

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney’s authority should be proved, the Rule- maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with accept only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of many pages of resolutions, delegations and substitutions still attached to applications by some litigants, especially certain financial institutions.”

Reasons

[13] In the instant case, the respondents do not deny that they failed to comply with the order since the issuing thereof during September 2018. They have not denied the factual content of the impugned statements. In the heads of arguments filed on their behalf, the respondents state that since Mrs Mbina—Mthembu is no longer a CEO, she is not authorized to depose to an affidavit in the contempt of court proceedings. The argument fails to distinguish between the authority to institute an action, which normally comes into play when the attorney's authority is challenged and the ability to lead evidence. It is not required for a witness in motion proceedings to be authorized to testify. For as long as the witness assists the court pertaining to the evidence germane to the issues before the court, the evidence of such witness is permissible. Accordingly, the submissions on behalf of the respondents on the point must fail.

[14] It is so that the juristic person such as the first applicant is incapable of being defamed. However, this point is irrelevant for the purpose of a contempt of court order proceedings. The previous order by Mdalana-Mayisela J did not deal with defamation of the first respondent.

[15] I now need to consider whether it is sufficient for the first respondent to state that he has, since the institution of these proceedings removed the impugned statements as ordered by Mdalana-Mayisela J. Given the authority quoted above, this is not enough to defeat the contempt of court proceedings. The first respondent has not in my view successfully discharged the burden of proving that his non-compliance with the previous order was *bona fide*. Therefore, there is sufficient evidence

before me to suggest that defiance of the court order was done with the wilful intention to undermine the court's authority. As a result, it follows that the applicants have made out a case.

ORDER

[16] An order is therefore granted in the following terms:(Repeat all as per order.

(a) The First and Second Respondents are declared to be in contempt of the order made by the Honourable MDALANA-MAYISELA J on 20 September 2018 under the above case number.

(b) The First Respondent, Mr. Freddie Nyathela, is sentenced to be committed to prison for a period of 30 (thirty) days, which committal is suspended on condition that the First Respondent complies with the order granted on 20 September 2018 within a period of 10 (ten) days from date of this order.

(c) Should the First Respondent fail to comply with this order the Applicant will be entitled to approach this Honourable Court, on the same papers duly amplified as may be necessary, for an order for the immediate committal of the First Respondent to prison for a period of 30 (thirty) days, *alternatively* such period as this Honourable Court deems fit.

(d) That the First and Second Respondents be ordered to pay the costs of this application on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.

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ML SENYATSI

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 04 July 2023

DATE APPLICATION HEARD: 24 April 2023

DATE JUDGMENT HANDED DOWN: 04 July 2023

APPEARANCES

Counsel for the Applicant: Adv WJ Bezuidenhout

Instructed by: Moodie & Robertson Attorneys

Counsel for the
Respondent: Adv ZF Kriel

Instructed by: Mthembu Inc Attorneys