IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 28/03/18

CASE NO:8105/2014

29/3/18

MBONISENI YSTER DLADLA — **PLAINTIFF**

and

TSHWANE UNIVERSITY OF TECHNOLOGY — **1ST RESPONDENT**

NTHABISENG AUDREY OGUDE — **2ND RESPONDENT**

MATOANE STEWARD MOTHATA — **3RD RESPONDENT**

VUSI NICHOLAS MGWENYA — **4TH RESPONDENT**

JUDGMENT

N V KHUMALO J

[1] The Applicant, M Y Dladla ("Dladla") is seeking the granting of a relief against all the Respondents for contempt of the order of the above honourable court that was granted by Matojane J against the 1st Respondent, Tshwane University of Technology ("TUT"), on 1 February 2014, which order read as follows:

> [1.1] Declaring the evictions that were effected at the Respondent's residences on 31 January 2014 by the Respondent to have been unlawful;
>
> [1.2] Ordering the Respondent to immediately allow all students who were evicted from the Respondent's residences back into such residences;

[1.3] That the Respondent pay the costs of this application on the scale as between attorney and own client.

("anti- spoliation interdict" or " the order")

[2] Dladla initially sought a contempt of court order citing only TUT, the party against whom the order was granted. After successfully applying for a joinder of the 2nd to 4th Respondent, the notice of motion was accordingly amended to set out the contempt order the Applicants are seeking to be:

[2.1] That until at least 4pm on Monday, 3 February 2014, the 1st to 4th Respondent were in contempt of a court order granted against them by the Honourable Court on 1 February 2014 under the case number 8104/2014;

[2.2] That the 1st Respondent be sentenced to pay a fine of R30 000.00;

[2.3] That the 2nd to 4th Respondent are each sentenced to a fine of R30 000.00 failing payment of which the Respondent that fails is to be committed to prison for a period of six months.

[2.4] The 1st to 4th Respondent are to pay, jointly and severally, the one paying the other to be absolved, the Applicant's cost, on a scale as between attorney and client.

[3] Dladla is a student at TUT. He launched these proceedings in his capacity as the President of the Central Student Representative Council representing TUT students, most significantly those who resided in the residence provided by TUT ("resident students").

[4] The anti-spoliation order referred to was obtained by Dladla whom I would continue to refer to as Dladla or "the Applicants," against TUT on an urgent motion following the abrupt eviction by TUT of resident students on 31 January 2014.

[5] The TUT was for two or three days leading to the eviction engulfed in student riots and protests that resulted in arson and vandalism of buildings, property and vehicles and the intimidation of their fellow students and staff. The management in a desperate move, having failed to diffuse the situation by obtaining an *ex parte* order restraining students from continuing with the violent protests and intimidation, resorted to shutting down the campus on 31 January 2014. They, without a court order, issued an overnight notice on Friday 30 January 2014 directing the students to vacate their rooms by 7h30 the next morning.

[6] On 1 February 2014, Dladla and the students, out of consideration of the desperate situation the resident students suddenly found themselves in, homeless on a rainy day, approached the urgent court on an *ex parte* notice and set the matter down for hearing that afternoon at 13h00, seeking an order declaring their eviction unlawful and ordering TUT to immediately allow the resident students back in the

residence. There is confusion with regard to the order granted whether it is a spoliation or an anti-eviction order. A spoliation order is a restitutionary interdict whereupon the Applicant is restored to its former position prior the unlawful conduct of the Respondent (if dispossessed is then by order put back in possession). The order has the final effect. The object of the order is merely to restore the status quo ante the illegal action, securing only that if such decision be required, it shall be given by a court of law; *Bon Quelle (Edms) bpk Munisipaliteit van Otavi* 1989 (1) SA 508 (A); *Viljoen v Viljoen* [2002] 2 All SA 143 (T) at 146a-b. It therefore resembles a final interdict with however different requisites; see *Pretorius v Pretorius* 1927 TPD178 at 179; *Nienaber v Stuckey* 1946 AD 1049 at 1053. TUT was ordered to restore the students accommodation at their residence after their eviction was declared unlawful. This fits the characterization of a spoliation order, that prevents the taking of the law into their one's own hands and illicit dispossession of property; *George Municipality v Vena* 1989 (2) SA 263 (A).

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[7] An *ex parte* interdictory order was granted against the unrepresented TUT, notwithstanding the Registrar, Mr Mthatha, the 3rd Respondent, having been contacted and warned in the early hours of the morning by e-mail that the Application was set down to proceed in the above Honourable court at 14h00.

[8] There are no real or bona fide disputes of fact in the matter. What took place after the anti eviction or spoliation order was obtained is common cause, which in short is that TUT management refused to comply with the order that was served on them on that late afternoon. The resident students were not allowed back into their residence until after 13h00 on 3 February 2014, following the service of the order by the sheriff.

[9] Dladla and the resident students on 1 February 2014 presented a copy of the order to the security personnel guarding the residence at the main campus. The security, on instruction of the Director of Campus Protection Services (DCPS), refused the students entry and ordered them to leave, for the reason that their court order was not served by the sheriff'. Upon which Dladla proceeded to the DCPS's office. **The DCPS insisted that on instruction by the TUT executive management, having spoken to the Deputy Registrar responsible for legal services, Mr Vusi Mgwenya ("Mgwenya")**, the 4th Respondent, the students are not to be allowed back onto the campus until service is effected by the sheriff. The DCPS had alleged to have sent a copy of the order to the executive and TUT representatives. Attempts to summon the assistance of the police was also to no avail as they also insisted on service by the sheriff.

[10] On 2 February 2014, on a Sunday, TUT published a communication stating that "the university has **become aware of the court interdict obtained by the SRC to allow students back into their residence, however the University has**

factually not been served with such an application or court order due to the sheriff's absence." Another statement was issued later that day confirming that TUT remains closed whilst awaiting service of the Notice by the sheriff.

[11] As indicated, TUT complied only after the order was served by the sheriff on 3 February 2014. On the same day TUT had to defend the contempt application which resulted in a *rule nisi* being issued on the following day by Matojane J that called upon TUT to come and show cause why the contempt order should not to be granted against it. Subsequent thereto, TUT launched an application for rescission of the students spoliation order. Kollapen J dismissed the application. The Applicants then applied for the joinder to the contempt application of Professor M A Ogude ("Ogude") the TUT Vice Chancellor and Principal as the 2nd Respondent being the head of management, Professor M S Mothata ("Mothata") the TUT Registrar as the 3rd Respondent, and of Mr. Mgwenya ("Mgwenya") the TUT's Deputy Registrar: Secretariat and Legal Services, as the 4th Respondent, after it allegedly became clearer in the Affidavit deposed to by 4th Respondent in the Rescission Application that the three (3) played a very significant role in TUT's non-compliance with the order of the court.

[12] Dladla's legal representative, Ms Nathaniah Jacobs ("Jacobs"), alleged in her supporting affidavit that upon obtaining the interdict, she on the same afternoon e-mailed it to the Registrar, Prof Ogude, Prof Mothata who was aware of the Application proceeding and Mr Mgwenya and Vice Chancellor of Student Affairs, warning them that any failure to comply will lead to a contempt of court being sought against the executive management. Her telephone calls to them went unanswered.

[13] She was apparently contacted by Mr Raubenheimer, TUT's attorney only on 3 February 2014 requesting copies of the order and the urgent application who nonetheless after receiving the documents maintained TUT's stance of defiance not to allow the students back into their residence and insisted on the demand that the court order be served by the sheriff before TUT complies.

[14] The issue to be determined is whether the Respondent when it refused to allow the students into their residence on presentation of the order was in deliberate defiance of the court order. The Applicants are supposed to establish beyond reasonable doubt guilt on the part of the Respondent which constitutes of a deliberate intent to disobey the order of the court, motivated by malice; see *Federation of Governing Bodies of SA Schools Gauteng v MEC for Education, Gauteng* 2002 (1)SA 660 (T) at 678F-G.

LEGAL FRAMEWORK

[15] In dealing with the offence of contempt of court we must bear in mind that it is interwoven with a criminal procedure even though it is a substantive offence. The requirements therefore for contempt and the test as set out in *S v Bresler and Another* 2002 (2) SACR 686 (CC) at 24g -25e are germane. The proceedings are as

a result considered to carry also a public interest dimension as confirmed by Cameron JA held at [39] that:

> "A court in considering committal for contempt, can never disavow the public dimension of its order, This means the use of the committals for contempt cannot be sundered according to whether they are punitive or coercive. In each, objective (enforcement) and means (imprisonment) are identical. And the standard of proof must likewise be identical.

and at [40] that:

> "....**The punitive and public dimensions are therefore inextricable**: coherence requires that the **criminal standard of proof should apply** in all applications for contempt of court." (my emphasis)

[16] The offence of contempt of court, due to its dual dimension that includes a criminal aspect, in reality applies the criminal standard which imperatively requires that the defiance be proven to have been intentional or wilful and *mala fide* beyond reasonable doubt. The court must be satisfied that the conduct occurred with the intention to disobey the court or to interfere with the administration of justice; see *Da Silva Pessegueiro v Tshinanga* 2006 (1) SACR 388 (T) par [15]. Consequently proof that an order has been disobeyed *per se* is not sufficient to amount to guilt of contempt of court, unless a presumption of wilfulness and *mala fide* can be drawn from the offending conduct. Hence, beyond proof of the existence of the order, service or notice thereof and non-compliance with the terms, the court has to be satisfied that non-compliance was as a result of wilfulness and *mala fide*; See *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

[17] No onus of proof rests on a person accused of contempt. The contemnor only has the burden to adduce evidence that rebuts any presumption of wilfulness or *mala fides* that might be drawn from the proven contempt, not on a balance of probabilities, but by establishing reasonable doubt. So to escape condemnation, a contemnor has only to raise reasonable doubt. Consequently Cameron JA's statement at [41] that, once the Applicant proves the three requisites, order, service and non- compliance, unless the Respondent provides evidence raising a reasonable doubt as to whether non compliance was willful and *mala fide* on a balance of probabilities, the requisites of contempt will have been fulfilled. In the next paragraph on [42] (c) he confirms stating that:

> "In particular the applicant must prove the requisites of contempt (the order, service or notice; non-compliance; and willfulness and mala fides) beyond reasonable doubt."

[18] The Respondents deny being in contempt of court, alleging that the order was not properly served on TUT until 3 February 2014 when it was served by the sheriff at 13h30. In their answering affidavit deposed to by Mgwenya, he confirms that he

was indeed **contacted by DSPC and informed of the order by the security staff on 1 February 2014 at 17h00.** He queried the validity of the order for the reason that neither a case number nor the name of the Judge appeared on the order. He confirms that he instructed the security personnel still not to allow the students inside the campus. He argued that also by virtue of the fact that no application was served on TUT prior to what he regarded as a suspicious order being allegedly obtained, there were no grounds to accept it.

[19] Furthermore Mgwenya confirmed that he also on 2 February 2014 **read about the granting of the order on News24.** Upon which he, with the assistance of their attorney and legal adviser, arranged for a publication of a comment on the TUT website stating that TUT gained knowledge of the issuing of the court order from the media and the students were however not to report to the residence whilst TUT is awaiting service by sheriff. In the meanwhile Ms Ruyter, the TUT's media spokesperson, had posted a publication on the TUT website confirming being aware of the order. Mgwenya alleges that Ruyter did not realize the significance of her statement.

[20] According to Mgwenya, Raubenheimer, their legal adviser also did not accept the validity of the order which they both regarded as a rumour. He denied that there was ever an intention on the part of any of the Respondent's many officials to disobey the court order but insists that the students were refused access after what he says "a purported court order" was presented and as a result of a genuine bona *fide* belief that such an order had in fact not been granted due to its lack of a case number, an indication of who granted the order and its grant not preceded by the service of an application. He also then denied that there was an intentional disobedience of the court order.

[21] With regard to the emails of the order sent to TUT executive management on the afternoon of 1 February 2014, Mgwenya alleges that none of them were read until Monday 3 February 2014 at 10h00 by Mothata who then drew their attention to the e-mailed order.

[22] In conclusion on the Respondents' submissions, Mgwenya at the time contended that the order should not have been granted by the court therefore they were going to apply to set it aside. He denied that a constitutional right of the Applicants was violated/infringed.

23] A part of the Applicants' response to some of the allegations in the Respondent's' affidavit against the joinder application were incorporated into this application for contempt, specifically those that substantiate the allegation that 2nd to 3rd Respondents caused the TUT not to comply and be guilty of contempt of court, given that TUT is a legal *persona*, that acts through its various officials.

[24] Professor Ogedu, who had left TUT at the end of that year in November 2014 filed a supplementary affidavit alleging that she knew nothing about the order until 3

February 2014, had no access to her e-mails nor did she receive any phone calls or messages during the weekend. She said she was only informed of the order at a executive management meeting held that morning at 10h00 but also advised by TUT's representative in the legal Department that there were doubts about the authenticity of the order which was being verified. She alleges that she had no reason not to believe the legal representative. In the said meeting a decision was taken to reopen the University. She was informed on the same day at 13h30 that service of the order has been effected by the sheriff.

[25] She denied having any intention to ignore the order and alleged that once she knew about it she relied on the advice of the legal department of the 1st Respondent which she had no reason not to believe.

[26] Dladlas reply in respect of Ms Ogedu, in an affidavit deposed to by his legal representative Ms Du Plessis from the human rights office, alleged that Ogedu's conduct of failing to open or read her work e-mails during the weekend, specifically on 1 February the date of the illegal eviction, constituted a transparent and *mala fide* attempt to avoid gaining any knowledge of a reasonably anticipated spoliation court order against TUT to avoid concomitant responsibility of giving effect to such order, seeing the volatile situation that prevailed in the campus at the time and the abrupt eviction of the students without a court order, for an undetermined period of time and left without shelter or food. According to Applicants Ogedu willfully and in bad faith embarked on an incommunicado stratagem. She therefore was not to escape the responsibility and accountability that goes with it.

[27] Prof Mthatha is also viewed in the same light that he ignored the communication that informed him of the Applicant launching the Application for the spoliation interdict. He was deliberately complacent and remained incommunicado to avoid gaining knowledge of the order and thereby aiding TUT's avoidance to adherence to the order. The Applicants therefore argue that he together with Ogedu must be held as accomplices to the contempt of court offence.

[28] Mgwenya is alleged as directly heading the TUT legal services, accordingly to be in a position of authority and accountability as it is also evident from his answering affidavit. He not only had the authority to comply with the court order but practically dealt with it during the whole contempt. He was given notice and or became aware thereof, notwithstanding, gave instructions that it be disobeyed.

[29] The Applicants are seeking a punitive order against TUT, Ogedu, Mathatha and Mgwenya for the general disregard of the order of the court from 1 February to 3 February 2014 which they allege to have proven to have been undoubtedly *willful* and *mala fide*.

[30] As espoused disobedience or non-compliance is not denied by TUT and Mgwenya but wilfulness and *mala fide* challenged on the basis that circumstances under which the order was obtained and its service effected was questionable, thus

justifying the Respondents' conduct or quelling the presumption of malice. In essence Respondents dispute that (i) the order was correctly granted (ii) proper notice or service of the application and or order effected (ii) or that non-compliance (defiance) deliberate and with malice.

ANALYSIS

[31] Mgwenya being part of the executive management from whose actions the conduct of TUT is imputed argues that he had reason not to believe that the order was properly granted. He alleges that firstly, the court was wrong to grant the order, without substantiating why. He seems oblivious of the fact that TUT's eviction of the students without a court order was unlawful. In essence, they as management were engaged in an unlawful act in their continuous refusal to correct their illegal act, which explains why TUT's endeavor to reverse the order did not succeed, because the court could not sanction an illegal act. As it is for the courts to correct and protect its processes and the rule of law. The merits of the spoliation order could therefore not be faltered.

[32] Mgwenya's reference to the volatile situation at the time to excuse the illegal eviction or the perpetuation thereof was foolhardy, as TUT management was able, during that time, to obtain an *ex parte* order to restrain the students from the volatile behaviour, they could also have obtained an eviction order under the same urgency. See *Vena v George Municipality* 1987 (4) SA 29 (C) at 52; *George Municipality v Vena* 1989 (2) SA 263 (A).

[33] Ngwenya also argued that he was entitled not to believe that the Applicants had a proper order as no application was served on TUT, whilst a day before TUT had obtained on an urgent basis an *ex parte* order of restraint against the Applicants under the same urgency without having served any papers. They therefore were aware that Rule 6 (12) (a) permits a court in an urgent application to can condone service and or notice of the application. Where appropriate and in cases of extreme urgency, the application may even be heard without service or notice to the Registrar; see *Republikeinse Publikasie (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) 782E also 782A-783H. Mgwenya had intimated to the volatility and urgency of the situation, which prompted TUT also to dispense with service. There was therefore no reason to doubt that the order could have been lawfully obtained without notice to TUT. Specifically if it is considered against the evidence that has not been disputed that the Registrar, Professor Mothata was also notified of the time and place the Application was to be heard. The actions of TUT through its management were therefore inconsistent with reasonable behaviour. The alleged disbelieve not only irrational but disingenuous.

[34] Mgwenya's other reason for defiance was that the order had no case number and did not indicate the judge who granted it. This was a draft order that has been made an order of court with a signature of the Registrar/Judge of the urgent court

and the date inserted. Even though Mgwenya is not an officer of the court, therefore with no authority to assert any knowledge about the processes of the court, he took it upon himself to illogically question the court order at the same time conceded that the Applicants did approach the court and also that usually **and not always** a court order will indicate the full name (in print) of the judge who granted it. A court order constitutes the recordal of what the judge had ordered, formulated carefully, being clear and easily understandable. It is to be embodied in writing by the Registrar. In an urgent court it can be typed so as to be signed by the presiding judge or his clerk.

[35] The reservations Mgwenya placed on the court's order was as a result unwarranted and very much disagreeable. Seeing that he is an authorized official of a public institution he did not only have a statutory duty but a moral duty to uphold the law and to see to due compliance with the orders of the court. Mgwenya disregards the significance of upholding and acting in accordance with the law. His attitude towards the legal approach that was followed by the Applicant of going to court and obtaining the spoliation order, being that it was a technique.

[36] Lastly, together with the Respondent's attorney, who is an officer of the court, Mgwenya passed judgment on the service of the court order by the Applicants' instead of the sheriff and on that basis even though aware of its existence refused to recognise its effectiveness. As a result the TUT continued to disobey the law and to act in defiance of the court order that sought to stop the illegal conduct. The disobedience persisted even after they were sent a copy by Ms Jacobs who is also an officer of the court and from whom they could have made enquiries about their misgivings. They without any valid grounds insisted on questioning the genuineness of the court order, keeping the students out of their residence and demanding that service be effected by the sheriff. They had no reason to disbelieve the order.

[37] I am satisfied that the Applicants have established that the order was brought to the attention of the TUT, through service upon its officials, who in turn duly notified the DPSC and Mgwenya who had the authority to abide by it but intentionally refused to do so. TUT and Mgwenya also acknowledged being aware of the existence of the order through the media whereupon they unequivocally indicated their resolve not to abide by it.

[38] In Van Rensburg's Erasmus Superior Court Practice 2nd edition at D6-24 par 10, its stated that, an interdict operates from the moment it is pronounced. There is no need for the order to be served upon persons bound by it, in order to make it effective. Any person bound to observe the prohibition contained in the order will be guilty of contempt if he flouts the order **whilst he has information, which he has no reason to disbelieve,** to the effect that an order of court has been issued against him; see *Burgers v Fraiser 1907* TS 318; *Frank v Van Zyl* 1957 (2) SA 207 (C) at 211 E-F; *Consolidated Fish Distributors (Pty) Ltd v Zive* 1968 SA 517 (C) at 522F; *Elliot Bros (EL) (Pty) Ltd v Smith* 1958 (3) SA 858 (E) at 863D. This accord with the

requirement that the order should be duly brought to the attention of, or served on the alleged contemnor.

[39] The principle being that when the information comes to the personal attention of the contemnor, he is bound to act as if that order had actually been served upon him, and if he fails to do so, he acts contrary to its tenor at his peril. If it is sought to impute constructive knowledge to a principal because of the knowledge of his agent, the knowledge of his agent must be actual knowledge and not merely constructive knowledge. I am satisfied that the existence of the order was duly brought to the attention of TUT, through Mgwenya and the Application through Mothata in due course, that is on 1 February 2014. They had no reason to disbelieve the information therefore any failure to comply with it was, as seen at all times, at their own peril.

[40] Furthermore the Respondents were insensible to the fact that the court has declared the eviction unlawful. The purpose of the court order was to interdict the illegal eviction of the students without a court order. There was an intentional resistance to the court's deterrence of the ongoing breach and undermining of the rule of law by the TUT's executive. The conduct militates against the doctrine of legality which is an integral part of our legal system since the Constitution became the supreme law of the country. That is the reason the rescission application was bound to fail, as it would have allowed an unlawful activity to be presented as a *fait accompli* and a serious undermining of the principal of legality. In *Pheko v Ekhuruleni municipality* 2005 (5) SA 600 (CC) at [42], the Constitutional court stated that "While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court order but of the contumacious disrespect of the law, moreover under such circumstances.

[41] Mgwenya had explained that he had regarded the Applicant's obtaining of the court order a technique that Dladla was using to dissuade TUT from what he regarded as a working strategy, that of having illegally evicted the students from their residence. Mgwenya therefore intentionally facilitated non-compliance with the order to preserve the *status quo,* keeping the students out of residence, therefore willfully persisting with an illegal act *mala fide*. A disobedience that was later perpetuated and supported by the executive management and their legal representatives.

[42] Ogedu has denied having any knowledge of the spoliation/anti eviction order obtained by the Applicants on 1st February 2014, alleging to have only had sight of her e-mails on Monday 3 February 2014. A conduct that Applicants allege to have been deliberate so as to avoid dealing with the situation which according to them demanded that she stays alert. Expectation that an emergency might arise requiring urgent attention cannot impute actual knowledge of its materialization if notice was not received. This might have been an undesirable or negligent behaviour by Ogedu that deserves strong criticism but cannot validate imputing knowledge at the time, of the existence of the court order *per se*. Neither Mgwenya nor Mothata alleged to have notified her of their awareness that an order has been obtained during the

weekend or that such an Application has been launched. It is also not far- fetched that she might not have seen the order and application sent to her work e-mail during the weekend until Monday 3 February 2014 when she was back at work. It is so that any contestation of her assertion to that effect should be resolved on her version and common cause facts; see National Director of Prosecutions v Zuma 2009 (2) SA 277 (SCA) para [26]. During the hearing however her denial was not an issue. On that ground there is no satisfactory evidence that she deliberately and with mala fide avoided compliance with the order or aided or abetted disobedience thereof.

[43] Ogedu conceded that by the 3 February 2014 she was told of the order in their management meeting but the attorney of the Respondent and a representative from the Respondent's legal Department, Mgwenya, informed her that the authenticity of the order was in question and being verified. She said she had no reason not to believe the advise of the legal practitioner and adviser. Also, a decision was taken in that meeting to allow the students back to the campus. She alleged to have genuinely believed being advised, that there was a cause to verify the order. The implementation only took place the next day. I cannot find that there is sufficient proof that her non-compliance was then deliberate given Mgwenya and the attorney's advise to her.

[44] In respect of Prof Mothatha he is on the same footing as Prof Ogedu, Applicants having argued that they both be held to have been accomplices to TUT's disobedience, although he in addition was warned of the Application when it was launched and particulars of TUT attorney sought from him. He remained disinterested and did not follow up on the outcome of the application. He had sight of his emails only on Monday 3 February 2014 after 9h00. An accomplice must have knowingly acted with impunity, proven beyond reasonable doubt that he in fact knew that the order has been granted and facilitated or assisted its disobedience. It however cannot be said the same with Mthatha.

[45] As against the individual Respondents, they have argued that at the time the order was made the only party that was cited was TUT, the subsequent *rule nisi* was made also against the cited party not against them in their individual capacity. They say they were added in the Notice of Motion and concomittant *rule nisi* after the order to be obeyed was granted against TUT and non-compliance already committed at the time (after the fact). Therefore contempt can only be against a party the order intended to bind, TUT, from whom compliance should have been expected.

[46] It is of course so that any person who, with the knowledge of the court order, aids and abets its disobedience or is willfully party to such disobedience, can also be held in contempt, even though such person is not cited as a party in the order granted or even to the contempt proceedings; see *Pheko* at para [47]. Conversely no contempt order can be made against a party who is not cited to appear in the contempt proceedings unless there is prove beyond reasonable doubt that the party aided and abetted the contumacious disobeyance of the court order.

[47] In *Cathway Pacific Airways Ltd v HL* [2017] 2 All SA 722 (SCA), the same issue arose where the court had to determine the liability for contempt of court of employees of a company in respect of an order granted against their employer, where such employees had neither been cited as a party nor an order granted against them. It was held that **it is of course so that any person who, with knowledge of a court order, aids and abets the disobedience of a court order or is willfully a party to such disobedience, can also be held in contempt, even though such person is not cited as a party to the contempt proceedings.**

[48] All three of the persons, Ogedu, Mgwenya and Mothata alleged to have been involved have been cited in the contempt proceedings, therefore a contempt order can be made against them if found guilty. There is overwhelming evidence beyond reasonable doubt that Mgwenya was significantly involved in the contumacious disobedience of the court order, meeting the standard, as is required that due to their axiomatic seriousness civil contempt of court convictions should only occur when there is prove beyond reasonable doubt. As an executive who had the authority his actions attributtable to the TUT, he also had in his personal capacity abetted and aided TUT's disobedience of the interdict.

[49] As far as Mthatha is concerned, although he was informed of the launching of the spoliation interdict application and further particulars of TUT's attorney sought from him, for the purpose of notice, he did nothing about it. The Application was then sent to him by e-mail. It is farfetched that he would have been aware of the existence of the Application and not alert the other executives about it. He was also expected to be on alert and lookout for the order. It also cast a doubt on the genuineness of Mgwenya's allegation that he was suspect of the order because no application was served on them. However, never mind the skepticism about Mthata's not opening his emails during the weekend, he factually had no actual knowledge of the order being granted, since there is proof that he only opened the e mail with the order on Monday 3 February 2014, Jacobs confirmed that she received read receipts from Mothatha at 9:14 that day. His awareness of the application cannot be imputed to actual knowledge that the order obtained. So since he became aware that the Applicant obtained the interdict/spoliation order only on Monday 3 February 2014 when he opened his e-mails, he cannot be found to have knowingly aided or abetted TUT's disobedience or non-compliance prior to knowing about t

he order.

[50] It is also therefore so that, as cautioned to be aware of the standard of proof that is beyond reasonable doubt.

[51] Under the circumstances, I make the following order:

[51.1] The Application to hold the 2nd and 3rd Respondent, that is Professor Ogedu and Professor Mothatha respectively, in contempt of court is dismissed.

[51.2] The Application to hold the 1st Respondent (TUT) and the 4th Respondent (Mgwenya) in contempt is granted.

[51.3] The 1st Respondent is sentenced to pay a fine of R30 000.00;

[51.4] That the 4th Respondent is sentenced to a fine of R30 000.00 failing payment of which he is to be committed to prison for a period of six months.

[51.5] The 4th Respondent is to pay, jointly and severally, the one paying the other to be absolved, the Applicant's cost, on a scale as between attorney and client.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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