

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: A308/19

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

In the matter between:

CRS TECHNOLOGIES (PTY) LTD

Appellant

and

JAMES MCKERRELL

1st Respondent

FRANCESCO ARICO

2nd Respondent

MARK ANDREW SCHORN

3rd Respondent

**FLASH CLOUD (PTY) LTD t/a THE PEOPLE
SOLUTIONS COMPANY**

4th Respondent

Coram: Mngqibisa-Thusi; Mali and Millar JJ

J U D G M E N T

MNGQIBISA-THUSI J:

- [1] This is an appeal with the leave of the court *a quo* against the judgment and order dated 20 July 2019, dismissing an application for the respondents to be held in contempt of an order dated 18 April 2017.
- [2] The appellant, CRS Technologies (Pty) Ltd, conducts a business as a service provider of human resources and payroll integrated software solutions. The first respondent, Mr James Mckerrell, was in the employ of the appellant since March 2000 as its chief executive officer until his resignation in February 2016. Currently, the first respondent is the CEO and one of the directors of the fourth respondent, Flash Cloud (Pty) Ltd, trading as 'The People Solutions Company', which conducts a similar business as that of the appellant.
- [3] It is common cause that in 1985 the appellant developed two software programmes, the "CRS HR and Payroll Software Solution" (the software) and a secondary programme known as the "CRS Support and Licensing Programme" (licensing programme). The secondary programme was intended to protect and provide security for the software programme and was designed for use with the software programme. It permits the logging of technical support issues for resolution and generates licence keys to give access to the software programme to the appellant's customers.
- [4] After resigning from the appellant, the first respondent allegedly set up a company in the UK which provided the same services as those of the appellant.

[5] During March 2017 the appellant launched an urgent application to prohibit and prevent the respondents from using its programmes. On 18 April 2017, the respondents consented to a draft order being made an order in terms of which the respondents were interdicted from, *inter alia*,:

- 5.1 reproducing the appellant's programmes;
- 5.2 using or publishing the appellant's programmes;
- 5.3 adapting the appellant's programmes;
- 5.4 reproducing or copying the appellant's system's manual; and
- 5.5 inviting or procuring the appellant's existing customers.

[6] In 2018 and after becoming aware that a UK company, Transact HR, was marketing a software programme similar to its own, a director of the appellant and a certain potential business partner, Mr Anthony de Richelieu (Mr de Richelieu), hatched a plan for Mr de Richelieu to contact the first respondent under the ruse that he wanted to do business with the fourth respondent. It is common cause that during a skype internet call between the first respondent and Mr de Richelieu, the first respondent gave a demonstration of the appellant's software programme which he claimed was the fourth respondent's. Further, the software demonstrated bore the logo of the fourth respondent.

[7] As a result the appellant launched an urgent application in terms of which Part A of the relief was, by agreement, granted pending the determination of Part B in which the appellant sought, *inter alia*:

7.1 a declaratory order that the respondents are in contempt of the order dated 18 April 2017; and

7.2 that the first respondent be committed to imprisonment for a period of six months.

[8] The primary objectives of contempt proceedings are to vindicate the authority of the court and to force litigants into complying with court orders.

[9] In contempt proceedings, the applicant bears the onus of proving, beyond reasonable doubt that the respondent is in contempt of court order. The test for whether disobedience of a court order amounts to contempt is whether the breach was committed deliberately and *mala fide*. In *Fakie NO v CCII Systems (Pty) Ltd*¹ the Supreme Court of Appeal held that whenever committal to prison is sought, the criminal standard of proof applies. A declaratory of contempt (without imprisonment) and a mandatory order can, however, be made on the civil standard. The applicant for a committal order must establish:

8.1 there is an underlying court order;

8.2 service of the court order has been effected or that the order has come to the notice of the Respondent;

8.3 despite it knowing about the order, there is non-compliance with the terms of the order; and

¹ 2006 (4) SA 326 (SCA).

8.4 wilfulness and *mala fides*, beyond a reasonable doubt².

[10] However, once the applicant has proven the first three above-mentioned requirements, the respondent bears the evidentiary burden in relation to prove absence of wilfulness and *mala fides*.

[11] No relief was sought against the second and third respondents as it was apparent that they were not aware of the order dated 18 April 2017.

[12] Part B of the application was opposed by the first and second respondents. In the answering affidavit the first respondent alleged that in 2016 and through the company he had set up in the UK, he had commissioned a software developer to create a software programme for use in the UK. Further, the first respondent admitted to being in possession of the appellant's evaluation copy. It is common cause that the evaluation copy was used by the appellant to demonstrate to its potential clients the capabilities of its software programme. The first respondent alleged that in the demonstration he made to Mr de Richelieu, he used the evaluation copy and not the appellant's software programmes. First respondent

² In *Tasima (Pty) Ltd and Others v Department of Transport and Others* [2016] 1 All SA 465 (SCA), the court held that: "[18] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 9. *Fakie* also held that whenever committal to prison is sought, the criminal standard of proof applies (para 19). A declarator of contempt (without imprisonment) and a mandatory order can however be made on the civil standard (see *Fakie* para 42). The applicant for a committal order must establish (a) the order; (b) service or notice of the order; (c) non-compliance with the terms of the order and (d) wilfulness and *mala fides*, beyond a reasonable doubt. But, once the applicant has proved (a), (b) and (c), the respondent bears the evidentiary burden in relation to (d) (*Fakie* para 42). Should the respondent therefore fail to advance evidence that establishes a reasonable doubt as to whether his or her non-compliance was wilful and *mala fide*, the applicant would have proved contempt beyond a reasonable doubt (*Fakie* paras 22-24)".

did not deny that the copy he allegedly demonstrated to Mr de Richelieu had the logo of the fourth respondent.

[13] Inasmuch as the court *a quo* found that the first respondent's explanation for using the appellant's programmes defied logic, it dismissed the contempt application by concluding that the evaluation copy was not covered by the order dated 18 April 2017. The court *a quo* further held that the appellant had not shown sufficient cause, even if the respondents were in contempt of the order, justifying the committal of the first respondent to prison and stated that:

"[25] The Court Order prohibiting the respondent from using the applicant's software is couched in such a way that the respondents are prohibited from using the applicant's specified software programmes. The evaluation copy is not specifically mentioned as one of the prohibited software. The evidence of use of the evaluation copy means the respondents have discharged their evidentiary burden of disproving any required wilfulness and mala fides.

...

[29] The finding of this application does not mean that the applicant has failed in the civil claim he has instituted against the respondents but only signifies that the applicant does not meet the required standard of proof for the court to conclude that there is contempt which justifies committal to civil imprisonment."

[14] The appellant is appealing against the judgment and order of the court *a quo* on various grounds including but not limited to the following:

13.1 that the court *a quo* erred in coming to a finding that the evaluation copy was not covered by the terms of the order of 18 April 2017;

13.2 that the court *a quo* erred in finding that there were material contradictions in the appellant's founding and replying affidavits with regard to the changes or modifications made by the respondents to the appellant's software programmes; and

13.3 that the court *a quo* erred in finding that there was no wilfulness and *mala fides* on the part of the fourth respondent in servicing the appellant's clients.

[15] On behalf of the appellant it was submitted that should the court make a finding that the court *a quo* misdirected itself in concluding that the appellant's evaluation report was not covered by the terms of the order of 18 April 2017, the court should make a finding that the respondents, in particular the first respondent, not only deliberately but also wilfully and with *mala fides* failed to comply with the terms of the 18 April 2017 court order and that he was therefore in contempt of the court order. The appellant further sought the committal of the first respondent to prison for a period of six months.

[16] On the day of the hearing of the appeal there was no legal representation on behalf of the respondents. However, the first respondent did join the hearing and submitted that he was there to represent himself and the fourth respondent as he did not have funds to engage a legal representative.

[17] The first respondent conceded that he did not comply with the court order dated 18 April 2017. He justified his non-compliance with the said order on the ground that he was entrapped by Mr de Richelieu. Further, the first respondent conceded that the appellant's evaluation copy could not be used without

reference to the appellant's software programme. The first respondent further admitted that when he showed the appellant's evaluation copy to Mr de Richelieu, it reflected the logo of the fourth respondent.

[18] It is common cause that the first and fourth respondents were aware of the court order of 18 April 2017 and that, as conceded by Mr Mckerrell that despite the existence of the court order, the first and fourth respondents did use the appellants' software programme in contravention of the court order.

[19] I am satisfied that the respondents have not rebutted the inference of deliberate and mala fide non-compliance with the court order of 18 April 2017 in that they have failed to give a plausible explanation for the use of the appellant's software programme despite having knowledge of the court order. I am of the view that the court a quo erred in concluding that the first and fourth respondents did not deliberately and with mala fides contravene the order of 17 August 2018.

[20] In line with the suggestion by Mr Stoop. Counsel for the appellant, this matter ought to be referred back to the court *a quo*, in light of the conclusion reached by this court, to consider the committal of the first respondent to imprisonment.

[21] With regard to costs, the general rule is that a successful litigant is entitled to his or her costs. However, this court is of the view that costs of two counsel is not justified under the circumstances.

[22] Accordingly the following orders are made:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and substituted by the following order:
 - '1. It is declared that the first and fourth respondents are in contempt of paragraphs 1 and 3 of the court order granted on 18 April 2017 by the Honourable Mr Justice Mothle.
 2. The matter is referred back to the court a quo for consideration of a sanction for the contempt of the court order.
3. The respondents to pay the costs of the application.'

NP MNGQIBISA-THUSI
Judge of the High Court

I agree

N MALI
Judge of the High Court

I agree

A MILLAR
Judge of the High Court

Date of hearing :04 May 2022

Date of judgment :19 July 2022

Appearances

For Appellant: Adv Stoop SC (instructed by Wiese and Wiese Inc)

For 1st and 2nd Respondents: Mr J Mckerrell (personal appearance)