

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

Saakno: **816/2021**
Date heard: **25/11/2022**
Date delivered: **27/01/2023**

In the matter between:

**KOMATSU SOUTH AFRICA (PTY) LTD
REGISTRATION NUMBER: 2013/168336/07)**

Applicant

and

**JOHANNES CORNELIUS LOURENS
IDENTITY NUMBER: [...]**

Respondent

Coram: Sieberhagen, AJ

JUDGMENT

SIEBERHAGEN, AJ

Introduction

[1] The Applicant approached the Court under case number 910/2020 for urgent relief against the Respondent and Facebook. On 9 June 2020 an interim order was granted in terms of which:

- 1.1 the Respondent was directed to remove all posts on Facebook in which he sought to defame the Applicant;
 - 1.2 the Respondent was directed to stop interfering in any manner with the business of the Applicant; and
 - 1.3 the Respondent was interdicted and restrained from placing defamatory material concerning the Applicant on Facebook or any other social media platform;
 - 1.4 if the Respondent failed to comply with the provisions of the interim Court order, Facebook was ordered to remove all such defamatory posts from its social media platform.
- [2] The Respondent was called upon to show cause on 26 June 2020 why a final Order should not be granted. On 26 June 2020 a final Court order was granted against the Respondent under case number 910/2020. The relevant paragraphs of the Court order read as follows:
- “1.2 That the First Respondent be interdicted from placing any defamatory material concerning the Applicant on Facebook or any other social media platform.*
 - 1.3 That the First Respondent be interdicted from interfering in any manner with the business of the Applicant...*
 - 6. That this Order of Court be served on the First Respondent by way of e-mail, WhatsApp and on the First Respondent’s Facebook page.”*
- [3] Service of the final Court order was carried out by the Applicant’s legal representatives in terms of the provisions of paragraph 6 of the Court order.
- [4] On 26 April 2021, the Applicant approached this Court under the abovementioned case number ordering the Respondent to appear

before the Court on Friday 28 May 2021 to show good cause why he should not be found guilty of contempt of Court for failing to abide and comply with the order of the Court dated 26 June 2020.

[5] The application is opposed by the Respondent.

Factual Background

[6] The Applicant carries on business in the manufacturing and supply of mining, construction, earthmoving and utility equipment to customers in Southern Africa with an established operation situated in Kathu in the Northern Cape Province. The Respondent was previously employed by the Applicant.

[7] On 25 January 2019 the Applicant issued the Respondent with a notification of suspension on full pay and benefits. A disciplinary hearing was held on 4 February 2019 in which it was recommended that the Respondent's employment be terminated. The Respondent appealed the outcome of the disciplinary hearing, but his appeal was dismissed.

[8] The matter was then referred to the Commission for Conciliation, Mediation and Arbitration ("CCMA") and on 27 November 2019, the Commissioner of the CCMA issued a ruling to the effect that the CCMA lacked the requisite jurisdiction to determine the dispute and that same must be referred to the Labour Court.

[9] According to the Applicant, the Respondent had made various defamatory statements regarding the Applicant on social media platforms since December 2018, which necessitated the Applicant to approach the Court for the relief sought under case number 910/2020 as referred to in paragraph 2 *supra*.

[10] Subsequent to the final order being granted on 26 June 2020, the Respondent addressed an email on 28 September 2020 to 47 entities including Media 24, First Rand Bank, Wesbank, Nedbank, Rapport, Huisgenoot, the CCMA, Columbus Stainless Steel and Solidarity. In the said email, the Respondent *inter alia* stated the following:

“nou word Kobus Botha ook deur die korrupte mense afgedank en ons het ‘n “patroon” ontdek in Komatsu SA wat blanke mans een vir een uitgooi om plek te maak vir die swart man. Ons het nie ons mense ondersteun nie en ons wil nou die saak vat na die hoog geregs hof toe.....”

Met die nuwe inligting rondom Kobus Botha en sewe van sy kollegas wat na Joe Lourens af gedank is gaan ons vra dat Komatsu SA sy salaris onmiddelik terug betaal totdat ons ‘n ondersoek span saamgestel het om vir Komatsu SA en hulle korupsie te ondersoek.....”

[11] On 7 September 2020, the Respondent made further statements regarding the Applicant on Facebook and stated the following:

“..O, en dit help nie julle prober om my weer op Facebook te verban nie want ek het hierdie boodskap gecopy en vir al die koerante aangestuur

Ek het lank genoeg gewag vir julle om julle fout te herstel deur die regse pad te loop met alle bewyse, Komatsu SA, julle kan maar weer julle prokureers kry om my te dreig met die hoog geregs hof want hierdie keer sal ek opdaag met ‘n paar van die mense wat julle afgedank het.....”

[12] According to the Applicant this statement made by the Respondent indicates that there was no point banning the Respondent from Facebook with reference to the final Court order because he has now taken a decision to make the newspapers his medium of communication.

[13] The Respondent also made the following statement on his Facebook page on 7 September 2020:

“.....Sluit my toe want julle het van ‘n normale mens wat geen kriminele rekord gehad het en op geen swart lys in 49 jaar was nie en getroud was met my vrou vir 26 jaar, julle het my gemaak wie ek nou gaan word, so wie moet toegesluit word Komatsu SA en dokter Franco Colin van die Wilgers Hospitaal?, Kom, antwoord bietjie my vraag? Julle hoort agter tralies.”

- [14] On 11 October 2020 the Applicant discovered that the Respondent again resorted to social media by publishing a Facebook post accusing the Applicant, Solidarity and Dr Franco Colin of causing his wife to seek a divorce. The Respondent also threatened to burn down the Applicant’s premises and stated the following:

“....A.g.v hulle korupsie het julle dogter my geskei, nie omdat ek iemand anders gehad het nie nee, maar a.g.v hulle korupsie.....

.....Nou is die skade wat Komatsu SA voor gaan moet betaal nog groter. As my vrou enige iets oorkom daan gaan ek Komatsu afbrand tot op die grond saam met Dr Fanco Colin en Solidariteit.....

- [15] On 9 December 2020, the Respondent addressed an email to Media 24, Solidarity, Legal Medical and the Applicant accusing the Applicant of selling and supplying defective equipment to customers, fraud and corruption.

- [16] On 4 January 2021, the Respondent sent an email to a wide range of recipients including Assmang Limited, a client of the Applicant, in which he described the Applicant as *“his own corrupt employer”*.

- [17] The Respondent then sent a further email on 15 February 2021 to employees of the Applicant and stated the following:

“.... I will stop using your companies name on WhatsApp and on all the other social media platforms if I can put food on my families table and when I can pay my car and bond.

Its up to you what happens next.....”

[18] On 17 February 2021, the Respondent sent a WhatsApp message to an employee of the Applicant and confirmed that the Respondent had broadcasted the same message on Facebook. In the message the Respondent indicated that he will drive through the gates of the Applicant and that he had discovered a big designing flaw in the equipment of the Applicant which resulted in millions of rands of damages.

[19] On 4 April 2021, the Respondent posted on his Facebook page that everyone should download the Zoom application without delay because that is the platform that he will be using in future. The message specifically states the following:

“There you are not stopped in the fb jail. It’s time to try other platforms as well.”

[20] The Applicant submits that the Respondent has no intention to stop his course of conduct and that the Respondent is aware of the final Court order granted against him on 26 June 2020.

[21] It is further the Applicant’s case that:

21.1 The Respondent is conducting himself in a *mala fide* manner in deliberately doing damage to the Applicant’s reputation and business by way of social media;

21.2 The material that the Respondent has published cannot be understood in any other context but as a continued attack on the Applicant in breach of the Court order of 26 June 2020 and that the Applicant is entitled to the relief claimed.

21.3 The Respondent has deliberately and wilfully infringed the Court order and has done so in a *mala fide* manner, knowing what he is doing is causing continuing harm to the Applicant.

[22] On 21 June 2021, the Respondent filed an answering affidavit to the Applicant's application. The affidavit was drafted by the Respondent personally and is not commissioned by a Commissioner of Oaths. The affidavit does not specifically deal with the paragraphs as set out in the founding affidavit.

[23] In the said affidavit he states the following:

".....This court told me to go and find a lawyer and I went on social media to look around for a righteous person to assist me in this fraudulent case. Now books are being written about me because of the weird things that started this snowball from rolling downhill which already uncovered corrupt people in the courts of South Africa who are about to be exposed for ignorance in their integrity....."

.....Applicants attempt to silence my constitutional rights of "Freedom of religious beliefs and opinion" in the design flaws they created by them. And under "Labor relations" and also under "education" and our right for "access to information" which the "Applicant" want to prevent the public out there from seeing that they are corrupt and that they have used doctors and unions and court to corrupt our "Constitutional Rights" by using the High Court to corrupt the system....."

[24] With regard to the Court order of 26 June 2020, the Respondent states that he was not able to get to Court in time for the court case, because he had lost his job and income.

[25] It appears from the Respondent's response to the founding affidavit that he is not disputing the fact that he made the relevant statements regarding the Applicant on social media. In this regard, he states the following:

"...The Applicant also ignored the law and now they want to use the Court to hide their criminal activities by using a woman to talk for them. The information I shared on Facebook was always under the constitutional law under the abovementioned topics which prevented the rest of South Africa citizens from injuries, fraud and corruption."

... And I explicitly took the photos and I placed them on Facebook because I was afraid of getting murdered by a big company for exposing the design problem on their hundred-million-rand machine.....

*... And I never mentioned the companies name in any posts I placed on Facebook **until** after their corruption and fraud caused damage to my family.....”*

- [26] In the replying papers, the Applicant denies having committed and/or is committing any criminal activities or ignoring the law at its operations or in vindicating its rights against the actions of the Respondent as alleged by the Respondent.
- [27] It is further submitted in the replying papers that the Respondent has not been prevented or prohibited from reporting and/or exposing the alleged fraud, corruption or unlawful activities. The Respondent must approach the relevant and appropriate forum and authorities with the necessary information he may have and the alleged unlawful activities can only be dealt with in and by those appropriate forums. The Respondent has failed to approach the correct forum and does not have the right to post defamatory statements regarding the Applicant on social media.
- [28] On 8 July 2021, the Respondent filed a further affidavit ostensibly in response to the Applicant’s replying papers. The Respondent did not request leave from the Court to accept the further affidavit in terms of the provisions of Rule 6(5)(e), but as a result of the Respondent being unrepresented and as a result of the relief claimed against the Respondent, I am of the view that it is in the interest of justice to accept the said affidavit. I will therefore consider the contents of the affidavit for purposes of adjudicating the application. The affidavit predominantly relates to the dispute between the parties in respect of the Respondent’s dismissal from his employment and the Respondent’s right to expose unlawful

activities. In paragraph 21.1 of the affidavit, he states the following:

“Labour Court need to be involved in this because of the history and all the facts points back to a previous dispute between myself and the applicant that was ignored by these “independent specialist” from LabourNet. If this Court gets involved in this matter, the court must be within their jurisdiction just like these people told me three times before in their attempt to prolong me and my families suffering. But because they wanted to involve this court in a criminal act, now this court need to react on that. This is therefore my constitutional right to use my media platforms to get legal representation out there who might be willing and able to take me to the labour court.....”

- [29] The matter was postponed on eight occasions between the period of 23 July 2021 to 26 August 2022. On 25 October 2021, the Applicant filed a supplementary affidavit, but failed to request the Court’s leave to file the affidavit and failed to explain why it was necessary to file the affidavit concerned. Accordingly, the contents of the Applicant’s supplementary affidavit are not considered in the adjudication of this matter.

Issues

- [30] It is the Applicant’s case that despite the final Court order of 26 June 2020 having been granted against the Respondent, the Respondent has continued to post statements defamatory of the Applicant on social media which are injurious to the reputation, status and business of the Applicant.
- [31] According to the Applicant, these statements are calculated to undermine and damage the good name and reputation of the Applicant.
- [32] The Respondent’s case is that the Applicant’s application is based on the Applicant attempting to silence the Respondent from exposing the Applicant’s corruption and fraud. It is also the

Respondent's case that the Applicant is not entitled to infringe the Respondent's constitutional rights with regard to publication of statements regarding the Applicant on social media.

Arguments on behalf of the parties

[33] On 25 November 2022, the Respondent appeared in person. He was informed of his rights to obtain legal representation and the seriousness of the relief claimed by the Applicant against him. The Respondent indicated that his application for legal assistance at Legal Aid South Africa was refused and that his appeal in respect of that decision was also unsuccessful. The matter stood down to enable the Respondent to consider his position. After the adjournment, the Respondent indicated that he wants to proceed and argue the matter without legal representation.

[34] On a second occasion the matter stood down to provide the Respondent the opportunity to have insight in the court file and to ensure that his case has been properly placed before Court. The Respondent indicated that a document bundle consisting of 114 pages was not placed before Court even though he had provided the Court with the documents on a previous occasion when the matter was postponed.

[35] Taking into consideration that the Respondent is unrepresented and as a result of the fact that Mrs Erasmus, on behalf of the Applicant, indicated that she has no objection that I accept the documentation, same was formally accepted. The 114 pages consists out of the following:

35.1 Documents pertaining to a dispute between the Applicant and the Respondent in the Labour Court of South Africa held at Johannesburg;

- 35.2 Documents pertaining to a case between the Respondent and Solidarity in the Magistrate's Court for the district of Kathu;
- 35.3 Documents pertaining to the labour dispute between the Respondent and the Applicant;
- 35.4 Documents pertaining to a matter between the Respondent and the Applicant in the Metal and Engineering Industries Bargaining Council, held at Kimberley;
- 35.5 An application by Curro Holdings Limited t/a Curro Kathu and the Respondent under case number 440/2021 issued in this Court;
- 35.6 Documents filed in the Equality Court held at Vanderbijlpark between the Respondent and Thys Venter.

[36] Unfortunately none of the documents referred to in paragraph 35 above assist the Court in determining the Applicant's contempt of Court application or the Respondent's opposition thereto and therefore do not take the matter any further.

[37] After the two adjournments, I heard arguments on behalf of both parties. Mrs Erasmus submitted that it is clear from the papers, that the Court order of 26 June 2020 was served on the Respondent; that he has not complied with it; that the Respondent's actions have been both deliberate and *mala fide* in not complying with the order of Court and that contempt of Court has been proved beyond a reasonable doubt.

[38] Although the Applicant is seeking an order for the immediate incarceration of the Respondent for such period as determined by

the Court in the Notice of Motion, Mrs Erasmus indicated that a more appropriate order will be to impose a period of imprisonment, but to suspend such imprisonment on condition that the Respondent complies with the Court order of 26 June 2020 during the period of suspension.

[39] The Respondent indicated during argument that he did receive the Court order of 26 June 2020. He submitted that the Court was not entitled to grant the Court order on 26 June 2020 as a result of the fact that he has a constitutional right to speak out against corruption.

[40] The Respondent referred to the dispute between him and the Applicant with regard to his dismissal and how it has affected his life. He is of the view that the Applicant “stabbed him in the back” and that he had no alternative but to revert to social media in an attempt to scream for help. He did not dispute the fact that he made the statements regarding the Applicant as set out in the founding affidavit, but indicated that he cannot recall indicating on social media that he would burn down the offices of the Applicant, although he admitted that the relevant post does appear on his Facebook page.

[41] The Respondent indicated that the dispute between himself and the Applicant is not over and he is taking them to the Labour Court.

Applicable Law and application of Law to the facts

[42] Contempt of Court has been defined as the deliberate, intentional (i.e. willful) disobedience of an order granted by a Court of competent jurisdiction.¹

¹Pheko v Ekurhuleni City 2015 (5) SA 600 (CC) – footnote 40

[43] Courts have the powers to ensure that their decisions or orders are complied with. In doing so, Courts are not only giving effect to the rights of the successful litigant but also and more importantly, are asserting their authority in the public interest. The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the Courts be upheld.²

[44] The position with regard to willful disobedience of an order made in civil proceedings is summarized as follows in the matter of **Fakie NO v CCII Systems (Pty) Ltd**³

- “(a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
- (b) The respondent in such proceedings is not an "accused person", but is entitled to analogous protections as are appropriate to motion proceedings.*
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
- (d) But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*
- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.”*

[45] It is clear from the papers and arguments that:

² Raath v Raath 2022 JDR 2536 (GJ) – par 36

³2006 (4) SA 326 (SCA) at 344G-345A

- 45.1 The Respondent was residing within the jurisdiction of the Court when the order was granted;
- 45.2 The Court order of 26 June 2020 was served and/or came to the attention of the Respondent;
- 45.3 The Respondent failed to comply with the Court order of 26 June 2020 in that he published statements on social media regarding the Applicant in which he accused the Applicant of fraud and corruption.
- [46] As previously stated, the Respondent indicated that the Court order should not have been granted because it infringes on his constitutional right to expose corruption.
- [47] The issue to be adjudicated is not whether the Court order was “correctly” or “incorrectly” granted as argued by the Respondent, but whether the Respondent is in contempt of Court. An order of Court stands until it is set aside. It is common cause that the Respondent did not bring an application to set aside the Court order of 26 June 2020.
- [48] In the matter of **Department of Transport v Tasima (Pty) Ltd**⁴ the majority of the Constitutional Court held that under section 165(5) of the Constitution of Republic of South Africa, 1996, (a) a court order is binding until set aside, irrespective of whether it was valid; (b) judicial orders wrongly issued were not nullities but existed in fact and might have legal consequences; and (c) whether an order was enforceable depended on whether the judge had the authority to make the decision at the time that the order was made. Consequently, it was held that a party bound by

⁴2017 (2) SA 622 (CC)

an invalid order must comply with the order until it is set aside as set out in paragraph 186 of the judgment that reads as follows:

“.....Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.

- [49] In respect of the evidentiary burden that rests upon the Respondent in relation to wilfulness and *mala fides* namely to advance evidence that establishes a reasonable doubt as to whether non-compliance with the order was wilful and *mala fide*, I am not convinced that the Respondent has established a reasonable doubt in this regard.
- [50] The Respondent did not provide any supporting documents and/or evidence in either social media or in this Court supporting the truth of the allegations made by him against the Applicant in respect of fraud and corruption. Although he indicated that he wants to expose corruption, he did not approach any relevant forum in this regard and elected to publish defamatory statements regarding the Applicant on social media.
- [51] The Respondent's motives are set out in his post on social media on 7 September 2020 where he clearly indicates that he will stop using the Applicant's name on WhatsApp and on all other social media platforms if he can put food on his family's table and when he *“can pay my car and bond”* as set out in paragraph 17 *supra*. This suggests that the Respondent will only comply with the Court order of 26 June 2020 in the event that he receives monetary

compensation from the Applicant which constitutes the deliberate and intentional disobedience of the Court order.

- [52] When the sanction is committal, the standard of proof must be beyond a reasonable doubt. In **Matjabeng Local Municipality v Eskom Holdings Ltd and others**⁵ the Constitutional Court, on a reading of **Burchell v Burchell**⁶, **Fakie NO v CCII Systems (Pty) Ltd**⁷ and **Pheko v Ekurhuleni City**⁸ held the position to be as follows:

“Summing up, on a reading of Fakie, Pheko, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, or differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine may have a material consequence on an individual’s freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always....”

- [53] In conclusion therefore, I find that the Applicant has proven beyond reasonable doubt that the Respondent is in contempt of the Court order under case number 910/2020, issued by Olivier J, on 26 June 2020 and that the Respondent failed to advance evidence that establishes a reasonable doubt as to whether non-compliance with the Court order was wilful and *mala fide*.

- [54] I agree with Mrs. Erasmus that a sanction of direct imprisonment is not appropriate in the circumstances.

Costs

⁵2018 (1) SA 1 (CC) at par 67

⁶2006 JDR 0062 (SCA)

⁷*Supra*

⁸*Supra*

[55] The Applicant did not seek a cost order against the Respondent in the Notice of Motion nor was the issue raised during argument.

I make the following order:

- 1. The Respondent is found to be in contempt of the Court order issued under case number 910/2020 out of this Court by Olivier J, on 26 June 2020;**
- 2. The Respondent is committed to imprisonment for a period of 60 days, which committal is suspended for a period of two years on condition that the Respondent, during the period of suspension:**
 - 2.1 Does not place or publish defamatory material concerning the Applicant on Facebook or any other social media platform;**
 - 2.2 Refrains from interfering in any manner with the business of the Applicant.**
- 3. A copy of this judgment and Court order must be served on the Respondent personally.**

**AS SIEBERHAGEN
ACTING JUDGE**

Obo the Applicant:	Adv. S.L. Erasmus (oio Duncan & Rothman Inc)
Respondent:	In person