IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO.

2099/2022

In the matter between:

INTERCAPE FERREIRA MAINLINER (PTY) LTD	Applicant

and

THE MEC FOR TRANSPORT, EASTERN CAPE	First Respondent
THE MINISTER OF TRANSPORT	Second Respondent
PROVINCIAL COMMISSIONER, EASTERN CAPE SOUTH AFRICAN POLICE SERVICE	Third Respondent
NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE	Fourth Respondent
NOMTHETHELELI LILLIAN MENE	Fifth Respondent
SEHLAHLE FANNIE MASEMOLA	Sixth Respondent

In re:

INTERCAPE FERREIRA MAINLINER (PTY) LTD Applicant

and

THE MEC FOR TRANSPORT, EASTERN CAPE First Respondent

THE MINISTER OF TRANSPORT Second Respondent

PROVINCIAL COMMISSIONER, EASTERN CAPE SOUTH AFRICAN POLICE SERVICE Third Respondent

NATIONAL COMMISSIONER, SOUTH AFRICAN POLICE SERVICE Fourth Respondent

NATIONAL PUBLIC TRANSPORT REGULATOR Fifth Respondent

EASTERN CAPE PROVINCIAL REGULATORY ENTITY Sixth Respondent

REASONS

Rugunanan J

[1] The present application served before this Court on 14 December 2023. It involves urgent contempt proceedings brought by civil process for conduct *ex facie curiae* which the applicant contends is tantamount to non-compliance with a Court order for which it seeks punitive relief. The matter implicates the third

and fourth respondents both of whom are incumbents of the South African Police Services ('the SAPS') respectively the Provincial Commissioner and the National Commissioner and it seeks their joinder in their personal capacities, in turn, as fifth and sixth respondents.

[2] As a collective and where contextually appropriate the third, fourth and fifth respondents will hereinafter be referred to as 'the SAPS respondents' or 'the respondents'. The answering affidavit on their behalf has been deposed in the name of the fifth respondent, Ms Nomthethelei Lillian Mene.

[3] Although joined in these proceedings in his personal capacity the sixth respondent did not depose to an answering affidavit in that capacity nor is there a confirmatory affidavit with reference to the answering affidavit put up by the fifth respondent.

[4] The focus of the proceedings is paragraph 5 of a rule *nisi* granted by Smith J on 14 June 2023 and confirmed on 22 August 2023. The relief contemplated in that paragraph culminated from a history of incidents indicating a deliberate strategy on the part of rogue taxi operatives within certain parts of the province to subject the applicant and its long-distance drivers and passengers to acts of violence, intimidation and coercion of the applicant to increase its rates, as also to reduce the number of its coaches operating on designated routes and to pay a fee to operate on specified routes.

[5] The incidents comprising of some 175 reported cases were manifest in areas identified as hotspots, namely the Chris Hani District, the Amathole District, and the OR Tambo District. The districts include loading points at Idutywa, Butterworth, Tsomo and Cofimvaba on the R409/N2 route between Queenstown and Mthatha. This history is dealt with more extensively in the judgments by Smith J that culminated in the granting of the rule *nisi* and its

confirmation, with much of it (on the applicant's version) recurring in Idutywa during the approach to the recent festive season and so, necessitating these proceedings.

[6] The relief in the relevant paragraph of the rule *nisi* (which relief is henceforth referred to as 'the SAPS relief') directed the SAPS to coordinate with other role players for ensuring that:

'5.1 a visible law enforcement presence is maintained at every loading point in hotspot towns and areas at each of the times at which the applicant's buses are scheduled to stop at those loading points in order to maintain the safety and security of long-distance bus drivers and passengers;

5.2 law enforcement escorts are provided to the applicant's buses along the hotspot routes, and any other routes, as and when requested by the applicant on account of a legitimate concern over a risk of intimidation or violence; and

5.3 where necessary, procure the assistance of other law enforcement agencies in order to ensure compliance with paragraphs 5.1 and 5.2.'

[7] This relief was aimed at ensuring interim protection of the applicant's coaches, its staff, and passengers while the first and second respondents (i.e. the MEC for Transport and the Minister of Transport) were directed within 60 days to revise an action plan formulated by the MEC. The action plan did not accord with the purpose of the confirmation order and required fundamental reconsideration. The action plan emanated from an order of 30 September 2022 – also granted by Smith J. (I interpose to point out that the SAPS respondents aver that the action plan was filed without mention of the date as to when this occurred).

[8] By its nature, the SAPS relief comprehends an order *ad factum preastandum*[1]. Its interim operative effect is not in dispute and subsists notwithstanding the SAPS' pending application for leave to appeal the confirmation order. Broadly speaking, the relief does no more than to compel the SAPS to comply with their constitutional and statutory obligations for the maintenance of safety and security and the prevention of acts associated with intimidation and violence directed against the applicant's coach drivers and members of the travelling public utilising the applicant's services. The obligations imposed by the order are indeed what the SAPS agreed to assume in terms of an Implementation Schedule proposed by the applicant.[2]

[9] Insofar as the SAPS respondents are concerned the primary relief sought by the applicant in its amended notice of motion entailed orders *inter alia*:

(a) declaring the respondents to be in contempt of the rule *nisi* order as confirmed by the confirmation order; and

(c) directing that the respondents be committed forthwith to prison for a period of 90 days pending compliance with the SAPS relief.

[10] At the hearing of the matter, save to state that its urgency was conceded and that the issue of joinder[3] was not seriously contested, the applicant's further relief (being immaterial to the determination of the primary relief) deserved no mention and was deferred for consideration by agreement between the parties. The further relief relates to an application filed on 12 September 2023 at the instance of the SAPS' Provincial Commissioner and the National Commissioner for leave to appeal against the confirmation order and a similar application filed on the same date by the first respondent, the MEC for Transport, Eastern Cape.

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[1] This is an order calling upon a person to perform a certain act or to refrain from specified action.

[2] See in this regard Annexure FA3 to the founding affidavit to which is attached the judgment by Smith J confirming the rule nisi, specifically pp 105-106 paras 26 and 27 of the judgment.

[3] Which could have been raised *mero motu – Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35 para 91.

[11] On 19 December 2023 having formed the view that the applicant did not make out a case beyond reasonable doubt for demonstrating wilful and *mala fide* non-compliance which effectively ruled out the suspended committal relief it sought against the respondents, I granted an order which in broad summary:

(a) declared the respondents to be in contempt of the confirmed rule *nisi* order (hereinafter 'the court order');
(b) directed the respondents and the SAPS to comply in full with paragraphs 5.1 and 5.2 of the court order;
(c) directed the respondents to file an affidavit within 30 days reporting on the steps they have taken to ensure that the SAPS complies in full with the aforementioned paragraphs of the court order; and
(d) granted the applicant leave to set the matter down for further hearing on supplemented papers for seeking the committal of the fifth and/or sixth respondents in the event of non-compliance.

[12] At the time of granting the order I indicated that my reasons for doing so would follow. As will appear later I am satisfied that the applicant has shown on the civil standard of proof that the respondents have failed to comply with the confirmed rule *nisi* order. I also hold the view that it is extremely unlikely that the respondents did not fully appreciate the practical implications attendant on compliance and for that reason I am hesitant to make a finding of wilfulness and *mala fides* beyond reasonable doubt on affidavit evidence alone.

[13] My conclusion in that regard is informed by my views of the substantial issue/s identified for determination and flowing fairly from the material before me. And in sketching these reasons, I intend confining myself to saying only that which is considered absolutely necessary to substantiate the order I made. To that end the research and reasoning in the heads of argument filed on behalf

of the parties' counsel assisted greatly in providing fair-minded guidance for the parties' submissions. The heads are supported by precedent and offer a dutiful rendition of the material contained in the affidavits and supporting annexures.

[14] The deponent to the applicant's founding affidavit is its Chief Executive Officer, Mr Johan Ferreira. In setting out the applicant's case on the contempt issue, he states:

'11. [F]or several months the SAPS respondents complied – albeit imperfectly – with the rule nisi and confirmation orders, they too filed an application for leave to appeal on 12 September 2023. And nearly a month later the SAPS stopped complying with the SAPS relief.'

[15] Elsewhere he avers:

'12.2 [A]ny protection that Intercape was receiving from the SAPS on an interim basis has come to an abrupt halt.'

[16] As a result of: *(a)* the SAPS' failure over several months to ensure that a visible law enforcement presence is maintained at the applicant's loading points as required in paragraph 5.1 of the rule *nisi* order; and *(b)* the SAPS' failure to ensure that the applicant is provided law enforcement escorts as required in terms of paragraph 5.2 upon apprehension of a legitimate fear of violence and/or intimidation, the applicant was constrained to seek the present contempt relief against the SAPS respondents.

[17] Contempt of court is a crime unlawfully and intentionally to disobey an order of court, the essence of which lies in violating the dignity, repute or authority of the court.[4] There is no gainsaying that orders of court are judicial pronouncements that bind all to whom they apply and that obedience to court orders is foundational to our constitutional ethos grounded in the rule of law. The authority of the courts depends on public trust and respect for the courts.

[4] *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 6.

Public officials should lead by example to ensure that the foundation of the democratic order of the society it sustains is not subverted. The chaos and damage caused to society by conduct that shows disobedience to court orders bears the risk of rendering the judiciary ineffective. The avoidance of that state of affairs is the rationale for the constitutional decree of deference. Contempt is thus not simply an issue *inter-partes* – it is an issue between the court and the party who has not complied with a mandatory order of court notwithstanding that harm may have been caused to the party in whose favour an order has been made.

[18] The test for whether disobedience of a civil order constitutes contempt is 'whether the breach was committed deliberately and *mala fide*'.

[19] In *Fakie NO v CCII Systems (Pty) Ltd*[5] the legal position for proof of contempt on the appropriate test applied to application proceedings by way of notice of motion was condensed as follows:[6]

'*(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 of a balance of probabilities.'

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[5] 2006 (4) SA 326 (SCA).
[6] Para 42.

[20] In summing up the above it is the form of relief which a party seeks that attracts a particular *onus* or burden of proof. An applicant seeking a sanction of committal must prove the requisites of contempt (i.e. *(i)* the order; *(ii)* service or notice; *(iii)* non-compliance; and *(iv)* wilfulness and *mala fide*s beyond reasonable doubt. The criminal standard of proof applies whenever committal is sought and the standard of proof on a balance of probabilities only applies if a *declarator* or other civil remedies short of committal are sought.[7]

[21] Once an applicant has proven these requisites the respondent bears an evidential burden in relation to wilfulness and *mala fides*. This is not a legal burden. To avoid conviction, the evidential burden only requires the respondent to adduce evidence that establishes a reasonable doubt that non-compliance was wilful and *mala fide*.[8]

[22] It is not in dispute that the first two requirements of the test have been satisfied. The respondents acknowledge that the order was granted against them and that it was served on them or that they had knowledge thereof. All that is in issue between the parties is whether there has been a failure to comply with the court order and, if so, whether non-compliance was occasioned by wilfulness and *mala fides*.

[23] On the non-compliance issue the parties' affidavits are by no means insubstantial and are heavily laden with a mass of competing factual and argumentative material in regard to which it is not intended to descend into a full-blown exposition.

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[7] *Fakie* at 345A; *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) para 64; *Els v Weideman and Others* [2011] ZAWCHC 449 para 25.
[8] *Fakie* para 23.

[24] My summation is that the applicant has adduced persuasive evidence indicating non-compliance by the SAPS with the terms of the confirmed rule *nisi* order.

[25] The applicant's complaints are confined to a timeline depicting *(a)* the period from date of the rule *nisi* and confirmation orders until 6 October 2023; *(b)* the period from 6 October 2023 until the launch of this application on 7 November 2023; and *(c)* the period 24 November 2023 to 28 November 2023.

[26] The founding affidavit meticulously sets out the factual detail within the timeline and is substantiated by a series of written communications by the applicant's attorneys to the state attorney. In its heads of argument the applicant abbreviates the SAPS' non-compliance by submitting that it has shown that –

(a) the SAPS complies with the visible law enforcement relief no more than half the time;

(b) on the limited occasions on which the SAPS does ensure visible law enforcement at loading points, it only does so after the applicant has gone door-to-door beseeching one SAPS official after the next to secure assistance;

(c) the SAPS has never implemented the visible law enforcement relief on the troublesome R409/N2 route;

(d) when the SAPS does provide visible law enforcement, it does so only in the normal course of its duties and in locations of its choice;

(e) the SAPS occasionally complies with the escorts relief and does so on its own terms by *(i)* ceasing to recognise certain areas as hotspots despite the designations having previously been determined by this Court; and *(ii)* applying its own requirement of proof of imminent danger before providing escorts; and

(f) raising resource constraints as a reason not to comply with the court orders when this Court in the previous judgments per Smith J has already determined that the SAPS relief is to be provided notwithstanding any resource constraints the SAPS might have.

[27] There are disputes of fact on these aspects and so too on the remaining issues pertaining to wilfulness and *mala fides*. The suggested approach to these disputes is mentioned later.

[28] The gist of the case for the respondents as advanced by Ms Mene in her answering affidavit is evident from the averment:

‘27. I deny that the SAPS has deliberately decided not to comply with the interim relief ordered by Smith J.’

[29] Her denial is repeated elsewhere in the following terms:

‘34. I, however, deny that the third to sixth respondents have failed to comply with a court order and that they did so wilfully and with *mala fides*.’

[30] And much further on she states:

‘80. The SAPS has complied with the court order and/or at the very least there has been substantial compliance with the court order.’

[31] The veracity of the SAPS respondents’ blanket denials is undercut by the acknowledgment of substantial compliance. Indeed, this appears to have also been the position adopted in their heads of argument albeit only insofar as contending that substantial compliance would not result in their committal.

[32] There are plainly conflicting levels of compliance from differing perspectives. On the one hand the applicant contends that the SAPS has only partially and sporadically complied; on the other hand the respondents have conceded substantial compliance. It was submitted for the applicant during

argument that the SAPS has not achieved anything close to substantial compliance. Substantial compliance sufficient to avoid committal for non-compliance is achieved 'where most of the order has been complied with and the non-compliance is in respect of some minor matter only'[9]. The SAPS relief requires enforcement of the law for ensuring the safety of the applicant's coach drivers and its passengers. Since these are matters recognised by the Constitution which places a general duty on the State to protect entrenched rights[10], the threshold for achieving substantial compliance must necessarily be higher when court orders concern the enforcement of constitutional duties and the protection of fundamental rights.[11] On the applicant's argument partial and sporadic compliance constitutes non-compliance especially where the protection of fundamental rights and the enforcement of constitutional duties are concerned. Undoubtedly, these are not minor matters and the assertion of substantial compliance gains no traction.

[33] While I am in agreement with the applicant's submissions aforementioned, the more weighty issue concerns wilfulness and *mala fides*.

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[9] *Consolidated Fish Distributors (Pty) Ltd v Zive and Others supra* at 522D-E.

[10] In *Minister of Safety and Security v Van Duiwenboden* 2002 (6) SA 431 (SCA) para 20, the Court stated [footnotes omitted]: 'The State is obliged by the terms of s 7 of the 1996 Constitution not only to respect but also to "protect promote and fulfil the rights in the Bill of Rights" and s 2 demands that the obligations imposed by the Constitution must be fulfilled. As pointed out in *Carmichele* our Constitution points in the opposite direction to the due process clause of the United States Constitution which was held in *De Shaney v Winnibago County Department of Social Services* not to impose affirmative duties upon the State. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are under threat, and while there might be no similar constitutional imperatives in other jurisdictions, in this country, the State as a positive constitutional duty to act in the protection of the rights in the Bill of Rights. The very existence of that duty necessarily implies accountability and s 41(1) furthermore provides expressly that all spheres of government and all organs of State within such sphere must provide government that is not only effective, transparent and coherent, but also government that is accountable (which was 1 of the principles that was drawn from the interim Constitution). In *Olitzki Property Holdings v State Tender Board and Another* Cameron JA said the following: "The principle of public accountability is central to our new constitutional culture, and can be no doubt that the Court of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupted and responsive government."' See, too, *Minister of Justice and Constitutional Development v X* 2015 (1) SA 25 (SCA) para 17.

[11] The rationale is that the courts will be all the more astute to address contempt of court when fundamental rights are infringed. See in this regard *Pheko and Ohters v Ekurhuleni Metropolitan Municipality* (No. 2) [2015] ZACC 10 para 61 read with fn 73: 'Contempt of court in all cases is to be prohibited and condemned, but much more so where the order with which the state is unwilling to comply concerns the provision of basic human rights'.

[34] The judgment of the majority in *Fakie* made it clear that a deliberate disregard of a court order is on its own not sufficient since the defaulter may genuinely, although mistakenly, believe themselves entitled to act in the way they did to constitute the contempt. Acting in good faith avoids the infraction even if the conduct is objectively unreasonable (though unreasonableness could, depending on the circumstances, evidence a lack of good faith).[12]

[35] While the SAPS' non-compliance may be unreasonable this must be evaluated against the consideration that there was never a definitive instruction to altogether stop complying with the confirmed rule *nisi*. The respondents' instructions communicated in correspondence by the state attorney, including WhatsApp exchanges between certain members of the SAPS and incumbents of the applicant – all of which, the purport and meaning pertaining to the practical aspects for implementation of the court order are matters that ought properly to have been investigated in oral evidence seeing as the applicant sought committal relief. I therefore have difficulty with the submission in the applicant's heads of argument that the Provincial Commissioner's answering affidavit consists almost exclusively of an attempt to explain why the SAPS has not failed to comply with the court order/s but does nothing to explain why there has been no wilfulness and *mala fides* insofar as she or the SAPS are concerned.

[36] Properly considered the submission relates to non-compliance, and wilfulness and *mala fides*. Indubitably, there are disputes of fact on these issues. This is an instance in which it would have been appropriate to have referred the matter to trial so that the deponents to the parties' affidavits (and confirmatory affidavits, if I might add) are subjected to a truth-searching cross-examination.

[12] *Fakie supra* at 333B-C.

[37] I hold the view nonetheless that the failure to have referred the matter to trial is not fatal to the application. The disputes of fact (on the version presented by the respondents) are not such as to establish reasonable doubt as to whether the applicant's complaints of disobedience was wilful and *mala fide*. I reiterate what was said earlier that it is unlikely that the respondents did not appreciate the practical implications of what they were doing hence my hesitancy to have made a finding of wilfulness and *mala fides* beyond reasonable doubt on affidavit evidence alone.

[38] In that regard I entertained reluctance to make an order that restricts personal liberty.

[39] The National Commissioner has been cited in these proceedings and despite being afforded the opportunity to advance evidence to contest the applicant's case, he distanced himself. This is what the Provincial Commissioner says in her answering affidavit:

'7. At the outset I point out that I carry out the statutory duties on behalf of the SAPS according to the relevant statutory prescripts and that I am the Provincial Commissioner and thus head of the SAPS in the Eastern Cape. The National Commissioner is not involved in the daily policing operations of the SAPS in the Eastern Cape as the duty falls within the statutory duties prescribed to me. I report to [the] National Commissioner on policing in the province. The National Commissioner can therefore not be held to be in contempt of the court order which directs policing in the province. I have been advised that it is not necessary for the National Commissioner to depose to an affidavit at this stage. In the event of this Honourable Court finding it necessary that the National Commissioner file an affidavit, such affidavit will be filed.'

[40] The attitude conveyed by the aforegoing is not only unavailing but damning. The starting point is section 207(1) and (2) of the Constitution. Responsibility for ensuring compliance with the SAPS relief falls not only on the Provincial Commissioner but also lies with the National Commissioner

whom the Constitution decrees is the presidential appointee who exercises control over and manages the police service.[13]

[41] This charge is also echoed in section 11 of the South African Police Service Act[14] wherein it is reiterated that the National Commissioner –

'… shall exercise control over and manage the police service in accordance with section 207 (2) of the Constitution…'

[42] And in which section it is further recorded that –

'[w]ithout derogating from the generality of subsection (1), the National Commissioner shall [inter alia] … (d) organise or reorganise the Service at national level into various components, units or groups; … and (g) perform any legal act or act in any legal capacity on behalf of the Service'.

[43] The aforegoing includes powers wide enough to determine the distribution of the SAPS' national resources and to divert and re-allocate them to the provinces where they are needed. The constitutional imperatives giving emphasis to enforcement of the law, the maintenance of public order, the prevention and combatting of crime, and the security of members of the public and protection of property[15] provides sufficient justification for this interpretation and to have cited the National Commissioner in these proceedings. Where resource constraints have been raised in the answering affidavit, it is obvious that the National Commissioner plays a direct and pivotal role in ensuring the SAPS' compliance with the order favouring the applicant.

[44] The National Commissioner's tacit endorsement of the affidavit by the Provincial Commissioner is indicative of a failure to appreciate the obligations imposed by legislation and to treat the matter with the seriousness it deserves. This smacks at section 165 of the Constitution which imposes a positive duty on

[13] Sections 207(1) and (2) of the Constitution of the Republic of South Africa, 1996.
[14] Act 68 of 1995.
[15] Section 205(3).

organs of state to uphold the dignity of the courts and to ensure the effectiveness of their orders.

[45] It is with respect salutary to remind the National Commissioner of the sentiments of Smith J in his judgment of 7 October 2022 apposite to the failure of the Minister of Transport to file an affidavit in response to allegations levelled against the Minister:

‘The Minister is also not bothered to file either an answering or confirmatory affidavit. His failure to do so was clearly also based on his belief that he did not owe Intercape any explanation. His rather curt reply to Intercape’s request for intervention to the effect that the problem is that of the MEC, evinces a clear and fundamental misunderstanding of his constitutional and statutory obligations under the Transport Act. In my view, their conduct is deserving of a punitive costs order.’

[46] Despite the National Commissioner’s distance from the matter (it being of significance beyond merely the matter of costs), I am cognisant of the need to consider and indeed safeguard his constitutional right to freedom. The order which I have made adequately affords him the opportunity to desist from offensive conduct and to place a version before this Court.

[47] To conclude, even if shorn of the punitive sanction sought by the applicant the declaratory relief has as its purpose to uphold the rule of law and to vindicate the authority of the Court.

[48] Accordingly, my order stands.

M S RUGUNANAN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: *P Farlam SC* with *A Molver* and *M Somandi*, Instructed by Adams & Adams, Pretoria (Ref: JSM/DJC/LT5149 - Tel: 012 432 6000; Email jacmarias@adams.africa demi.pretorius@adams.africa) c/o Huxtable Attorneys, Makhanda (Ref: O Huxtable – Tel: 046-622 2692; Email owen@huxattorneys.co.za).

For the opposing Respondents: *A Rawjee* with *X Nogantshi*, Instructed by The State Attorney, Gqeberha (Ref: M Botha – Tel: 041-585 7921; Email MicBotha@justice.gov.za), c/o Whitesides Attorneys, Makhanda, (Ref: G Barrow/C13386 – Tel: 046-622 7117; Email barrowsec@whitesides.co.za).

25 January 2024.