

SOUTH AFRICA / JUDGMENT

Morake v Karstens and Another (1173/2020) [2022] ZANCHC 27 (9 May 2022)

[2022] ZANCHC 27

COURT

Northern Cape High Court, Kimberley

BEFORE

A Eillert

CASE / FILE NUMBER

1173/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTHERN

CAPE DIVISION, KIMBERLEY

CASE

NO: 1173/2020

Reportable:

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between:

MOLEFE

P MORAKE

Applicant

and

MARCEL

KARSTENS

First

Respondent

MULTITECH

AFRICA (PTY) LTD

Second Respondent

JUDGMENT**EILLERT AJ:****Introduction**

- [1] The Applicant, Molefi P Morake (“Morake”) and the First Respondent, Marcell Karstens (“Karstens”) are the directors of the Second Respondent, Multitech Africa (Pty) Ltd (“Multitech”). On 19 June 2020 Olivier J made an order under case number 208/2020 of this court directing and ordering Karstens to provide Morake with information and/or documentation relating to the affairs of Multitech, specified as: contracts from 1 February 2016 to 31 December 2019 entered into between Multitech and third parties, the financial statements of Multitech for the same period, an inventory of all the movable and immovable assets registered in the name of Multitech, names of financial institutions holding accounts opened in the name of Multitech, bank statements including account numbers, current balances and transactions of the accounts opened in the name of Multitech from the 1st of February 2016 until the 31st of December 2019 and the current liabilities of Multitech. Karstens was ordered to provide this information and/or documentation within ten days of the date of the order.
- [2] Karstens did not provide the information and/or documentation to Morake within the prescribed time. Morake therefore launched the current application, requesting that Karstens be held in contempt of the court order 19 June 2020 and for appropriate sanctions to be imposed against him.
- [3] The approach to be followed in contempt of court proceedings within the new constitutional context was definitively set out by Cameron JA (as he then was) in *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA). It bears repeating for purposes of this judgment. The applicant is required to prove the requisites of contempt of court, being the existence of the order, service thereof on, or notice thereof to, the respondent, non-compliance with the order, and wilfulness and mala fides (bad faith) on the part of the respondent. The standard of proof is beyond a reasonable doubt. But, once the applicant has proved the order, service or notice thereof 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.[1]
- [4] In this matter the existence of the order, notice thereof to Karstens and non-compliance therewith within the prescribed ten days, are not in dispute. What must be decided is whether it has been established that Karstens acted wilfully and mala fide.

The affidavits of the parties

- [5] Morake has not sought any relief against Multitech and Multitech did not take part in these proceedings. An answering affidavit was delivered on behalf of Karstens.
- [6] Multitech and Karstens initially delivered a notice of intention to oppose the proceedings under case number 208/2020. Their opposition was however withdrawn by way of a notice of withdrawal of opposition that was delivered one or two days before the order of 19 June 2020 was granted. On or about 23 June 2020 Magoma Attorneys (“Magoma”) on behalf of Morake, wrote a letter to Karstens’ attorneys, Van de wall Incorporated (“Van de Wall”), informing them of the order granted on 19 June 2020 and attaching a copy thereof to the letter. Van de Wall was requested to provide Magoma with the necessary information on or before the 3rd of July 2020. Van de Wall was already informed in this letter that should they fail to provide the necessary information, Magoma was instructed to apply to court for an order holding Karstens in contempt of court.
- [7] At a stage Van de Wall asked an indulgence from Magoma to deliver the information and/or documents by the 15th of July 2020.
- [8] The current application was launched by Magoma on 17 July 2020.
- [9] The facts recounted above are the facts set out by Morake in his founding affidavit that were not disputed by Karstens.
- [10] The facts alleged by Karstens in his answering affidavit were the following.
- [11] According to Karstens he agreed to provide the information whilst having the assurances from his accountant that all the information would be available by the 15th of June 2020. The information was however not available on the 15th of June and Karstens made a request from Morake on the 9th of July 2020 to provide the information no later than the 15th of July 2020. In support hereof, Karstens attached a letter dated the 9th of July 2020, addressed by Van de Wall to Magoma, to his answering affidavit, that stated that due to an oversight in Mr Addinall’s[2] department the court order of 19 June 2020 was only sent to their client on the 8th of June 2020[3] and that apologised for such oversight. The letter went on to state that Karstens did request the documentation from his bookkeeper and that the documentation would be available on Wednesday the 15th of July 2020. Morake granted Karstens’ request for the indulgence.
- [12] On the 16th of July Karstens was notified by his accountant that the outstanding financial statement had not been completed because of the relocation of the accountant’s offices in Kimberley, the accountant then relocating from Kimberley to Upington and delays related to the Covid pandemic. Karstens stated that a confirmatory affidavit by the accountant was attached to his answering affidavit as annexure “C”. I interpose to state that annexure “C” however can only be construed as a statement, as the document does not comply with the regulations governing the administering of an oath or affirmation.[4]
- [13] Karstens further stated that he agreed to provide the information knowing that:

13.1 No contracts or service level agreements were concluded between Multitech and any other entity. All quotations and invoices were captured on an accounting system and freely available to Morake;

13.2 Morake went with Karstens to Multitech's accountants during November 2018 and was introduced to Multitech's specific accountant at the firm. As majority shareholder, Morake was entitled and able to request and obtain the financial statements of

Multitech;

13.3 The inventory of moveable and immovable assets is dealt with in the financial statements;

13.4 Multitech only holds banking accounts with First National Bank;

13.5 Multitech holds an account with First National Bank in Kimberley. The bank statements for this account up to December 2019 is in possession of the bookkeeper (accountant, I suppose) and would be available when the financial statements up to December 2019, forming part of the 2020 financial statements, were completed. The delay in completion of the 2020 financial statements was caused by the circumstances set out in paragraph 12 above. There is a second account held by Multitech in Lime Acres, but which is virtually dormant, and was only opened to tender for contracts in the area, but which did not materialise. Karstens requested statements from the bank on the 4th of August 2020. An- email request was attached to his answering affidavit as annexure "D";

13.6 The current liabilities are dealt with in the financial statements.

[14] Karstens received the management accounts up to December 2019 and would be able to provide, and tendered, all information requested, except for the bank statements of the FNB account in Lime Acres, which was requested on the 4th of August 2020. Karstens undertook to provide the bank statements as soon as he had received it from the bank.

[15] In light of Karstens' averments set out above, he denies that he refused and/or neglected to provide the information to Morake.

Wilfulness and mala fides

[16] The requirements of wilfulness and mala fides were dealt with in Fakie supra inter alia as follows:

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed

'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly,

believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good

faith).

- [10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt-accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.”
- [17] Morake’s legal representatives did not request this matter to be referred for oral evidence, or for Karstens to be cross-examined. When I enquired from Mr Hefer at the hearing why this had not been considered, he responded that the Applicant’s legal representatives would not mind if this were to happen. However, there being no request or application on behalf of Morake to this effect, a court will usually not do so mero moto. The result is that this court must adjudicate the question of wilfulness and mala fide by application of the test laid down in Plascon
- Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) in order to decide the factual dispute between the parties.

Analysis

- [18] Karstens’ explanation of his conduct in the face of the court order of 19 June 2020 unfortunately leaves much to be desired. It is common cause that whilst he initially opposed the proceedings under case number 208/2020, he withdrew this opposition shortly before 19 June 2020. It is unlikely that he would not have been aware that Morake would be moving for the order on 19 June 2020, but the court was not afforded with any explanation in this regard, or told whether Karstens himself made any enquiries to ascertain whether the court order was indeed granted against him on 19 June 2020. It would have been important for Karstens to do so, as he had to have been aware that Multitech’s accountant had not made good on her assurance that the information would already have been produced by the 15th of June 2020.
- [19] When Karstens was informed of the court order by Van de Wall on 8 July 2020, the prescribed ten days for provision of the information and /or documentation had already expired on 3 July 2020. This ought to have created a sense of urgency in Karstens to ensure that what was necessary is done as soon as possible.
- [20] In accordance with the indulgence granted by Magoma, the information and/or documentation had to be provided by the extended deadline of 15 July 2020. Karstens avers that he was only notified on 16 July 2020 that the financial statements had not been completed. Once again Karstens is silent on whether he made any enquiries from his accountant on or before 15 July 2020 regarding the collation of the information and/or documents and the completion at the financial statements, or whether he took any steps

from his side to side to ensure that the extended deadline is met.

- [21] Annexure “D” to Karstens’ answering affidavit, which he tendered in support of his request on 4 August 2020 to First National Bank for provision of the bank statements of the Lime Acres account, tends to show that an earlier request in this regard had been made on 20 July 2020. However, Karstens would have been aware of the existence of the Lime Acres account right from the start, and annexure “D” then shows that he only requested the bank statements well after 19 June 2020, or even well after 15 July 2020, being the date of the extended deadline.
- [22] Karstens’ explanation about the non-existence of contracts or service level agreements between Multitech and any other entity ought not to absolve him from responsibility. If the non-existence thereof was indeed the case, Karstens could have disputed this in the proceedings under case number 208/2020, which appears he did not do in any way.
- [23] Neither does it avail Karstens to allege that the accounting systems of Multitech is freely available to Morake and that Morake is entitled and able to request and obtain the financial statements of Multitech as majority shareholder. Karstens acquiesced in the granting of the court order under case number 208/2020, and the court imposed an obligation on him to take positive steps to ensure that the required information and/or documentation be provided to Morake.
- [24] A number of the items of information and/or documentation that Karstens was obliged to provide to Morake ought to have been easy to compile with relatively limited assistance by the accountant. A separate inventory of all the movable and immovable assets of Multitech as well as a list of current liabilities, could have been prepared. The name of First National Bank as the banker of Multitech could easily have been provided. Copies of the bank statements in possession of the accountant could easily have been

made and provided to Morake. Had this been done, it would have gone a long way to show Karstens’ willingness to comply with the court order. Instead, the court is left to wonder why these steps were not simply taken.

- [25] Mr Harmse, on behalf of Karstens, informed the court from the bar that a file with the required information and/or documentation was delivered to Magoma on 28 August 2020. A copy of this file was in Mr Harmse’s possession at the hearing. This caused some debate whether the file related to case number 208/2020, or another matter in which the parties are involved. In light thereof that Karstens deposed to his answering affidavit on 26 August 2020 and that the affidavit was delivered on 27 August 2020, no cogent explanation was forthcoming on behalf of Karstens as to why Karstens did not seek to file a further affidavit to establish that

compliance with the court order had taken place on 28 August 2020, if this was indeed the case. Karstens had ample opportunity to do so until the hearing of this matter.

[26] The findings set out above necessarily leads me to the conclusion that Karstens' assertion that he did not act wilfully or in bad faith is untenable and must be rejected on the papers. Karstens has therefore not advanced sufficient evidence to establish a reasonable doubt that his non-compliance was not wilful and mala fide, and Morake has succeeded in proving contempt of court beyond reasonable doubt.

The appropriate sanction

[27] What is then left to decide is the appropriate sanction to be imposed, and the issue of costs. Morake from the outset requested that Karstens be committed to imprisonment, but that the sentence be suspended on condition that Karstens complies with the order under case number 208/2020. The period of suspension of the sentence was requested to be a year. Mr Hefer indicated that Morake would not object if the time period allowed for compliance with the order under case number 208/2020 be extended from the 30 days requested by Morake to a period of 45 days. Should I order Karstens to comply with the court order under case number 208/2020 within 45 days, there would be no purpose in casu to suspend the sentence for a year.

[28] In *Protea Holdings Ltd v Wriwt and Another* 1978(3) SA 385 (W) Nestadt J remarked that:

"(I)t is vital to the administration of justice that those affected by court orders obey them. Our courts cannot tolerate the disregard of its orders. Accordingly, it seems to me that I would be failing in my duty if I did not impose a punishment which takes into account the serious nature of this type of offence".

[29] The fundamental importance of ensuring that court orders are obeyed was more recently stressed by the Constitutional Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and others* (Helen Suzman Foundation as amicus curiae) 2021 (9) BCLR 992 (CC).

[30] Given the sentiments set out above, I find that it would be appropriate in the circumstances of this matter to order the First Respondent to pay the Applicant's costs on the attorney and client scale.

ORDER

[31] In the premises, the following order is made:

1. The First Respondent is held in contempt of the court order granted by this Court under case number 208/2020 on 19 June 2020;
2. The First Respondent is committed to imprisonment of 30(thirty) days;
3. The order set out in paragraph 2 above is suspended for a period of 45 days from date of this judgment on condition that the First Respondent complies with the terms of the order made under case number 208/2020 within this period of suspension.

4. The First Respondent is ordered to pay the costs of the Applicant on the attorney and client scale.

A EILLERT

ACTING JUDGE OF THE HIGH COURT

DATE HEARD:

29 January 2021

DATE OF JUDGMENT: 5 May 2022

For the Applicant:

JJF Hefer SC, instructed by Magoma Attorneys

For the First Respondent: J Harmse, instructed by Van de Wall Incorporated

[1] At 344 I – 345 A

[2] Mr Addinall is the attorney and director at Van de Wall who was acting for Karstens at the time.

[3] The Applicant accepted that this date should have been the 8th of July 2020.

[4] GNR. 1258 of 21 July 1972, Promulgated in terms of section 10 of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963

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