IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/37/2021**

In the matter between

DOCTOR MICHEL ILUNGA YANGINDU **APPLICANT**

V

THE REGISTRAR - LESOTHO MEDICAL DENTAL, AND PHARMACY COUNCIL **1ST RESPONDENT**

LESOTHO MEDICAL AND PHARMACY COUNCIL **2ND RESPONDENT**

CORAM : M. G. HLAELE J

HEARD : 19th May, 2022

DELIVERED : 26th May, 2022

Neutral Citation: Doctor Michel ILunga Yangindu **v** Registrar – Lesotho Medical Dental and Pharmacy Council and One Other **[**2021] LSHC 113 CIV (26th May, 2022)

SUMMARY:

Contempt of court-locus standi for contempt of court-jurisdiction of the court in contempt proceedings. Complying with an unlawful court order.

ANNOTATIONS

CITED CASES

Marabe v Maseru Magistrates' Court and Others (Constitutional Case No. 18/2020) [2021] LSHCONST 51 (07 June 2021)

Lesotho Medical, Dental, Pharmacy Council and Another v Musoke

Schiffbau und Maschinenfabrik v South India Shipping Corporation LTD

Lesotho Medical, Dental Pharmacy Council And Another V Musoke

Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation LTD

The case of Gross And Others V Pentz

Veronica Lotteryman (Previously Tromp, Born Cronje) V Frederick James Loteryman And Others Veronica Lotteryman (Previously Tromp, Born Cronje) V Frederick James Loteryman And Others

Aegams Data (Pty) Ltd And Others V. Sebata Municipal Solution (Pty) Ltd Case

Aegams Data (Pty) Ltd And Others V. Sebata Municipal Solution (Pty) Lt Mothetjoa Metsing And Another V. The Director of Public Prosecution And 12 Others

Attorney General V. Khauoe

Fakie NO v CCII Systems (PTY) LTD

Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited

Rats'iu v the Ministry of Forestry and Another

Mansell v Mansell

Firestone South Africa (Pty) Ltd Genticuro v AG

STATUTES

The Medical, Dental and Pharmacy Order of 1970

Section 12 of The Medical, Dental and Pharmacy Order of 1970
Section 3 of The Medical, Dental and Pharmacy Order of 1970
High Court Act
Section 14 (b)

Section 14 (1)(c) (As amended)

Section 34 MDP Order of 1970

BOOKS

BACKGROUND:

[1] The authority of the Judiciary to enforce compliance with its orders by imprisonment is inherent from its constitutional role as the guardian of the Constitution underpinned by the rule of law. Disobedience of orders of the courts strike at the very heart of the rule of law and engenders self-help and lawlessness. Hence the Constitution grants power to the courts to punish any private actor or state-actor adjudged

guilty of disobeying a court order and to secure compliance with legal obligations.[1]

[2] This is a matter wherein the Applicant is seeking the court to enforce its order by way of contempt of court proceedings. The Applicant is alleging that the Respondents are acting against the dictates of the order of court.

FACTUAL MATRIX:

[3] The facts as gleaned from the founding affidavit in the review application which formed the foundation of the contempt application are as follows;

- The Applicant is a medical doctor stationed at Queen Mamohato hospital. He is a foreigner from the Democratic Republic of Congo who came to the kingdom of Lesotho in 2013. He was initially registered by the Respondents as a General Practitioner but in 2018 he was registered by them as an Internal Medicine Specialist. It is worth noting that the registration was not without hurdles,[2] as the Respondents had to undertake verification procedures as is their statutory duty.[3]

[1] Marabe v Maseru Magistrates' Court and Others (Constitutional Case No. 18/2020) [2021] LSHCONST 51 (07 June 2021)

[2] Paragraph 6 of the Founding affidavit to the Review Application.

[3] The Medical, Dental and Pharmacy Order of 1970

- It was in 2018, not long after his registration, when he was informed by the Respondents that the registration was revoked resulting in him being deregistered as an Internal Medicine Specialist. He however retained his registration status as a General Practitioner. He alleges in his affidavit that this was done without due process. This precipitated the application to this court petitioning the court to review the decision to deregister him.

- The review application resulted in negotiated settlement between the parties', culmination in a final court order. It is this order that is the subject matter of the contempt proceedings. The facts alluded to above are common cause as they stand uncontroverted.

APPLICANT'S CASE:

[4] In his founding affidavit, the Applicant asserts that after obtaining the Final Court order, in March 2021, armed with the same order he attempted to renew his certificate. He was however informed that his certificate could not be renewed. This refusal was as a result of an instruction from the respondents.

[5] The urgency in filing the contempt proceedings emanates from the fact that failure to renew his certificate could result in him not receiving his salary for the month of May and thereafter for as long as his certificate remains un-renewed. These facts are not denied by the Respondents and are thus common cause.

[6] It is the Applicant's case that failure of the Respondents to renew his certificate and in turn to (re)register him as a Specialist is an act in contempt of the final Court order issued by this court on March 2021. As a result, he petitions this court to;

1. Direct the Respondents to comply with an order granted by this Court on the **16th March 2021** and renew the Applicants certificate registering him as an **Internal Medicine Specialist** immediately upon service of the interim order.[4]

2. Failing Compliance with **Prayer 1 (b),** directing 1st Respondent to appear before this court to show cause why the 1st Respondent cannot be committed sixty days to jail for contempt of court.[5]

[4] Prayer 1(a) of the Notice of Motion.
[5] Prayer 1(C) of the Notice of Motion.

3. An order of committing the 1st Respondent to jail for contempt of court.[6]

4. An Order for costs on Attorney and Client Scale.[7]

RESPONDENT'S CASE:

[7] The 1st Respondent is the Registrar of the Lesotho Medical, Dental and Pharmacy Council (herein after called (MDP). She is the custodian of all records of medical practitioners in Lesotho.[8]

The 2nd Respondent is the (MDC) Council. It is a body corporate whose functions are to regulate the practice of the Medical Professionals.[9]

[8] It is the Respondents' case, as appears in their answering papers, and as well as articulated to by their council Mr. Rasekoai during the oral addresses that;

> Neither myself nor the 2nd Respondent can be held in contempt of court for in reality, when the order was made, it was a mistake common to the two parties. No legal right or legitimate claim can flow from an evidently compromised order as expressed above....[10]

[6] Prayer 1(d) of the Notice of Motion
[7] Prayer 1€ of the Notice of Motion
[8] Section 12 of The Medical, Dental and Pharmacy Order of 1970
[9] Section 3 of The Medical, Dental and Pharmacy Order of 1970
[10] Paragraph 3.8 of the founding affidavit. page 23 of the record.

[9] In essence, the defence of the Respondents is that the order of court is *pro non scripto* as such, it is unenforceable. The Respondents have thus devised a *collateral attack* against contempt proceedings as opposed to appealing the order.

ISSUES BEFORE THE COURT:

[10] The issues before the court are:

1. Was the consent order issued by the court as a final court order dated 16th March 2021 an unlawful/illegal order incapable of being enforced?

2. If the order is found to be unlawful (illegal), is it incapable of
   enforcement by way of contempt proceedings?

3. In the event that the order is unenforceable, does this court
   have jurisdiction to entertain the relief sought.

4. Does the Applicant lack *locus standi* to sue for contempt of
   court because his academic credentials do not fall within the purview of those recognised by the Statutory Regulations?

The issues relating to *locus standi* and jurisdiction were raised as *points in limine*. There being no objection, the court took a holistic approach to the case.

PRELIMINARY ISSUES FOR DETERMINATION:

The Respondents have raised 2 points in limine. I will commence by dealing with them.

JURISDICTION:

[11] It is the contention of the respondents that the jurisdiction of this court is ousted on the following grounds and I proceed to cite verbatim from their written submissions:

- The cause of action of the Applicant stems from the fact that he seeks to be registered as a full-fledged medical practitioner in spite of the fact that he is not from a recognized university per the Regulations as pleaded. This aspect is not in dispute and the Applicant conceded during oral argument.

- What is further worth mentioning is the fact that he has not pleaded both in the main application and in the contempt application herewith that he meets all the

jurisdictional requirements in order to be registered. This may understandably be due to the fact that he is alive to the glaring reality that he does not qualify and hence ineligible for registration.

- Clearly the Applicant does not qualify under *Section 14 (b)* as a full- fledged medical practitioner and there are no jurisdictional requirements which have been met to render him eligible as such. He neither qualifies as an Internal Medicine Specialist nor a General Practitioner.

- The next point to explore is that of jurisdiction and this point can be answered yet again by a decision of the apex court in this jurisdiction of ***Lesotho Medical, Dental Pharmacy Council And Another V Musoke***[11]

- The delayed jurisdiction of this court is premised on the footing that the statutory mandate of registration vests in the MDPC not the court. The court's intervention can only be justified provided the court concludes that the non-registration as a full- fledged medical practitioner was without a firm basis in law. There is clearly no justification for this court to adopt the doctrine of substitution in the context of this case and to substitute its decision for that of the MDPC. We clearly rest on the footing that there is a firm and sound basis for refusing

[11] Lesotho Medical, Dental, Pharmacy Council and Another v Musoke

registration of the Applicant in terms of the order sought.

[12] My reading of this point is that the jurisdiction of this court is ousted by the legislative requirements that govern the relationship between these parties herein. This explains reliance by Mr. Rasekoai on Musoke and Lerotholi cases, where the applicants therein were seeking the court's intervention directing the council to register them.

[13] Put differently, the Respondents' contention in this case is that this court does not have the jurisdiction to entertain the relief sought in the contempt application for they are of the view that the renewal and registration powers vest in the 1st Respondent not the court. They are also of the view that the court may only exercise jurisdiction on review proceedings, provided there are justifiable grounds which are tenable in law.

THE LAW:

[14] The law on the issue of the jurisdiction of this court is as follows:

In the case of *M V M*[12] the English case of ***Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping***

[12] A3076/2016) 2017 ZAGPJHC 279 (28 March 2017)

Corporation LTD, Lord Diplock described the Supreme Court's inherent jurisdiction as;

> "The general power to control its own procedure so as to prevent being used to achieve injustice. It applies to an almost limitless set of circumstances". There are four general categories for its use, namely to:
>
> a) ensure convenience and fairness in legal proceedings;
>
> b) *prevent steps being taken that would render judicial proceeding ineffective;*
>
> c) prevent abuses of process.
>
> (My own Emphasis)

[15] This case is instructive to show the jurisdiction of the courts to enforce its own orders. If a court is unable to take steps to prevent judicial proceedings being rendered ineffective, then its inherent jurisdiction is rendered a naught. This court's inherent jurisdiction is spelled out in the Constitution[13] and the *High Court Act* which outlines when such powers are ousted.[14]

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[13] section 119(1) which provides that; "the High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings and the power to review the decisions or proceedings of any subordinate or inferior court, court martial, tribunal, board or officer exercising judicial quasi-judicial or public administrative functions under any law and such jurisdiction and powers as may be conferred on it by this Constitution or by or under any other law"

[14] Section 6

[16] An application for contempt of court, is an application where a litigant seeks the court to enforce its orders, or to render judicial proceedings effective. This being the basis of the application before me, the court finds that it has jurisdiction to entertain this matter.

This point is therefore dismissed.

***LOCUS STANDI*:**

[17] The second *point in limine* raised by the Respondent is that the applicant has no locus standi to bring the proceedings before this court. They couch their point in the following manner as alluded to in their oral and written submissions,

The best option that the Applicant could explore is that of seeking to be registered in line with *Section 14 (1)(c)* (As amended) not in terms of *Section 14 (1) (b)* and as a result the APPLICANT has no cause of action in this litigation as alleged or at all. This is inextricably linked to the fact that he has no locus standi to seek to be registered under *Section 14 (1) (b)* (As amended) because he did not acquire academic credentials from a recognized university in terms of the Regulations. This much has been accepted by the Applicant's counsel during argument. The MDPC cannot be said to be in contempt of an order which was patently flawed and which bore a glaring *justus error.*

[18] In essence the Respondents are arguing that the *locus standi* of the Applicant is found or should be found on whether they are registerable or not under the governing Act/Order. That, due to the fact that they don't qualify in terms of the Act then they have no standing to bring the contempt application.

They further argue his *Locus standi* cannot be founded on an illegal order of court.

[19] This court finds no merit in this argument for the following reason:

> My opinion in this regard is that the Applicant's *locus standi* in this matter flows directly from the very fact that he was granted an order by this Court and as such, he has the responsibility as well as the right to ensure that such an Order is complied with; hence the institution of these proceedings. It is my further opinion that even if the Order was indeed pro non-scripto, that on its own does not vitiate the Applicant's *locus standi* in contempt proceedings. This is so because as long as such an order has not been set aside, it must be

complied with. The following cases offer assistance in this regard;

The case of Gross And Others V Pentz[15] where it was held by Harms JA that:

> "The question of *locus standi* is in a sense a procedural matter, but it is also a matter of substance. It concerns the sufficiency and directness of litigation in order to be accepted as litigating party".

[20] In the Namibian Case of ***Veronica Lotteryman (Previously Tromp, Born Cronje) V Frederick James Loteryman And Others***[16] where it was held by Geier J that:

> "It is indeed well established that an applicant for contempt on this basis must show that an order was granted against the respondent, and that the respondent was either served with the order or was informed of the grounds of the order against him and could have no reasonable ground for disbelieving the information, and that the respondent had either disobeyed it or had neglected to comply with it.
>
> It flows from these central requirements applicable to contempt relief that a party to a Court order - obliging

[15] (414 of 1995) [1996] ZASCA 78 (22 August 1996) at 632 B-C

[16] CASENO: I 2293/09

the other – the respondent - to do something is generally to be regarded as the applicant – ie. the party having locus standi to institute and bring contempt proceedings".

[22] In another Namibian case of ***Aegams Data (Pty) Ltd And Others V. Sebata Municipal Solution (Pty) Ltd*** *Case*[17] where Muller J had this to say;

> "Our law is clear that a litigant cannot act against an existing court order or an Act. This is commonly referred to as the doctrine of "dirty hands" or "clean hands". This doctrine has been considered in old English cases and the ratio is "purge first and argue later". In the context of an existing law or court order it means that until such time as that law or court order had been set aside it must be complied with. It is irrelevant that the law or court order may be unconstitutional or wrong".

[23] The aforesaid cases are distinguishable from the case of ***Mothetjoa Metsing And Another V. The Director of Public Prosecution And 12 Others***[18] which analyzed the case of ***Attorney General V. Khauoe*** in that unlike in Khauoe case, the Applicant in casu has already been granted

[17] NO.: A 224/2009

[18] CC NO27 and 28/2018

a Court Order by this court, an Order which is the subject of these proceedings.

For the aforegoing reasons, I find that the Applicant herein has locus standi to bring this application.
Having dismissed the *points in limine* I venture into the merits of this case.

THE FACTS:

[24] The facts of this case are as outlined above. The question that this court thus seeks to delve into is, do the facts reveal contemptuous behaviour against the order of this court, thus attracting the sanction of contempt of court.

THE LAW.

What is contempt of court?

[25] In order to give their rulings and decisions legal force, courts of law are armed with the power to order that one who acts contemptuously against such by disregarding them to purge such contempt. Failure to purge attracts dire consequences such as incarceration. It is a mechanism, which has since received a stamp of approval stating that it complies with the principles of constitutionalism notably the rule of law in that it maintains the dignity and authority of the courts, as

well as their capacity to carry out their functions, should always be maintained.[19]

[26] The foundation and bases for a conviction of contempt of court have been authoritatively set out in ***Fakie NO v CCII Systems (Pty) Ltd***.[20] In summary this were the highlights of the findings of the court;

(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:

[19] Per Sachs J in *Coetzee v Government of the Republic of South Africa* [1995] ZACC 7; 1995 (4) SA 631 (CC) para 61
[20] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) para 42.

Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether noncompliance 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.'[21]

[27] The application of the principles enunciated in the Fakie judgement found meaning in the case of ***Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited***[22] which cited that the below requirements must be satisfied in order to succeed with your application:

- The existence of the order;
- The order must be served on, or brought to the notice of the alleged *contemnor*;
- There must be non – compliance with the order; and
- The non – compliance must be wilful and mala fide (there must be deliberate defiance of the Court order).

[21] Cited from *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* (767/2013) [2014] ZASCA 209 (1 December 2014) per: CACHALIA, WALLIS and ZONDI JJA and SCHOEMAN and DAMBUZA AJJA
[22] (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC)

In our own jurisdiction, the Fakie principles were cited with approval in Constitutional Court case of ***Marabe v Maseru Magistrates' Court and Others***.[23]

APPLICATION OF THE LAW TO THE FACTS:

[28] The above stipulated requirements thus mandate me to establish whether the order conforms with the law. As has been said earlier herein, the existence of the court order is common course. It is also common cause that the order was served on the Respondents. It is also common cause that there has been noncompliance with the order. The bone of contention is whether this noncompliance is strictly speaking contemptuous. It is also disputed whether noncompliance was wilful and mala fide. Thus this case turns to these two (2) latter requirements.

Was the final order lawful or legal?

[29] It is Mr. Rasekoai' s contention that the order stands not to be complied with since it is an illegal order. His submission is founded on the premises that the court is usurping the statutory powers of the Respondents through the Final Order.

[23] (Constitutional Case No. 18/2020) [2021] LSHCONST 51 (07 June 2021);

[30] He also charges that once an order of court is illegal for want of compliance with the law, it is unenforceable. I proceed hereunder to tackle this submission and simultaneously deal with the 3rd requirement in Fakie.

Was there compliance with the court order?

[31] The mere fact that the final court order which is the subject matter of these proceedings was birthed by a negotiated settlement should not automatically translate into this court holding that it can attract contempt proceedings. Thus in the inquiry whether there has been compliance by the respondents with the order, I am charged to take caution of the nature of the order which is the subject matter of the dispute. I must dissect it in line with the dictates pronounced in the case of ***Rats'iu v the Ministry of Forestry and Another***[24] where the court of appeal citing ***Mansell v Mansell***[25] cautioned;

> "For many years this court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the court is not a registry of obligations. Where persons

[24] Rats'iu v Principal Secretary Ministry of Forestry (C of A (CIV) 9 of 2017) [2018] LSCA 28 (07 December 2018);
[25] Mansell v Mansell 1953 (3) SA 716 (N) **at 721 B-F;**

enter into agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of court is to cut out the necessity of instituting action and to enable execution. When, therefore, the court is asked to make an agreement an order of Court it must… look at the agreement and ask itself a question: is this sort of agreement upon which the obligee (normally the plaintiff can proceed to execution? If it is, it may well be proper for the court to make it an order. If it is not, the court would be stultifying itself in doing so. It is surely elementary principle that every court should refrain from making orders which cannot be enforced. If the plaintiff asks the court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears … to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation."

[32] In this laborious assignment, I engage into the reading and interpretation of the order of the 16th March 2021 in order to ascertain whether the court complies with the third and fourth requirement elucidated in Fakie.

Applying the Rats'iu provisions to the facts of the case.

The order that forms the basis of this application reads as thus;

The deed of settlement filed of record by the parties is hereby made an order of court in the following terms:

> *1. The Respondents shall, upon renewal of the Applicant's certificate, re-register the Applicant as an Internal Medicine Specialist and issue the Applicant with a certificate to that effect;*
>
> *2. The respondents shall not interfere with the Applicant's status and or conduct of his profession except by due process of the law;*
>
> *3. No order as to costs*

[33] In the interpretation of the order I will employ the tools articulated in the case of ***Firestone South Africa (Pty) Ltd Genticuro v AG***[26] where the court provided that the reading of a court order should follow the following principles:

> The basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order. The Court's intention is to be ascertained primarily from the language of the

[26] 1977 (4) SA 298 (A) at page 304 D-H):

judgment or order as construed according to the usual well-known rules.

[34] My reading of the 1st order is that the Respondents are not directed to renew the Applicants license, neither are they directed by the court to re-register the Applicant. For if this were the case, then the court would be usurping the powers of the Respondents. This is contrary to the assertion by Mr. Rasekoai that the order is an illegality and thus incapable of compliance. His argument that the order is illegal and therefore violates the principles of legality and in turn renders the order *pro non scripto* was formulated on the premises that this court cannot in law interfere with the statutory powers of the Respondents and demand blanket registration without considering the qualification required by statute.[27] He made out his case by indicating that this court cannot substitute its own decision for that of the 1st Respondent. He goes on to state the relief sought is untenable in law. [28]

[35] As stated, I am of a different view for in my opinion nowhere does the court order the registration of the Applicant without due process. The words "upon renewal", presuppose that the renewal shall be as a result of the processes envisaged in

[27] To this end he cited the cases of Lerotholi and Musoke
[28] Paragraph 4 of the Answering affidavit at page 25-26 of the Record.

the Regulations and Statute governing the Respondents. This is as opposed to an order which would read “the Respondents are directed to renew... In my view,” the intention of the Order, ascertained from contextual meaning, charges the respondents to adhere to their own regulations.

[36] I therefore conclude that it was well within the powers of this court to make this order. The reading of the order shows that it was never the intention of the court to oust the powers of the Respondents; hence it ordered any objection should follow due process of the law.

[37] The second order charges the Respondents not to interfere with the Applicants status except by due process of the law. Talking to this order, Mr. Masoeu for the Applicant provided that what this order envisaged was that all these issues that are raised by the Respondents relating to his qualifications and accreditation of his university could and should be raised but in compliance with the law. The order reads” ... except by due process of the law.” In interpreting what due process of the law means, Mr. Masoeu specifically referred this court to *Section 34 of the MDP Order of 1970* which reads;

34 (10) The Council may apply to the High Court for the Removal of a registered person's name from the register.

[38] To this Mr. Rasekoai said that the Respondents options are not restricted to this section. He argued that another option would be to mount a **collateral attack** to a contempt application filed in court. His submission therefore was that his response to the contempt application qualified as a collateral attack.

[39] I am inclined to agree with Mr. Masoeu that any objection that the Respondents have against the registration of Applicant should follow the ***MDP Order of 1970*** which is the law that governs the relationship between these parties to the litigation.

[40] I therefore conclude that upon scrutinizing the court order, it is lawful and legal. As such, it is an order which should be complied with. This also demonstrates in turn that the Respondents failed to satisfy the third requirement outlined in the case of Fakie and adopted in our jurisdiction.

[41] The fourth requirement is that non – compliance must be wilful and *mala fide* (there must be deliberate defiance of the Court order). On the question of who bears the *onus* and what scale should the standard of proof be, the court In ***Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited***[29] provided that;

> "Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, 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 have material consequences 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. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies − for example, declaratory relief,

[29] *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* (CCT 217/15; CCT 99/16) [2017] ZACC 35; 2017 (11) BCLR 1408 (CC); 2018 (1) SA 1 (CC) (26 September 2017

mandamus, or a structural interdict − that do not have the consequence of depriving an individual of their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies.

On the issue of the standard of proof the courts have said:

> It should be noted that developing the common law thus does not require the prosecution to lead evidence as to the accused's state of mind or motive: Once the three requisites have been proved, in the absence of evidence raising a reasonable doubt as to whether the accused acted wilfully and *mala fide*, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and *mala fides* on a balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.

[42] In discharging the duty to disprove that he acted willfully and *mala fide* in his refusal to comply with the order of court, the Applicant put evidence before this court that the Respondents had given a clear instruction to its employees not to accept the any subscription from the Applicant.[30] This is not withstanding the order of court which charged the

[30] Paragraph 9 of the Founding affidavit at page 10 of the record.

Respondents that any objection they had to the renewal should be by due process of the law. *Section 16* of the (*MDP) Order of 1970*[31] stipulates the procedure to be adopted by the Respondents in the event where an applicant or a licensee does not meet the requirements. The Order does not envisage a refusal to accept subscription as one such method.

[43] This is compounded by the fact that the 1st Respondent is the custodian of the laws that govern the council. They cannot be heard to be saying that they do not know the legal procedure or due process outlined by their Regulations in relation to objecting to renewal of licenses. To make matters worse, the order that they are being contemptuous against is a negotiated order. They thus had full control of the wording and the desired outcome, hence inserting a legal protection against a directive by the court to register the Applicant without due process.

[44] To this end, I find that non-compliance was willful and *mala fide*. Any dissatisfaction that the Respondents held against the Final Order could be addressed by appealing the order. Blatant non-compliance is not an option available to them.

[31] Section 16 (4) reads; the Council or the Executive Committee of the Council, as the case may be, may refuse registration if in its opinion the applicant, notwithstanding he is otherwise qualified.

CONCLUSION:

[45] The court has applied the four requirements for contempt of court adopted in our jurisdiction. Applying the facts of the case to this four-tier test, the applicant has made out a case for contempt of court.

[46] For the aforementioned reasons, the application is successful, and the Respondents are held to be in contempt of court.

THE ORDER:

I make the following order:

The Respondents are ordered to purge the contempt of court within 30 days.

M. G. HLAELE
JUDGE

For Applicant : Adv. Masoeu

For Respondents : Mr. Rampai