IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No.: 48/2021**

In the matter between:

SAHI INVESTMENT (PTY) LTD	**1st Appellant**
UMER ZIYAD	**2nd Appellant**
IMITIAZ AHMAD	**3rd Appellant**
AHMED IMITIAZ RAAZA	**4th Appellant**
AHMED IFTIKHAR	**5th Appellant**

And

ESWATINI REVENUE AUTHORITY	**1st Respondent**
MINISTRY OF HOME AFFAIRS	
(IMMIGRATION DEPT)	**2nd Respondent**
THE ATTORNEY GENERAL	**3rd Respondent**

Neutral Citation: *Sahi Investment (Pty) Ltd and 4 Others vs Eswatini Revenue Authority & 2 Others (48/2021) [2023] SZSC 15 (23/05/2023)*

Coram: **S.J.K MATSEBULA JA;**
J.M. Van Der Walt JA; AND
J.C CURRIE JA.

Date Heard: 22nd March, 2023.

Date Delivered: 23rd May 2023.

SUMMARY : ***Civil Law – Civil Appeal – Civil Contempt of Court – requirements thereof – Discussed – Standard of proof – beyond reasonable doubt – inference of willfulness and mala fides – rebuttal on a balance of probabilities – failure to rebut case is prove beyond reasonable doubt – committal to prison justified where contemnor persists with contempt of Court – Imposition of fine also justified, depending on circumstances surrounding each case – Committal to prison is to persuade contemnor to comply with Court Order – Fine is further justified as contempt is also a crime committed against the Court for injuring its dignity and attempting to render the judicial system meaningless and useless.***

JUDGMENT

S.J.K MATSEBULA, JA:

INTRODUCTION

[1] This is an appeal arising from a decision of the High Court as per His Lordship Maphanga J. delivered on the 20th August, 2021 (Conviction) and 17th September, 2021 (Sentencing) in which the Appellants herein were found to have committed contempt of Court. The Appellants were sentenced as follows, as per the Court Order-

1. *On account of the Respondents failure to abide by the order of Court of the 20th August, 2021 for the return of the vehicles as directed by the determined timeline and the said Respondents having failed to purge their contempt;*

2. *The contemnors, being the various Respondents, Third to the Tenth are hereby committed to a term of imprisonment of three (3) months; and*

   The First and Second Respondents are sentenced to each pay a fine of E300 000.00 (Three Hundred Thousand Emalangeni);

3. *The Respondents are ordered to pay the Applicant's costs of this application at a scale as between Attorney and Own Client.*

[2] It is against this order that the Appellants have filed this appeal before this Court. There were previous interim orders issued by the Court *a quo* but the above order is the final order.

The Narrative/Background

[3] The parties are referred to herein as they appear in the citation of this judgment. The Second to fifth Appellants are Directors of the First Appellant, a company registered in terms of the Laws of Eswatini dealing in importing, servicing and fixing mechanical faults and breakdowns on imported second hand cars. The First Respondent is a collector of taxes and other revenues on behalf of the Government of the Kingdom of Eswatini.

[4] On the 23rd April 2021, the First Respondent (who shall henceforth and hereinafter be referred to simply as Respondent) went to the First Appellant's premises who also rented out a portion of its premises to Extreme Cars Investments, also engaged in the same business, and therein attached 137 cars through Detention Notice 1638 and locked the gates to the premises. The reason for the Detention Order is that the cars were suspected of being imported unlawfully into the country without proper declaration or at all, by Extreme Cars Investments as investigations were in progress.

[5] As the owner of the premises the First Appellant moved an urgent application to the High Court for the unlocking of the gates to the premises. Prior to that, First Appellant's Attorneys had written to the Respondent with the following excerpt –

> "3. *We are instructed by our clients that in the said property, they have let part of the open space outside the office to Extreme Cars*

(Pty) Ltd, and Auto Hub (Pty) Ltd. Our clients operate a motor vehicle repair workshop on the premises.

4. *We are instructed by clients that on Friday, 23rd April 2021 you caused a detention Notice to be served on Extreme Cars (Pty) Ltd in which you detained 137 cars.*

4.1 *Our clients instructs that you have caused all the access points to the property to be locked thereby denying them and their other tenants access to the premises.*

4.2 *We are further instructed that only 102 motor vehicles belong to Extreme Cars (Pty) Ltd. The other 35 cars belong to other people. They came for repairs at the workshop owned by Sahi Investments (the First Appellant herein) while others are scrap.*

4.2.1 *The scrap motor vehicles belong Auto Hub (Pty) Ltd who deal in second hand.*

5. .....

6. *We are instructed by our clients that because all the gates are locked, they <u>are unable to post a security guard</u> within the premises or turn on the lights for security purposes. Clients instructs that in the past they have suffered a number of break ins where car parts and car keys have been stolen".* (Underlining mine)

[6] In support of the urgent application to compel the Respondent to unlock the gates, the Third Appellant deposed to the Founding Affidavit and at paragraph 18 therein, he states-

> *"18 There is also the fact that since the gates are locked, Applicant is unable to post a security guard within the premises and to turn on the lights. In recent times Applicant has experienced a number of burglaries where motor vehicle parts and ignition keys were stolen. I fear that unless this matter is heard on urgent basis the Applicant stands to suffer irreparable harm in that thieves may take advantage and break into the premises".*

[7] Before the Court could finalise the matter, the parties entered and signed a Deed of Settlement with a preamble as follows-

> *"Wherein the Applicant has instituted proceedings against the First Respondent to unlock gates and access routes on Plot No. 846 situate in Matsapha Township, Manzini District, Eswatini. And whereas the parties have resolved to settle their claims between themselves amicable and desire that the above Honourable Court makes this agreement an Order of the above Honourable Court"*

[8] The gist or material parts of the Deed of Settlement is as follows-

> ***" 2. It is Agreed that:***

2.1 *The First Respondent has unlocked the gates at the Applicant's premises situate on Plot No. 846 situate in Matsapha Township, Manzini District, Eswatini and will not lock same.*

2.2. *The Applicant and Second Respondent is interdicted and restrained or any third party to remove any of the items listed in the Detention Notice and the Inspection List Attached herein for ease of reference at Plot No 846 situate in Matsapha Township, Manzini District, Eswatini pending finalization of the investigations by the First Respondent against the Second Respondent.*

2.3 *Each party to pay its own costs.*

2.4 *Should any of the interdicted parties fail to comply with this Order, and allow the removal of the listed items in any manner, they shall be held to be in contempt of Court.*

3. *Court Order*

The parties agree that this agreement shall be binding inter partes. (underlining mine)

[9] The First Appellant (Sahi Investments) signed the Deed of Settlement on the 4th June, 2021, and the Respondent (Eswatini Revenue Authority) on the 8th June, 2021. On the 11th June, 2021 the Deed of Settlement was entered by the High Court as an Order of Court. The roles quickly changed, Eswatini Revenue Authority became an Applicant on the 17th June, 2021 and Sahi

Investment and Others became Respondents on allegations that the Court Order had been breached by the Respondents (therein and Appellants herein).

[10] At paragraph 20 of its Founding Affidavit, the Applicant stated-

> *"I am advised and verily believe that on the same day the Deed of Settlement was made an Order of Court at about 1400 hours, the Applicant sent on assignment some officers, Mrs. Mthokozisi Mdluli and Ms. Samkelisiwe Dlamini to conduct a random check-up on the motor vehicles detained at First and Second Respondent's premises.*
>
> *20.1 I am advised by the legislative Customs officers that when they arrived personally at the premises, they discovered that out of the one hundred and thirty seven (137) vehicles as per the Detention Notice which were the motor vehicles detained on the 23rd April 2021. Only one vehicle, a black Mercedes was found parked at the showroom. (sic)*
>
> *20.4 I am advised an attempt to gain entry into the showroom was futile as all the gate premises were locked.*
>
> *20.5 I aver the Respondents were at all material times aware of the consent Court Order to refrain from removing the motor vehicles……"*

[11] After a subsequent hearing, on the 17th September 2021 the Court *a quo* issued the following Order styled Final Contempt of Court Order in the following terms-

> *"It is ordered that-*
>
> 1. *On account of the Respondents failure to abide by the order of the Court of the 20th August 2021 for the return of the motor vehicles as directed by the determined timeline and the said Respondents having failed to purge their contempt;*
> 2. *The contemnors being the various Respondents, Third to Tenth are hereby committed to a term of imprisonment of three (3) months; and*
>
> *The First and Second Respondents are sentenced to each pay a fine of E300 000.00 (Three Hundred Thousand Emalangeni).*
>
> 3. *The Respondents are ordered to pay Appellant's costs in this application at a scale as between Attorney and Own Client"*

[12] The Respondents therein, (Appellants herein), have appealed to this Court the Orders as well as the judgment of the Court *a quo* as per Maphanga J. The grounds of appeal are namely that the Court *a quo*-

> 1. *Erred in fact and in concluding that the 4th and 5th Appellants are Directors of the 1st Appellant.*
>
> 1.1 *Consequently, the Court a quo erred in law and fact in finding the 4th and 5th Appellants guilty of contempt of Court.*

2. *Erred in law and fact in finding Appellants guilty of contempt of Court.*

3. *Erred in law and fact in sentencing the Appellants as it did to serve a custodial term for contempt of Court.*

4. *Erred in law by fining the Appellants as it did.*

5. *Erred in law by fining the Appellants and sentencing them to a custodial sentence.*

6. *Erred in law in granting costs against the Appellants.*

The Appellants' Case

[13] In summary the Appellants admit that the motor vehicles were removed from their premises, that is Plot No. 486 Matsapha Township, Manzini District, but they deny that they personally removed or participated in their removal. They state that they had no duty to police the motor vehicles against removal. They further allege that the requirements to prove contempt of Court were not satisfied. It is also alleged that the 4th and 5th Appellants had resigned long before this litigation was born. The Appellants further argue that the Court *a quo* applied a wrong standard of proof when the Appellants were only required to **show reasonable doubt** and not the reverse burden standard and this misdirection resulted in their commitment to gaol.

The Respondent's Case

[14] The Respondent holds the Appellants to the Deed of Settlement which was endorsed by the Court as an order of Court which amongst other things bound the Appellants not to release or allow any third party to remove the detained motor vehicles from Plot No. 846, Manzini District at the pain of contempt of Court. The Respondent submits that the Appellants have allowed the removal of the said motor vehicles contrary to the terms of the Court Order and have therefore committed the offence of contempt of court and should be found guilty of Contempt of Court as all the requirements to prove the offence have been satisfied and the appropriate standard of proof was applied by the Court *a quo*.

Applicable Principles of Law for Contempt of Court

[15] Dunn AJ, as he was then, cast in stone the requirements to be observed and proved by an applicant in a Contempt of Court suit in the case of Craw and Another v Jervis SLR 1982-1986 at page 219 when he stated thus at paragraph [B]-

> *"It is clear that an applicant in an application, such as the present, must show-*
>
> *(a) that an order was granted against the respondent;*
>
> *(b) that the respondent was either served with the order, or was informed of the grant of the order against him and could have no reasonable ground for disbelieving the information; and*

(c) *that the respondent had either disobeyed the order or has neglected to comply with it".*

At paragraph [D] His Lordship continued-

> *"The onus would thus have been on the respondent to rebut, on a balance of probabilities, the inference of mala fides and willfulness flowing from the second applicant's evidence of non-compliance with the Court Order.*

[16] The preceding paragraph lays the foundation of our law on cases of civil contempt of Court. Numerous decisions have followed this decision and it has been the common law position within and outside our borders. This position has somewhat changed in neighbouring South Africa. The South African case of **SA Fakie NO VCC 11 Systems (Pty) Ltd [2006] SCA 54 (RSA)** brought changes to the common law position as we knew it. Interestingly both the Appellants as well as the Respondent are relying, amongst others, on this case in support of their arguments. That being the case, I figure some discussion of it would be in order herein, and it shall be referred to, hereinafter, as the Fakie case for purposes of convenience.

[17] The *Fakie* case is a very useful case, though not binding on this jurisdiction as are all South African cases but persuasive, as it brings forth both the old approach and the new approach to Contempt of Court proceedings especially for the South African Courts. The case takes into account the emergent South African Constitution especially the Bill of Rights therein and finally decides

the case on the basis of section 35 (3) (h) of that country's Constitution which provides that the accused has no onus at all to rebut evidence brought against him as the prosecution has the sole duty to prove its case beyond any reasonable doubt. The accused has a right to silence even in the face of incriminating evidence brought against him, although that silence may have unfavourable consequences. He remains silent at his peril. Eswatini has a similar provision in the Bill of Rights in its Constitution as well but does not provide the right to silence. What makes this judgment appeal to both litigants in our case herein is that the *Fakie* case is not a unanimous judgment, it is three against two justices. As it is not binding here, each litigant is at liberty for persuasive reasons to pick either from the majority judgment or minority judgment.

[18] The majority decision of the Fakie case was of the view that with the emergence of a new Constitution in that country there was a need to improve or modernize the law on Contempt of Court Orders whilst the minority decision felt that the status *quo* should be maintained as the new approach seem to favour the contemnor and works against the interests of the Applicant as well as of the Courts. In a nutshell the new approach discards the reverse burden and replaces it with "reasonable doubt" meaning that the prosecution or the Applicant in a civil case after proving his case on the high standard of "beyond any reasonable doubt" the accused or the respondent as the case may be is only required to offer "reasonable doubt" to the submissions of his adversary. That the failure was not willful or mala fide. I now wish to cite some extracts from that case.

[19] From the majority decision at page 19 under paragraph [22] Cameron JA states-

> *"The decisions deal with statutory presumptions and reverse onuses. But they undoubtedly entail that where the state prosecutes an alleged contemnor at common law for non-compliance with a civil order, the requisite elements must be established beyond reasonable doubt. In such prosecution the contemnor is plainly an "accused person" in terms of section 35 (3) of the Constitution of the Bill of Rights, and enjoys the inter-related rights that section 35 (3) (h) confers (see Eswatini Constitution section 21 – although strictly refers to Criminal Offences) to be presumed innocent, to remain silent (silence is not provided for in the Eswatini Constitution) in the face of the charges and not to testify during the proceedings. By developing the common law in conformity with the Constitution, the reverse onus the accused bore in prosecution such as Bayers must now be reduced to an evidential burden.... Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was willful and mala fide, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent (not in terms of the Eswatini Constitution), but does not exercise the choice without consequence.*
>
> *[23] 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 mentioned have been proved, in the absence of evidence raising a reasonable doubt as to whether the*

accused acted willfully 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 willfulness and mala fides on a balance of probabilities, but to avoid conviction need only lead evidence that establishes reasonable doubt" (underlining mine).

It should be noted that Cameron JA says at paragraph 24 of his judgment that there is no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance. This according to Cameron JA, the new approach applies to both civil and criminal contempt of court proceedings.

[20] The Sakie case is not in isolation, the same conclusion is found per **Uncedo Taxi Service Association v Mtwa 1999 (2) SA 495 (E)** where it is stated that once the prosecution (principles applicable to civil cases as well) has established-

(i) the existence of the order;

(ii) its service on the accused; and

(iii) non-compliance,

and if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was willful and *mala fide*, the offence will be established beyond "reasonable doubt"). The South African position which is not our law, is that the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and willfulness and *mala fides* beyond reasonable doubt. See *Fakie* case *Supra* at paragraph 42. The

Eswatini position is that willfulness and *mala fide* is inferred, for the respondent to rebut on a balance of probabilities (see Crow and Another V Jarvis, *Supra*)

[21] In my opinion, as stated above, the legal exposition by Cameron JA does not reflect our current legal position. Theirs was to develop the common law to be in conformity with the South African Constitution which as shown is not in all fours with the Eswatini Constitution. During the proceedings in the Fakie case the debate was lively as to whether to develop the common law the way they did or maintain the *status quo* and that was not the case during the hearing of this case. In our case we are still to do so when the opportune time presents itself. As to the appropriateness in our case as well as the merits and demerits of the South African new approach as expounded in the *Fakie* case was not debated herein, and therefore it would not be wise to simply follow and adopt the majority conclusions in the *Fakie* case.

[22] Our legal stand point remains as expounded in the *Crow and Another V Jarvis*, *Supra*. My opinion is derived from and cemented by numerous decided cases in our jurisdiction and one or two should suffice. In **Swazi MTN United and Others v Swaziland Posts and Telecommunications Corporation and Another (58/2013 [2013] SZSC 46 (29 November 2013)** at paragraph [35] the Court stated-

> *"Insofar as the law of contempt is concerned it is trite that where the Order of the Court has been brought the knowledge of the respondent, as here, and the respondent fails to comply with it, again as here,*

willfulness and mala fides will be inferred on the part of the respondent and the onus burden such respondent to rebut this reference on a balance of probabilities. See, for example, ***Bahle Sibandze v Petros Jacobus Van Vuuren, civil case No. 22/2006...***"see also ***Beauty Build Construction v Muzi P. Simelane and 2 Others (68/2015) [2018] SZSC 30*** **(24th September, 2018).** *(underlining mine)*

[23] In **Stanlib Swaziland (Pty) Ltd and Others v Abel Sibandze [2010] SZSC 20** at paragraph [27] the Court, first referring to the case of *Herman Staffer v Rex Criminal Appeal No 12/00,* stated-

> *"This case is authority for the self-evidence proposition that, in a Criminal prosecution for contempt of Court, the allegation of contempt must be proved beyond a reasonable doubt. It also lends support to the proposition that, even where only civil contempt is alleged, it must be proved beyond a reasonable doubt. It also bolsters the rule that, even where only civil contempt is charged as in this case, the criminal standard of proof must apply because of the penal sanctions faced by a civil contemnor. By the same token, it follows ineluctably that where the evidential burden rests upon the putative contemnor, that burden is discharged upon a preponderance of probabilities".*

[24] The above quoted cases reflect our jurisprudence and I find no justification in developing the common law as sought to be done in the *Fakie* case. Was I at liberty to do so I would on the contrary have suggested the lessening of the standard of proof in civil contempt as I regard disobeying court orders

undermines the rule of law in a serious way and is recipe for chaos leading to jungle law. On the other hand, in criminal prosecutions the State has the financial resources to dig up even hidden evidence. In civil contempt the applicant may lack meaningful financial resources and in any event he is already being owed and probably his estate cannot carry any further financial burdens. As pointed out by Heher JA in the dissenting judgment in the *Fakie* case at paragraph [83] when he observed-

> *"The existing reverse onus of proof renders the prospect of a finding against a respondent in contempt applications more likely than the application of a heavier onus would. Since such an onus has a tendency towards deprivation of the freedom of the subject it must be able to withstand constitutional scrutiny at the... level of procedural fairness"*

His Lordship concludes (a conclusion which favours our position in Eswatini) by saying-

> *"The existing reverse onus is a rational response to a proved breach of a Court Order which confers a right of enforcement on a party. It is proper and satisfies one's sense of justice that the breaching party should be required to justify non-compliance".*

The Issues in casu

[25] What falls to be decided first and foremost is whether the Appellants are guilty of Contempt of Court or not. Contempt of Court is a crime. It is a crime to unlawfully and intentionally disobey a Court Order, the essence of which is the violation of the dignity, repute, authority of the Court and generally the

administration of justice. It is a serious crime that has the potential to lead to anarchy where the Courts are rendered a useless limb of the three limbs of government which would eventually lead to a collapse of the whole government or to a non-functioning government. All Courts in the land have a duty that "requires that the dignity and authority of the Courts together with their capacity to carry out their functions, should always be maintained" (*see* ***Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC)*** paragraph [61]). The argument that committal to prison of a contemnor conflicts with the right of liberty of the person or some other fundamental rights of the individual is misplaced and ill-conceived and on the contrary compliance with Court Orders is of fundamental concern to a society that prides itself on the observance of the rule of law.

[26] The Appellants, *in casu,* agreed with the Respondent that the Respondent should unlock their premises, Plot No 846, Matsapha Town, Manzini District to enable the Appellants to carry on their business and to also make it possible for the provision of a security guard to police the premises and in return for the unlocking of the premises, the Appellants would not by themselves or by a third party remove or permit to be removed the detained motor vehicles from their premises, Plot 846. This agreement was made an Order of Court. This Order of Court was breached the same day the Court endorsed it by the removal of all the 137 motor vehicles except one, a black Mercedes Benz.

[27] The Appellants do not deny the removal of the motor vehicles from their premises but state that they did not themselves remove the motor vehicles nor did they participate in their removal. They further state that they had no duty

to police or to ensure the motor vehicles were not removed from their premises. Having been found guilty of contempt of Court by the Court *a quo* the Appellants state that the Court *a quo* applied a wrong standard of proof and further convicted certain Directors who had long resigned before the beginning of this lis.

What is the Law of Civil Contempt of Court in Eswatini

[28] As pointed out in numerous paragraphs above, the law has not changed since Ben Dunn AJ, as he then was, stated in *Craw and Another v Jarvis SLR1982-86* at page 219 and, at the expense of repetition, His Lordship stated that–

> *"An applicant must show-*
>
> *(a) that an Order was granted against the respondent;*
> *(b) that the respondent was either served with the orders, or was informed of the grant of the orders against him and could have no reasonable ground for disbelieving the information; and*
> *(c) that the respondent has either disobeyed the order or has neglected to comply with it"*

Once the above three requisites have been satisfied, at paragraph [D] of the judgment, his Lordship stated further-

> *"The onus would thus have been on the respondent to rebut, on a balance of probabilities the inference of mala fides and willfulness flowing from the second applicant's evidence of non-compliance with the Court Order".*

Application of the Law on Facts in Casu

[29] This Court, as well as other Courts, decides each and every matter before it on the facts stated by the Respondent, together with those the Applicant avers and the Respondent does not deny. In this case the first two requirements in contempt cases, that is, order being made by the Court and its service on the Appellants is not denied. The Appellants only deny their involvement in the non-compliance of the Order of Court. The Appellants are not denying that the Court Order was made against them and they are also not denying that it was served on them. They are not saying the wrong persons were cited in the Court Order and served which means any stipulations in the Court Order was directed to them and placed a duty on them to comply with. On signature of the Deed of Settlement the Appellants agreed to be bound by the agreement which was later to be made an Order of the Court.

[30] The Appellants supplementary Heads of Argument at page 12 paragraph [30] contains the admission of the first two requirements. But it does not end there, it admits the third requirement that there has been a breach of the Court Order however, but not by them. They are saying, yes the Court Order has been breached but not by us notwithstanding that it is directed at us: ordering us not to permit or allow removal from our premises the motor vehicles wherein we exercise full control over the premises.

Paragraph [30] of the Appellants' Heads of Argument admits or states as follows-

> *"30 .... An order was granted by the Court and it is not denied it came to the notice and/or knowledge of the First Appellant and its Directors.*

It had however, not proven factually that the First Appellant and its Directors removed or participated in the removal of the motor vehicle. None of the deponents on the part of the First Respondent stated directly that they witnessed the Directors of the First Appellant remove or participate in the removal of the items. This element of the offence must be proven beyond a reasonable doubt. The First Appellants and it's Directors denied involvement and there is no evidence to contradict that."

[31] This evidences a clear admission of: (1) order being made by the Court; (2) service being effected; and (3) non-compliance though not by Appellants. On the element of non-compliance, the reasoning of the Appellants is faulty. Faulty reasoning goes against the tide of sound reasoning. The Respondent was not expected to sleep on Plot 846 Matsapha to witness who was removing motor vehicles there. The Respondent did not in law have to physically see by its eyes the actual removal or witness it. An order by court had been made and it was in effect, that the Appellants should not remove or permit any third party to remove the motor vehicles in question from its premises, Plot 846. The Respondent through its officers came to inspect the motor vehicles only to find the motor vehicles removed and the gates locked and no security guard or any other personnel for that matter on the premises. It turned out later that the Appellants had sold the premises to some third party.

[32] The Respondent submits that on the totality of the facts and on the circumstances of the case, the Appellants breached the Court Order for the following facts-

(i) There is history which led to signing of the Deed of Settlement which was subsequently made an Order of Court. The Respondent searched and found motor vehicles on the premises of Appellants. The cars were suspected to have been imported into the country illegally or improperly without declaring the motor vehicles for customs or imports duties or taxes. The Respondent detained the motor vehicles on the premises in exercise of the powers the Respondent had and locked all the gates to the premises. The Appellants wanted access to the premises to continue trading and granting access to other tenants and to enable a security guard to police the premises. The parties entered into an agreement and in a nutshell the agreement was for the Respondent to unlock the gates and the Appellants to safeguard against removal from their premises of the motor vehicles. The motor vehicles were removed and that alone breached the agreement and the Court Order.

(ii) The Respondent, and the Court agrees, says the Appellants cannot be heard to be saying they do not know who removed the motor vehicles because when applying for the unlocking of the gates they alleged that their security guard cannot police the premises if the gates remained locked.

(iii) The Respondent further alleges that out of the 137 cars detained some were actually imported by the Appellants using various companies in a quest to beat the tax man through the avoidance of tax. This means the Appellants had an interest in some of the motor vehicles as importers. When the motor vehicles are removed the Appellants claim no knowledge as to who could have removed the motor vehicles but do not report a theft of such magnitude to law enforcers. They do not report same even to the Respondent. They did neither. Some of the removed cars are alleged to have been found at premises suspected to be residences of some of the Appellants.

(iv) The Respondent further states that when his employees discovered that the cars had been removed they found the gates locked and intact. No employees were found. No security guard was found. The place was locked there were no signs of burglary or break-in. The Respondent further states that the Appellants sold the very premises, Plot 846 Matsapha, which had the detained motor vehicle to third parties hence the motor vehicles were removed.

[32] In terms of our law, it was at this juncture that an inference of willfulness and *mala fide* fell upon the Appellants to rebut on the civil standard of proof, that is, on a balance of probabilities.

In terms of our law, once the Appellants as they are in this case, have failed to rebut the inference that their non-compliance with the order was willful and

mala fide, the Respondent is held to have proved his case beyond any reasonable doubt. For the Appellants to say they did not participate in the removal of the motor vehicles or in the non-compliance when the Order of Court was directed to them not to allow or permit any person to remove the motor vehicles is frivolous and can also be said to be a fictitious answer deserving to be thrown out by the Court, as I now do just that.

[33] As a further defence the Appellants also state that they did not understand the Order of Court as putting a responsibility on them to guard against the removal of the motor vehicles. This is fictitious and mischievous when one looks at paragraph 2.4 of the Deed of Settlement which was subsequently endorsed as an Order of Court.

> *"2.4 Should any of the interdicted parties fail to comply with this order, and allow the removal of the listed items in any manner, they shall be held to be in contempt of Court"* (Underling for emphasis).

The interdicted persons were the Appellants and Extreme Cars (Pty) Ltd. I find no substance in what the Appellants are submitting here.

[34] On sentencing, sentencing is the discretion of the sentencing Court, a discretion exercised judiciously and expeditiously depending on the circumstances of each case. The judicial officer presiding will take into consideration all the attendant facts and behaviour of the litigants and weigh the seriousness of the offence and probably its likely effect on the offenders and on the larger population of the country. The judicial officer will search

and find an appropriate sentence which an upper Court would not likely interfere with unless it causes a sense of shock in that in the circumstances of the case it is outrageously out of place.

[35] In Contempt of Court cases the judicial officer will consider the nature of the remedy sought that resulted in the order being made. In this case, the Appellants were first given an opportunity by the Court to return the motor vehicles so that if found to be owing taxes, to pay those taxes. The Appellants refused to return the motor vehicles, meaning, even this day they persist in their conduct to disobey the Court. No society can survive where court orders are disobeyed. There is no allegation that the motor vehicles were, maybe destroyed by fire and therefore cannot be returned. The motor vehicles are somewhere and the Appellants can purge their wrongdoing by simply returning the motor vehicles but they choose not to. The Contempt of the Court is therefore continuing and the Court is left with no option but to stamp its disapproval of such wanton or gangsterism behavior. The country should not be turned into the *wild west*. It is not as if the Appellants have no options available to them regarding what they perceive as unfair sentencing: their first, fair and legitimately correct option is to comply with the Orders of Court.

[36] I do not find much substance in the argument that the fine imposed by the Court *a quo* of E300 000.00 (Three hundred thousand Emalangeni) is excessive when considering that even to this day the Contempt of Court still continues and is deliberately done by a corporate person through its Directors.

One persuasive case for the purposes of this case is **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 [2021] ZACC18** where Mr. Jacob Gedleyihlekisa Zuma was committed to prison for 15 months for contempt of Court, ordered to pay the cost of the Secretary...including the costs of two Counsel, on an Attorney and client scale.

In that case at paragraph [54] the Court said –

> *"...in determining appropriate relief in contempt proceedings, this Court should be guided by the approach adopted by other Courts. On numerous occasions, it has been confirmed that "the principal purpose of contempt of Court proceedings when an order has been disobeyed has been the imposition of a penalty in order to vindicate the Court's honour upon the disregard of its order ....and to compel the performance thereof"*
>
> The Court continued to hold at paragraph [56] that it was appropriate or in order to order a punishment of a fine as well as commitment to prison where, as was the case with Mr. Zuma, there was no hope that the contemnor will desist from its contempt.

[37] I therefore find no misdirection on the Court *a quo's* imposition of a fine and committal of the Appellants to gaol. Court Orders whether correctly or incorrectly granted have to be obeyed until properly set aside. To subvert it one is subverting the very foundations of the civilization which it protects. Subverting Court Orders renders meaningless the whole process of taking disputes to Courts for adjudication and that is a recipe for chaos and disorder. (See **Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng [2016] ZACC 14 at 678)**. For this reason a strong message must be sent out by our Courts that disobedience of Court Orders has dire consequences. I found no misdirection by the Court *a quo*.

[38] The Appellants also contend that the Court *a quo* should have given them notice to make submissions before a custodial sentence could have been imposed as committal infringes on the rights of liberty. Depending on the circumstances prevailing in each case, but bearing in mind that Contempt of Court proceedings are by their nature urgent, a Court could consider whether, litigants such as the Appellants should be granted an opportunity to plead to a

sentence of committal or not. In the present case I do not believe that was feasible.

The circumstances were urgent, the Appellants had no respect for the Court, a disrespect of great magnitude. As the Court Order was being issued by the Court, the Appellants were removing or concealing the motor vehicles, some are alleged to have been recovered at Magevini Flats, a place they denied residing in. Some of the Appellants were already skipping the country. They were also divesting themselves of any property, such as Plot No. 846 which would leave them with no valuable property in the country to satisfy any possible debt to the Commissioner of Taxes in the event the investigations reveal they were owing the Commissioner of Taxes. The totality of the actions of the Appellants was to render the judicial system useless and ineffective. I cannot see why the Court *a quo* was expected to bend backwards while its very foundations were under attack and not only that, the fiscal integrity of the whole country was also under attack. The Court was being disobeyed and secondly the interests of the Respondent and by extension the fiscus of the whole country were being undermined. The skipping of the country by some of the Directors rendered this case more than urgent justifying immediate finalization of the case before all the Appellants had fled the country.

Conclusion

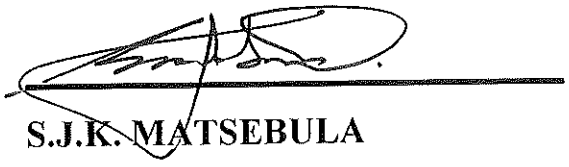
[39] I am satisfied on the facts of this case that the Appeal must fail whether one applies the civil or criminal standard of proof. It is one of those cases or appeals that are hopeless and no wizardry can salvage it. There is no doubt that at all materials times the Appellants never acted in good faith but with *mala fides*. They allowed or permitted the motor vehicles to be removed when the Court Order placed a responsibility on them to ensure the motor vehicles were not removed. They have failed to account for the security guard who was to guard the premises. The premises were not broken into for when the Respondent's Officers visited premises, they found the premises secured but missing were the motor vehicles and Appellants' employees. The place was empty and deserted. The Appellants did not report any theft of the motor

vehicles. The Appellants sold the whole premises but could not account what happened to the motor vehicles when they sold off the premises. On the very day the Court issued its orders those orders were violated and breached with impunity. The Appellants have dismally failed to discharge or rebut the evidential burden placed on them on a balance of probabilities. They have further failed to submit convincing evidence as to at what time and stage the Fourth and Fifth Appellants ceased to be Directors of the 1st Appellant. They contended to file an illegible document which they say support their case that the Fourth and Fifth Appellants resigned directorship before the detention of the suspected illegally imported motor vehicles.

[40] It is our law that costs follow the event, unless exceptional circumstances exist and none exist in this case. The upper scale, attorney and own client, is justified when one views the high level of contempt of Court especially that the motor vehicles were removed as the Court was endorsing the Deed of Settlement. They took the Court for a play-field.

Order

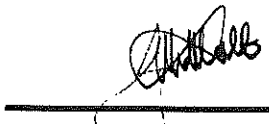
[41] In the result and in light of the foregoing the Appeal is dismissed with costs on the scale as between attorney and own client.



S.J.K. MATSEBULA

JUSTICE OF APPEAL

I agree



J.M. VAN DER WALT

JUSTICE OF APPEAL

I agree

J.M CURRIE

JUSTICE OF APPEAL

For the Appellant: ZONKE MAGAGULA & COMPANY

For the 1st Respondent: S.V MDLADLA & ASSOCIATES