THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1270/2023

In the matter between:

THE SHERIFF OF THE HIGH COURT:
GIYANI (SIDNEY HERBERT PARK,
An Officer of the Court) **APPELLANT**

and

RENKY THULANI MAKHUBELE **RESPONDENT**

Neutral citation: *The Sheriff of The High Court: Giyani (Sydney Herbert Park, An Officer of the Court) v Renky Thulani Makhubele* (1270/2023) [2025] ZASCA 104 (15 July 2025)

Coram: NICHOLLS JA and SALDULKER and NORMAN AJJA

Judgments: Norman AJA (minority): [1] to [54]
Nicholls JA and Saldulker AJA (majority): [55] to [77]

Heard: 19 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 15 July 2025.

Summary: Civil procedure – whether appellant acted *mala fide* in contempt proceedings by not complying with the court order issued by the high court – clear intention to petition the President of this Court – whether appellant was in contempt where the period of one month to deliver petition as prescribed in s 17(2)*(b)* of the Superior Courts Act 10 of 2013 had not expired – whether high court correctly found the appellant in contempt of its order – whether contempt of court has been established beyond a reasonable doubt.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Tshidada J, sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'The application for contempt of court is dismissed with costs.'

JUDGMENT

Norman AJA:

[1] The appellant is before us having been granted leave to appeal by the high court. The appeal lies against a contempt of court judgment and order of Tshidada J, Limpopo Division granted in favour of Mr Renky Thulani Makhubele (the respondent) on 24 October 2023. The appellant is Mr Sydney Herbert Park, the sheriff of the high court in Giyani. He was declared to be in contempt of the order issued on 26 July 2023 (the July order). He was further ordered to pay a fine in the amount of R50 000 which was wholly suspended on condition that the appellant does not commit a similar offence within a period of two years during the period of suspension. He was also ordered to pay costs of the application. The contempt of court order was occasioned by the appellant's non-compliance with the July order.

[2] In terms of the July order the appellant was directed to release and pay into the trust account of the respondent's legal representatives, forthwith, the withheld

proceeds in the sum of R219 541.41 (the funds) realised from a sale in execution at a public auction conducted on 6 July 2023, within 48 hours of service of the order; that the storage fees/costs imposed over the respondent's judgment debt are declared unlawful and invalid; that the appellant's conduct in failing to carry out its constitutional mandate in terms of the respondent's warrant of execution is declared unlawful; and directed the appellant to pay costs of the application including costs of two counsel on the high court scale. On the same day of the granting of the July order the appellant filed an application for leave to appeal against it.

[3] Pursuant thereto the respondent applied on an urgent basis in terms of s 18(3) of the Superior Courts Act 10 of 2013 (the Act) seeking the operation and execution of the July order.[1] That application was heard on 8 August 2023. It was neither granted nor dismissed but in its stead the high court granted an interim preservation order in relation to the funds (the preservation order). Briefly, the preservation order reiterated the order for the transfer of funds within 48 hours as ordered in the July order. The high court further directed the respondent's legal representatives to create an interest-bearing account for investing the amount and not to dissipate or dispose the funds unless ordered to do so by the court. The

[1] Section 18 of the Superior Courts Act 10 of 2013 provides:
Suspension of decision pending appeal
'(1) Subject to subsection (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
(3) A court may only order otherwise as contemplated in subsection (1) or (2) , if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
(4) If a court orders otherwise, as contemplated in subsection (1) –
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next higher court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.
(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

appellant was ordered to pay the costs of the application. Some three days later the appellant filed a notice entitled 'Notice of Appeal in terms of s 18(4)(ii) of the Supreme Courts Act, 10 of 2013'. The appellant submitted before us that the preservation order is not relevant for the purposes of this appeal. Nothing more will be said about it.

[4] The application for leave to appeal the July order was heard on 5 September 2023 and was dismissed with costs. On the same day the respondent's legal representatives advised the appellant's legal representatives that with the dismissal of the application for leave to appeal, the appellant was obliged to transfer the funds within 48 hours, failing which the appellant would be in contempt of court. I now turn to refer to the correspondence, where necessary, for context.

[5] On 6 September 2023, the appellant's legal representatives responded as follows:

'Dear Sirs

THE SHERIFF OF THE HIGH COURT / R T MAKHUBELE

We refer to the abovementioned matter as well as your letter dated 5 September 2023.

We are fully aware of the court order which we obviously expected.

We confirm that we hold instructions to petition the Judge President as we maintain that the result and outcome of these judgments and the specific interpretation of the law has far reaching consequences for not only our client but the sheriffs of court in general.

We shall instruct our correspondent to draft the petition and file the same with the Judge President as a matter of urgency. We are however unable to comply with your demand to respond within 48 hours from the court order dated 5 September 2023.

We are also not in agreement with your interpretation that our client has to transfer the funds to your client within 48 hours from the aforementioned order.

We therefore request you to advise your client that our client will not transfer the funds pending the final outcome of this matter. We furthermore herewith undertake to file the petition as soon

as our correspondent is in a position to do so as he is currently involved in other matters which render it impossible to comply within 48 hours.
Your counsel mentioned to our correspondent Mr J P Morton that he intends to advise your client to proceed with an application for contempt of court should our client fail to transfer the funds as per your demand.
Please be advised that such an approach will be vexatious and malicious, and we shall request the court to award a cost order de bonis propriis against your firm should you proceed with such conduct.'[2] (Emphasis added.)

[6] On 7 September 2023, the respondent's legal representatives responded by, among others, calling upon the appellant to comply with the July order; referred to the appellant's failure to file urgent papers as required in petitioning the President of this Court to avoid contempt of court and made reference to the provisions of s 18(4)(ii) of the Act. They further stated:

'[I]n the absence of your client's duly stamped, served, and filed petition to the President of the Supreme Court of Appeal or proof of payment or transfer of our client's proceeds or funds by 15:42 pm (in the afternoon), today, the 7th day of September 2023, in line with the order of Tshidada J, that funds be transferred within 48 hours, which court order was only suspended by your client's application for leave to appeal which has since been dismissed with costs, we shall deliver our urgent application for civil contempt of court and pray for costs on a punitive scale.'

[7] On the same day, the appellant's legal representatives responded and restated, among others, that Mr Morton who was drafting the petition had other commitments and would finalise the petition by 8 September 2023. They also stated:

'*You are therefore well aware that our client will exercise its rights in this regard. We reiterate that our client will therefore not transfer the funds as the petition will inevitably suspend the further implementation of the court order.* We consider your demand uncollegial and unreasonable considering the fact that we also have commitments towards other clients and courts of law.' (Emphasis added.)

…

[2] Emphasis added.

It is therefore abundantly clear that our client has no intention whatsoever to deliberately ignore the court order.[3] You should also be well aware of the principles laid down in *Fakie NO vs CCII Systems (Pty)* Ltd 2006 (4) SA 326 SCA where the court found that:
"The test for when the 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".' (Emphasis in the original.)

[8] On 8 September 2023, the respondent's legal representatives brought the contempt of court application. On the same day, the appellant's legal representatives indicated that they needed a copy of the order dismissing the application for leave to appeal to attach to the petition and had instructed the transcriber to transcribe the judgment. They further stated for the first time that:
'We reiterate that in terms of section 17(2)(b) of the Superior Courts Act, the Sheriff of Giyani has one month after judgment to file and issue his Application for Leave to Appeal.'

[9] On 15 September 2023, the appellant opposed the application and simultaneously delivered a counter-application seeking a stay of execution of both the July order and the preservation order pending a petition to the President of this Court.

[10] The appellant did not depose to the answering affidavit but authorised the office manager, Ms Brenda Nel (Ms Nel), to do so and to oppose the application. He filed an affidavit confirming all the facts deposed to by Ms Nel. The appellant in his answering affidavit and affidavit in support of the counter-application, raised certain points *in limine* such as lack of urgency. On the merits the defences raised were: that on 8 September 2023 it was communicated to the respondent that the appellant had one month after judgment refusing leave to appeal in terms of s 17(2)*(b)* of the Act to petition the President of this Court; that the implementation of the July order would be in contradiction to the preservation order; the funds that

[3] Emphasis added.

are the subject of the orders issued by the high court were held in trust pending finalisation of all disputes between the parties; it was disputed that a litigant who intends to exercise its right to appeal and the *dies* for filing the appeal had not yet lapsed, can be said to be *mala fide* or wilful in not complying with a court order. The delay in lodging the petition was caused by the fact that the order issued on 5 September 2023 had not been transcribed and that affected the appellant's ability to file its petition timeously. The appellant contended that he cannot be forced to comply with an order that might be overturned. It was disputed that the appellant was in contempt.

High court findings

[11] The high court found that the appellant deliberately defied the court order simply on the basis of a petition that was yet to be delivered; there was no merit or justification why the respondent should not be held in contempt of the court's order on the facts and in terms of the law; the approach of the respondent was condescending; the respondent's conduct was clearly contemptuous blended with mala fides; that the court must show its displeasure at the total disregard and disobedience of the court process, court orders and the rule of law as demonstrated by the respondent.

In this Court

[12] The appellant made the following submissions: that he could not be regarded as having been *mala fide* when he did not comply with a court order in circumstances where he made it clear that he intended to challenge the order and was still within the prescribed time period of a month for lodging a petition. A party cannot be compelled to deliver their application for leave to appeal within short periods than those prescribed in the Act simply because a court order requires shorter periods. The high court erred in that the application before it did not seek

enforcement of the order but it sought imprisonment of the sheriff. That, it was argued, was intended to punish the appellant.

[13] The jurisdictional factor of non-compliance was not met, and the order should not have been granted. The respondent had a choice: he could have executed on the order instead of bringing contempt of court proceedings. The appellant sought an order upholding the appeal with costs. He relied on *Fakie*[4] for his contention that he was not *mala fide* in not complying with the order.

[14] The respondent submitted that this Court must determine whether the court a quo correctly found that the sheriff was in contempt. After the application for leave to appeal was dismissed the appellant was obliged to comply with the order as there was no legal impediment barring compliance. The fact that the appellant conveyed his intention to appeal does not render the order unenforceable. The intention does not suspend the execution of the order.

[15] Furthermore the respondent contended that the appellant should have brought an application in terms of Rule 45A if he intended to suspend the operation of the order. The mental state should not be used to defy court orders. The appellant was ordered to comply with the order within 48 hours, he failed to do so. In this regard reliance was placed on *Samancor Chrome Limited v Bila Civil Contractors (Pty) Ltd*.[5] The appellant deliberately stated that they were not going to comply with the order. At the time the contempt of court application was launched the appellant had not filed the petition. The appellant received the July order but demonstrated disrespect towards the order of court. He displayed a clear intention not to comply with the order. Furthermore he failed to display factual

[4] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*).
[5] *Samancor Chrome Limited v Bila Civil Contractors (Pty) Ltd* (159/2021) [2022] ZASCA 154 (7 November 2022) (*Samancor*) para 60.

inability to comply with the order and thus failed to discharge the evidentiary burden in creating a reasonable doubt as to the wilfulness and mala fides of his default to perform in terms of the order. Thus his intention cannot be used as a legal basis to disregard a lawful court order and that the high court correctly found that his conduct was wilful and mala fides. The appeal should be dismissed with costs of two counsel.

Issues

[16] First, whether or not in civil contempt proceedings, a person can be found to be *mala fide* by not complying with a court order when he or she intends to appeal against the said order and the prescribed period to petition this Court has not yet expired. Second, whether in those circumstances a punitive contempt of court application can be brought. Third, whether the high court correctly found that the appellant was in contempt of the July order.

Discussion

Whether appellant acted mala fide in contempt proceedings by not complying with the court order and had expressed a clear intention to appeal it?

[17] The starting point is to appreciate that court orders stand in the league of their own. They rank above the status of the parties. They command compliance. In the Oxford English Dictionary, a court order is defined as 'an instruction or decision made by a court regarding what must or must not happen in a particular legal situation. It is a legally binding directive that requires compliance'.

[18] The foundational existence of all court orders is to be found in the Constitution. Section 165(1) and (5) of the Constitution provide:

'**Judicial authority**

(1) The judicial authority of the Republic is vested in the courts.

…

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.'

[19] What s 165(5) conveys to everyone is that a court order issued against a person binds that person. It is legally enforceable and must be obeyed or carried out by that person. It is common ground that only one person was ordered to carry out the July order and that is the appellant, who is the sheriff,[6] an officer of the court.

[20] 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*,[7] the Constitutional Court stated:

'It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and all costs. The corollary duty borne by all members of South African society – lawyers, laypeople and politicians alike – is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function.'

[21] The Legislature was quite alive to the issue raised herein and made adequate provision for its eventuality. I say so for these reasons. First, urgent orders are part of our daily lives, hence the existence of Rule 6, and in particular, Rule 6(12) in the Uniform Rules of Court.[8] The high court had found that the matter was urgent

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[6] Rule 1 of the Uniform Rules of Court provides: **'sheriff'** means a person appointed in terms of section 2 of the Sheriffs' Act, 1986 (Act 90 of 1986), and includes a person appointed in terms of section 5 and section 6 of that Act as an acting sheriff and a deputy sheriff, and a person designated to serve process in terms of section 6A of the said Act.

[7] *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] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (*Secretary, Judicial Commission of Inquiry*) para 1.

[8] Rule 6(12) provides:

'(12)*(a)* In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

and granted an order that required compliance on an urgent basis. If one were to adopt the attitude of the appellant, no urgent orders would be complied with because every person who is ordered to comply with the order on an urgent basis would leisurely await the one-month period. That would render urgent orders obsolete.

[22] Section 17(2)*(b)* provides:

'**Leave to appeal**

Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(2)*(a)* …

(b) If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court *within one month* after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.'(Emphasis added.)

[23] The period of filing of a petition 'within one month' does not mean that a petition cannot be filed prior to the expiry of one month. To avoid any confusion, the Legislature made it clear in s 18(5) of the Act that:

'(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[24] Section 18(5) makes it clear that a decision becomes the subject of an appeal or application for leave to appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules. Absent an

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(b) In every affidavit filed in support of any application under paragraph *(a)* of this subrule, the applicant shall set forth explicitly the circumstances which it is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.

(c) A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for reconsideration of the order.'

application for leave to appeal lodged with the registrar, the order is operative and must be complied with.

[25] The appellant conveyed his intention in relation to the order that he was going to petition this Court. He was, at all relevant times aware and alive to the fact that the order was not suspended but operational. This was also confirmed in argument before us.

[26] After the dismissal of the application for leave to appeal, the respondent's legal representatives cautioned the appellant that he would be in contempt of the July order if he failed to comply therewith. The appellant failed to heed that caution. When the appellant brought a counter-application to stay the July order and the preservation order, that was an acknowledgement that the operation of the order was not going to cease until a court order was obtained to stay or suspend it. Despite that knowledge the appellant continued to refuse deliberately and wilfully to comply with the order.

[27] If the belief that, the appellant had 30 days to file the petition even though the order was operative, was bona fide, then why was it necessary for him to apply for the stay or suspension of the operation of the order? The appellant applied for the stay of the order because he was aware that by not complying with an operative order, he was acting in contempt of the court order. It follows that the period of one month that was available to him for petitioning this Court, in circumstances where he had to comply with an urgent order that was granted in urgent circumstances, does not constitute a valid cause to escape liability for contempt. He conveyed his stance that he was not going to transfer the money more than once.

[28] In *Devadhasen v Devadhasen*,[9] the Court found that '[a]s I suggested during argument every wilful non-compliance with any order or decree of the Court is in a sense a contempt'. This position changed because the standard for proving contempt was the criminal one of 'proof beyond reasonable doubt', and consistent with the constitutional imperatives, a person alleging contempt had to show that the deliberate refusal was *wilful and mala fide*.[10]

[29] This was a sheriff who is designated to serve process on the members of the public and juristic persons on behalf of the court as envisaged in Rule 4 of the Uniform Rules and s 6 of the Sheriffs Act 90 of 1986.[11] It was not contended on behalf of the appellant that the existence of the 'one month' period within which a petition was to be delivered to the registrar of this Court, automatically suspended the operation of the order. Instead, he understood and as correctly submitted before us that after the dismissal of the application for leave to appeal, the operation of the order was not suspended. He never tendered compliance with the order and in fact deliberately refused to comply therewith.

[30] On these facts, I am of the view that the jurisdictional facts to be proved in a contempt of court application existed. They are that: there was an order lawfully issued by a court of law against the appellant; the appellant had knowledge of the order; and he failed to comply with it; and wilfulness and mala fides had to be proved. The onus that rested on the respondent to prove all these requirements beyond a reasonable doubt was discharged. The appellant, on the other hand, bore the evidential burden in relation to wilfulness and mala fides once the respondent

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[9] *Devadhasen v Devadhasen* 1905 N.L.R at 205.
[10] *Fakie* fn 4 above para 12. Emphasis added.
[11] Section 6 of the Sheriffs Act provides:
(1) Any sheriff or acting sheriff may with the approval of the Board and on such conditions as the Board may determine appoint one or more deputy sheriffs, for whom he shall be responsible.
(2) A deputy sheriff may, subject to the directions of the sheriff or acting sheriff appointing him, perform the functions of any such sheriff or acting sheriff.
(3) Any sheriff or acting sheriff may appoint such other persons in his employ as he may consider necessary.

had established the existence of the order, service or notice and non-compliance. The appellant failed to provide evidence to establish reasonable doubt as to whether non-compliance was wilful and *mala fide*. In the circumstances, it follows that contempt of the court order was established beyond a reasonable doubt.[12]

[31] On the one hand the appellant steadfastly reiterated his stance that he will not transfer the funds as directed by the court whilst indicating that he will petition this Court. Although advised and referred to the relevant provisions of the Act, such as s 18(3),[13] he persisted in his attitude refusing to comply with the order in circumstances where he was not taking action to apply for the suspension of the order or delivering an urgent petition. The transfer of funds is at the heart of the July order. A refusal to transfer, although it may appear to be directed at the respondent, was actually directed at the court. Therein lies the malice.

[32] His constant reiteration that he intended to lodge a petition did not excuse his conduct of refusing to comply with the court order because he knew that the operation of the order could only be suspended by another court order. That he deliberately and wilfully disregarded. In my view, contempt of court was established beyond a reasonable doubt.

[33] In *Fakie*,[14] this Court stated:

'Given our very different constitutional setting, the approach of the English, Australian and Canadian courts seems convincing to me. As they have found, there is no true dichotomy between proceedings in the public interest and proceedings in the interest of the individual, because even where the individual acts merely to secure compliance, the proceedings have an inevitable public dimension – to vindicate judicial authority. Kirk-Cohen J put it thus on behalf

[12] *Fakie* fn 4 above para 42.
[13] Section 18(3) of the Act provides:
'(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'
[14] *Fakie* fn 4 above para 38.

of the full court, "Contempt of court is not an issue inter partes*; it is an issue between the court and the party who has not complied with a mandatory order of court*".' (Emphasis added; footnotes omitted.)

Whether in those circumstances a punitive contempt of court application can be brought?

[34] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* (*Pheko II*),[15] the Constitutional Court set out the purpose of contempt of court proceedings thus:

'The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.'

[35] Where a party is of the view that it will not be able to comply with a court order for valid reasons, it must go back to the court that issued the order and seek, among others, an order suspending the operation of that court's order. This is so because in *Pheko II*, it was found that a court that grants an order retains jurisdiction to ensure its compliance and thereby to vindicate its authority. The party seeking the suspension of the order would have advanced exceptional circumstances upon which its request is based and if satisfied the court would grant the order sought. The Act makes provision for that in s 18(1) to s 18(4).[16]

[36] The Uniform Rules of Court also cater for that situation in Rule 45A.[17] Needless to say, where the order commands compliance on an urgent basis the

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[15] *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) para 28.

[16] Section 18(4) provides:

'(4) If a court orders otherwise, as contemplated in subsection (1)-
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next highest court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.'

[17] Rule 45A provides: 'The court may, on application, suspend the operation and execution of any order for such period as it may deem fit: Provided that in the case of appeal, such suspension is in compliance with section 18 of the Act.'

suspension proceedings must be brought on an urgent basis as well. The scheme of the Act was designed to cater for situations where a party against whom an order has been issued encounters difficulties in complying therewith. There is accordingly no lacuna as suggested by the appellant.

[37] There is no room for a party not to comply with an order and simply take its time because it has 30 days within which to petition this Court. That attitude is aggravated by the fact that the appellant herein repeatedly, through its legal representatives and in the answering affidavit, displayed knowledge that it had to comply with the order but would not do so. The appellant was resolute in his refusal to transfer the funds and that demonstrated a marked disregard for the authority of the court. An application to compel compliance would be to no avail, instead it would inevitably result in further acts of defiance and contempt.[18] The respondent was well within his rights to bring a contempt of court application.

Was the high court correct in its finding that the non-compliance was deliberate and mala fide?

[38] The issue is whether the appellant was deliberate and *mala fide* in his refusal to comply with the July order. The high court found that he was.

[39] In *Fakie*, this Court found:

'3. 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.

4. But once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

[18] *Secretary, Judicial Commission of Inquiry* fn 7 above para 50.

5. A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities.'[19]

[40] It was submitted that the appellant does not contend that after the dismissal of the application for leave to appeal the operation of the order was suspended. It must be accepted therefore that he knew that the order was operational and had to be complied with. On 5 September 2023, the day of the dismissal of the application for leave to appeal, the respondent's legal representatives advised the appellant's legal representatives of the consequences of the dismissal. They informed them that the appellant was liable to comply with the July order failing which he would be in contempt. In *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others*,[20] the Constitutional Court when dealing with the provisions of s 18(1) of the Act and the suspension of orders stated:

'Based on this clear statutory position, the operation and execution of the order of the Supreme Court of Appeal was halted. In practical terms, what happened immediately after that order was granted was that the countdown on the 12 month period of suspension began. But the countdown was halted on the 21st day by the lodgment of the application for leave to appeal in this Court. Because section 18(1) suspends the operation and execution of a judgment "pending the decision of the application [for leave to appeal] or appeal", the countdown resumed after this Court dismissed the appeal on 16 February 2022. Unsurprisingly, the Minister does realise that this is how the order ought to be interpreted.' (Footnotes omitted.)

[41] A statement by the appellant that the transfer of the funds will not be made pending finalisation of the matter is clear and unambiguous. The fact that the appellant intends to file a petition is of no moment because that did not constitute a valid cause for its deliberate choice not to transfer the money as directed by the court. Most importantly, the insistence on the refusal even after having been advised of the consequences thereof was an explicit display of disrespectful, wilful

[19] *Fakie* fn 4 above para 42.
[20] *Minister of Finance v Sakeliga NPC (previously known as Afribusiness NPC) and Others* [2022] ZACC 17; 2022 (4) SA 401 (CC); 2023 (2) BCLR 171 (CC) para 16.

and *mala fide* intent. In *Fakie* there was late compliance with an order of court and that is a distinguishing feature from this case.

[42] In *Samancor* this Court held:

'Be that as it may, for the respondents to labour under the impression that only the intention of a party, which is effectively the mental state of a party, without any action, could automatically suspend an order is not only untenable but is far-fetched. Taken to its logical conclusion, it is no different to a contention that an intention to institute summons without actually doing so interrupts prescription.'[21]

These remarks apply equally herein.

[43] The appellant had been warned by the respondent that if he failed to transfer the funds as ordered, a contempt of court application would be brought. In response, his legal representatives stated that such an approach would be vexatious and malicious, and they would seek an award of costs *de bonis propriis* against the respondent's firm of legal representatives.

[44] What to make of the argument that the respondent had an option to execute on the order. It is so that the execution on the order was available to the respondent. He chose the route of enforcement through contempt of court proceedings. In any event, the availability of that option is not an answer to the contempt of court issue. In fact, it seeks to condone the flagrant disregard of the relevant court order by the appellant and puts the party in whose favour the order was granted, on trial, for failure to execute. That approach is at odds with the purpose for which court orders are issued and why they should be complied with. The fact that the respondent did not seek an order directing the appellant to comply with the order is of no moment because of the explicit refusal to transfer the funds as conveyed by the appellant.

[21] *Samancor* fn 5 above para 60.

In any event, contempt proceedings are intended, as found in *Fakie*, 'to enforce compliance'.[22]

[45] I read the majority judgment of my sisters Nicholls JA and Saldulker AJA and I, with respect, part ways with it for these reasons. In the majority judgment the following findings are made:

'The problem was compounded when the high court granted a contempt order in circumstances where the sheriff had at all times evinced an intention to appeal the July order and when he was still within the 30 days prescribed by the rules of court to do so. In fact, this Court ultimately granted leave to appeal to the full bench of the Limpopo Division of the High Court, Thohoyandou against the July order. The appeal has not yet been heard. Should the sheriff be successful, then the potential for harm alluded to in *Knoop (Execution)* would come to pass.'[23]

[46] After the dismissal of the application for leave to appeal on 5 September 2023, up to the time when a contempt of court application was launched and heard, there was no petition pending. According to the order of this Court granting leave to appeal on petition, there is reference 'to the application lodged in this office on 29 September 2023', almost three weeks after the dismissal of the application for leave to appeal. There is no explanation why there was no compliance with the court order, which on the appellant's version, was operational after the dismissal of the leave to appeal.

[47] Unfortunately, the majority judgment does not, with respect, engage with the operation of the July order in relation to the period between the dismissal of the application for leave to appeal and the filing of the petition. The contempt of court application was brought and heard before the filing of the petition (ie 29 September 2023). There was no compliance with the July order and no petition pending at that time. The contempt of court order related to that period.

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[22] *Fakie* fn 4 above para 15.
[23] See below para 66 of this judgment.

The fact that the appellant subsequently filed the petition prior to the handing down of the judgment in the contempt of court application does not cure the contemptuous conduct, in my view. All it does is to address the execution point which was not an issue raised by the appellant before us.

[48] On these facts there was no suspension of the order and its operation could not be suspended by the appellant's intention to appeal according to the decision of this Court in *Samancor*. In my view, each day when there was non-compliance with an operative order by the appellant, was a display of a malicious intention to disobey the July order.

[49] The majority judgment further found that by not bringing the petition to this Court within 48 hours, the sheriff was acting within his rights; the sheriff's conduct was not indicative of a contumacious disrespect of the court, rather, the sheriff was acting within his rights to appeal an order and then petition a higher court as the law allows; and that the sheriff was not in contempt of court when he did not transfer the funds in terms of the interim preservation order.

[50] These findings make reference to the interim preservation order which was, with respect, not the subject of this appeal. The appellant submitted, as stated above in paragraph 3, that the interim preservation order was not relevant for the purposes of this appeal. It follows therefore that the execution of the order and the harm it would cause to the appellant was not an issue which ought to have detained this Court.

[51] It was also found in the majority judgment that the *dies* for filing the application for leave to appeal to this Court had not expired and ultimately the sheriff successfully petitioned this Court. The difficulty with that approach is that it, with respect, conflates two issues, namely, the operation of the July order and

non-compliance therewith prior to the filing of the petition, on the one hand; and the procedural requirements for filing a petition, on the other. First, the time period of 'one month' for filing of an application for leave to appeal with this Court as provided for in s 17(2)*(b)*, does not grant a license to the person enjoined to comply with a court order to ignore it on the basis that such period has not expired. That period, with respect, does not resolve the issue relating to non-compliance with an operative order. Second, the period of 'one month' available to the appellant does not suspend the operation of the order because to accord such power to the 'one month period' would undermine the express provisions of s 18(1) read with 18(5) of the Act in relation to suspension of decisions or court orders.

[52] If then the 'one month' period does not have the effect of suspending the operation of the order, what is its value? In my view, its utility is purely procedural but can never serve as a legitimate excuse for refusal to comply with an operative court order. The refusal to comply, despite valid deadlines and knowledge, fits squarely within the ambit of civil contempt.

Conclusion

[53] Taking all the facts into account, I am satisfied that the high court dealt with the matter that was between it and the appellant as found in *Fakie.* Had I commanded the majority, I would have found that the finding of the high court that the appellant was in contempt was justified. I would have also found that there is no room for this Court to interfere with that decision and would have made the following order:

[54] The appeal is dismissed with costs such costs to include costs of two counsel, where so employed.

_____
T V NORMAN
ACTING JUDGE OF APPEAL

Nicholls JA and Saldulker AJA (Majority):

[55] We have read the first judgment of my sister Norman AJA, but respectfully differ with the findings. While the facts have been lucidly set out in the first judgment, some of the more important aspects will be briefly emphasised.

[56] The genesis of this appeal is an order granted on 26 July 2023 (referred to as the July order in the first judgment) against the sheriff, in favour of Mr Makhubele, ordering the sheriff to pay to Mr Makhubele, within 48 hours, an amount of approximately R220 000 realised from a sale in execution at a public auction, together with ancillary relief. The judgment was subject to an application for leave to appeal by the sheriff, filed the same day. This prompted Mr Makhubele to bring an urgent application in terms of Rule 18(3) of the Act seeking the immediate execution of the order. After hearing the application in terms of s 18(3), the high court per Tshidada J granted what was referred to as an 'interim preservation order'. The effect of this order, dated 8 August 2023, was that the full amount should be released by the sheriff and paid into the trust account of Mr Makhubele's attorneys within 48 hours of the service of the order.

[57] The sheriff's application for leave to appeal the July order was dismissed on 5 September 2023. The funds were still not paid over by the sheriff. After 48 hours, on 7 September 2023, Mr Makhubele launched the application for contempt of court, which is the appeal before us. What was sought was a declaration that the sheriff be found in contempt of the July order, a fine of R200 000 be imposed, and that the sheriff be imprisoned for 30 days wholly suspended on the condition that a similar offence was not committed. On 24 October 2023, the high court gave judgment in which it held the sheriff to be in contempt of court and imposed a fine of R50 000 wholly suspended on condition that the sheriff did not commit a similar offence within a period of two years. On 8 November 2023, the high court granted leave to appeal to this Court.

[58] Since the seminal decision in *Fakie*,[24] the law in relation to contempt is now settled. A respondent in such proceedings enjoys the analogous protection of an accused person. The requisites that an applicant must show are well known: the existence of an order; service or knowledge of the order; non-compliance with the order; and wilfulness and malice beyond reasonable doubt. Once the first three requisites are proved the respondent bears an evidential burden to show a lack of wilfulness or malice. The test is the criminal standard – beyond reasonable doubt.[25] As the Constitutional Court observed what this means is that mala fides and wilfulness are presumed unless the respondent is able to provide sufficient evidence to create reasonable doubt as to their existence.[26]

[59] There is no doubt that complying with court orders is an incident of the rule of law and is foundational to our constitutional democracy.[27] Contempt is the commission of any act or statement which displays disrespect towards the court.[28]

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[24] *Fakie* fn 4 above.
[25] Ibid paras 41-42.
[26] *Pheko II* fn 14 above para 36.
[27] Section 165 of the Constitution.
[28] *Pheko II* fn 14 above para 28.

To disobey a court order is a criminal offence, the essence of which is a violation of the dignity and authority of the court.[29] The crime is that of disrespecting the court, and ultimately the rule of law. It cements the notion that no one is above the law. As held by the Constitutional Court in *Pheko II*:

'. . . Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons.'[30]

[60] The Constitutional Court in *Pheko II* went on to describe the difference between coercive contempt orders and punitive contempt orders. The former call for compliance with the original order where the contemnor can avoid the imposition of a sentence by complying with the coercive order.[31] Punitive orders on the other hand aim to punish the contemnor by imposing a sentence which is unavoidable.[32] In this matter the order sought, and granted although not in the same terms, was a punitive contempt order.[33]

[61] It is against this backdrop that the appeal should be considered. The only question is whether the sheriff has met his evidential burden in respect of wilfulness and malice – has the mala fides been shown beyond reasonable doubt.

[62] The sheriff at all times evinced an intention to appeal the July order. He first applied for leave to the high court. When this was not granted on 5 September 2023, the sheriff's attorneys immediately informed Mr Makhubele's attorneys, on 6 September 2023, that they had instructions to petition the 'Judge President'. They stated that they would be unable to comply with the

[29] Ibid para 28; *Fakie* fn 4 above para 6.
[30] *Pheko II* fn 14 above para 30.
[31] Ibid para 31.
[32] Ibid para 31.
[33] Ibid para 67.

request for payment within 48 hours. What was meant was a petition to the Supreme Court of Appeal (SCA) as became apparent two days later on 8 September 2023, when the sheriff's attorneys wrote to Mr Makhubele's attorneys to inform them that they would be unable to file a petition to the President of the SCA without attaching the judgment of Tshidada J of 5 September 2023. It was also pointed out that in terms of s 17(2)*(b)* of the Act, the sheriff had one month after judgment in which to file his application for leave to petition the SCA. These facts are set out under oath in the answering affidavit. Mr Makhubele in his replying affidavit does not deal with any of the sheriff's averments, other than to state that there is no authority that a litigant's intention to file a petition to the SCA, suspends the operation of a valid court order.

[63] The manner in which this matter was dealt with by the high court is regrettable. In the first place it was not open to the high court to grant an 'interim preservation order' under the rubric of a general discretion to grant an alternative order, when Mr Makhubele launched a s 18(3) application. Section 18(1) of the Act makes it clear that the operation or execution of a judgment which is the subject of an application for leave to appeal is automatically suspended pending the decision of the application. Section 18(3) of the Act is a remedy for a party who seeks the immediate operation of the judgment. Such a party must show exceptional circumstances, that it will suffer irreparable harm if the execution order is not granted and, the respondent will not suffer irreparable harm if the execution order is granted.[34]

[64] Contrary to what the high court stated, execution orders are appealable in the interests of justice.[35] The reason for this, as stated by this Court in *Knoop NO*

[34] Section 18(3) of the Act provides that, '…if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.'
[35] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) para 20. See also *Khumalo and Others v Holomisa* 2002 (5) SA 401; 2002 (8) BCLR 771 para 8.

v Gupta (Execution) (*Knoop (Execution)*),[36] is that '[t]he immediate execution of a court order, when an appeal is pending and the outcome of the case may change as a result of the appeal, has the potential to cause enormous harm to the party that is ultimately successful'.[37] The Court went on to observe:

'At common law, unless the court in the exercise of a discretion ordered otherwise, an application for leave to appeal and an appeal pursuant to leave being granted suspended the operation of the order. It was not open to the successful party to execute on, or otherwise act pursuant to, that order. This common-law rule and the power to grant an execution order are now expressly embodied in s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013 (the SC Act). The grant of leave to execute is constrained by the requirements that it may only be granted if there are exceptional circumstances; if the applicant will suffer irreparable harm if it is not granted; and if the grant will not cause the respondent to suffer irreparable harm. A further safeguard against the risk of harm being caused by an execution order is the automatic right to an urgent appeal given by s 18(4). Pending such an appeal, the statute expressly provides in s 18(4)(iv) that the operation of the suspension order is itself suspended. This case illustrates what can go awry when a court attempts to override that statutory provision.'[38] (Footnotes omitted.)

[65] There is no indication that Mr Makhubele set out exceptional circumstances or what irreparable harm he would suffer if the immediate execution of the order were not granted. Certainly an 'interim preservation order' was not competent relief in the circumstances of this case.

[66] The problem was compounded when the high court granted a contempt order in circumstances where the sheriff had at all times evinced an intention to appeal the July order and when he was still within the 30 days prescribed by the rules of court to do so. In fact, this Court ultimately granted leave to appeal on petition to the full bench of the Limpopo Division of the High Court,

[36] *Knoop NO and Another v Gupta (Execution)* [2020] ZASCA 149; 2021 (3) SA 135 (SCA); [2021] 1 All SA 17 (SCA) (*Knoop (Execution)*).
[37] Ibid para 1.
[38] Ibid para 2.

Thohoyandou against the July order. The appeal has not yet been heard. Should the sheriff be successful, then the potential for harm alluded to in *Knoop (Execution)* would come to pass.

[67] Notwithstanding the above, the high court held that:

'With full knowledge of the fact that pursuant to the dismissal of the leave to appeal, it followed that [the sheriff] had the 48 hours from the date of the dismissal order to comply with the main order, alternatively timeously file a notice to petition the appellate court, which notice would have effectively suspended the operation of the main order.

[The sheriff] could also have resorted to launching an urgent application in terms of Rule 45A of the uniform rules of court to seek a suspension and implementation of the court order granted against him, if [he] realised that he would not be able to comply with the order within the time provided and/or if the intention was to further challenge the court order.'[39]

[68] The logical entailment of this judgment is that a petition to the SCA had to be filed within 48 hours, despite the rules of court indicating otherwise. Furthermore, Rule 45A is utilised where a party seeks the interim suspension of the execution of a court order while it applies to vary, rescind or set aside the court order. It is not necessary, where an application for leave to appeal is pending because s 18 automatically suspends the operation of a court order. This is the procedural advantage that appeals have over rescission applications.[40] The high court in *Panayiotou v Shoprite Checkers (Pty) Ltd and Others*,[41] considered the interplay between s 18 and s 17(2)*(f)* and held that an appeal which has not been pursued within the prescribed 30 days has lapsed and the grant of condonation is a requirement before a s 18 suspension is afforded.[42] Thus, where the petition to the SCA or the application for leave has been filed out of time, an

[39] High court judgment paras 28-29.
[40] *Lee v Road Accident Fund* [2023] ZAGPJHC 1068; 2024 (1) SA 183 (GJ) (*Lee*) para 20.
[41] *Panayiotou v Shoprite Checkers (Pty) Ltd and Others* [2015] ZAGPJHC 292; 2016 (3) SA 110 (GJ) (*Panayiotou*).
[42] Ibid paras 13-14.

application for the condonation of the late filing of the petition does not revive a petition for the purposes of s 18.[43] However, this was not the case in this appeal. In any event it is not disputed that the *dies* for filing the application for leave to appeal to the SCA had not expired and ultimately, the sheriff successfully petitioned the SCA.

[69] The first judgment found mala fides on the basis that the filing of a petition within 'one month' does not mean that a petition cannot be filed prior to the expiry of one month. Even if the sheriff could have petitioned the SCA sooner, notwithstanding his right to take more time, his failure to do so is not a demonstration of contempt, but rather of adherence to the law, the very opposite of contempt. By not bringing the petition to the SCA within 48 hours, the sheriff was acting within his rights.

[70] The first judgment held that the sheriff was aware he was acting in contempt of the court order but steadfastly refused to transfer the funds even though he had been advised and referred to the relevant provisions of s 18(3) of the Act. That he responded to the s 18(3) application by launching a counter-application to stay the orders of 26 July 2023 and 8 August 2023, the first judgment considered to be proof beyond reasonable doubt that the sheriff was aware that he was not complying with an operative order, and that he was acting in contempt of the court order. Likewise, his refrain that he intended to lodge a petition, did not absolve him as he was well aware that the operation of a court order could only be suspended by another court. Therefore, Norman AJA found that the sheriff had deliberately and wilfully disregarded the court order, as a result of which contempt had been established beyond reasonable doubt.

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[43] *Panayiotou* fn 41 above para 13; *Lee* fn 40 above para 20.

[71] Furthermore, the first judgment held that the sheriff 'refuse[d] deliberately and wilfully to comply with the order' because '[h]e was, at all relevant times aware and alive to the fact that the order was not suspended but operational' until a notice of appeal was lodged in terms of s 18(5) of the Act. This loses sight of the fact that the question is ultimately whether the requirements for contempt have been met. Given that the threshold is that of criminal intent, it is of little use to launch into an enquiry regarding compliance with the requirements of s 18(5) of the Act.

[72] Finally, it is unclear how s 18(3) could have been of assistance to the sheriff, as suggested by the first judgment. This provides a remedy to a litigant who seeks the execution of a decision. It was not required of him to launch a counter application that the orders of 26 July 2023 and 8 August 2023 be stayed until the *dies* for an application for leave to appeal to the SCA had expired. But the fact that he did so, does not amount to an acknowledgment that he was in contempt of court, rather that he acted out of an abundance of caution.

[73] Contempt of court does not consist of mere disobedience of a court order, but of the 'contumacious disrespect for judicial authority.[44] Thus it would have to be proved beyond reasonable doubt that the sheriff, a legal officer, deliberately, wilfully and maliciously defied the court order. This is not the case here.

[74] These are the relevant facts which mitigate against any findings of bad faith and malice. When leave to appeal by the sheriff had been dismissed by the high court, the attorneys of the sheriff informed Mr Makhubele's attorneys of their intention to petition this Court. This was confirmed under oath in the sheriff's affidavit in support of its counter application deposed to on 13 September 2023.

[44] *Pheko II* fn 14 above para 42.

They had a period of one month after judgment in which to file the application for leave to appeal to the SCA in terms of s17(2)*(b)* of the Act, which period had not yet expired (and, as stated earlier the sheriff did, in fact, petition this Court, which granted leave to appeal to the full bench). It was also, correctly, pointed out by the sheriff that they would not be able to file the petition without the transcribed judgment of Tshidada J on 5 September 2023, dismissing leave to appeal.

[75] The Sheriff's conduct is not indicative of a contumacious disrespect of the court. Rather, the sheriff was acting within his rights to appeal an order and then to petition a higher court, as the law allows. To act in terms of the law, as the sheriff was doing, is evidence of respect for the law, the very opposite of a contemptuous bad faith disregard for the law. As was stated in *Fakie*:

'. . . [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).'[45] (Footnotes omitted.)

[76] In the circumstances we are satisfied that the sheriff was not in contempt of court when he did not transfer the funds in terms of the July order. Mala fides and malice have not been shown beyond reasonable doubt.

[45] *Fakie* fn 4 above para 9.

[77] In the result, the following order is made:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

‘The application for contempt of court is dismissed with costs.’

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C E HEATON NICHOLLS

JUDGE OF APPEAL

_____

H K SALDULKER

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	S S Green
Instructed by:	Coxwell, Steyn, Vise & Naude Inc. Louis Trichardt
	Symington De Kok, Bloemfontein
For the respondents:	V Munzhelele (with D E Sigwavhulimu)
Instructed by:	Ntsako Phillis Mbhiza Attorneys, Johannesburg
	MM Hattingh Attorneys, Bloemfontein.