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**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION: POLOKWANE**

CASE NUMBER: 1973/2021

M[...] C[...] P[...]

APPLICANT

AND

N[...] M[...] H[...]

FIRST RESPONDENT

GLEND A SEMENYA

SECOND RESPONDENT

In re:

T[...] A[...] B[...] M[...]

The Child

JUDGEMENT

AML PHATUDI J

Introduction

[1] The applicant approaches this court on an urgent basis seeking an order (i) that the first respondent is found to be in contempt of court of the order granted on 1 April 2021 by Honourable Justice MG Phatudi (High Court) and (ii) the court order granted

on 8 April 2021 by the Learned Magistrate Hewetson in the Childrens Court¹ held at Nebo (Nebo).

[2] The applicant (M[...]) and the first respondent (N[...]) are married to each other-one 10 year old boy child is born of the marriage. The boy child(BM) was born on 2[...] N[...] 2010. M[...] -N[...] separated shortly after BM's birth. BM is a string that keeps the two on speaking terms through court proceedings. The one contends that the other is cantankerous relating to BM's affairs. Lack of proper and meaningful communication between the two led to the parties turning to Nebo's intervention relating to the best interest of BM. The High Court is approached only for enforcement of the orders granted by Nebo. Both M[...] and N[...] enjoy legal representation at both Nebo and High Court. The following factual background reminds me of an idiomatic expression that says: "when two elephants fight, it is the helpless grass that gets hurt".

Factual background

[3] M[...] approached Nebo on an ex parte basis for an order for the immediate removal of BM from N[...]. He approached the court with a document purporting to be a social worker's (Semenya) report. The court granted the order on 1 March 2021. The Court ordered:

"BM be removed from the custody of N[...] by Semanya and be placed in [House No 4[...], F[...] Avenue, Northview Estate, Polokwane] a temporary safe care until this order is confirmed, set aside or varied in terms of section 156 of the Act by a Presiding officer of a Children's Court."

[4] Nebo found that BM "lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being". The court further ordered

¹ Childrens Court means Childrens Court referred to in section 42.
Section 42 (1)

“[a] supervision order, placing a *child(ren)/ the parent/care-giver of a child(ren)/ both the child(ren) and the parent or care-giver, under the supervision of a *social worker/other person designated by the court.

The social worker to ensure that the child is registered and enrolled with a public or private school duly registered and recognised by the Department of Education with the area of Polokwane.

This order is valid until 18 March 2021 subject to extension or variation by Children’s Court in a district having jurisdiction over the child”.

[5] On 11 March 2021, N[...] anticipated. The matter was, without any consideration of the merits, postponed and extended the interim order to 18 March 2021. The matter was further postponed with the interim order granted on 01 March 2021 being extended to 25 March 2021. It is not clear from the record as to what transpired on 25 March 2021.

[6] On 28 March 2021, the matter was adjourned to 08 April 2021 “to allow parties to file their opposing and replying papers respectively”. The matter was further postponed to 4 June 2021.

[7] On 01 April 2021 M[...] approached the high court on an urgent basis, for an order declaring N[...] to be in contempt of court order dated 01 March 2021. The High Court found N[...] to have been in contempt of court and sentenced her to 30 days’ imprisonment, which sentence was suspended on condition that N[...] complies with the Nebo’s order dated 01 March 2021 within 24 hours’ service thereof. Immediately thereafter, M[...] and Thovhakale, the social worker, went to N[...]’s purported residence to fetch BM. They encountered some challenges that prompted them to seek the assistance of SAPS but to no positive fruition.

[8] On 9 March 2021, N[...] launched an urgent application seeking an order to “suspend the Children Court order of 01 March 2021. M[...] countered with an application seeking execution of the suspended sentence imposed by the High Court on 01 April 2021. The matter came before me on 13 April 2021. I struck the

applicant's application off of the roll and postponed the counter application *sine die*. None was mulcted with costs.

[9] Hardly a week from the said order, M[...] returns with this application. He now seeks an order that N[...] be found to be in contempt of court of the High Court order granted on 1 April 2021, and the Children's Court order of 08 April 2021 respectively. With that in mind, I find it prudent to regurgitate the said orders. The High Court order handed down on 1 April 2021 stipulates:

"1. ...

2. [N[...]] is found to be in contempt of the court order issued out of the Children's Court held at nevo on 1 March 2021 under case no: 14/1/4-06/2021.

3. [N[...]] be committed to imprisonment for contempt of court for period of 30 (thirty) days, [or] such period as this Honourable Court deems just and equitable..."

Nebo's order issued on 08 April 2021 stipulates:

1.The court orders that the social worker from Glen Cowie provides a report.

2.The court orders that an attorney LASA takes instruction from child concerned in order to protect the interest of the child.

3.In respect of the interim order the applicant to comply by handing over the child to the father pending the outcome of the court's final order as it would be in the best interest of the child.

4. Remanded to 4/06/2021 for the social worker's report.

5. Both warned for 08h30."

Issues

[10] Issues to be determined are whether N[...] is indeed in contempt of court order handed down on 01 April and 08 April 2021 by the High Court and Nebo respectively.

Law in relation to contempt of court

[11] Contempt of court is a common law offence of being wilfully disobedient to court orders or disrespectful towards a court of law. It has been accepted under the common law that contempt of court, where there is non-compliance with a court order to do or not to do something (*ad factum praestandum*), is a criminal offence² which may, however, be enforced or prosecuted either by way of civil or criminal proceedings. Contempt of court can be committed either in court, commonly referred to as *contempt in facie curiae* or outside court proceedings-*contempt ex facie curiae*. Committal for contempt was only available in those instances where an offending litigant has been ordered by the courts to do or not to do something and has failed to comply with the order. The Magistrates' Court Act³ provides a penalty for disobedience of a judgment or order of court. Section 106 of the Act provides that 'any person wilfully disobeying, or refusing or failing to comply with any judgment or order of a court or with a notice lawfully endorsed on a summons for rent prohibiting the removal of any furniture or effects shall be guilty of contempt of court and shall, upon conviction, be liable to a fine, or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.

² *S v Beyers* 1968 (3) SA 70 (A) at 80E-81F.

³ Magistrates' Court Act, Act 32 of 1944 as Amended

[12] I find it apposite to firstly deal with the case law that espouse the principle set pre and post constitutional dispensation governing contempt of court with specific reference to the principle set out by the Supreme Court of Appeal in *Fakie*.⁴

[13] Section 165 of the Constitution of the Republic of South Africa⁵ entrenches the judicial authority. The section provides that an order or decision issued by a court binds all persons to whom it applies.⁶ Nkabinde J penned in *Pheko and others v Ekurhuleni Metropolitan Municipality*⁷ and later in *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited*⁸ (as she then was ADCJ) that

“Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. 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.” (footnotes omitted)

[14] Prior to the constitutional dispensation certain requirements had to be met on a balance of probabilities when determining a contempt in relation to a court order that created certain obligations to the contemnor. Those requirements are that (a) the order must exist; (b) the order must have been duly served on or brought to the notice of, the alleged contemnor; (c) there must have been non-compliance with the order; and (d) the non-compliance must have been wilful or mala fide⁹. The majority in *Fakie*, through the pen of Cameron JA (as he then was), after consideration of the rights of a contemnor entrenched in the Constitution, had this to say:

[22] The decisions deal with statutory presumptions and reverse onuses. But they undoubtedly entail that where the state prosecutes an alleged contemnor

⁴ *Fakie NO v CCI Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA)

⁵ The Constitution of the Republic of South Africa Act, Act 108 of 1996.

⁶ Section 165(5). An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

⁷ (No 2) (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015)

⁸ [2017] ZACC 35

⁹ See *Fakie* case

at common law for non-compliance with a civil order, the requisite elements must be established beyond reasonable doubt. In such a prosecution the contemnor is plainly an ‘accused person’ in terms of s 35(3) of the Bill of Rights, and enjoys the inter-related rights that s 35(3)(h) confers: to be presumed innocent, to remain silent 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 prosecutions such as *Beyers* must now be reduced to an evidential burden (as Mbenenge AJ rightly envisaged in the second *Uncedo* decision). 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 wilful and mala fide, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent, 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 wilfully and mala fide, all the requisites of the offence will have been established. What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt. (footnotes omitted).

[15] After analysing *Fakie*, Nkabinde J said that “the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fide and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to created reasonable doubt as to their existence”¹⁰.

Evaluation

[16] It is without doubt that these proceedings were instituted against N[...] not as an “accused person”- with section 35 of the Constitution available to her- but as a “civil contemnor” (*ex facie curiae*) who is sought to be imprisoned as a punishment for disobeying court orders of 01 and 08 April 2021 respectively.

¹⁰ Pheko and the other case

Contempt of High Court order

[17] Let me first determine if N[...] is indeed in contempt of court of the order granted on 1 April 2021 by the High Court. As indicated at paragraph [9] above, MG Phatudi J found N[...] to “be in contempt of the court order issued out of the Children Court held at Nebo on 1 March 2021 under case no 14/1/4-06/2021”.

[18] It is common cause that Nebo issued an order on 01 March 2021 on *Ex parte* basis. The court ordered

BM be removed from the custody of N[...] by Semanya and be placed in the temporary safe care until this order is confirmed, set aside or varied in terms of subsection 156 of the Act... This order is valid until 18 March 2022 subject to extension or variation by Children’s Court in a district having jurisdiction over the child”

[19] The order was anticipated on 11 March 2021. The court postponed and extended the order to 25 March 2021. There is no evidence led as to what transpired on the 25 March 2021. I engaged both counsel as to what transpired on the day in question. Both counsel could not make any submission as to what transpired on the 25 March 2021. The evidence on record is that Nebo issued an order on 28 March 2021 postponing the matter to 08 April 2021. On the 08 April 2021, before remanding the matter to 04 June 2021, Nebo, ordered:

“ ...

3. In respect of the interim order the applicant to comply by handing over the child to the father pending the outcome of the court’s final order as it would be in the best interest of the child...”

[20] It is now trite law that for a person to be found to be in contempt of court order, the applicant must prove that an order exist. The order issued by Nebo on 1 March 2021, returnable on 18 March 2021, was extended to 25 March 2021. I indicated

earlier at paragraph [19] that there is no evidence led on what transpired on 25 March 2021. In the absence of such evidence, Nebo's interim order issued on 01 March 2021 and as extended on various occasions up to and including 25 March 2021 respectively, lapsed, in my view, on 25 March 2021. There is no order extending the "interim order" to 28 March 2021. If an interim order is not extended on the return day, then such an order lapses by operation of the law.

[21] I suspect that the High Court was not aware and or was not informed that the order issued on 01 March 2021 had lapsed. The High Court would not have found N[...] to be in contempt of court order issued on 01 March 2021 had the parties brought that fact to the fore. Put differently, had the High Court knew that there was no court order, the sanction imposed on 01 April 2021 or committal to imprisonment for contempt of court as ordered, would not have been pronounced.

[22] I cannot agree more with counsel for the applicant's submission that a court order remains valid and enforceable until it is set aside or varied upon proper application to a court of competent jurisdiction. (*see: Bezuidenhout v Patensie Sitrus Beherend Bpk 2001(2) SA 224 (E) @ 229*). The High Court order remains valid because it has not been set aside by a competent court. Therefore, the High Court order does exist. Let me continue with other factors.

[23] There is no contestation that the order was brought to the notice of N[...]. The issues to determine is whether there has been non-compliance with the High Court order of 01 April 2021 and if so, whether such non-compliance was wilfully or mala fide.

[24] It is common cause that on 01 April 2021 M[...], accompanied by the social worker Thovhakale, went to N[...] sister's homestead with the view to fetch BM. BM refused to go with them. Again on 13 April 2021 in Glen Cowie, at N[...] maternal homestead, M[...], accompanying social worker- Semenya to go fetch BM, sought police's assistance. BM refused to leave with them. The members of SAPS present thereat tried to intervene but to no positive fruition. BM told the members of SAPS that he is not going to leave with them. Members of SAPS left M[...] and Semenya at the said homestead. It is common cause or not seriously contested, that the said police officers placed on record that "the child refused to leave with the social worker" and they left to attend to their daily duties.

[25] Counsel for M[...] submits that it is untenable for a child to dictate to court what he/she wants or does not want irrespective of what the court order stipulates. She submits that it is not about the child's "wishes"- but what is in the best interest of that child. She refers this court to certain decisions including that of *MEC for Education, Kwazulu –Natal and others v Pillay 2008 (1) SA 474 (CC)*.

[26] In that Pillay matter, a parent approached the governing body of the school to exempt a school child from its code of conduct to allow a school child to wear a gold nose-stud to school. In considering the facts before it, the Constitutional Court reiterated what they said in *Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)* that "in the context of a case concerning children that their actual experience and opinions would not necessarily have been decisive, but they would have enriched the dialogue". The pen of Langa CJ continued to stipulate that "the need for the child's voice to be heard is perhaps even more acute when it concerns children of [certain] age who should be increasingly taking responsibility for their own actions and belief". (emphasis added)

[27] The question to determine in casu, is not the interest of the child *per se*, but whether N[...] is in contempt of the High Court order finding her to be in contempt of the court order issued by Nebo on 01 March 2021. On 01 March 2021, Nebo ordered Semenya and not any other person to remove BM from N[...] to a place stipulated in the order.

[28] There is no court order that directs N[...] to remove that child. There is no evidence led that N[...] refused to release BM to whomsoever. The evidence tendered is that N[...] said-"if the child refuses to go, you cannot force him". This evidence is corroborated by the evidence of the two police officers who accompanied Semenya to fetch BM. The police officers too, left on realising that the child refuses to leave with either the social worker or them. There is no evidence, even by the enforcers of the law who were present, that N[...] played a magnificent role towards the child's refusal to leave with Semenya.

[29] It is common cause that the court order of 01 March 2021 orders Semenya to remove the child. The child's refusal to leave with either Semenya or Thovhakale does not impute any wrong doing on the part of N[...] especially that there is no evidence that proves refusal by N[...] to release the child. All she says is that neither Semenya nor Thovhakale can remove the child if the child refuses to go. All she says, in my view, is that BM's voice needs to be heard acutely especially that the

order for his removal tramples more on his (BM) best interest. There is no evidence of any wilful disobedience of the High Court order led.

[30] It is perhaps an appropriate time to consider the decisions referred to by counsel for M[...] before coming to my final conclusion as to whether the application falls to be dismissed or not. In *MT v CT. 2016 (4) SA 193 (WCC)* the presiding judge was tasked to manage the pre-trial conference as envisaged in terms of Rule 37(8)(c) of the Uniform Rules of this Court. The main issue at that pre-trial was the care and contact arrangements in relation to a child born of the parties' marriage. The plaintiff agreed at pre-trial, to "facilitate a domestic visit at her place of residence on a specific date for assessment of the child by the social workers". The plaintiff failed to honour the appointments as agreed and "ordered" at the pre-trial-thus withholding the progress of the litigation at ransom and ultimately the finalisation of divorce. The plaintiff's failure thereto, prompted the court to direct the plaintiff to appear and answer to charges of contempt of court. The plaintiff failed to appear in court resulting in the warrant of arrest being issued against the plaintiff. The plaintiff was found to have wilfully disobeyed the court orders and was correctly found to have been in contempt of court. In *casu*, there is no direction or order directed to N[...] . Nebo ordered Semenya to remove BM and not N[...] to take the child to M[...]. The two cases are distinguishable from each other.

[31] The Court in *FB and Another v MB 2012 (2) SA 394 (GSJ)* dealt with a Child's right to bring, and to be assisted in bringing a matter to court as provided for by section 14 of the Children Act 38 of 2005. This case too, has got nothing to do with the contempt of court order and thus misplaced. I need not analyse the principle espoused therein. In my consideration of the evidence tendered and submissions made, I have no reason to find N[...] to have been in contempt of court of the order granted by the High Court on 01 April 2021. The second prayer of the applicant's application falls to be dismissed. This takes me to the determination of whether N[...] is indeed in contempt of the court order granted by Nebo on 08 April 2021.

Contempt of Children's Court order of 08 April 2021

[32] Nebo issued an order on 8 April 2021 as stated verbatim at paragraph [9] above . The point that requires determination is number 3 of the said order. The typed version has been handed up and marked CPM1A. The order warrants repetition. It states

“In respect of the interim order , the applicant [is ordered] to comply by handing over the child to the father pending the outcome of the courts final order as it would be in the interest of the child”

[33] On perusal of the order, Nebo ordered the “applicant” to comply by handing over the child to M[...]. M[...] and Semenya are cited as the applicants on the order. One can easily draw an inference that the second applicant as cited in the order, Ms Semenya, the social worker, is the one ordered to comply with the “interim order”. The interim order referred to can only mean an order issued on 28 March 2021. Even if I am wrong and reference of an interim order is considered to be that of 1 March 2021, my *ratio decidendi* at paragraph [29] above relating to prayer 2 sought in the notice of motion, applies *mutatis mutandis* and find N[...] not to be in contempt of the Children’s Court order issued on 08 April 2021. Prayer 3 sought in the notice of motion, as well, falls to be dismissed. Prayers 2 and 3 are the pillars of the rest of the prayers. The fall of the two prayers, pulls the other prayers down. There is no need for their consideration save for costs.

[34] The issue of costs needs no determination because both counsel for the applicant and respondent, submits that neither party seek costs against the other notwithstanding their prayers in the contrary. In simpler terms, both parties abandoned their prayers for costs. I have no reason to open this closed door.

[35] I, in the result, make the following order:

Order

35.1 The applicants’ application is dismissed.

35.2 There shall be no order as to costs.

AML PHATUDI

JUDGE OF THE HIGH COURT

Appearances

For the Applicant: M.C de Klerk

**Instructed by: DDKK Attorneys Inc
POLOKWANE**

For the First Respondent: T.E Buthane

**Instructed by: Buthane Rasemana Attorneys
POLOKWANE**

Heard: 28 and 30 April 2021

Judgment: 14 May 2021