

IN THE SUPREME COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 3805/2004

In the matter between:

CITIBANK N.A.

Applicant

and

OCKERT PETRUS VAN ZYL N.O.

First Respondent

JACOBUS JOHANNES VAN ZYL N.O.

Second Respondent

HEARD ON:

25 NOVEMBER 2004

JUDGMENT:

VAN DER MERWE J

DELIVERED ON:

9 DECEMBER 2004

[1] These are civil proceedings for contempt of court based on alleged failure or refusal by respondents to comply with orders of the magistrate's court, Bloemfontein.

[2] During September and October 2002 the applicant and C.I.T.I. Trust No. IT1268/02 ("the trust") entered into 45

separate instalment sale agreements in respect of 45 trucks, truck tractors, trailers and motor vehicles. It is admitted by respondents that the applicant is the owner of all but one of these 45 vehicles. Applicants allege that the trust breached each of the aforesaid instalment sale agreements by failing to punctually pay the monthly instalments in terms thereof. The applicant says that on 9 September 2004 the total indebtedness of the trust in respect of the instalment sale agreements amounted to R10 346 282,36 and that at that date the trust was in arrears with payment of monthly instalments in the amount of R1 002 073,92. As a result, so applicant states, it cancelled each of the instalment sale agreements as it was entitled to do. These averments are denied by respondents.

- [3] It is common cause however that the applicant issued summons out of the magistrate's court for the district of Bloemfontein in which is claimed *inter alia* the confirmation of the termination of each of the aforesaid instalment sale agreements, consequent return of the vehicles owned by the

applicant, damages to be proved and ancillary relief. The action is defended by respondents. In terms of clause 10 of each of the instalment sale agreements the applicant approached the magistrate's court for the district of Bloemfontein on an urgent basis and ex parte for an interim attachment order in respect of all the vehicles in question. Such order was granted on 28 September 2004. In terms of the order of 28 September 2004 a *rule nisi* operating as interim order and with return date 28 October 2004 was issued calling upon the respondents to show cause why an order of attachment and safekeeping in respect of the vehicles pending the applicant's action for return of the vehicles, should not be made. In terms of the order the return date thereof could be anticipated by the respondents upon giving 12 hours notice to the applicant.

- [4] On 30 September 2004 the deputy sheriff of Bloemfontein served the order as well as the application papers on both first respondent and second respondent at the principal place of business of the trust. According to the return of service of

the deputy sheriff, he was informed by both first respondent and second respondent that all the vehicles were outside of the jurisdiction of the deputy sheriff as they all were utilized countrywide at the time. The deputy sheriff therefore was unable to attach or remove any of the vehicles. Both respondents however undertook to immediately see thereto that the vehicles be brought within the area of jurisdiction of the deputy sheriff for purposes of attachment. This, also according to the return of service, was never done.

- [5] On 4 October 2004 the respondents filed a notice in terms of which the return date of the rule *nisi* dated 28 September 2004 was anticipated. As a result, on the morning of 5 October 2004, the attorney of the applicant instructed the deputy sheriff not to proceed with the execution of the order pending the outcome of the hearing on the anticipated return date. This hearing took place on 5 October 2004. Judgment was reserved. Judgment confirming the rule *nisi* was handed down on 14 October 2004. On the same day, a notice of appeal in terms of which it is purported to note an

appeal against the judgment of 14 October 2004, was filed on behalf of the trust.

- [6] On the morning of 15 October 2004, the deputy sheriff again attended the place of business of the trust. There he met only the first respondent. The deputy sheriff enquired from the first respondent in respect of the whereabouts of the vehicles and also informed him that he had been instructed to lay criminal charges if the vehicles are not made available for attachment immediately. The first respondent then telephoned his attorney who subsequently himself spoke to the deputy sheriff. The deputy sheriff was informed, apparently on the strength of the notice of appeal, that the vehicles would not be made available for attachment and that the applicant is welcome to lay such criminal charges. According to the return of service of the deputy sheriff, he went by the place of business of the trust everyday thereafter until 19 October 2004 at 13H00 and on all these occasions none of the vehicles were at the premises of the trust. It is common cause that none of the vehicles were made

available for attachment to date and none were attached.

[7] First respondent's only complaint in respect of the abovementioned matters mentioned in the return of service is that it constitutes hearsay evidence. This complaint is devoid of any merit in view of the provisions of section 17 of the Magistrates' Courts Act, No. 32 of 1944 which section provides that the return shall be *prima facie* evidence of the matters therein stated.

[8] The application in this Court was brought on an urgent basis whereafter it was postponed by agreement to 25 November 2004. It was not disputed that the application was properly brought as a matter of urgency.

[9] It is convenient to deal at the outset with the position of the second respondent. Second respondent was cited in the application in the magistrate's court solely in the capacity of trustee of the trust, as was first respondent. It is clear therefore that the application was brought and the orders in the magistrate's court granted against the trust, naturally represented by its trustees. In the answering affidavits it is

stated that although second respondent previously was a trustee of the trust, since 8 July 2002 first respondent was and still is the sole trustee of the trust. This is confirmed by the letter of authority issued in terms of the provisions of the Trust Property Control Act, No. 57 of 1988 by the Master of this Court on 8 July 2002. This document forms part of the annexures to the founding affidavit. It is stated by first respondent that when the instalment sale agreements were entered into, he was mistakenly under the impression that the second respondent was still a trustee of the trust. The evidence in the replying affidavit in respect of the alleged participation of second respondent in the affairs of the trust is vague in the extreme. In any event the applicant cannot be allowed to make a case against second respondent in reply. It follows that in the circumstances the orders of the magistrate cannot be regarded as orders granted against second respondent. Also, accepting that second respondent also gave an undertaking to the deputy sheriff to assist in making the vehicles available, it has not, in my judgment, been shown by the applicant that second respondent caused

the trust to disobey the orders against the trust.

[10] It is clear from what is stated above that the orders in question were granted against the first respondent, being the sole trustee of the trust and that first respondent was served with the orders and/or informed of the grant thereof. It is also clear that first respondent did not in any way comply with any of the orders. Nevertheless, the committal of first respondent for contempt of court was resisted, on three main grounds. Counsel for first respondent submitted in the first place that this Court has no jurisdiction to entertain proceedings for committal for contempt of court in respect of orders made by another court, such as the magistrate's court. In the second place it was contended that the notice of appeal filed on 14 October 2004, suspended the order of confirmation of the rule *nisi* and that therefore, thereafter no order was in operation and consequently no order could be disobeyed. In the third place, in the alternative, it was submitted that disobedience of the orders by first respondent was not wilful or *mala fide*. I deal with these contentions in turn below.

[11] In support of the argument that this Court has no jurisdiction to make an order of committal of a respondent to prison for civil contempt in respect of the order of another court, counsel for first respondent relied on the decision in **WRIGHT v ST MARY'S HOSPITAL, MELMOTH AND ANOTHER** 1993 (2) SA 226 (D & C). In this judgment, Magid J held that the High Court has no jurisdiction to make an order for committal to prison for contempt of court in respect of disobedience of an order of the then industrial court. Magid J also held that the industrial court itself had the power to do so. In **FOOD AND ALLIED WORKERS UNION v SANRIO FRUITS CC AND OTHERS** 1994 (2) SA 486 (T), De Klerk J disagreed with the finding that the industrial court had the power to entertain proceedings for committal for contempt of court in respect of failure to comply with its orders. He however held that he considered this finding in the **WRIGHT**-case to be an *obiter dictum* but that for the reasons given in the **WRIGHT**-case, the High Court had no jurisdiction to make orders for committal for contempt

of Court in respect of failure to comply with an order of the industrial court. In **FOOD AND ALLIED WORKERS**

UNIONS v SCANDIA DELICATESSEN CC AND ANOTHER

1999 (3) SA 731 (D & C) Page J found it unnecessary to decide the issue of the power of the industrial court to commit for civil contempt of court and found that for the reasons stated in the **WRIGHT**-case and the **SANRIO FRUITS**-case the High Court had no jurisdiction to issue a committal order for contempt of an order of the industrial court. In an unreported judgment of this Division subsequently brought to my attention by the applicant's attorney of record with the consent of his colleague for respondents, namely the case of **PIEK v AMSTRONG**

AND ANOTHER, Appliation No.: 800/2000, Malherbe J, as he then was, declined to follow the conclusion in the **WRIGHT**-case in respect of an order of the magistrate's court. However, I consider the matter to have now been settled by the judgment of the Constitutional Court in the matter of **BANNATYNE v BANNATYNE (COMMISSION FOR GENDER EQUALITY, AS AMICUS CURIAE)** 2003 (2)

SA 363 (CC).

[12] The **BANNATYNE**-case dealt with contempt of court consisting of failure to comply with an order for payment of maintenance made by a maintenance court. A maintenance order is of course regarded as an order *ad factum praestandum*. My understanding of this judgment is that the High Court, as an incident of its ordinary jurisdiction, has a discretion to enforce the judgment of another court by civil proceedings for committal for contempt of court. The High Court will exercise this discretion when it is warranted by what was referred to as good and sufficient circumstances. What constitutes good and sufficient circumstances in any particular case will to a large extent, but to my mind not exclusively, depend on whether or not effective alternative remedies are available to protect the right in question. In my judgment therefore, the first submission on behalf of first respondent stated above, must fail.

[13] When the rule *nisi* was confirmed on 14 October 2004, the initial order of 28 September 2004 had served its purpose. There is no doubt however, in my view, that the confirmation order of 14 October 2004 is an interlocutory order. This order expressly serves as an *interim* or *pendente lite* attachment order pending the outcome of the action instituted by the applicant for the return of the vehicles. Such order is not appealable. See Jones & Buckle, **The Civil Practice of the Magistrate's Courts in South Africa, 9th Edition, Vol. 1**, page 350. Counsel for first respondent, as I understood him, did not seriously dispute that the order in question is not appealable but argued that filing of the notice of appeal nevertheless had the effect of suspension of the order of 14 October 2004. This argument is unacceptable. It is correct that in terms of the common law a judgment or order of a magistrate's court is automatically suspended by a noting of an appeal against that judgment or order. This rule however, in my judgment, pre-supposes a valid notice of appeal or appeal. See by analogy the decisions of **MODDER EAST SQUATTERS AND ANOTHER v**

MODDERKLIP BOERDERY (PTY) LTD [2004] 3 ALL SA
169 (SCA) para. [46] and **ABSA BANK LIMITED v OLIVIA**
PROPERTIES **1999 (4) SA 554 (W)** in respect of High
 Court Rule 49(11). As the order in question is not
 appealable, there is no valid notice of appeal and no valid
 appeal and therefore the order of 14 October 2004 was not
 suspended.

[14] The third contention referred to above requires a
 consideration of the applicable onus and standard of proof.
 In the pre-constitutional era it was settled law that in civil
 proceedings for committal to prison for contempt of court an
 applicant has to show on a balance of probabilities that an
 order was granted against the respondent, that the
 respondent was either served with or properly informed of
 the grant of the order against him and that the respondent
 either disobeyed the order or neglected to comply with it.
 Once these matters are shown, the onus is on the
 respondent to show that his disobedience was not wilful for
mala fide. This is an onus proper and not a mere evidential

presumption; therefore it must be satisfied by the respondent on a balance of probabilities. See for instance **NOEL LANCASTER SANDS (EDMS) BPK v THERON EN ANDERE** 1974 (3) SA 688 (T) at 691 and **CULVERWELL v BEIRA** 1992 (4) SA 490 (W) at 493 E. These principles were confirmed by the Appellate Division in **PUTCO LTD v TV & RADIO GUARANTEE CO (PTY) LTD** 1985 (4) SA 809 (A) at 836 D – E.

- [15] In **UNCEDO TAXI SERVICE ASSOCIATION v MANINJWA AND OTHERS** 1998 (3) SA 417 (EC) Pickering J reconsidered these principles in the light of the Constitution of the Republic of South Africa, Act No. 108 of 1996. He concluded that the practice of bringing summary proceedings by way of notice of motion in respect of civil contempt of court is not unconstitutional. However it was held that it is unconstitutional to deprive a person of his/her liberty for contempt of court on proof merely on a balance of probabilities and that it is unconstitutional to place an *onus* upon the offender. It was therefore concluded that in motion

proceedings in respect of contempt of court the guilt of the offender must be proved beyond reasonable doubt. In a further decision emanating from the Eastern Cape,

UNCEDO TAXI SERVICE ASSOCIATION v MTWA AND

OTHERS 1999 (2) SA 495 (EC), this judgment was followed. It was also held in accordance with general principles applicable to proof beyond reasonable doubt, that when it was shown that an order was granted against the respondent, that the respondent was served with the order or informed thereof and that the respondent disobeyed the order or neglected to comply therewith, that would generally constitute *prima facie* proof of wilfulness and *mala fides* on the part of the respondent. Such *prima facie* proof places an evidentiary burden (“weerleggingslas”) on the respondent to disturb the *prima facie* case. If the evidence of the respondent raises a reasonable doubt as to wilfulness or *mala fides*, the respondent must be found not guilty. If however for whatever reason the *prima facie* case in this regard is not disturbed, the respondent may be convicted.

[16] I respectfully agree with these decisions. To my mind it is of vital importance for the proper administration of justice that the remedy of civil proceedings in respect of contempt of court remains available. However, in my view the decisive factor is that a respondent committed for civil contempt of court is punished because he or she had been convicted of the crime of contempt of court. This is clear from *inter alia* the judgment in the case of **S v BEYERS** **1968 (3) SA 70 (A) at 80**. In terms of the provisions of section 35(3)(h) of the Constitution a person may only be convicted upon proof beyond reasonable doubt. It is in conflict with section 35(3)(h) of the Constitution to convict a person upon a mere balance of probabilities and to place a so-called reverse *onus* on that person. In my view it is also not reasonable and justifiable to limit the rights of the offender in terms of section 36 of the Constitution. It does not matter, in my judgment, whether the proceedings that led to conviction for contempt of court were instituted by the State or by a private citizen. This is in my view *inter alia*

Illustrated by the fact that in a private prosecution in terms of section 7 of the Criminal Procedure Act, No. 51 of 1977, the *onus* and standard of proof do not differ from those applicable to a prosecution by the State. Contempt of court is in the first place the business of the courts. And the courts have wide powers to obtain further evidence if required by considerations of justice. It follows that I respectfully disagree with the contrary conclusion reached in **LAUBSCHER v LAUBSCHER 2004 (4) SA 350 (T)**.

- [17] It must therefore be decided on the facts whether it is established beyond reasonable doubt that the first respondent is guilty of contempt of court in respect of any of the aforesaid orders of the magistrate's court. For this purpose the period from the morning of 5 October 2004, when the attorney for the applicant instructed the deputy sheriff not to proceed with the execution of the order of 28 September 2004 pending judgment on the application in respect of the hearing on the anticipated return date, until 14 October 2004, when the said judgment was delivered, will be

excluded from consideration. In respect of the non-compliance with the order between 30 September 2004 and 4 October 2004 the starting point is that the first respondent undertook to make the vehicles available to the deputy sheriff for attachment. In his answering affidavit first respondent dealt with his failure to comply with the order during the period in question virtually in one sentence, simply saying that during that period all the vehicles were out of town. No explanation whatsoever was given as to why none of the vehicles returned to the place of business of the trust or as to why of the drivers of the vehicles could not be contacted to so return. The evidence of the first respondent in this regard is so cryptic and seriously unconvincing that it cannot in my judgment be regarded as reasonably possibly true. Regarding the period since 14 October 2004 consideration must be given to the fact that the notice of appeal was delivered on that date and whether that fact raises a reasonable doubt in respect of whether the disobedience of the order was wilful and *mala fide*. The difficulty here however is that the first respondent simply

nowhere stated or said that he at the time had been advised by his attorney that the notice of appeal suspended the order of 14 October 2004 and that therefore first respondent was not obliged to comply and that he believed such advice to be correct. The stereotyped expression in the answering affidavit, nl. “Ek is geadviseer ...”, does not assist the first respondent in this regard. For all I know, on the evidence of the first respondent his attitude at the time may have been that he does not care what his attorney does but he will not comply with the order. There are in fact several indications from the conduct of the first respondent and the tenor of his answering affidavit that the first respondent had no intention to comply with the order. This includes the fact that apparently from 15 October 2004 to 19 October 2004 none of the vehicles attended the premises of the trust. In these circumstances I do not believe that I should speculate in respect of something that the first respondent could easily have said. In my judgment therefore, it is established beyond reasonable doubt that the first respondent is guilty of contempt of court in respect of both the orders of 28

September 2004 and 14 October 2004.

- [18] What remains to consider is whether I should nevertheless in the exercise of my discretion refuse to deal with the first respondent. The magistrate's court, being a creature of statute, has no power to entertain civil proceedings for contempt of court. It is correct that in terms of section 106 of the Magistrate's Court's Act, No. 32 of 1944 first respondent may be prosecuted for the criminal offence created by that section. In the founding affidavit it is stated that for the applicant to lay criminal charges against first respondent will not provide an effective remedy as it will probably take a very long time for criminal proceedings to be finalized. This is not disputed by first respondent and accords with general experience. This is also illustrated by the attitude displayed by the attorney for first respondent to the deputy sheriff in respect of criminal charges. In the meantime however, the trust will continue to use the vehicles in direct contravention of a court order and thereby continually decrease the value thereof and expose the vehicles to risk. In terms of the

instalment sale agreements the trust consented to the jurisdiction of the magistrate's court. I am satisfied that there are good and sufficient circumstances in this case warranting the exercise of my discretion in favour of the applicant.

[19] In its notice of motion the applicant also moved for orders that the orders of the magistrate's court be declared orders of a competent court and that this Court order the respondents to comply with the order of the magistrate's court. In my judgment it is not necessary or proper to make such orders.

[20] The following orders are made:

- 1) First respondent is convicted of contempt of court in respect of the orders granted by the magistrate's court of Bloemfontein on 26 September 2004 and 14 October 2004 under case no. 34346/2004.
- 2) First respondent is committed to prison for a period of

60 days, which order of committal is suspended for a period of 1 year or until finalization of the action instituted by the applicant against the C.I.T.I. Trust in the magistrate's court of Bloemfontein, whichever happens first, on condition that the first respondent complies with the aforesaid order of 14 October 2004 within 10 days of date of this judgment.

- 3) First respondent is ordered to pay the applicant's costs.
- 4) The application against second respondent is dismissed with costs.

C.H.G. VAN DER MERWE, J

On behalf of Applicant: Advocate A Mooij
Instructed by
Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of Respondents: Advocate HJ Benade
Instructed by
Goodrick & Franklin
BLOEMFONTEIN

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