

THE HIGH COURT OF SWAZILAND

S C D
Applicant

And

J P
Respondent

Civil Case No. 2685/2005

Coram

S.B. MAPHALALA - J

For the Applicant

MR. Z. MAGAGULA

For the Respondent

MR. M. XABA

JUDGMENT

(12th October 2005)

[1] This matter has a chequered history and has attracted itself a media frenzy regard to be had to the fact that the Respondent is a man of the cloth being accused of unlawfully abducting a minor child he has with the Applicant in their putative marriage. Presently, the court is concerned with whether Respondent is in contempt of court and if so, what" measure of punishment should be imposed. Before dealing with this aspect of the matter I find it imperative to sketch briefly the history of the matter, for a better understanding of the issues.

[2] On the 21st July 2005, before Matsebula J an order was recorded by consent directing that Respondent deliver to Applicant the minor child N P before the 29th July 2005. The Deputy Sheriff or other duly authorised person be and was directed to attach and deliver to Applicant the minor child. Further, the order was returnable on the 5th August 2005. On that date the matter appeared before Annandale AC J where certain orders were issued and the matter postponed to the 19th August 2005, the rule extended to that date.

[3] On the 12th August 2005, the matter again appeared before Matsebula J and the Respondent was represented by *Mr. Xaba*. By consent an order was then recorded that Respondent be committed to the Matsapha Police Station. However, the execution of that order was stayed until 15th August 2005. The effect of that order was that Respondent be committed to prison for contempt of this court's orders dated 15th July and 21st July 2005, ordering Respondent to deliver to Applicant the minor child and, *inter alia*, restraining and interdicting Respondent from insulting Applicant or entering Applicant's residence or place of work

[4] On the 19th August 2005, the matter appeared before me because Respondent had disappeared and a warrant of his arrest had been issued to no avail, the following order was recorded:

i) The Commissioner of Police or his duly appointed officer are ordered to do all that in their power to apprehend the Respondent, to return the minor child N P to the Applicant. To bring the Respondent to court on 2nd September 2005.

[5] Thereafter, the rule has been extended a number of times, as Respondent had not been apprehended.

[6] The material facts leading to the cause of action between the parties are clearly reflected in the Founding affidavit of the Applicant that the child in question was born of their putative marriage where they lived together as husband and wife since the year 2002 at Usuthu Mission. On the 16th May 2005, the Respondent left Applicant and the minor child to live at his own house at Masundvwini High School. The Applicant then commenced proceedings before this court to have the putative marriage set aside on the basis that it was not conducted lawfully in terms of the laws of the Republic of South Africa where it was purportedly solemnized. On the 15th July 2005, this court granted the Applicant certain orders and reserved the prayer pertaining to setting aside of the putative marriage. On Thursday the 14th July 2005, the Respondent came to Applicant's residence, in her absence and took away the minor child without her consent or without being authorised by an order of court. Thereafter, followed this protracted litigation as outlined in paragraphs [2] to [5] *supra*.

[7] On the 7th October 2005, in the uncontested motion of that day the matter appeared before me for the committal of the Respondent to jail as ordered by the previous pronouncements of this court. The Respondent was also in attendance and it appeared that he had come on his own accord, despite the fact that warrants of his arrest have been issued. *Mr. Magagula* vigorously argued that the court is duty bound to order that the Respondent be committed to jail for a period of five (5) days to mark its disapproval in the way Respondent has until now evaded the law and was thus in contempt of the court's judgments.

[8] *Mr. Xaba* for the Respondent on the other hand advanced an impassioned plea before the court against the imprisonment of his client. He proffered an explanation before the court why Respondent failed to answer as directed by the various court orders. That if the court orders that he be imprisoned that will be self defeating in that Respondent will be in jail and thus further delaying the return of the child who has since been registered with the Department of Home Affairs in South Africa. *Mr. Xaba* further contended that this court should not view this matter vengefully. *Mr. Magagula* on the other hand argued *per contra*.

[9] In this case I have considered the submissions made by *Mr. Magagula* for the Applicant and those by *Mr. Xaba* for the Respondent. It appears to me that the statement made by *Mr. Xaba* that the Respondent need more time to follow certain procedures with the Department of Home Affairs in South Africa does not in anyway explain why Respondent has not answered to the orders of the court. A number of orders of this court have been issued and because of Respondent's status as pastor there was wide coverage of this case in both the electronic and print media from the inception of this case right up to last Friday. The police were alerted to apprehend the Respondent even the highest police officer in the country, being the Commissioner of Police was ordered by the court to arrest the Respondent. The Respondent knew that he was wanted by court in relation to the child. The Respondent chose to ignore numerous court orders and thus acted defiantly.

[10] I agree in *toto* with the submissions made by *Mr. Magagula* that Respondent acted with wanton disregard to the orders of this court and was thus in brazen contempt. It would be inappropriate for this court to apply kid-gloves in such a situation. As much as sending the Respondent to jail may appear to be self-defeating in the circumstances, it is also important for this court to stamp its authority for its orders to be respected, courts do not issue orders in vain. It is for this reason therefore that I have come to the conclusion that as Respondent has openly defied orders of this court and as a consequence committed the criminal offence of contempt, an order that he be committed to jail for a period of 5 days will not be out of place in the circumstances. In this regard I have taken the approach as enunciated by Botha J A in the case of *S v Nel 1991 (1) S.A. 730 (A) at 752 H* (translation) cited at page 201 of *Milton, South African Criminal Law and Procedures, Vol (11) at page 201* as follows:

"The most important function of the imposition of punishment in this case is to enforce the court's authority. There is no room whatsoever for any notion of retribution. There can also be limited scope of reformation: for the most part (leaving aside exceptional cases) the purpose of the punishment which is imposed is to bring the offender to his senses in the very proceedings in which the offence is committed. Deterrence is by the same token often and chiefly directed at getting the offender to refrain from continuing with his contemptuous conduct in the proceedings which are underway. The punishment is not meant to hurt the offender but to bring about an end to the outrage to the court's esteem and authority. The extent of the punishment stays in the background; in the foreground is the esteem and authority of the court; and between the one and the other there is no direct relationship. The authority of the court is too precious to attempt to measure it against any punishment which may be imposed for conduct which harms it...'

recorded: i) ii) iii) result, for the afore-going reasons the following order is accordingly

Respondent be and is hereby to be incarcerated at the Matsapha Central Correctional Prison for a period of 5 days.

The officer in charge of the aforesaid facility ordered to accept the Respondent in his custody for a period of 5 days.

Upon his release, Respondent to comply with the order of the court to restore the minor child to the Applicant within a period of two days and to appear personally to confirm compliance with the said order on 20th October 2005 at 9.30am.

SB MAPHALALA

JUDGE