



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 304/2012

In the matter between:

PHINDILE BHEMBE (NEE DLAKUBI)

Applicant

And

JOHN BHEMBE

Respondent

Neutral citation: *Phindile Bhembe (nee Dlakubi) v John Bhembe (304/2012) [2013] SZH252 (11th November, 2013)*

Coram: M. Dlamini J.

Heard: 23rd August 2013

Delivered: 11th November, 2013

– Application for contempt of court - requirements thereof – applicant to prove non-compliance – respondent to rebut inference of willfulness or mala fide on his part - respondent found to have “thumbed his nose” at the court – guilty.

Summary: The present applicant, who is in person, applied *viva voce* for the respondent to be committed to goal for contempt of this court order dated 3rd May, 2013.

Chronology of events

[1] The applicant filed an application for orders, *inter alia* interdicting the respondent from entering their matrimonial home following a series of violent actions by respondent against the applicant. This interdict was pending a divorce action filed at the Magistrate's court. This court, after hearing *viva voce* evidence, granted the interdict on 3rd May, 2013.

Evidence

[2] The applicant appeared in person before court and prayed for orders of contempt of court following non compliance of the order of 3rd May, 2013 against the respondent. The respondent was represented by his Counsel Mr. S. Jele. Applicant gave evidence under oath as follows:

[3] This Court issued an order interdicting respondent from entering the matrimonial home. However, on the 11th May, 2013 respondent entered the matrimonial home. This was gathered from Bongani Masuku, AW2. It was her evidence that when respondent went home, he was violent towards their son. Invectives were uttered against their son by respondent. She feared that had she been home at that time, judging from respondent's asperity as evidenced from the abusive language against their son, her life would have been in danger. Upon receipt of the information that

respondent was at their matrimonial home, she proceeded to the Manzini Police Station. She was attended by Mr. Mthembu, the desk officer who called the respondent. Respondent obliged. It was her evidence further that respondent did not deny that he went into the matrimonial home. Upon being questioned by the Police, however, respondent then laid a charge against applicant, accusing her of destroying the kraal at the matrimonial home. She disputed such accusation and demanded that respondent be arrested for violating the court order of 3rd May, 2013. The Police advised her to approach this court for an order.

[4] The matter was then postponed from the 22nd May 2013 to 29th May 2013 in order to allow respondent's Counsel to take instructions on the *viva voce* attestation by the applicant.

[5] On the 29th May 2013 respondent's Counsel moved an application to have the proceedings stayed pending appeal as he had since noted an appeal against the judgment of 3rd May, 2013 which led to the order thereof. He further took a *point in limine* to the effect that contempt of court proceedings should be on affidavit.

[6] The court overruled such an objection as baseless in law. That a litigant had noted an appeal was not a licence to violate the orders of the court, moreso when the orders are so meant to prevent violence. It is correct that as a general rule, the noting of an appeal has the effect of staying orders of the court *a quo* unless leave of court is granted ordering otherwise. However, I do not envisage that the general rule applies to matters where violence is in issue. The rational is that violence carries with it an element of crime. A crime is always sanctioned irrespective of whether there is the noting of an appeal or not.

- [7] On the second point, nothing in our procedure calls for contempt of court orders' applications to be on affidavit. Justice is open to all irrespective of whether one lives in a hut or castle. It is sufficient that evidence is tendered under oath and this may be so done either on paper or oral.
- [8] The applicant was cross-examined. It was flatly denied that respondent entered the matrimonial home. Her evidence was challenged as hearsay. She maintained her evidence and indicated that a witness who was present at home will corroborate her evidence. It was put to her that that witness was mistaken. It was further put to her that the order of 3rd May, 2013 did not prevent respondent from going to the matrimonial home but only entering the said home. She maintained that respondent entered into the matrimonial home. The rest of the cross-examination was irrelevant to the issue *in casu*, as it bordered on issues dealt with in the application which resulted in the orders of 3rd May, 2013.
- [9] Bongani Masuku, AW2, identified himself as the person who resides at the parties' matrimonial home. Under oath he informed the court that on 11th May 2013 respondent came to the matrimonial home and instructed him to open the gate. He complied. Respondent went around the yard. This witness decided to inform the applicant and applicant's son through his cellular phone. As he was speaking to Nhlanhla, respondent's son, respondent snatched the cellular phone from him. He insulted Nhlanhla. Respondent tried opening the door of the house but failed as it was locked. He then left, taking with him boots which were lying in the yard when he heard that police were on their way to the matrimonial home from this witness.

[10] This witness was cross-examined at length. It was put to him that respondent wanted his remaining items on the day in question. This witness informed the court that respondent had taken all his belongings before. It was put further that this witness was fabricating the evidence against the respondent because he was not in good terms with him and that he relied on applicant for his maintenance and therefore should he not give evidence in her favour, his interest would be at stake. The witness refuted the same. It was also put to him that Boy would give evidence in favour of applicant to the effect that he never went to the matrimonial home. This witness informed court that Boy would corroborate his evidence.

[11] The applicant closed her case.

[12] On the 1st August 2013, respondent led the evidence of one Richard Vusi Makhundu Bhembe who on oath attested that he was respondent's brother and neighbor to his matrimonial home. In chief, he informed the court that on the 11th May, 2013 he found his brother parked outside the gate of his (respondent) homestead and enquired as to why he did not enter into homeestead. Respondent informed him that he was respecting a court order against him. He noticed the respondent speaking to AW2 as if they were arguing. He witnessed AW2 giving respondent clothing and respondent leaving. He also went home. That was the last time he saw respondent.

[13] Applicant crossed examined this witness. RW1 repeated his evidence in chief. He saw respondent outside the gate speaking to AW2. He was asked whether he saw AW2 speaking to a cell-phone of which he answered in the negative. When asked whether he knew that respondent called Zakhele, he responded in the negative. He was quizzed further as to where he was

when respondent called Zakhele. He informed the court that he was not aware that he had called Zakhele.

[14] I will revert to the cross-examination of this witness later in my judgment.

[15] Respondent took the witness stand. He informed the court on oath that in 11th May, 2013 he left Bhunya and drove to his matrimonial home to collect his work uniform, passport and Nokia box and boots. As the gate leading into his matrimonial home is always locked, he parked at the gate. AW2 approached him. He asked as to the whereabouts of applicant and AW2 informed him that applicant no longer resided at their home. He became angry. AW2 then spoke with his cell-phone. He enquired as to who was on the line. AW2 replied that it was Nhlanhla, his son who was asking as to what respondent wanted. He became very angry on the enquiries by his son. AW2 informed him that applicant was on her way home in the company of police. He waited for their arrival but in vain.

[16] While waiting his brother, RW1 came along. They greeted each other and RW1 enquired what he wanted. He informed him that he was waiting for the Police. RW1 bade him farewell and left for home. He also left. While along the way, he received a call from the police to report to the police station. He obliged. At the police station he was shown the court order issued on the 3rd May 2013 restraining him from his home. He explained that his reason to go home was to get his clothing.

[17] He was cross-examined at length on that he entered the matrimonial home on the day in issue. Respondent closed his defence.

Principles of the law

[18] My duty at this stage is to sift the evidence, putting on the imaginary scale the *facta probanda* and reject *facta probantia*. Their Lordships in **James Ncongwane v Swaziland Water Services Corporation (52/2010) [2012] SZCS 65** at page 29 eloquently stated:

“In this venture, the court is required to first of all put the totality of the testimony adduced by both parties on any imaginary scale. It will put the evidence adduced by the plaintiff on the one side of the scale and that of the defendant on the other side and weigh them together. It will then see which is heavier not by the number of witnesses called by each party, but the quality or the probative value of the testimony of those witnesses.”

[19] The same principle was stated with brevity but clarity in **Orion Hotels (Pty) Limited t/a Pigg’s Peak and Casino v Mag Air CC 20/2010** at page 25 as follows:

“The trial court faced as it was with the two irreconcilable version looked at the credibility and reliability of the witnesses heard as well as the probabilities of the matter.”

[20] In following the above principle, I bear in mind the onus resting upon the applicant in contempt of court charges.

[21] **Van Copenhagen J. in Holtz v Douglas and Associates (O.F.S.) CC Andrerre 1991 (2) S.A. 797 at 798** defined contempt of court emanating from civil proceedings as:

“As an intentional refusal or failure to comply with the order of a competent court.”

[22] **Goldin J. in Haddorn v Haddorn 1974 (2) S.A. 181** of “intention”:

“Where an applicant in proceedings to commit the respondent for contempt of court, in that he has disobeyed an order of court of a nature justifying such punishment, has proved that the respondent has disobeyed the order of court which was brought to his notice, then both willfulness and mala fides will be inferred. The onus is then on the respondent to rebut the inference of mala fides or willfulness on a balance of probabilities.”

Determination

[23] The first enquiry is whether the respondent has disobeyed the court order of the 3rd May 2013.

[24] It is common cause that this court issued an order on 3rd May 2013 interdicting respondent from entering the matrimonial home. It is not in issue that respondent is fully aware of the court order.

[25] The evidence by the applicant is that she received information that respondent was at the matrimonial home from Bongani Masuku, AW2. She reported this incident to the police who summoned respondent. Respondent arrived at the police station. At the police station a number of accusations exchanged between the parties, with applicant blaming respondent for disobeying the court order and respondent accusing her of destroying the matrimonial kraal.

[26] The strained conversation at the police station was confirmed by respondent in his evidence in chief. Respondent informed the court further that he informed the police that he had gone to the matrimonial home to retrieve his clothing. This evidence finds support from DW2 who informed the court that respondent came and said that he wanted a box of cell phone and his uniform. Respondent left carrying his boots.

[27] DW2's evidence is that respondent entered the matrimonial home. He attempted opening the doors of the main house but they were locked. On the other hand, respondent disputes the same. His evidence is that although he went to the matrimonial home, he did not enter. He waited outside the main gate. He called his brother Richard Vusi Makhundu Bhembe, RW1 to corroborate him in this regard.

[28] RW1, in chief, informed the court that he found his brother having parked by the gate. He enquired as to why he was not entering the gate. He said that he was respecting a court order to that effect. It was his evidence that the respondent then left in his presence. However, under cross examination, RW1 informed the court that he left the respondent by the gate and he did not know what transpired thereafter. In his evidence in chief, respondent informed the court that RW1 passed by as he was in his way home. Having exchanged greetings, RW1 asked why he was waiting. He informed him that he was waiting for the police, having been informed by AW2 that police were on their way. Respondent's version was different from one given by RW1 who told the court that respondent informed him that the reason he was by the gate was because he was obeying a court order. The reason for the differing version is clear, RW1's evidence dismally failed the test under cross examination and therefore stands to be rejected.

[29] I now consider the evidence of AW2 and respondent.

[30] AW2's evidence is that respondent entered the matrimonial home and tried opening the doors but only to find that they were locked. He took boots which were in the yard.

[31] Respondent, in chief informed the court that he was subsequently called by the police. He states of the events at the police station:

“I entered the desk officer’s office. There was Mr. Mthembu, who was acting for the desk officer and Sgt. Magagula whereupon applicant produced a court order, the one that I have a copy of restraining me from going home. I explained that I had gone home looking for my items and I only retrieved canvass boots only as the others were locked in.”

[32] This evidence by the respondent is corroborative of that adduced on behalf of applicant by AW2 who was present at the matrimonial home when respondent arrived.

[33] For the above, I find that respondent did enter the matrimonial home.

[34] What remains is to ascertain whether respondent has rebutted the presumption of willfulness as per **Goldin J. in Haddorn** (*supra*). I do not think so.

[35] Respondent explains away his action by informing the court that he went to his matrimonial home to retrieve his items. He did so in total disregard of the court order of which he gave evidence that he has a copy.

[36] The court order of 3rd May 2013 by written judgment gave the reasons why respondent was restrained from entering the matrimonial home. The reasons were that respondent had a violent temper. It is therefore not surprising that this violent temper manifested itself on the 11th May 2013 when respondent was at the matrimonial home. AW2 informed the court that respondent snatched away his cellular phone while he was speaking to respondent's son. Respondent then passed insults against his son. Respondent himself in his evidence in chief informs the court that he became angry while at the matrimonial home upon learning from AW2 that his son was enquiring from AW2 as to what respondent wanted. The evidence by AW2 pertaining to insults hailed against his son were not disputed by respondent. The fears by applicant that but for her absence her person would have been subjected to violence on that day are justified in the circumstances.

[37] The action by the respondent is aggravated by the fact that respondent is a police officer. He is better informed about the importance of respecting court orders. His line of duty entails *inter alia* ensuring that litigants respect court orders. Before he is discharge by his superiors to perform his duties, he voluntary takes an oath to carry out his duties faithfully, honesty and with diligence. Not only do litigants who have such orders in their favour but members of the public as well look up to persons of respondent's office to assist them in ensuring that court orders are complied with. However, in the present case, as submitted by applicant, no sooner had the court issued a court order, respondent violated it. Her Ladyship Justice Agyemang J in **R v Thembela Andrew Simalane Civ. Case No. 234/2002** describe perfectly well respondent's attitude and behavior:

*“...but as a former lawyer (police officer) who should uphold the dignity and integrity of this court, has shown no regard for such. In common parlance, he has “**thumbed his nose**” at the court.”*(bracketing my own and underlining my emphasis)

[38] In mitigation, his attorney prepared a written document indicating contrition. However, when the respondent took the witness stand, what was reduced on paper was completely the opposite. He proved to be a difficult client even towards his attorney. He threw an egg at his attorney’s face, as it were. The court can only sympathise with the learned Counsel Mr. S. Jele and commend him for his diligence and patience. Such circumstances warrant a sentence commensurate to respondent’s class of persons.

[39] In the totality of the above, I enter as follows:

1. Applicant’s application succeeds.
2. Respondent is found guilty of contempt of court and therefore sentenced to:
 - 2.1 payment of a fine to the amount of E10 000.00 within ten (10) calendar days from date hereof, failing which twenty (20) days in custody; and
 - 2.2 a term of imprisonment for a period of 30 days wholly suspended for a period of five years on condition that respondent is not found to have committed a similar offence.
3. Respondent is ordered to pay applicant costs of suit.

4. Registrar is to assist applicant in compiling a taxed bill on costs.

M. DLAMINI
JUDGE

For Applicant : **In Person**

For Respondent : **S. Jeje**

