

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 32/2023

In the matter between:

MALINGA MPUMELELO LUCKY

APPLICANT

And

NOMVULA JOYCE MASANGO

FIRST RESPONDENT

NATIONAL COMMISSIONER OF

POLICE

SECOND RESPONDENT

ATTORNEY GENERAL

THIRD RESPONDENT

Neutral citation : *Mpumelelo Lucky Malinga v Nomvula Joyce Masango
& 3 Others (32/2023) [2023] SZHC 111(29/05/2023)*

CORAM: B.S DLAMINI J

DATE HEARD: 24 March 2023

DATE DELIVERED 29 May 2023

Summary: *Civil Contempt proceedings-An application to hold First Respondent in contempt of Court for failure to comply with Court Order. First Respondent alleging that compliance not possible due to existence of another Court Order in respect of the same property. First Respondent not able to produce the said Court Order relied upon as a defence. Requirements for civil contempt examined.*

Held; *The First Respondent is found guilty of contempt of Court for non-compliance with the order issued in the main matter. First Respondent is to spend 60 days imprisonment at the Sidwashini Correctional Facility.*

JUDGMENT

INTRODUCTION

[1] In the main matter, the Applicant approached this Court and sought the following relief;

- “1. That this Honourable Court dispenses with the normal requirements relating to time limits, manner of service, form and procedure in application proceedings and deals with this matter as one of urgency in terms of Rule 6 of the High Court Rules.
2. That a *rule nisi* be issued calling upon the first respondent to show cause on a date to be determined by this Honourable Court why the prayers set hereunder could [sic] not be confirmed and made final.
3. That the Deputy Sheriff for the District of Manzini with the assistance of the National Commissioner and or any of his subordinates; be directed to attach from the first respondent and or from whosoever may be in possession of the motor vehicle hereunder fully described and the Deputy

Sheriff [shall] keep the said motor vehicle till finalization of the matter..."

- [2] On the issue of non-service of the application prior to the granting of the interim order, the Applicant deposed as follows in the Founding Affidavit;

"The 1st Respondent has demonstrated that she has no regard for the law and due process. If the first respondent was to be served with the application, the first respondent may defeat the relief that I am seeking by disposing of the motor vehicle, hence [I am] moving this application ex parte. The first respondent boasted [boasted] to me that, she knows people that live in the Republic of Mozambique. Motor vehicles have in the past been taken to the Republic of Mozambique or the Republic of South Africa; once a motor vehicle enters Mozambique, it does not come back. I once lost a motor vehicle in Mozambique, and, to date, I have not recovered same."

- [3] Based on the averments made by the Applicant in the Founding Affidavit and, in full knowledge that any of the Respondents can at

any time, anticipate the *rule nisi*, the Court on the 16th January 2023 granted an interim order authorizing the Deputy Sheriff to attach from the First Respondent or from any person the motor vehicle described in the Notice of Motion and to keep same pending finalization of the matter in Court.

- [4] The interim order granted by the Court was duly served on the First Respondent. In terms of the 'Return of Service' filed in Court, it stated by the Deputy Sheriff that;

"...On the 18th January 2023 at 09:15 hours, I proceeded to Fairview Kushi area where I got information that the prescribed motor vehicle is, then on the 19th I duly served both copies upon Nomvula Joyce Masango at her place of resident [residence] situated at Fairview Kushi area personally to the above mentioned, thereof after exhibiting the original and explaining the nature and exigency of the said process. Under the provisions of rule 4 (2) (a) Act No.20/1954 [sic].

Remarks: On the 18th we found the car at her place of resident [residence] but on the 19th the car was no longer there, after serving her with the copies she said she won't deliver the car to me but to Lobamba Police Station because she no longer trusts anyone.

- [5] The failure by the First Respondent to release the motor vehicle to the Deputy Sheriff as per the Court Order prompted the Applicant to institute the present application, namely contempt proceedings.

APPLICANT'S AVERMENTS

- [6] According to the Applicant, the motor vehicle in question was located in the premises of the First Respondent when the Court Order was served by the Deputy Sheriff. These averments are confirmed by the Deputy Sheriff in a confirmatory affidavit. According to the Deputy Sheriff, Silence Gamedze;

“[3] I wish to confirm all the contents in the Founding Affidavit of the applicant herein as for [far] as they relate to me and how I served the Court process upon the 1st Respondent.

- [4] In particular, I wish to confirm that on the 18th January 2023, I located the motor vehicle which forms the subject matter at the residential premises of 1st Respondent. The motor vehicle was locked with chains which make it difficult to move it out without unlocking the chains.**

[5] To avoid damaging the motor vehicle on the 18th January 2023, I opted to telephonically contact the 1st Respondent and requested her to come and unlock the chains and hand over the car keys so that we can execute the Court Order. 1st Respondent requested me to come back with Court papers to serve her on the 19th January 2023. On the 19th January 2023 when serving the 1st respondent with the Court processes, the motor vehicle was no longer where it was parked on the 18th January 2023.

[6] I wish to categorically state that 1st respondent stated that she will not deliver the motor vehicle to me in total disobedience of the Court Order and till to date, 1st respondent still refuses to deliver the motor vehicle.”

FIRST RESPONDENT’S SUBMISSIONS

[7] In response to the averments by the Applicant, the First Respondent disputes that she deliberately refuses to comply with the Court Order. It is alleged by the First Respondent in her Answering Affidavit that;

“[10.2] I humbly submit that, upon being served with the court process I did explain to the Deputy Sheriff that, this Court Order was conflicting with an order that, had been granted

in respect of the very same motor vehicle at Lobamba Circuit Court. Hence I then asked the deputy sheriff to confirm same with the investigator of the matter, Detective Zwane as I was now confused about what was happening.

[10.3] As such the Deputy Sheriff called the Investigator to ascertain about the validity of the Court Order that, was authorizing me to keep possession of the motor vehicle. I do submit that, whilst the deputy sheriff and the investigator were still having their conversation, I then overheard them having a heated exchange of words with the Sheriff refusing to accept validity of the order of the Magistrate Court.

[10.4] In essence I am now in limbo as I am faced with two (2) conflicting orders and the first having not been appealed, reviewed, rescinded and/or set aside.”

[8] In her written submissions, it is submitted by the First Respondent that the existence of two Court Orders in respect of the same motor vehicle makes it impossible for her to comply with the order issued by

this Court. The First Respondent refers to the authoritative writing of Herbstein and Van Winsen , *The Civil Practice of the Supreme Court of South Africa* states as follows at page 817;

“Generally, a person may not refuse to obey an order of the court merely because it has been wrongly made, for to do so would be seriously detrimental, if not fatal to the authority of the Court. But where blind compliance with an obviously invalid order would itself tend to weaken respect for the administration of justice, disobedience of the order cannot be regarded as contemptuous.”

- [9] The First Respondent also referred the Court to the Supreme Court case of *Stanlib Swaziland (Pty) Ltd and Others v Abel Sibandze* Civil Appeal Court Case No: 65/2009 in which it was held that;

“The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed ‘deliberately and male fide.’ 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 could evidence lack of good faith.

These requirements-that the refusal to obey should be both willful and male fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt- accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

[10] The First Respondent accordingly argues that in as much as she is aware of the Court Order, it is not possible to comply with same as there is another order from the Magistrates Court authorizing her to keep possession of the motor vehicle.

ANALYSIS AND CONCLUSION

[11] The Court is required to determine whether the First Respondent is guilty of civil contempt of Court. What is clear from the facts and not disputed is that the First Respondent was served and is aware of the Court Order.

[12] The First Respondent is however arguing that she is justified in ignoring same on account of the existence of the Magistrates' Court Order. The non-compliance by the First Respondent to the Court Order is not founded on the existence of a mistaken belief or some other justification but is founded on an alleged 'invalidity' of the Court Order. This conclusion is found in paragraph 10.4 of the Answering Affidavit in which the First Respondent states;

"In essence I am now in limbo as I am faced with two (2) conflicting Orders and the first having not been appealed, reviewed, rescinded and/or set aside."

[13] The above assertion by the First Respondent gives the impression that the latter is relying either on *lis pendens* or *res judicata* as a defence to the application before this Court. For how else could one either appeal

or review or rescind the Magistrates' Court Order (assuming there is one) unless they were part of those proceedings?

[14] There is no allegation whatsoever in the Answering Affidavit (to the contempt application) that the matter instituted by Applicant is pending or was finalized by the Magistrates' Court or is in any way related to the matter dealt with by the lower court. In the absence of such an allegation, the defence raised on behalf of the First Respondent is off-side and completely lacks merit. Any judgment creditor of the First Respondent is entitled to lawfully attach the motor vehicle in order to fulfil the judgment of the Court.

[15] In **Beauty Build Construction v Muzi P. Simelane and Others** (68 of 2015) [2018] SZSC 30 (24 September 2018), the Supreme Court of Eswatini held that;

“[10] ...It is true, as *Herbstein and Van Winsen* say, “Orders of Court requiring compliance are generally speaking divided into two categories: orders *ad pecuniam solvendam* (ie orders to pay a sum of money) and orders *ad factum praestandum* (ie orders to do or to abstain from doing a

particular act). Not every order of court can be enforced by committal for contempt. The order must be one *ad factum praestandum* before the court will enforce it in that manner...

[11] *Herbstein and Van Winsen* further write;

“Before steps are taken by a judgment creditor to sue out a writ of execution in satisfaction of a judgment in his favour, inquiry must be directed to the point whether the judgment is in a form that admits of enforcement by means of such a writ. If the judgment is one *ad pecuniam solvendam*, namely, one in which the court orders the debtor to pay a sum of money, it is appropriate to seek its enforcement by means of a writ of execution. An order to pay a sum of money by way of damages for breach of contract or delict...are all examples of judgments *ad pecuniam solvendam*...”

[12] “When a judgment is one *ad factum praestandum*, namely an order to perform some act, for example pass transfer, remove an obstruction or vacate premises, the judgment creditor cannot seek its enforcement by the levying of a writ. His remedy is to apply for the committal of the judgment debtor for contempt of court...

The object of proceedings that are concerned with the wilful refusal or failure to comply with an order of court is the imposition of a penalty in order to vindicate the court's honour consequent upon the disregard of its order and to compel performance in accordance with the order...The penalty may take the form of committal to gaol, a suspended sentence or the imposition of a fine. In less serious cases the court may caution and discharge the respondent. (See *Protea Holdings Ltd v Wriwt* 1978 9 (3) SA 865 (W) at 872 E).

“Application should be brought in the court that made the order which the respondent is alleged to have disobeyed...When a High Court entertains civil proceedings for committal for contempt it does so in the exercise of its inherent jurisdiction to ensure that its orders are obeyed.”

- [16] The facts of the present matter are that the First Respondent is fully aware of what the Court Order requires her to do. The First Respondent is represented by a qualified attorney. The order issued by the Court is an interim order and not a final order. The order required that the motor vehicle be removed from the First Respondent, albeit on a temporary basis, and be kept with the Deputy Sheriff pending

finalization of the matter in Court. No substantial prejudice would be have been suffered by the First Respondent at all.

[17] Procedurally, if the First Respondent is unhappy with the interim order, all she had to do was to anticipate the *rule nisi* so that whatever reservation she had could be heard and determined by the Court in the normal manner. All litigants or their attorneys know or ought to know this simple rule. The route chosen by the First Respondent is that she will not comply with the Order issued by this Court. Worse still, in the *Beuty Build Construction case* (supra), the Supreme Court of Eswatini stated in unequivocal terms that in order for a Magistrates' Court Order to be binding upon the High Court, that order must first be registered and recorded as an order of the High Court. Simply put, the High Court cannot be bound by an order of a lower Court.

[18] The Court further notes that the First Respondent relies on hand written notes and has not attached any order in her papers in opposition to the contempt proceedings. The procedure is that a Court Order must be typed, signed by the Civil Clerk of the relevant Court and stamped with an official Court stamp. For all intents and

purposes, there is no other Court Order placed before this Court even if the Court wanted to entertain the First Respondent's stance in the matter.

[19] What therefore is the Court to do in these unfortunate circumstances? If the First Respondent's stance of non-compliance wins the day, the entire matter collapses and the Applicant is left without any remedy. The matter cannot proceed without compliance to the interim order or at the very least, without the interim order being anticipated and set aside. In these circumstances, the Court is left with an egg on its face and is rendered useless. That position is not sustainable and cannot be allowed to persist.


[20] In the circumstances, the Court issues the following orders;

- (a) The First Respondent is found guilty of contempt of Court for the deliberate, willful and intentional disobedience of the Order issued by this Court on the 16th January 2023.**

(b) The First Respondent is hereby sentenced to serve two (2) months' imprisonment at any one of the Correctional Facilities in the country as may be determined by the National Commissioner of Correctional Services.

(c) The National Commissioner of Police is directed to give effect to this judgment within 14 days from the date hereof.

(d) The First Respondent is further directed to pay costs of this application at the attorney and own client scale.



B. S. DLAMINI J

THE HIGH COURT OF ESWATINI

For Applicant: Mr. M. Shongwe (V.Z Dlamini Attorneys)

For the First Respondent: Mr. Jele (Phakathi Jele Attorneys)