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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA09/2021

REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED.

In the matter between:

T C M **APPELLANT**

And

L R M M **RESPONDENT**

JUDGEMENT

MULLER J:

[1] I have had the opportunity to read the judgment prepared by Naude AJ. I do not agree with her that the appeal should be dismissed.

[2] The respondent launched an urgent application in this court for an order to declare the appellant in contempt of court for his failure to comply with a court order

issued on 19 July 2018 in terms of the Maintenance Act, 99 of 1998[1] in the Polokwane magistrate's court. The application succeeded, hence the present appeal to the Full Court of this Division. The appeal is with leave granted by the Supreme Court of Appeal.

[3] The order attached to the papers is barely legible. The appellant was ordered to pay maintenance in the amount of R2 0000.00 per month in respect of each of three children. He was also ordered to pay of the monthly school fees and to pay the medical costs of the minor children to either the service provider or the respondent. The first payment was to be made on 1 August 2018 and thereafter on or before the 7th of each succeeding month into a nominated FNB account [....].

[4] The respondent averred in her founding affidavit that the appellant stopped payment in terms of the maintenance order in September 2019. He launched an application in the magistrate's court on 23 October 2019 to suspend the maintenance order. The respondent opposed the application and delivered her opposing affidavit.[2] The application of the appellant was set down for 16 March 2020 but was postponed until 6 April 2020 due to the unavailability of the magistrate.

[5] It seems as if the respondent did not attend at court on 6 April 2020 because she only learned on 29 May 2020 when she attended court in a custody matter that the application has been postponed until 20 October 2020 due to the lock-down. It was a surprise to her since both the matters were postponed due to the lock-down. The respondent failed to provide details appertaining to the custody matter or whether it has relevance to the pending suspension application of the appellant. She, however, stated that both matters were to be heard simultaneously. She was aggrieved and held the view that the postponement of the application to suspend was at the behest of the appellant to prolong the outcome of the suspension application.

[6] The respondent launched the urgent application a few days later on 5 June 2020. The respondent also explained in her founding affidavit that she has a right as

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[1] Hereinafter "the Maintenance Act".
[2] Both the application and the answering affidavit were annexures in the urgent application thereby incorporating the pending suspension application in the magistrate's court in the urgent application.

the primary caregiver of the children to approach this court on behalf of the minor children after she received a letter of demand from M[....] House school where two of their children are attending school and from P[....] M[....]2 where one child is attending school to settle the accounts failing of which steps could be taken to exclude the children from school. She called upon the court to intervene as expulsion from school might damage the self-esteem and confidence of the children which will cause irreparable harm to them should the unlawful conduct of the appellant continue. The respondent stated that she has no alternative remedy but to approach this court to exercise its inherent powers in the interests of justice since it involved the rights of the minor children.

[7] It is by now settled law that the High Court has inherent jurisdiction to enforce the order of another court, as a process-in-aid, if that court is unable to effectively enforce its order by its own process. It was for the respondent (as the applicant) to make the necessary allegations and to present evidence in the founding affidavit to show that there is a good and sufficient reason for the High Court to exercise its inherent jurisdiction to enforce an order of the magistrate court as a process-in-aid. I find myself in agreement with what was held in Dreyer v Wiebols[3]:

> "The legal position regarding the issue of jurisdiction, briefly, is as follows. Proceedings for committal for contempt of court ought to be brought in the court that made the order which the respondent is alleged to have disobeyed. When a high court entertains an application in civil proceedings for committal for contempt of court, it does so in the exercise of its inherent jurisdiction to ensure that its orders are complied with. Process-in-aid is a remedy by means whereof a court enforces a judgment of another court which cannot be effectively enforced through that court's own process and it is also means whereby a court secures compliance with its own procedure. Although it is sometimes sanctioned by a statutory provision or a rule of court, it is an incident of a superior court's ordinary jurisdiction. It is discretionary remedy that will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that other court which can be used. It was held by the Constitutional Court in *Bannatyne* that

[3] 2013 (4) SA 498 (GSJ).

is for the applicant to show that there is good and sufficient reason for the high court to enforce the judgment of another court. It held that-

> '(w)hat constitutes 'good and sufficient circumstances' warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights [of the applicant]'.[4]

[8] The process-in-aid is a discretionary remedy. In *Bannatyne v Bannatyne* (CGE as Amicus Curiae)[5] the Constitutional Court has re-stated the general rule that:

> "process-in-aid will ordinarily not be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used. However, there may well be instances in which facts of a particular case justify approaching a High Court for such relief."[6]

[9] An applicant must, therefore, make out a proper case in the founding papers to justify the process-in-aid relief. I am ever mindful that it was held in *Titty's Bar and Bottlestore v ABC Garage (Pty) Ltd and Others*[7] that*:*

> "It lies, of course, in the discretion of the court in each particular case to decide whether the applicant's founding affidavit contains sufficient allegations for the establishment of his case. Courts do not normally countenance a mere skeleton of a case in the founding affidavit, which skeleton is then sought to be covered in flesh in the replying affidavit."

[10] The respondent has failed to make out any case that the mechanisms provided by the Maintenance Act was ineffective or less effective in protecting her rights or the rights of their children so that this court must exercise its jurisdiction as a process-in-aid to supplement what was lacking in terms of the Maintenance Act. Nothing was said in the founding affidavit that the respondent has ever attempted to

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[4] Par 9.
[5] 2003 (2) SA 363 (CC).
[6] Par 12.
[7] 1974 (4) SA 362 (T) 369A.

invoke any of the mechanisms provided by the Maintenance Act or that any of the procedures that she indeed invoked proved to be ineffective to protect her rights and the best interest of their children.

[11] The learned Judge has found that it is common cause that the respondent has instituted criminal proceedings.[8] I cannot agree with her finding of fact. The founding affidavit contains no shred of evidence that even remotely suggests that the respondent instituted criminal proceedings against the appellant or that she has invoked any other provision of the Maintenance Act to enforce the maintenance order that proved to be ineffective.

[12] Section 26(1) of Maintenance Act provides:

> "Whenever any person-
>
> (a) against whom a maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or
>
> (b) against whom any order for payment of a specified sum of money has been made under section 16 (1)(a)(ii), 20 or 21 (4) has failed to make such a payment,
>
> such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon-
>
> (i) by execution against property as contemplated in section 27;
>
> (ii) by the attachment of emoluments as contemplated in section 28;or
>
> (iii) by the attachment of any debt as contemplated by section 30."

[13] Section 31(1) provides:

> "Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a

[8] Par 36.

period not exceeding one year or to such imprisonment without the option of a fine."

[14] And section 40 states:

"(1) A court with civil jurisdiction convicting any person of an offence under section 31(1) may, on the application of the public prosecutor and in addition to or in lieu of any penalty which the court may impose in respect of that offence, grant an order for the recovery from the convicted person of any amount he or she has failed to pay in accordance with the maintenance order, together with any interest thereon, whereupon the order granted shall have the effect of a civil judgment of that court and shall, subject to subsection (2), be executed in the prescribed manner.

(2) A court granting an order against a convicted person may-

(a) in a summary manner enquire into the circumstances mentioned in subsection (3) and

(b) if the court so decides, authorise the issue of a warrant of execution against the movable or immovable property of the convicted person in order to satisfy such order.

(3) At the enquiry, the court shall take into consideration-

(a) the existing and prospective means of the convicted person;

(b) the financial needs and obligations of, or in respect of, the person maintained by the convicted person;

(c) the conduct of the convicted person insofar as it may be relevant concerning his or her failure to pay in accordance with the maintenance order and

(d) the other circumstances which should, in the opinion of the court, be taken into consideration,

(4) Notwithstanding anything to the contrary contained in any law, any pension, annuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under an order granted under this section.

[15] Specific reference is made to the relevant sections of the Maintenance Act to highlight what the enforcement mechanisms are which are provided in the Maintenance Act, none of which the respondent attempted to utilize before embarking on an urgent application in this court. Maintenance orders, on the one hand, may be enforced by civil execution which includes execution against property; attachment of emoluments and the attachment of debts. It may, on the other hand, be a criminal offence if a maintenance order is not complied with. Section 40 deals specifically with the recovery of arrear maintenance by the criminal court.

[16] The applicant approached the urgent court simply because she became aggrieved that the application for suspension was postponed. She questioned the propriety of the postponement despite having been informed at court that it was due to the lock-down. She relied exclusively on the best interest of the minor children as the reason why the High Court should come to her aid as process-in-aid to enforce the order of the maintenance court. There was nothing that the appellant could do when the lock-down caused the delay. The lock-down can hardly be accepted as a cause for the failure of the Maintenance Act after the national disaster was promulgated and was put in place to save lives due to an extraordinary global event, if no attempt had been made to enforce the maintenance order by means of the Maintenance Act.

[17] No doubt, the best interest of children are affected when maintenance orders in respect of them are not complied with but that does not, in itself, mean that this court may be approached in every case where the a maintenance order is not complied with, simply on the basis that it is in the best interest of the minor children. An applicant should first endeavour to utilize of the mechanisms provided for in the Maintenance Act to enforce the order. The mechanisms which may be employed to enforce maintenance orders are *prima facie* wide ranging and very effective include a criminal prosecution and a term of imprisonment that may be imposed on those

who failed to comply with the order. In the final analysis the circumstances of each case will ultimately determine when the High Court should come to the aid of an applicant by invoking the process-in-aid remedy. This not such a case.

[18] In my view, the appeal should be upheld and the order granted in the court below be set aside.

ORDER

(1) The appeal is upheld with costs.

(2) The order is set aside and replaced with the following order:

"The application is dismissed with costs."

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GC MULLER J

JUDGE OF THE HIGH COURT OF SA

LIMPOPO DIVISION, POLOKWANE

KGANYAGO J

[19] I have had the pleasure of reading both Muller J and Naude AJ written judgments. I fully agree with the reasoning and outcome of Muller J. But regrettably, I cannot agree with the approach and outcome of Naude AJ. The judgment of Muller J did not deal with the issues of whether the appellant was in contempt of the order of 18th July 2018, and also whether the papers as they stand did not raise a dispute of fact. I am of the view that it is vital that the two issues also be dealt with. Both Muller

J and Naude AJ judgment have correctly captured the background facts of this matter and I am not going to repeat them.

[20] The first issue to be dealt with is whether the papers as they stand did not raise a dispute of fact. It is common cause that the respondent was seeking a final relief and not an interim relief. The respondent in her founding affidavit has attached as an annexure of an application by the appellant in the magistrate court, in which the appellant is seeking to suspend the maintenance order granted on 19th July 2018. The appellant's application was issued on 23rd October 2019 and set down for 13th November 2019 if unopposed. The respondent had opposed the appellant's application, and the matter was set down to be heard on 16th March 2020. On 16th March 2020 the presiding officer who was supposed to hear the matter was not available and the matter was postponed to 6th April 2020. It is common cause that on 26th March 2020 the whole country was put into national lock down due to covid 19 pandemic which had engulfed the entire world.

[21] Due to the national lock down, the matter could not proceed on 6th April 2020. According to the respondent on 29th May 2020, she attended a custody matter in the same magistrate court in which the appellant's application is proceeding and that is when she learnt that the appellant's application has been postponed to 20th October 2020. According to the respondent, the appellant's application and the custody matter application were previously dealt simultaneously and was surprised to hear that the application of the appellant has been postponed to a date in the future. The respondent was therefore of the view that for the appellant's matter to be postponed to 20th October 2020 shows that the appellant was not interested in finalising his suspension of the maintenance order application, and that this was causing a lot of hardship to the minor children. That prompted the respondent to institute the urgent application in the court *a quo*.

[22] The appellant is his founding affidavit in the court *a quo* had submitted that on 19th July 2018 when he consented to the maintenance order, he was unemployed, and he informed the court that he intends to sell some of his motor vehicles, and use a portion of the proceeds of the sale to pay the maintenance. The appellant has further stated that he indeed sold the vehicles and paid an amount of R200 000.00

into the respondent's account in favour of the minor's children's maintenance, as an upfront payment in fulfilment of the maintenance order of 19th July 2018.

[23] The respondent in her answering affidavit in the magistrate court which is also an attachment to the respondent's founding affidavit in the court *a quo*, has conceded that the appellant had sold two of his vehicles after the order of 19th July 2018, and also that after the sale of the vehicles, the appellant had paid R200 000.00 into her account. However, the respondent is disputing that the said payment was a contribution towards payment of maintenance of the minor children. According to the respondent, the amount paid by the appellant into her account was a contribution for a deposit of her vehicle which she had immediately transferred it into BMW Legacy account. The respondent has further stated that the appellant had also made another payment of R400 000.00 which the appellant paid directly into BMW Legacy account as part of his contribution towards the purchase of her car.

[24] The respondent was well aware when she instituted her urgent application in the court *a quo* that a dispute fact was bound to develop in respect of payment of R200 000.00 by the appellant into her account. The appellant in his founding affidavit in the magistrate court has stated that on 19th July 2018 when he consented to the maintenance order he was unemployed. The respondent in her answering affidavit has disputed that the appellant was unemployed. This is another dispute of fact which the respondent was aware that it was bound to develop. The appellant when he paid the R400 000.00, he paid it directly into BMW Legacy, and R200 000.00 into the respondent's account. The question is if both amounts were for the deposit of the respondent's car, why did he pay the other portion directly into BMW's account and the other portion into the respondent's account. The other question is if the appellant was employed, what was the reason for him to sell his cars, and thereafter pay a certain portion into the respondent's account.

[25] It was not part of the maintenance order that the appellant will sell his cars in order to pay maintenance in terms of the order of 19th July 2018. It was also not part of the maintenance order that the appellant was required to buy the respondent a car. It was just a verbal agreement between the parties outside court, and the terms of the agreement does not even appear in the parties' papers. The issues in the

parties' papers are not common, and can therefore not be decided on the papers as the stand.

[26] In *National Director of Public Prosecutions v Zuma*[9] Harms DP said:

> "Motion proceedings unless concerned with interim relief, are about the resolution of legal issues based on common cause of facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings dispute of fact arise on the affidavits, a final order can only be granted only if the facts averred in the applicant's affidavit, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be difficult if the respondent's version consists of bald or uncreditworthy denials, raises fictitious dispute of facts, is implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on papers."

[27] Nuade AJ in her judgment has stated that this payment into the respondent's account was an after-thought defence in order to circumvent the contempt of court application. I disagree with her approach on this aspect. She overlooked what the appellant has stated in his founding affidavit in the magistrate court that when he consented to the order he was unemployed, and that he will have to sell the cars and pay a portion of the proceeds into the respondent's account in order to comply with the court order. Relying on payment of that portion of the sale of the cars which was paid into the respondent's account cannot be said with certainty that it was an after-thought. Whether it is true or not that the said payment was for maintenance of the minor children, can only be cleared by leading oral evidence and not through the papers as they stand.

[28] It is clear that with the papers as they stand, there are genuine and serious disputes of fact which could not be resolved on papers, which the respondent was aware of when she instituted her urgent application. It is trite that an applicant who

[9] 2009 (2) SA 277 (SCA) at 290D-F

elects to proceeds by way of motion proceedings despite being aware that a serious dispute of fact was bound to develop, runs the risk that the application may be dismissed with costs. It is not proper that an applicant should proceed by way of motion procedure with the full knowledge that the dispute of fact might arise. (See *Room Hire Co (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd*[10]. In my view, the court *a quo* should have dismissed the respondent's application on the basis that there are serious and genuine disputes of fact which have developed which could not have been resolved on papers.

[29] The second issue to be decided is whether the appellant was in contempt of the order of 18th July 2018. In *Secretary of Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*[11] Khampepe ADCJ said:

> "As set out by the Supreme Court of Appeal in Fakie, and approved by this Court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once all these elements are established, wilfulness and mala fides are presumed and the respondent bears evidentiary burden to establish a reasonable to doubt. Should the respondent fail to discharge this burden, contempt will have been established."

[30] I have already found that a serious and genuine material dispute of fact had arisen in relation to the alleged advance payment of maintenance by the appellant, and that the issue of advance payment will not be resolved on the papers as stand. If it is found that indeed the appellant's payment of R200 000.00 was for advanced maintenance payment, it follows that at the time of the institution of the respondent's application, the appellant was not in arrears. If indeed the appellant at the time he consented to the order of 18th July 2018 was unemployed, and the basis of him consenting to that order was that he will sell some of his cars and pay a portion of

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[10] 1949 (3) SA 155 (T)
[11] [2021] ZACC 18 (29 June 2021) at para 37

the proceeds into the respondent's account, he did sell the cars and paid a portion into the respondent's account.

[31] This court will not overlook the fact that the appellant had indeed sold some of his cars and split the proceeds of the sale by paying R400 000.00 directly into BMW Legacy account and R200 000.00 into the respondent's account. If the R200 000.00 was also meant to be part of a contribution towards the deposit of the respondent's car, why did the appellant split the amounts whilst he could have paid the whole amount directly into BMW's account. That somehow gives credence to the appellant's allegation that it was meant for maintenance of his minor children. If indeed it was for maintenance, it was reckless of the respondent to have used it as a deposit for her car. However, all these questions will be answered if oral evidence is led and the credibility of the appellant's version is tested through cross examination.

[32] The appellant will not be crucified for despite having made an advanced payment of R200 0000.00, he continued to make other payments and paying school fees for the children until August 2019, which the respondent's viewed as compliance with the court order. If indeed the appellant was unemployed at the time he consented to the maintenance, by making other payments despite having made an advance payment, he was showing to be a responsible father by always being ahead with his maintenance payments, rather than to wait for the R200 000.00 to be depleted before he could make another payment whilst he did not have a stable income. In my view, without this issue of advanced payment being resolved, even though it is clear that an order was granted against the appellant and the appellant was aware of it, it will be difficult to say with certainty that the appellant had failed to comply with that order.

[33] Even if it can be found that the three elements for contempt of court have been met, that is not the end of the matter, the next question to be determined is whether the appellant's non-compliance with the court order was wilful and mala fide. In *Fakie v CCII Systems (Pty) Ltd*[12] Cameron JA said:

[12] 2006 (4)- SA 326 (SCA) at para 9

> "The test for when disobedience of a civil order constitutes contempt has to be stated as whether the breach was committed 'deliberately and mala 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 infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."

[34] What triggered the respondent's urgent application which was issued on 5th June 2020, was that on 29th May 2020 she was at the magistrate court for a custody matter, and that is when she learnt that the appellant's application has been postponed to 20th October 2020, whilst she was under the impression that it was on the same date with the custody matter. There is no evidence that the appellant was involved or had any say in the matter being postponed to 20th October 2020. All along the respondent was content with the appellant's application proceeding in the magistrate court in the manner in which it was proceeding. When the matter was postponed on 16th March 2020, it was due to the unavailability of the presiding magistrate for that matter, and when the matter could not proceed on 6th April 2020, it was due to hard lock down. The respondent could not tell as to which date was matter postponed to when it could not proceed on 6th April 2020, except to state that the appellant's matter was proceeding simultaneously with the custody matter. However, the appellant dispute that there was any custody application that was pending, which fact the respondent had conceded to in her replying affidavit.

[35] It clear that the finalisation of the appellant's application was delayed by the national lockdown which resulted in courts functioning in a skeleton format, and that was the circumstances beyond the control of the appellant. The respondent was opportunistic and mala fide to use that as a ground that the appellant had no interest in finalising his application for suspension of the maintenance order, whilst she knew the true facts as to what was causing the delay, and it was not through the appellant's fault.

[36] I agree with Nuade AJ that if the appellant was disputing the increased school fees, he could at least have paid maintenance in order to show his bona fides and a

true desire to maintain his children an amount equate to what he used to pay at the previous schools. What Nuade AJ has overlooked is that the appellant is not only disputing the increased school fees, he had been paying that for the better part of 2019, but raised affordability and advanced payment as the reasons for his non-payment, hence the application for the suspension of the maintenance order.

[37] Before the appellant stopped paying the school fees, on 1st August 2019 he wrote a whattsup message to the respondent, informing the respondent to apply for admission of the children at government schools as he was not going to afford to pay for them the following year. The respondent response to that message was just to say “noted”. The respondent in her replying affidavit does not dispute receipt of the whattsup message, but state that she was surprised that after their communication breakdown, all of a sudden the appellant can no longer afford. Thereafter the appellant alleges that on 31st May 2019 the appellant bought a BMW X5 M50d-Sport G05 2019 model worth R1 675 731.50. This was before the 1st August 2019, and a person’s financial situation can change at time. It is trite that maintenance of the children is paid according to the means of the party who is liable to pay. In this case the appellant consented to the order whilst allegedly unemployed, and his means of complying with that order was sell some of his cars, of which he did.

[38] When the appellant saw that his circumstances have changed, he brought an application to suspend the order. It can therefore not be said that the appellant was deliberate in failing to comply with the maintenance order, but did not have the means to do so, and also the believe which he had that he had made an advance payment, which according him he was not in arrears. I am alive to the fact that a court of order whether good or bad remain valid and enforceable and need to be obeyed. If indeed the appellant was unemployed, and did not have any source of income, it would have been difficult for him to be up to date with his monthly maintenance payment. To show that he was not deliberate and mala fide in failing to comply with the order, he did not sit on his laurels but brought an application to suspend that order due to changed circumstances. The respondent is opposing the appellant’s application in the magistrate court, and is therefore having an opportunity to test the appellant’s true intentions.

[39] According to the appellant he was ahead with his payment of maintenance, and was therefore under the bona fide believe (whether mistaken or not) that he had made advance payment of maintenance of his minor children up until 2023. The appellant by proving that there is a payment which was paid into the respondent's account which he regards as advance payment, in my view has discharged his evidentiary burden which creates a reasonable doubt. With the reasonable doubt created, in my view, the court *a quo* should have dismissed the respondent's application.

[40] I therefore agree with Muller J that the appeal should be upheld and the order granted in the court *a quo* be set aside, and that application be dismissed.

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KGANYAGO J

JUDGE OF THE HIGH COURT OF SA

LIMPOPO DIVISION, POLOKWANE

NAUDE: AJ (DISSENTING)

[41] **To pay the piper…or not?** This is an appeal to the full Court of this Division against the judgment and order of Phatudi J dated 23 June 2020. This appeal is with leave of the Supreme Court of Appeal.

[42] The Respondent issued an application for contempt of a maintenance order granted by the Maintenance Court on 19 July 2018. The order for maintenance was granted by consent by the Appellant.

[43] After the parties' separation, the Respondent brought an application for maintenance of the parties' three minor children, and the Appellant brought an application for access and visitation of the minor children. A maintenance order by consent was granted against the Appellant after he consented in terms of Section 17 read with Section 16 of the Maintenance Act 99 of 1998.

[44] The Maintenance order, which is the subject herein, stipulates that the Appellant is to pay an amount of R2000,00 per month per child maintenance, of which the first payment is to be made on 01 August 2018 and thereafter on or before the seventh day of each succeeding month to an FNB Cheque Account, Account No [....]. In addition the Appellant is to pay the monthly school fees payable to "The Learning Mill Pre-School" and "The Kids Kingdom, Polokwane" and also to pay medical costs of the minor children including medication directly to the service provider or Respondent, preferably Dr. Nchabeleng.

[45] Since the maintenance order was granted, the Respondent proceeded to close her FNB Cheque account. The minor children have also changed schools, however, according to the Respondent, the Appellant paid the children's school fees at their respective new schools in full for the year 2019, being M[....] House for two of the minor children and P[....] M[....]2 for the remaining minor child.

[46] The Appellant without any court order varying the maintenance order of 19 July 2018, stopped paying the maintenance of the minor children during September 2019. The Appellant, on the 23rd of October 2019, brought an application to suspend the aforesaid maintenance order granted against him. The Respondent opposed the application for variation of the maintenance order. The matter was set down for 16 March 2020, but was then postponed to 6 April 2020. On 6 April 2020, the matter could not proceed due to the National Covid-19 Lockdown and was once again postponed to 20 October 2020.

[47] The Respondent submitted in the court *a quo* that the Applicant is in arrears with payment of maintenance in the amount of R60 000.00 and school fees and school books in the amount of R64559.00 in respect of P[....] M[....]2 for the academic year of 2020 and an amount of R78401.50 in respect of M[....] House for

the academic year of 2020. The Respondent further submits that L[....], one of the minor children, is placed on her mother's medical aid due to his ill health, to which her mother contributes R1323.00 per month.

[48] The Appellant in his answering affidavit in opposition to the Respondent's application for contempt of court submitted that he is maintaining the minor children despite the court order being invalid. He submitted that he has paid the minor children's maintenance in advance up to the year 2023.

[49] The Appellant further submitted that the Respondent's application lacks good and sufficient reasons, and/or circumstances to justify the High Court in exercising its discretionary powers, to adjudicate the application for contempt of court. It was submitted that the High Court's powers to act as process-in-aid or adjudicate on contempt of court for an order made by the Maintenance Court is regulated by Section 169 of the Constitution of South Africa, 108 of 1996 read with the Maintenance Court Act, 99 of 1998 – there must be compelling reasons to do so.

[50] According to the Appellant the Respondent has not established that the statutory remedies available in the Maintenance Court have been fully and diligently pursued and proved to be ineffective. The Appellant submitted that the Respondent has failed to show good and sufficient reasons and/or circumstances which warrant the High Court to enforce the judgment of the Maintenance Court as required.

[51] In addition to the above defences, the Appellant submitted that the application for contempt of court in the High Court constitutes *lis alibi pendens* in that the Respondent has opened a case against the Appellant in the Magistrate's Court to which he has received a summons in a criminal case for failure to pay maintenance, requiring him to appear before the Magistrate's Court on 25 March 2020 on the same cause of action based on the same facts, which case has since been postponed for investigations and is still pending before the Magistrate's Court.

[52] The Appellant in opposition to the application for contempt of court raised another *point in limine* in that the Respondent failed to comply with the legal principles relating to seeking an order declaring the Appellant to be in contempt of the order and for his committal. In respect of this defence, the Appellant submitted

that the Respondent seeks to enforce a maintenance order, which order orders the Appellant to pay an amount of R6000.00 maintenance per month in favour of the Applicant, towards the maintenance of the three minor children to the following account number: FNB, Cheque Account, Account Number [....]3.

[53] The Appellant submitted that the aforementioned account number is invalid and/or does not exist and it is therefore impossible to comply with the aforementioned court order in respect of the payments therein.

[54] It was further submitted by the Appellant that the court order states that he should pay monthly school fees to the Learning Mill Pre-School and the Kids Kingdom, Polokwane and to pay the medical costs of the minor children, including medication directly to the service provider, or Applicant, preferably Dr. Nchabeleng. The Appellant submits that the minor children are no longer enrolled at the aforementioned schools and therefore the Appellant is no longer under a duty to pay school fees to the abovementioned schools as the minor children have no accounts in the aforementioned respective schools. The Appellant submitted further that the court order has become null and void and is he therefore no longer under a duty to pay school fees. It should be noted that the Appellant admits to having failed to pay the minor children's school fees in paragraph 25 of his answering affidavit.

[55] In respect of the medical costs, the Appellant submitted that he does not owe any outstanding medical costs to Dr. Nchabeleng. The Appellant submits that he has not been approached by the Respondent to reach an agreement to use any alternative medical services and he has not consented to the use of any other medical service provider.

[56] The Appellant raised yet another *point in limine* in respect of the medical aid contributions made by the Respondent's mother on behalf of the minor child, L[....]. The Appellant submits that the Respondent does not have *locus standi* to bring an application for reimbursement on behalf of her mother and he has no agreement with the Respondent's mother in respect of the payment of the medical aid contributions on behalf of L[....].

[57] It should be noted that despite the Appellant's submissions as stated here above that it is impossible to comply with the maintenance court order in that the banking details as stated in the order has changed, in paragraph 13 of his answering affidavit he submits that he has paid the maintenance of the minor children in advance to the Respondent's other bank account (ABSA Bank Account) and attaches proof of payments made to the said bank account.

[58] It should further be noted that the Appellant submits that he has requested the Respondent to remove the children from their current schools as he cannot afford to pay their school fees and has requested her to enroll the minor children in government schools, yet, the Respondent has not made any payments towards the minor children's school fees. He has not even paid a lessor amount equate to the previous school fees he paid or that of government schools. In his preceding paragraphs of his answering affidavit he stated that he does not have to comply with the court order as it has become null and void.

[59] In reply the Respondent submitted that the Appellant stated that he had paid maintenance in advance up until 2023, but he fails to inform the court how he calculated that he paid maintenance up until 2023. The Appellant merely attached a statement to his answering affidavit wherein it is reflected that he has paid R315615.00 maintenance in advance. According to the Respondent, the Appellant in his founding affidavit filed in the Magistrate's Court, attached to her founding affidavit in her application for contempt of court in the *court a quo a*s annexure "LRMM2" at paragraph 5.9 stated as follows:-

> *"The total for payments made to date for maintenance is R350 900.00, of these payments only R54 000.00 was due for maintenance to date (25 September 2019). The amount in excess is R296 900 and my intention in so doing was to ensure that I am always ahead of my monthly contribution to the children's maintenance as my source of income is uncertain."*

[60] According to the Respondent the relationship between her and the Appellant improved after the granting of the maintenance order on 19 July 2018. The Appellant came to her work place and even referred his friends to buy cars from her.

One day when the Appellant visited her at work, she showed him one of the vehicles she was interested in, it was a BMW320d. The Appellant then replied and said to her to look into something more her and told her that he will assist her with a deposit to buy a car that she want.

[61] The Appellant requested the Respondent to sell his Range Rover. The settlement on the Range Rover was approximately R433 000.00 and the Range Rover was sold for R820 000,00 to a dealership. The Appellant sold his Ford Ranger as well to the dealership. On 19 December 2018, the dealership deposited the first R200 000.00 into BMW Legacy's account. On the 22nd of February 2019, the Appellant paid into the Respondent's account an amount of R200 000.00 which she immediately transferred into BMW Legacy's account. On 11 March 2019, Iscars dealership paid a sum of R200 000.00 into BMW Legacy's account. On 20 March 2019, the Appellant also gave her R10 000.00, R24 000.00, R1000.00 and R15 000.00 in order to make up for the total remaining deposit of R97611.00 towards the conclusion of her new motor vehicle deal. All these amounts were deposited in one day by the Appellant. These amounts were in order to assist the Respondent to buy a new vehicle and not for maintenance.

[62] It is submitted that despite the Appellant having made the aforementioned payments, he continued to pay maintenance into the Respondent's ABSA Bank Account in respect of the three minor children until August 2019. If the amounts deposited by the Appellant as stated here above was in respect of maintenance as alleged by him and not for a vehicle for the Respondent as agreed between the parties, why would he continue to pay his maintenance?

[63] The issues for determination by this court are in short as follows:-

(a) Whether Section 169(1)(b) of the Constitution of South Africa, Act 108 of 1996, read with the Maintenance Act, Act 99 of 1998 permits the High Court to deal with contempt of court for enforcement of a maintenance order granted by a Maintenance Court, as a first step to enforce compliance with the maintenance order where the Respondent has not exhausted the remedies provided in the Maintenance Act, 99 of 1998, in the alternative

whether the High Court has jurisdiction to enforce maintenance orders through contempt of court proceedings where the Maintenance Court since failed to enforce its order/the maintenance order.

(b) Whether the Respondent was entitled to institute contempt of court proceedings against the Appellant for non-compliance with a maintenance order whilst there are pending criminal procedures and a summons against the Appellant in the Maintenance Court for the same cause of action.

(c) Whether the Respondent complied with the legal principles and/or requirements for contempt of court in that whether the Court order dated 19 July 2018 constitutes a valid and enforceable court order considering the changed circumstances and whether such variation is enforceable by contempt of court proceedings, wherein the children's best interests are of concern.

[64] The first question to be determined is whether the High Court has the necessary jurisdiction or power to enforce a maintenance order of the Maintenance Court through contempt of court proceedings.

[65] **Section 169(1) of the Constitution** of South Africa stipulates as follows:-

"The High Court of South Africa may decide-

(a) …

(b) Any other matter not assigned to another court by an Act of Parliament."

[66] The Appellant submits that the High Court's power to enforce maintenance orders is restricted by **Section 169(1)(b) of the Constitution of South Africa, Act 108 of 1996,** read with Section 3 and Chapter V (Section 26 and 30 of the Maintenance Act, 99 of 1998. It was submitted that the High Court may only usurp its inherent jurisdiction to enforce maintenance orders under exceptional circumstances.

[67] The Constitutional Court in the case of **Bannatyne v Bannatyne and Another (CCT18/02) [2002] ZACC 31; 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) (20 December 2002) at para 1** stated as follows:-

> *"The applicant applied for special leave to appeal to this Court on the basis that, in its finding regarding when a High Court is competent to make an order for contempt, the SCA failed to take into consideration and give due weight to section 28(2) of the Constitution which requires that the best interests of the child be given paramountcy in all matters affecting children."*

[68] The Constitutional Court at **para 18 of Bannatyne v Bannatyne *supra*** held as follows:-

> *"Although money judgments cannot ordinarily be enforced by contempt proceedings, it is well established that maintenance orders are in a special category in which such relief is competent.*[16] *What is less clear is whether it is competent for a High Court to make an order for contempt of court for the failure to comply with an order made by a magistrate's court. This question was left open by the SCA in this case. While it was willing to assume that the High Court had such jurisdiction, it concluded on the evidence that the applicant had not pursued her remedies under the Act "fully and diligently" and that there were accordingly insufficient grounds for the High Court to have made the order that it did."*

[69] The circumstances in which a High Court should exercise its inherent jurisdiction was fully dealt with by **Mokgoro J** in **Bannatyne v Bannatyne *supra* at para 19-21. Mokgoro J** stated as follows:-

> *"[19] In terms of Section 8 of the Constitution the judiciary is bound by the Bill of Rights. Courts are empowered to ensure that constitutional rights are enforced. They are thus obliged to grant "appropriate relief" to those whose rights have been infringed or threatened. In **Fose v Minister of Safety and Security Ackermann J** said:*

". . . I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal." (Footnote omitted.)

[20] There is however no need to forge new remedies permitting the High Court to enforce a maintenance order made by the maintenance court. Process-in-aid is an appropriate remedy for this purpose. It is the means whereby a court enforces a judgment of another court which cannot be effectively enforced through its own process. It is also a means whereby a court secures compliance with its own procedures. Although process-in-aid is sometimes sanctioned by a statutory provision or a rule of court, it is an incident of a superior court's ordinary jurisdiction. Contempt of court proceedings are a recognised method of putting pressure on a maintenance defaulter to comply with his/her obligation. An application to the High Court for process-in-aid by way of contempt proceedings to secure the enforcement of a maintenance debt is therefore appropriate constitutional relief for the enforcement of a claim for the maintenance of children.

[21] This does not mean that High Courts can be seized of all claims for maintenance. Process-in-aid is a discretionary remedy. In ***Troskie v Troskie*** *the court dealt with the question of whether it should exercise a discretion which it had under the rules of court as they then existed, to conduct an enquiry into the financial position of a person who had failed to make payment in terms of a maintenance order and to grant appropriate relief in*

the light of such examination. In developing the test for the exercise of the discretion, ***Trollip J*** *said the following:*

"Now the important factor relating to the exercise of such discretion by the Court is the existence of the Maintenance Act, 23 of 1963, as amended by Act 19 of 1967. In that Act ample provision is made for the enforcement, and the variation if necessary, of any order for maintenance made by a Supreme Court by the appropriate magistrate's court by means of a simple, inexpensive and effective procedure.

…

Those provisions were obviously designed to expedite and to simplify the procedure relating to maintenance orders, and, above all, to avoid the necessity of the parties having to resort to the far more costly procedure of applying to the Supreme Court for relief. A further object must have been to relieve the Supreme Court from having to deal with the somewhat frequent applications that, in the past, were directed to it to enforce or vary maintenance orders.

It seems to me, therefore, that this Court, in the exercise of its discretion, should not entertain any application under Rule 45(12)(i) to enforce payment of the arrears of a maintenance order, unless there are good and sufficient circumstances warranting it."

(Footnotes omitted)

[70] At **para 22-23 of Bannatyne v Bannatyne, Mokgoro J** stated as follows:-

"[22] Process-in-aid will not ordinarily be granted for the enforcement of a judgment of another court if there are effective remedies in that court which can be used. However, there may well be instances in which the facts of a particular case justify approaching a High Court for such relief. Although Troskie was concerned with the circumstances in which a High Court should invoke Rule 45(12) of the Supreme Court Rules which requires the Court to

conduct an investigation into the financial position of a person for the purpose of enforcing payment of a High Court maintenance order, the policy considerations underlying that test are equally applicable in this case.

[23] It is for the applicant to show that there is good and sufficient reasons for the High Court to enforce the judgment of another court. What constitutes "good and sufficient circumstances" warranting a contempt application to the High Court will depend upon whether or not in the circumstances of a particular case the legislative remedies available are effective in protecting the rights of the complainant and the best interests of the children. This much is confirmed in Section 38 of the Constitution which permits a court to grant appropriate relief where it is alleged that a right in the Bill of Rights has been infringed or threatened."

[71] **Section 28(2) of the Constitution of South Africa**, provides as follows:-

"A child's best interests are of paramount importance in every matter concerning the child."

[72] It is trite that children have a right to proper parental care. There is an obligation on children's parents to ensure that all children are properly cared for. There is however also an obligation on the state to create the necessary environment for parents to do so. The Constitutional Court held in **Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 78** that the state:-

"…must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by s 28"

[73] The Maintenance Act, 1998 makes provision for a comprehensive legal framework specifically created for the recovery of maintenance, it is however not doubted that there is logistical difficulties in the maintenance courts that result in the system not functioning effectively. This administrative disfunctionality, or alternatively systematic failure have a negative impact on the enforcement of

maintenance orders, the protection of minor children's best interest and the rule of law.

[74] As upper guardian of all minor children, the High Court must ensure that minor children and women are protected against defaulters of court orders. It was held in **para 27 of Bannatyne v Bannatyne *supra***, that if court orders are habitually evaded and defied with relative impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law.

[75] Very importantly **Mokgoro J** stated in **para 31-32 of Bannatyne v Bannatyne *supra***, as follows:-

> *"[31] The appropriate relief required by section 38 is relief that is effective in protecting threatened or infringed rights. Where legislative remedies specifically designed to vindicate children's rights as efficiently and cost-effectively as possible fail to achieve that purpose, they do not provide effective relief. The SCA, in upholding the appeal held that:*
>
> *". . . it has not been established that the statutory remedies have been fully and diligently pursued and have been found to be wanting."*
>
> *This fails to have regard to the fact that once the applicant had reported the respondent's maintenance default, the matter was then in the hands of the maintenance officer on whom there was a duty to investigate the complaint and provide the applicant with the requisite assistance to enforce the order. It also fails to have regard to the parlous circumstances in which the applicant found herself, and the fact that despite her efforts to secure relief through the provisions of the Act, the respondent had failed to pay any maintenance whatsoever to her and the children for seven months. If regard is had to all the circumstances there were indeed "good and sufficient circumstances" warranting an application to the High Court.*
>
> *[32] Courts need to be alive to recalcitrant maintenance defaulters who use legal processes to side-step their obligations towards their children. The*

respondent was entitled to apply for a variation of the maintenance order. But whatever excuse he might have had for failing to comply with the existing order, there was not excuse for his failure to pay even the reduced amount that he contended should be substituted for it. The respondent appears to have utilized the system to stall his maintenance obligations through the machinery of the Act…"

[76] In the present matter, it is common cause that the Respondent has instituted criminal proceedings against the Appellant in the Maintenance Court. It is further common cause that the matter has been postponed several times due to various reasons and that the criminal matter is still pending. It should be noted that this criminal matter has been pending since at least February 2020. It is further common cause that the Appellant has not paid the children's school fees for the minor children and that the children's respective schools have sent a notice of breach (letter of demand) to the Respondent for the arrear school fees.

[77] In applying the above principles laid down in **Bannatyne v Bannatyne** to the present matter, I am of the view that this matter falls within the ambit intended by the Constitutional Court where good and sufficient circumstances exist warranting a contempt of court application to the High Court. The Respondent did attempt to utilise the processes in the Maintenance Court first, prior to approaching the High Court, but the processes proved to be ineffective. In my view the Respondent was justified in the present matter to approach the High Court as upper guardian of minor children to protect the best interests of the minor children.

[78] Having concluded that the court *a quo* had the necessary power and jurisdiction to entertain the application for contempt of court, the next issue to determine is whether the institution of the application for contempt of court constitutes *lis alibi pendens* whilst criminal proceedings are pending in the Maintenance Court.

[79] In order to succeed with the defence of *lis pendens*, the party raising it bears the onus of alleging and proving the following requirements-

(a) pending litigation,

(b) between the same parties or their privies,

(c) based on the same cause of action (the requirement of the same cause

of action is satisfied if the other proceedings involve determination of a question that is necessary for the determination of the present case and substantially determinative of its outcome) (See **Nestlé (SA) (Pty) Ltd v Mars Inc [2001] 4 All SA 315 (A), 2001 (4) SA 542 (SCA)**).

(d) in respect of the same subject matter. (This does not mean that the form of relief claimed must be identical.) (See **Williams & Kantor v Van Diggelen 1935 TPD 29**)

[80] Contempt of court is punishable as a common law crime. It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the Court. The offence had, in general terms, received a constitutional 'stamp of approval', since the rule of law – a founding value of the Constitution – 'requires that the dignity and authority of the Courts, as well as their capacity to carry out their functions, should always be maintained.

[81] **Section 26(1) of the Maintenance Act, 99 of 1998** provides:

"Whenever any person−

(a) against whom any maintenance order has been made under this Act has failed to make any particular payment in accordance with that maintenance order; or

(b) . . . .

such order shall be enforceable in respect of any amount which that person has so failed to pay, together with any interest thereon−

(i) by execution against property as contemplated in section 27;

(ii) by the attachment of emoluments as contemplated in section 28; or

(iii) by the attachment of any debt as contemplated in section 30."

[82] Criminal proceedings in the Maintenance Court in terms of Section 31 deals with the failure to pay maintenance. **Section 31(1) of the Maintenance Act, 99 of 1998** stipulates as follows:-

> *". . . any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine."*

[83] Contempt is a common law offence against the court and dignity of the court, whilst criminal proceedings in terms of **Section 31(1) of the Maintenance Act, 99 of 1998** is a statutory offence for failure to pay maintenance and is an offence against the person entitled to maintenance. The cause of action and the person or institution against which the respective offences are committed are therefore not the same. In the result there is no merit in the *point in limine* raised of *lis alibi pendens*.

[84] The last issue to determine is whether the Respondent complied with the legal principles and/or requirements for contempt of court in that whether the Court order dated 19 July 2018 constitutes a valid and enforceable court order considering the changed circumstances and whether such variation is enforceable by contempt of court proceedings, wherein the children's best interests are of concern.

[85] In my view the banking details provided in the Maintenance Order does not alter the order or in any manner whatsoever define the purpose of the order. The banking details provided merely gives a means to ensure that compliance with the order is effected. The Appellants argument that it is impossible for him to comply with the Maintenance Order as the banking details of the Respondent have changed constitutes nothing but a fanciful and meritless defence. The Appellant on his own version made payments of ancillary maintenance and amounts into the Respondent's new Absa Bank account without any issue. In my view, the Appellant

only thought of this defence as an after-thought in order to circumvent the contempt of court application.

[86] I harbor the same view in respect of the Appellants submission that the minor children's schools have changed and therefor he is absolved from paying any school fees as the maintenance order has become null and void. The crux and purpose of the order is that the minor children should be maintained in the amount of R2000.00 per month per child and their school fees and medical costs should be paid by the Appellant. It is logic that as the children become older their schools they initially attended, will change – pre-school to primary school and primary school to high school. In my view, the Appellant cannot refuse to pay the minor children's school fees just because they have changed schools. If the Appellant disputes the increased school fees, he could at least have paid in order to show his *bona fides* and a true desire to maintain his children an amount equate to what he used to pay at their previous schools, but instead he chose not to make any payments whatsoever for the school year of 2020, whilst having paid in full for the school year of 2019 to their respective new schools.

[87] I view the Appellant's argument in respect of the change in schools and his inability to pay the higher school fees in a dim light and take it with a pinch of salt. It is highly improbable that if the Appellant truly was not in a financial position to pay the minor children's school fees that he would allegedly pay maintenance 3 years in advance. Considering the luxurious vehicles the Appellant drives for example the Range Rover, the security estate the Appellant resides in and the Appellants alleged ability to pay 3 years maintenance in advance, it is highly unlikely that he is not in a financial position to pay the minor children's school fees. The Appellant's version in this regard is inconsistent and contradictory and should be rejected.

[88] In **AR v MN A R v M N (26583/2014) [2020] ZAGPJHC 215 (21 September 2020) Snyckers AJ stated at para 22** as follows:-

> *"22. What appears to me to be completely undeniable is the fact that, whatever father's true current ability, when it comes to payment of maintenance and meeting the court order, he must at least be, to the tune of*

a significant amount every month, in mala fide contempt. This is because of his complete failure to pay anything at all, apart from one payment in August 2018, since February 2018. Even the amount of R1 000 per child per month as a total amount that he alleged he was able to afford in March 2020 (which appears on the face of it to be risible in the circumstances), and was formally used to ground his application for a reduction in maintenance, did not find its way into any bank accounts that had anything to do with compliance with the court order. The same can be said for the amount of R2 500 per month per child and one-third of the school fees which became the fall-back position, before the Maintenance Court – in circumstances where it was not suggested that this had suddenly become possible overnight and had not been possible the day before. I agree with counsel for mother that the reasoning of Kollapen J in JD v DD 2016 JDR 0933 (GP) is apposite: ***if father were truly not mala fide, one would have expected him at the very least to have made payment of those amounts that he alleged he was able to pay in his application for reduced maintenance."*** (own emphasis)

[89] To ensure that courts' authority is effective, **Section 165(5) of the Constitution** makes orders of court binding on "all persons to whom and organs of state to which it applies". The purpose of a finding of contempt is to protect the fount of justice by preventing unlawful disdain for judicial authority. (See **S v Mamabolo 2001 (3) SA 409 (CC)**). Discernibly, continual non-compliance with court orders imperils judicial authority.

[90] It "is a crime unlawfully and intentionally to disobey a court order". (See **Fakie N.O. v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at para 6).** The crime of contempt of court is said to be a "blunt instrument". (See **Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality [2014] ZASCA 209; 2015 (2) SA 413 (SCA) at para 35)**) Because of this, "[w]ilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence".(See **Pheko v Ekurhuleni Metropolitan Municipality (No 2) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC)**) All contempt of court, even civil contempt, may be punishable as a crime.

[91] In determining whether the Respondent is guilty of contempt of court the following requirements as set in **Compensation Solutions (Pty) Ltd v Compensation Commissioner [2016] ZASCA 59; (2016) 37 ILJ 1625 (SCA)** should be proved:-

> *"The question which then arises is whether the appellant proved that the Commissioner's failure to comply with the [consent order] amounted to civil contempt of court, beyond a reasonable doubt to secure his committal to prison. An applicant for this type of relief must prove (a) the existence of a court order; (b) service or notice thereof; (c) non-compliance with the terms of the order; and (d) willfulness and mala fides beyond reasonable doubt. But the respondent bears an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that his non-compliance was not wilful and mala fide. Here, requisites (a) to (c) were always common cause. The only question was whether the Commissioner rebutted the evidentiary burden resting on him."*

[92] In **Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Shadrack Shivumba Homu Mkhonto and Others v Compensation Solutions (Pty) Limited [2017] ZACC35, Nkabinde ADCJ at para 67** held as follows:-

> *"Summing up, on a reading of Fakie, Pheko II, and Burchell, I am of the view that the standard of proof must be applied in accordance with the purpose sought to be achieved, differently put, the consequences of the various remedies. As I understand it, the maintenance of a distinction does have a practical significance: the civil contempt remedies of committal or a fine have material consequences on an individual's freedom and security of the person. However, it is necessary in some instances because disregard of a court order not only deprives the other party of the benefit of the order but also impairs the effective administration of justice. There, the criminal standard of proof – beyond reasonable doubt – applies always. A fitting example of this is Fakie. On the other hand, there are civil contempt remedies − for example, declaratory relief, mandamus, or a structural interdict − that do not have the consequence of depriving an individual of*

their right to freedom and security of the person. A fitting example of this is Burchell. Here, and I stress, the civil standard of proof – a balance of probabilities – applies."

[93] In this matter the onus to prove contempt of court remained on the Respondent (Applicant in the court *a quo*) seeking a finding of contempt. The Appellant (Respondent in the court *a quo*) bore an evidentiary burden in relation to willfulness and *mala fides* and had to adduce evidence to rebut the inference that his non-compliance was not wilful and *mala fide.*

[94] In the present matter I am satisfied that the Respondent has proven beyond reasonable doubt the existence of a court order; service or notice thereof and non-compliance with the terms of the order. The Appellant failed to discharge the evidentiary burden and adduce evidence to rebut the inference that his non-compliance was not wilful and *mala fide*. In the result the court *a quo* was correct in its finding and I would accordingly dismiss the appeal.

_____

M. NAUDÈ
ACTING JUDGE OF
THE HIGH COURT, LIMPOPO DIVISON
POLOKWANE

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